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Professional Responsibility -- A Constitutional Challenge to Disciplinary Rule 7-109(C)

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Professional Responsibility—A Constitutional Challenge to Disciplinary Rule 7-109(C)

In a recent and unprecedented decision[1] a federal district court ruled that the application of Disciplinary Rule 7-109(C)[2] of the New York State Code of Professional Responsibility,[3] which prohibits the payment of expert witnesses on a contingent fee basis, violates the equal protection and due process clauses of the fourteenth amendment. The memorandum and order in *Person v. Association of the Bar of New York*[4] grants to all litigants in the Eastern District of New York involved in civil actions the right to retain expert witnesses on a contingent payment basis. The court premised its holding on a finding that the rule "must particularly forbid to the less affluent and to the indigent a means of obtaining an equal hearing to that accorded to a more affluent adversary in the same case."[5] *Person* marks an unwarranted expansion of the due process and equal protection tests prescribed by the United States Supreme Court[6] and heralds the disintegration of a heretofore unquestioned standard of legal ethical conduct.[7]

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1. Person v. Association of the Bar of New York, 414 F. Supp. 144 (E.D.N.Y. 1976).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-109(C) provides:

> 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. But a lawyer may advance, guarantee, or acquiesce in the payment of:
> (1) Expenses reasonably incurred by a witness in attending or testifying.
> (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
> (3) A reasonable fee for the professional services of an expert witness.

3. The instant case dealt specifically with the Lawyers Code of Professional Responsibility promulgated by the Association of the Bar of New York City. Reference will be made, however, to the ABA Code of Professional Responsibility, since the New York Bar and every state bar association (with the exception of California) have adopted the ABA Code of Professional Responsibility in whole or in part. *See* ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY i (unverified draft 1975).

4. 414 F. Supp. 144 (E.D.N.Y. 1976).

5. *Id.* at 146.

6. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 377-80 (1971) (absent countervailing state interest of overriding significance, persons forced into judicial process must be given a meaningful opportunity to be heard; a person may not be deprived of a fundamental right regardless of validity of the legitimate exercise of state power); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (reasonable basis test); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (compelling governmental interest necessary to penalize the exercise of a constitutional right).

7. *Cf. In re* Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911) (holding contingent compensation agreements with witnesses violative of public policy); S. WILLISTON, CONTRACTS § 1716, at 879 (3d ed. 1972) (stating the basic premise of the

Person,[8] an attorney prosecuting an antitrust case, applied for the convening of a three judge court[9] to enjoin the enforcement of DR 7-109(C).[10] He alleged *inter alia* that the cost of the antitrust litigation had become so prohibitive that his client, plaintiff in the pending litigation, could not bear the expense of hiring an expert witness, although in contrast, wealthy industrial defendants in such cases usually could afford and did retain experts to aid in their defense.[11] It was further alleged that the application of the rule resulted in a legally enforced disparity in treatment that transgressed the litigant's constitutional right to access to the courts.[12] Person reasoned that the denial of the right to retain an expert witness essentially denigrates the right to litigate fully one's civil action, since expert testimony is often indispensable in the prosecution of antitrust litigation.

After a consideration of New York law,[13] the district court found

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rule); ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 98-99 (unverified draft 1975) (no state has made significant changes in the rule).

8. A question arose whether Person had standing to bring suit on behalf of his clients. Judge Dooling addressed this point in cursory fashion as follows:

> It is the plaintiff who is the one directly restricted by the Rule and rendered less effective than . . . he would be if able [to retain] expert testimony uninhibited by [DR 7-109(C)] . . . .
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> . . . [B]ut while the disciplinary rule, of necessity, directly affects the lawyer, it affects the client's underlying interest [in having genuine access to the courts] more drastically.

414 F. Supp. at 145.

The case was decided on the basis of the client's right of access to the courts. In regard to whether Person's interest and his relationship to his clients were substantial enough to confer standing upon him, see Singleton v. Wulff, 96 S. Ct. 2868, 2871-76 (1976); Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

9. Pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 988 (formerly 28 U.S.C. § 2281 (1970)), which required that no injunction restraining the enforcement, operation or execution of any state statute due to its unconstitutionality shall be granted unless the application therefor is heard and determined by a district court of three judges. This statute was later repealed. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

10. Person v. Association of the Bar of New York, 414 F. Supp. 139 (E.D.N.Y. 1976). Two opinions are dealt with in this Note. The first, reported at 414 F. Supp. 139 (E.D.N.Y. 1976), dealt with the denial of the convening of a three judge court. The second, reported at 414 F. Supp. 144 (E.D.N.Y. 1976), declared DR 7-109(C) unconstitutional.

