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Civil Procedure - Compensation of Witnesses in a Civil Action

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COMMENTS

CIVIL PROCEDURE — COMPENSATION OF WITNESSES IN A CIVIL ACTION—As the amount and complexity of litigation has increased, there have been corresponding increases in demands for added compensation of witnesses. Like the juror, the witness often receives the time-honored answer that he cannot be heard to complain that his compensation is inadequate; the administration of justice is a mutual benefit to all members of the community, and each is under a public duty to further it.

At common law witnesses received no compensation.[1] Time spent in testifying was held to be claimed by the public as a tax, paid by the witness to the system of law which protected the rights of all.[2] Statutory provisions gradually were enacted, providing for various degrees of compensation.[3] Today, there are such statutory provisions in every state as well as in the federal courts. The area is fraught with controversies and bears examination.

I. *The Ordinary Witness*

The ordinary witness is one who has personal knowledge of matters of fact pertaining to the case; on the witness stand he relates these facts. This is in contrast to the expert, who primarily gives opinion concerning the significance of facts. In general, the compensation of the ordinary witness includes a specified amount per day plus an additional mileage fee. Per diem rates range from 50 cents in Connecticut,[4] New Jersey,[5] and Virginia[6] to six dollars in Utah.[7] Several states have

[1] 39 L.R.A. 116 (1898).

[2] Blair v. United States, 250 U.S. 273, 39 S.Ct. 468 (1919).

[3] 5 Eliz., c. 9, §12 (1562), providing for compensation ". . . according to his or their countenance or calling such reasonable sum of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf."

[4] Conn. Stat. (1949) §3611.

[5] N.J. Rev. Stat. (1937) tit. 22, c. 1, §4.

[6] Va. Code (1950) §14-187.

[7] Utah Code Ann. (1953) tit. 21, c. 5, §4. Other statutes provide the following per diem rates: 28 U.S.C. (Supp. V, 1952) §1821: $4; Ala. Code (1940) tit. 11, §44: $1.50; Ariz. Code Ann. (1939) §34-131: $1.50; Ark. Stat. (1947) §28.524: $1.50; Del. Code (1935) c. 156, §19: $2; Fla. Stat. Ann. (1943) tit. 7, §90.14: $2; Ga. Code Ann. (1949)

a special rate for half days.[8] Fees depend on the class of county in Colorado,[9] while North Carolina declares that the county board of commissioners shall fix compensation within a range of one to three dollars per day, but if the witness attends a trial outside of his county of residence, the statute specifies the rate.[10] Generally, the fees of voluntary witnesses are allowed as costs, regardless of whether they come from beyond the reach of subpoena,[11] but some courts limit costs to subpoenaed witnesses.[12] In New York, the Civil Practice Act specifies that a witness will get one dollar per day, if subpoenaed; otherwise, he will receive 50 cents.[13] California is the only state in which the statute declares that the state may require the services of witnesses, with or without compensation.[14] In general, where testimony is worthless and in substance inadmissible, no fees are taxed in costs.[15] If a subpoenaed witness attends and is deemed necessary to an issue presented and then the issue is abandoned and the witness is not sworn because of this, compensation is nevertheless customarily allowed.[16] However, a party cannot call an unnecessary number of witnesses and the court can exercise discretion as to the number of witnesses for which the prevailing party shall be allowed to tax costs.[17]

Reimbursement for mileage traveled also varies greatly. Georgia offers none,[18] whereas Idaho gives an allowance of 25 cents per mile for

