

Contingent Fees for Witnesses

The legal system recognizes two classes of witnesses, nonexpert and expert. A nonexpert witness is generally known as a witness. He testifies to facts within his personal knowledge and has a public duty to do so.¹ An expert witness is "[a] witness who has been qualified as an expert and who thereby will be allowed (through his/her answers to questions posited) to assist the jury in understanding complicated and technical subjects not within the understanding of the average lay person."²

At common law no witness fees were paid,³ and consequently, state statutes normally provide for some compensation to witnesses.⁴ In addition to the statutorily set fees, a witness may receive "payment of [e]xpenses reasonably incurred . . . in attending or testifying."⁵ This would include compensation for a witness who missed work to testify. Any contract or agreement providing for compensation in excess of that set by law is void and against public policy⁶ as it might provide the potential for perjury and, in any respect, the nonexpert witness has a duty to testify.

An expert witness may receive compensation in excess of the ordinary witness fees.⁷ This extra payment is to provide "[a] reasonable fee for the professional services of an expert witness."⁸ This amount is only limited by the requirement that it be

1. See *Alexander v. Watson*, 128 F.2d 627, 630 (4th Cir. 1942).

2. BLACK'S LAW DICTIONARY, 519 (rev. 5th ed. 1979).

3. *Dixon v. People*, 168 Ill. 179, 187, 48 N.E. 108, 109 (1897).

4. See ALA. CODE § 12-19-131 (1975) (\$1.50 for each day of attendance and \$0.05 a mile); N.Y. CIV. PRAC. LAW § 8001(a)(Consol. 1982)(subpoenaed witness is entitled to \$2.00 for each day of attendance and \$0.08 a mile).

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as MODEL CODE] DR 7-109(C)(1) and (2) (1981); see generally H. DRINKER, LEGAL ETHICS 75-76 (1953) (discussion of compensation in excess of statutory witness fee); Christopher, *Compensation of Witnesses by Lawyers*, 1 J. LEGAL PROF. 149 (1976)(general discussion of compensation for witnesses).

6. *State ex rel. Spillman v. First Bank*, 114 Neb. 423, —, 207 N.W. 674, 677 (1926)(quoting *Ramachel's Estate*, 24 Pa. Super. 262 (1926)); see generally 6A A. CORBIN, CONTRACTS § 1430 (1962).

7. *Alexander*, 128 F.2d at 630.

8. MODEL CODE, *supra* note 5, DR 7-109(C)(3); MODEL CODE, *supra* note 5, EC 7-28.

reasonable.

A party or a lawyer may attempt to condition the fee a witness is to receive on the testimony he is to give. This is one form of a contingent fee. A contract calling for such a fee would be clearly invalid. A witness is to tell the truth, the whole truth, and nothing but the truth. Another kind of contingent fee for a witness is a fee in which the compensation is dependent on the party's success with his case. This is the same as a lawyer's contingent fee. The amount of the fee may be tied to the contingency,⁹ but it does not have to be. This comment deals with this second kind of contingent fee.

The issue of contingent fee arrangements has usually concerned expert witnesses and the fee they receive which is in excess of the ordinary compensation for witnesses. In some cases this fee can be a rather substantial amount. On the other hand, ordinary witness fees are normally rather nominal compared to the general costs of litigating. When the issue has arisen, most courts have struck contingent fee arrangements or contracts as illegal and against public policy.¹⁰ These cases have largely resulted from a court's lack of trust and confidence in the witness. The witness, under a contingent fee, appears to be transformed into an interested party as he is paid only if his party is successful in the case.

9. See *Thomas v. Caulket*, 57 Mich. 392, 24 N.W. 154 (1885) (witness to get \$300 if plaintiff won \$1500 or \$500 if plaintiff won \$2000); *Davis v. Smoot*, 176 N.C. 538, 97 S.E. 488 (1918) (doctor to receive 20% of plaintiff's recovery in addition to expert witness fee).

