The
MARYLAND LITIGATOR

MSBA LITIGATION SECTION FEBRUARY 2012

Attorneys' Fees in Maryland: Careful What You Wish For!

By Maury S. Epner, Esq.

The story is told of the long-married couple, each 60 years old, who happen upon a dusty, half-buried lamp. As the husband rubs off the dust, a genie appears and grants him three wishes. He wishes for a grand mansion and, *poof*, a beautiful estate appears. He wishes for $10 million and, *poof*, the requested cash hoard is laid out before him. Finally, he wishes for a wife 30 years younger than himself. This time, *poof*, he is instantly transformed into a 90-year-old. So it is with seeking and obtaining attorneys' fee awards in Maryland: be careful what you wish for!

Maryland, together with the vast majority of states, follows the "American Rule" concerning the award of attorneys' fees. The American Rule generally "prohibits the prevailing party in a lawsuit from recovering his attorney's fees as an element of damages."[1] Nevertheless, several exceptions to the American Rule are well recognized in Maryland.[2] Two in particular—contractual and statutory fee-shifting provisions—are well known to Maryland practitioners and are the chief focus of the remainder of this discussion.

Fee-Shifting Statutes

A variety of Maryland statutes include fee-shifting provisions.[3] These fee-shifting statutes are typically designed to encourage suits that, in the judgment of the legislature, will further certain public policy goals.[4] Frequently, such provisions are meant to level the proverbial playing field between individuals and those perceived by the legislature to have superior economic power or leverage. In this way, the legislature establishes certain legal objectives and, cognizant of the limits on the ability of the executive—any executive, really—to proceed against every deviation from legislative policy, empowers private parties to enforce the dictates in individual cases by private action rather than by government action. Thus, to cite but two common examples, attorneys' fees "may" be awarded in cases where an employer baselessly withholds an employee's wages,[5] or where a landlord demands a security deposit that exceeds two months' rent or insists on the inclusion of illegal terms in a lease.[6]

When faced with a *statutory* claim for an award of attorneys' fees (in contrast to a contractual claim; more on that below), our Courts generally employ the "lodestar method" to calculate the proper award. This method "begins by multiplying the number of hours *reasonably* spent pursuing a legal matter by a 'reasonable hourly rate' for the type of work performed" (emphasis added).[7] Thus, at the outset, the Court will exclude hours it finds to be "excessive, redundant, or otherwise unnecessary..., as well as hours that are not properly billed to one's client."[8]

Once the Court arrives at a reasonable hourly figure multiplied by a reasonable hourly rate, it may then adjust that product, up or down, after considering 12 non-exclusive factors: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill necessary to perform the legal

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THE MARYLAND LITIGATOR

- Editorial Board -

Message from the Chair

By M. Natalie McSherry, Esq.

Remember how you felt just before your first trial? Remember your first motion argument in open court? Remember your first deposition? How about your first day of work as a lawyer? Remember the uncertainty? Remember feeling like someone was going to disclose to all the world that you really didn't know what you were doing? You had done well in college, gotten through law school, taken and passed the bar exam, and you never felt more clueless.

Imagine if you had not even finished high school; didn't know a tort from a treatise; had no idea what a "cause of action" was, or a motion, or how to ask to have something be admitted into evidence and made part of the record. What if you didn't know where to turn, or even what to ask?

Imagine if you dropped out of high school to marry your pregnant girlfriend. You both worked hard at part time jobs with no health benefits, had two or three children in school, and your wife was diagnosed with breast cancer. The medical bills and loss of her income made money so tight you couldn't pay your gas& electric, rent, or bus fare.

Imagine if you worked hard every day, bought a house, got sucked into a variable rate mortgage with a balloon payment that you could never afford, but had been told at settlement by the friendly broker "not to worry about reading, much less trying to understand the paperwork, just sign it" and assumed that's what everyone did.

Imagine you found yourself in an abusive relationship with two children to care for. Your choices seem limited to putting up with the abuse or letting the state take your children, or living on the street with them – homeless.

This is how a great number of citizens in this country have to deal with legal issues

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Limits of Zealous Advocacy

By Lydia E. Lawless, Assistant bar counsel

"Zeal is fit for wise men, but flourishes chiefly among fools."
- John Tilloston, Archbishop of Canterbury

Attorneys' courtroom speech and conduct in Maryland is regulated by the rules of procedure, the laws of contempt, and the Maryland Rules of Professional Conduct. Lawyers who face disciplinary or contempt charges for their speech or conduct in court frequently attempt to defend with the argument that they were merely providing zealous representation to their client. A defense of zealous advocacy usually fails.

This is the first of a two-part article reviewing the defense of zealous advocacy. The first part is a review of disciplinary cases where the defense of zealous advocacy was rejected by the courts. The second part analyzes the application of ethical standards by courts in reviewing contumacious conduct defended as zealous advocacy.

The Maryland Rules of Professional Conduct require, among other things, candor toward the tribunal (Rule 3.3), fairness to opposing party and counsel (Rule 3.4), impartiality and decorum of the tribunal (Rule 3.5) and a prohibition against conduct prejudicial to the administration of justice (Rule 8.4(d)).

In recent years, the value of "zeal" has waned. Canon 7 of the Model Code stated that lawyers should represent clients "zealously." The Maryland and Model Rules refer only to "diligence" and relegate "zeal" to the preamble and to Comment [1] to Rule 1.3. Notably, the District of Columbia is the only jurisdiction whose Rule 1.3 affirmatively requires zeal.

In *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983), Respondent's improprieties during trial included: frequent sarcastic, disrespectful and irrational comments, accusing the court of collusion with the prosecution, cronyism, racism, permitting the proceedings to have a "carnival nature," conducting a kangaroo court, prejudging the case, conducting a "cockamamie charade of witnesses" and barring defense counsel from effectively participating in the proceedings, conducting a sham hearing, acting outside the law, being caught up in his "own little dream world," and ex-parte communications with the prosecutor. *Id.* at 593.

The Supreme Court of New Jersey found Respondent was "guilty of behavioral delinquencies transcending any notion of decent advocacy" and dismissed Respondent's claim that his conduct was justified on the basis of "forceful and zealous representation." *Id.* at 601. The court noted that the Respondent's offered justification – zealous advocacy "simply underscores his flawed perception of a lawyer's obligation to the court, to other attorneys, and to witnesses." *Id.* The Respondent was suspended from the practice of law for one year.

In *Bar Assoc. of Greater Cleveland v. Milano*, 9 Ohio St. 3d 86, 459 N.E.2d 496 (1984), Respondent, during and immediately following his client's murder trial, made several intemperate comments directed toward the trial court. Respondent read a "statement" into the record which, among other things, claimed the trial judge "stole the case", was anxious to finish the case in order to go on vacation, and improperly received information from his bailiff about jury deliberations. The statement concluded with Respondent saying "[expletive] this system."

The Respondent, while recognizing that some of his comments may have been inappropriate, argued that the remarks were made while zealously representing his client whom he believed to be innocent. The Supreme Court of Ohio found that the Respondent's "zealous representation" of his client did not excuse his behavior and suspended the Respondent from the practice of law for one year noting that "the zealous representation of a client is possible while maintaining and preserving the dignity of the courtroom and remaining courteous to the tribunal." *Id.* at 498.

In *In re Goude*, 296 S.C. 510, 374 S.E.2d 496 (1988), Respondent, at his client's sentencing hearing made disparaging remarks about the victim, referring to him as "this thing." Additionally, Respondent angrily interrupted during the prosecution's remarks to the court. As a result of this outburst the trial judge admonished Respondent to address the court "with a little more respect than which you have." Following the sentencing, as his client was escorted through the hallway, Respondent yelled "I don't see how this jury could convict my client with this *little lying piece of [expletive]*." *Id.* at 511.

The Supreme Court of South Carolina found Respondent's behavior to be prejudicial to the administration of justice and issued a public reprimand. *Id.* at 512. The Court noted that, in providing zealous representation, a lawyer must act in a dignified and professional manner. *Id.* at 498.

The Maryland Court of Appeals recently rejected a defense of "zealous advocacy" for an attorney facing disciplinary charges. In *Attorney Grievance Com'n v. Usiak*, 418 Md.

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THE LITIGATION SECTION OF THE MARYLAND STATE BAR ASS'N AND ITS APPELLATE PRACTICE COMMITTEE

PRESENT

Recent Impact Decisions of the Maryland Appellate Courts

Thursday, April 26, 2012
5:00 – 8:00 p.m.

Robert C. Murphy Courts of Appeal Building
Fourth Floor
361 Rowe Boulevard
Annapolis, MD 21401

5:00 - 6:00 p.m. Social Hour Reception – Foyer to the Courtroom
Cash Bar (Beer & Wine) & Hors D'oeuvres
6:00 p.m. - 8:00 p.m. – Courtroom
Speaker Presentations and Audience Questions

$10.00 for MSBA Litigation Section Members
$25.00 for others

SPEAKERS:

GLENN T. HARRELL JR., *Judge, Court of Appeals of Maryland*

ROBERT N. McDONALD, *Judge, Court of Appeals of Maryland*

JAMES R. EYLER, *Judge, Court of Special Appeals of Maryland*

CHARLES E. MOYLAN JR., *Judge, Court of Special Appeals of Maryland* (retired)

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Theresa L. Michael, tmichael@msba.org
410-685-7878 ext. 3017

Brief Guide to Maryland Procurement Law

By Philip M. Andrews and John F. Dougherty

Maryland's procurement process for government contracts differs from negotiation of contracts between private parties. Recent headlines about audits of various State agencies are a reminder that there are strict procedural rules for negotiating contracts with the State, and there can be serious consequences for failing to follow those rules. Business practices that are commonplace in the private sector, such as an informal phone call to understand a prospective client's needs, can be expressly prohibited when one is dealing with a State agency governed by the Maryland General Procurement Law.[1]

The purposes of the Maryland Procurement Law are to foster competition and thereby maximize the State's purchasing power, ensure fair and equitable treatment of bidders, and maintain the integrity of the procurement system.[2] In this article, we aim to achieve the same purposes, by providing our fellow attorneys with a brief overview of the rules governing the procurement process. The reader is cautioned, however, that this article is not intended as an exhaustive description of all requirements for doing business with the State.

Procurement Methods and Process

Most contracts with the State of Maryland are awarded using either competitive sealed bids (an invitation for bids or "IFB"), or competitive sealed proposals (a request for proposals or "RFP").[3] The specific requirements of a particular solicitation are set forth in the IFB or RFP, which are posted on the State's *eMarylandMarketplace* website.[4] Prospective vendors are required to register in that system, which is used for all communications relating to pending solicitations.