§1501: 75 cents; Idaho Code Ann. (1948) tit. 9, §1601: $3; Ill. Stat. Ann. (Smith-Hurd, 1951) c. 53, §65: $1; Ind. Stat. Ann. (Burns, 1946 Replacement) §2.1710: $1.25; Iowa Code Ann. (1946) §622.69: $2; Kan. Gen. Stat. Ann. (1949) §28-125: $1.50; Ky. Stat. (1948) tit. 38, §421.010: $1; La. Rev. Stat. (Dart, 1950) §13.3661: $1.50; Me. Rev. Stat. (1944) c. 100, §129: $2; Md. Code Ann. (1951) art. 35, §16: $1; Mass. Laws Ann. (1952 Supp.) c. 262, §29: $3; Minn. Stat. Ann. (1947) §357.22: $1; Miss. Code Ann. (1942) §3953: $1.50; Mont. Rev. Code Ann. (1947) tit. 25, §404: $3; Neb. Rev. Stat. (1943, reissue, 1952) §33-139: $2; Nev. Comp. Laws (Supp. 1931-1941) §8490: $2; N.H. Rev. Laws (1942) c. 392, §16: $3; N.D. Rev. Code (1943) §31-0116: $2; Ohio Rev. Code (1953) §2335.06: $1; Okla. Stat. (1951) tit. 28, §81: $1; Ore. Comp. Laws Ann. (1940) §87-961: $2; Pa. Stat. Ann. (Purdon, 1952 Supp.) tit. 28, §416.2: $3; R.I. Acts and Resolves (1939) c. 715, §7: $1.50; S.C. Code (1952) §27-603: $1; S.D. Code (1939) §36.0401: $2; Tenn. Code Ann. (1934) §9799: 1; Tex. Rev. Civ. Stat. Ann. (Vernon, 1925) art. 3708: $1; Vt. Stat. (1947) §10,522: $2.50; Wash. Rev. Code (1951) §2.40.010: $4; W.Va. Code (1949) §5833: $1; Wis. Stat. (1951) §325.05: $5.

[8] Mich. Stat. Ann. (1951 Supp.) §27.2557: $5 per day and $2.50 per half day; Wyo. Stat. Ann. (1945) §3-3701: $2 per day and $1.50 per half day.

[9] Colo. Stat. (1935) c. 66, §46. Range is from $1.50 to $2.50 per day.

[10] N.C. Stat. (1953) §6-52.

[11] Marks v. Merrill Paper Co., (7th Cir. 1913) 203 F. 16.

[12] Lillienthal v. So. Cal. Ry. Co., (D.C. Cal. 1894) 61 F. 622.

[13] N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §1539.

[14] Cal. Govt. Code (Deering, 1951) tit. 1, §204.

[15] Wollenberger v. Hoover, 346 Ill. 511, 179 N.E. 42 (1931).

[16] Jones v. Antrim Circuit Judge, 223 Mich. 141, 193 N.W. 873 (1923).

[17] Kane v. Luckman, (D.C. Iowa 1904) 131 F. 609.

[18] Ga. Code (1949) §1501. But in Dickerson v. Mangham, 194 Ga. 466, 22 S.E. (2d) 88 (1942), the court stated that disinterested witnesses should be compensated for travel time and expense.

the distance one way between the place of residence of the witness and the place of trial.[19] The majority of statutes base the mileage rate on a to-and-from computation, with the most usual figure being that of five cents per mile.[20] Ordinarily, mileage out of the state is not taxable.[21] For travel in the state, mileage is normally allowed in taxing costs, whether or not the witness is subpoenaed.[22] However, some states either by judicial limitation[23] or by statute[24] have established otherwise. North Carolina specifies that the county board of commissioners fix the rate, within a maximum of five cents per mile on a round trip basis.[25] In Maryland, mileage allowance depends on the county.[26] A few jurisdictions do not allow any mileage at all within a specified radius of the place of trial, usually less than twenty miles.[27] In the

[19] Idaho Code Ann. (1948) tit. 9, §1601.

