

Circuit Court for Montgomery County
Case # Civil No. 129371

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1997

ALAN F. POST, CHARTERED

v.

DOUGLAS M. BREGMAN et al.

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Karwacki
(Retired, Specially Assigned)

JJ.

Dissenting Opinion by Chasanow, J.
in which Eldridge, J. joins

Filed: January 15, 1998

I respectfully dissent. In a case where summary judgment was properly granted, the Court reverses the granting of a motion for summary judgment and remands to apply a vague and problematic “equitable” test fashioned by the Court.

THE TRIAL JUDGE DID NOT ERR IN GRANTING SUMMARY JUDGMENT

In the trial court, attorney Alan Post contended that, in order for attorney Douglas Bregman to recover 13% of the fee as provided in a fee sharing agreement, Bregman had to establish compliance with Maryland Rule of Professional Conduct 1.5 (e) by proving the 13% was in proportion to the legal services performed by him. In his response to Bregman’s motion for summary judgment, Post makes his position clear:

“The Maryland Rules of Professional Conduct prohibit [Post] from ratifying conduct which [Post] reasonably believes to be in violation of the Rules. [Bregman and his firm] have refused to provide [Post] with any evidence to support the division of fees claimed. [Post] has not attempted to avoid any obligation to [Bregman], but has, in response to [Bregman’s] failure to provide any evidence to support the division of fees claimed, properly requested that this Court review the facts and circumstances, and declare whether [Bregman’s] claim is lawful.”

Post goes on to set out what he contends are the issues in the case and complains that Bregman has not addressed those issues. He explains:

“In their Memorandum of Law, [Bregman and his firm] have failed to address the issue which the Court has been asked to address, is the division of fees claimed in proportion to the services performed by [Bregman] as required by Rule 1.5(e). [Bregman and his firm] have also failed to address the possible secondary issue, should [Bregman’s] violation of Rule 1.5(e) of the Maryland Rules of Professional Conduct bar [Bregman’s]

enforcement of the December 20, 1991, agreement to obtain the division of fees claimed.”

At the hearing on the cross motions for summary judgment, Post’s attorney continued to press his contention that it would be unethical to enforce Bregman’s contractual claim unless as a condition precedent to recovery Bregman proves that his claim for 13% of the fee is in proportion to the legal services he performed for the client.

“[POST’S COUNSEL]: We are seeing it as a condition precedent to payment of the fee; we are not seeing it as a defense to the claim for a fee, all right? And therefore, there is a difference. ... I did a lengthy, exhaustive research in several of the best law libraries in this city, and I was not able under any reporter, any state bar reporter, or any published document whatsoever, to find any case dealing with this particular provision of the Rules of Professional Conduct, either in its current form or in its original model Code form.

So I think this is not an area that has been heavily dealt with by the members of the Bar. I understand that certain jurisdictions see this as a civil matter, not an ethical matter.....

So it is something that I think that my client is entitled to ask what he asked. I mean, under the Declaratory Judgment Act he is entitled to ask for it. And again, it is not offered as a defense for a claim for a fee; it is offered for a condition precedent to deciding what that fee should be....”

Post apparently acknowledged that he could find little support for his somewhat novel contention that it would be an ethical violation to pay the contractual fee demanded by Bregman unless as a condition precedent to recovery Bregman proves that his contractual percentage fee is proportionate to the percentage of work he actually performed on behalf of the client.

Post's defense to Bregman's claim was perhaps limited because his argument was fraught with pitfalls. Post could not argue that Bregman's 13% share was unethical at the time of contracting because Post initiated the agreement, and Bregman merely accepted Post's written proposal. Post could not seriously contend that Bregman breached any implied duty to do additional work after the present fee agreement since Bregman could not initiate work not delegated to him by lead counsel, and it was stipulated that Bregman did all work assigned to him. Also, if Post was claiming that his December, 1991 seemingly unconditional promise to pay Bregman 40% of one-third of any fee was unenforceable because Bregman failed to do a proportionate (13%) share of the work, Post bears the burden under traditional contract law to establish that Bregman breached the contract. *Glen Alden v. Duvall*, 240 Md. 405, 422, 215 A.2d 155, 167 (1965). Post could not prove Bregman's efforts did not constitute 13% of the legal services since it was stipulated Post kept no time records, lead counsel who settled the case kept no time records, and a firm that did a considerable portion of the work received no part of the fee. Similarly, the burden of proving that a contract is unreasonable or unethical should be on the party asserting this defense. *Cf. Sears v. Polan's*, 250 Md. 525, 534, 243 A.2d 602, 607-08 (1968); *Gingell v. Backus*, 246 Md. 83, 90, 227 A.2d 349, 352-53 (1967); *Bernstein v. Real Estate Comm.*, 221 Md. 221, 231, 156 A.2d 657, 662 (1959).