The Procurement Law states a preference for competitive sealed bids, in which specifications are included in the IFB and the award decision is based primarily on the lowest bid price. If, however, it is not possible to prepare specifications that would permit an award based solely on price, the agency may issue an RFP seeking competitive sealed proposals.[5] With an RFP, offerors typically submit both a technical proposal and a price proposal,and the award decision is based on a combination of high technical competence and low price.

Negotiating Contract Terms Before the Proposal Due Date

A key difference from the private market can arise when a bidder[6] is preparing a bid or proposal, and thinks that some part of the IFB or RFP is ambiguous or unreasonably restrictive. The Procurement Law sets limits on what a bidder can do to renegotiate such terms.

A bidder can ask a pre-bid question about the ambiguous or overly restrictive term, in the hope that the State will clarify it before bids are due. The term "question" is interpreted liberally in this context; in many cases "request for modification" would be a better phrase. For example, a bidder wanting to substitute a less expensive product might ask the following question:

> Q:IFB § 1.1.1 states that only "Acme #3 widgets or products with comparable specifications" may be used to perform the project. There are no other widgets with specs identical to Acme #3 widgets, but Global Manufacturing makes a comparable widget that would meet the State's needs and is less expensive. A specification sheet is attached. Are Global widgets acceptable?

All bidders must be given the same information, so such questions must be directed to the procurement officer, and the response is provided in the form of an amendment to the IFB or a publicly-released document that sets forth the question and the answer. With an RFP, contract terms can sometimes be negotiated through the discussion and best and final offer ("BAFO") process. If those procedures do not result in amendment of ambiguous or overly restrictive terms, the bidder can file a bid protest with the procurement officer.

Many bidders, however, do not want to give away their competitive edge by posing questions, or sour a potential business relationship with the State by filing an early protest. Instead, they include an assumption in their bid:

> "Our bid is conditioned on the assumption that Global widgets are an acceptable substitute for the Acme #3 widgets specified in IFB §1.1.1. A specification sheet is attached."

A typical RFP will include language allowing exceptions to be taken to the terms and conditions, but also providing that exceptions may be unacceptable to the agency and may cause an offeror to be deemed not responsible or not reasonably susceptible of being selected for award. Consequently, such a strategy involves a risk that the substitution or exception will cause a bid be rejected as non-responsive. The decision comes down to whether the substitution or exception is material. Whether a particular substitution or variance is material involves a number of factors and is decided by the agency on a case-by-case basis. If a contract is awarded with material changes from the IFB, an agency's failure to reopen the bidding can be a basis for a successful bid protest.

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Change is Good, But Don't Let It Catch You By Surprise!

By Karen Federman Henry, Esq.

The litigator's life revolves around following the Maryland Rules of Procedure. New practitioners constantly check the Rules for filing deadlines and the contents of motions and briefs. As we become familiar with a particular area of expertise, we find ourselves referring to the Rules less frequently—we know the deadlines and we know what documents have succeeded in court countless times before. Usually, this does not pose a problem, because change does not occur often or drastically to our favorite Rules. Get ready, though—the Rules are bringing significant changes for anyone who regularly files documents in the District Court of Maryland seeking a judgment on affidavit.

With the new year, an amendment to Md. Rule 3-306 will take effect and applies to actions commenced beginning January 1, 2012. Where the prior Rule gave generous discretion to the applicant and the court in determining what supporting documents and statements would suffice to show the details of liability and damages, the new Rule sets forth extensive details for supporting a claim. The Rule starts by adding 10 defined terms that describe the parties involved (principal, original consumer debtor, and original creditor) and the types of debts that may be collected under the Rule (charge-off, consumer debt, future services). The Rule then makes some minor modifications to the required contents of the affidavit and necessary attachments. For example, if you seek interest, you must include a worksheet in the form set up by the Chief Judge of the District Court; if you request attorney's fees, you must include evidence of entitlement to the award and show that the fees are reasonable. The Chief Judge also will establish a checklist for the items required for an assigned consumer debt. So far, it's the same old stuff, right? Keep going and the significance of the changes becomes more evident.

For new actions, the Rule requires proof of the existence of the debt or account, along with the terms and conditions of the consumer debt. The proof cannot simply be through a sworn statement, but must be accompanied by a certified or authenticated copy or original of the document evidencing

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Clouding E-discovery

By Marc Hirschfeld, Esq.

Cloud computing concepts can be traced back to the 1960's and were built upon the premise that computer processing power and equipment was too expensive and too large for an end user to purchase, install and maintain. A consumer would pay for the computing power of a "mainframe" but access the information through a cheap terminal that didn't have a processor, memory chip or disk space. However, as the costs and sizes of PCs plummeted and their processing power skyrocketed, end users lost the need for classic cloud computing solutions. The current batch of cloud computing solutions are much more robust and complicated than the mainframe/terminal framework of yesteryear and pose substantial e-discovery challenges for attorneys and their clients involved in litigation.

Current cloud computing services can be broken down into three basic categories: 1) SAAS or software as a service, 2) PAAS or platform as a service, and 3) IAAS or infrastructure as a service. SAAS is the most common form of cloud computing services and is also the most likely to involve E-discovery issues. Traditionally, when an individual would purchase a computer, they would be required to purchase and install additional software to perform the most basic tasks like word processing and email. The software would have to be compatible with the hardware and installed and configured prior to opening, editing or emailing a document. A dialup connection would have to be established prior to an email being sent and delivered. With the advent of broadband internet and the increasing sophistication of internet browsers, technology companies are now able to deliver software directly to end users without the end user having to install additional software or purchase powerful hardware. Storage can be moved to the internet and that same information can be accessed on multiple devices; through Ipads and smartphones as well as traditional computer platforms like desktops and laptops.

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MD Court of Appeals Recognizes Applicability of "Reasonable Expectations" Doctrine To Disputes Among Shareholders of Closely-Held Corporations

By Geoffrey H. Genth, Esq.

In its October 25, 2011, decision in *Boland v. Boland*, 423 Md. 296, 31 A.3d 529, 542-543 and 573-575 (2011), the Court of Appeals of Maryland recognized the "reasonable expectation" doctrine's applicability to disputes among shareholders of closely held corporations. (***Author's Note:*** A paginated version of Boland from the Maryland Reports is not yet available.) The Court of Special Appeals of Maryland had previously recognized the "reasonable expectations" doctrine in its reported decision in *Edenbaum v. Schwarcz-Ostreicherne*, 165 Md. App. 233, 254-261, 885 A.2d 365 (2005). To provide clients with competent advice and advocacy, Maryland litigators and transactional lawyers representing closely held corporations and/or their shareholders must be familiar with the "reasonable expectations" doctrine as recognized by Maryland's appellate courts. This doctrine, which the majority of states now recognize, represents a significant departure from a narrower view of minority shareholders as being mere at-will employees of closely held corporations, and therefore generally subject to termination for any reason or no reason absent a written employment agreement or other writing to the contrary.

As in many other states, Maryland's "reasonable expectations" doctrine has evolved to give meaning to a statutory prohibition of "oppressive" conduct by the directors or those in control of the corporation. *See* Md. Code Ann., Corps. & Ass'ns § 3-413(b)(2). Section 3-413(b)(2) authorizes any shareholder entitled to vote in the election of directors of a corporation to "petition a court of equity to dissolve the corporation on grounds that . . . [t]he acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent."

Writing for the Court of Special Appeals in *Edenbaum*, Judge Peter Krauser observed that, although the statute does not define "oppressive" conduct, "oppression" has been commonly defined to include "conduct that defeats the reasonable expectations of a stockholder." 165 Md. App. at 256. Judge Krauser stated that:

> the typical characteristics of a closely held corporation are: "(1) a small number of stockholders; (2) no ready market for the corporate stock, and (3) substantial majority stockholder participation in the management, direction and operation of the corporation". . . . "[T]he shareholder in a [closely held] corporation considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership." Employment by the corporation is one such privilege and often is the shareholder's main source of income." Moreover, "'providing for employment may have been the principal reason why the shareholder participated in organizing the corporation.'"
>
> But the very nature of a closely held corporation makes it possible for a majority shareholder to "freeze out" a minority shareholder, that its, "'deprive a minority shareholder of her interest in the business or a fair return on her investment.'"
>
> ***
>
> The "reasonable expectations" view of oppressive conduct "[r]ecogniz[es] that a minority shareholder who reasonably expects that ownership in the corporation would entitle him to a job, a share in corporate earnings, and place in corporate management would be 'oppressed' in a very real sense [sic] when the majority seeks to defeat those expectation and there exists no effective means of salvaging the investment." But, we caution, "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." It "should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled."

Id. at 257-258 (citations omitted).

At least as important as the Edenbaum decision's recognition of the "reasonable expectations" doctrine was the decision's clarification that, in addition to the relatively drastic remedy of dissolution, a Circuit Court sitting in equity has broad discretion to craft and to use a wide variety of other equitable remedies in cases of shareholder oppression. Judge Krauser wrote:

> While . . . § 3-413 only mentions dissolution as a remedy for oppressive conduct, we join other courts today "which have interpreted their similar statutory counterparts to allow alternative equitable remedies not specifically stated in the statute." Alternative forms of equitable relief were

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The Joys and Dangers of E-Mailing

By: Alvin I. Frederick, Esq., and Erin A. Cohn, Esq.

Conventional wisdom holds that instant communication, via e-mail and text messaging, has been a boon for the practice of law. In the wink of an eye, the modern attorney can communicate with clients, courts, witnesses, other attorneys – in short – just about everyone in the known universe. Even more amazing is the fact that the cost of this instant and unrelenting communication is virtually free. So long as the attorney knows how to type, even if only at the speed of two thumbs or one finger, she is in business long before her secretary arrives for work. Instant communication now follows most attorneys wherever they might travel. While attorneys may not physically in their office, their availability is now virtually guaranteed by the ubiquitous cell phone and the rapidly expanding use of blackberries or laptops. Indeed, many clients not only assume, but demand that their attorneys be continually accessible through these miracles of modern technology. Fine linen paper and expensive engraved or embossed letterhead are largely a thing of the past, and use of the postage machine and United States mail is rapidly dwindling. Instant, nearly free and all pervasive communication must be a terrific advance in the practice of law – or is it?

