

Opinions and Advice Quarterly Summary

Office of the
Maryland Attorney General



July – September 2010

OPINIONS

ALCOHOLIC BEVERAGES

LIQUOR BOARDS – WICOMICO COUNTY BOARD OF LICENSE COMMISSIONERS DOES NOT HAVE REGULATORY OR ENFORCEMENT AUTHORITY OVER WICOMICO COUNTY LIQUOR CONTROL BOARD

Question 1: Is the retail sale of alcoholic beverages by the Wicomico County Liquor Control Board subject to the enforcement authority of the Wicomico County Board of License Commissioners, either generally or specifically under Article 2B, §15-108.1 and §15-112(x)(3)?

Answer: The State Alcoholic Beverages Law does not give the Licensing Board enforcement authority over the sale of alcoholic beverages by the Control Board.

Question 2: Does the State Alcoholic Beverages Law permit the Licensing Board to fine the Control Board or to revoke or suspend its authority to engage in the retail sale of alcoholic beverages for violation of Article 2B, §12-108 or other provisions of the Alcoholic Beverages Law?

Answer: The Licensing Board may not take enforcement action against the Control Board under Article 2B, §12-108, or other provisions of the Alcoholic Beverages Law.

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September 15, 2010

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COURTS AND JUDGES

CRIMINAL PROCEDURE – FEES – COSTS – ASSESSMENT OF “COSTS OF PROSECUTION” FOR WHICH A CONVICTED DEFENDANT IS LIABLE

The State’s Attorneys Office for Worcester County and the Public Defender’s Office disagree whether

the “costs of prosecution” assessed against a person convicted of a crime are the same as court costs.

Question: Who assesses “costs of prosecution” and how are they determined?

Answer: The “costs of prosecution” assessed against a convicted defendant are the court costs associated with the criminal case. They are assessed by the court in which the prosecution took place, in accordance with the statutes defining costs and schedules adopted by the State Court Administrator.

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August 12, 2010

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HEALTH OCCUPATIONS

PHYSICAL THERAPISTS – ACUPUNCTURISTS – PHYSICAL THERAPY BOARD HAS AUTHORITY TO DETERMINE BY REGULATION WHETHER “DRY NEEDLING” IS WITHIN THE SCOPE OF PRACTICE OF PHYSICAL THERAPY

A procedure known as “dry needling” is performed by some physical therapists. Dry needling involves the insertion of acupuncture needles into the skin at certain locations for therapeutic effect – usually relief of pain. The Acupuncture Board believes that the authority to insert needles is reserved, under the Maryland Acupuncture Act, to licensed acupuncturists and certain health care professionals specifically exempted from its licensing requirements.

Question: Is “dry needling” within the definition of the practice of physical therapy in Maryland and is it appropriate for the Board of Physical Therapy Examiners (“Physical Therapy Board”) to determine that it is without legislation on the subject?

Answer: The authority to use acupuncture needles for therapeutic purposes is not reserved exclusively to licensed acupuncturists or those specifically exempted from the licensing requirement for acupuncturists. State law recognizes that the scope of practice of health care professions may overlap and confers extensive discretion on licensing boards to define the scope of a profession, within statutory limits. In our opinion, the Physical Therapy Board may determine that dry needling is within the scope of practice of physical therapy if it conducts rulemaking under the State Administrative Procedure Act and adopts a regulation that relates dry needling to the statutory definition of the practice of physical therapy. Any such process would presumably need to consider standards for education and training at least as stringent as those set by the Legislature for physicians who use acupuncture needles for similar therapeutic purposes.

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August 17, 2010

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OPEN MEETINGS LAW

PUBLIC SCHOOLS – APPLICATION OF ST. MARY’S OPEN MEETINGS ACT AND OTHER OPEN MEETINGS LAWS TO THE ST. MARY’S COUNTY BOARD OF EDUCATION

Under the State Open Meetings Act (“OMA”), county boards of education need not meet in open session when they are performing an “administrative function” and when the State education law does not otherwise require an open meeting. However, unlike other local boards of education, the St. Mary’s Board is also subject to the St. Mary’s Open Meetings Act (“St. Mary’s OMA”). The St. Mary’s OMA does not have a specific exclusion for an “administrative function,” but has different limitations on its scope. Both the State OMA and the St. Mary’s OMA defer to any “more stringent” law requiring open meetings.

