

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



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OPINIONS

ELECTIONS - REGISTRATION - CONSTITUTIONALITY OF VOTER LIST MAINTENANCE PROCEDURES UNDER FEDERAL AND STATE LAW

Question: Should a local board of elections, in accordance with direction from State Board of Elections, remove an individual from a voter registration list when the local board receives returned mail from the Post Office and the individual has not voted or appeared to vote in the past two general elections?

Answer: Federal law requires that the State Board implement the removal procedure that the State Board has directed the local boards to follow. As recognized in the final judgment in the *Green Party* case, that law prevails over possibly inconsistent provisions of the State Constitution, in light of the Supremacy Clause of the United States Constitution. Therefore, the removal procedure does not violate any constitutional provisions or existing law.

90 Opinions of the Attorney General 133
September 28, 2005

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HEALTH OCCUPATIONS – MORTICIANS – LIMITED LIABILITY COMPANIES – MORTICIAN’S LICENSE MAY NOT BE TRANSFERRED TO LIMITED LIABILITY COMPANY

Question: May the State Board of Morticians (“Board”) approve the transfer of an existing mortician license from a sole proprietor to a limited liability company (“LLC”) established and managed by that proprietor and in which that proprietor is the sole member?

Answer: The Maryland Mortician’s Act authorizes the Board to issue specific types of licenses to individuals and certain corporate entities. However, under the Act, none of those licenses could be granted to an LLC. Nor does the Act authorize an unlicensed LLC to conduct a mortuary science business, even if it were owned by, and employed, licensed morticians. The Board may not approve the transfer of an existing mortician license from a sole proprietor to an LLC.

90 Opinions of the Attorney General 109
August 8, 2005

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HEALTH OCCUPATIONS – MALPRACTICE INSURANCE – INTERPRETATION OF STATUTE CREATING TEMPORARY STATE SUBSIDY FOR MALPRACTICE INSURANCE PREMIUMS

Question: A recently-enacted law establishes a formula for a State subsidy of physician malpractice insurance premiums over a four-year period. Should a subsidy be paid if an insurer decides not to alter its premium rate for 2006?

Answer: The statutory language that defines the subsidy formula, if applied literally, would result in no subsidy being paid in 2006 if an insurer’s premium rate does not change; by contrast, it could result in a very substantial subsidy in a subsequent year if even a small rate increase became effective. This appears to be attributable to an oversight in the drafting of the statute. The statute as a whole demonstrates a legislative intent to subsidize physician malpractice premiums for a limited period at a gradually declining rate. The legislative history confirms that intent. Accordingly, the Insurance Commissioner should disregard the portion of the statute that reflects the drafting error and apply the subsidy

formula to achieve the legislative purpose even if an insurer does not alter its premium rate for 2006.

90 Opinions of the Attorney General 117
September 6, 2005

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ADVICE LETTERS

AMBER ALERT PROGRAM – BROADCASTER LIABILITY

Question: The AMBER Alert Program is a voluntary program where law enforcement agencies “partner with broadcasters to issue an urgent bulletin in the most serious child abduction cases.” Could a broadcaster be held liable for the airing of an AMBER Alert if the information for the alert provided by the State police turns out to be false?

Answer: It is highly unlikely that a broadcaster would be held liable for a false AMBER alert if the broadcast fairly reflects the information provided by the State Police. Maryland courts would likely recognize common law privileges and protect a broadcaster who aired an official alert. However, raising these defenses can involve considerable expense. An express statutory immunity could discourage such litigation, however, or where suits are filed, could facilitate their resolution at an earlier stage.

Letter to
Senator Carol Petzold
July 7, 2005

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EMINENT DOMAIN

Question: How does the Supreme Court’s recent decision in *Kelo v. City of New London* affect the use of eminent domain in Maryland?

Answer: Very little. In *Kelo*, a 5-4 majority of the Court held that promoting economic development was a “public use” for which property could be taken consistent with the Fifth Amendment to the U.S. Constitution, as long as just compensation was provided to the property owners. The Supreme Court’s opinion in *Kelo* reflects the Maryland case law on the scope of eminent domain.

Letter to
Senator Allan H. Kittleman
July 18, 2005

Question: This inquiry posed several basic questions about eminent domain in Maryland.

Answer: Article III, §40 of the Maryland Constitution bars the taking of private property for private use but does not set out a definition of either public use or private use. Court of Appeals cases interpreting this provision have recognized that property can be condemned for economic development purposes. This provision does not place any restriction on the Legislature’s power to further regulate the exercise of eminent domain. Thus, the General Assembly may restrict the categories of public uses for which the power of eminent domain may be exercised and may restrict the authority to condemn for economic development purposes. For example, the General Assembly could simply prohibit the exercise of eminent domain for economic development.

A local jurisdiction may not take property without specific authorization from the Legislature. A number of statutory provisions grant the power of eminent domain to local jurisdictions.

Letter to
Delegate Donald H. Dwyer, Jr.
August 1, 2005

Question: Are lands under agricultural easements and lands held by land trusts subject to the State’s power of eminent domain?

Answer: Yes. The State’s power of eminent domain is plenary, except as limited by the Constitution or the provisions of State law. Thus, in the absence of statutory provision limiting the exercise of eminent domain over lands subject to

agricultural easements or lands held by land trusts, they are subject to the State's power of eminent domain.

