University of Baltimore Law Forum

Volume 28
Number 2 *Summer 1998*

Article 12

1998

Recent Developments: Post v. Bregman: Rule of Professional Conduct Regarding the Splitting of Attorney's Fees May Extend beyond Disciplinary Proceedings

Gwendolyn S. Lubbert

Post v. Bregman:

RULE OF PROFESSIONAL CONDUCT REGARDING THE SPLITTING OF ATTORNEY'S FEES MAY EXTEND BEYOND DISCIPLINARY PROCEEDINGS

By Gwendolyn Lubbert

The Court of Appeals of Maryland held in *Post v. Bregman*, 349 Md. 142, 707 A.2d 806 (1998), that the Maryland Lawyers' Rules of Professional Conduct establish public policy which should be given the force of law. Due to this characterization, Rule 1.5(e), which deals with the splitting of fees among attorneys who are not part of the same firm, is not strictly limited to the disciplinary proceedings provided by the Rules and may be enforced in private agreements between attorneys. Agreements entered into in clear violation of the Rule, therefore, can be rendered unenforceable.

In 1988, Stanley Taylor ("Taylor") approached Douglas Bregman ("Bregman") about representing him in a workers' compensation claim. Bregman informed Taylor that he did not handle such matters and referred him to Alan F. Post ("Post"). Taylor then retained Post to handle the compensation case as well as a subsequent tort claim. With Taylor's consent, Post retained the firm of Connerton, Ray, & Simon ("Connerton") to assist with the case.

Connerton eventually withdrew from the case and Post retained the firm of Paulson, Nace, Norwin, & Sellinger ("Paulson") to assume the role of lead counsel. This necessitated a new fee arrangement because Paulson insisted on receiving two-thirds of the contingency fee. Post and Bregman decided that sixty percent of the remaining one-third would go to Post, leaving Bregman with forty percent of one-third. The deal was conditional on Bregman contributing that same percentage of work and expenses to the case. On November 1, 1994, Post received $260,000 from the settlement of the Taylor case. Post then balked at honoring the agreement. In order to settle the issue, Post filed a complaint for declaratory relief in the Circuit Court for Montgomery County. Post asked the court to declare the agreement with Bregman unenforceable because it violated public policy. He believed the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") should govern and that Rule 1.5(e) would be violated if the arrangement was upheld. The Rule states that a division of fee between lawyers from different firms is acceptable only if the division is proportional to the work done by each lawyer. Bregman filed a counterclaim, contending that he had done all the work that was asked of him and was entitled to the share previously agreed upon.

The trial court, treating the case as a breach of contract action, granted Bregman's motion for summary judgment and determined that there was no longer a need to issue declaratory judgment. Accordingly, the court ordered Post to pay the amount owed to Bregman plus interest. The Court of Special Appeals of Maryland affirmed the trial court's decision, holding that the agreement was clear and that courts should refrain from applying MLRPC, which are rules passed by the judiciary not the legislature, in contract disputes.

Before turning its attention to the claim that MLRPC should govern the fee arrangement, the court of appeals considered the trial court's decision to dismiss the action for declaratory judgement. *Post*, 349 Md. at 159, 707 A.2d at 814. While it is permissible for a court to dismiss an action for declaratory judgment if the issue raised becomes moot, the court of appeals did not believe that such was the case here. *Id.* Rather than dealing with the several issues which the parties sought to clarify, the trial court rendered a judgment on the breach of contract claim in order to resolve the dispute. *Id.* Thus, the trial court never reached the MLRPC issue. The court of appeals determined that the dispute in this case was far from the ordinary breach of contract and the parties were entitled to "a specific written declaration" of their rights. *Id.* at 106, 707 A.2d at 815.

The court of appeals next turned to the issue surrounding the application of MLRPC, in particular, Rule 1.5(e). *Id.* at 161, 707 A.2d at 815, The court found the effect of the Rule had been viewed by the lower courts' in two different ways, as a condition incorporated into the contract or, like any law, as a supervening check on the contract. *Id.* at 162, 707 A.2d at 815. The court believed that this contradiction arose from the larger issue of the cognizance and enforceability of MLRPC as a "statement of public policy, equivalent in effect to a statute." *Id.*

The court looked at the effect the code of professional responsibility had in other states, as well as in Maryland. *Id.* at 162, 707 A.2d at 815-16. Unlike other states, the court found that the Maryland rules were not "self-imposed internal regulations" but were adopted by the court in order to thoroughly regulate the practice of law. *Id.* at 162-63, 707 A.2d at 816. The court held that such a detailed regulation of any occupation, "the integrity of which is vital to nearly every other institution and endeavor of our society, constitutes an expression of public policy having the force of law." *Id.* at 163, 707 A.2d at 816. Only the court of appeals had been granted the authority to establish MLRPC, not the legislature, and therefore the code operates with the same legal force as a statute. *Id.* at 163-64, 707 A.2d at 816.

Turning from the general operation of MLRPC, the court stated that the real issue in the instant case was whether MLRPC, specifically Rule 1.5(e), was enforceable outside the context of the traditional disciplinary proceeding. *Id.* at 164, 707 A.2d at 817. The court found that courts in Maryland and elsewhere have applied specific rules outside the disciplinary context. *Id.* Furthermore, Rule 1.5 itself had been applied in cases outside Maryland to determine the validity of fee-sharing agreements. *Id.* at 166, 707 A.2d at 817 (citing *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294 (7th Cir. 1995)). The court agreed that Rule 1.5(e) establishes public policy with regard to the splitting of fees among attorneys and that its application should not be limited to the disciplinary context. *Id.* at 168, 707 A.2d at 818. Although the rule was not a per se defense, the court held that it could be used to render agreements which are "in clear and flagrant violation" of the rule unenforceable. *Id.*

Finally, the court annunciated a number of factors to be considered by a trial court when confronted with a defense arising from Rule 1.5(e). *Id.* at 169-70, 707 A.2d at 819. Some of the factors a trial court must analyze to determine the significance of a violation include any harm done to the client, the good faith of the lawyers involved, and the public's interest in enforcement. *Id.* Like any equitable defense, the court held the "principles of equity" should be applied when raising a Rule 1.5(e) violation. *Id.*

Judge Chasnow rejected the majority opinion's application of Rule 1.5(e) to the instant case. *Id.* at 173, 707 A.2d at 821 (Chasnow, J. dissenting). Even if such an ethical defense could be raised in other cases, Chasnow disagreed with its application to the present facts for the simple reason that Post, "not only entered into [the contract], but ... made the proposal himself." *Id.* at 174, 707 A.2d at 822. Further, Bregman should not have to prove that he did the requisite proportion of work as a condition precedent to receiving the money. *Id.* at 178-79, 707 A.2d 823-24. To determine validity, the contract must be reasonable when it was initiated, not after the case was complete. *Id.* at 180, 707 A.2d at 825. Accordingly, unless the contract was clearly improper or unethical when it was entered into, the terms should be enforced regardless of subsequent events. *Id.* at 181, 707 A.2d at 825.

The Court of Appeals of Maryland's ruling in *Post v. Bregman* gives tremendous significance to the Maryland Lawyers' Rules of Professional Conduct. Circumstances to which they apply are no longer strictly limited to disciplinary proceedings. More specifically, the court's holding that Rule 1.5(e) can be raised as an equitable defense to contracts entered into between lawyers regarding the division of fees is likely to have a great impact on the legal community. Attorneys will now have to take great pains to further account for the amount of work done when such an agreement is established.