The trial judge, in his oral opinion, held that there was a contract to pay Bregman 13% of the fee, that the contract was proposed by and prepared by Post, that Bregman did work on Taylor's case, and even if it is assumed that Bregman did not do exactly 13% of the

work so that there may theoretically be an ethical violation, it would not constitute a defense to the contract based on the undisputed evidence in the instant case. The judge stated in part:

“There is no question that the contract, the December 20th letter — there is no question of its existence, of who wrote it, of the fact that it was agreed to, and there is, of course, no question of the fact that the money has not been paid.

So that leaves us with the third question, which is really brought by way of [Post’s] first request of the Court, which is that there either is or may be an underlying ethical problem, and that because of that, that problem needs to be resolved. In fact, [Post] uses the word, or the phrase ‘condition precedent.’

That problem, or the resolution of that problem, is a condition precedent to whether or not [Bregman] should be entitled to consummate his claim for breach of contract.

It is my belief, based upon the motions and memorandums that have been supplied, that that ethical question is not a defense to a breach of contract between the parties. It seems to me that there is no party that suggests that there is. There is substantial law outside of Maryland that suggests that it is not.

But in addition to that, it doesn’t make sense to me to be able to raise that as a defense to a breach of contract, that one of the parties — in this case, one of the lawyers — not only entered into, but in this case made the proposal himself.

So I don’t believe that the ethical argument that is made by [Post], even if there is an ethical violation, is a defense to this suit or the claim for a breach of contract, and that being the case, it seems to me there is no other reason why the Motion for Summary Judgment on the part of [Bregman] should not be granted.”

The trial judge was absolutely correct. Post was insisting Bregman could not recover unless, as a “condition precedent,” Bregman proved that there was no ethical violation by

proving he did 13% of the work. The trial judge disagreed with this contention and held that, even if there might be a Rule 1.5 (e) ethical violation because Bregman did not prove he did precisely 13% of the work, such a violation should not be a defense in the circumstances of the instant case where Post proposed paying Bregman 13% of the fee knowing the amount of work Bregman had done already and knowing the case was about to be turned over to another lead counsel who might not, and did not, demand any further work by Bregman. At the time of the fee agreement of December, 1991, there was an existing contract to pay Bregman 25% of the fee. The new fee division contract reduced Bregman's percentage. At that point, Bregman had already done enough work to make Post's promise of 13% of any fee a reasonable enforceable fee contract even without proof that when the client's case was finally concluded Bregman's 13% fee was precisely "in proportion to the services performed by each lawyer."

Some of the facts considered by the trial judge when granting summary judgment were admitted by Post in pleadings and documents he filed in the instant case. They included the fact that Bregman first met with the client, Taylor, and then introduced Taylor to Post. In several letters Post acknowledged that Bregman was the referring attorney for the worker's compensation and tort cases.¹ Bregman also contributed two thousand dollars

¹The trial judge did not decide whether the fee sharing agreement was also enforceable because Bregman had joint responsibility for the representation. Post contended there was a potential factual issue about whether the client had consented to joint representation. The majority makes reference to an affidavit by the client Taylor albeit noting that the affidavit could not be considered because it did not recite that it was based on personal knowledge. Taylor's affidavit also may be questionable because at the motions

toward expenses for the Taylor litigation. In late 1990, Bregman arranged for an associate to participate in the preparation of an amended complaint and certain preliminary discovery matters. That associate worked on the case until April 1991.. Other facts are undisputed since they are contained in an amended affidavit filed by Bregman, which was the only affidavit in support of the motion for summary judgment that was in proper form and based on personal knowledge, and thus, the only affidavit properly considered by the circuit court.