[20] The following compensation rates are on a per mile basis (asterisks denote payment for one way only): 28 U.S.C. (Supp. V, 1952) §1821: seven cents; Ala. Code (1940) tit. 11, §44: five cents; Ariz. Code Ann. (1939) §34-131: fifteen cents*; Colo. Stat. (1935) c. 66, §47: fifteen cents*; Del. Code (1935) c. 156, §19: three cents; Fla. Stat. Ann. (1943) §90.14: five cents; Ill. Stat. Ann. (1951) c. 53, §65: five cents; Iowa Code Ann. (1946) §622.69: five cents; Kan. Stat. Ann. (1949) §28-125: five cents; La. Rev. Stat. (Dart, 1950) §13.3661: five cents; Me. Rev. Stat. (1944) c. 100, §129: six cents; Mass. Laws Ann. (1952 Supp.) c. 262, §29: five cents; Mich. Stat. Ann. (1951 Supp.) §27.2557: ten cents*; Minn. Stat. Ann. (1945) §257.22: six cents; Miss. Code Ann. (1942) §3953: five cents; Mo. Stat. Ann. (Vernon, 1952) §491.280: five cents; Mont. Rev. Code Ann. (1947) tit. 25, §404: seven cents; Neb. Stat. (1943, reissue 1952) §33-139: five cents; Nev. Comp. Laws (Supp. 1931-1941) §8490: fifteen cents*; N.J. Rev. Stat. (1937) tit. 22, c. 1, §4: one dollar "for every thirty miles from and to his or her place of residence"; N.M. Stat. Ann. (1941) §20-104: five cents; N.D. Rev. Code (1943) §31-0116: ten cents; Ohio Rev. Code (1953) §2335.06: five cents; Okla. Stat. (1951) tit. 28, §81: five cents; Ore. Comp. Laws Ann. (1940) §87-964, as amended Ore. Laws 1949: eight cents; Pa. Stat. Ann. (Purdon, 1952 Supp.) tit. 28, §416.4: five cents; R.I. Acts and Resolves (1939) c. 715, §7: ten cents; S.C. Code (1952) §27-603: five cents; S.D. Code (1939) §36.0401: ten cents*; Tenn. Code Ann. (1934) §9799: four cents; Tex. Rev. Civ. Stat. Ann. (Vernon, 1925) art. 3708: six cents; Utah Code Ann. (1953) tit. 21, c. 5, §4: twenty cents*; Vt. Stat. (1947) §10,522: six cents; Wash. Rev. Code (1951) §2.04.010: ten cents; W.Va. Code (1949) §5833: five cents; Wis. Stat. (1951) §325.05: five cents; Wyo. Stat. Ann. (1945) §3-3701: ten cents.

[21] Woodard v. Chicago, R.I. and Pac. Ry. Co., 193 Iowa 516, 185 N.W. 978 (1921).

[22] In re Estate of Hulme, 185 Iowa 1219, 171 N.W. 599 (1919).

[23] Daloia v. Boyd, 16 Wash. (2d) 439, 133 P. (2d) 950 (1943); Barber v. Parsons, 145 Mass. 203, 13 N.E. 491 (1887) (travel fees taxed only when witness is summoned).

[24] Ark. Stat. (1947) §§28.526, 28.527: no mileage to persons within the county where the trial is being held. Five cents per mile to attend outside the county of the witness' residence. But see Ind. Stat. Ann. (1946 Replacement) §1710: five cents per mile both ways "not to be computed beyond the limits of adjoining county."

[25] N.C. Stat. (1953) §6-52.

[26] Md. Code Ann. (1951) art. 35, §16: mileage depends on the county, ranging from "itinerant" charges to ten cents per mile based on the witness' distance from the county seat.

[27] Ky. Stat. (1948) §421.010: four cents per mile going and returning, when the witness resides more than twenty miles away; N.H. Rev. Laws (1942) c. 392, §16: six cents per mile each way where the witness has to leave the town or city in which he resides in order to testify; N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §1539: eight cents per mile one way if the witness lives more than three miles from the trial; Va. Code (1950) §14-187: four cents per mile to and from point "beyond ten miles necessarily traveled to the place of attendance."

federal courts, a few cases allow costs for the entire mileage of witnesses, regardless of the distance traveled or the fact that the witnesses might come from outside the district or state.[28] But the great majority of decisions hold that mileage fees are taxable only as far as the subpoena will run.[29]

From all of this data one conclusion is obvious: the witness will usually be attending a trial at a financial sacrifice. This is especially true if he lives comparatively far from the place of trial and is forced to stay overnight. Several states have attempted to alleviate this situation by providing for special allowances for overnight shelter and extra meal expense.[30] A provision in Missouri allows the witness an additional sum if he testifies outside the county of his residence.[31] All of these problems are magnified when the person testifying is an "expert."