10. See *Dawkins v. Gill*, 20 Ala. 206 (1842); *Laos v. Soble*, 18 Ariz. App. 502, 503 P.2d 278 (1972); *Von Kesler v. Baker*, 131 Cal. App. 654, 21 P.2d 1017 (1933); *Pelkey v. Hodge*, 112 Cal. App. 424, 296 P. 908 (1931); *Thomas v. Caulket*, 57 Mich. 392, 24 N.W. 154 (1885); *Western Cab Co. v. Kellar*, 90 Nev. 240, 523 P.2d 842 (1974), *cert. denied*, 420 U.S. 914 (1975); *Davis v. Smoot*, 176 N.C. 538, 97 S.E. 488 (1918); *Belfonte v. Miller*, 212 Pa. Super. 508, 243 A.2d 150 (1968); see also *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, 95 F.2d 978 (6th Cir. 1937) (The court noted that a contract providing a witness compensation contingent upon the outcome of the case is illegal yet stated that it did not have to reach the issue of illegality of the contract in the case before the court); *In re Schapiro*, 144 A.D. 1, 128 N.Y.S. 852 (1911) (although the court condemns contracts which provide compensation for witnesses contingent upon outcome of the case, the court did not expressly hold the contract was void in this case); *But see Marine Midland Trust Co. v. Forty Wall St. Corp.*, 13 A.D.2d 118, 213 N.Y.S.2d 689 (1961), *aff'd*, 11 N.Y.2d 679, 180 N.E.2d 909, 225 N.Y.2d 755 (1962); *Barnes v. Boatmen's Nat'l Bank*, 348 Mo. 1032, 156 S.W.2d 597 (1941); *Lack Malleable Iron Co. v. Graham*, 147 Ky. 161, 143 S.W. 1016 (1912).

The witness is seen as perjuring himself or at least as having his testimony influenced to enable the calling party to prevail.¹¹ One court even ruled a contingent fee contract invalid which was made after all the testimony had been given and the jury had retired to deliberate the verdict.¹²

A few courts have upheld a contingent fee for a witness as valid.¹³ These cases all concern expert witnesses. In *Martine Midland Trust Co. v. Forty Wall St. Corp.*,¹⁴ the court noted "a long-standing, unarticulated acquiescence in payment of contingent fees to experts . . ."¹⁵ In *Lack Malleable Iron Co. v. Graham*,¹⁶ the court upheld a contingent fee for a physician stating:

[I]t would be a serious and unwarranted reflection upon the integrity of a physician to say as a matter of law that his testimony was warped or influenced by the fact that, unless a recovery was had, he would not be paid for his services, in examining or treating the patient.¹⁷

In response to an inference that a witness' testimony was false because his fee was contingent upon the success of the litigation, the court in *Barnes v. Boatman's Nat'l Bank*,¹⁸ stated

[i]f [the inference was drawn], we would be compelled to infer that a party litigant's testimony was false because he is interested in the outcome of his litigation. We would also have to infer that all witnesses were guilty of perjury who were produced by an attorney trying a case on a contingent fee basis.¹⁹

11. See *Dawkins v. Gill*, 10 Ala. 206 (1842) (inevitable tendency of contingent fee contract would be to invite perjury, at least to sway the mind of the witness); *Laos v. Soble*, 18 Ariz. App. 502, 503 P.2d 978 (1972)(witness's evidence may be improperly influenced by contingent fee contract).

12. *Pelkey v. Hodge*, 112 Cal. App. 424, 296 P. 908 (1931) (the evil tendency, not the actual injury, of the contract made it invalid).

13. *Lack Malleable Iron Co. v. Graham*, 147 Ky. 161, 143 S.W. 1016 (1912); *Barnes v. Boatmen's Nat'l Bank*, 348 Mo. 1032, 156 S.W.2d 597 (1941); *Marine Midland Trust Co. v. Forty Wall St. Corp.*, 13 A.D.2d 118, 213 N.Y.S.2d 689 (1961), *aff'd*, 11 N.Y.2d 679, 180 N.E.2d 909, 225 N.Y.S.2d 755 (1962).

14. 13 A.D.2d 118, 213 N.Y.S.2d 689 (1961), *aff'd* 11 N.Y.2d 679, 180 N.E.2d 909, 225 N.Y.S.2d 755 (1962).

