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Appeals to Court from Administrative Agencies

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This article was originally prepared as part of The Maryland Appellate Practice Handbook published by MICPEL in November 1977 and is reprinted with its consent. It has been revised to reflect some recent appellate decisions and changes in the Maryland statutory law made by the General Assembly at its 1978 regular session. The Handbook will be supplemented by MICPEL later this year, and this article will be included in that supplement.

A person who is adversely affected by a final action of a State or local administrative agency may generally obtain review of that action by a circuit court (or its counterpart in Baltimore City). In most instances, such review is made available and is regulated by statute. Often, the statute which authorizes the agency to act also provides a mechanism for appeal. If not, the Maryland Administrative Procedure Act provides the right of judicial review of the final action of most State agencies. Similarly, a county and municipal charter or ordinance or the Code of Public Local Laws for a county may set out a procedure for the review of a county or municipal agency action, usually by appeal to a board of appeals and then to the circuit court. Finally, Rules B 1 through B 12 of the Maryland Rules of Procedure govern all of the statutory appeals from State and local executive and legislative branch agencies.

The Maryland Administrative Procedure Act

The Maryland Administrative Procedure Act, Sections 244-256A of Article 41 of the Annotated Code of Maryland (as amended by the General Assembly during its 1978 session), is designed to provide a standard procedure for a variety of proceedings, including the promulgation of rules, the conducting of contested cases, and the prosecution of administrative appeals. It applies to all State agencies, with the exception of the Governor, the Workmen's Compensation Commission, the State Insurance Department, the Public Service Commission, the Maryland Tax Court (successor to the State Tax Commission), and the other agencies listed in Section 244(a) of Article 41.

Section 255(a) of Article 41 states that "[a]ny party aggrieved by a final decision in a contested case" is entitled to judicial review of that decision. A contested case is defined in Section 244(c) as a

"proceeding before an agency in which the legal rights, duties, statutory entitlements or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." [*Emphasis supplied*]

Accordingly, if either the statute authorizing the agency action or the regulations of the agency require a hearing, a decision of that agency is reviewable by a court. If the statute or regulations are silent on the right to a hearing, the reviewability of the agency action will depend upon whether the interest of the person affected by the agency action is of such a character that the principles of due process of law mandate a hearing before the agency. Because there is little Maryland case law on this question, an appellant must look to federal cases for guidance. See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). *See generally* Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267 (1975). The Court of Appeals has stated in dicta in one case that the denial by the Secretary of Health and Mental Hygiene of a builder's request for an exemption from a sewer moratorium is not a "contested case". *Montgomery County v. One Park North Associates*, 275 Md. 193, 202 (1975).

Another requirement for review under Section 255(a) is that the appellant must be a "party aggrieved". Thus, under the Maryland APA, the appellant must be aggrieved by the decision and must have been a party to the administrative proceeding before the agency. In *One Park North Associates, supra*, the Court of Appeals held that, although Montgomery County may have been "aggrieved" by the decision of the Board of Review of the Department of Health and Mental Hygiene granting an exception to a sewer moratorium, it was not a "party" in the hearings before the Board and hence it could not seek judicial review of the Board's decision.

The agency decision being appealed must be the final decision. A party to an administrative proceeding may not seek review of interlocutory administrative orders. In addition to this aspect of finality, which is very similar to the question of finality in appeals from trial courts, there is, except in rare instances, an additional prerequisite: the appellant must have exhausted his administrative remedies. If the statute pursuant to which the agency has acted requires the would-be appellant to follow a certain path through the administrative machinery, the appellant may not seek judicial review until that path has been traversed. The clearest example is the necessity, discussed in greater detail below, of seeking review of an agency decision by that agency's board of review be-

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fore turning to the courts. *See generally Commission on Medical Discipline v. Bendler*, 280 Md. 326 (1977); *Leatherbury v. Gaylord Fuel Corporation*, 276 Md. 367, 373-76 (1975). The exceptions to the requirement of exhaustion of remedies were most recently enunciated by Maryland's appellate courts in *White v. Prince George's County*, _____ Md. _____, 387 A.2d 260 (June 5, 1978), *State Dept. of Assess. and Tax v. Clark*, 281 Md. 385 (1977) and *Waller v. Montgomery County*, 36 Md. App. 326, 330-34 (1977).

Subsection 255(c), added by the 1978 revision, authorizes either the agency or the reviewing court to stay the agency decision being appealed.