Bregman's affidavit alleges that:

“At the request of Mr. Post, my firm rendered a wide array of legal services to Mr. Stanley W. Taylor, which included: meeting with and interviewing the client, developing legal theories for the actions against the defendants, investigating potential defendants, drafting numerous pleadings (e.g., the Complaint, interrogatories, answers to interrogatories), appearing in court, attending a deposition, meeting with co-counsel to discuss case strategy, conducting legal research, reviewing pleadings, speaking with [opposing] counsel, and receiving, reviewing, and organizing voluminous pleadings, records, faxes, and federal expressed and/or hand-delivered documents from all counsel.

* * *

Throughout the Taylor case, my firm continued in its role as counsel of record, receiving all of the hundreds of pleadings and papers filed by both sides. My firm, specifically myself and an associate, stayed up-to-date and prepared to get more deeply involved in the Taylor case at any time.”

hearing Post's attorney informed the trial judge “Mr. Taylor, quite frankly, was very ill during the portion of this, after the time the cases were actually filed. He has no recollection whatsoever. He recalls a lot of different people, and a lot of people involved in this case, but he has no recollection of Mr. Bregman at all.”

This was the only affidavit that could be considered by the trial judge as evidence in the motion for summary judgment, and it was never controverted by any legally sufficient affidavit. In addition, in Post's second amended complaint for declaratory relief, Post acknowledges Bregman attended a deposition and court hearing in the tort suit.

There are also several relevant stipulations entered into by the parties that were properly considered by the trial judge when deciding the motion for summary judgment.

Some of those stipulations were:

“Throughout the Taylor litigation, Mr. Bregman was listed on the pleadings in the Taylor litigation as co-counsel of record for Mr. Taylor.

* * *

The Post firm has no accounting of its time spent on the Taylor litigation.

The Nace firm made no accounting of its time spent on the Taylor litigation to the Post firm.

The Post firm made no accounting of its time spent on the Taylor litigation to the Nace firm.

The Bregman firm participated in the drafting of the original Complaint filed in the Taylor litigation.

The original Complaint filed in the Taylor litigation listed Mr. Bregman as co-counsel for Mr. Taylor.

On or about October 4, 1990, Mr. Taylor was provided a copy of the original Complaint filed in the Taylor litigation.

* * *

The Bregman firm participated in the drafting of the Amended

Complaint filed in the Taylor litigation.

* * *

The Amended Complaint filed in the Taylor litigation listed Mr. Bregman as co-counsel for Mr. Taylor.

On or about April 24, 1991, Mr. Taylor was provided a copy of the Amended Complaint filed in the Taylor litigation.

* * *

Mr. Bregman was included in the final version of the Official Service List provided to the Clerk of the Court on or about February 21, 1992.

* * *

At no time during the course of the Taylor litigation was the Bregman firm assigned any task that it did not properly perform.

* * *

The Simon firm was lead counsel for Mr. Taylor from the commencement of the Taylor litigation until Mr. Simon withdrew his appearance in the matter.”

There are several reasons why the trial judge properly rejected Post’s “ethical” argument that Bregman should not collect his contractual 13% of the fee unless as a condition precedent he proves he did 13% of the work. First, none of the firms that worked on the case kept time records so it would be almost impossible to prove the proportion Bregman’s efforts bore to the efforts of Post and the other attorneys in the case. Second, Ron Simon of the Connerton firm was lead counsel during a substantial portion of Taylor’s tort litigation, from the period before Taylor’s tort suit was filed until over a year after suit

was filed. That firm withdrew before the current Post-Bregman fee sharing contract; Simon and his firm got no fee for the work they did in the case so if Post prevails, presumably he would also keep the full percentage of the fee attributable to Simon's work. Third, basic contract law is inconsistent with Post's "ethical" defense. To the extent that Post was actually asserting that the contract should not be enforced because it was unethical or that Bregman somehow breached the contract, then the burden of proof was on Post to prove those assertions. Fourth, the amount of work done by Bregman at the time of the current fee division contract could be reasonably estimated to be 13% of the legal work that would be done in the client's case. Post should not be able to shift the almost insurmountable burden of proving the proportion of work done by each attorney to Bregman by claiming it would be unethical for him to divide his portion of the fee with Bregman unless Bregman first proves the contractual division is "ethical."