II. *The Expert Witness*

Correlative with the increasing complexity of society has been a greater complexity in litigations, entailing more and more testimony of a technical character. This has resulted in great pressure to furnish added compensation for expert witnesses. Generally, a witness having personal knowledge is required to attend court without pay other than that provided by statute.[32] He may be required to testify regarding matters within his knowledge, even though he has obtained superior knowledge through experience and special training.[33] For instance, a doctor who witnesses an accident and renders first aid must testify as to the condition of the person injured; he is not entitled to demand extra compensation because he is more qualified than the layman to testify on such matters.[34]

But when a person not directly connected with the facts of a case gives testimony of a technical character, the real problem of added compensation for experts comes into focus. The expert can be best

[28] Morris-Turner Live Stock Co. v. Director General of Railroads, (D.C. Mont. 1920) 266 F. 600.

[29] Friedman v. Washburn Co., (7th Cir. 1946) 155 F. (2d) 959.

[30] La. Rev. Stat. (Dart, 1950) §13.3661: a person residing outside of the parish wherein the case is pending who is required to stay overnight is allowed $3.50 for hotel and meal expense; Pa. Stat. Ann. (Purdon, 1952 Supp.) tit. 28, §416.6: where witness resides more than fifty miles from the proceeding and is necessarily absent from one day to the next, $3 per night for lodging.

[31] Mo. Stat. Ann. (Vernon, 1952) §491.280: $1.50 per day in the county of the witness' residence, and $2 per day outside the county; N.M. Stat. Ann. (1941) §20-104: $1 per day in the county of the witness' residence, and $2 per day outside of the county. But see Indiana statute, note 24 supra.

[32] McClenahan v. Keyes, 188 Cal. 574, 206 P. 454 (1922).

[33] Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897).

[34] Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121 (1907).

defined as ". . . a witness otherwise unconnected with the case who because of his . . . special qualifications is called to give in evidence his expert opinion, either based on facts, or on the result of examination of material or data, submitted to him for the purpose."[35] In dealing with these problems, there appear to be four categorical approaches. (1) The expert is compensated as an ordinary witness. Any additional compensation must be paid by the party calling the witness. This is by far the majority approach.[36] (2) The expert is compensated as an ordinary witness, and a contract for any additional compensation is void for want of consideration[37] or illegal.[38] Making such added compensation illegal has little effect, for the statute can be readily circumvented through the device of consultation fees. (3) Several statutes specifically allow additional compensation for experts, some limiting

[35] 111 J.P. 144 (1947).

[36] *Alabama:* An expert "may be compelled to . . . testify . . . without . . . tender of compensation other than the per diem and mileage allowed to [ordinary] witnesses." Ala. Code (1940) tit. 7, §366. Contract for additional compensation is valid. Hartley v. Alabama Nat. Bank, 247 Ala. 651, 25 S. (2d) 680 (1946). *Arkansas:* An expert cannot demand extra compensation. Flinn v. Prairie County, 60 Ark. 204, 29 S.W. 459 (1895). *Georgia:* An expert subpoenaed is not entitled to more fees than an ordinary witness. Schofield v. Little, 2 Ga. App. 286, 58 S.E. 666 (1907). *Illinois:* Expert witnesses are in the same position as others with respect to their fees. Commissioners of Lincoln Park v. Schmidt, 395 Ill. 316, 69 N.E. (2d) 689 (1946). *Indiana:* An expert can be compelled to testify "in relation to any matter, whenever such opinion is material evidence relevant to an issue on trial . . . without compensation other than [that] allowed by law." Ind. Stat. Ann. (1946 Replacement) §2.1722. Persons who have experience in any particular business may be called as experts. Fort Wayne v. Coombs, 107 Ind. 75, 7 N.E. 743 (1886). *Kentucky:* An expert may be subpoenaed and required to attend without the guarantee of any compensation over and above the statutory witness fee. Sanders v. Commonwealth, 291 Ky. 216, 163 S.W. (2d) 493 (1942). *Missouri:* Contract to pay expert more is not invalid as against "public policy." Barnes v. Boatmen's Nat. Bank of St. Louis, 348 Mo. 1032, 156 S.W. (2d) 597 (1941). *New York:* Fees for experts in excess of regular statutory amount must be borne by the party calling the expert. In re Greco's Estate, 190 Misc. 769, 78 N.Y.S. (2d) 429 (1947). *Pennsylvania:* Expert can receive additional compensation, but it shall not be taxable as costs. Pa. Stat. Ann. (Purdon, 1952 Supp.) tit. 28, §416.9. See Lance v. Luzerne County Mfrs. Assn., 366 Pa. 398, 77 A. (2d) 386 (1951). *Texas:* Plaintiff not entitled to recover for fees paid in obtaining expert testimony. Gulf, C. and S.F. Ry. Co. v. Dooley, 62 Tex. Civ. App. 345, 131 S.W. 831 (1910). *West Virginia:* An expert witness may be compelled to testify as to matters of professional opinion or as to special knowledge gained by reason of his professional training or experience without a fee other than that of an ordinary witness. Ealy v. Shetler Ice Cream Co., 108 W.Va. 184, 150 S.E. 539 (1929). *United States:* Additional amounts paid to expert witnesses cannot be allowed as costs in the federal courts. Henkel v. Chicago, St. Paul, M. and O. Ry. Co., 284 U.S. 444, 52 S.Ct. 223 (1932).

