Circuit Court for Prince George's County
Case No. CAL19-30550

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0949

September Term, 2021

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ALEXANDER & CLEAVER, P.A.

v.

MARYLAND ASSOCIATION FOR JUSTICE, INC.

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Wells, C.J.,
Graeff,
Tang,
JJ.

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Opinion by Wells, C.J.

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Filed: May 9, 2022

Alexander & Cleaver, P.A. ("A&C"), appellant, filed suit against appellee Maryland Association for Justice, Inc. ("MAJ") in the Circuit Court for Prince George's County alleging that MAJ breached a contract for lobbying services that A&C was to provide. MAJ moved to dismiss, or alternatively for summary judgment, claiming, among other things, that A&C did "not set forth any actionable claims and [the complaint] must be dismissed as a matter of law." The circuit court agreed and dismissed the complaint but allowed A&C thirty days to amend and refile the complaint.

Within the prescribed thirty-day period, A&C filed an amended complaint. MAJ moved to dismiss the amended complaint on the same grounds as before. After a hearing, the circuit court again ruled in MAJ's favor, but this time dismissed the amended complaint with prejudice. A&C filed a timely appeal.

In their briefs, the parties disagree on the basis of the circuit court's dismissal. A&C frames its questions to us in terms of whether the circuit court properly granted summary judgment in favor of MAJ.[1] In contrast, MAJ argues that the circuit court correctly

[1] A&C's verbatim questions are:

> 1. Whether the Circuit Court judge was correct to grant Defendant's Motion for Summary Judg[]ment based upon the lack of undisputed facts presented to the Court.
>
> 2. Whether there was a genuine dispute as to a material fact which would preclude granting a Motion for Summary Judg[]ment or whether the Complaint as filed by Plaintiff below justified the denial of a Motion to Dismiss.

dismissed A&C's complaint because it failed to state a claim.[2] For the reasons that follow, we hold that the circuit court improperly dismissed the amended complaint with prejudice and reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

On its website, MAJ states that as a professional association of over 1,200 trial attorneys, it "is dedicated to improving and protecting the civil justice system through legislative advocacy and the professional development of trial lawyers."[3] For several years after its founding in 1954, MAJ was known as Maryland Plaintiff's Bar Association. After incorporating and later developing a relationship with the American Association for Justice, "on October 29, 2008, the Association changed its name from the Maryland Trial Lawyers Association to the Maryland Association for Justice, Inc." Like most advocacy groups, MAJ seeks to change law and policy on the state level in ways it believes appropriate.

[2] MAJ's sole verbatim question is:

> WHETHER THE CIRCUIT COURT ERRED IN GRANTING MAJ'S MOTION TO DISMISS APPELLANT'S AMENDED BREACH OF CONTRACT CLAIM WHERE THE EXPRESS TERMS OF THE AGREEMENT PERMITTED TERMINATION, AND WHERE APPELLANT FAILED TO ALLEGE AN ACTIONABLE BREACH, PERFORMANCE, OR RECOVERABLE DAMAGES?

[3] https://www.mdforjustice.com/?pg=AboutMAJ.

On July 12, 2018, representatives of MAJ signed a contract with A&C, then a law firm with a lobbying component, to lobby for legislation favoring MAJ's interests.[4] The contract was to be in effect for two years, from July 1, 2018 until June 30, 2020. Important to this discussion is the contract's fee provision. The agreement stated that MAJ was to pay A&C $307,000.00 for its services. The contract specified that the fee was to be paid as follows: for the first year—July 1, 2018 through June 30, 2019—$150,000.00 was due on the first day of the term year. For the second year—July 1, 2019 through June 30, 2020—$157,500.00 was due on the first day of the term year. The agreement specified that "as a courtesy to [MAJ]," A&C would allow for monthly billing of the fee at an amount due on the first of each month. The contract noted that the fee was called "an engagement fee under Maryland law." The contract explained that because of the agreement, A&C "will be foregoing certain other clients and client opportunities to undertake this representation" of MAJ.