E-mail in particular has rapidly become the favorite method of communicating among not only many attorneys, but also among a huge swath of society in the 21st Century. Text messaging among the younger set occurs at a rate and in a language that seems foreign to the vast majority of attorneys who have been practicing law for at least 15 to 20 years. E-mail, and to a lesser extent text messaging, present a number of opportunities, while simultaneously posing an even greater number of challenges and risks. The pervasive use of computers, laptops, cell phones and blackberries has quite simply revolutionized the practice of law both for better and worse.

Only a few of the oldest curmudgeons still deny the significant benefits to be derived from the use of e-mail as a cost effective, nearly instantaneous and flexible way of communicating. E-mail has become an integral part of virtually every attorney's practice. It is easy to understand why e-mail has become so ubiquitous. It carries the advantage of allowing the attorney to create a record of what was said in a highly usable, storable and retrievable format. Indeed, it has become the expected method of communication in many situations. Most people not only expect and accept e-mail as an appropriate and desirable method to communicate, but would be shocked if they dealt with an attorney who did not possess access to e-mail.

Consider however some of the potential pitfalls of e-mail. The amazing speed of e-mail is not necessarily a good thing. How many attorneys receive a pleading or motion and draft an immediate response? Would it ever be wise to "file" the response without thoroughly considering the options, performing appropriate research or review of other materials or even proofreading the response? Certainly no competent lawyer would file any formal paper in such a haphazard manner. Yet, when it comes to communicating via e-mail, or text messaging, instant haphazard response is the norm rather than the exception. Often, the desire for instant response means the attorney will perform no spell check, and may not carefully check the names and addresses of those who might receive a "reply." Clearly little, if any, time elapses for careful consideration and the weighing of options before a response is flashed back through this modern miracle of technology. Yet, such e-mail and, on occasion, text messages are regularly sent to clients, adversaries and others. There is little doubt that adversaries are expected to use every weapon in their arsenal to further the interests of their clients. A poorly worded e-mail sent without appropriate consideration has therefore become an increasing problem in the modern practice. The shorthand

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UPCOMING EVENTS

April 12, 2012, 6:00 p.m.
Practicing in the Circuit Court: The Judges' Perspective
Dinner with the Judges Program
Also: Presentation of the Judge of the Year Award
Presented by the Litigation Section of the MSBA
Double Tree Hotel
Annapolis, MD 21401

April 26, 2012, 5:00 p.m. – 8:00 p.m.
Recent Impact Decisions of the Maryland Appellate Courts
Presented by the Litigation Section of the MSBA and its Appellate Practice Committee
Robert C. Murphy Courts of Appeal Building
4th Floor, 361 Rowe Boulevard
Annapolis, MD 21401

NOMINATE a DISTINGUISHED MARYLAND JUDGE for the 2011-2012 "Judge of the Year" Award

Background Information and Instructions:

In the areas below and on the second page, provide requested information about you and any information that is reasonably available to you about the nominee. You may attach additional pages, as necessary.

Any person may make nominations. A person may make more than one nomination. Current members of the Section Council are not eligible to be nominated.

To be eligible for nomination, a person must:

- o Currently be a judge in a State or federal court sitting in Maryland
- o Currently be a dues-paying member of the MSBA

Criteria for evaluation of nominations:

1. assessment of knowledge of the law
2. assessment of courtroom management skills
3. reputation for fairness and civility
4. extra-curricular service to the Judiciary and the Bar
5. extra-curricular contributions to the community-at-large

The award will be presented at the Litigation Section's "Dinner with the Judiciary," in Annapolis, Maryland, to be held on **Thursday, April 12, 2012**.

The Section Council will select the recipient. Please submit your completed nomination form by mail or e-mail, by the close of business on **March 1, 2012**, to: **M. Natalie McSherry, Kramon & Graham, P.A., One South Street, Suite 2600, Baltimiore, Maryland 21202, nmcsherry@kg-law.com**.

Information About You:

Name: _____

Law Firm/Employer: _____

Business Address: _____

_____

_____

Telephone No. _____

Are you related to the nominee by blood or marriage: Yes____ No____

(If yes, please describe relationship: _____)

Information About Nominee:
(use additional sheets if necessary)

Name: _____
Business Address: _____
_____
_____
Telephone No.: _____

Judicial experience (length of service and on which courts, experience showing expertise and integrity, collegiality, etc.):

Contributions to Improving the Operation of the Judiciary and the Practice of Law (legislation, continuing legal education, community, etc.):

Personal, Professional and Academic Accomplishments (bar, memberships and activities, professional associations, etc.):

Other:

To the best of my knowledge, the nominee meets the criteria for nomination set forth in the instructions above.

_____
Signature of Person Making Nomination

service properly; (4) the preclusion of other employment by the attorney as a result of her acceptance of the case; (5) the customary fee, if any; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount at issue and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases.[9] While each of these factors can impact the Court's ultimate decision regarding how much to award, the single most important factor is the attorney's degree of success.[10]

One very important consequence of the fact that statutory fee-shifting provisions are designed to further public policies is that an award made pursuant to a fee-shifting statute may well be larger than the amount in controversy. Application of the "lodestar method" in these cases, in other words, "is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that [other methods] would provide inadequate compensation."[11] Put another way, fee-shifting statutes "are designed to incentivize small claims by providing monetary compensation" in the form of attorneys' fees sufficient to make it economically worthwhile for a private practitioner to pursue such claims.[12]

Contractual Attorneys' Fees Provisions

Sometimes, private parties include a provision in their contracts to defeat the "American Rule" by providing that, in the event of litigation between the parties, the loser shall pay the winner's reasonable attorneys' fees. Private contracting parties typically are not motivated to include such fee-shifting provisions to further any public policy, but rather to discourage purely tactical litigation or to force themselves, by "raising the stakes," to include another cost/benefit factor into the calculation of whether litigation is the best technique for resolving a particular dispute.

When confronted with a request for attorneys' fees based on a contractual fee-shifting provision, our Courts do not apply the "lodestar method" but, instead, apply the eight non-exclusive factors set forth in Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct: (1) the time and labor required, the novelty and difficulty of the issues presented, and the skill necessary to perform the legal services competently; (2) the likelihood that the acceptance of the particular matter will preclude the lawyer from taking on another matter; (3) the fee customarily charged in the locality for similar legal services; (4) the amount in controversy and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship between the lawyer and client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent.[13] There are, in other words, certain ethical limitations on the size of an attorney's contractually agreed-upon fee with his client, and these ethical constraints also govern the propriety of any particular attorneys' fee award authorized by a contractual fee-shifting provision.[14]

The careful reader will note the near similarity, at least on the surface, between the eight Rule 1.5 factors recited immediately above and the dozen factors to be considered, when a court employs the "lodestar method," in cases involving fee-shifting statutes. Nevertheless, there is one crucial distinction: because contractual attorneys' fee provisions are not grounded in public policy, our courts are reluctant to award fees in contractual cases that are disproportionately large in relation to the amount in controversy. "[U]nlike the lodestar method, Rule 1.5 does not carry with it the notion that the importance of the right vindicated will justify an expenditure of attorney time that is hugely disproportionate to the dollar amount at issue in the case. Indeed, when applying Rule 1.5, trial judges should consider the amount of the fee award in relation to the principal amount in litigation, and this may result in a downward adjustment."[15]

So, What's the Problem?

In the abstract, it all makes perfect sense: Maryland, like almost every one of its sister states, has a longstanding default rule that attorneys' fees are not among the compensatory damages a plaintiff will be permitted to seek, prove, or be awarded. But private contracting parties are free to override that default "American Rule" and agree that the winner of any legal dispute between them may collect its *reasonable* attorneys' fees from the loser. And the legislature can, and often does, override the same default rule in order to further certain important public policies; policies which might fail to be vindicated unless the holders of small claims—and their lawyers—know that the fees they stand to collect upon winning need not necessarily be proportional to the amount in controversy.

Unfortunately, we—and our disputes—are all too human, rather than mere abstractions. And that is where things sometimes become, as the old Chinese curse says, "interesting."[16]

One recent Maryland case—actually, it is *four* separate appeals, and counting—demonstrates that disputes over attorneys' fees

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in statutory fee-shifting cases can take on a life of their own: one that produces recurring nightmares for the parties, who become little more than horrified spectators hemorrhaging money. And another recent Maryland case illustrates at least one of the pitfalls that accompany the contractual impulse to incorporate a "loser pays" provision into a contract.

The Perpetual (and Financially Ruinous) Rollercoaster Ride

Friolo v. Frankel began innocently enough—albeit, 12 years ago—as a breach of contract and wage payment case. The plaintiff sought damages that, by the time of trial, and after trebling under the Maryland Wage Payment statute, totaled approximately $78,000, plus reasonable attorneys' fees in accordance with the statutory fee-shifting provision.[17] Following trial, the jury awarded the plaintiff less than $12,000. Her attorney then filed a fee petition seeking nearly $70,000 in attorneys' fees and, following a hearing, the trial court awarded her $6,212 in fees and costs.[18]

Friolo appealed and, before the case could be heard by the Court of Special Appeals, the Court of Appeals granted *certiorari*. In its decision,[19] the Maryland high court remanded the case to permit the trial court to apply the proper methodology—namely, the lodestar method—to a statute-based fee petition, but took pains to observe that, by remanding, it did "not suggest that the amount of the fee awarded . . . in this case was inappropriate."[20]

On remand, Friolo's counsel amended his fee petition to seek, in addition to the full amount of nearly $70,000 he originally had requested, new fees and costs totaling $60,000 attributable to the appeal. This time, the circuit court awarded Friolo's lawyer approximately $65,000, thereby leaving *both* parties dissatisfied and prompting cross appeals.[21]

This time, the appeal stayed with Court of Special Appeals, which held, in *Friolo II*,[22] that the trial court had neither correctly applied the lodestar method nor clearly explained its reasoning for arriving at the fee award it did. The intermediate appellate court also held that Friolo's lawyer was not entitled to additional fees related to his work on the appeal.[23]

Friolo then sought further review from the Maryland Court of Appeals, which, after granting *certiorari*, affirmed in part and reversed in part in *Friolo III*. The Court first agreed with the Court of Special Appeals that the trial court had "failed to provide an explanation of how [the lodestar] factors affected the amount of [its] award."[24] However, it reversed the lower court's ruling that Friolo's lawyer was ineligible for fees related to his work on the appeal, explaining that it "is as important to compensate counsel for ensuring that the trial court gets it right, even if to do so requires counsel to appeal, as it is to ensure that counsel is compensated for services rendered at trial. Indeed, it is a disincentive to the retention of competent counsel . . . to deny recovery for successful appellate advocacy. . . ."[25]

So, back to the trial court went the parties, who made their respective cases to a court-appointed special master. In January 2010—nearly a decade after Friolo had first filed suit—the special master recommended an award of $16,000 for Friolo's attorney's trial work and an additional award of more than $200,000 for his appellate work. Upon review, however, the circuit court largely rejected the special master's recommendations. "[E]xtremely distressed" by the course of the litigation, and ascribing the blame for the unusually protracted duration of the case to Friolo's counsel, the trial court awarded him approximately $7,300 for his work at the original trial and then decided, in its "discretion," not to make any further award for counsel's appellate work. The trial court then ordered the parties to split the special master's fee of approximately $15,000, which of course had the effect of fully negating the small attorneys' fee award to Friolo.[26]

Stung by the minimal award, Friolo's lawyer initiated a third round of appeals, which resulted, in September 2011, in a reported[27] —and reported upon[28] —decision of the Court of Special Appeals in *Friolo IV*. The *Friolo IV* court's lengthy opinion reversed the trial court but, instead of simply remanding for yet another round of argument over counsel's fees, the court entered judgment in accordance with Maryland Rule 8-604(e). Although the judgment entered was nominally in favor of Friolo, Friolo's lawyer surely was not gladdened thereby: the court determined that Friolo's attorney was entitled to a total fee award of no more than approximately $45,000, *less* a judgment, against Friolo and in favor of the special master, for 88% of the special master's total fee, or $13,332.

