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The Contingent Compensation of Expert Witnesses in Civil Litigation

Financing the ever increasing costs of litigation has always been a problem, especially for the less affluent party. In the civil context, the contingent fee arrangement for payment of attorney fees has afforded many an opportunity to litigate which might not otherwise have been available. However, in those areas in which expert witnesses are necessary, where witness fees can quickly skyrocket, no such ameliorative plan is available. The Code of Professional Responsibility's Disciplinary Rule 7-109(C) explicitly states the bounds of acceptable conduct in compensating witnesses,[1] and expressly prohibits contingent payments to witnesses. A federal district court, in *Person v. Bar Association of New York*,[2] recently found this prohibition to be constitutionally defective, posing an unreasonable and irrational barrier to litigation for the meritorious though less affluent party. Whether the rule's prohibition is unconstitutional and, further, whether there are viable alternatives to the present use of experts or areas this note will explore.

WITNESS FEES

The compensation of witnesses has long been a subject for legislative determination,[3] and contracts for compensation above the statutorily provided level have been held highly suspect by the courts.[4] In litigation

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[1]DR 7-109 Contact with Witness:

. . .

(C) 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 payment of:

(3) A reasonable fee for the professional services of an expert witness.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109.

[2]414 F. Supp. 144 (E.D.N.Y. 1976). The court granted a summary judgment to plaintiff-attorney challenging the rule in New York as an irrational prohibition unconstitutionally barring less affluent litigants equal protection. Though the court granted a favorable ruling, it declined to sever the motion from the ongoing antitrust action which occasioned the challenge.

While this note was being printed, the district court's decision was reversed by the Court of Appeals for the Second Circuit. Person v. Bar Ass'n of N.Y., 45 U.S.L.W. 2535 (2d Cir. May 17, 1977). The appellate court found that there was no denial of a fundamental interest (access to the courts) and that the state had a compelling interest in insuring that "judicial proceedings in New York were free of false testimony." *Id. Cf.* text accompanying notes 28-30, 44-60 *infra*.

[3]*See, e.g.*, IND. CODE § 5-7-9-4 (1976).

[4]*See, e.g.*, Dodge v. Stiles, 26 Conn. 463 (1857), where the court stated:

The statute regulating salaries and fees, provides that the fee of a witness shall be thirty-four cents a day for attendance, and five cents a mile for travel. This is all the

involving nonexperts, such payments have frequently been held unlawful.[5] The contract analysis applied to such agreements is straightforward and follows two well-defined theories.

The first theory maintains that such contracts are invalid under the traditional analysis applied to contracts to perform an act which the promisor is already under a duty to perform.[6] Every citizen is under a duty to appear in court and to testify to facts within his knowledge when properly summoned.[7] Further, since there is a legal compulsion to appear, any agreement for additional compensation must fail for want of consideration.[8]

The second and perhaps more compelling theory frequently expressed is that such contracts are void as against public policy.[9] This argument focuses on the potential for extortion of excessive fees by a witness offering crucial testimony[10] as well as the potential for exaggeration or outright perjury.[11] These inherent dangers of such agreements are uniformly condemned.

A necessary exception to the prohibition against fees in excess of statutory determination has been maintained in the area of expert testimony.[12] Using the contract analysis, it is argued that while any expert is

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remuneration he is entitled to for this service; and any attempt directly or indirectly to secure more, is against the language and policy of the law

Id. at 464-65. *See also* Alexander v. Watson, 128 F.2d 627 (4th Cir. 1942); Wright v. Somers, 125 Ill. App. 256 (1906); Clifford v. Hughes, 139 App. Div. 730, 124 N.Y.S. 478 (1910); *In re* Ramschasel's Estate, 24 Pa. Super. 262 (1904); Dorr v. Camden, 55 W. Va. 226, 46 S.E. 1014 (1964).

[5]There are exceptions to the rule, as when a witness appears pursuant to an agreement though otherwise outside the jurisdiction of the court. Dodge v. Stiles, 26 Conn. 463 (1857); State *ex rel.* Spillman v. First Bank of Nickerson, 114 Neb. 423, 207 N.W. 574 (1926); Cowles v. Rochester F. Box Co., 179 N.H. 87, 71 N.E. 468 (1904).

[6]6A A. CORBIN, CONTRACTS § 1430 (1962); RESTATEMENT OF CONTRACTS § 552(1) (1932); Annot., 16 A.L.R. 1457 (1922).

[7]*See, e.g.*, Alexander v. Watson, 128 F.2d 627, 630 (4th Cir. 1942), where the court stated, "The giving of testimony as facts within one's knowledge is a matter of public duty and one may not impose any condition upon that duty which the law does not authorize." *See also* M. Farbman & Sons, Inc. v. Continental Cas. Co., 62 Misc.2d 236, 300 N.Y.S. 2d 493 (1970).

[8]*See, e.g.*, Keown & McEvoy v. Verlin, 253 Mass. 374, 149 N.E. 115 (1925), where it is stated, "Where a witness has been subpoenaed to attend at court and testify, a promise to pay extra fees for his attendance is unenforceable to want of consideration." *See also* Wright v. Somers, 125 Ill. App. 256, 258 (1906).

[9]*See, e.g.*, *In re* Ramschasel's Estate, 24 Pa. Super. 262 (1904); Thatcher v. Darr, 28 Wyo. 452, 199 P. 938 (1921).

[10]Wright v. Somers, 125 Ill. App. 256 (1906); *In re* O'Keefe, 49 Mont. 369, 142 P. 630 (1914); Quirk v. Muller, 14 Mont. 467, 36 P. 1077 (1894); *In re* Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Davis v. Smoot, 176 N.C. 538, 97 S.E. 488 (1918).

