

FEBRUARY 2005 BAR EXAMINATION

BOARD ANALYSIS

QUESTION 1

Anyone seeking to challenge the constitutionality of a statute must show that they are in danger of substantial injury from the operation of said statute. Mega Mart's rights to develop its land in the manner that it would like are infringed by the law. Accordingly, it will have standing to challenge the law.

The Legislation enacted by the Town Council adversely affected Mega Mart's property rights. While a property owner is not entitled to rely upon the zoning of its land, he is entitled to the assurance that laws will not be enacted unless they are rationally related to the furtherance of the public health, safety, morals and general welfare of the Town's inhabitants. Levinson v. Montgomery County, 95 Md. App. 307 (1993) The facts do not reveal any rational basis for the law, other than the protection of local interests.

Mega Mart may argue that the law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution since any noncommercial use or commercial use less than 5,000 square foot in size may locate within Southside. The Town must have a rational basis to discriminate in this manner. Under the facts, it does not appear to have one since the emergency legislation was enacted solely to thwart Mega Mart.

Mega Mart may argue that Article I, Section 8, of the United States Constitution empowers Congress to regulate interstate commerce and precludes the Town from enacting a law that burdens or obstructs interstate commerce. The law bars any commercial use in excess of 5,000 square feet and is a clear burden upon a sizable portion of the commerce within the Town. It clearly favors "local" commerce. As a national chain, Mega Mart and its customers' rights are being obstructed since the former may not be able to sell, and the latter may not purchase, Mega Mart products within the Town.

Mega Mart may argue that its rights were infringed without benefit of procedural due process of law. Again, the facts state that emergency legislation was enacted to thwart Mega Mart. It arguably was not informed of the hearing and could not participate prior to enactment. The law also violates Mega Mart's substantive due process rights since it is unclear what activity is being prohibited (i.e. - the law is vague as to what is intended by commercial use) or, in the alternative, the law goes much further than it must (i.e. - prohibits all activity of a commercial nature) without any rational basis for so doing.

Although not as strong an argument, Mega Mart may argue that the State's legislation is a violation of Article I Section 10 of the Constitution, which is commonly referred to as the Contracts Clause. Although the Contract Clause "does not operate to obliterate the police power", a court can look at the degree to which the government's action is a valid exercise of the police power.

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 503 (1987) Mega Mart would argue that the State legislation created a substantial impairment upon its contractual relationship with the property owner and the Town has not demonstrated a significant and legitimate public purpose for said impairment.

QUESTION 2

The issue is whether there was a binding agreement between the parties. If supported by consideration, an option is a binding agreement that cannot be withdrawn by the optionor during its term. Blondell v. Turover, 195 Md. 251 (1950).

Under the facts, Sheila may argue that neither the original option nor the addendum meets the requirements of the Statute of Frauds. The Statute of Frauds requires that the option (1) be signed by the party to be charged or his agent; (2) name each party with sufficient definiteness to identify them; (3) describe the land to which it relates; and (4) set forth the terms and conditions of all the promises constituting the agreement. Forsyth v. Brillhart, 216 Md. 437 (1958). The original option and the addendum do not specifically describe Blackacre. This is a fatal flaw, given the fact that Sheila and Ben own other property.

If the court allows Steve to get past that hurdle, however, Sheila may argue that there was no consideration for the extended option. An option, or an agreement in general, must be supported by consideration in order to be binding and enforceable. Chernick v. Chernick, 327 Md. 470 (1992); Beall v. Beall, 291 Md. 224 (1981). Next, Steve may argue that the extension was not a contract, but an offer, which he duly accepted. However, Ben had died by that time, and the general rule is that the death of an offeror causes the offer to lapse. Beall. So, upon Ben's death there no longer was an offer on the table, and unless Sheila extended an offer to Steve he has no right to Blackacre.

QUESTION 3

Maryland Rule 5-702 governs the admissibility of expert testimony. The rule sets out a three

part analysis: 1. is the witness qualified as an expert “by knowledge, skill, experience, training or education”; 2. the appropriateness of the expert testimony on a particular subject and 3. whether there is a factual basis to support expert testimony.