[37] *Connecticut:* Agreement to pay witness more than legal fees will not ordinarily be enforced; exceptional cases will be considered. Dodge v. Stiles, 26 Conn. 463 (1857).

[38] *Michigan:* No expert witness shall receive a sum in excess of ordinary witness fee unless court awards a larger sum. Any witness who directly or indirectly receives a larger sum and any person paying such sum shall be guilty of contempt of court. Mich. Stat. Ann. (1951 Supp.) §27.918. *Nebraska:* A special contract to pay more than the regular witness fee is illegal and void. State v. First Bank of Nickerson, 114 Neb. 423, 207 N.W. 674 (1926).

it to a certain maximum amount[39] and others leaving the payment to the discretion of the court.[40] Additional compensation can be paid, though the person also testifies to facts of the case as an ordinary witness,[41] but there is disagreement as to whether he has to be called as an expert in order to receive added fees.[42] (4) Finally, California permits added compensation for experts appointed by the court.[43] It is generally agreed in all jurisdictions that the expert can recover fees for work involved in rendering an opinion from the party for whom the work is performed;[44] a very common example is a chemical analysis done upon request.

Various policy considerations have been offered to support or controvert added compensation. It has been argued that the expert's time is especially valuable to him.[45] However, the hardship is relatively no

[39] *Florida:* Expert allowed reasonable amount "not in excess of ten dollars per hour from time of reporting to place of trial until conclusion of his testimony." Fla. Stat. Ann. (1943) as amended 1949, §90.231. The judge shall determine the amount, and it shall be taxed as costs. See Daytona Beach v. Humphreys, (Fla. 1951) 53 S. (2d) 871. *Iowa:* Expert witnesses "shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed four dollars per day. . . ." Iowa Code Ann. (1946) §622.72. *Maine:* ". . . The court in its discretion, may allow . . . a sum not exceeding $25 per day for the attendance of any expert witness. . . ." Me. Rev. Stat. (1944) c. 100, §129.