11. 414 F. Supp. at 140. It was also alleged that experts who regularly testify for large industrial concerns are influenced as expert witnesses due to a continuing relationship between the two. *Id.*

12. *Id.*

13. *Id.* at 143. The court cited *In re* Schapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Laffin v. Billington, 86 N.Y.S. 267 (App. Div. 1904); and ASSOCIATION OF THE BAR OF NEW YORK COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 213 (1932) & No. 76 (1927-1928), all of which give support to DR 7-109(C). Wellington v. Kelly, 84 N.Y. 543 (1881), stands as virtually the only New York case allowing a contingent payment agreement with a witness for the production of critical testimony.

that the New York State Bar Committee would not likely acquiesce in Person's prospective violation of DR 7-109(C) in view of that state's strong renunciation of contingent payments to witnesses.[14] Since Person had not as yet contracted with an expert witness, however, any enforcement of DR 7-109(C) in the form of a disbarment proceeding was necessarily premature.[15] Therefore, the district court correctly denied Person's motion to convene the three judge panel.

Three months later Person moved for a summary declaratory judgment[16] to invalidate DR 7-109(C) based essentially on the allegations filed in the earlier action.[17] The court accepted without question plaintiff's contention that he was disadvantaged in the pending antitrust case because of his client's financial inability to obtain accounting and economic testimony.[18] Apparently without supporting facts, the court also accepted that this predicament recurred frequently in the plaintiff's antitrust practice.[19] Having identified a pattern of "recurrent" discrimination as a result of imminent state enforcement of DR 7-109(C), the court, relying on *Boddie v. Connecticut*[20] and *Winters v. Miller*,[21] found a deprivation of plaintiff's access to the courts. In light of traditional constitutional practice,[22] the court then balanced the denial of plaintiff's access to the courts with the basis and purpose of the rule.

The court observed that DR 7-109(C) condones non-contingent payment to expert witnesses if such payment is reasonably measured by time spent by the expert, difficulty of the problem, and the inconvenience imposed upon the expert.[23] The recognition of a reasonableness requirement in DR 7-109(C) indicated to the court the ABA's awareness that any payment to an expert witness might prove an incentive to untruthful testimony. On that basis, the court concluded that

14. 414 F. Supp. at 143.
15. *Id.* at 141, 144.
16. 414 F. Supp. at 144.
17. *Id.* at 145.
18. *Id.*
19. *See id.*
20. 401 U.S. 371 (1971).
21. 446 F.2d 65 (2d Cir. 1976).
22. The court concluded that the case was partly governed by United States v. Kras, 409 U.S. 434 (1973) (no denial of due process or equal protection when indigents are incapable of paying filing fees in bankruptcy proceedings); Lindsey v. Normet, 405 U.S. 56 (1972) (double-bond prerequisite for appealing a forcible entry and detainer action a violation of equal protection); and Boddie v. Connecticut, 401 U.S. 371 (1971) (denial of due process when indigents incapable of paying court fees denied access to court in divorce proceedings). 414 F. Supp. at 145.
23. *Id.* at 146.

contingent payment to an expert witness will create no more of an incentive for perjury than any other payment if the contingent payment is reasonable.[24] Stated another way, the court found no good reason for the exclusion of contingency of payment as a relevant factor in a determination of reasonableness of payment. Thus, when the right to full and equitable litigation was balanced against a rule of questionable effectiveness and validity[25] that categorically denied a less than affluent party the right to retain an expert witness, the court determined the application of DR 7-109(C) to be "too irrational to survive Fourteenth Amendment analysis."[26]

The court in *Person* did not clearly indicate which form of "Fourteenth Amendment analysis" was applied in the invalidation of DR 7-109(C).[27] Under both due process and equal protection analysis the Supreme Court in recent years has steadfastly employed a balancing test in cases in which personal and state interests are in conflict.[28] Inherent in this balancing test is the necessity that the infringed right be of a "fundamental" nature, or at least of a certain "constitutional level."[29] The determination of whether the individual or state right will take precedence is achieved through a weighing of the significance that the court gives to the underlying rationales of the two conflicting interests.[30] In the due process cases the state must adduce a "countervailing"[31] interest to overcome a claimant's personal right; in the equal protection cases the state must exhibit a "compelling governmental interest."[32] The distinction is largely one of semantics.