1. In order to qualify as an expert, the witness must demonstrate a “minimal amount of competence or knowledge in the area in which he purports to be an expert.” *Wood v. Toyota*, 134 Md. App. 512, 521 (2000). Here, Smith has studied the issues pertaining to the relationship between mold and respiratory disease. While admission of expert testimony is within the sound discretion of the trial court, *Myers v. Celotex Corp.*, 88 Md. App. 442, 460 (1991), Smith’s knowledge is such that he would probably be admitted as an expert witness.

2. Although Smith may be recognized as an expert, his testimony would be limited to areas within his expertise, i.e. the relationship between airborne mold and respiratory ailments. In Maryland, testimony as to the cause of medical condition in a particular person is generally reserved for physicians. *See, e.g., T-Up v. Consumer Protection Division*, 145 Md. App. 27, 801 A.2d 173, cert. denied, 369 Md. 661 (2002) (biologist with a Ph.D. not permitted to testify on the effectiveness of the use of aloe vera in treating cancer, HIV, and AIDS; the Court of Special Appeals noted the witness did not have a medical degree and was a “non-physician witness” *id.* at 55 & 56); *Newman v. Motorola*, 218 F. Supp.2d 769 (D. Md. 2002) (Plaintiff claimed that his cellular phone caused brain cancer. He attempted to use an expert who held a Ph.D. in biochemistry and had done significant research on the biological effects of electromagnetic radiation. The court rejected the plaintiff’s efforts to have this expert express opinions on the causation of the plaintiff’s brain tumor, pointing out his lack of a medical degree and the fact he had never diagnosed a patient with cancer. *id.* at 780 n. 24); *Giddings v. Bristol-Myers Squibb Co.*, 192 F. Supp.2d 421, 425 (2002).

3. Generally in Maryland, expert scientific testimony is admissible according to the so-called *Frye/Reed* test (*Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923); *Reed v. State*, 283 Md. 374, 388 (1978), i.e. only when it reflects what is generally accepted within the relevant scientific community. *Hutton v. State*, 339 Md. 480, 493 (1995). In that case the Court of Appeals discussed the standard for scientific evidence:

This Court has adopted the standard of admissibility for scientific evidence expert testimony announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). Under the *Frye-Reed* standard, in order to be admissible, a court must determine that a scientific process or technique is generally accepted within the relevant scientific community. *See Frye*, 293 F. at 1014, *Reed*, 283 Md. at 381, 391 A.2d at 367. Recently, however, in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court reviewed the *Frye* standard “in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony.” *Id.* at ----, 113 S.Ct. at 2792, 125 L.Ed.2d at 478. It held that the adoption by Congress of Federal Rule of Evidence 702 has modified the *Frye* standard, reasoning:

Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.

Daubert, at ----, 113 S.Ct. at 2794, 125 L.Ed.2d at 480.

On July 1, 1994, this Court adopted Maryland Rules of Evidence patterned after the federal rules. Our counterpart to Federal Rule of Evidence 702 is Md.R.Evid. 5-702. As a committee note makes clear, however, the adoption of the Rule "is not intended to overrule *Reed* . . . and other cases adopting the principles enunciated in *Frye*. . . . The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law."

339 Md. at 493 ftn. 10.

Under this standard, Smith's evidence would not be admissible since its conclusions are not generally accepted within the scientific community. Contrast the federal rule enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, which would (perhaps) allow admission of the evidence based upon the trial court's evaluation of the overall reliability of the proposed evidence.

QUESTION 4

As a party, Connie cannot serve process. Maryland Rule 3-123(a).

Bill is not authorized to accept service of process for the corporation since he is not the resident agent, president, secretary or treasurer, Maryland Rule 3-124 (d). The Maryland Rules permit service upon persons “expressly or impliedly authorized to receive service of process” only if a good faith attempt to serve the resident agent, president, secretary or treasurer had failed. Even if Bill has the “implied authority” to accept service, there has been no previous good faith attempt to serve.

As a result of these defects, there has been no proper service on EZ Compute.

Since proper service was never effected, the District Court lacked *in personam* jurisdiction over EZ Compute and the judgment is null. *Miles v. Hamilton*, 269 Md. 708, 309 A.2d 631 (1973).

Maryland Rule 3-535(b) provides that a court can reopen a judgment at any time for fraud, mistake or irregularity. Failure to make proper service falls within this category. Post-trial motions allowed by other rules, Maryland Rules 3-534 and 3-535, are barred by the passage of time.

