No. 22287 - The Committee on Legal Ethics of The West Virginia State Bar v. James R. Sheatsley, a member of The West Virginia State Bar

Cleckley, Justice, concurring:

Although I agree with the majority opinion, I feel compelled to file a concurring opinion to voice my objection to any future expansion of the majority's holding to encompass the area of arrangements for contingent fees for expert witnesses.

In West Virginia, "a contract to pay a witness for testifying[,] coupled with the condition that the right of compensation depends upon the result of the suit in which his testimony is used, is contrary to public policy and void for the reason that it leads to perjury and the perversion of justice." Ealy v. Shetler Ice Cream Co., 108 W. Va. 184, 189, 150 S.E. 539, 541 (1929). (Citations omitted).[1] The impact of this rule on less

[1]See also Rule 3.4(b) of the Rules of Professional Conduct, which states: "A lawyer shall not . . . (b) . . . offer an inducement to a witness that is prohibited by law[.]" DR 7-109(C) of the former Code of Professional Responsibility provided, in part: "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case." EC 7-28 recognized that lawyers may pay an expert witness a reasonable fee for his services as an expert, but added that "in no event should a lawyer pay or agree to pay a contingent fee to any witness."

affluent litigants who seek to engage expert witnesses has combined with the evolution of constitutional doctrines to require a reexamination of our "public policy."

Section 17 of Article III of the West Virginia Constitution provides: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

Under our precedents, the Open Courts Clause in Section 17 establishes a right of access to the courts and further embraces an equal protection component with regard to such access. Section 17 "guarantees that all litigants, regardless of financial ability, are entitled to equal access to the judicial system." Johnson v. Stevens, 164 W. Va. 703, 706, 265 S.E.2d 764, 766 (1980). Accordingly, we have relied on Section 17, among other things, to confer upon criminal defendants (1) a right to appeal their convictions, Rhodes v. Leverette, 160 W. Va. 781, 239 S.E.2d 136 (1977); (2) a right to effective assistance of counsel and to a transcript at the State's expense if a criminal defendant cannot afford them, Rhodes, supra; (3) a right to paid counsel for indigents in parole revocation proceedings, Dobbs v. Wallace, 157 W. Va. 405, 201 S.E.2d 914 (1974); and (4) a right to consult privately with their attorneys free of obstruction from prison officials, State

ex rel. McCamic v. McCoy, 166 W. Va. 572, 276 S.E.2d 534 (1981). We also resorted to Section 17 to hold that any citizen can present a complaint to a grand jury. State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981).

On the civil side, we have recognized that invoking the jurisdiction of our courts is a fundamental right. Thus, an employee fired because he sued his employer can state a claim for relief for retaliatory discharge. McClung v. Marion County Comm'n, 178 W. Va. 444, 360 S.E.2d 221 (1987); Cf. Webb v. Fury, 167 W. Va. 434, 282 S.E.2d 28 (1981), overruled on other grounds, Harris v. Adkins, 189 W. Va. 465, 468, 432 S.E.2d 549, 552 (1993). Furthermore, the State may not deny a hearing to indigent litigants because they cannot post a double property value bond, State ex rel. Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972), or pay the costs of service of process by publication. Johnson, supra. Finally, Section 17 confers a fundamental right upon civil litigants to represent themselves. Blair v. Maynard, 174 W. Va. 247, 324 S.E.2d 391 (1984).

[2]The Legislature also supported the goals of Section 17 by providing, inter alia, indigent criminal defendants not only with counsel, but also with investigative services, counsel's travel expenses, and expert witnesses. W. Va. Code, 29-21-1, et seq. The State helps indigent civil defendants by supporting legal services for the poor through IOLTA (Interest on Lawyers Trust Accounts) funds and filing fees and by providing for in forma pauperis actions.

Viewed collectively, our cases applying the Open Courts Clause establish at least two guarantees: (1) the right of civil litigants to obtain judicial hearings of their grievances free from unnecessary obstacles or retaliation, e.g., McClung, supra; Johnson, supra; State ex rel. Payne, supra; and (2) the right of criminal defendants not only to trial and appeals but also to meaningful chances for full and fair treatment. Section 17 clearly does not confer the same benefits on civil litigants that it does on criminal defendants. The relative interests of the two groups are distinct, and special obligations may fairly be imposed on the State in the criminal process. In criminal cases, unlike civil litigation between private citizens, the State is bringing all its power and resources to bear upon individual citizens. Therefore, Section 17 does not impose on the State any duty to provide civil litigants with counsel, transcripts, or expert witnesses. Section 17 does ensure, however, that the State cannot, without adequate justification, erect obstacles to the litigants' ability to secure

[3]The Open Courts Clause also supplied the basis for other rights unrelated to this case, including a right of the public to attend criminal proceedings, State ex rel. Herald Mail Co. v. Hamilton, 165 W. Va. 103, 267 S.E.2d 544 (1980), and to have access to lawyer disciplinary matters. Daily Gazette Co., Inc. v. Committee on Legal Ethics, 176 W. Va. 550, 346 S.E.2d 341 (1985).

a meaningful opportunity to present their cases effectively. E.g., Blair, supra; Johnson, supra.