[40] *Colorado:* Courts may allow experts amounts which the courts deem proper. Denver Joint Stock Land Bank v. Board of County Comrs., 105 Colo. 366, 98 P. (2d) 283 (1940). *Delaware:* Fees of experts fixed by court in its discretion and taxed as part of the costs. Del. Code (1935) c. 129, §21. *Louisiana:* Expert witnesses "shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required." La. Rev. Stat. (Dart, 1950) §13.3666. Court can restrain litigant where he attempts to summon uselessly a number of expert witnesses. Stern v. Lanng, 106 La. 738, 31 S. 303 (1901). For taxing as costs, see Levy v. McWilliams, 13 La. App. 444, 129 S. 170 (1930). *Michigan:* See note 38 supra. $50 per day fee allowed in Security Life Ins. Co. v. Schwartz, 221 Mich. 496, 191 N.W. 216 (1922). *Minnesota:* Judge of any court of record may allow expert "such fees or compensation as, in his judgment, may be just and reasonable." Minn. Stat. Ann. (1947) §357.25. See Le Mere v. McHale, 30 Minn. 410, 15 N.W. 682 (1883), for construction of "expert." See also 14 MINN. L. REV. 432 (1930). *North Carolina:* "Experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order." N.C. Stat. (1953) §6-52. See Connor v. Hayworth & Cole, 206 N.C. 721, 175 S.E. 140 (1934). *Vermont:* "In state causes extra compensation may be allowed to expert witnesses" when so ordered by the court; "compensation will be fixed by the court before whom the trial is had." Vt. Stat. (1947) §10,524.

[41] Attrep v. Horecky, (La. App. 1937) 177 S. 379.

[42] Must be called as expert: Snyder v. Iowa City, 40 Iowa 646 (1875). *Contra:* Suthon v. Laws, 132 La. 207, 61 S. 204 (1913).

[43] Cal. Code Civ. Proc. (Deering, 1949) tit. 1, §1871. Court can appoint one or more experts, on motion of either party or of the court. Court fixes compensation, if any, and charges to parties in such portion as court shall determine and it may thereafter be taxed and allowed in like manner as other costs. Experts produced by parties shall be entitled only to ordinary witness fees, which shall be taxed as other witness fees.

[44] Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909); 8 WIGMORE, EVIDENCE, 3d ed., §2203 (1940).

[45] Buchman v. State, 59 Ind. 1 (1877).

greater on the expert than on the ordinary person; each loses a day's labor. Sometimes a constitutional argument is made that the knowledge of the expert is his property and that taking it without just compensation violates due process under the federal and most state constitutions; there is a benefit conferred for which there should be payment.[46] This presupposes that opinion is property, a concept that seems tenuous at best. A more cogent reason for paying the expert added compensation is that otherwise there will be too great a burden on well-known men in their respective fields.[47] This argument is in part rebutted by the fact that since an overburdened expert is likely to be disgruntled, litigants will be cautious in asking such persons to testify. Finally, it has been argued that the opinion of the expert is his means of livelihood, and he should not be compelled to contribute it.[48] Stryker has said, "The physician has as much right to be compensated for his store of goods, namely, his knowledge, as has the grocer for his cans of tomatoes or his green vegetables on his shelves."[49]

Opponents of added compensation contend that it is difficult to distinguish opinion from fact; some say opinion is fact for the consideration of the court, whereas others say facts are opinions of witnesses as to circumstances.[50] Another difficulty often mentioned is fixing a scale of pay for various experts. England has such a scale, which has been much criticized,[51] but this matter has not confronted American courts, for additional compensation where allowed is usually at the discretion of the court.[52] It is also argued that though the person calling the expert may realize benefit from his knowledge without paying for it, the primary benefit is in the betterment of judicial administration.[53] This suggests again the basis of all arguments *against* extra compensation for expert witnesses: the administration of justice is a mutual benefit to all members of the community, and each individual is under a public duty to give the best testimony possible to further justice.[54]

[46] Pennsylvania Company v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918).

[47] Buchman v. State, 59 Ind. 1 (1877).

[48] United States v. Cooper, 21 D.C. 491 (1893).

[49] STRYKER, COURTS AND DOCTORS 166 (1932).

[50] See 50 UNIV. PA. L. REV. 346 (1902).

[51] See 111 J.P. 144 (1947); 112 J.P. 600 (1948). See also, Mitchell, "Witnesses' Expenses," 23 N.Z.L.J. 166 (1947).

[52] See notes 39 and 40 supra.

[53] Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897).

[54] See 8 WIGMORE, EVIDENCE, 3d ed., §2203 (1940); Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909).