There is also a fairly recent case in this Court that is not cited by the majority, but was cited to the trial judge, and that case may have been a basis for the trial judge's holding in the instant case. In *Vogelhut v. Kandel*, 308 Md. 183, 517 A.2d 1092 (1986), plaintiff attorney was representing a client who, without good cause, discharged plaintiff attorney and retained defendant attorney. After defendant wrote to plaintiff and asked for the client's files, the two attorneys came to an agreement that the discharged attorney would get 25% of the 40% contingent fee the client agreed to pay the defendant attorney. When the case settled, the defendant attorney refused to pay plaintiff attorney anything more than *quantum meruit* based on an hourly rate. Plaintiff attorney filed suit against defendant attorney to

collect the contractual 25% of the fee, and a bench trial was held. The record extract contains testimony of the defendant attorney that he expended from between 300 to 350 hours on the case, but the plaintiff attorney testified he could not give even an estimate of the number of hours he worked on the case because his office kept no time records.

The trial judge in *Vogelhut* acknowledged he was faced with a situation where the party seeking to enforce the fee splitting contract could not prove what proportion of the total legal services he performed, but the judge, nevertheless, entered judgment for the plaintiff for \$18,700 which represented the contractual 25% of the fee received by the defendant attorney. The trial judge concluded there was an agreement reached and the agreement was enforceable even without proof that the contractual fee split was proportionate to the work done. On appeal the contention was that “the agreement ... [was] one violating the Code of Professional Responsibility, since it constituted unethical fee splitting in violation of DR 2-107 and resulted in an excessive fee prohibited by DR 2-206 to appellee considering his [‘modest’] legal services to [the client].” *Vogelhut v. Kandel*, 66 Md. App. 170, 178, 502 A.2d 1120, 1124 (1986). The Court of Special Appeals affirmed the trial court’s judgment. *Vogelhut*, 66 Md. App. at 180, 502 A.2d at 1125. We granted certiorari. One of the issues to be resolved was:

“Is a discharged lawyer ethically precluded from sharing the fee of his successor, either not in proportion to the value of services, or in the absence of the client’s consent?”

308 Md. at 188, 517 A.2d at 1095. This Court affirmed the ruling of the trial judge, holding that because there was not concurrent representation of the client and because the client was

not adversely affected by the fee sharing agreement, the ethical rules were not violated. Neither the majority nor the concurring opinion apparently found any impediment to enforcing the discharged attorney's contractual claim to 25% of the fee without proof that he did 25% of the legal work on the case.

DIVIDING CONTINGENT FEES

Pursuant to Rule 1.5 (e), a proper contract to divide a contingent fee among lawyers who work on a contingent fee case should be a division in approximate proportion to the work each lawyer did or expects to do on the case. The reasonableness of contingent fee contracts with the client and contracts dividing a contingent fee among the attorneys normally should be judged on the reasonableness of the percentage agreed on at the time of contracting, not on whether the attorneys put in more or less work than anticipated to win the case and not whether the recovery was more or less than anticipated. "Courts have generally stated that the reasonableness of a contingency fee contract should be looked at in light of the factors as they existed at the time the contract was entered into, but this must be qualified by the inherent power of a court to review fees in the case before it." 1 ROBERT L. ROSSI, ATTORNEYS' FEES § 2:9, at 111-12 (2d ed. 1995).

A contingent fee contract is by its nature something of a gamble on the strength of the client's case and the skill of the attorneys. If there is no recovery for the client the attorney gets no fee regardless of the amount of work he or she performed on behalf of the client. If the client has to compromise and receives only a small recovery the attorney gets only the

agreed on percentage regardless of the efforts expended. On the other hand, if the case settles for a great deal of money shortly after the attorney is retained, the attorney receives the agreed on contingent fee even though relatively little work was done on the case. As long as the contingent fee division contract was not proven to be unreasonable or unethical when entered into, each attorney ordinarily should get the agreed contractual division. Merely speculating that the fee division might be unreasonable or unethical by recomputing the proportionate division of efforts after the client's case is settled should not be a defense to a suit on the contract.