[11]Davis v. Smoot, 176 N.C. 538, 97 S.E. 488 (1918), offers a particularly vivid example, "[d]efendant had unlawfully and willfully represented to his [plaintiff's] intestate that he would be worth that much to him because he would so describe his injuries to the jury as to make his damages much larger . . . ." *Id.* at 539, 97 S.E. at 488.

[12]*See, e.g.*, Gordon v. Conaley, 107 Me. 286, 78 A. 365 (1910); Barrus v. Phaneuf, 166 Mass. 123, 44 N.E. 141 (1896); Barnes v. Boatmen's Nat'l Bank, 348 Mo. 1032, 156 S.W.2d 597 (1942); Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918); Note, 9 So. CAL. L. REV. 61 (1935). *See also* 6A A. CORBIN, *supra* note 6.

required to testify to facts within his knowledge, analyzing data, running tests and using acquired knowledge and expertise to answer hypothetical questions is compensable activity beyond that required of every citizen.[13] As recognized by the Pennsylvania Supreme Court, this approaches a deprivation of property analysis:

> The state or the United States may call upon her citizens to testify as experts in matters involving the common weal, but that is because of the duty which the citizen owes to his government, and is an exercise of its sovereign power. . . . But the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things.[14]

Thus, contracts for compensation for the services of experts are enforceable. The propriety of these agreements has been unquestioned in this country[15] and is expressly provided for in the Code of Professional Responsibility's rule dealing with witnesses.[16]

Because of the dangers of excess compensation, courts have been rather rigorous in their interpretation of who is an expert and when a witness should be so designated for purposes of compensation.[17] This scrutiny has most frequently been seen in personal injury litigation involving the testimony of attending physicians. It is usually held that where the witness obtained informaiton from mere personal observation and not from extra prepartion, he too is under a compulsion to testify to facts within his knowledge for no more than the normal witness fee despite the increased awareness or knowledge his expertise provided.[18]

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[13]"[N]o one, expert or otherwise, is required to make special investigations for the purpose of learning or determining the facts or of accummulating evidence of forming an opinion." 6A A. CORBIN, *supra* note 6. *See also* Stanton v. Rushmore, 112 N.J.L. 115, 169 A. 721 (1934); Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918).

[14]Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 441-42, 105 A. 630, 630 (1918).

[15]Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1904); RESTATEMENT OF CONTRACTS § 552(2) (1932); 31 AM. JUR. EXPERT OPINION EVIDENCE § 12 (1967).

[16]DR 7-109. *See* note 1 *supra.*

[17]*See, e.g.*, Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897); State v. Bell, 212 Mo. 111, 111 S.W. 24 (1908); Burnett v. Freeman, 134 Mo. App. 709, 115 S.W. 488 (1909). These cases indicate that a contract for witness fees in excess of statutory fees would be void if the subject matter can be required of the witness absent expert designation.

[18]Much of the testimony of a so-called expert is in no wise different in character from that of any other witness. . . . A skilled physician discovers facts by the use of [senses] which another man might not. But this distinction is one of degree merely, and not of king. All men differ in their ability to observe accurately and in the certainty of knowledge which they derive from such observation. . . . Any attempt to draw a line between the exceptionally stupid and nonobservant person and others who, by greater alertness, training or skill in observation, may acquire more knowledge, is impracticable and irrational.

Philler v. Waukesha County, 139 Wis. 211, 214, 120 N.W. 829, 830 (1909). *See* McClenahan v. Keyes, 188 Cal. 574, 206 P. 454 (1922); Swope v. State, 145 Kan. 928, 67 P.2d 416 (1937) (examining physician held in contempt for not testifying before expert fee paid).

CONTINGENT FEES

The question of contingent payments to witnesses, both expert and nonexpert, has arisen on occasion, and almost without exception courts have struck down such agreements as contrary to public policy.[19] The court in *Sherman v. Burton*[20] succinctly states the major reasons for such a holding: "The plaintiff's interest in the amount of the damages furnished a powerful motive for exaggeration, suppression, and misrepresentation, a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice, and therefore invalid."[21]

To understand why such a result is appropriate in the area of expert testimony, it is necessary to examine the role the expert takes in a litigation. In civil actions, an expert is usually called to establish or refute damage claims so that an appropriate award might be forthcoming. Though there are exceptions, as in malpractice cases, the expert is less frequently called in the stage of determining liability—guilt or innocence.[22] Any agreement which ties compensation to the amount of the award carries with it a tremendous incentive to perjure or exaggerate in the area in which judge and jury have least knowledge and where the greatest need exists for impartial guidance. Any prohibition does not so much condemn the professional-witness as a potential liar as it recognizes the fact that such an arrangement yields the appearance of possible complicity. It is this appearance, or tendency which is to be avoided:

> The rule applied to such contracts is not to be affected by proof that the behavior of the parties was in fact exemplary, for it is the tendency of such contracts which serves to generate their undesirability. Improper conduct or bias can be predicted easily when the compensation of the witness is directly related to the absolute amount of an award which may in turn be dependent to a great degree on the testimony of that same witness.[23]

Closely connected with this concern is the recognition that the expert is placed in the position of testifying "for" a particular litigant.[24]

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[19]*See, e.g.*, Laos v. Soble, 18 Ariz. App. 502, 503 P.2d 978 (1973); First Nat'l Bank v. Hasty, 183 Ark. 519, 36 S.W.2d 967 (1931); Van Norden v. Metson, 75 Cal. App. 2d 995, 171 P.2d 485 (1946); Von Kessler v. Baker, 131 Cal. App. 654, 21 P.2d 1017 (1933); Pelkey v. Hodge, 112 Cal. App. 424, 296 P. 908 (1931); Weinberg v. Magid, 285 Mass. 237, 189 N.E. 110 (1934); Thomas v. Caulkett, 57 Mich. 392, 24 N.W. 154 (1885); *In re* Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); Webster v. McFadden, 190 Okl. 551, 125 P.2d 987 (1942); Belfonte v. Miller, 212 Pa.Super 508, 243 A.2d 150 (1968); *In re* Ramschasel's Estate, 24 Pa.Super 262 (1904); Wright v. Corbin, 190 Wash. 260, 67 P.2d 868 (1937); 6A A. CORBIN, CONTRACTS § 1430 (1962); RESTATEMENT OF CONTRACTS § 552(2) (1932). *But see* Barnes v. Boatmen's Nat'l Bank, 348 Mo. 1032, 156 S.W.2d 597 (1942) (a valid contract does not become invalid because respondent-psychiatrist was to be paid only if the litigation involving an estate were successful).