Alternatively, if the right sought to be preserved does not achieve a level of constitutional importance, the Supreme Court has applied a rational justification test.[33] Under this less stringent test, the consti-

24. *Id.*

25. *Id.* at 146. The court stated:

> The interest in access to the courts on a basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a constraint that is not adapted to effective achievement of its professed goal and which exacts a sacrifice which must, in any case, be disproportionate to the merely conjectured probability of occurrence of the wrong aimed at.

Id.

26. *Id.*

27. *See* note 22 *supra.*

28. *See* cases cited note 6 *supra.*

29. *See, e.g.*, United States v. Kras, 409 U.S. 434, 444 (1973).

30. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1968).

31. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

32. Shapiro v. Thompson, 394 U.S. 618, 634 (1968).

33. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972).

tutionality of a law is upheld upon a showing that it rests upon a non-arbitrary and rational basis.[34]

In *Boddie v. Connecticut*,[35] a case upon which the court in *Person* heavily relied, appellant welfare recipients challenged Connecticut's requirements for payment of court fees alleging that such costs denied them access to the courts in their attempt to bring an action for divorce.[36] The decision, sounding in due process, recognized the basic importance to the public interest of the marriage relationship,[37] the indispensability of access to the courts in dissolving a marriage,[38] and the state's "monopoly" in the control of the marriage relationship.[39] Having established the importance of access to the courts, the Supreme Court balanced it against any possible countervailing state interest of overriding significance, and, finding none sufficient,[40] ruled that the requirement of the fee denied appellants due process. The Court, however, tempered its holding with a caveat:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for . . . in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.[41]

Although *Boddie* was determined solely on due process grounds, its rationale can be logically applied to cases arising under the equal protection clause, particularly when the essential grievance to be redressed is that of invidious discrimination whereby a fundamental right has been denied.[42] The line of demarcation between due process and

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34. *Id.* at 79.

35. 401 U.S. 371 (1971).

36. *Id.* at 372.

37. *Id.* at 377; *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

38. 401 U.S. at 381 & n.8 (citing Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1056, 296 N.Y.S.2d 74, 87 (Sup. Ct. 1968)).

39. 401 U.S. at 374. These factors led the majority of the Court to the view that "although [appellants] assert here due process rights as would-be plaintiffs, we think [their] plight . . . is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes." *Id.* at 376.

40. *Id.* at 380-82. The state's interests were (1) "prevention of frivolous litigation," (2) "use of court fees and process costs to allocate scarce resources," and (3) the "balance between the defendant's right to notice and the plaintiff's right to access." *Id.* at 381.

41. *Id.* at 382-83.

42. Mr. Justice Douglas in his concurrence with the result achieved by the majority in *Boddie* criticized the mode of decision stating:

equal protection has never been clearly defined, and, in many instances both have been applied to the same set of circumstances.[43] In *United States v. Kras*,[44] decided two years after *Boddie*, the Supreme Court held that denial to Kras of access to a discharge in bankruptcy due to his inability to meet fee requirements was not a denial of due process nor of equal protection of the law.[45] The district court,[46] relying on *Boddie*, had ruled that the required fees served to deny Kras "his Fifth Amendment right of due process, including equal protection."[47] It also held that a discharge in bankruptcy was a "fundamental interest" that could be denied only when a "compelling government interest" was demonstrated.[48] In reversing the district court, the Supreme Court delimited and clarified its holding in *Boddie*,[49] which theretofore had been seen by some as a gateway to increased procedural rights for indigent civil litigants tantamount to those afforded indigent defendants in criminal actions.[50]

> The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. . . .
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> . . . .
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> An invidious discrimination based on poverty is adequate for this case
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> . . . .
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> . . . Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.

Id. at 384-85, 386. Mr. Justice Brennan in his concurrence simply stated: "The validity of this partial denial . . . can be tested as well under the Equal Protection Clause." *Id.* at 388.

43. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (in criminal proceedings due process requires that all persons have access to the courts; equal protection requires that the poor have the same access as the wealthy); *see, e.g.*, United States v. Kras, 409 U.S. 434 (1973); Nebbia v. New York, 291 U.S. 502 (1934).

44. 409 U.S. 434 (1973).