About two months into the contract's first year, all but one of A&C's lobbyists resigned and formed a separate lobbying group in the Annapolis area. Because of this, in a letter dated September 7, 2018, MAJ notified A&C that it was terminating the contract "on the grounds that the principal lead on our account and other principals of the Firm are no longer able to provide the Services required." About a month later, October 1, 2018, MAJ sent A&C another letter stating that because of the lack of any "substantive

[4] Partly as a result of the events which led to this appeal, A&C sold its lobbying operation in 2020. Bryan P. Sears, *Alexander & Cleaver sells lobbying practice; former employees rebrand as Z & C*, Daily Record (June 5, 2020), https://thedailyrecord.com/2020/06/05/alexander-cleaver-z-c-llc/.

communication from [A&C], with any official representatives of MAJ," it was apparent to MAJ that A&C had not attempted "to cure the sudden departure of the principal lobbyist on our account together with most of MAJ's other lobbyists." MAJ requested that A&C promptly return any of its documents, electronically stored information, and other materials. A&C responded by letter four days later and enclosed a flash drive with MAJ's entire file.

Although not directly pertinent to this appeal, the next event chronologically was A&C suing the "defectors" in the Circuit Court for Anne Arundel County ("Anne Arundel County court"), alleging, among other things, "tortious interference with contractual relations," "misappropriation of trade secrets," and "civil conspiracy" (hereinafter, the "Anne Arundel County lawsuit"). In the Anne Arundel County lawsuit, A&C alleged that its erstwhile employees, in leaving and forming their own lobbying firm, did so with the intent of stripping A&C of its government-relations clients. Additionally, A&C alleged that the former head of the lobbying wing had signed a contract with A&C containing non-solicitation and non-competition clauses. In starting a new lobbying firm, A&C alleged that its former head lobbyist was in violation of both provisions. A&C averred that similar clauses in the contracts of the other "defecting" lobbyist-employees similarly constrained them from performing lobbying work with A&C's clients. In February 2020, the Anne Arundel County lawsuit settled.

On September 18, 2019, A&C sued MAJ for breach of contract in the Circuit Court for Prince George's County, alleging that MAJ had failed to pay the balance of the contract's fee. By consent, the parties stayed this lawsuit until the Anne Arundel County

lawsuit was resolved. Soon after the Anne Arundel County lawsuit ended, rather than file an answer in this lawsuit, MAJ moved to dismiss the complaint, or in the alternative, moved for summary judgment, essentially asserting that A&C did not set forth any facts that would sustain an action for breach of contract. A&C responded that the complaint did state a claim for breach of contract, namely, that MAJ agreed to pay a fee to A&C to lobby on its behalf. Even though A&C lost its lobbyists in a mass resignation, A&C asserted it was able to "cure" the loss of one group of lobbyists by hiring new lobbyists to handle MAJ's account.

### A. The September 29, 2020 Hearing on MAJ's Motion to Dismiss the Original Complaint

The Circuit Court for Prince George's County convened a hearing on MAJ's motion. At this hearing, MAJ argued that the contract was for professional services which A&C had not performed and for which A&C had not earned a fee. MAJ contended that it had a right to terminate the contract because A&C's lead lobbyist left with the other lobbyists. In sum, MAJ argued that the complaint was deficient because A&C did not allege that A&C performed services for which it was not paid.

A&C argued that the contract was valid and enforceable. A&C averred that payment of an engagement fee was appropriate under the circumstances because A&C had to turn away clients whose interests conflicted with MAJ's. According to A&C, MAJ knew this, signed the contract, and was now obligated to pay the balance of the fee.

Based on its reading of the contract and the complaint, the circuit court found that A&C was acting exclusively as a law firm at the time the contract was signed. Because

MAJ was the client, MAJ could terminate the contract with A&C at any time. The court determined that as a law firm, A&C had to "show more than you earned a fee, and [MAJ] didn't pay it. You have to show damages based on work performed or loss of business." The court stated that it was granting the motion to dismiss, "or for summary judgment," but permitted A&C thirty days to amend the complaint.

A&C filed an amended complaint within thirty days of the court's order.[5] The amended complaint laid out much of the same information about the contract, namely, that A&C's lobbyists left, that MAJ sought to terminate the agreement, and that within thirty days of the notice of termination, A&C had hired additional lobbyists to service MAJ's account. The amended complaint alleged that MAJ signed the lobbying agreement knowing that A&C was foregoing other clients, and that MAJ had breached the agreement by not paying the balance of the fee, which A&C claimed was owing in the amount of $282,500.00.

MAJ filed a motion to dismiss, or in the alternative, for summary judgment, arguing many of the same points that it had previously advanced. The court set the matter for a hearing.