[20]165 Mich. 293, 130 N.W. 667 (1911) (physician bargained for percentage of recovery in exchange for satisfaction for existing debt owed him).

[21]*Id.* at 297, 130 N.W. at 668.

[22]*See, e.g.*, SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON THE MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 6 (1956).

[23]Belfonte v. Miller, 212 Pa. Super. 508, 514, 243 A.2d 150, 153 (1968).

[24]*See* notes 75-78 *infra* & text accompanying.

Cited in connection with these contingent fee contracts are elements of champerty and maintenance. Proper applications of these prohibitions have arisen, even when strict doctrinal definitions are maintained.[25] A distinction is made between those agreements which look toward actual participation in the litigation (held invalid),[26] and those in which the party is merely preparing or gathering information relevant to a possible suit, though participation is not anticipated (held valid).[27] The judicial concern for maintaining the highest levels of honesty within a judicial proceeding and eliminating any visible incentive to perjury is the touchstone for such a distinction.

THE CODE OF PROFESSIONAL RESPONSIBILITY RULE

The almost uniform holdings of courts in the area seem to leave little if any room for possible challenge. Indeed, the number of cases involving such agreements is not substantial especially in recent years. The discouraging opinions are, in part, responsible. But so too is the proliferation of various codes of ethics generated by organizations which frequently provide experts for litigation. Most condemn the practice of testifying as an expert in litigation where the fee is contingent on outcome or content, as the following suggests:

> It is the opinion of the Judicial Council that the contracting for, or acceptance of, a contingent fee by a doctor, which is based on the outcome of litigation, whether settled or adjudicated, is unethical. . . . Furthemore, the Council is of the opinion that the physician's obligation to uphold the dignity and honor of his profession precludes him from entering into an arrangement of this nature because, if a fee is contingent upon the successful outcome of a claim, there is the everpresent danger that the physician may become less of a healer and more of an advocate—a situation that does not uphold the dignity of the profession of medicine.[28]

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[25]In Weinberg v. Megid, 285 Mass. 237, 189 N.E. 110 (1934), a physician sought to enforce a contract for medical attention received by defendant after an accident. In lieu of immediate payment, plaintiff agreed to attend her throughout her illness, "provided she agree that his compensation would be twenty percent of the verdict recovered against the person who caused her injuries. If, however, the verdict was against her, it was agreed that he was to get nothing." As the court noted, this had every element of a champertous agreement. *Id.* at 237, 189 N.E. at 110. Note the close connection between such an arrangement and the one proposed by the attorney in Person v. Bar Ass'n of New York, 414 F. Supp. 144 (E.D.N.Y. 1976), wherein he proposed a system of outside investors to finance the ongoing litigation.

[26]*See, e.g.*, VanNorden v. Metson, 75 Cal. App. 2d 995, 171 P.2d 485 (1946); Griffith v. Harris, 17 Wis.2d 255, 116 N.W.2d 133 (1962).

[27]*See, e.g.*, Wilhelm v. Rush, 18 Cal. App. 2d 366, 63 P.2d 1158 (1937); Apter v. Joffo, 32 Mich. App. 411, 189 N.W.2d 7 (1971); Barnes v. Boatmen's Nat'l Bank, 348 Mo. 1032, 156 S.W.2d 597 (1941); Haley v. Hollenback, 53 Mont. 494, 165 P. 459 (1917); Miller v. Anderson, 183 Wis. 163, 196 N.W. 869 (1924).

[28]AMERICAN MEDICAL ASSOCIATION, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL 56-57 (1960). *See also National Interprofessional Code for Physicians and Attorneys*, AMERICAN MEDICAL ASSOCIATION, DIGEST OF OFFICIAL ACTIONS 1846-1958, at 445 (1959); The Provision for Contingent Fee Arragements of the Code of Ethics of the American Institute of Real Estate Appraisers cited in Laos v. Soble, 18 Ariz. App. 502, 503 P.2d 978, 979 n.1 (1973); The

The major concern reflected by such provisions is not primarily the fear of lying or exaggerating witnesses. Rather, it is that such arrangements heighten the suspicion that complicity exists, thus lowering the public esteem of the profession involved.[29]

It is against such a backdrop of case and statutory law and professional ethics codes that the CPR provision, in its present form, was drafted. The rule limits the options available to both attorney and client as to the financing of needed experts. It is the attorney who is frequently the contact between client and witness, both expert and nonexpert. The demands of a needed witness,[30] as well as the effective allocation of a client's limited resources, are often left to the attorney. The CPR rule serves to resolve any potentially difficult decisions at that point in favor of systemic integrity. Participants in a judicial proceeding must assure its propriety. As an officer of the court, the attorney above all others has a basic interest in that goal. Conceptually the rule seems unassailable. However, the questions remaining are unresolved are whether the limitations of the rule are effective in maintaining integrity and whether they are constitutional.

CONSTITUTIONAL CHALLENGE

The case of *Person v. Association of Bar of New York*[31] provides a framework for constitutional interpretation of the prohibition against contingency payment. The court's decision is based upon the equal protection clause of the fourteenth amendment. It is useful to examine the analysis used by the *Person* court in light of Supreme Court rulings in recent years.[32]

Provision for Contract Fee Arrangements of the Code of Ethics of the Society of Real Estate Appraisers cited in Belfonte v. Miller, 212 Pa. Super. 508, 515, 243 A.2d 150, 154 n.5 (1968).