15. *Id.* at 126, 213 N.Y.S.2d at 696.

16. 147 Ky. 161, 143 S.W. 1016 (1912).

17. *Id.* at 165, 143 S.W. at 1018.

18. 348 Mo. 1032, 156 S.W.2d 597 (1941).

19. *Id.* at —, 156 S.W.2d at 602.

The court, in each of the three cases above, showed a trust and confidence in the witness in question. The witness' fee was contingent on the outcome of the case. The amount of the fee was not related to the success of the party's case. It was for an amount determined before trial or to be determined by the court on a reasonable basis. Even though the amount was not related to the success of the party's case, the witness was still an interested party. The witness did not recover his fee unless his party won the case.

The Model Code of Professional Responsibility [hereafter cited as Model Code]²⁰ is designed to gain the respect of society for the individual lawyer who follows the Code.²¹ The Model Code has expressly prohibited contingent fees to witnesses.²² In line with the Model Code, various other professions have prohibited the acceptance of contingent fees by their members who serve as expert witnesses in trials.²³ The various professional codes of ethics appear to be concerned with the overall dignity of their particular profession. It appears these codes of ethics are very concerned with the way society views the particular profession. The American Medical Association Judicial Council reflected this idea stating:

[T]he 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,

20. The MODEL CODE, *supra* note 5, became effective January 1, 1970. It developed out of the 32 CANONS OF PROFESSIONAL ETHICS adopted in 1908. There are three sections of the MODEL CODE: the Canons, the Ethical Considerations and the Disciplinary Rules. The Canons are the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived. The Ethical Considerations represent the objectives toward which every member should strive. The Disciplinary Rules are mandatory and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

21. AMERICAN BAR ASSOCIATION, ABA CODE PREAMBLE, 1c (1974).

22. MODEL CODE, *supra* note 5, EC 7-28, ("But in no event should a lawyer pay or agree to pay a contingent fee to any witness"); MODEL CODE, *supra* note 5, DR 7-109 (Contact with Witnesses (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.")

23. AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS, Rule 302, at 20 (1975); AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, CODE OF ETHICS § 10.202 (1961), *cited in* Laos v. Soble, 18 Ariz. App. 502, ___, 503 P.2d 978, 979 n.1 (1972); AMERICAN MEDICAL ASSOCIATION, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 7, ¶ 11, at 42 (1969); Hilton & Sellers, *Code of Ethics Adopted by Questioned Document Examiners*, 40 A.B.A.J. 690, 691, ¶ 7 (1954).

if a fee is contingent upon the successful outcome of a claim, there is the ever-present 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.²⁴

A New York lawyer, Carl Person, challenged the constitutionality of Model Code DR 7-109(C) [hereinafter cited as DR 7-109(C)] in *Person v. Association of the Bar of the City of New York*.²⁵ "This rule has been adopted by the New York State Bar Association and incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department."²⁶ Person was the lawyer for ten plaintiffs who were suing General Motors Corporation in an antitrust action for \$300,000,000 in damages.²⁷ The action became stalled as Person was unable to retain needed accounting and economic testimony because of his client's lack of funds and the inhibition of DR 7-109(C).²⁸ Person argued the prohibition of contingent fees by DR 7-109(C) denied his clients genuine access to the court as he was disadvantaged in not obtaining the needed expert testimony.²⁹

The district court found the challenged rule deprived Person's clients of their fundamental right of access to the court and was "too irrational to survive Fourteenth Amendment analysis."³⁰ The court did not find the entire rule unconstitutional. It found a reasonable fee arrangement could not be rejected simply because it was contingent on the party winning the case.³¹ The court noted

24. AMERICAN MEDICAL ASSOCIATION, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL, § 7, ¶ 11, p. 42 (1969).

25. 414 F. Supp.144 (E.D.N.Y. 1976), *rev.* 554 F.2d 534 (2nd Cir. 1977), *cert. denied*, 434 U.S. 924 (1977).

26. *Person v. Association of the Bar of the City of N.Y.*, 554 F.2d 534, 535 (2nd Cir. 1977), *cert. denied*, 434 U.S. 924 (1977).