The Court of Special Appeals arrived at this noteworthy result after undertaking an extensive analysis of Friolo's attorney's degree of success and concluding—in light of Friolo's original trial demand, Frankel's settlement offer, and the jury's award—that Friolo's attorney had achieved only a 12% success in the case. The Court arrived at this conclusion after dividing the amount by which the jury's award exceeded Frankel's settlement offer (i.e. Friolo's actual success) by Friolo's total demand (i.e. the amount that, had it

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been awarded by the jury, would have been a 100% success). This yielded a success rate of 12%.

This writer will leave to others[29] —not least the Maryland Court of Appeals, which recently agreed to hear Friolo's appeal from *Friolo IV*[30] —an evaluation of whether the intermediate appellate court's innovative methodology and analysis are sound. Instead, focus for a moment on the parties themselves, for the case of *Friolo v. Frankel* stopped, *nearly a decade ago*, being a fight between them, and, since that time, has been a dispute—in which the parties are no more than spectators—chiefly between Friolo's lawyer and the courts that will determine his fee.

The plaintiff won a modest victory nearly a decade ago, but presumably has yet to even collect her small judgment.[31] And the defendant, Frankel, has been forced to pay an attorney to defend him—over the course of multiple appeals and post-judgment trial court fee hearings—not against any claims of wrongdoing by him (for those claims were finally resolved years ago), but against claims, by the plaintiff's *lawyer*, that the lawyer's fee award should be bigger than it is. Although there is obvious public interest in having our courts sort out the law relating to statute-based attorneys' fee awards, regardless of how long or how many appeals it takes, it is far less clear that the parties, whose dispute *inter se* long ago concluded, should be forced to remain lashed to—and have to pay for—the purely public interest questions that really no longer even concern them.

In a perfect (or even closer to perfect) world, the legislature—in seeking to advance the public interest by enacting statutory "loser pays" provisions in certain circumstances—might fine-tune the process to avoid the absurd spectacle (at least from the perspective of the parties themselves) that *Friolo v. Frankel* has become. Thus, for instance, the legislature could provide that, once the merits of the original dispute were finally resolved, any remaining litigation purely over fees would be subject to a new "loser pays" provision, but one in which the losing *lawyer*, rather than his client, bore the expense. Indeed, perhaps even in the final chapter of this case, and depending on how it is resolved, the Court of Appeals will find some way to achieve a similar correction. But, until then: be careful what you wish for!

Drafting Errors Equal Blowback

In the movie classic "White Men Can't Jump," street-wise Gloria famously observed that: "Sometimes when you win, you really lose. And sometimes when you lose, you really win." She could have been speaking of the recently decided case of *Weichert Co. of Maryland, Inc. v. Faust*,[32] where, among other litigation nightmares, the victim, which actually won its main claims, ended up paying the loser's attorneys' fees.

Faust, a real estate agent, managed Weichert's 80-agent Bethesda real estate office until she was lured away by Weichert's biggest competitor, Long & Foster. After she announced her departure, but before she actually moved, she persuaded nearly all her colleagues to bolt to Long & Foster as well, thereby decimating Weichert's office. Weichert then sued both Faust and Long & Foster and subsequently won a $250,000 judgment against Faust for breach of her implied contractual duty of loyalty and an additional $375,000 judgment against Long & Foster for unfair competition.[33] But, because of the peculiar (i.e. fundamentally flawed) way in which two provisions in Faust's employment agreement with Weichert had been drafted (presumably by Weichert), Weichert—the victim and indisputably the prevailing party in the litigation—ended up having to pay the losing perpetrator Faust's attorneys' fees in the amount of more than $946,000.[34]

The Weichert employment agreement prohibited Faust, "directly or indirectly, in any capacity," from soliciting her fellow employees "during the period of one year *from the date of termination*." Here, however, Faust announced her resignation two weeks before it took effect—*i.e.* two weeks *before* "the date of [her] termination"—knowing full well that it would prompt a stampede by her colleagues. As such, she cleverly avoided violating the letter of her agreement—which prohibited only those solicitations that occurred *after* "the date of [her] termination"—while plainly, indeed ostentatiously, breaching its spirit. A (far) better non-solicitation clause would have precluded the employee from soliciting her fellows at any point beginning on the effective date of the agreement and concluding one year following termination.

Second, the agreement contained a fee-shifting provision, but, because of the peculiar way in which the provision was drafted, the Court held that it applied *only* to claims relating to non-solicitation. And so, even though Weichert, the employer, clearly prevailed in great part over its faithless employee Faust, because Weichert did not also *specifically* prevail on its non-solicitation claim, not only was it not entitled to the recovery of its attorney's fees, it was obliged to pay the attorney's fees of Faust, who *did* prevail—i.e. by not losing—on the non-solicitation claim.[35]

The lessons from *Friolo* and *Weichert* are clear: Fee-shifting

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Attorneys' Fees...

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statutes and contracts can, and frequently do, serve great public and private interests. They enable a wronged party to secure a just outcome without ultimately having to bear great cost to achieve it. They deter overreaching by the powerful over the weak. And they force potential disputants to think twice before initiating litigation. But, because fee shifting provisions are also the inventions of humans and are executed by humans, they are capable of producing unintended, and occasionally perverse, results. And so, as in all things involving the law, lawyers, and litigants, be careful, and be careful what you wish for!

Endnotes:

[1] *St. Luke Evangelical Lutheran Church, Inc. v. Smith,* 318 Md. 337, 344 (1990); *accord, e.g., Caffrey v. Dep't of Liquor Cont. for Montgomery Cty,* 370 Md. 272, 292 (2002).

[2] Awards of attorneys' fees are available in cases (1) where the parties to a contract have an agreement to that effect, (2) where a statute permits such an award, (3) where the wrongful conduct of the defendant forces a plaintiff into litigation with a third party, and (4) where the plaintiff is forced to defend against a malicious prosecution. *Thomas v. Gladstone,* 386 Md. 693, 699 (2005). In addition, when a plaintiff is eligible for an award of punitive damages, the fact finder may consider the plaintiff's attorney's fees in determining whether and how much to award in the form of such exemplary damages. *St. Luke Evangelical Lutheran Church,* 318 Md. at 345-46.

[3] *See, e.g., St. Luke Evangelical Lutheran Church,* 318 Md. at 346-47 n.6.

[4] *Monmouth Meadows Homeowners Ass'n v. Hamilton,* 416 Md. 325, 334 (2010).

[5] Md. Code, Labor and Employment Art., § 3-507.2(b) (attorneys' fees and treble damages "may" be awarded where wages withheld absent a "*bona fide* dispute").

[6] Md. Code, Real Property Art. §§ 8-203(b)(2), 8-208(g)(2).

[7] *Monmouth,* 416 Md. at 333-34 (2010).

[8] *Friolo v. Frankel,* 403 Md. 443, 453-54 (2008) (*"Friolo III"*).

[9] *Monmouth,* 416 Md. at 334.

[10] *Friolo III,* 403 Md. at 460 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) (degree of success is "a crucial factor")).

[11] *Monmouth,* 416 Md. at 334 (*quoting Krell v. Prudential Life Ins. Co. of Am*., 148 F.3d 283, 333 (3d Cir. 1998)).

[12] *Friolo v. Frankel,* 201 Md. App. 79, __, 28 A.3d 752, 769 (2011) ("Friolo IV"), *cert. granted,* --Md. -- (Dec. 16, 2011).

[13] *Monmouth,* 416 Md. at 336 n. 10; *accord, Congressional Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 504-05 (2011).

[14] *Friolo I,* 373 Md. at 527 ("Rule [1.5] is important to note because it puts a limit on what a lawyer may charge his or her own client").

[15] *Monmouth,* 416 Md. at 337.

[16] Although Wikipedia reports that no known Chinese language version of the curse has ever been found, the curse "may you live in interesting times" has long been attributed to the Chinese.

[17] *See* fn. 5 *supra.*

[18] *Friolo IV,* 28 A.3d at 758-59.

[19] *Friolo v. Frankel*, 373 Md. 501 (2003) ("*Friolo I"*).

[20] *Friolo I,* 373 Md. at 529.

[21] *Friolo IV,* 28 A.3d at 762.

[22] *Friolo v. Frankel*, 170 Md. App. 441 (2006).

[23] *Friolo II*, 170 Md. App. at 451-52.

[24] *Friolo III*, 403 Md. at 454-55.

[25] *Id.*, 403 Md. at 458.

[26] *Friolo IV,* 28 A.3d at 768.

[27] *See supra* note 12.

[28] *See, e.g*., http://thedailyrecord.com/2011/09.18/concerns-about-new-formula-for-attorneys%e2%80%99-fee-awards/.

[29] See *supra* note 27.

[30] -- Md. -- (Dec. 16, 2011).

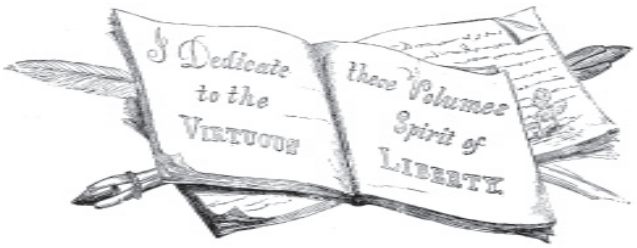
[31] And perhaps never will, as the defendant Frankel has apparently declared personal bankruptcy. Who, moreover—Friolo or her lawyer—will end up having to pay however much of the special master's fee that ultimately is assessed against Friolo? Surely the lawyer, who was entirely responsible for the need for the special master in the first place, will not expect his client to bear that expense.