[29]Further, it is a step toward eliminating the adversarial expert, the professional witness with little regard for his profession.

[30]*See, e.g., In re* O'Keefe, 49 Mont. 369, 142 P. 638 (1914), where the attorney was in contact with witnesses threatening no show or unfavorable testimony unless their compensation demands were met. *See also In re* Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911).

[31]414 F. Supp. 144 (E.D.N.Y. 1976).

[32]Seemingly entrenched in modern equal protection doctrine is the two tier model of analysis. A primary issue in the analysis is the proper standard to be applied, which tier is appropriate to determine constitutionality. The upper tier, or strict scrutiny, is to be applied in classifications either disadvantaging suspect classes which now include race, *e.g.*, McLaughlin v. Florida, 329 U.S. 184 (1964); alienage, *e.g.*, Graham v. Richardson, 403 U.S. 365 (1971), ancestry, *e.g.*, Oyama v. California, 332 U.S. 633 (1948), and perhaps, in some instances, sex, *e.g.*, Craig v. Boren, 97 S. Ct. 451 (1976), or which impermissibly interfere with a fundamental right, such as interstate travel, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote, *e.g.*, Bullock v. Carter, 405 U.S. 134 (1972). Such a classification will be upheld only upon a showing of a compelling state interest, nearly an impossible feat. All other statutes, regulations and classifications are subject to the lower tier, mere rationality. Here legislation is presumed valid absent a showing of total irrationality, the justification being that some arbitrary lines need be drawn and absent the considerations generating strict scrutiny, the legislature is best equipped to draw those lines.

There are frequent challenges to this analytical structure. The criticism has focused on the importance to be attached to the assignment of proper scrutiny rather than the underlying

Disparity in Means

In many litigations, especially between individuals and corporations, disparity in means exists. The problem is whether this disparity is unconstitutionally maintained or strengthened by the Code of Professional Responsibility. The court in *Person* recognizes that disparity in means, or wealth discrimination, alone is not sufficient to trigger the strict scrutiny of the upper tier of modern equal protection analysis.[33]

While application of equal protection analysis by the Supreme Court in the area of economic inequality has been sporadic, the present position of the Court is clearly stated in *San Antonio School District v. Rodriguez.*[34] There the Court upheld a school financing plan wherein residents of relatively poor districts received less funding for their schools than did residents of other more affluent districts.[35] The Court discussed the difficulties of defining such a large and amorphous class as "the poor"[36], and further found any such classification to be lacking in the rather explicit requirements for a suspect class.[37]

This holding, which remains unchanged, marked an end to a surge of equal protection holdings involving the elevation of indigency to a favored

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analysis. Once the initial classification or interest determination is made, the analysis is effectively completed. Should strict scrutiny be applied, it is very likely that classification will be found to be unconstitutional. If mere rationality is to be the test, the classification is almost certain to stand valid, with no in-depth inspection of the gray area between these extremes. Justice Marshall developed an alternate model which, he argues, satisfies these requirements. This is the sliding scale model first described in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973), and most recently forwarded in dissent in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). It is argued that such a model allows increased flexibility in judicial analysis as well as recognizes the necessary sophistication with which courts must approach this analysis. Further, it would be a formal and affirmative recognition of what the Supreme Court is already, in essence, undertaking, though not so identifying its actions. *See also* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Even the frequent dissenters, however, recognize that the two tier model remains favored in equal protection analysis.

[33]Disparity in means between the litigants is not always present, nor is total inability to pay a needed expert the common situation. But disparity and need are frequent, and, . . . it is inherent in the Rule that it 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.

414 F. Supp. at 146.

[34]411 U.S. 1 (1973).

[35]*See* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 955 (1975), where it is stated: "San Antonio School District v. Rodriguez may be seen as failing to relieve a consequence of poverty and as a failure to provide more equal competitive opportunities for children of poverty-poor school districts."

[36]411 U.S. 1, 25-29 (1973).

[37]The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

status in court analysis. This line of cases, headed by *Griffin v. Illinois*[38] and including *Douglas v. California*[39] and *Harper v. Virginia Board of Elections,*[40] has been described as cases "whose extravagent rhetoric appeared to herald some broad constitutional advance against inequalities of means."[41] It was not to be. Indeed, the petitioners in *Rodriguez* recognized the improbability of a favorable court holding[42] and attempted to link wealth classification with another favored equal protection area, that of a fundamental interest.[43] The Court still failed to find a proper circumstance for invoking strict scrutiny. In *Person,* the disparity in means argument was also linked with another recognized area of equal protection adjudication—access to courts.

Access to Courts

The factual situations in both *Griffin* and *Douglas* obviously fit into a discussion of constitutionally guaranteed access to courts. It should be noted that in both cases, the challenging party was brought into court as a criminal defendant. These parties are, by way of the fourth, fifth and sixth amendments, of special and deep-rooted interest to the Court. For now, such cases will be distinguished from civil cases in which the challenging party is not in court by reason of alleged criminal acts.

With this distinction in mind, one of the leading cases in the area of court access is *Boddie v. Connecticut,*[44] a case cited in support of the decision in *Person.* In *Boddie,* the Court held that the filing fees and court costs associated with a divorce posed an unreasonable and unconstitutional barrier to indigent plaintiffs, denying them due process. The Court, through Justice Harlan, stressed two important factors.

First, Justice Harlan discussed the importance of due process in our society and the role our judicial system plays in it.—a "monopoly over techniques of final dispute settlement,"[45] where, as in actions like this, no

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[38]351 U.S. 12 (1956). Here the court held that petitioners were denied equal protection when, due to lack of funds, they were denied the complete certified transcript necessary to pursue an appeal of a criminal conviction. As stated by the Court: "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has." *Id.* at 19.