Appeal Procedure

Under Section 255(b) of Article 41, proceedings for review are instituted in the circuit court of the county (or in the Baltimore City Court) where any party resides or has a principal place of business. Maryland Rule B provides that an administrative appeal is taken by filing with the clerk of the proper court an order of appeal which is merely a short, pro forma notice that an appeal is being prosecuted. The appellant must file the order of appeal within 30 days from the date of the action appealed from (see Rule B 4.a.) and, prior to filing the order, must serve a copy of this order on the agency. The appellant must attach to the order being filed a certificate that such service has been made.

Within 10 days after the filing of the order of appeal, the appellant must file a petition which describes the action being appealed from, the error committed by the agency, and the relief being sought. This petition generally resembles an initial pleading in a civil proceeding. The peril of noncompliance is identified in *Ohio Casualty Insurance Co. v. Insurance Commissioner*, 39 Md. App. 547 (June 9, 1978).

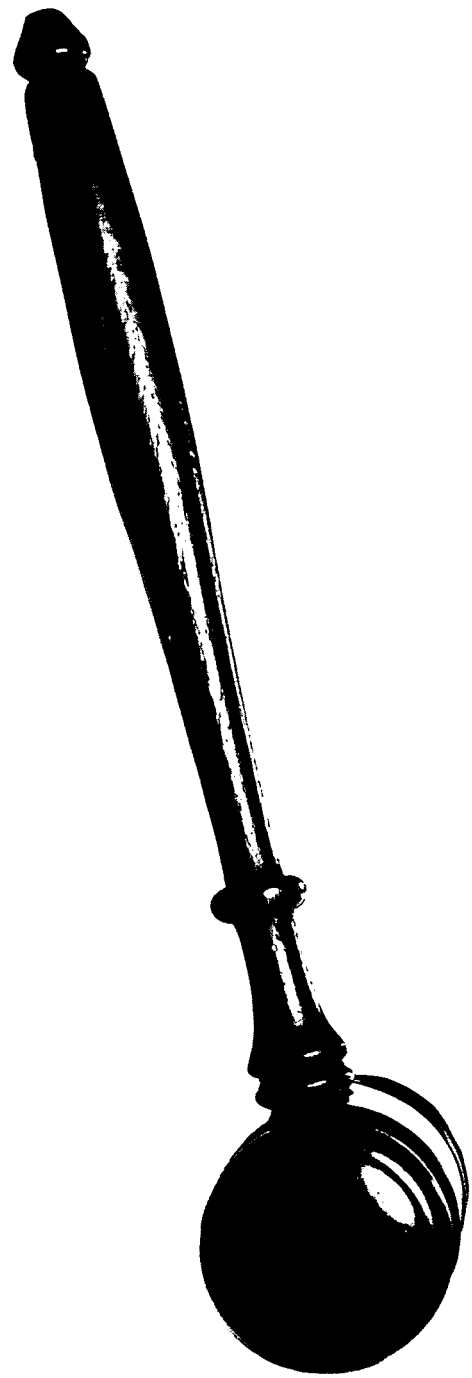
The agency must prepare the record. Section 252(b) of Article 41 declares that all evidence must be made a part of the record in the case and that no other factual information or evidence may be considered in the determination of the case. However, Rule B 7 allows the omission of any portion of the record by stipulation. Moreover, Rule B 7.b. allows the parties, with the approval of the agency, to prepare a statement of the case, which then serves as the record, if the question presented by the appeal can be determined by the court without an examination of the record.

The agency must send the administrative record to the clerk of the court within 30 days of the filing of the first petition (unless the court fixes a different time limit of up to 90 days from the filing of the first petition). The appellant has an obligation to ensure that the record is transmitted in time. If the record is not sent within the prescribed time period, the appeal may be dismissed unless the appellant can demonstrate that the delay was caused by the agency or a party other than the appellant. Rule B 7.c. *See Giant Food, Inc. v. Hatcher*, 256 Md. 239 (1969), (holding that an appeal from an award of the Workmen's Compensation Commission was properly dismissed because the appellant's failure to notify the Commission of the appeal was responsible for the delay in the transmission of the record to court); *Jacober v. High Hill Realty, Inc.*, 22 Md. App. 115 (1974), (holding that an appeal from a decision of the Board of Zoning Appeals was properly dismissed because the agency's failure to transmit the record in time was caused by the appellant's delay in having the testimony before the Board transcribed).