However, this does not meet the problem of the "professional" witness, who in the ordinary practice of his profession acquires knowledge of the facts of the case before the court and is called upon to give evidence as to these facts or to express an opinion based on his general professional knowledge and experience. Nor does it adequately rebut the argument that knowledge is the stock in trade of the expert, which, it is contended, no litigant should obtain without reasonable compensation.

One solution to this dilemma has been the making of compensation contracts between a litigant and his expert witness. In some states such contracts are illegal.[55] A great many more hold that since a witness owes a legal duty to testify, these contracts are unenforceable because the performance of a legal duty is not consideration.[56] However, this would not apply where the witness is in another state or is privileged.[57] But as already shown, a great many states do allow the making of such contracts.[58] The expert does not owe a legal duty to give more than facts observed, so it would seem that a contract for expert testimony is not against public policy.[59] Contingent contracts in preparing evidence, however, have been in large part condemned on the basis that they breed perjury and fabrication.[60] On the other hand, it has been contended that there is no reason to strike down such agreements where there is no evidence of abuse, and that they greatly aid the poor man who ordinarily could not afford an expert's services.[61]

In this entire area, it is unfortunate that statutes either giving or allowing extra fees seem to be directed solely toward protecting the expert by providing him with adequate compensation. The approach should rather consider the judicial system as a whole, with two major problems in mind: (1) should any additional compensation be paid at all? and (2) if paid, should such compensation be taxed as costs?

From the standpoint of sound judicial administration, there are several strong reasons why the expert should not receive additional

[55] Note 38 supra.

[56] See note 37 supra; Klepper v. Klepper, 199 Mo. App. 294, 202 S.W. 593 (1918).

[57] 16 A.L.R. 1442 (1922).

[58] Note 36 supra.

[59] Stanton v. Rushmore, 112 N.J.L. 115, 169 A. 721 (1934). But see Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909) (a witness may be required to give testimony as to his professional opinion).

[60] Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911). Agreements making fee contingent on result of litigation are void. Pelkey v. Hodge, 112 Cal. App. 424, 296 P. 908 (1931).

[61] Barnes v. Boatmen's Nat. Bank of St. Louis, 348 Mo. 1032, 156 S.W. (2d) 597 (1941).

compensation. Because he is selected, compensated, and coached by one party, the expert witness may not be sufficiently unbiased and disinterested. On this basis, the whole idea of expert testimony has been severely criticized.[62] Another criticism is that unlimited expert testimony is economically unjust because it favors the wealthy litigant.[63] It seems appropriate, then, that in any statutory scheme allowing individuals to pay experts additional compensation, courts should have some supervision over the amount. One suggestion is to have the court approve the fee of the expert before testimony is admitted. This would result in less inequality arising from differences in economic status and might have the effect of encouraging more objective testimony. But there will still be partisanship in favor of the person paying the fee. Such bias is not necessarily based on the idea of selling to the highest bidder; more likely, it stems from natural feelings of loyalty to the person paying the bill, plus the witness' desire that his benefactor "get his money's worth."

A solution to these problems has been proposed by writers urging that experts be compensated entirely by the state.[64] This presents the second issue of whether compensation paid should be taxed as costs. Absent statutes, there is generally no taxing as costs because the expert can sell his services and cannot by law be required to testify as an expert in most jurisdictions allowing extra compensation.[65] Even though experts were to be limited on each side, the cost of litigation would nevertheless be substantially increased, especially considering estimates so often given that over sixty percent of all cases require expert testimony.[66] Because of the additional state expense, some writers take a limited view of state compensation, believing that only in the case of court-appointed experts should the state pay more than ordinary fees. This cuts the cost for the state, yet assures both parties of the availability of expert testimony, regardless of financial means.

The American Law Institute has proposed this procedure:

> "The compensation of each expert witness appointed by the judge shall be fixed at a reasonable amount. . . . In a civil action it shall be paid as the judge shall order; he may order that it be

[62] See 38 COL. L. REV. 369 (1938).

[63] 1 TEX. LAW AND LEGIS. 100 (1947).

[64] See 12 A.B.A.J. 150 (1926); Friedman, "Expert Testimony, Its Abuse and Reformation," 19 YALE L.J. 247 (1910).