[32] 419 Md. 306 (2011).

[33] 419 Md. at 314. Weichert's $250,000 damages award was offset in part by an award of $116,000 in favor of Faust on account of an unpaid bonus owed to her by Weichert. *Id*.

[34] Weichert also unsuccessfully sought its own award of attorney's fees in an amount exceeding $2.2 million. *See Weichert v. Faust*, 191 Md. App. 1, 6 (2010), *aff'd*, 419 Md. 306.

[35] 419 Md. at 328.



Message from the Chair...

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every day. Many of us, who know the legal system, understand the concepts and terminology, still beg off from volunteering to help because, we say, we don't know anything about consumer debt law, public benefits, family law or disability law. It's hard to imagine that we could know less than those who are trying to navigate the system with no knowledge of it at all. It's even harder to imagine when almost every public interest law group looking for volunteers offers short training courses and help with those areas some of us may not know as well as we would like to in order to feel really helpful. Most even provide malpractice insurance for cases referred by them.

We in the litigation section are lawyers who are supposed to know how to think on our feet. We are supposed to be adept at innovation and flexible enough to deal with whatever might come up in a courtroom. Yes, we want to be prepared, and should be. But that can be accomplished far better by those of us with the basic understanding than by those who are completely unfamiliar with the territory. Many times, all that is needed by someone faced with a daunting legal problem, but without the funds to hire a lawyer, is a guide – someone to explain the process and the vocabulary. Someone to counsel them, in the truest sense of the word.

So, as government faces ever greater financial challenges, and those challenges lead to further cuts in funding for legal services to the poor from government source, let those of us who are the champions of the rule of law in the courts, extend a hand, an hour or even 10 or 20 hours, to a person who doesn't know where to begin, but faces possible loss of home, family or job. They are not looking for a handout. They are looking for help. We who know how to navigate, owe it to them to lead them thorough our legal system.

If you are willing to help, and don't know where to start looking yourself, try:

- Allegany Law Foundation, Inc. (301) 722-3390
- Alternative Directions, Inc. (410) 889-5072
- Asian Pacific American Legal Resource Center (202) 393-3572
- Associated Catholic Charities Immigration Legal Services (410) 534-8015
- Baltimore Bar Foundation Legal Services to the Elderly Program (410) 396-5277
- Baltimore Neighborhoods, Inc. (410) 243-4400
- CASA de Maryland Employment Rights Project (301) 431-4185
- CASA, Inc. (Citizens Assisting and Sheltering the Abused) (301) 739-4990
- Catholic Charities Legal Services Immigration Project (301) 942-1790
- Community Law Center (410) 366-0922
- Community Legal Services of Prince George's County Pro Bono Project (301) 864-8354
- Domestic Violence Center of Howard County Legal Assistance Project (410) 997-0304
- Harford County Bar Foundation Pro Bono Project (410) 836-0123
- Heartly House Legal Advocacy Project (301) 662-8800
- Homeless Persons Representation Project (410) 685-6589
- House of Ruth Domestic Violence Legal Clinic (410) 889-0840
- Legal Aid Bureau, Inc. (410) 951-7777
- Maryland Coalition for Inclusive Education (410) 859-5400
- Maryland Crime Victims Resource Center Legal Advocacy Project (301) 952-0063
- Maryland Disability Law Center (410) 727-6352
- Maryland Public Interest Law Project (410) 706-8393
- Maryland Volunteer Lawyers Service (410) 539-6800
- Mid-Shore Council on Family Violence Legal Advocacy Project, Inc. (410) 479-1149
- Mid-Shore Pro Bono, Inc. (410) 690-4890
- Montgomery County Bar Foundation Pro Bono Project (301) 424-3453
- Pro Bono Resource Center of Maryland, Inc. (410) 837-9379
- Public Justice Center (410) 625-9409
- SARC (Sexual Assault/Sexual Abuse Resource Center) (410) 863-8431
- St. Ambrose Legal Services (410) 366-8537
- Sexual Assault Legal Institute (301) 565-2277
- Southern MD Center for Family Advocacy (301) 373-4141
- University of MD Law School HIV Legal Representation Project (410) 706-8316
- Whitman-Walker Health Legal Services Project (202) 939-7627
- Women's Law Center of Maryland, Inc. (410) 321-8761
- YWCA of Annapolis & Anne Arundel County: Domestic Violence Legal Services Project (410) 626-7800

Thanks for your help.

On another different but somewhat related note, the Litigation Section has decided to institute two Awards, hopefully to be given annually: the Section's **Judge of the Year Award** and **Litigator of the Year Award**. It is our hope that these awards will shine a light on deserving judges and litigators, who excel in a well-rounded sense, including knowledge of the law, courtroom skills or courtroom management, fairness, civility, service to the judiciary and bar and to the community at large. Please look for the flyer in this edition of The Litigator and in your emails to come, and nominate those truly special judges and litigators who make us all look good.

Zealous Advocacy…

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667, 18 A.3d 1 (2011), Respondent, along with his client, left a courtroom in the middle of proceedings when the court disagreed with Respondent's claim that it could not deny the State's uncontested motion to stet a criminal charge. The Respondent left the courtroom despite being told the case was not over and despite a directive from the court to Respondent's client to remain in the courtroom. Respondent was held in contempt and a bench warrant was issued for his client. The Court of Appeals held that Respondent violated Rule 8.4(d) and that his conduct was prejudicial to the administration of justice.

In issuing a 60-day suspension, the Court of Appeals noted: "At oral argument, in response to the Court's questioning, Respondent showed no remorse and was adamant that if presented with the same situation again, his actions would be the same. That response is troubling where Respondent was on notice that his decision to walk out on the court proceedings to make a point is not acceptable behavior; nonetheless, he would repeat the conduct, apparently because he believes such behavior constitutes zealous advocacy, toward the goal of protecting his client. It is the failure to distinguish between zealous advocacy that is appropriate and professional misconduct that gives the Court pause."

The line between zealous and aggressive advocacy and an ethical violation is not entirely clear. Courts may be hostile to the idea that uncivil behavior is justified in the name of zealous advocacy. See *In re Abbott*, 2007 Del. LEXIS 199, 925 A.2d 482 (2007) ("Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric...") On the other hand, courts clearly recognize that vigorous and contentious advocacy is an essential component of the adversary system. And while judges must have power to deal with disruption and uncivil behavior in the courtroom "it is also essential to the fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases." *In re McConnell*, 370 U.S. 230, 236 (1962).

As stated by the Utah Supreme Court: "Zealous advocacy is advocacy within the bounds set by court orders and the rules of ethics. Attorneys may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. It is not a license to seek a particular result without regard to such orders and rules, even unfavorable and inconvenient ones. By definition, then, an attorney who violates court orders and breaks ethical rules is not zealously advocating his client's cause and cannot claim immunity from contempt proceedings. The rules of ethics dictate that attorneys may not protest adverse rulings by violating them in the name of zealous advocacy. The proper method for contesting an adverse ruling is to appeal it, not to violate it." *State v. Clark*, 2005 UT 75, 124 P.3d 235 (2005).

While Attorneys Vincenti, Milano, Goude, and Usiak may clearly be outliers, pushing the bounds of acceptable behavior in any context, an attorney who chooses to defend his uncivil behavior in court claiming "zealous advocacy" does so at his own peril.

Change is Good…

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the debt (although a few transactions are exempt from this requirement). The plaintiff also must prove ownership of the debt—this includes the history of the debt and all prior owners, the dates of any transfers, and the certified or authenticated copy of the bill of sale or other document reflecting each transfer. Further details of the accounts are also required—the last 4 digits of the defendant's social security number or the last 4 digits of the account number, and the defendant's full name as shown on the account or debt documents. Comparable itemization also is required for collecting payment on future services contracts.

Although the precise provisions of the new Rules are not repeated here, make sure to refer to the applicable Rules when you file your next action for judgment in district court. In fact, it's a great way to start the new year by confirming the requirements of the Rules and updating all of your practice checklists so that you are not caught by surprise.

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A protest based on alleged improprieties that are apparent before bids or proposals are due, such as overly restrictive specifications, must be filed by the bid/proposal due date. With an RFP, an alleged impropriety that did not exist in the initial RFP but was subsequently incorporated in the solicitation must be filed by the next closing date for receipt of proposals. Protests based on other matters must be filed not later than seven days after the basis of protest is known or should have been known, whichever is earlier. Whether the deadline for filing a protest has been triggered is fact-specific.

Evaluation and Award Decision

Evaluation of bids submitted in response to an IFB is fairly simple; the lowest price from a responsive and responsible bidder usually wins.

With an RFP, it is more complicated, and the lowest price does not always win. Evaluation of proposals in response to RFPs is necessarily more subjective, but still must be based on the evaluation criteria stated in the RFP. After proposals are submitted, the procurement officer and evaluation committee may conduct discussions with the offerors, and there can be extensive written and oral communication during that phase. If the discussions reveal that it is in the interest of the State to allow offerors to amend their proposals, the State can request BAFOs.

Technical proposals, price proposals, and BAFOs usually are evaluated by an evaluation committee which makes a recommendation to the procurement officer, who makes the final award recommendation and issues a notice of intent to award.

Unsuccessful offerors can request a debriefing to learn why they were not selected. Unsuccessful bidders and offerors can also file a protest challenging the award decision. Reasons for a protest are numerous, but typically are a variation on the claim that the protestor was incorrectly rejected, or that the successful bidder should have been rejected. Protests are submitted to the procurement officer who then issues a written decision. Adverse protest decisions by the procurement officer can be appealed to the Maryland State Board of Contract Appeals.

The Board of Contract Appeals

The Maryland State Board of Contract Appeals ("MSBCA") is an independent unit of the Executive Branch of State government. It consists of three members, all gubernatorial appointees. All proceedings before the MSBCA are contested case hearings under the Administrative Procedure Act (the "APA").[7] Protest appeals before the MSBCA involve limited discovery and briefing, and a hearing followed by a written decision. As set forth below, more extensive discovery is allowed in contract claims before the MSBCA. Individuals may appear *pro se* before the MSBCA, but corporations must be represented by an attorney. The Board has subpoena power in aid of its jurisdiction.