Immediately after receiving a copy of the order of appeal, the agency must give notice of the filing of the appeal to every party which participated in the preceeding before the agency. Further, the agency, when it is entitled to be a party to the appeal, and any party to the proceeding before the agency who decides to participate in the appeal must file an answer within 30 days after the filing of the petition of appeal.

Although the Rule B 2.d. places upon the agency the responsibility of notifying all of the other parties to the administrative proceedings of the appeal, the appellant should ensure himself that all parties have been so notified. Otherwise, the agency's failure to do so may frustrate the appellant's quest for resolution of his appeal. Such frustration occurred in *Morris v. Howard Research and Development Corporation*, 278 Md. 417 (1976). In this case, the Court of Appeals held that Morris, a party to the administrative proceeding before the Howard County Zoning Board who had not received notice from the Board of the filing of an order of appeal by the Howard Research and Development Corporation, would be able to force the reopening of the proceedings for judicial review in the circuit court (after that court had issued an order reversing the decision of the Board), if he could demonstrate the requisite standing.

Any person who has participated in the administrative proceeding in some way is a party for purposes of an appeal. See the discussion in *Morris, supra*, 278 Md. at 423. Moreover, any person who has participated in the administrative proceeding and is interested in the final outcome of the proceeding should participate in the appeal. Such a participant may be the only person who can take to the Court of Special Appeals a further ap-



peal of a decision of the circuit court reversing the agency action, because an administrative agency may not be a party for purposes of taking such a further appeal unless a statute specifically provides otherwise. *See generally Maryland Board of Pharmacy v. Peco, Inc.*, 234 Md. 200 (1964); *Board of Zoning Appeals v. McKinney*, 174 Md. 551 (1938). Consequently, a successful appeal from an administrative agency will not, in many cases, be subject to further appellate review unless another participant in the administrative proceeding has participated in the appeal to the circuit court and is seeking further appellate review. On the question of intervention, see *Montgomery County v. Ian Corporation*, 282 Md. 459 (1978).

Standards of Review

The grounds for an administrative appeal will fall into two categories: (1) a challenge to the legality of the agency action, and (2) a challenge to the findings of fact and the conclusions drawn from those findings. The first type of error is described in subsections 255(f)(1) through (4) of Article 41:

—a violation of constitutional provisions *(cf., e.g., County Council for Montgomery County v. Investors Funding Corporation*, 270 Md. 403, 441 (1973), which invalidated a provision of the Montgomery County Fair Landlord-Tenant Relation Act allowing the Commission on Landlord-Tenant to assess civil penalties not exceeding $1000 for violation of the Act as an invalid delegation of legislative power and in violation or requirements of due process);

—exceeding the statutory authority or jurisdiction of the agency *(see, e.g., Gutwein v. Easton Publishing Company*, 272 Md. 563 (1974), *cert. den.* 420 U.S. 991, (1975) which affirmed the circuit court's reversal of an order of the Human Relations Commission awarding monetary damages on the grounds that the Commission lacked the statutory authority to make such an award);

—unlawful agency procedure *(see, e.g., Ferguson v. United Parcel Service*, 270 Md. 202 (1973), *cert. den.* 415 U.S. 1000, (1974) *Sub. nom. State of Maryland Commission on Human Resources and Ferguson v. United Parcel Service*, which affirmed the reversal of an order of the Human Relations Commission on the grounds that the Commission failed to provide adequate notice to the appellant of the nature of the administrative proceedings against it); and

—other error of law *(cf., e.g., Investors Funding Corporation, supra)*

The bases for challenging the fact findings and conclusions of law which comprise the agency decision are characterized in subsections 255(f) (5) and (6) by the expressions "unsupported by competent, material and substantial evidence," and "arbitrary or capricious." Before the 1978 revision, these subsections also included the standards of against the weight of the evidence and unsupported by the entire record. In an oft-quoted passage, the Court of Appeals has interpreted these and other phrases to mean the same thing:

> *"'Whichever of the recognized tests the court uses—[whether it be the arbitrary, capricious, unreasonable or illegal standard . . ., or the tests of] substantiality of the evidence on the record as a whole, clearly erroneous, fairly debatable or against the weight or preponderance of the evidence on the entire record—its appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence. The required process is difficult to precisely articulate but it is plain that it requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions under any of the tests, all of which are similar. There are differences but they are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.'"* [*Emphasis and insertions by the Court.*]

Department of Natural Resources v. Linchester Sand and Gravel Corporation, 274 Md. 211, 225 (1975), quoting *State Insurance Commission v. National Bureau of Casualty Underwriters*, 248 Md. 292, 309-10 (1967). In any challenge to the factual conclusions of the agency, the appellant has the burden of showing that a reasoning mind could not reasonably have reached the conclusions that the agency did. Because courts presume that the agency has an expertise that the courts lack, they are generally loath to disturb the factual findings of the agency. Thus, as a practical matter, a successful appeal of the factual determinations of an agency is less likely than that of the factual determinations of a jury or a judge sitting as the jury.