[39]372 U.S. 353 (1963) (a party may not be denied counsel on first appeal when proven clearly indigent).

[40]383 U.S. 663 (1966). Here the Court overturned a state poll tax, stating, "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." *Id.* at 668.

[41]Wilkinson, *supra* note 35.

[42]"But in recognition of the fact that this court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention." 411 U.S. 1, 29.

[43]*See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 629-34 (1969), for an example of fundamental interest analysis in equal protection. Where a discrimination affects a fundamental interest, strict scrutiny is applied to the classification. In *Rodriguez,* the petitioners attempted to show that education was a fundamental interest. 411 U.S. at 28-29.

[44]401 U.S. 371 (1971).

[45]*Id.* at 375.

alternative is available. Coupled with the state monopoly over disposition is the fundamental importance of the marriage relationship. When forged together, these two factors produced a compelling due process argument:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[46]

Though the court added strict limiting language at the close of the opinion,[47] many commentators felt another new area for expansion of rights had been opened.[48] For here, a plaintiff in a civil action had been granted constitutionally protected access to the courts.[49] Justice Douglas, in concurrence, placed the case squarely in the *Griffin-Douglas* line of cases.[50] Indeed, the arguments of Justice Harlan seemed to fit into equal protection analysis as it had developed to that point.

This constitutional interpretation of court cost and fee barriers in *Boddie* quickly surfaced in several lower court cases.[51] Commentators immediately recognized the potential impact a broad interpretation of the court's ruling could have.[52] The Supreme Court, however, chose to read the holding in *Boddie* narrowly. Certiorari was denied in a group of civil

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[46]*Id.* at 374.

[47]In concluding that the Due Process Clause of Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessay to dispose of the case before us. . . . We do not decide that acess for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause.

Id. at 382.

[48]*See, e.g.*, Brickman, *Of Arterial Passageways through the Legal Process: The Right of Universal Acess to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595 (1973); LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487; Note, *Indigent Access to Civil Courts: The Tiger is at the Gates*, 26 VAND. L. REV. 25 (1973). *See generally* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153; *Part II*, 1974 DUKE L.J. 527; Comment, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein*, 8 HARV. C.R.-C.L. L. REV. 571 (1973); Note, *Constitutionality of Cost and Fee Barriers for Indigent Litigants: Searching for the Remains of Boddie after a Kras Landing*, 48 IND. L.J. 452 (1973); Note, *Free Access to the Civil Courts as a Fundamental Constitutional Right: The Waiving of Filing Fees for Indigents*, 8 NEW ENG. L. REV. 275 (1973).

[49]In a very real sense, a civil plaintiff might be characterized as a likely candidate for least favored in terms of a hierarchy of constitutional protection—certainly below criminal defendants. *But see* Lester v. Lester, 69 Misc. 2d 528, 330 N.Y.S.2d 190 (1972) where, in dicta, the court stated that, if demonstrated that an inexpensive alternative is not available, "effective" access may be constitutionally guaranteed, *i.e.*, at state expense. *See also* Hotel Martha Washington Management Co. v. Swinick, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (1971); note 65 *infra* & text accompanying.

[50]401 U.S. at 383.

[51]*See, e.g., In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Naron, 334 F. Supp. 1150 (D. Or. 1971); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

[52]*See generally* note 48 *supra.*

litigation access cases weeks after *Boddie* was handed down, under *Meltzer v. C. Buck LeCraw.*[53] Another major barrier to expansionist ideas was erected by the Court in *United States v. Kras,*[54] a case upholding fee requirements prior to the obtaining of a discharge in bankruptcy. The effect of the decision was to indicate, over vigorous dissents,[55] that access to courts was not in all cases a fundamental right—a crucial distinction considering the established two-tier analysis.[56] Further, the "privilege" of bankruptcy was not of the same constitutional significance as marriage or its dissolution.[57] This decision, in connection with the Court's holding in *Ortwein v. Schwab,*[58] halted any further movement toward a broad ranging constitutional guarantee of access to courts in a civil context.

What emerges from the court's analysis in *Person* is the joining of the classification of "less affluent,"[59] which is not a suspect class but which does deserve special attention, with an interest in meaningful access to courts for civil litigation, which is apparently not a fundamental or constitutionally guaranteed right, but which is of increased concern to courts. Although the strict scrutiny test utilized in connection with a suspect class or fundamental interest is not available, the equal protection test to incorporate these considerations should be, as the *Person* court agreed, one of a heightened scrutiny, or a "means with bite" test first suggested by Professor Gunther.[60] This is a proper test to be applied to a constitutional challenge to the Code of Professional Responsibility rule.[61] However, several facts prevent a comfortable fit into the above discussed cases.

[53]402 U.S. 954 (1971). Of particular interest is Mr. Justice Black's dissent. He could find no reason for distinguishing *Boddie* from the cases at hand, especially one *(Kaufman v. Carter)* in which an indigent mother was denied court-appointed counsel in an action to remove her as an unfit mother. Mr. Justice Black wrote:

> In my view, the decision in *Boddie v. Connecticut* can safety rest on only one crucial foundation—that the civil courts of the United States belong to the people 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 . . . [I]n my judgment *Boddie* cannot and should not be limited to either its facts or its language, and I believe there can be doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.

Id. at 955. *See also* Carter v. Kaufman, 8 Cal. App. 3d 383, 87 Cal. Rptr. 678 (1970); *In re* Ella B, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

[54]409 U.S. 434 (1973).

[55]*Id.* at 451, 457, 458.

[56]*See* note 32 *supra.*

[57]409 U.S. at 444-45.

[58]410 U.S. 656 (1973) (appellants not denied due process when twenty-five dollar filing fee maintained in order to prosecute an appeal of decrease in welfare benefits).