Not every regulation of the civil litigation process, however, must give way to ease the litigants' burdens. The State may be able to justify reasonable burdens. When examining whether a governmentally imposed obstacle to meaningful judicial resolution of a claim can satisfy Section 17's rigorous standards, a court should consider: (1) the extent to which the regulation actually obstructs meaningful access; (2) the degree to which the prohibited conduct actually threatens important State interests; and (3) the existence of alternatives that might meet the State's legitimate concerns without imposing the obstacle.

Looking at the first of these factors, the ban on contingent fees for experts can seriously impair the ability of less affluent litigants to effectively present their cases. Unquestionably, and increasingly, in our ever more complex and technical world, litigants need the assistance of experts to establish their claims and defenses. Equally incontrovertible is the fact that experts are expensive. Even if a lawyer advances the money for an expert, the ultimate obligation to pay for the expert normally remains with the litigant. Thus, many litigants who do

not have substantial financial resources (i.e., not only the indigent but also a sizeable portion of the great middle class) will either be unable to hire an expert or will be dissuaded from hiring an expert because of the potential liability for paying his or her fee. On the other hand, if the litigants could contract with an expert on a contingent fee basis, they know they will either have the money to pay for the expert, through damage awards, fee-shifting statutes, or, for defendants, from money otherwise needed to pay a judgment, or they will not be liable to pay the fee. As a consequence, our rule against contingent fees for experts discriminates against the less affluent in their ability to obtain a fair and meaningful ruling on their claims and defenses. The discrimination becomes invidious when a person without substantial means must litigate against a well-financed opponent who has hired an expert.

[4]In referring to the usefulness of expert assistance under the "meaningful access to justice" contention in the criminal context, the United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985), stated that "[w]ith such assistance, . . . [a party]. . . is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination. . . . In such a circumstance, where the potential accuracy of the jury's determination is so drastically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield."

As to the second factor, the State's interests, the State certainly has legitimate and important interests in preventing perjury and the perversion of justice. See Ealy, supra. As maintained by the Second Circuit in Person v. Association of the Bar of the City of New York, 554 F.2d 534 (2nd Cir.), cert. denied, 434 U.S. 924, 98 S. Ct. 403, 54 L.Ed.2d 282 (1977), a legislature rationally may conclude that contingent fees for experts enhance the likelihood that they will embellish their testimony in order to be paid or that the contingent nature of a fee might even induce perjury. See also, Cresswell v. Sullivan & Cromwell, 704 F. Supp. 392, 401-02 (S.D.N.Y. 1989), modified on other grounds, 922 F.2d 60 (2d Cir. 1990). Two critical factors, however, distinguish these precedents. First, they did not consider the impact of Section 17. For instance, the Court in Ealy did not address any constitutional arguments against the rule. Moreover, the relevant doctrines clearly had not developed when Ealy was decided. Likewise, Person is not dispositive because that court was bound only by the Federal Equal Protection Clause, under which the contingent fee bar needed to satisfy merely the rational basis standard rather than the more rigorous scrutiny required by Section 17. Second, in this case, there is no need for any deference to a legislative judgment. Ealy set forth a judge-made rule, and under Sections 1 and 3 of Article

VIII of the West Virginia Constitution, this Court has the ultimate and unqualified responsibility for establishing the rules for conducting litigation and for the conduct of the Bar.

While no one could question the legitimacy of preventing perjury and perversion of the judicial process, one seriously could question whether contingent fees for experts would, in fact, create any greater likelihood of causing such evils than our current system. As is presently the case, an expert is retained for litigation only when the expert's opinion supports the position of the engaging litigant. Thus, there is already a built-in economic incentive for experts seeking to be engaged to shape their testimony to fit their contractors' needs. Moreover, many experts have an ongoing (or recurrent) professional relationship with those who hire them or have an economic interest in staying in the good graces of their patrons.

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[5]Section 1 of Article VIII provides: "The judicial power of the State shall be vested solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts."

Section 3 of Article VIII states, in part: "The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law."

Finally, as to the third factor, an easy alternative is available to counter the potential for perjury, that is, courts may allow, as they already do, opposing parties to cross-examine experts on the nature and size of their fees, and this may be extended to include whether their fees are contingent. Moreover, as John H. Wigmore "consistently [has] maintained[,] . . . cross-examination [is] indeed the best vehicle for the discovery of the truth. See [5] Wigmore on Evidence, . . . § [1367], at [32 (Chadbourn rev. 1974)]. See also State v. Thomas, 187 W. Va. 686, [691,] 421 S.E.2d 227[, 232] (1992) ('[c]ross-examination is the engine of truth')." 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 6-6(D)(1) at 655 (3d ed. 1994). Thus, the jury will have the information before it, and the jury can weigh that information along with all the other evidence presented.

To be sure, some scrutiny of contingent fees for experts must be maintained. Fees certainly must be reasonable both in the rate of pay promised and in their relationship to the services rendered. Thus, a percentage fee, that is a fee promising a percentage of a plaintiff's damage award, would be inherently unreasonable. Such regulatory measures merely emphasize, however, that reasonable alternatives exist to meet the interest of the State

in sustaining the integrity of the judicial process without creating obstacles that impair meaningful access to that process for the less fortunate in our State. Moreover, by preventing many litigants from putting their best cases forward, obstacles such as the contingent fee ban might threaten the integrity of the process more than they protect it with their meager or illusory contribution to encouraging honest testimony.

I am authorized to state that Justice Neely joins in this concurring opinion.