Additional Evidence Under the Maryland APA

The hearing in the circuit court normally consists of oral argument on the petition, answers to the petition, and the record, and it therefore is similar to other appellate proceedings. Nevertheless, Section 255(d) of Article 41 authorizes the court to order the agency to consider the additional evidence. In addition, the extent that the additional evidence is relevant to any alleged irregularity in the agency procedure, such as the lack of adequate notice, the court pursuant to Section 255(e) may receive such evidence.

Specific Statutory Appeal Provisions

Many times the statute which authorizes an agency to act also authorizes an appeal from that action. Most often, these statutes merely recite that an aggrieved party may appeal pursuant to Section 255 of Article 41. There are other statutes, however, that provide a complete procedure for an appeal from an agency action which may differ from the provisions of the Maryland APA and Subtitle B of the Maryland Rules in any number of ways. See, for example, Section 38 of Article 89 of the Annotated Code of Maryland, which authorizes "any person adversely affected or aggrieved" to obtain judicial review of any rule or order of the Commissioner of Labor and Industry issued under the Maryland Occupational Safety and Health Act; Section 6-111 of the National Resources Article, which authorizes appeals from "any action" of the Department of National Resources in issuing rules, orders or permits concerning the drilling or operation of gas and oil wells in Maryland; and Section 404 of Article 43, which allows a person to appeal from any order or regulation issued by the Secretary of Health and Mental Hygiene pursuant to his authority to safeguard the sanitary condition of the waters of the State and to regulate public water system and refuse disposal plants.

Appeals From Administrative Agencies

If there is an inconsistency between a specific statutory provision authorizing judicial review and either the Maryland APA or Subtitle B of the Maryland Rules and the inconsistency is one of procedure, the more cautious approach is to follow which-

ever provision is more restrictive. For example, Section 38 of Article 89 authorizing an appeal from a rule or order issued by the Commissioner of Labor and Industry requires that the petition be filed within 30 days of the issuance of such rule or order. Although Subtitle B of the Maryland Rules requires only the filing of an order of appeal within 30 days and the filing of the petition for review within the following ten days, an appellant should file both an order and a petition within the 30 day period. In this way, the appellant can avoid having to argue the question of whether the more restrictive or the more lenient provision applies. In this regard, the differences in procedure may involve the type of pleadings, time limits for the filing of pleadings, the court in which the pleadings are to be filed, and many other items.

If the inconsistency between a specific statutory provision and the Maryland APA involves a different standard of review, a more confusing picture is presented. If the standard in the specific statute is merely a variation of the substantial evidence standard, or if no standard is set forth in the specific statute, the courts will follow the basic formulation of "whether a reasoning mind reasonably could have reached the factual conclusion". On the other hand, if the specific statutory provision provides for a de novo appeal to a circuit court, such as is provided in Section 6-111 of the Natural Resources Article, the recent case of *Department of National Resources v. Linchester Sand and Gravel Corporation*, 274 Md. 211 (1975), as more fully discussed below, suggests that the de novo appeal would not be proper. Presumably, the standard of review then becomes the substantial evidence test set forth in the Maryland APA. An appellant faced with this confusion should be prepared to present a de novo litigation of the issues decided by the agency, to argue whether the *Linchester Sand and Gravel* case applies, and to challenge the factual conclusions of the agency under the substantial evidence test.

The specific statutory appeal provisions may differ from the APA in one very important respect. It may allow an appeal by any "person" aggrieved, in contradistinction to the Maryland APA, which limits judicial review to a "party" aggrieved. While the language of *Montgomery County v. One Park North Associates*, 275 Md. 193 (1975), suggests that a "person" aggrieved must still be a party in order to have standing to seek judicial review, there may be situations in which a person who is not a party to the proceedings, who had no notice of an administrative proceeding, but who is adversely affected by an agency action may be able to appeal as a "person" aggrieved. *Cf. Leatherbury v. Gaylord Fuel Corporation*, 276 Md. 367, 376 (1975).