### B. The August 2, 2021 Hearing on MAJ's Motion to Dismiss the Amended Complaint.

On August 2, 2021, the hearing commenced before the same circuit court judge who had heard the identical motion a year previously. At this hearing, MAJ's counsel argued

[5] A&C also filed a comparison copy showing the alterations made to the original complaint.

that "nothing has changed from a year ago," there being no new allegations in A&C's amended complaint. MAJ's counsel then asserted what he considered were the court's three main findings from the previous hearing: 1) the court found that A&C had not separated its lobbying wing from its law practice. A&C, therefore, was acting as a law firm and MAJ, as the client, could discharge A&C whenever it wanted; 2) "[t]he engagement fee argument doesn't apply" because the court found A&C was acting as a law firm at the time the parties signed the contract; and 3) A&C was not suing to recover for work for which it was not paid.

A&C's counsel maintained that the amended complaint stated a valid cause of action. That in considering a motion to dismiss, counsel urged the court to look "at the document itself." Further, counsel maintained that the case was not ripe for summary judgment because the facts were either in dispute or undeveloped.

A&C's counsel advised the court not to adopt one of the findings that the Circuit Court for Anne Arundel County court made arising from the lawsuit in that county. In that case, the Anne Arundel County court ruled on dueling motions for summary judgment, one of which was filed by A&C's former lead lobbyist. In part of its ruling, that court found that a non-competition clause in the lead lobbyist's employment contract with A&C was unenforceable. In reaching that decision, the Anne Arundel County court found that A&C had not "adequately separated their lobbying practice from their legal services division." Now, before the Circuit Court for Prince George's County, A&C argued that if the court adopted the Anne Arundel County court's conclusion, it would affect how lobbying firms operate in Maryland because different rules applied between non-lawyers and lawyers.

Acknowledging that the Maryland's Lawyer's Rules of Professional Conduct ("MLRPC") "apply to lawyers in all areas", the court below focused its inquiry on whether A&C was "acting as a lawyer or something else[?]" Answering its own question, the court concluded that A&C could not practice law and simultaneously lobby, suggesting that such an arrangement would raise ethical concerns. A&C's counsel responded that the potential for an ethical problem, at least at this stage in the proceedings, was speculative because no facts had been developed that would support such a conclusion. The court seemed to backtrack, admitting it did not "know how you [A&C] are set up," and the court then posed a hypothetical question involving lawyers and non-lawyers sharing fees. A&C's counsel responded that its former lobbyists were salaried employees and not in a fee sharing arrangement with A&C's lawyers. A&C's counsel closed by re-asserting that the case was not ripe for either summary judgment or dismissal.

**C. Court's Ruling**

The court began its oral ruling by noting that "[n]ot much ha[d] changed" from a year ago when it considered MAJ's motion to dismiss the original complaint. Responding to A&C's concern that the court should decline to adopt the Anne Arundel County court's factual finding, the court noted that it was not "necessarily" relying on that decision. The court then considered whether A&C had adequately "divided its law side from its lobbying side." In so doing, the court cited to MLRPC 19-305.7 in support of the proposition that "the rules of professional conduct apply to attorneys who provide law related services."[6]

[6] MLRPC 19-305.7 states:

The court then read the opening sentences of the amended complaint which state that "[A&C] is a law firm organized under the laws of the State of Maryland." The court summarized the factual allegations contained in A&C's amended complaint and summarized the contract's fee provisions. Afterward, the court said:

> I think the rule [MLRPC 19-305.7] requires Alexander & Cleaver had to separate its lobbying operation from its legal services operation, such that they were distinct. And I don't think the record demonstrates that's not the case here – is the case that they are distinct.
>
> And I find again that Maryland Association for Justice as a client of a law firm had the right to fire its attorneys, so to speak, and when it wanted to do so.

In its oral ruling the court suggested that, as a law firm suing for breach of contract, A&C was required to plead that it had lost business as a result of the breach. Countering A&C's assertion that it had to forego clients whose interests conflicted with MAJ, after reading the agreement, the court also found that A&C could have engaged a client whose interests differed from MAJ's own interests.

A&C filed a timely appeal. Additional facts will be discussed later in the opinion.

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(a) An attorney shall be subject to the Maryland Attorneys' Rules of Professional Conduct with respect to the provision of law-related services, as defined in section (b) of this Rule, if the law-related services are provided:

(1) by the attorney in circumstances that are not distinct from the attorney's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the attorney individually or with others if the attorney fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-attorney relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-attorney.