The MSBCA's written decisions formerly were published by MICPEL, but more recently are published on the Board's website.[8] Final decisions of the MSBCA may be appealed to the Circuit Court pursuant to Maryland Rules of Procedure 7-201 *et. seq*.

Minority Business Enterprise ("MBE") Requirements

A relatively new area of potential protests involves MBE decisions. Before 2011, a regulation provided that bidders were not permitted to protest or appeal decisions relating to MBE matters.[9] A decision in 2011 by the Court of Special Appeals of Maryland struck down that regulation.[10] Protests and appeals are now allowed regarding decisions relating to MBE matters, but it remains to be seen how such decisions will be handled by the Board.

The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs. This is typically done by setting MBE subcontractor participation goals in an RFP or IFB.

An MBE is a legal entity, other than a joint venture, that is organized to engage in commercial transactions; at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and managed and controlled on a day-to-day basis by one or more of the socially and economically disadvantaged individuals who own it. A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged. An MBE must be certified as such by the Maryland Department of Transportation (MDOT). For calendar year 2012, an individual with a personal net worth in excess of $1,577,337 is not considered economically disadvantaged. The MBE program is scheduled to terminate July 1, 2012, but legislation has been filed for the 2012 Session to extend that deadline for an additional year.

State procurement law allows a contractor to request and obtain a waiver from MBE contract requirements. Waiver request procedures are set forth in the RFP or IFB. Generally, a

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waiver request must include a detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs, and a detailed statement of the efforts made to contact and negotiate with certified MBEs, by MBE classification (if appropriate). The statement must include, among other things, a list of contacts made with MBEs and reasons why any bids or offers received from MBEs were not accepted. A waiver may be granted only if the bidder or offeror reasonably demonstrates that certified MBE participation could not be obtained, or could not be obtained at a reasonable price, and if the agency head determines that the public interest is served by a waiver.

Contract Claims

All Maryland State procurement contracts must include a Dispute Clause, either in long or short form. There is no substantive difference between those forms; the long version spells out various procedural requirements that the short form adopts by reference.[11] Regardless of the form appearing in the contract, Maryland statutes and regulations control the dispute resolution process.[12]

Maryland's General Procurement Law provides the opportunity for informal dispute resolution. When the agency and the contractor are unable to resolve their differences without litigation, the dissatisfied contractor must invoke the contract claim process, which involves three steps. The first step is the filing of a Notice of Contract Claim with the procurement officer. The second step is the filing, with the procurement officer, of the Contract Claim itself. If the contractor is dissatisfied with the final decision of the agency, the third step is filing a Notice of Appeal with the MSBCA.

Except for a contract claim relating to a lease of real property, the MSBCA has exclusive initial jurisdiction of State contract claims concerning breach, performance, modification, or termination of contracts procured under Title II of Maryland's General Procurement Law. The MSBCA has adopted regulations that govern contract claim proceedings before it.[13]

Unless a shorter period is prescribed by law or by contract, the Notice of Contract Claim, which must be in writing, should be filed with the appropriate procurement officer within 30 days after the basis of the claim is known or should have been known, whichever is earlier. The issue of timeliness in the contract claim context has been the subject of litigation before the MSBCA.[14] Typically, the focus is on what the contractor "knew or should have known" and often requires an evidentiary hearing to resolve. The failure to comply strictly with the 30-day Notice of Contract Claim requirement does not automatically divest the MSBCA of jurisdiction to hear a contract claim,[15] but a contractor would be well-advised to adhere to the 30-day deadline to avoid having to litigate a dispositive motion to dismiss brought by the agency.

The contract claim itself can be filed: (a) with any Notice of Contract Claim contemporaneously; (b) for services or other non-construction contracts, within 30 days of the filing of a Notice of Contract Claim; or (c) for construction contracts, within 90 days of the filing of a Notice of Contract Claim.[16] Regardless of the type of contract at issue, the contract claim cannot be filed later than the date that final payment is made.[17] Contract claims may be filed electronically only if expressly permitted by the contract and only as specified by the contract.[18] By regulation, a Notice of Contract Claim, or a Contract Claim, that has not been filed within the time required by COMAR shall be dismissed.[19]

There is no specific form or template for a contract claim. Regulations require, however, that the claim be in writing and must contain: (a) an explanation of the claim, including reference to all contract provisions upon which it is based; (b) the amount of the claim; (c) the facts upon which the claim is based; (d) all pertinent data and correspondence that the contractor relies upon to substantiate the claim; and (e) a certification by a senior official, officer, or general partner of the contractor (or the subcontractor, as applicable) that to the best of the certifying individual's belief the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the relief sought from the agency.[20]

As noted above, claims for construction contracts are subject to different time requirements. While the Notice of Contract Claim must still be filed with the procurement officer within 30 days after the basis of the claim is known or should have been known, the contractor has until 90 days after such filing to provide, in writing, the facts upon which the contract claim is based, and all relevant data and correspondence that may substantiate the contract claim. The procurement officer is required to provide a written decision within 180 days after receiving the contract claim, or longer if the parties so agree.[21] That decisional deadline is shortened to 90 days after receiving the contract claim (unless the parties agree to a longer period), if the amount of the contract claim is not more than the amount under which an accelerated procedure before the MSBCA may be selected.[22]

For purposes of noting an appeal to the MSBCA, a decision not to pay a construction contract claim is a final action. The

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procurement officer's failure to reach a decision within the time structures imposed for construction contracts may be deemed, at the contractor's option, to be a decision not to pay the contract claim.[23]

For all service and non-construction State contracts, Maryland law does not impose any deadline upon the procurement officer to render a decision. Unlike the "pocket veto" for construction contract claims, the length of time a contractor will wait for the agency's final decision varies widely among Maryland State agencies. In the event of an unreasonable delay by the agency in rendering a final decision after the submission of a proper and valid contract claim, the MSBCA may award interest on the principal amount awarded to the contractor.[24]

Upon the final action of an agency denying, in whole or in part, any contract claim, the contractor has thirty days to note an appeal to the MSBCA. Within thirty days of receipt of notice of the docketing of an appeal, the appellant must file its complaint, setting forth the basis of its claims and the dollar amount sought. Unlike protest appeals before the MSBCA, which typically are heard on expedited basis and have very limited discovery, contract claim litigation before the MSBCA resembles, in many ways, litigation in a judicial forum. Formal discovery – depositions, document requests, interrogatories, and requests for admissions – are permitted. The MSBCA's rules also permit a party to move for summary disposition, which is akin to summary judgment in the Circuit Court. The trial of a contract claim before the MSBCA has the same structure as a Circuit Court bench trial, subject to the APA's provisions regarding evidence.[25] The MSBCA typically requires the parties to file post-trial memoranda, after a full trial transcript has been prepared.

There are a variety of MSBCA regulations that are case-specific and bear careful review. For example, there are less formal procedures permitting expedited consideration ("small claims" of $10,000 or less) or accelerated consideration ($50,000 or less).[26]

Conclusion

To navigate the Maryland procurement process, a bidder must follow a different set of rules. At the end of the day, just as with contracts between private parties, quality and price still drive the State's award decisions. Similarly, just as with private contracts, whether resort to the dispute resolution process becomes necessary depends on relationships, value and performance.

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Endnotes:

[1] Md. Code Ann., State Fin. & Proc. § 11-101 et seq.; COMAR, Title 21.
[2] See Md. Code Ann., St. Fin. & Proc. § 11-201(a).
[3] See COMAR § 21.05.01.
[4] eMarylandMarketplace, https://ebidmarketplace.com (last visited Jan. 6, 2012).
[5] See COMAR § 21.05.01.02.
[6] Entities responding to an IFB or RFP are called "bidders" and "offerors", respectively, but "bidder" is used interchangeably herein.
[7] Md. Code Ann., State Fin. & Proc. § 15-216(b)
[8] www.msbca.state.md.us.
[9] COMAR § 21.11.03.14.
[10] See Salisbury Univ. v. Joseph M. Zimmer, Inc., 199 Md. App. 163, 20 A.3d 838 (2011).
[11] COMAR § 21.07.01.06.
[12] Md. Code Ann., State Fin. & Proc., § 15-215; COMAR § 21.10.04 et. seq.
[13] COMAR §§ 21.10.05 & 21.10.06.
[14] Engineering Mgmt. Services, Inc. v. SHA, 375 Md. 211, 825 A.2d 966 (2003).
[15] Id.
[16] COMAR § 21.10.04.02(B).
[17] Id.
[18] COMAR § 21.10.04.02(E).
[19] COMAR § 21.10.04.02(C).
[20] COMAR § 21.10.04.02(B).
[21] Md. Code Ann., State Fin. & Proc., § 15-219(d).
[22] Id. at § 15-219(e).
[23] Id. at § 15-219(f).
[24] Correctional Medical Services, Inc., MSBCA 1822, 1867-9, and 1825, 5 MSBCA ¶411 (1996).
[25] COMAR § 21.10.06.01-11.
[26] COMAR § 21.10.06.12.

E-Discovery…

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Google's email and word processing tools are great examples of SAAS products. Instead of purchasing Outlook software to manage calendars and email, a user can access his/her email and calendars online through a browser or on their android/iphone/ipad devices with an app. If a user already has outlook installed on their computers, they can connect Outlook directly to Google's email server similar to the way they would connect to an Outlook Exchange server. There is also no need to setup and maintain a companywide Outlook Exchange server and be subjected to system wide email outages in the event of a power or internet failure affecting the server. Google docs allow a user to create and edit Word, Excel and PowerPoint documents online within a browser window or through a dedicated app without having to install Microsoft Office. It even has built in version control and allows multiple users to edit documents at the same time.

Moving information and applications such as Word/Excel documents, email and calendars into the cloud does have its drawbacks especially where E-discovery is concerned. What a company gains in accessibility, function and cost, it loses in control, and security. As an E-discovery consultant, I am routinely ordered by Courts to forensically image computers and servers for the purpose of locating and producing responsive data in litigation. When crucial information is moved to the cloud, it is virtually impossible to gain control of the hard drives and servers hosting the data to perform the Court ordered imaging in a defensible manner. Even something as simple as running Court approved search terms within the cloud is difficult. Google's search tools are excellent for retrieving the most relevant documents from a court approved search term list, but will not retrieve all relevant documents. Litigation holds and retention policies are also difficult to implement when users are capable of deleting information stored in the cloud irretrievably with a push of a button from their phones. In the event that data is deleted, the data cannot be retrieved without access to the cloud provider's servers that host the data. These types of deletions could lead to adverse inferences and sanctions for spoliation of evidence if opposing counsel discovers missing data. Another important E-discovery aspect of the cloud is the difficulty in exporting data in bulk for a production to opposing counsel. For example, Yahoo's mail does not allow a user to export sent email to a local computer without a complicated or creative workaround.