Additional Evidence and De Novo Appeals

The Maryland APA before the 1978 revision authorized the taking of additional evidence by the reviewing court, and other statutory appeal provisions allow de novo appeals that contemplate the taking of additional evidence. To the extent that such evidence relates to the agency's determinations of facts, there is some doubt whether the court may receive such evidence and modify the agency decision as a result. *Department of Natural Resources v. Linchester Sand and Gravel Corporation*, 274 Md. 211 (1975). In this case, the Secretary of Natural Resources has denied the applicant's request for a wetlands permit to dredge and fill certain wetlands on its property. After the Board of Review of the Department affirmed the Secretary's decision, the applicant appealed to the Circuit Court for Worcester County and requested a jury trial pursuant to Section 9-308 of the Natural Resources Article, which provided for a de novo appeal from decisions of Secretary on wetlands permits. The jury made an independent judgment of the merits of the permit in the context of the public interest in preserving existing wetlands and decided that the permit should be granted.

On appeal to the Court of Appeals, the Court held that the de novo appeal provision of Section 9-308 was an unconstitutional delegation of an administrative function to the judicial branch of State government. The Court stated:

> *"It was not competent, therefore, for the court to empanel a jury and then in effect instruct it to convert itself into an administrative body with authority, as if original, to grant or deny a permit and in doing so determine whether there was or potentially could be a deleterious effect, as contemplated by the 'wetlands statute,'... On appeal, §9-308(b) notwithstanding, the circuit court is constitutionally limited to an assessment of whether that determination was based on evidence sufficiently substantial so that the permit denial was not 'arbitrary and capricious.'"* [*Emphasis added.*]
> *Id. at 228.*

Linchester Sand and Gravel Corporation involved an extreme situation in which a jury had made a factual determination of whether a wetlands permit should issue without any regard to the record made before the Department of Natural Resources. On the other hand, the Court of Appeals in an earlier case, *County Federal Savings and Loan Association v. Equitable Savings and Loan Association*, 261 Md. 246 (1971), construed a statute calling for a "de novo" appeal as merely allowing a court to take new evidence and to weigh both the new evidence and the record made before the agency in evaluating the reasonableness of the agency action. Nevertheless, the constitutional issue of the separation of powers was not presented in this case, and both the specific language of and the principles espoused in *Linchester Sand and Gravel Corporation* imply that even this modest judicial supplementation of the administrative record and a judicial modification of an agency factual decision because of the additional evidence are an impermissible judicial usurpation of the administrative function. Unless the appellant is willing to litigate this closer issue in the appropriate courts, the most prudent course to follow if additional evidence is to be taken in a de novo appeal particularly when the challenge is to the fact-findings and the conditions drawn therefrom is to request the circuit court to order the agency to receive the evidence and to make appropriate modifications in its decision, if any. This is the course of action which the Court of Special Appeals recommended to the circuit court in *Toland v. State Board of Education*, 35 Md. App. 389 (1977), (which, however, did not mention *Linchester Sand and Gravel.)*

Boards of Review[1]

A troublesome problem is the statutory requirement that in certain instances an appellant seek review of an agency decision by the Board of Review of that agency before proceeding to court. The Boards of Review of the Departments of Agriculture, Natural Resources, Transportation and Health and Mental Hygiene have the authority to hear and determine appeals from most decisions of the

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secretary or other agencies within the department which are subject to judicial review under the Maryland APA or any other provision of law.[2] If an appellant is seeking to review such a decision and, if there be no reconsideration, an internal administrative review of the decision through the department to the secretary, who then must make a determination of the question involved. After this determination, the appellant may appeal to the Board of Review.

The proceedings before the Board of Review resemble the proceedings before a reviewing court. The Board applies the same standard of review as a reviewing court would, except that the Board may receive additional evidence to supplement the record made before the agency. However, the Board lacks authority to conduct an entirely de novo proceeding. The Board's decision becomes the final agency action which is then subject to review in accordance with the Maryland APA or other provision of law granting the right of judicial review.

The requirement to take an appeal to the Board of Review has ambushed many appellants along the road of judicial review. The Court of Appeals has held that an appellant who does not seek review by the Board of Review when such review is mandated has failed to exhaust the available administrative remedies and therefore may not seek review in the circuit court. *Commission on Medical Discipline v. Bendler*, 280 Md. 326 (1977); *Leatherbury v. Gaylord Fuel Corporation*, 276 Md. 367 (1975).