The proper procedure would be for EZ Compute to file a motion to revise the judgment pursuant to Maryland Rule 3-535(b) because this can be done “at any time.” Pursuant to this Rule, in revising a judgment, the Court may exercise any of the powers it has under Rule 3-534, including to open a judgment to receive additional evidence, amend the judgment or enter a new judgment. This authority enables the District Court to set aside the judgment and allow a trial on the merits of Ms. Consumer’s claim.

EXTRACT SECTIONS FOR QUESTION 4

Annotated Code of Maryland, MARYLAND RULES

TITLE 3. COMMENCEMENT OF ACTION AND PROCESS: Rules 3-121, 3- 123, 3- 124, 3-306, and 3- 533.

QUESTION 5

A. The LLC should not be liable for Marty’s claims. The LLC was formed after Marty’s claims arose (claim arose in September 2002; the LCC was formed in June 2004). The facts do not state

that Andy and Chris intended for the LLC to be liable for claims incurred by them in their individual practices prior to creation of the LLC. See, Md. Code Ann. Corps and Ass'ns §§ 4A-701 and 4A-709. Unless the Articles of Organization or Operating Agreement provide that the LLC will assume the liability for claims against the individual members prior to the date of formation, the LLC should not be liable for any claims made by Marty. The limitation on liability is not grounded in the limitation on liability provision contained in the Articles of Organization, but in Md. Code Ann. Corps & Ass'ns § 4A-301.1(a).

Chris should not be liable for alleged malpractice committed by Andy before the LLC was formed. Individual members are not liable for the professional malpractice committed by other members unless the member either appointed, cooperated with, or supervised the individual providing the negligent services. See Md. Code Ann. Corps. & Ass'ns §§ 4A-301.1(a) and (d).

The Court should rule that Andy is liable for any professional malpractice that he committed before he and Chris formed Counselor and Attorney, LLC. Under Md. Code Ann. Corps & Ass'ns § 4A-301.1(a), individual professionals retain individual liability for their acts of professional malpractice.

B. Sally Stationery, Inc. (“SSI”) should prevail in its claim against Andy because SSI can show that Andy ratified the purchase of stationery when Andy used the stationery to thank SSI for its prompt service and to notify his important client.

SSI should prevail against the LLC because the LLC had not yet been formed since its Articles of Organization had not yet been accepted by SDAT (formation occurs at the time that SDAT accepts the Articles of Organization for record [Md. Code Ann. Corps & Ass'ns § 4A-202(b)]). SSI should show that even though the LLC did not exist at the time that the order was placed, the LLC ratified Chris’ action in ordering the stationery by using it to conduct its business and to notify its clients. In fact, Chris told SSI that the LLC was “ready to operate.” Therefore, the LLC should be prevented from denying that Chris acted as an agent of the LLC in ordering the stationery. See, Md. Code Ann. Corps, and Ass'ns § 4A-401(a) and (b).

SSI may prevail against Chris individually since Chris signed individually for the order. SSI may show that SSI fully expected that Chris would pay for the stationery. On the other hand, it is also arguable that since SSI understood that the LLC was operating, SSI should not be permitted to recover against the individual members. Rather, payment should be obtained solely from the assets of the LLC. If the LLC refuses to pay, then Chris should seek indemnification.

QUESTION 6

A tortfeasor is responsible for his own actions. Therefore, Mike is responsible to Sue for his negligent or intentional actions.

Sue will prevail against Milky King if she is able to show that (i) even though Tim terminated Mike's employment that fact was either not generally known or had been concealed by Tim, and (ii) Tim had knowledge of Mike's bad temper and propensity to endanger the health and safety of others with implements of the ice cream trade. If Tim had allowed, in the past, Mike or other former employees to go behind the counter and scoop ice cream, then Tim may be found to be liable for not having stated and enforced a strict policy limiting behind the counter access to current employees only. Sue will have to demonstrate that Tim, as manager, had authorized Ray to give Mike permission to scoop ice cream anytime and that Tim had reason to believe that Mike might go beyond the lawful bounds of scooping ice cream when provoked. Although Mike's employment had been terminated by Milky King, it may still be held responsible for Mike's actions. Under ordinary circumstances a principal-agent relationship must exist for the principal to be held vicariously responsible. However, if a third person is not aware of the termination of the relationship, the principal may still be held responsible. Milky King and Tim should be able to avoid any liability by showing that even if it was unclear whether or not Mike was still a Milky King employee, the company did not sanction or encourage torts to be committed against its customers.