## STANDARD OF REVIEW

"'We review the grant of a motion to dismiss de novo.'" *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (quoting *Reichs Ford Road Joint Venture v. State Roads Comm'n*, 388 Md. 500, 509 (2005)); *accord Kumar v. Dhanda*, 198 Md. App. 337, 342 (2011) ("We review the court's decision to grant the motion to dismiss for legal correctness."), *aff'd*, 426 Md. 185 (2012). We will affirm the circuit court's judgment "'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *Monarch Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) (quoting *Pope v. Bd. of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995)).

Likewise, when reviewing a trial court's grant of summary judgment, we do so without deference because we must determine whether the court's decision was legally correct. *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) ("A determination of '[w]hether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal.'" (citing *Tyler v. City of College Park*, 415 Md. 475, 498 (2010))).

## DISCUSSION

### I. Motion to Dismiss versus Motion for Summary Judgment

Because there is confusion over what the trial court decided, it is worthwhile reviewing the difference between motions to dismiss and those for summary judgment. Deciding each motion calls for different considerations and requires a court to undertake different analyses. Determining what the court decided below will guide our analysis.

When ruling on a motion to dismiss, the court is generally confined to reviewing the complaint itself and any supporting documents that may logically be incorporated into it. *D'Aoust*, 424 Md. at 572. "When ruling on a motion to dismiss, 'consideration of the universe of 'facts' pertinent to the court's analysis of the motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any.'" *Id*. (quoting *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)). In ruling on a motion to dismiss a court is tasked with determining whether the facts and allegations in the complaint, when viewed in the light most favorable to the non-moving party, set forth a cause of action on which relief may be granted. *Latty v. St. Joseph's Soc'y of the Sacred Heart, Inc*., 198 Md. App. 254, 262–63 (2011).

On the other hand, when ruling on a motion for summary judgment under Rule 2-501, the court's analysis moves beyond the complaint to an examination of whether the core facts at issue are disputed and whether the moving party is entitled to judgment as a matter of law. *120 W. Fayette St., LLLP v. Mayor & City Council of Balt. City*, 413 Md. 309, 329 (2010) ("[a] trial court may grant summary judgment when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law.") (internal quotation omitted); *Injured Workers' Ins. Fund v. Orient Exp. Delivery Serv. Inc.*, 190 Md. App. 438, 450 (2010) (stating the same). Summary judgment is appropriate for those cases where the parties do not dispute what is factually material and, therefore, there is no need for a trial. *Sadler v. Dimensions Healthcare Corp*., 378 Md. 509, 534 (2003).

Because it arguably is the case here, a hearing on a motion to dismiss may be transformed into a hearing on a motion for summary judgment under Rule 2-322(c) if "a

party presents factual matters outside the pleadings, and the [trial judge] does not exclude them from consideration . . . ." *Dual, Inc. v. Lockheed Martin Corp*., 383 Md. 151, 161 (2004) ("the [trial judge] must treat the motion [to dismiss] as a motion for summary judgment"). But the rule is also clear that when this happens, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501." Rule 2-322(c); *see also Worsham v. Ehrlich*, 181 Md. App. 711, 722, (2008), *cert. denied*, 406 Md. 747. Because the court is now considering factual matters outside "the four corners of the complaint," Rule 2-322 allows the parties to present evidence of whether a genuine dispute of material fact exists that would then permit the court to decide whether summary judgment is appropriate as a matter of law. *D'Aoust*, 424 Md. at 573–74.

In this case, confusion has arisen over what action the court took below when it ruled on MAJ's motion. A&C argues that the court considered facts outside of the complaint and, therefore, undertook a summary judgment analysis. MAJ counters that the court made a straightforward ruling on the motion to dismiss. Adding to the confusion, at the end of the hearing, the court stated that it was considering "a motion to dismiss or, in the alternative, a motion for summary judgment," without specifying which of the two motions it was considering. Based on our review of the record, we conclude that the court ruled on the motion to dismiss and did not enter summary judgment in MAJ's favor for several reasons.