This contract initiated by Post promised Bregman 13% (40% of one-third) of any fee recovered. It was not shown to be an unreasonable or unethical division of the potential fee when it was entered into. There was no suggestion by Post that the contract was coercive, improper or unethical when entered into. Post obviously thought at the time of contracting that Bregman deserved 13% of any fee since Post was the one who proposed that division. Our ethical focus should be on whether the contract was proper and ethical when entered into, not through hindsight based on fortuitous events that occurred later.

In an analogous situation, let us assume that an attorney agrees to represent a client in a difficult personal injury action and does considerable work on the client's case. As the case gets close to trial, the attorney, with the full agreement of the client, decides to bring in a much more skillful and experienced trial attorney. The two attorneys carefully compare the amount of work the referring attorney has already done and the work the new attorney can reasonably be expected to do and mutually agree it would be reasonable and

proportionate to divide the one-third contingency fee equally between them. That agreement to equally divide the fee ought to be enforceable as long as both attorneys do everything they are supposed to do on behalf of the client. It should not matter whether the case settles shortly after the being turned over to new the trial attorney and the original attorney has done the majority of the work or whether the new trial attorney in preparing for and trying the case and its appeal expends more effort than either party thought would be necessary. Like the original contingent fee contract with the client, normally the validity of the fee sharing contract should be judged on the facts at the time the contract was made.

This is in accord with what this Court held in *Mortgage Inv. v. Citizens Bank*, 278 Md. 505, 510, 366 A.2d 47, 50 (1976), a case where a note provided for an attorney's fee of 15% of recovery. When the note was not paid, suit was filed and judgment was entered for the amount due on the note as well as over \$150,000 in attorneys' fees representing 15% of the amount judgment. On appeal the primary contention was that the judgment for attorneys' fees was grossly excessive based on the amount of legal work necessary to file suit on the note. This Court recognized that it had to reconcile several doctrines including "first, the inherent power of a court to oversee the activities of members of its bar ... [and] second, the rights of parties to make such contracts as they please, so long as they are consistent with law." 278 Md. at 508-09, 366 A.2d at 49 (citations omitted). This Court upheld the fee because the agreement was one entered into by informed and sophisticated contracting parties, and it should be enforceable even though ultimately the amount due at the time of suit made the 15% attorneys' fee unreasonably high. We stated:

“While the amount of the collection fee may be regarded as grossly disproportionate to the amount of work involved, it must be remembered that [the defendant] was an informed and sophisticated borrower, entirely familiar with banking practices.”

278 Md. at 510, 366 A.2d at 50.

The single dissenting judge made an argument similar to that made by Post in the instant case. The dissenting judge, although perhaps not accurately characterizing the majority opinion, complained that:

“The Court tacitly concludes that a contract provision providing for an attorney's fee should be treated in the same manner as any other provision in a contract; for example, an attorney's fee provision is void only if there is clear evidence of overreaching. I believe, however, that provisions for attorneys' fees fall in a separate category because of our supervisory role over attorneys, who are, after all, officers of the Court. The majority, of course, recognizes that because attorneys are officers of the Court, the Court possesses the power to uphold the highest standards of professional conduct and to protect the public from imposition by the practitioner. This power should be exercised when necessary to merit 'the respect and confidence of ... the society which (an attorney) serves.' American Bar Association, Code of Professional Responsibility, Preamble (1975). Achievement of this objective compels, in circumstances such as are present here, special treatment for contracts for attorneys' fees.

The Code of Professional Responsibility provides the touchstone against which we should measure an attorney's conduct:

'(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or *clearly excessive* fee.

(B) A fee is clearly excessive when, after a review

of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is *in excess of a reasonable fee....*' Code of Professional Responsibility, Disciplinary Rule 2-106(A), (B), Maryland Rules App. F (emphasis added).

These rules are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. American Bar Association, Code of Professional Responsibility, Preliminary Statement (1975). The majority apparently would permit attorneys to collect excessive fees, while not permitting them to enter into unconscionable agreements for excessive fees. I doubt that the public will draw such fine distinctions in assessing its confidence in attorneys." (Emphasis added).