It is likely that Tim would not have individual liability for Mike's individual wrongful act committed outside the scope of either employment (whether actual or implied) or permissive participation in the business enterprise of Milky King. The facts do not show that Tim either encouraged or sanctioned Mike's conduct either in scooping ice cream or in wounding Sue with the hot fudge. It is plausible that Tim was negligent in leaving Ray, a 15 year old, in charge of the ice cream store as it was Ray's first job. However, the finder of fact must determine whether Tim acted reasonably in leaving the operation of the store to Ray. Finally, if either Milky King or Tim is held vicariously liable for Sue's injuries, Milky King or Tim should seek indemnification.

Sue is likely to prove that Ray was negligent in allowing Mike behind the counter. Ray may be held liable as a minor for his negligence. The standard of care would be based on a child the same age, experience and intelligence. It is arguable that Ray was acting in an adult capacity by managing the shop. Therefore, Ray would be liable to the same extent as would an adult. To hold a child liable for a tort, the child must have committed the tort herself or himself. A child may not appoint another (Mike) to act as his agent.

Ray was acting under apparent authority from Milky King. It appears that he was in control of Milky King during Tim's absence. Sue will try to show that Milky King is vicariously liable for Ray's negligent conduct as there was clearly a principal-agent relationship between Ray and Milky King. However, the principal will not be held liable for any actions of the agent that are outside the agent's scope of authority. Ray would have to show that Tim encouraged him to have his friends fill in as free counter help or that he knew and did not object to Ray's actions in order to successfully show that he was only acting as Milky King's agent within the scope of his authority when Mike wounded Sue. Ray may wish to seek indemnification from Mike and Milky King if Ray is found vicariously liable for Mike's actions.

QUESTION 7

These facts raise the issue of the relative rights of tenants by the entireties to the proceeds from the sale of real property.

Tenancy by the entireties is the unique relationship applicable only to spouses' ownership status. Each spouse owns an equal undivided interest in the whole of the property which cannot be

altered or terminated during the marriage without the joint action of the spouses. Upon the death of one spouse, the entire fee simple interest in real property vests in the survivor.

In this case, the facts indicate that prior to his marriage to Wilma on May 1, 1995, Hugh owned, individually, an improved parcel of real estate in Baltimore County which he sold on February 2, 2001.

When he purchased the \$800,000 home in Charles County, he had title transferred by deed to himself and Wilma, as tenants by the entireties.

When a spouse purchases real property with his own funds and has the deed made to himself and his wife as tenants by the entireties, he has made a gift to her of the interest thereby conveyed, i.e., an undivided one-half interest in the whole.

When Hugh and Wilma jointly conveyed the "Sidney" house to a third party, the proceeds (\$1,200,000) retained the character of tenancy by the entireties property in absence of an agreement to the contrary.

The fact that Hugh used tenants by the entireties funds to purchase the \$200,000 property in his name alone did not create a tenancy by the entireties in the real property so purchased. Tenancy by the entireties is not presumed except in cases in which title is in fact in the name of both spouses without any clear understanding as to how title is held.

If one spouse uses the proceeds from the sale of the tenancy by the entireties property for the payment of individual debts of that spouse, personal use and the payment of joint living expenses, with the acquiescence of his spouse, there is no obligation to repay any portion thereof in the absence of an express promise to do so.

The facts here negate acquiescence by Wilma to the use of the tenancy by the entireties funds to purchase the \$200,000 home. To the extent that Wilma knew and consented to the use of the funds for medical bills, etc. she is not entitled to recover them. While Wilma cannot obtain title to the real property in question, she can claim in his estate the purchase price of \$200,000 as traceable to tenant by the entireties property.

In addition, Wilma is entitled to these funds in the bank that are traceable to the proceeds of sale of the \$1,200,000 property, less expenditures for individual debts, medical expenses and joint living expenses.

Unless Wilma renounces Hugh's will, she is also entitled to the \$200,000 bequest.

QUESTION 8

Alice's suit would allege negligence on the part of Bennett. To establish a prima facie case, Alice must introduce facts which show that Bennett owed her a duty of care; that by failing to exercise reasonable care under the circumstances, he breached his duty to her; that his breach was the proximate cause of the accident; and that her damage and injuries were the direct and proximate

result of the alleged negligence.