45. *Id.* at 443-46.

46. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971).

47. *Id.* at 1212.

48. *Id.* at 1214.

49. *Boddie* was distinguished on several grounds: (1) access to courts is not the only conceivable relief available to bankrupts; (2) the interest in a discharge in bankruptcy does not attain the same constitutional level of fundamentality as the interest in the dissolution of the marital relationship; and (3) "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." 409 U.S. at 446. The Court, upon these determinations, found the rational justification test a more appropriate test of the fee requirement's validity and dispensed with the more stringent fundamental rights test. *Id.* at 445-49.

50. *See, e.g.*, Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971), *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1969), in which Mr. Justice Black, the only dissenter in *Boddie*, evidenced a change of heart:

> In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. . . .

Two predicates emerge from *Kras*: (1) in civil cases the fundamentality of the right of access to the courts is made contingent upon the nature of the wrong sought to be redressed; and (2) if the underlying right is not of a substantial constitutional level such as the right to free speech or marriage the appropriate test is the "rational justification" test and not the "compelling governmental interest" test applied in *Boddie*.

The court in *Person* summarily dispensed with *Kras* in the belief that that decision was based primarily on the assumption that alternatives to bankruptcy appeared to be available in that case and that no such alternatives to antitrust litigation are available.[51] It would appear, however, that there are as many alternatives to antitrust litigation as there are to bankruptcy.[52] Thus *Person* and *Kras* are not logically distinguishable on this ground and are perhaps even analogous.

It is difficult to ascertain the true nature of the right actually sought to be protected in *Person*. The court apparently believed it was protecting plaintiff's right of access to the courts.[53] This view is somewhat misguided, however, since DR 7-109(C) prohibits payment to expert witnesses on a contingent basis and affects only the quality of the case, not the right to commence litigation. The deprived litigant is not denied access to the courts, but only the aid of an expert witness.[54]

> [P]eople might recognize that this constitutional decision will eventually extend to all civil cases but believe that it can only be enforced slowly . . . so that the country will have time to absorb its full import.

Id. at 955-56.

51. 414 F. Supp. at 145.

52. The primary alternative offered by the court in *Kras* was negotiated agreement with the bankrupt's creditors. The alternative to antitrust litigation would similarly be a settlement. Neither possibility is particularly viable. Observations such as this led Justice Black, in his dissent from the denial of certiorari in several access to the court cases, to conclude that exclusivity of redress in the courts was no limit at all to open access to the courts. This was premised on the fact that the "States and the Federal Government hold the ultimate power of enforcement in almost every dispute" and that "the alternatives [to litigation in other areas of law] are exactly the same as in a divorce case." Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 956-57 (1971), *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1969).

53. In *Person*, the court cited as supporting its decision Winters v. Miller, 446 F.2d 65 (2d Cir. 1971) (forced medication on a woman of questionable sanity in violation of her belief in the Christian Science faith held violative of her first amendment rights without a prior adjudication of her sanity having been made). 414 F. Supp. at 146. In *Winters* the court stated: "Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal." 446 F.2d at 71.

54. Reliance on the right to an expert witness in *Person* necessarily imports an expansion of procedural due process in civil trials. Such procedural rights as this, though afforded to criminal defendants, have been extended no further than *Boddie* (as limited by *Kras*) permits. *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam). The

Even if the right in issue is conceded to be plaintiff's access to the courts—on the assumption that denial of an expert essentially denies one a proper trial—it is apparent, in light of *Kras*, that in *Person* that right cannot be considered to be of a fundamental nature as it was found to be in *Boddie*. It is evident that the right to vindicate one's property rights in antitrust litigation is more closely akin to the right to a discharge in bankruptcy than to the right to the dissolution of a marriage. Like the right to seek a declaration of bankruptcy,[55] the right to bring an antitrust action[56] is a statutorily created benefit of Congress, and is not of a constitutional nature.[57] Furthermore, in the antitrust situation, as in the bankruptcy case, there is no "adjustment of . . . fundamental human relationship[s]"[58] at stake as was the case in *Boddie*. Consequently New York should only have been required to show that it had a rational basis in enforcing DR 7-109(C) to the purported disadvantage of impoverished litigants.