[59]This may not even be a classification. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 19-23 (1973); 411 U.S. at 62 (Mr. Justice Stewart's concurring opinion); 411 U.S. at 69-70 (Mr. Justice White's dissent); 411 U.S. at 91-97 (Mr. Justice Marhsall's dissent).

[60]Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 20-24 (1972).

[61]Note the similarities of such a test to the less favored sliding scale test discussed in note 32 *supra.*

The Test Applied

An effective way to recognize these differences is to examine the alternatives if the rule is declared unconstitutional and compare these with results obtaining in other access cases. In the *Griffin-Douglas-Boddie* situation,[62] once a party has been designated indigent, the costs and fees are paid for him, presumably from state funds. Militating against a broader application of such a result, such as paying expert witness fees, is that this is essentially a welfare program. It is income redistribution and therefore appropriate for legislative but not affirmative judicial action.[63]

Should the rule be found to be unconstitutional, the effect should be to make contingency payments lawful in principle. This alternative would involve neither a determination of indigency of particular litigants the problems involved in class definition, nor would it require a state subsidy. If allowed, it would be an available alternative to all litigants.[64] Further, eliminating the contingency prohibition could be favorably characterized as a proper, socially cost-free act of the judiciary, responding to its own rules and not infringing on the legislative domain.

On the other hand, court access is not really being denied by application of the CPR rule. The problem raised in *Person* is not entrance into the judicial process; rather it involves effectiveness of access, what has been described as including equipage.[65] This is a step toward affirmative equalization by the court,[66] and could possibly lead to regulation of attorney's fees and to other perhaps more obnoxious limitations.

Nevertheless, the court in *Person* applies a heightened scrutiny test to the rule and finds its prohibititon of contingent payment to be "too irrational to survive Fourteenth Amendment analysis."[67]

It is crucial to note that under this analysis, the framing of the purpose can be finally dispositive of the constitutional question.[68] The court states the purpose of Rule 7-109 to be "to remove an incentive to untruthful testimony."[69] While this certainly is a purpose, there remains an alternative and broader characterization of the rule's purpose.

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[62]*See* notes 38-50 *supra* & text accompanying.

[63]*See, e.g.*, Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153.

[64]*Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax overturned as to all citizens of Virginia rather than merely as to indigent voters).

[65]Equipage would include fees of counsel, witnesses, stenographers, transcripts, etc. The problem involved in such a program are myriad. Major among them is that such a provision would place the judiciary in an inappropriate role—providing affirmative relief for litigants in the form of subsidization. Judicial payment of access fees might only be the beginning. For an excellent discussion of these concepts in light of *Boddie, Kras* and *Ortwein* see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1163-69.

[66]*See* Mr. Justice Black's dissent in Meltzer v. C. Buck LeCraw, 402 U.S. 954 (1971).

[67]414 F. Supp. at 146.

[68]*But cf.* Gunther, *supra* note 60, at 21. The Gunther analysis concerns itself more with means than ends.

[69]414 F. Supp. at 146.

At the outset it should be noted that the Code of Professional Responsibility is not a general statute; rather it is an ethical code for attorneys. The source of a stated purpose, a necessity in initiating equal protection analysis, is not to be found in the usual source, legislative history. Here the document itself provides the insight. In most states where the Code is adopted, the entire Code, including the Preamble, is followed. The Preamble indicates the broader scope:

> But in the last analysis it is the desire for respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.[70]

It is not necessary in a contingency fee arrangement, then, for there to be actual perjury. It is enough that the incentive be apparent. By its existence, it calls into question the integrity of the judicial proceedings and all participants.

The court in *Person* reasons: "No basis in reason exists for rejecting a reasonable fee arrangement simply because the fee is not to be paid if the client does not prevail in the case."[71] The reasoning seems appealing. There remains, however, a basic problem in interpretation. Of particular import is the phrase "the fee is not to be paid if the client does not prevail." That fact inevitably will affect, even if only subconsciously, a potential witness.[72] Once this is recognized, the legitimacy of the testimony is open to question.

There is a tension within Rule 7-109, the prohibition of contingent payment and the express provision for payment of reasonable fees to experts. It is not a proper interpretation of the rule to limit payments to experts by reasonableness whether contingent or not—to allow a contingent fee to an expert if it is demonstrated to be reasonable. Such an interpretation implies that the rule's prohibition is solely to assure reasonableness. But reasonableness of witness fees is not the ultimate objective of the rule; maintaining the integrity of the judicial process is. While it can be argued that the rule is relatively ineffective in preventing such fee arrangements, sanctioning them would likely cause the loss of the respect and confidence which the entire Code was drafted to protect.[73] Though a disparate effect may be shown, under prevailing Supreme Court decisions[74] and under a proper interpretation of the Code of Professional

[70]ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble 1C (1975).

[71]414 F. Supp. at 146.

[72]*See, e.g.*, 6A A. CORBIN, CONTRACTS § 1430 (1962).

[73]Though the foregoing provides a substantial challenge to the court's reasoning in *Person*, it appears from the opinion that the Bar Association chose to argue that the grant of a declaratory judgment was improper and that no constitutional question was presented.

[74]*See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976), where the Court states that when judging a facially neutral law which impacts disproportionately on a particular race while serving ends otherwise within the power of the government, the strict scrutiny standard is not triggered.

Responsibility rule's purpose, the absolute prohibition of the rule should survive even under the appropriate heightened scrutiny of equal protection challenge.