First, the court's written order issued after the hearing states that A&C's amended complaint was dismissed with prejudice, not that summary judgment was granted for MAJ. Second, in rendering its oral decision, the court read and summarized passages from the

amended complaint as well as parts of the contract at issue in the complaint. Because the court confined itself to consideration of the amended complaint and the contract, we conclude that the court was only considering the motion to dismiss. Finally, the court noted that "it didn't rely on the judgment of the Court in Anne Arundel County." Although at times during its dialogue with counsel the court alluded to the proceedings in Anne Arundel County, in its oral findings and ruling, the court was careful not to consider the other court's decision.[7] Accordingly, we agree with MAJ that the court considered and ruled on the motion to dismiss.[8]

## II. The Court Improperly Granted MAJ's Motion to Dismiss

A. Parties' Contentions

As noted, A&C framed both of its questions to us in terms of whether the circuit court properly granted summary judgment for MAJ. They argue that summary judgment is inappropriate because the facts in this case are disputed. Still, the thrust of A&C's argument is that the amended complaint stated a viable cause of action. Specifically, A&C argues that MAJ voluntarily entered into the agreement with them solely for lobbying services. In return, MAJ agreed to pay "an engagement fee" for those services. A&C argues that whether lobbying is a "law related service," as the circuit court found, and

[7] We will fully address A&C's concern that the court seemingly looked beyond the amended complaint to other issues aside from the Anne Arundel County court's decision in the next section of this opinion.

[8] We pause to respectfully remind the trial court that when a pleading offers an alternate basis for the court to act, the court should specify which course it is taking. Doing so will avoid confusion for the parties and the reviewing court.

whether a law firm engaged in lobbying services creates an impermissible ethical business arrangement, are questions of fact and law that cannot be determined based solely on a reading of either the contract or the amended complaint.

MAJ contends that the court properly dismissed A&C's amended complaint for breach of contract because, in its view, A&C did not "allege an actionable breach, performance, or recoverable damages." Specifically, MAJ claims that A&C was required to allege how MAJ was responsible for the balance of the fee when A&C allegedly did no work on their behalf. Further, MAJ argues that the "the express terms of the agreement permitted termination . . . ." It maintains that it had cause to end the contract after the lobbying group left A&C's employ.

B. Analysis

As previously noted, when we review a motion to dismiss for failure to state a claim under Rule 2-322(b), we "must assume the truth of all well-pleaded, relevant, and material facts in the complaint and any reasonable inferences that can be drawn therefrom." *Hines v. French*, 157 Md. App. 536, 548–49 (2004); *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 555 (1999); *Bobo v. State*, 346 Md. 706, 708 (1997). In this case, the circuit court's dismissal will be affirmed only if the alleged facts and permissible inferences to be drawn from a reading of the amended complaint would not afford A&C relief. *Bobo*, 346 Md. at 709.

It is well-established in Maryland that a complaint alleging a breach of contract "must of necessity allege with certainty and definiteness *facts* showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant." *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 655 (2010) (quoting

*Continental Masonry Co., Inc. v. Verdel Constr. Co., Inc*., 279 Md. 476, 480 (1977) (emphasis in original). "The elements of a contract are offer, acceptance, and consideration." *B-Line Med., LLC. v. Interactive Digital Sols., Inc*., 209 Md. App. 22, 46 (2012).

The circuit court granted the motion to dismiss based on two separate conclusions. The first was that A&C was obliged to allege, or otherwise show, that it separated its law practice from the lobbying practice based on the court's reading of the amended complaint and the MLRPC. "I think the rule [MLRPC 19-305.7] requires that [A&C] had to separate its lobbying operation from its legal services operation, such that they were distinct." The court reasoned that: 1) A&C had not adequately separated the two practices and therefore, it was effectively operating as a law firm when it signed the contract; and 2) MAJ was A&C's client, and as a client, MAJ could "fire" the law firm, A&C, at any time.

We know of no statute, nor have we found any appellate authority that suggests a law firm cannot employ lobbyists as part of its menu of services.[9] To be sure, in Maryland, ethical issues might arise when lawyers and nonlawyers are engaged in a business. *See, e.g.*, *Attorney Grievance Com'n of Md. v. Barton*, 442 Md. 91 (2015). Indeed MLRPC 19-305.3[10] addresses a lawyer's responsibility to supervise nonlawyers within a practice, as

[9] Indeed, a quick internet search will reveal several law firms in the Washington, D.C. metropolitan area, including a few law firms in Maryland, that employ lobbyists and engage in the practice of law.