Bennett would respond to the complaint with a general denial of negligence on his part. However, he would include in his defense (assuming Alice alleges and ultimately makes out a *prima facie* case) that, as one of the class of persons intended to be protected by the quoted statute, Alice violated its mandatory provisions and was, therefore, contributorily negligent as a matter of law and barred from any recovery against Bennett.

Factors bearing on Bennett's negligence, as well as Alice's contributory negligence, include Alice's location on "A" Street when struck, any obstructions which may have impaired their ability to see each other, including other vehicles, structures, trees, etc., and the speed of Bennett's vehicle, time of day and weather related factors.

The fact that the light changed to a flashing red "don't walk" signal as Alice "was about to step off the median" suggests that Alice elected to cross "A" Street against the light rather than remain in a place of relative safety and would support an argument by Bennett that she had acted negligently. Whether or not Alice can bring herself within the statutory provision "(c)" as having partially completed her crossing would be a question of statutory construction as would the distinction, if any, between the steady and flashing "don't walk" signal and whether the grassy median was a safety island within the purview of the statute.

Alice should argue in rebuttal that, in Maryland, violation of a statute is not negligence per se but is evidence of negligence, and that, assuming her contributory negligence, Bennett had the last clear chance to avoid the accident. The success of this position would turn on the evidence presented with regard to factors noted above.

QUESTION 9

The issues here concern what rights Kappa Title has to recover its losses as a result of the Acme Bank's refusal to pay the \$1 million forged certified check.

Title 3 of the Commercial Law Article establishes that if a bank accepts a certified check and then wrongfully refuses to pay it, the person asserting the right to enforce the check is entitled to

compensation for expenses and loss of interest resulting from the non-payment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages. §3-411. Acceptance must be in writing, but need only consist of a signature of a bank official. It may also consist of a stamp mark that indicates that the check is certified. Under §3-408, acceptance/certification becomes effective upon notification by the bank. Thus, acceptance occurs when a check has the certification stamp on the check and/or the signature of a bank official indicating certification, and the holder notified.

Although generally an unauthorized signature is ineffective except as the signature of the unauthorized signer, an unauthorized signature may be ratified by the actions of the person whose name was forged or his agent. §3-403

Thus, it must be determined: whether the Bank by its branch manager accepted the certified check by adopting the forged stamp and/or signature on the stamp as its own and then wrongfully refused to pay it; whether the Bank ratified the unauthorized signature of its officer; or whether the Bank or Kappa Title had any negligence contributing to the forged signature.

If the Bank accepted the check, then the Bank steps into the shoes of Biggins as the obligated party to Kappa Title, and must pay all consequential damages from its failure to pay the certified check, including Kappa Title's loss of business. If the check was not accepted by the Bank, then Bill Biggins is still liable to Kappa Title on the underlying debt.

Kappa Title may also have common law causes such as negligent misrepresentation which supplement the Maryland Commercial Law. § 1-103.

EXTRACT SECTIONS FOR QUESTION 9

Annotated Code of Maryland, COMMERCIAL LAW

TITLE 1. GENERAL PROVISIONS: § 1-103.

TITLE 3. NEGOTIABLE INSTRUMENTS: § 3-403, 3-406, 3-408, 3-409, 3-411, 3-413, and 3-414.

QUESTION 10

Lawful stop, off-duty status makes no difference. Search of vehicle illegal because no consent-- *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirements. The exception allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a crime – item is within the car. The search of Danny's car was illegal because consent was denied

and the police did not have probable cause. But, Earl has no standing to assert 4th Amend Violation of Danny's car.

Passengers can be asked out of car-- Following *Carroll*, the Supreme Court has held that during a lawful traffic stop, officers can compel the driver and passengers to exit the vehicle. The Supreme Court has gone on to hold that a passenger's property left within a vehicle, when occupants are ordered out of a car, falls within the permissible scope of the automobile exception to a warrantless search.

Arrest of both suspects valid under common enterprise theory. *See State v. Pringle*, 2003 WL 22938461 (Dec 2003).

Statement coerced from Danny may have been violative of Danny's 5th Amend rights, but Earl has no standing to object to statement coerced from co-defendant.