Question: May the St. Mary’s County Board of Education (“St. Mary’s Board”) convene in a closed session when performing an “administrative function” as defined under the State Open Meetings Act?

Answer: As a result of the St. Mary’s Open Meetings Act, the St. Mary’s Board must meet in open session for many, if not most, activities that

would qualify as an administrative function under the State OMA and for which another local board of education may be permitted to hold a closed session. However, some activities that do not trigger the open meeting requirements of the State OMA or education law are also outside the scope of the St. Mary’s OMA. For example, we understand that there are sessions in which the Superintendent of Schools (or the Superintendent’s staff) reports to the Board solely for informational purposes on matters that are within the purview of the Superintendent, that do not involve the formulation of substantive policy, and that do not require any action by the Board. Not only would such briefings be an administrative function under the State OMA and beyond the open meeting requirements of the State education law, they also would not amount to “official action” triggering the open meeting requirements of the St. Mary’s OMA. Thus, the St. Mary’s Board need not conduct those briefings in open session.

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September 7, 2010

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ADVICE LETTERS

EDUCATION

Public Schools – Copyright – Public Ethics Law – Open Meetings Act

The following questions concern the Articulated Instruction Module grading plan (“AIM”) that was proposed for Baltimore County Public Schools (BCPS”).

Question 1: Is AIM the intellectual property of the school system?

Answer: The paper and pencil version of AIM was developed by Dr. Dezmon during her employment by BCPS. The copyright to it would belong to the school system unless it was created outside the scope of that employment. Because Dr. Dezmon and school system personnel declined to be interviewed about the underlying facts, we are unable to reach a conclusion as to whether or not it was created within the scope of her employment. The digital version of AIM was apparently created through the use of BCPS resources. The school system assigned its rights to that version to Dr. Dezmon.

Question 2: Does the school system’s use of AIM involve a conflict of interest that violates ethical rules governing the school system?

Answer: Determination of conflicts of interest under the relevant ethical rules is a function of the BCPS Ethics Review Panel. The Ethics Review Panel determined that the agreement between BCPS and Dr. Dezmon did not involve a conflict of interest. That determination was based on the premise that the intellectual property rights in the paper and pencil version of AIM belonged to Dr. Dezmon.

Question 3: Did the Articulated Instruction Module Work Group appointed by the Superintendent violate the Open Meetings Act when it excluded the president of the Teachers Association of Baltimore County from attending a work group meeting?

Answer: The AIM Work Group is not a “public body” under the State Open Meetings Act and therefore the statute did not apply.

*Letter to
Several Senators and Delegates
September 15, 2010*

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FIREARMS Constitutional Law – Due Process

In 2009, the Legislature amended certain laws relating to the surrender or possession of a firearm by an individual who is the subject of a protective order.

Question: What is the impact on Maryland’s firearms regulations from the Supreme Court’s recent decision in *McDonald v. City of Chicago*?

Answer: The 2009 amendments are not affected by the recent Supreme Court firearms decisions. *McDonald*, like *Heller*, made clear that the Second Amendment does not bar all regulation of firearms. In particular, those cases acknowledged that state laws could limit possession of weapons by individuals for whom there is a legitimate concern about misuse of a weapon – e.g., felons or the mentally ill. The 2009 amendments appear to be carefully drawn to forbid possession of a firearm without the consent of the respondent only in well defined situations where there is a legitimate concern about possible misuse: (1) in a final protective order, when the court has found by clear and convincing evidence, after opportunity for a hearing, that the respondent in fact committed the alleged abuse; or (2) in a temporary protective order,

for a very brief period, when the alleged abuse involved the use or threat of a firearm or serious bodily harm. As noted in a previous advice letter, Maryland’s domestic violence law provides various protections to respondents who may be required to surrender firearms as part of a protective order. Similar protections have been incorporated in the 2009 legislation. Thus, those laws are likely to survive scrutiny under the Second Amendment.