[10] MLRPC 19-305.3 states: With respect to a non-attorney employed or retained by or associated with an attorney:

(a) a partner, and an attorney who individually or together with other attorneys possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the attorney;

(b) an attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the attorney;

(c) an attorney shall be responsible for conduct of such a person that would be a violation of the Maryland Attorneys' Rules of Professional Conduct if engaged in by an attorney if:

(1) the attorney orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the attorney is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and

(d) an attorney who employs or retains the services of a non-attorney who

(1) was formerly admitted to the practice of law in any jurisdiction and

(2) has been and remains disbarred, suspended, or placed on inactive status because of incapacity shall comply with the following requirements:

(A) all law-related activities of the formerly admitted attorney shall be

(i) performed from an office that is staffed on a full-time basis by a supervising attorney and

(ii) conducted under the direct supervision of the supervising attorney, who shall be responsible for ensuring that the formerly admitted attorney complies with the requirements of this Rule.

(B) the attorney shall take reasonable steps to ensure that the formerly admitted attorney does not:

(i) represent himself or herself to be an attorney;

(ii) render legal consultation or advice to a client or prospective client;

(iii) appear on behalf of or represent a client in any judicial, administrative, legislative, or alternative dispute resolution proceeding;

(iv) appear on behalf of or represent a client at a deposition or in any other discovery matter;

(v) negotiate or transact any matter on behalf of a client with third parties;

(vi) receive funds from or on behalf of a client or disburse funds to or on behalf of a client; or

(vii) perform any law-related activity for

the circuit court recognized. But we can find nothing unethical about a law firm employing lobbyists to offer "government relations service." Further, nothing that our research has found would prohibit a lawyer, or someone trained as a lawyer, from being engaged solely in the business of lobbying or government relations as the employee of a law firm, as A&C alleges was the case with its lobbyists.

After reading the amended complaint and reviewing the contract, the court concluded that A&C had "not separated its lobbying operation from the practice of law." Our independent review of the record does not reveal evidence that would suggest this. In fact, the record suggests the opposite conclusion. Foremost, the contract itself specifically

(a) a law firm or attorney with whom the formerly admitted attorney was associated when the acts that resulted in the disbarment or suspension occurred or

(b) any client who was previously represented by the formerly admitted attorney.

(C) the attorney, the supervising attorney, and the formerly admitted attorney shall file jointly with Bar Counsel

(i) a notice of employment identifying the supervising attorney and the formerly admitted attorney and listing each jurisdiction in which the formerly admitted attorney has been disbarred, suspended, or placed on inactive status because of incapacity; and

(ii) a copy of an executed written agreement between the attorney, the supervising attorney, and the formerly admitted attorney that sets forth the duties of the formerly admitted attorney and includes an undertaking to comply with requests by Bar Counsel for proof of compliance with the terms of the agreement and this Rule. As to a formerly admitted attorney employed as of July 1, 2006, the notice and agreement shall be filed no later than September 1, 2006. As to a formerly admitted attorney hired after July 1, 2006, the notice and agreement shall be filed within 30 days after commencement of the employment. Immediately upon the termination of the employment of the formerly admitted attorney, the attorney and the supervising attorney shall file with Bar Counsel a notice of the termination.

states that the parties were agreeing for A&C to provide lobbying services, not legal representation ("Upon signing this agreement, you will have engaged [A&C] for government relations services. No legal or law related services will be performed under the terms of this representation. Accordingly, no client relationship is created by this agreement."). Whether or not an attorney-client relationship was created between A&C and MAJ under the specific circumstances seems unlikely. At best, it is an open question that would have to be factually developed.

Further, the contract attempts to address the court's ethical concerns as it specifically states that no attorney-client relationship would be established under the agreement's terms. And, although the court ruled that A&C had not separated its law practice form its lobbying practice, at one point during the hearing, the court admitted that it was "not sure how [A&C was] set up." This comment suggests that the court's conclusion of an ethical problem based on its reading of the amended complaint was based on conjecture rather than a factual finding. In sum, there is sufficient evidence in the record when viewed, as we must, in light most favorable to A&C, the non-moving party, to conclude that A&C and MAJ contracted for lobbying services and not legal services.

Because the court here reached the same conclusion as the Anne Arundel County court in finding that A&C had not separated its legal and lobbying practices, A&C surmises that the court below simply adopted the Anne Arundel County court's rationale and conclusions as its own. We decline to make that inferential leap. We will take the court's comments in this case at face value. The court said that it was not considering the Anne Arundel County court's decision, and we will abide by that statement. The court seemed

to recognize that the Anne Arundel County court's decision had no persuasive, dispositive, or precedential bearing in explicitly stating that it was not considering the decision. Further, when rejecting the application of collateral estoppel, the court recognized that the cases involved different parties and issues. Even so, taking all of this into account, we are at a loss to understand how the court came to its factual and legal conclusions based solely on a reading of the amended complaint and contract.