On its face, DR 7-109(C)[59] exhibits a compelling state purpose in maintaining the integrity of the judicial system. The payment to a witness of an amount contingent upon the outcome of the case and in some instances upon the favorable content of the witness' testimony can serve only as an invitation to prevarication. Such concern is magnified in the case of the expert witness whose testimony is "difficult, often inscrutable and, therefore, especially open to calculated distortion."[60] The court in *Person*, however, attacked not the premise upon which the rule was based, but the application of the rule in categorically denying to all litigants, regardless of the intent of the parties or the reasonableness of the agreement, the ability to retain an expert on a contingent payment basis.[61]

Prior to the ABA's adoption of the Code of Professional Responsibility in 1969, no specific prohibition against contingent payment to expert witnesses had been enunciated. Before its amendment in 1937,[62] Canon 39, the predecessor to DR 7-109(C), provided that any

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general sentiment, however, is to the contrary. *See* note 49 *supra*; Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968); Note, *The Indigent's Right to Counsel In Civil Cases*, 76 YALE L.J. 545 (1967).

55. 11 U.S.C. § 11 (1970).
56. 15 U.S.C. § 15 (1970).
57. *See* United States v. Kras, 409 U.S. 434, 446-47 (1973).
58. Boddie v. Connecticut, 401 U.S. 371, 383 (1971).
59. *See* note 2 *supra*.
60. 414 F. Supp. at 142.
61. 414 F. Supp. at 146.
62. ABA CANONS OF PROFESSIONAL ETHICS No. 39.

compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel.[63] Implicit in this rule was the possibility that an attorney, if forced to acquire an expert witness on a contingent payment basis, might do so if the court were informed of the agreement.

In re Schapiro,[64] a New York decision, illustrates the basic approach that courts have taken in dealing with contingency fees for expert witnesses. Schapiro, an attorney, was coerced by a physician into entering a contingent fee agreement on threats that if forced to appear under subpoena the physician would testify adversely to the attorney's cause unless he were paid one-third of the judgment in the case.[65] At trial, the doctor had testified on cross-examination that he had no interest in the litigation whatsoever. Schapiro was disbarred for gross misconduct in acquiescing to the physician's demands and failing to inform the court of the witness' substantial interest in the case.[66]

Paramount in the *Schapiro* court's analysis was a judicial concern for the maintenance of the orderly and efficient administration of justice. Such contingent witness payment contracts, regardless of the form of the arrangement, were condemned as violative of public policy in their tendency to promote perjured testimony and unjust awards from juries unaware of biased testimony.[67] Nevertheless, the court did recognize that the attorney had a duty to inform the court of the unlawful agreement so that the jury in its consideration of the testimony could weigh its credibility.[68]

Despite a sparse caselaw foundation,[69] it appears that the absolute prohibition against contingent payment to expert witnesses is founded on the policy exemplified by *In re Schapiro*. However, a literal reading of the rule allows no credence to the implication that informing a jury

63. ABA OPINIONS OF THE COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES WITH ABA CANONS OF PROFESSIONAL ETHICS No. 39.

64. 144 App. Div. 1, 128 N.Y.S. 852 (1911).

65. *Id.* at 4, 128 N.Y.S. at 855. The physician's testimony was vital in establishing the attorney's client's recovery. *See id.*

66. *Id.* at 12, 128 N.Y.S. at 860.

67. *Id.* at 9, 128 N.Y.S. at 858-59.

68. *Id.* at 11, 128 N.Y.S. at 859-60.

69. Footnote 90 to DR 7-109(C) makes reference to *In re* O'Keefe, 49 Mont. 369, 142 P. 638 (1914). *O'Keefe* dealt *solely* with contingent payment to ordinary fact witnesses, not experts, and the court took into consideration O'Keefe's honest intentions in reducing his penalty from disbarment to suspension for 30 days. It is unusual that no reference was made to *In re Schapiro*, a case so solidly in line with the prohibition of the rule.

of an expert's interest in the outcome of a case will alleviate the possibility of unjust results from perjured testimony. Nor does the rule allow any review of the intent of the parties or of the particular factors precipitating the contingent fee arrangement.