[65] Note 36 supra. See also Cheatham Electric Switching Device Co. v. Transit Development Co., (2d Cir. 1919) 261 F. 792; 16 A.L.R. 1442 (1922).

[66] WELLMAN, ART OF CROSS EXAMINATION, 4th ed., 76 (1936); Harno, "Uniform Expert Testimony Act," 21 J. AM. JUD. SOC. 156 (1938).

paid by the parties in such proportions and at such times as he shall prescribe, or that the proportion of any party be paid by [insert name of the proper authority], and that, after payment by the parties or [insert name of the public authority] or both, all or part or none of it be taxed as costs in the public action. Any witness appointed by the judge who receives any compensation other than that fixed by the judge and any person who pays or offers or promises to pay such other compensation shall be guilty of contempt of court. The fee of an expert witness called by a party but not appointed by the judge shall be paid by the party calling him but shall not be taxed as costs in the action."[67]

California has an analogous provision in its statutes, with the added proviso that the court before or during the trial may limit the number of witnesses to be called by any party.[68] In theory this seems to be a very good compromise plan; however, its practicality is questionable in that there is the complex problem of which experts the court will appoint and upon whose recommendation the court will choose. If the court appoints experts recommended by both sides, the dilemma of excessive litigation costs arises. The calling of many expert witnesses might make litigation so expensive that valid causes of action are frustrated. However, if a statute is to authorize the taxing of expert fees as costs, it seems fair that the court should have some supervision over the amount.

This leads into a possible middle ground of achieving independence of expert witnesses and yet not burdening the state with excessive fees. Interrogatories and answers or depositions taken pursuant to commission could be admitted, regardless of the presence of the witness within the range of process of the court. Costs would be cut down and in addition the expert would not be losing much time in traveling to the trial and testifying in person, for the interrogatories and depositions could be taken at his convenience. Unfortunately, the practicality of this solution is limited, for it is generally agreed that no matter how carefully a judge instructs a jury, interrogatories and depositions do not carry as much weight with the jury as actual witnesses.

III. *Conclusion*

There is no complete solution to the difficulties involved in compensation of witnesses. The central problem is one of balance; litiga-

[67] A.L.I. MODEL CODE OF EVIDENCE, Rule 410 (1942).
[68] Cal. Code Civ. Proc. (Deering, 1949) tit. 1, §1871. See note 43 supra.

tion costs should not be so cheap that there is no deterrent to frivolous actions and yet costs should not be so excessive that valid causes of action are frustrated because expert testimony requires increased financing. In addition there must be considered the problems of economic inequality, the burdens on persons well known in their professions, and the fact that knowledge is the "stock in trade" of the expert. Finally, it is important to encourage impartiality of the expert.

It is generally agreed that the expert should at least receive pay for preliminary work undertaken in order to give opinion.[69] This is only fair; otherwise it would be impossible to get much work of this kind done. It is the opinion of this writer that courts should have some supervision over the payment of extra compensation by the individual parties; this would counter differences in economic status and offset the natural bias of the expert toward his employer. As to the extent of supervision, the availability of consultation fee agreements is a limiting factor. Although the scheme of state appointed experts has recently received wide attention, it is laden with difficulties of choosing and appointing such experts.

All proposals for added fees for experts are confronted with the basic philosophy of the American judicial system that the administration of justice is a mutual benefit to all members of the community and each individual is under a public duty to give the best testimony possible to further justice. Although there are economic inequalities in allowing private parties to hire their own experts, this argument has had somewhat less validity as the general standard of living has risen. Opening the door for the taxing of expert fees as part of costs can result in an intolerable increase in the cost of litigation. If there is any increase at all, it should be uniform for all witnesses. By and large, statutes now in force allow ordinary witnesses' fees on a scale of fifty or seventy-five years ago. The value of the dollar has changed so that these fees are in reality nominal. It is in this area that the most effective pressure can be exerted for increasing compensation for witnesses. But to yield to demands for increasing the fees given for expert testimony opens the door to manifold problems.

David W. Belin, S.Ed.

[69] Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909); 8 WIGMORE, EVIDENCE, 3d ed., §2203 (1940).