The second rationale that the circuit court gave for dismissing the amended complaint rested on its conclusion that "the engagement fee didn't apply." We understand this comment to mean the court concluded that lawyers may not charge a client unreasonable fees under MLRPC 19-301.5(a) and that the engagement fee in this case was such a fee. Further, the circuit court reasoned that A&C's amended complaint failed because A&C did not allege how it suffered damages with a loss of business. "I don't find that the claim in the [amended] complaint . . . it's [A&C] suing for the money on the contract based on an engagement fee and not for having lost any business or not having engaged with any other parties that it could have in lieu of signing an agreement with [MAJ]."

In the majority of cases, an attorney who charges a client a non-refundable consultation fee, in some instances inaccurately called an engagement fee, will run afoul of MLRP 19-301.5(a) which prohibits lawyers from charging unreasonable fees. The prohibition arises because the lawyer is charging the client a fee for which no work is performed. *Attorney Grievance Comm'n of Md. v. Stinson*, 428 Md. 147, 171–72 (2012) ("Respondent did not earn $5,000.00. By retaining the full amount, notwithstanding her

self-serving designations of the fee as 'nonrefundable' and 'reasonable,' Respondent charged and collected an unreasonable fee, in violation of Rule 1.5(a)."); *Attorney Grievance Comm'n v. Lawson*, 401 Md. 536, 580 (2007); *Attorney Grievance Comm'n v. McLaughlin*, 372 Md. 467, 501 (2002); *Attorney Grievance Comm'n v. Monfried*, 368 Md. 373, 393 (2002).

Although rare, true engagement fees are not prohibited, however. A true engagement fee has been defined as a "retainer paid in order that the attorney is deprived from the right of rendering services for the other party." *Stinson*, 428 Md. at 164–65. In Maryland State Bar Association Ethics Opinion 92-41, the Committee on Ethics stated that if such a fee is reasonable, it should be placed in the attorney's escrow account until earned. Former head of the Maryland State Bar Ethics Commission, Melvin Hirshman, in a Maryland Bar Journal article explained, that true engagement fees were sometimes strategically used in divorce cases.

> In Maryland, we have been advised that in certain counties one spouse will attempt to prevent his/her mate from obtaining representation by arranging initial conferences and thereafter discharging skilled family practitioners. For this reason, those specialists demand what appear to be high—if not exhorbitant [sic]—initial consultation fees.

MARYLAND BAR JOURNAL, April 17, 1984, at 13. And in *Attorney Grievance Commission of Maryland v. Barbara Osborn Kreamer*, 404 Md. 282, 296, n.16 (2008), the Court of Appeals explained:

> An engagement fee is considered the same as a general retainer or an "availability fee." *See In re Gray's Run Technologies, Inc.*, 217 B.R. 48, 53 (Bankr.M.D.Pa.1997); *In re Printing Dimensions, Inc.*, 153 B.R. 715, 719 (Bankr.D.Md.1993). In *In re Gray's Run Technologies, Inc.*, the court described this type of named retainer "as a sum of money paid by a client to

> secure an attorney's availability over a given period of time." 217 B.R. at 53 (quotation and citation omitted). The court continued: This type of retainer binds a lawyer to represent a particular client while foreclosing that attorney from appearing on behalf of an adverse party. [This] fee is generally considered "earned upon receipt" or "non-refundable." *Id*. (citations omitted).

Where an engagement fee is negotiated for lobbying services, the Court of Appeals has explained the rationale for such a fee. *Bereano v. State Ethics Commission*, 403 Md. 716 (2008), involved a non-lawyer lobbyist, Bruce Bereano, who entered into a contract with Mike Traina on behalf of Mercer Venture, Inc., for "lobbying, political consulting, and strategy development . . . with various county, municipal, and State government agencies and departments . . . ." *Id*. at 724. Bereano and Traina agreed that Mercer would pay Bereano a $2,000.00 retainer for lobbying services plus expenses. *Id*. at 726.