In *Barnes v. Boatmen's National Bank*[70] the Missouri Supreme Court demonstrated a willingness to examine all aspects of a particular contingent payment relationship. It upheld a contract for the contingent payment of $25,000 to a psychiatrist testifying in a will contest. The court rejected the common presumption,[71] adopted at least vicariously by the ABA, that every contingent payment contract with an expert witness is ipso facto void as against public policy.[72]

Rule 7-109(C) permits reasonable noncontingent compensation to an expert for his time and labor in preparing to testify.[73] In *Person* the court found it irrational that reasonable compensation was permitted but that contingent compensation, regardless of its reasonableness, would never be permitted.[74] The court's analysis implies that a twenty percent stake in the outcome of a case would be considered unreasonable, whereas a payment of ten dollars an hour contingent upon success at trial would be reasonable and therefore permitted.[75] In the former arrangement the more the expert exaggerated and colored his testimony, the greater would be his compensation; such inducement would be dissipated in the latter instance. Although the inducement to perjure himself is reduced, the expert is still faced with a win or lose proposition and some incentive to lie remains. On the other hand, there appears to be no greater inducement to prevarication than is present in any case involving the testimony of an interested witness such as a party to the litigation.[76] Courts have consistently allowed interested

70. 348 Mo. 1032, 156 S.W.2d 597 (1941).

71. *See* Laos v. Soble, 18 Ariz. App. 502, 503 P.2d 978 (1972); Burchell v. Ledford, 226 Ky. 155, 10 S.W.2d 622 (1928); Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911); Griffith v. Harris, 17 Wis. 2d 255, 116 N.W.2d 133, *cert. denied*, 373 U.S. 927 (1962).

72. 348 Mo. at 1040-41, 156 S.W.2d at 602.

73. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C)(3).

74. *See* text accompanying note 24 *supra*.

75. *See* 414 F. Supp. at 146, where the court stated: "It is not meant to suggest that in the case of the expert a fee measured as a percentage of the recovery might not generally or in particular cases be regarded as *per se* unreasonable."

76. At common law interested parties were disqualified from testifying on the premise that their interest in the outcome would induce them to perjure themselves. *See, e.g.*, Taber v. Perrott & Lee, 13 U.S. (9 Cranch) 39 (1815); DeFarges v. Ryland & Brooks, 87 Va. 404, 12 S.E. 805 (1891). Exceptions were made, however, in cases where no other means of proof were available. *See, e.g.*, United States v. Murphy, 41 U.S. (16 Pet.) 203, 210 (1842).

witnesses to testify after cautioning the jury about the possible biased nature of their testimony.[77] There is no logical reason why testimony of an expert witness paid on a contingent basis could not be conditioned in the same manner.[78]

On its face DR 7-109(C) makes no distinction among different types of litigation in prohibiting contingent payment to experts. Given the necessity of expert testimony and the diverse roles experts play in certain areas of the law, however, it would appear that consideration of such factors would be warranted in a determination of the propriety of a contingent fee arrangement. It is not coincidental that the majority of disputes over contingent payment to expert witnesses have arisen in the area of personal injury suits.[79] In such cases the doctor who treated the plaintiff and who is retained on a contingent fee to give expert testimony is in a particularly favorable position to perjure himself, since he has personal knowledge of the facts of his client's treatment to which the opposing party's expert has no access. These facts may be exaggerated and distorted by the expert in his formulation of an opinion about the extent of injuries and length of recovery period in order to increase the amount of his compensation without serious refutation from an opposing expert. Conversely, in the areas of antitrust and products liability both experts have equal access to data and facts from which they formulate opinions, and an objective review of the veracity of those opinions is available to discount the injurious effects of one or both experts perjuring themselves.

These observations serve to point out some of the considerations absent in the ABA's promulgation of DR 7-109(C). A less rigid application of the language of the rule would serve to reduce the unjust results achieved when a party due to his indigency is categorically de-

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77. The common law prohibition has been put to rest and disqualification by interest has been removed by statute in almost all jurisdictions in this country. *See, e.g.*, Sanderson v. Paul, 235 N.C. 56, 61, 69 S.E.2d 156, 160 (1952); Stream v. Barnard, 120 Ohio 206, 209, 165 N.E. 727, 728 (1929). Renunciation of the prohibition was due to acceptance of the theory that it is better to receive testimony, however biased, leaving credibility of witnesses to the jury. Griswold v. Hart, 205 N.Y. 384, 395, 98 N.E. 918, 921-22 (1912).

78. *See* 31 AM. JUR. 2d *Expert and Opinion Evidence* § 181 (1967), where it is stated that "[i]t is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering [*inter alia*] . . . his possible bias in favor of the side for whom he testifies, [and] whether he is a paid witness . . . ."