There are a number of SAAS solutions designed specifically for attorneys that are involved in E-discovery. Concordance and Summation are two litigation database software packages which allow attorneys to manage and review large amounts of discovery material in an efficient manner. Attorneys with limited needs for such software can have the software and case data hosted in the cloud on a case by case basis. Attorneys pay for access on a monthly basis and do not have to purchase software nor do they need to have experienced staff on hand to load and maintain databases. Some of the largest E-discovery providers are now offering solutions for attorneys to perform the full E-discovery process online. Attorneys can obtain raw data from their clients and upload it online into a full E-discovery processing suite. Once the data is online, attorneys can perform the full gamut of E-discovery services such as early case assessment, deNISTING (removing system files), deduplication (removing duplicate items from productions), culling via search terms, dates and custodians, review, production and even court room presentation. These solutions are still in their infancy, but will likely bring the cost and ease of E-discovery down significantly.

This latter type of E-discovery tool could also be classified as a PAAS cloud computing service or platform as a service. PAAS provides more than just a software application to an end user, it is a platform for a user to install or host their own software applications. An example of PAAS is a Wordpress website which is often used by attorneys for blogging purposes. A Wordpress website requires a web server and a sql server running in the backend to run correctly. The cloud service provider hosts the sql server and web server as a platform and the owner of the site adds blog posts through a web browser. The consumer has control over the deployment of the website as well as the hosting environment configurations. Once the website is configured properly, a visitor is able to view blog posts and provide comments when visiting the website. Discoverable information for a lawsuit may be stored on the cloud provider's web and sql servers and create additional E-discovery issues if it cannot be exported in a reviewable format or if it is not searched properly. Backups of PAAS system components can also contain relevant information that are not accessible nor within the control of a litigant for the purpose of E-discovery.

The third cloud computing service, infrastructure as a service or IAAS, allows a company to move their entire computer server infrastructure to the cloud. A consumer can create a virtual copy of their servers and move the copies to an online host. Moving servers to an online host allows a company to free up space and provides access to unlimited hardware configurations at a moment's notice. The cloud provider is responsible for maintaining the physical components involved in hosting the servers but the end user has complete autonomy with regard to everything else. IAAS gives companies the most control over

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Reasonable Expectations...

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outlined . . . in [*Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395-396 (Or. 1973)]. They include:

(a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;
(b) The appointment of a receiver, not for purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until differences are resolved or "oppressive" conduct ceases;
(c) The appointment of a "special fiscal agent" to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;
(d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or "special fiscal agent";
(e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;
(f) The issuance of an injunction to prohibit continuing acts of "oppressive" conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive;
(g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital;
(h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price;
(i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court;
(j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of "oppressive" conduct by the majority in control of the corporation.

165 Md. App. at 260-261 (citations omitted).

Until *Boland*, no reported Maryland case had directly addressed or discussed the holdings or reasoning of *Edenbaum*. In *Boland*, 31 A.3d 529, 542-543 and 573-575 (2011), the Court of Appeals recited those holdings and reasoning with apparent approval.

E-Discovery...

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data, however, the physical servers that host the virtualized servers can change from day to day. Cloud providers can move or copy virtualized servers and information at any time and information may reside in places not contemplated by attorneys and non-IT employees of a company.

While cloud computing is revolutionizing the computer industry, it is also creating additional E-discovery challenges that are difficult to articulate to a Court or negotiate with opposing counsel. The key to tackling these challenges is to be proactive: 1) Understand what types of data may be stored online with a cloud provider and its relevancy; 2) Create a data map to share with opposing counsel; 3) Determine how the information can be retrieved and test your results, and 4) Attempt to forge an agreement with opposing counsel prior to production. In the event you are unable to reach consensus with opposing counsel regarding the sources, methods of culling, and production this information should be laid out clearly to the Court at the earliest stages of litigation.

Maryland has thus fully adopted the prevailing judicial view that "'[o]ppression' and other similar terms in state statutes provide broad grounds for relief which cannot be stated with precision in advance without destroying their utility in new and unforeseen situations." *See* O'Neal and Thompson, *Oppression of Minority Shareholders and LLC Members*, § 7.12. Despite the cases' fact-dependent nature, decisions from around the country have established guidelines that include the following:

(1) Expectations need not be evidenced by a written instrument;
(2) Expectations must be important to the investor's participation;
(3) Expectations must be known to the other parties;
(4) The relevant expectations are those that exist at the inception of the enterprise, and as they develop thereafter through a course of dealing concurred in by all shareholders;
(5)Expectations can be different where the employment aspect of the relationship dominates as opposed to a situation when a shareholder has expectations of employment and ownership; and
(6)Expectations can be evidenced in an agreement, but agreements are not always complete.

Id. It should be noted that the holdings in *Edenbaum* and *Bo-*

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Reasonable Expectations...

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land apply to corporations that can or should be characterized as "closely held" in a general sense, regardless of the whether or not the shareholders have elected statutory "close corporation" status under title 4 of the Maryland Corporations and Associations Article. Conversely, those decisions do not appear to apply to disputes in which the pertinent corporation is not closely held in a general sense. Application of the "reasonable expectations" doctrine in the middle of the spectrum between closely held and public corporations is uncertain.

Maryland's recognition of the "reasonable expectations" doctrine and the variety of available equitable remedies have a substantial impact on the representation of majority and minority shareholders of Maryland closely held corporations. Depending on the facts and circumstances, it may be incorrect for a lawyer to advise a client that a minority shareholder is merely an at-will employee, whom the majority can terminate for an insubstantial reason or for no reason at all.

Having represented the minority shareholder in *Edenbaum* as well as numerous other majority or minority shareholders in shareholders' disputes both before and after *Edenbaum*, I offer the following practice tips:

(1)To try to avoid or reduce the potential for expensive, uncertain litigation, transactional counsel involved at the inception of a closely held corporation should, if possible, clearly define by written agreement the shareholders' mutual understandings as to employment duration, potential termination grounds, method for determining stockholder-employee compensation, stockholder participation in management, dispute resolution, and similar issues; at least in their traditional form, corporate by-laws and corporate "buy-sell" agreements may be totally insufficient for those purposes in view of the "reasonable expectations" doctrine;

(2) If potentially irresolvable frictions develop among the shareholder of a closely held corporation without written agreements clearly setting forth the stockholders' "reasonable expectations," shareholder counsel (whether minority or majority), as well as (if appropriate and feasible) independent corporate counsel, should carefully assess the situation and its history, in light of the numerous factors that may come into play in the event of a proceeding for dissolution and/or alternative equitable relief under § 3-413(b)(2);

(3) In the event of such frictions, minority shareholders should be sure to refrain from any conduct that, in traditional circumstances, would justify a "for cause" termination of an employee; before deciding whether or not to terminate a shareholder's employment, the corporation should perform a careful review of the situation and its history to try to assess the chances that, if challenged, a Maryland court would find the termination to have been "oppressive"; relevant factors include the length of a minority shareholder's involvement relative to the corporation's history and the majority shareholders; all other factors being equal, courts seem to regard the expectations of "original partners" with more sympathy than the expectations of employees who join an already successful going-concern and receive an equity interest as part of an employment-compensation package; the reasonable expectations doctrine is also likely to be applied in other situations where there is not a significant difference in the relative seniority of shareholders – for example, if all current stockholders received their shares from a common ancestor who founded the corporation;

(4) If settlement discussions occur before potential termination of a minority shareholder's employment, the parties should try to agree whether such discussions will be admissible or inadmissible in any subsequent proceeding; particularly given that "strong arm" negotiations may be admissible to prove over-reaching or "oppression" by the majority or by the minority, counsel and stockholders should not rely too heavily on the negotiations' presumptive inadmissibility;

(5) Counsel for majority shareholders should carefully consider the potential consequences of threatening to terminate a minority shareholder's employment if he or she does not agree to sell his or her equity in the corporation; courts frequently view such threats as persuasive evidence of "oppression," on the ground that a refusal to sell one's stock interest does not by itself constitute a valid cause for terminating employment;

(6) If at all possible, in the absence of substantial or irrefutable evidence that termination is in a corporation's best interest, counsel and the parties should make all reasonable efforts to resolve the pertinent issues before a corporation involuntarily terminates an "original partner's" employment;

(7) If litigation becomes necessary, counsel should carefully consider venue selection, particularly because of the broad discretion that the law affords a Circuit Court judge sitting in equity; and

(8) Litigation counsel should carefully consider the potential interplay between an equitable claim under § 3-413(b)(2) and other, legal claims for money damages.

With these and other factors in mind, Maryland lawyers can provide competent representation in disputes among the shareholders of closely held corporations.

Joys of E-Mailing...

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method of replying often leads to situations where clients' interests are compromised by the inadequacies of communication which are fast, tersely worded, and unconsidered.

In many instances, ambiguity, confusion and poor advice can be at least partially attributed to this great reliance upon e-mail as a primary method of communication with clients. E-mail communications tend to be cryptic, short hand and colloquial in nature. The use of abbreviations and a typically laconic method of writing lead easily to confusion. This is even more true with regard to text messaging and the use of blackberries where the use of abbreviations and the emphasis on terse messages is even more prevalent. Your client might very innocently misunderstand your hasty e-mail or text message, and the potential for adverse consequences is obvious. In recent years, the incidence of e-mail being used as an exhibit in legal malpractice cases has exploded.

Reflections on the "days of old" is sufficient to illustrate the point. Merely recalling the 1980s is sufficient in this context to bring us back to the "good old days." Prior to the common usage of computers and complex electronic devices so common in today's society, lawyers communicated typically in a more formal manner. To a far greater extent, communications took place via the United States mail, the telephone or an in-person meeting. Because of time constraints, formal written communication was typically the accepted form for important communications for which a record was desirable.