*Letter to
Senator E.J. Pipkin
August 26, 2005*

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GOVERNOR'S WEBSITE PHOTOS – RESTRICTIONS ON ACCESS AND USE

Question: A section of the Governor's website entitled "The Governor's Office Photo Gallery" notifies anyone seeking to download the photos that the person must agree to restrictions on the use and distribution of the photos. A person must agree that "these photographs are intended for the private use of the individual or entities in the photographs" and that "if you are not the intended recipient ... any digital alteration ... or copying of these photos for other than an personal use is strictly prohibited." Are these restrictions valid?

Answer: Under the Maryland Public Information Act, photographs on the Governor's website are public documents and are required to be available for inspection and copying without restrictions as to whether the person doing the copying is in the photograph, or as to whether their use would be for personal, political, or commercial purposes. Moreover, denying to the press documents generally available to the public would be of questionable validity under the First Amendment.

*Letter to
Senator Roy P. Dyson
July 14, 2005*

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MEDICAID – BUDGET – DEPARTMENT OF HEALTH AND MENTAL HYGIENE – EMERGENCY REGULATIONS

Question: Does the Department of Health and Mental Hygiene ("DHMH") have the authority to implement a budget cut deleting State-only

Medicaid coverage for children and pregnant women who are permanent resident aliens before the adoption of emergency regulations providing for such a change?

Answer: Yes. A State agency has no discretion to contravene a budget decision and not to implement a budget cut. Therefore, DHMH must implement the cut, regardless of whether implementing regulations have been approved or are in effect.

*Letter to
John F. Wood
Chairman, AELR Committee
September 22, 2005*

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MEDICAID SERVICES – IMMIGRANTS

Question: The Maryland Medical Assistance Program provides medical services for eligible indigent and medically indigent individuals, pregnant women and children. The Governor's FY 2006 Budget deleted \$7 million dollars for health services for aliens. Does the \$7 million dollar cut for Medicaid services for low income legal immigrant women who are pregnant and legal immigrant children under 18 amount to illegal sex or national origin discrimination?

Answer: No. The Welfare Reform Act (WRA), enacted by Congress in 1996, contains provisions restricting the eligibility of legal aliens for Medicaid benefits and programs and permits a state to use its own funds to provide benefits to some aliens who would otherwise be ineligible. In 1997, the General Assembly enacted the Welfare Innovation Act, requiring that the Medicaid program (1) provide "comprehensive medical health care and other legal services for all legal immigrants" in the country at the time of the passage of the WRA; and (2) provide benefits for children and for pregnant women who arrived after that date. The \$7 million cut eliminates benefits in the second category.

The cut does not discriminate based on sex. It applies to the entire affected class of pregnant women and children who are ineligible for federal

benefits. Nor does the cut illegally discriminate based on national origin, because the WRA itself contains provisions that favor one group over another on the basis of national origin. Finally, the withdrawal of benefits in the WRA has been upheld against challenges based alienage.

*Letter to
Senator Sharon Grosfeld
September 26, 2005*

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SPECIAL LEGISLATIVE COMMITTEE – ADMINISTRATIVE PROCEDURES

Question 1: Does the General Assembly have the authority to create a special committee during the interim to investigate State employee rights and protections related to hiring and employment termination? Does this authority give the special committee the power to administer oaths and issue subpoenas? If so, could a member of the General Assembly be called as a witness and be subpoenaed to testify in connection with the “MD4Bush” controversy?

Answer: The history of the Legislative Policy Committee statute (Ch. 362, Laws of 1976), the text of the 1968 Code of Fair Practices for Investigating Committees (*see* SG §2-1602(b)) and relevant case law on the delegation of subpoena powers support the creation of a special committee with full power to administer oaths and issue subpoenas.

A subpoena from a legislative committee is valid only if its issuance is approved by a majority of the members of the committee. The subpoena must also fall within the proper jurisdiction of the issuing committee. A subpoena addressed to the “MD4Bush” controversy would be outside the special committee’s jurisdiction and invalid.

Finally, if the inquiry were aimed at information or prior statements unprotected by absolute legislative privilege, if the questions were within the scope of a legally sufficient resolution, and if the subpoena were approved by a majority of committee members, a legislator could be compelled to appear as a witness.

Question 2: Can an at-will employee be promptly terminated for any reason?

Answer: The term “at-will” employee does not appear in the State Personnel and Pensions (“SPP”) Article; provisions in the SPP Article and COMAR regarding termination of employees in the executive service, management service, skilled and professional service, and special appointments do not establish a duty to provide a reason for the termination of employees in these categories. However, if the employee challenges the termination based on constitutional or discriminatory grounds, the State will have to explain the reason for the termination.

Question 3: Do conflicts of interests provisions apply to members of legislative investigating committees?

Answer: Conflicts of interest provisions in the Public Ethics Law deal with disqualification of legislators for financial conflicts. Although Due Process requires an impartial adjudicator in judicial and quasi-judicial proceedings, and the Bill of Rights has been applied to legislative investigating committees, there is no due process right to unbiased members on a legislative investigating committee.

Question 4: Does State law preclude a legislator who is simultaneously employed with the State and a local subdivision from serving on a legislative investigating committee?

Answer: No. Neither a due process nor a State statutory or common law prohibition precludes such service.

*Letter to
Senator J. Lowell Stoltzfus
August 2, 2005*

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