79. *E.g.*, Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911); *In re* Schapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Davis v. Smoot, 176 N.C. 538, 97 S.E. 488 (1918).

nied the vital use of an expert at trial. The rule as it stands necessarily overreaches its purported goal of reducing the possibility of perjury in that it applies to all instances of contingent payment to an expert, regardless of the motivating factor behind such arrangements and regardless of the particular circumstances of the arrangement.

Nevertheless it is doubtful that such considerations are within the ambit of constitutional review in this case. The degree of scrutiny that a statute comes under in testing its rationality is commensurate with the value and significance of the interest upon which that statute purportedly infringes[80]—the higher the value of the interest, the more intense the scrutiny. An analysis of *United States v. Kras* revealed that in an access to the court case the Supreme Court centered its attention on the right to a discharge in bankruptcy.[81] The right was declared to be of an economic and social nature and therefore more deference was granted to the legislative purpose in requiring the payment of court fees[82] than was conceded in *Boddie* where marital rights were involved. Because marital rights are protected under the first amendment, the court utilized a more intense scrutiny of the statute requiring payment of court fees to find that requirement unconstitutional.[83]

Like the right to a discharge in bankruptcy, the right to bring an antitrust action is an economic right. Therefore if there is some rational basis for a law that infringes upon that right, the court will not scrutinize the application of the law intensely but will defer to what appears on the face of the statute to be a rational justification.[84] DR 7-109(C) clearly exhibits a rational basis in upholding the principles of judicial and legal ethics and in its concomitant objective of reducing fraud and perjury in civil proceedings. If precedents such as *Cohen v. Beneficial*

80. *Cf.* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 658-63 (9th ed. 1975) (summarizing old and new forms of equal protection analysis).

81. *See* text accompanying notes 44-52 *supra.*

82. *See* United States v. Kras, 409 U.S. 447-48 (1973).

83. *See* Boddie v. Connecticut, 401 U.S. 380-82 (1971).

84. Dictum in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948), exhibited the Supreme Court's reluctance to delve into the intricacies and theories supporting a state law if the law were shown to have a rational basis. Petitioners in *Cohen* challenged the constitutionality of a New Jersey statute requiring small shareholders bringing stockholders' derivative actions to post security for expenses incurred by the corporation in prosecuting the action. In upholding the statute on equal protection and due process grounds, the Court found sufficient justification for the law in its positive action taken toward alleviating the corporation's burden of dealing with fraudulent suits. And though other plausible means for achieving the result desired were feasible, the Court did not invalidate the state legislation because it failed "to embody the highest wisdom or provide the best conceivable remedies." *Id.* at 550-51. *See also* Dandridge v. Williams, 397 U.S. 471, 485-87 (1970).

Loan Corp.[85] that exhibit extreme deference to legislative purpose are given credence, alternatives to the rule will warrant little consideration in the face of a rule replete with valid, justifiable objectives and the support of a vast majority of cases.

However, the deferential manner in which a court might deal with this issue should not preclude a reconsideration of the policy behind DR 7-109(C). It is apparent that in many instances the prohibition of the rule does render an injustice. If contingent payment to expert witnesses were tempered by requirements that the payment be reasonable and that there be full disclosure to the court, jury and opposing counsel, such agreements could be permissible.

Although the decision in *Person* has no further jurisdictional reach than the boundaries of the Eastern District of New York, it may spark the ABA and state bar associations to institute changes in DR 7-109 (C). Total revocation of the rule would inevitably lead to abuses of a privilege that should be reserved for exceptional situations. Retention of the rule and its arbitrary and categorical denial of expert testimony to those who cannot afford such testimony is itself an abuse of justice. Difficulty of administration should not prevent the amendment of a rule unyielding in its absolute denial of the only means an indigent plaintiff might have for obtaining fair treatment at trial.

MICHAEL A. HEEDY

Taxation—The Twilight Zone of Charity: The IRS Denies Exemption for a Free Tax Planning Service Under Section 501(c)(3)

The Internal Revenue Service (IRS) exercises a major influence over the development of public charities through its power to characterize an organization as "charitable" under section 501(c)(3)[1] of the

85. 337 U.S. 541 (1948); *see* note 84 *supra.*

1. I.R.C. § 501 provides in part:

(a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) . . . shall be exempt from taxation . . . .

. . . .

(c) LIST OF EXEMPT ORGANIZATIONS. . . .

. . . .

(3) Corporations, and any community chest, fund, or foundation, organ-