27. *Id.* at 535.

28. *Id. But cf. Marine Midland Trust Co. v. Forty Wall St. Corp.*, 13 A.D.2d 118, 125, 213 N.Y.S.2d 689, 695 (1961), *aff'd* 11 N.Y.S.2d 755 (1962)(allowed contingent fees for expert witnesses as complaining security holder seldom possesses the ability to match the enormous resources of management). This case was decided before the MODEL CODE had been formulated.

29. *Person*, 414 F. Supp. at 145. It was argued that under the principles of *Broddie v. Connecticut*, 401 U.S. 371 (1971), access to the court can be a fundamental right so that strict scrutiny is required.

30. *Person*, 414 F. Supp. at 146.

31. *Id.*

the purpose of DR 7-109(C) was to remove an incentive for untruthful testimony, but that was unlikely to be achieved by the rule.³² The court saw an incentive to untruthful testimony implicit in any payment to a witness.³³

The Second Circuit Court of Appeals reversed, finding "DR 7-109(C) [did] not affect a fundamental right nor create a suspect classification."³⁴ The circuit court found the litigants were not denied access to the court since they were already in court.³⁵ The court did nothing to refute the district court's holding that the litigants were denied genuine access to the court. In finding the litigants' rights of access were not fundamental, the circuit court associated the economic rights of the indigent in *United States v. Kras*³⁶ with the litigants' rights in *Person*. By doing so, the court lightly stepped over the district court's reason of putting *Kras* aside. The district court reasoned "that [in *Kras*] alternatives to bankruptcy appeared to be available"³⁷ whereas in the case at bar "the [litigants have] no alternative to seeking justice except the courts established to dispense it."³⁸

The circuit court did realize that the elimination of DR 7-109(C) would help the less affluent in difficult and complex litigation.³⁹ Yet, the court still held that contingency arrangements presented a danger of inducing false testimony.⁴⁰ The court finally looked to what it called the legislature's judgment, and found "that the need for discouragement of contingent fee arrangements outweighs the obstacle to financing litigation which a ban on contingent fees may create."⁴¹ The court seems to be concerned not only with the fear of false testimony, but also with the public's impression of a legal system that allows such arrangements.

32. *Id.*

33. *Id.*

34. *Person*, 554 F.2d at 539.

35. *Id.* at 537.

36. 409 U.S. 434 (1973).

37. *Person*, 414 F. Supp. at 145.

38. *Id.*

39. *Person*, 554 F.2d at 537-38.

40. *Id.* at 538.

41. *Id.* at 538; *But see Shore v. Parklane Hosiery Co.*, 93 Misc. 2d 933, 937, 403 N.Y.S.2d 990, 992 (Sup. Ct. 1978) *aff'd sub nom. In re Shore*, 67 A.D.2d 526, 415 N.Y.S.2d 878 (1979) (legislative judgment in *Person*, 554 F.2d at 538 is somewhat misleading as the supreme court is vested with the power and control over lawyers).

Two New York cases dealing with contingent fees have been decided since the *Person* case.⁴² In *Shore v. Parklane Hosiery Co.*,⁴³ the court of special term noted that the contingent fee was to be set by the court and held "the nature of the fee was relevant only as to his credibility, not to his competency."⁴⁴ Although it did not reach the issue of the special term's holding,⁴⁵ the appellate court did state that it was "in agreement with special term's general observations to the effect that the trend of the law is that a witness' self-interest goes to his credibility and not to his competency."⁴⁶ The appellate court did hold DR 7-109(C) inapplicable "where an attorney [acquiesced] in an arrangement whereby the witness [agreed] to look to the court for his fee."⁴⁷ This decision does, however, seem to be limited to actions brought under BUSINESS CODE OF NEW YORK § 623.⁴⁸ Even with the limitation, it represents a breakthrough in that a court decided, under the shadow of DR 7-109(C), that contingent fees in some circumstances are not void and against the public policy of New York. In this particular situation, the court actually decided that the contingent fee arrangements reflected the public policy of New York as expressed in paragraph (7) of subdivision (h) of section 623 of the Business Corporation Law and in the relevant case law."⁴⁹