Appeals From Administrative Agencies—Further Appeal

Section 12-302(a) of the Courts and Judicial Proceedings Article provides that, unless granted by law, there is no right of appeal from a decision of a circuit court reviewing the decision of an administrative agency. The Maryland APA does grant such a right of further appeal, in Section 256 of Article 41, as do most other statutes regulating appeals from agencies not covered by the Maryland APA. There are, however, some statutes providing a right of review of an agency decision by a circuit court and which, therefore, preclude such further appeals. An example is the "Law-Enforcement Officers' Bill of Rights", Section 727-734A of Article 27. In such a case, an appellant may have a further appeal from the circuit court only on the ground that that court was without jurisdiction to entertain the original appeal, and the subject matter of the further appeal will be limited strictly to the jurisdictional issue. *Abbott v. Administrative Hearing Board*. 33 Md. App. 681 (1976).

If a right of further appeal is given, the Court of Special Appeals or the Court of Appeals will apply the same standards of review to the decision of the administrative agency as the circuit court did. For example, if the question for review is the sufficiency of the evidence, the appellate court will inquire whether there is sufficient evidence to sustain the agency decision, not whether there is sufficient evidence to sustain the circuit court's judgment. On the problem of finality, see *U.S. Fire Ins. Co. v. Schwartz* 280 Md. 518 (1977). Because the circuit court performs an appellate function, its rulings are rulings of law. The appellate court may treat these rulings as it would treat any other ruling of law—with courtesy, perhaps, but not with deference. *Public Service Commission v. Baltimore Gas and Electric Co.*, 273 Md. 357, 362 (1974).

Other Means of Review

If there is a statutory provision for an appeal from an agency action, that provision, except in the extraordinary circumstances discussed *supra* is the exclusive means of seeking judicial review. If there is no such statutory remedy for the particular agency action, the person affected by that action may seek review of that action by means of a declaratory judgment pursuant to Sections 3-401 through 3-415 of the Courts and Judicial Proceedings Article or by means of a petition for injunctive relief or mandamus. *Urbana Civic Association, Inc. v. Urbana Mobile Village, Inc.*, 260 Md. 458 (1971); *State Department of Health v. Walter*, 238 Md. 512 (1965); *Heaps v. Cobb*, 185 Md. 372 (1945). These proceedings are original actions and are governed by their respective rules, and not by Subtitle B of the Maryland Rules. □

[1]For a more expanded discussion of this subject see Lord, *Md. Bar J.*, Summer, 1977 at pp. 49 *et seq.*

[2]The Boards of Review of the Human Resources and Economic and Community Development Departments though abolished as of July 1, 1978 continue in existence with full authority, to hear and decide all appeals properly filed with them on or before that date.

Lawyer Referral Service

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recommendation, one which The Maryland State Bar Association has implemented, is that state bar associations which do not now have statewide lawyer referral service should be encouraged to establish one immediately.

Utilizing those marketing tools and strategies which have proved successful in other lawyer referral services throughout the country, the MSBA Lawyer Referral Service has set September 1, 1978 as the target date for establishing the statewide service. The Special Committee has made arrangements for a display listing in the yellow pages of the telephone directories throughout the state. A toll-free telephone number (800-492-1993) has been obtained for the purpose of handling inquiries statewide.

The success of this endeavor, however, largely depends upon the support which the program receives from members of the bar. Those attorneys who practice in a jurisdiction which already has a lawyer referral service should become a member of their local panel. If the local bar association does not have LRS, then the attorneys should make application to the MSBA Lawyer Referral Service panel. Although LRS is a public service program designed to assist those consumers who do not know a lawyer or how to retain one, lawyers will benefit from the LRS advertising and obtain a part of the market which remains unserved. Additionally, it is expected that the statewide LRS program shall generate and foster an improved professional image of attorneys.

The Maryland State Bar Association, Inc., through its president, Vince Gingerich, and its staff, has furnished both encouragement and financial assistance to the statewide lawyer referral service program. Complete staff support has also been provided as well as money budgeted specifically for the program. It is through this combined effort and cooperation that the MSBA LRS program can assist attorneys in helping those persons in need of legal assistance obtain the services of a competent attorney while at the same time enhancing the image of the profession. □