*Letter to
Delegate Donald Dwyer, Jr.
July 8, 2010*

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FIRE SPRINKLERS Building Codes

Question: Does Cecil County have the authority to adopt a building code that requires fire sprinkler systems in one- and two-family residences?

Answer: Yes. The process by which building standards are set in Maryland is governed by Public Safety Article, §12-505, which requires the Department of Housing and Community Development to adopt the International Building Code when it promulgates the Maryland Building Performance Standards (the “Standards”). COMAR 05.02.07.01. Local jurisdictions are required to adopt the Standards and, subject to State statutory limitations, may also amend them. Because State law does not limit county authority to require fire sprinklers, Cecil County could amend the Standards in this way.

*Letter to
Delegates Richard Sossi and LeRoy Myers, Jr.
July 22, 2010*

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HOMEOWNERS’ ASSOCIATIONS Political Signs

Question: May a homeowners’ association or a cooperative housing corporation (“co-op”) prohibit political activity such as political canvassing or the display of political signs on the homeowners’ property?

Answer: With some exceptions, a homeowners' association or co-op generally has authority to restrict political signs or canvassing on members' private property. However, some statutes, including the Maryland Homeowners Association Act and Maryland Cooperative Housing Corporation, limit the extent of the restrictions that may be imposed on property owners.

*Letter to
Delegate Susan W. Krebs
July 22, 2010*

Political Solicitations

Question: May a homeowners' association or a community that has public streets and individually owned homes and yards prohibit political or other solicitation by posting a sign at the entrance to the neighborhood?

Answer: No. Ordinarily, public streets are open to the public. The ability to walk down the street and knock on doors of residents to convey information, drop off literature, or solicit sales is protected by the First Amendment, subject to the right of individual homeowners to exclude such activities. A homeowners' association can exclude First Amendment activities from properties that it owns, but not from public streets or the property of individual homeowners.

*Letter to
Delegate Christopher B. Shank
August 30, 2010*

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WIRETAP AND ELECTRONIC SURVEILLANCE (Attorney Client Privilege Waived)

Question: Does the Maryland Wiretap Act apply to situations in which citizens record public activities of police officers?

Answer: The State Wiretap Act does not regulate video recording, except to the extent that sound is recorded as part of the video. Whether statements made by a police officer during an encounter with a citizen are protected under the Maryland Wiretap Act depends on whether they are part of a "private conversation" and therefore an "oral communication" covered by the Act. The Maryland appellate courts

have not yet construed the Maryland Wiretap Act as it may apply to a conversation between a police officer and an individual during the course of an arrest or other official police action involving the individual. Appellate courts in other jurisdictions have decided a number of such cases. It appears that there are three possible outcomes to such a case under the Maryland Wiretap Act.

First, it is possible that a court might find that a particular encounter between an individual and a police officer involved a "private conversation" and thus qualified as an "oral communication" subject to the Wiretap Act. This seems an unlikely conclusion as to the majority of encounters between police and citizens, particularly when they occur in a public place and involve the exercise of police powers. As best we can tell, no reported appellate decision has reached this conclusion.

Second, a court might reach a conclusion similar to that of the Supreme Judicial Court of Massachusetts, which held that a Massachusetts statute forbade only a surreptitious recording of a police stop. This result also seems unlikely, given the difference in language between the Massachusetts and Maryland statutes.

Finally, a court could hold that a police stop of an individual necessarily is not a "private conversation" and therefore does not involve an oral communication covered by the State Wiretap Act. This conclusion would be consistent with the suggestion made in a previous Attorney General Opinion (85 *Opinions of the Attorney General* 225 (2000)) and with the holdings of the courts in most other states construing state eavesdropping statutes. Given the language of the Maryland statute, this seems the most likely outcome in the case of a detention or arrest.

*Letter to
Senator and Several Delegates
July 7, 2010*

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The Opinions and Advice Quarterly Summary summarizes formal opinions of the Attorney General. Also included are letters of advice by Assistant Attorneys General that have been issued on the understanding that they may be made public. (Other advice provided by the OAG may be confidential under the attorney-client privilege.)

Copies of opinions may be obtained from the Attorney General's website at www.oag.state.md.us/opinions/index.htm. There is a direct link to each advice letter at the end of its description in the electronic version of this newsletter.

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