Mortgage Inv., 278 Md. at 511-12, 366 A.2d at 50-51. In *Mortgage Inv.*, we recognized that ordinarily when a question is raised about the reasonableness of a contingent fee contract the relevant period is the time of contracting. The contract initiated by Post to give Bregman 13% (40% on one-third) of any fee recovered was not shown to be other than a reasonable attempt to ethically divide the contingent fee. Absent special circumstances not present in the instant case, our ethical evaluation of a fee division contract should be based on whether the contract was proper and ethical when entered into, not based on fortuitous events that occurred after the contract. There was no claim that Bregman breached his contract, and he should not be required to "ethically" justify his contractual claim by proving the percentage of the work he actually performed equaled his percentage of the fee.

Many of the cases cited by the majority in support of its position are referral fee cases where a fee was claimed by an attorney who did nothing more than refer a case. States are

not in agreement about whether there should be a public policy against charging a fee for doing nothing more than referring a case to another attorney. *See Carroll J. Miller, Annotation, Validity and Enforceability of Referral Fee Agreement Between Attorneys*, 28 A.L.R. 4th 665 (1984). Had this been a contract to pay Bregman a substantial portion of the contingent fee for merely referring the case, the contract itself might have been unethical and thus unenforceable. That issue, however, need not be decided in the instant case. Where a lawyer who has worked on a case gets permission from the client to refer the case to another lawyer to handle the trial and the two attorneys agree on a reasonable division of the contingent fee, normally the agreement should be enforceable unless at the time the agreement was entered into it contemplated an unethical split. That is what we held in *Vogelhut*, and it is what we should hold in the instant case. Referral of cases can often benefit the client and referral agreements should not be considered improper where the referring attorney has performed work on the client's case and the contracting attorneys agree that the fee division approximates the proportion the work done by the referring attorney bears to the work anticipated to be done by the trial attorney.

When a client comes to an attorney with a case that will potentially generate a very large fee, most attorneys will be reluctant to turn down the case. Cases that potentially can result in very large contingent fees generally will be vigorously opposed by highly competent counsel and often require extraordinary skill and expertise. An attorney who takes such a case and comes to realize the client might be better served by another attorney with greater skill or experience should be not be discouraged from referring the case to another attorney

better able to champion the client's cause. Common sense tells us that attorneys would be reluctant to refer cases that will potentially result in contingent fees amounting to hundreds of thousands of dollars in exchange for *quantum meruit* payments for services rendered at an hourly rate. Public policy should permit a referring attorney to share in the risk of no recovery or the reward of a very large recovery as long as the fee sharing agreement is reasonable when entered into and does not adversely affect the client. That is not to suggest that highly disproportionate division of contingent fees would be permitted merely because one attorney referred the case to another. It does suggest, however, that where the referring attorney has done some work and the referring attorney as well as the new lead counsel have come to an agreement on division of a contingent fee, courts should assume both attorneys have acted ethically and arrived at a proportionate division of fees, recognizing that at the time of agreement no one is able to accurately predict how much work will be done by the new attorney or even if there will be any fee at all.

Furthermore, the attorney seeking to set aside a contingent fee sharing agreement should have the burden of proving that the agreement was unreasonable or unethical when entered into. *See* 2 ROBERT L. ROSSI, ATTORNEYS' FEES § 13:12, at 309 (2d ed. 1995). Unquestionably, Post did not and could not meet such a burden of proof, even if we assume that ultimately the division might not be the precisely proportionate division that the ethical rules seem to require.

Other courts permit attorneys in Bregman's position to recover contractual fee divisions even if the fee is not exactly in proportion to the services performed.

“When faced with an agreement between attorneys to share a legal fee in a situation where the applicable rule required that the division of fees between attorneys be in proportion to the services performed by each, many courts have given a liberal construction to that requirement. Some courts have held that such an agreement is enforceable according to its terms provided that the attorney who seeks his or her share of the fee contributed some work, labor or service toward the earning of the fee. Other courts have taken only a slightly less liberal position, stating that the respective fees need not precisely correlate with the work performed by each attorney, and that the agreed fee division should be enforced where there is a substantial division of services or responsibility.” (Footnotes omitted).