Discussion of whether there is state action by state actor to impact 4th Amend when airman goes into Earl's pockets that would suppress all evidence resulting from violative search. No search by State actor.

QUESTION 11

First degree burglary charge.

First degree burglary charge. Section 6-202 (a) of the Criminal Law Article of the Annotated Code of Maryland (as amended). The elements of the crime are breaking and entering the dwelling of another with the intent to commit theft or a crime of violence. Able has the following defenses to the crime.

The events did occur at Baker's dwelling, but there was no breaking and entering. While Able did push the partially opened door so that it was fully opened, he was told by Baker in response to his knock on the door to "come on in". Therefore, there was consent of the owner. Able did not commit an act of trespass. There was no actual breaking by Able.

To gain entrance to Baker's house, Able knocked on the door. He did not say anything. Baker told him to come in. Entry was not by fraud, trickery, or threat of force. Baker never inquired as to who was at the door or for what purpose. There was no constructive breaking.

Able did announce that he was hungry and he did demand money. Baker felt threatened by Able's presence and statements. When Able stuck his hand in his own pocket, Baker feared that Able had a weapon. However, the purpose or motive of Able would not be sufficient to constitute a constructive breaking without the other elements of the crime.

Assault charges

Charge of assault in the first degree. Section 3-202 (a) of the Criminal Law Article of the Annotated Code of Maryland (as amended). Able did not reveal or show any weapon to Baker. He took only one step over the threshold of the door and stopped. There was no attempt to cause serious physical injury to Baker. There was no assault in the first degree.

Charge of assault in the second degree. Section 3-203 (a) of the Criminal Law Article of the Annotated Code of Maryland (as amended). The basis of this charge would be of the intentional threatening variety from the viewpoint of Baker that Able had a weapon in his pocket. The facts relate that Baker was threatened by Able's presence and statements. Baker feared that Able had a weapon in his pocket. However, Able had only put his hand in his own pocket; he did not display a weapon or make any reference to a weapon. However, Able did have a lock blade pen knife which the police recovered from his pocket. There was reasonable apprehension of an imminent battery.

The defenses stated for the first degree burglary charge and the first degree assault charge would be successful.

There is sufficient evidence to convict Able of assault in the second degree. Baker feared that Able had a weapon when Able stuck his hand in his own pocket. In fact, Able did have the lock blade pen knife in his pocket, but he never revealed it to Baker. There was reasonable apprehension by Baker of an imminent battery.

Holland v. State, 154 Md. App. 351, 839 A.2d 806 (2003)
and cases cited.

Hill v. State, 134 Md. App. 327, 759 A.2d 1164 (2000)
and cases cited.

Section 6-202 (a), Criminal Law Article, Annotated Code of Maryland (as amended)

Section 3-202 (a), Criminal Law Article, Annotated Code of Maryland (as amended)

Section 3-203, (a). Criminal Law Article, Annotated Code of Maryland (as amended)

QUESTION 12

A fee must be reasonable. Rule 1.5(a).

The terms of a contingent fee agreement must be communicated to the client in writing, including the percentage(s) to be charged in the event of a settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after calculation of the fee. Rule 1.5(a). Bentley failed to communicate the contingent fee agreement to Abe in writing.

When the attorney's stake in a case exceeds the client's stake, the fee is generally unreasonable. Attorney Grievance Commission v. Korotki, 318 Md. 646 (2003). The contingent fee of 50% of the recovery before deduction of expenses is unreasonable under these facts.

The application of a contingent fee percentage to a personal injury protection payment is an excessive fee. Attorney Grievance Commission v. Kemp, 303 Md. 664 (1990). Bentley should have charged Abe a reasonable hourly or fixed fee for obtaining the PIP payment.

A lawyer may not charge a contingent fee for representing a client in a criminal case. (Rule 1.5(d)). The "bonus" was a contingent fee in violation of the Rule.

It is questionable whether Bentley should have deposited the \$1,000 for the criminal fee in his general operating account until he had completed the work associated with representing Abe in his defense to the criminal charge.

A retainer from which hourly billings are to be deducted remains client property until the fees are earned and must be maintained in an escrow account. Attorney Grievance Commission v. Duvall, 373 Md. 482 (2003). The flat fee designation in the circumstance may allow for a different treatment, however.