Subsequent legislation[11] rendered Bereano's ability to lobby for Mercer illegal after a certain date. One issue in the appeal was whether the new law applied retrospectively. *Id*. at 732. Bereano argued that although he signed the agreement with Traina, he did nothing after the law went into effect. *Id*. at 737–38. The Court, however, noted that the engagement of Bereano for lobbying services over the life of the contract was the critical factor.

[11] State Government Article § 5-706 provides:

> A regulated lobbyist may not be engaged for lobbying purposes for compensation that is dependent in any manner on:
> (1)(i) the enactment or defeat of legislation; or
> (ii)any other contingency related to legislative action; or
> (2)(i)the outcome of any executive action relating to the solicitation or securing of a procurement contract; or
> (ii) any other contingency related to executive action.

> The crucial element is not that an agreement was signed by the parties. To the contrary it is that the agreement gave Mercer a claim upon Bereano's time and lobbying services. There is no requirement that services actually be rendered, as the benefit to Traina begins and continues for as long as Bereano is "on call." Thus, the agreement entitled Mercer to expect that Bereano would take actions to protect and advance its interests and would refrain from taking actions that would have an undesirable effect. For example, had unfavorable legislation been introduced during the term of the agreement and had Bereano done nothing to thwart it, Mercer might have legal recourse for Bereano's failure to fulfill his lobbying obligations. In this regard, there is a kinship to a lawyer's "engagement fee" or "availability fee," in which the service purchased by the client is the attorney's availability to render service if and as needed as long as the agreement continued. *In re Gray's Run Technologies, Inc.*, 217 B.R. 48, 53 (Bkrtcy.M.D.Pa.1997).
>
> Bereano's engagement as Mercer's lobbyist commenced, but did not terminate, on the day the agreement was signed. Despite his protestations, the Commission found that Bereano "engaged in" the lobbying activities for which he was "engaged by" Mercer, making himself available for, and engaging in, lobbying purposes after 1 November 2001, the effective date of the statute. We agree.

*Bereano*, 403, Md. at 738.

These cases underscore that several facts would have to be developed before the court could conclude that merely because what the parties called an engagement fee for lobbying services means that such a fee was unethical for A&C and MAJ to negotiate and then for A&C to enforce. Two established facts lead to the conclusion that the parties considered the contracts fair and enforceable when they executed it. First, A&C and MAJ specifically contracted for lobbying, not legal services. Second, up until the time that A&C's lobbyists left the firm, the parties amicably abided by the agreement. One plausible inference that may be drawn from both facts is that had the lobbyists not left A&C, the parties would have continued to abide by the agreement until its termination. With

circumstances different, the ultimate question of whether the fee provision is enforceable is a question for a trier of fact to resolve and cannot form the basis of a motion to dismiss.

**CONCLUSION**

Upon our independent review of the amended complaint and the contract, we conclude that the amended complaint meets the basic criteria of a valid cause of action. The amended complaint alleges that MAJ hired A&C to "provide government relations services to MAJ in exchange for a fee" during a two-year period, July 2018 to June 30, 2020. As a result, according to the terms of the agreement, "MAJ expressly agreed that [A&C] would be foregoing other clients to represent MAJ." For these services, MAJ was to pay A&C "a flat fee" of $307,000.00, in monthly installments "over the life of the contract." A&C alleges that MAJ breached the agreement by initially giving notice of intent to terminate the contract soon after A&C's principal lobbyist and most of the other lobbyists resigned. A&C alleges MAJ breached the contract outright by not giving A&C time to cure. In the amended complaint, A&C claims it hired new lobbyists and "cured" any potential inability to perform. In other words, A&C alleges it was prepared to perform but MAJ refused to do so because MAJ "decided to go with" the newly formed lobbying group. Because of this alleged breach, A&C demands the payment of the balance of the fee. A&C further asserts that the balance of the fee was due and owing regardless of the breach because A&C had refrained from taking on potential clients to represent MAJ at the outset of the contract period. Reading the complaint and the contract in the light most favorable to A&C, the non-moving party, the complaint states a valid cause of action.

We understand that MAJ maintains that it could end the agreement under the contract's terms due to the mass resignation of A&C's lobbyists. While it is plausible that the mass resignation of A&C's lobbyists provides a ground for MAJ to terminate the contract, whether MAJ is responsible for the balance of the fee either under the contract's terms or as a measure of damages because of the alleged breach is a determination that will have to be made later by the trier of fact.

**THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS REVERSED. APPELLEE TO PAY THE COSTS.**