Contrast for a moment the difference between writing a letter to a client and sending an e-mail. In drafting a formal letter, the lawyer would either first handwrite the letter herself, or more commonly, dictate the letter for transcription by a secretary. The secretary either later in the day, or within a day or two, would create a written draft of the lawyer's communication. That draft would usually be presented to the lawyer for review, editing and reconsideration over the course of the next few business days. This permitted the attorney to mull over the communication, and to not only ensure that the precise content was clear and unambiguous, but to also attend to the more stylistic aspects of the communication. In fact, ensuring that the appropriate tone of the communication had been achieved was often an important consideration. Time for reflection and opportunity to ensure that both the content and tone of the communication was being properly conveyed was a little recognized, but important, part of the process. Typically, the lawyer would have at least one more opportunity to consider the communication before it left her control when the secretary presented the final edited version for signature. It is hard to imagine that there are any attorneys who have not, in the heat of the moment, dictated a response to a client or opposing attorney which upon an hour or a day's

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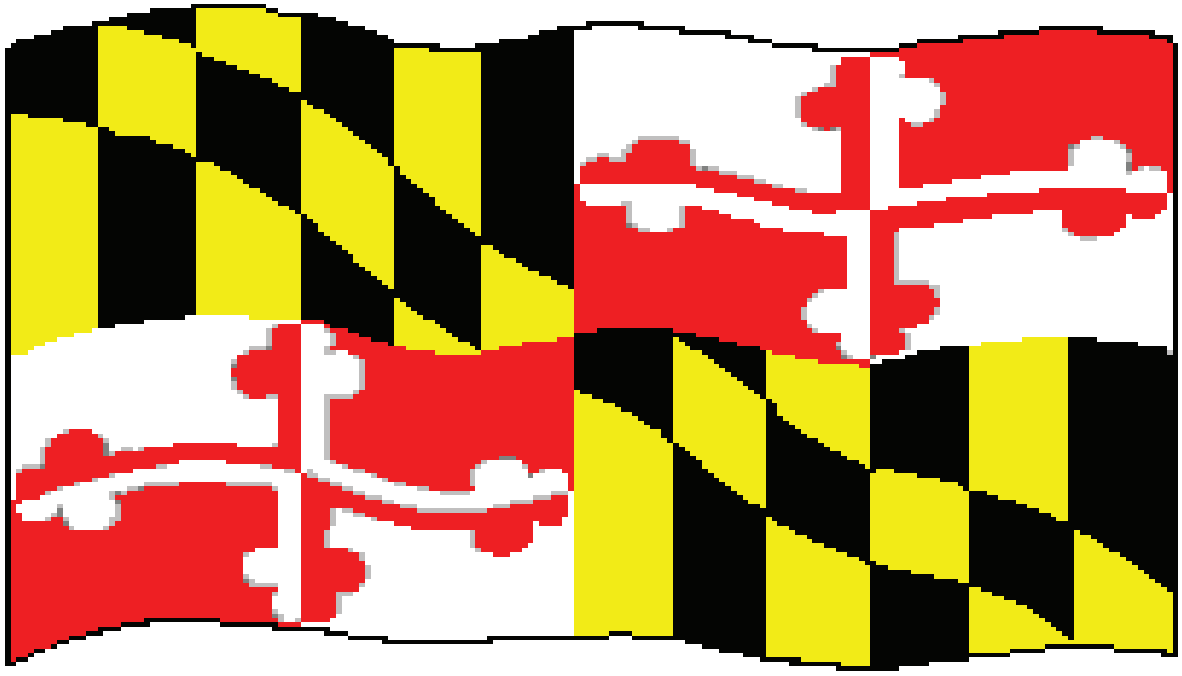

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reflection was not modified. The great difficulty with instant communication is that the time for reflection and consideration is virtually eliminated.

In the good old days, the "final form" of the letter was usually presented on a high linen content paper, with raised and embossed letterhead clearly identifying the lawyer and firm. Once signed, that letter represented a well thought out, carefully crafted communication expressly intended by the sender to reflect her training, education, experience and professionalism. Compared to the process of receiving an e-mail from a client and immediately striking the reply key and personally stroking out a brief response before clicking the send key is a far cry from the earlier method. While certainly unfortunate communications occurred in the good old days, which method of written communication is more likely to reflect well upon the sender? Which has the greater potential to be sloppy, ambiguous, convey the wrong tone, include excessive spelling and punctuation errors, and misconvey the truly well thought out and considered position of the sender?

Obviously, many communications are innocuous and/or ministerial in nature and the opportunity for reflection and careful crafting is largely irrelevant. In this field, there is no doubt that the ability to receive and send e-mail or text messages is incredibly convenient, and permits the attorney to respond in a manner that enhances her representation of a client. The process of scheduling meetings, mediations or depositions by way of example are greatly enhanced. No longer in a large case involving multiple parties is the mind-numbing and seemingly endless round of telephone calls and messages necessary. Moreover, the ability to instantly deliver well thought out and crafted material or to attach complex documents to advance the goal of providing clear, precise, well thought out communications are obviously enhanced. There is nothing that inherently mandates that an attorney respond instantly simply because that option is available. The receipt of an e-mail does not require that the attorney instantly reply. Indeed, in many situations, it is far more appropriate for the attorney to dictate, after careful consideration, an extensive and formal reply in just the same manner that would have occurred in the bad old days of the 1970s and 1980s. Once again, the attorney would receive a draft back from her secretary for further consideration and contemplation and the use of the new technology is reduced simply to a quick, efficient, cost effective delivery method.

Security

Far too few attorneys have considered the question of whether e-mail is secure. For the most part, attorneys assume it is secure without ever giving the issue much contemplation. Unfortunately, the question is not as simple as it might appear at first glance inasmuch as the answer must be sought from both an electronic perspective as well as from the human perspective.

Electronically, the answer is a definitive – maybe. Most people have no idea how e-mail is actually routed from one place to another. It does, however, generally arrive more times than not at its appropriate destination. It is suggested that communication via e-mail be covered in an attorney's Engagement Agreement with language along the following lines:

> There is a developing body of law to the effect that use of an employer's server to convey email may jeopardize the confidentiality of the email document. That is, ordinarily all communications that are between a lawyer and a client (without the presence of any third person) are confidential and privileged. Absent court order or certain very limited circumstances, neither the lawyer nor the client can be required to divulge the information that is conveyed, one to the other. The purpose for that rule is to encourage clients to be open and candid with their lawyers in order that lawyers may provide full and complete advice and information to their clients.
>
> The American Bar Association has recently opined that any email communication affixing to an employer's server, even if used on the client's private email, i.e., Yahoo, Bing, MSN, etc. may nonetheless not be confidential or privileged because it is attaching to the employer's server and therefore subject to review by the employer. To that end, if you elect to communicate with this firm via email, please do so from your home or someplace that you are absolutely sure is completely confidential. If you prefer, we can avoid email communication.
>
> Secondly, sharing advice given to you by this firm could jeopardize the confidentiality that attaches to that advice. Many people are involved in today's social networking, Twitter, Face Book, etc. Posting attorney/client information on any of those social networks jeopardizes, if not eliminates, the privilege associated with the communication, and may eliminate the privilege in its entirety.

Including language similar to the above certainly should not be taken as providing the attorney with full protection from

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Joys of E-Mailing...

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any subsequent claims or suits related to difficulties which might arise in this field. It should also not be taken as license by the attorney to be sloppy or careless with regard to the use of any method of communication, including e-mail and text messaging.

The question regarding security is always incomplete without considering the human perspective. As the old adage goes – to err is human – and certainly we must assume that mistakes will be made. Unfortunately, the natural tendency to be sloppy or to make careless mistakes is heightened given the fast paced demands of modern practice in this electronic age. People tend to perform in a sloppy manner when they try to accomplish too many things at the same time or in a compressed period of time. While multitasking may be a unfortunate fact of life, it does raise the chances that sufficient attention will not be paid to one or more of the tasks involved. This, of course, can easily lead to security breaches inasmuch as it is incredibly easy to misdirect e-mail particularly with computers that now automatically "guess" who the correct addressee is when you simply type in a letter or the first several letters of your proposed addressee. Moreover, errors often follow when a reply is sent to all addressees. Thus, it is essential that attorneys take the time to carefully review exactly who might be receiving such a communication.

The consequences of misdirected communication vary greatly from jurisdiction to jurisdiction. While no developed body of law on misdirected e-mail is extant at this time, a clear analogy to telefaxes is apparent. There is law on the issue of misdirected facsimiles which should provide guidance on this issue.

Then there is the "added" feature of scanning documents and conveying them via e-mail. In a flash of time a lawyer can receive a proposal from his adversary, scan it and e-mail it to the client so that both may consider the document, almost simultaneously.

If this all worked as intended, the system is flawless. The lawyer and client may view the communication and jointly construct a response. What, however, happens if the administrative person charged with responsibility for scanning the document doesn't quite understand his assignment and scans and e-mails the wrong document – perhaps something that relates to a different client and is confidential.

The lawyer, busy and multitasking as usual, receives the scan from her administrative assistant, presumes it is correct, crafts her own e-mail to her client and sends it without ever checking the content of the scan. The recipient at best recognizes the error, and destroys the document but would still lose some level of confidence in the lawyer's ability to competently represent his interests and preserve his client confidences. Bear in mind that is the best result in this scenario.

The parade of potential adverse consequences requires little imagination. The wrong client may learn something that was otherwise secret and use it to his advantage. For example, buying a parcel of real property out from under the first client.

Equally prevalent is the problem of scanning in documents and having them sent to lawyers by support staff. How many lawyers carefully review the scanned material prior to attaching it and sending it via e-mail? It is not unusual for support staff not to understand where one document ends and another begins and accordingly the wrong information can inadvertently be sent to others.

What happens to attorney/client privilege with an inadvertent disclosure? Again, the answer to that question depends in large measure on your jurisdiction. Some jurisdictions have taken the position that inadvertent disclosures, particularly in the electronic age, do not constitute a waiver of the attorney/client privilege. Other jurisdictions make the information fair game. Why subject yourself to the potentiality of being caught in the switches in a matter of that nature? Obviously, the smartest thing to do is to avoid the problem arising, which requires care and careful review of those items being sent

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Joys of E-Mailing...

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from your office.

Some words of guidance. It is strongly suggested that all lawyers have metadata scrubbers installed as promptly as possible. For reasons as noted, it is extraordinarily easy to avoid the metadata issue and the scrubber is the most available means to accomplish that end.

Slow down. Is there really a need to reply to communication instantly? If not, dictate a response, edit it and send that response via PDF through an e-mail. By so doing you will be more inclined to carefully craft a communication and nonetheless speed the process. If there is in fact a need for an immediate response, exercise care in its crafting. Read, re-read and spell-check the response. Avoid informality. Avoid slang and abbreviations or acronyms. Treat the e-mail as if it will be an exhibit in a civil or disciplinary matter brought against you – because it just might be. Open and review all attachments before sending them to be certain that you are in fact, sending the correct material.

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