REMEDIES

Despite the fact that an acceptable defense can be raised to a constitutional challenge, there remains the problem of the litigant who hesitates in entering the judicial process because of a lack of funds, as well as the meritorious claimant who is defeated simply because of the superiority of an opponent's experts.[75] In fact, even if the rule is found constitutionally defective, the long and developed common law and public policy arguments against contingent payments pose a substantial barrier to the immediate use of such arrangements.[76]

Perhaps a root of the problem and a true point of contention is Rule 7-109's express provision for payment to experts.[77] Just as undeniable as the subconscious incentive to perjure or exaggerate if the fee is contingent, is the knowledge of the retained expert as to who has employed him and for what purpose. The problem remains incurable so long as experts are acting "for" a party in an adversarial sense. Further, though the inference of complicity is not as strong as in a contingent arrangement, the taint of "purchased" testimony is, nonetheless, a fact quickly recognized by jury and judge.[78]

Thus, any remedy to be fashioned must effectively deal with these two problems: financing of the still-needed experts by low and middle-income litigants and the improper, inefficient and wasteful use of experts in our present system.[79]

A form of court-appointed, impartial expert is best suited to resolve these problems. As the bulk of experimentation with such plans has been in the area of medical testimony,[80] the discussion will rely on such plans

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[75]As the court in *Person* notes, an attorney can avoid any problems by refusing the case, while no such alternative is available to the litigant. 414 F. Supp. at 145.

[76]"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." 414 F. Supp. at 146.

[77]"An incentive to untruthful testimony is implicit in any payment to a witness 'for' his testimony." 414 F. Supp. at 146.

[78]Ford & Holmes, *The Professional Medical Advocate*, 17 Sw. L.J. 551 (1963). This may mean that the expert's testimony will be unduly discounted by the jury. It also weakens the legitimacy of the trial process.

[79]For a discussion of the inherent problems of partisan experts, including reduction of litigation into a "battle of experts" and the inappropriateness of the adversary proceeding to sound scientific fact finding, *see* M. GUTTMACHER & H. WEIHOFFEN, PSYCHIATRY AND THE LAW 205-268 (1952); Elliot & Spellman, *Mediacal Testimony in Personal Injury Cases*, 2 L. & CONTEMP. PROB. 466 (1935); Polsky, *Expert Testimony: Problems in Jurisprudence*, 34 TEMP. L.Q. 357 (1961).

[80]Plans have been implemented by local court rules in numerous jurisdictions including: New York, Baltimore, Philadelphia (Eastern Dist. of Pennsylvana), Western District of Pennsylvania, Missesota, Northern District of Illinois, Los Angeles, Utah and Cleveland. For

and reported results,[81] though broader coverage to include all professions is appropriate.[82]

The concept of the court appointed expert is not new.[83] There is and has been statutory authority for judges to summon experts who, in the court's opinion, are necessary to the proper resolution of a particular action.[84] Such statutes, however, have not been heavily used.[85] This seeming lack of interest may stem from basic philisophical differences as to the proper role of the judge—as an active participant, not only in matters of law but also in evidence,[86] or a mere umpire, restraining any fact finding ventures.[87] From a public policy standpoint, the former, due to its greater potential for factually-based, as opposed to adversarially promoted, results is preferable.

The appropriate role of the judge is but one source of criticism of any court appointment plan. Several of these require further inspection. It is argued that once a witness has been designated as court appointed, there is a tendency for a trier of fact to assume infallability.[88] While this underestimates the interpretive powers of jury members, there is a risk that

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short discussions of several of these plans, *see* Myers, *"The Battle of Experts:" A New Approach to an Old Problem in Medical Testimony*, 44 NEB. L. REV. 539, 562-77 (1965). *See generally* note 81 *infra.*

[81]C. MCCORMICK, EVIDENCE § 17 (2d ed. 1972); Barr, *Medical Testimony: Doctors and Lawyers Cooperate*, 41 J. AM. Jud. Soc. 78 (1957); Botein, *The New York Medical Expert Testimony Project*, 33 U. DET. L. REV. 388 (1956); Frankel, *The Use of Disinterested Medical Testimony*, 25 INS. COUNSEL J. 93 (1958); Martin, *The Impartial Medical Testimony Project*, 28 INS. COUNSEL J. 612 (1961); Myers, *"The Battle of Experts": A New Approach to an Old Problem in Medical Testimony*, 44 NEB. L. REV. 539 (1965); Peck, *Impartial Medical Testimony*, 22 F.R.D. 21 (1958); Van Dusen, *The Impartial Medical Expert System: The Judicial Point of View*, 34 TEMP. L.Q. 386 (1961). *See also* SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON THE MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY (1956) [hereinafter cited as IMPARTIAL MEDICAL TESTIMONY]; 82 REPORTS OF AMERICAN BAR ASSOCIATION 184-85 (1957) (House of Delegates' approval of a resolution encouraging the development of impartial expert witness panels for personal injury litigation).

[82]UNIFORM EXPERT TESTIMONY ACT, in HANDBOOK OF THE CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 337 (1937).

[83]For an excellent discussion of the history of the expert in litigation, see Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901); Rosenthal, *The Development of the Use of Expert Testimony*, 2 L. & CONTEMP. PROB. 403 (1935). *See also* Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699, 762-67 (1974).

[84]*See, e.g.*, the use of court appointment by Judge Wyzanski in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd* 347 U.S. 521 (1954); United States v. Sisson, 294 F. Supp. 520 (D. Mass. 1968). *See also* FED. R. EVID. 706; CALIF. EVID. CODE § 730 *et seq.* (West 1966); Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1105 (1941); Note, *Opinion and Expert Evidence under the Federal Rules*, 36 LA. L. REV. 123, 136-38 (1975); Note, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 Nw. U.L. REV. 761 (1957).

[85]Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 S. CAL. L. REV. 195 (1956).

[86]*See, e.g.*, Scott v. Spanjer Bros. Inc., 298 F.2d 928, 930-31 (2d Cir. 1962).

[87]Levy, *Impartial Medical Testimony Revisited*, 34 TEMP. L.Q. 416, 425 (1961).

[88]*Id.* at 424-29.

a jury will tend to accept an expert's opinion without substantial question, especially in a matter involving high level, technically sophisticated information. Some feel that such a result effectively supplants the seventh amendment right to trial by jury.[89] They buttress this argument by alleging the ocurt designation of a witness as expert further erodes the fact finding province of the jury.