1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 4:1, at 218-19 (2d ed. 1995). *See, e.g., Schniederjon v. Krupa*, 474 N.E.2d 805, 809 (Ill. Ct. App. 1985)(noting that where attorney performed some work, labor, or service, fee sharing agreement may be enforced despite fact that actual participation in case may not have been in proportion to amount of fee claimed); *Fitzgibbon v. Carey*, 688 P.2d 1367, 1374 (Or. Ct. App. 1984)(noting that agreement between attorneys to divide a contingency fee may be enforced “even though it is claimed that the division is not directly proportional to the work performed by each” attorney), *review denied*, 695 P.2d 49 (Or. 1985).

EQUITABLE PRINCIPLES

The majority, without any citation of authority, decides that an ethical violation of Rule 1.5 (e) should be treated as an “equitable defense” and holds “principles of equity ought to be applied” to these ethical violations. ___ Md. ___, ___, ___ A.2d ___, ___

(1998)(Majority Op. at 30). The majority also holds that contracts that violate ethical rules are not “*per se*” invalid but are unenforceable unless the ethical violation is “technical, incidental, or insubstantial” or unless it would be “manifestly unfair and inequitable” not to enforce the unethical agreement. ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 28). This vague, amorphous “equitable” test for contract enforcement is not the law anywhere else, and is at best problematic. For example, what variance between an ethical fee and the actual contractual fee would constitute an “insubstantial” difference justifying enforcement of the unethical agreement? Can clients also use this “equitable” test to abrogate contingent fee contracts either because the case settled before the attorney had to do very much work or because the recovery was lower than the attorney and client expected? Will lead counsel be able to avoid paying the agreed upon percentage of the contingent fee to associate counsel by not assigning the same proportion of the work as associate counsel’s proportion of the fee?

Although I do not subscribe to the majority’s equitable principles defense, if equitable principles are going to be applied, then as a matter of law the clean hands doctrine and equitable estoppel should bar Post from challenging the fee division contract he proposed and prevent him from keeping the full one-third of the fee without having to justify his own fee by proving he did one-third of the legal work. The Court remands the case so that Post can assert an “equitable defense” that would allow Post to keep some or all of the fee he contracted to give to Bregman even though Post proposed this fee division and Bregman did not breach the contract. That equitable defense does not seem very equitable. Where the

agreement between two attorneys is proven to be an unethical division of the fee or an attempt to evade the ethical rules, both attorneys should be required to prove what they are entitled to in *quantum meruit* and neither attorney should be permitted to keep a disproportionate share of the fee. If this agreement is not enforceable then Post as well as Bregman should have to justify their percentages of the fee and any portion of the fee not justified by either attorney should go to the client and not be retained by Post. If the Court is going to remand the case to the trial court we should expressly direct that the client be made a party to the proceedings and any portion of Bregman's contractual fee not recoverable by Bregman should go to the client not to Post. It seems obvious that Mr. Simon did considerable work on the Taylor case yet he and his firm received no part of the fee. If the fee is not going to be divided in conformity with the attorneys' contracts, then Simon's proportionate share as well as Bregman's unearned share of the fee should be refunded to the client rather than being an unethical, unearned fee windfall for Post. Isn't allowing Post to keep more of the fee than he can prove he earned at least as unethical as allowing Bregman to recover more of the fee than he can prove he earned?

The trial judge did not hold that a violation of the Rules of Professional Conduct could never void a fee division agreement; the judge held that under the circumstances of the instant case Bregman's efforts on the client's behalf justified his contractual 13% of the fee even if conceivably there might have been a violation of Rule 1.5 (e) because Bregman did not prove his efforts constituted 13% of the total legal work. There is no proof that the fee sharing agreement was unreasonable or unethical at the time it was entered into, and there

was no proof of any breach by Bregman, so he should be entitled to enforce the agreement. Post's ethical argument was properly held by the trial judge not to constitute a defense to Post's contract to pay Bregman 40% of one-third of the fee he received from the lead attorney. This Court should affirm the judgment entered below. I respectfully dissent.

Judge Eldridge has authorized me to state that he joins in this dissenting opinion.