Another problem raised often is tht one expert alone could never properly reflect the many schools of thought a discipline might contain.[90] The witness will naturally reflect his personal biases, the argument continues, and discount other possible views thus burdening one party to the action with an unfavorable, yet powerful witness. In short, the attorney is likely to find protection in sheer numbers of experts, and the jury will properly refine the mass of information and arrive at a proper disposition. Finally, and most important to this discussion, is the problem of financing such a venture.

A careful drafting of any remedial plan can eliminate many of these problems. First, it should preclude the possibility of a judge actually calling a specific witness as an expert. Rather, once it is recognized that an expert will be required,[91] the judge would request from a court administrator the assignment of an expert from a panel of previously screened, highly qualified and acceptable candidates.[92] Ideally, little or no contact between judge or attorney and the expert would be allowed at that point so that no possible influence could exist. This would assure a witness unconnected with any party.[93]

While a carefully drawn plan may go far in assuring capability and impartiality, there remains the very basic problem of litigation costs and disparity in means. If, for example, the fees of the expert witness are taxes as costs to the loser,[94] too high a barrier to nonfrivolous litigation may still exist. The New York plan resolved this problem by creating a fund out of

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[89]*But cf. Exhibit A*, 34 TEMP. L.Q. 386, 396 (1961), where a constitutional defense of the rule adopted by the Eastern District of Pennsylvania is set forth.

[90]Levy, *Impartial Medical Testimony Revisited*, 34 TEMP. L.Q. 416, 421-24 (1961). *See also* Scott v. Spanjer Bros., 298 F.2d 928, 932 (2nd Cir. 1962).

[91]Such a determination may be made as the result of a pretrial conference. Under the Los Angeles plan, the need is determined by a pretrial judge who generally does not conduct the trial, thus further protecting both the witness and the judge. *See* Note, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 733 (1967). There are conflicting opinions as to who, judge or attorney, should have final approval for specific witnesses. *But see* note 92 *infra*.

[92]Local universities have provided pools of qualified experts as have local professional organizations. Any plan should preclude, through proper screening and extensive rotation, any identification with a particular class of litigating parties (*e.g.*, plaintiffs, defendants, insurance companies, etc.).

[93]As to how the Los Angeles plan attempts to achieve the goal see Note, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 729-34. The New York plan is discussed in IMPARTIAL MEDICAL TESTIMONY, *supra* note 81, at 15-16.

[94]This is the case in both the Western District rule and the Eastern District (Philadelphia Federal) rule in Pennsylvania set out in Annot., 95 A.L.R.2d 390, 395 N.3 (1964).

which expert fees were paid, incorporating these costs into the normal operating expenses of the court.[95] Such a plan is desirable in that the onus of one party paying for the witness is eliminated and economic inequality would be corrected without any equal protection problems of where to draw the line as to who receives the benefits.[96] It would be preferable for such a plan to be established by the appropriate legislative body to avoid charges of judicial overreaching. Further, the amounts necessary to budget such a plan over all fields of experts could quickly grow quite large.[97] An equitable plan would split the cost between contesting parties equally. This would eliminate the cost to the state and would likely not be viewed as court legislation.

An interesting and workable alternative is possible in establishing a rule that only if an expert is actually called at trial would fees be assessed—pretrial work would be funded by the state. Such a plan would give litigants access to the valuable work of the expert. They could then weigh the value of eventual testimony and make a decision. Eliminated would be the incentive and the opportunity to "show" experts in order to impress the jury.[98]

It is at pretrial that the additional benefits of this plan are realized. One of the most favorable results of the medical plans has been the dramatic increase in out-of-court settlements prior to trial with an attendant decrease in costs to litigants and the court both. The reported statistics are impressive.[99] An ancillary benefit is the potential clearing of overcrowded civil court dockets.[100]

Should a case proceed to trial, the expert is in a new position. His monetary bias now eliminated, no one can question his allegiance. He is there for one purpose, to discuss his findings. Assuming a proper screening, there should be neither any challenge to his credentials nor his relationship to either litigating party. Overall, the shift in emphasis would be from surprise, calculating strategy and dramatic showmanship to careful scrutiny, analysis and questioning of the facts presented.

CONCLUSION

The use of experts in litigation has become almost a fixture in many areas—antitrust, condemnation, desegregation, malfunction and defects in

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[95]IMPARTIAL MEDICAL TESTIMONY, *supra* note 81, at 26, 38.

[96]*See* Goodpaster, *The Integration of Equal Protection Due Process Standards and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 263 (1970).

[97]A major benefit and justification, however, lies in the fact that reported results demonstrate that such plans can save more in terms of settlements and decreased litigation costs than is spent on financing the plans. *See* IMPARTIAL MEDICAL TESTIMONY, *supra* note 81, at 34-35.

[98]It is not clear that the court could preclude a party from calling additional experts, although this is certainly to be discouraged as inimical to the proper function of the plan.

[99]IMPARTIAL MEDICAL TESTIMONY, *supra* note 81, at 28-32.

[100]*Id.* at 32-34.

design in products liability, malpractice in an increasing number of professions, obscenity control, patent and copyright, probate—the list continues. Contemporaneous with the growth of the use of expert witnesses has been the development of the statutory and common law prohibition against payments to such witnesses contingent on content of testimony or outcome of the action. The Code of Professional Responsibility DR 7-109 reflects the judicial concern expressed in this area. The concerns and problems it was drafted to remedy are real. No less real, however, are the needs of the less affluent litigant as the court in *Person* forcefully points up. To accomplish a solution to these conflicting problems, a basic change in the conduct of civil proceedings in required. This change, in the form of the impartial expert, will likely be slow in finding general acceptance. But in this age of increasing sophistication in litigation, such a remedy is required or the judicial process may become an opportunity reserved only for the affluent.

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