The second case which has looked at contingent fees since *Person* concerned a shareholder derivative action.⁵⁰ The defendant

42. See, *Seigel v. Merrick*, 619 F.2d 160 (2nd Cir. 1980)(Agreement with witness not contingent on its face is not prohibited by DR 7-109(C)). *Shore v. Parklane Hosiery Co.*, 93 Misc.2d 933, 403 N.Y.S.2d 990 (Sup. Ct. 1978), *aff'd sub nom. In re Shore*, 67 A.D.2d 526, 415 N.Y.S.2d 878 (1979)(That plaintiffs had an understanding with their expert witnesses that the witnesses would, upon a favorable outcome, look to the court for their fees was not unethical since the grounds for the suit, BUS. CORP. § 623 (1982), provides means for "minority shareholders [to obtain] true access to the appraisal remedy which was enacted for their protection.").

43. *Shore v. Parklane Hosiery Co.*, 93 Misc. 2d 933, 403 N.Y.S.2d 990 (Sup. Ct. 1978), *aff'd sub nom. In re Shore*, 67 A.D.2d 526, 415 N.Y.S.2d 878 (1979).

44. *Id.* at 938, 403 N.Y.S.2d 993.

45. *In re Shore*, 67 A.D.2d 526, 531, 415 N.Y.S.2d 878, 881-82 (1979).

46. *Id.* at 536 n.5, 415 N.Y.S.2d at 885 n.5.

47. *Id.* at 536, 415 N.Y.S.2d at 885. See also AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS, Rule 302, at 20 (1975)(fees are not regarded as contingent if fixed by the court).

48. *Id.* at 536, 415 N.Y.S.2d at 885.

49. *Id.* at 531, 415 N.Y.S.2d at 882.

50. See *Seigel v. Merrick*, 619 F.2d 160 (2nd Cir. 1980).

claimed plaintiff's expert witness was paid a contingent fee in violation of DR 7-109(C).⁵¹ The court noted a voluntary forbearance of a fee by a witness is not precluded by the New York Disciplinary Rules and in fact is one of several established methods of getting around DR 7-109(C).⁵²

There seems to be a trend by the courts to circumvent DR 7-109(C).⁵³ The Second Circuit Court of Appeals noted that the arguments advanced in the *Person* case may indicate the desirability of legislative change.⁵⁴ However, most states legislate according to the recommendations of the American Bar Association, and there appears to be little movement for change in this area from that body.⁵⁵ Thus, any change will come slowly unless courts are willing to make exceptions to this long standing policy by new judicial analysis of DR 7-109(C) and its state counterparts.

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51. *Id.* at 166. Plaintiff's lawyer and the expert witness had an agreement which was not contingent on its face. The defendant's allegation of contingency rested on the sound prediction that the expert witness would not have tried to collect his full fee if plaintiff had lost. The expert's fee under the court order was \$12,225 and plaintiff had less than \$1,000 of stock in the defendant corporation.

52. *Id.* at 166-67.

53. See *Seigal v. Merrick*, 619 F.2d 160 (2nd Cir. 1980)(an expert witness' voluntary forbearance from fee to which he is entitled pursuant to a fee arrangement not contingent on its face did not violate MODEL CODE, *supra* note 5, DR 7-109(C)). *Shore v. Parklane Hosiery Co.*, 93 Misc. 2d 933, 403 N.Y.S.2d 990 (Sup. Ct. 1978), *aff'd sub nom. In re Shore*, 67 A.D.2d 526, 415 N.Y.S.2d 878 (1979)(construed contingent expert witness fee arrangement to fall outside ambit of DR 7-109(C)).

54. *Person*, 554 F.2d at 539. *Person's* arguments were: (1) cross-examination would reveal whatever financial stake a witness would have in the outcome of the litigation; (2) experts often have ongoing business relationships with the parties who retain them and therefore, have a stake in the litigation although their fee is not contingent; (3) other experts on a "fixed fee" basis often do not get paid unless their party is successful. See also Note, *The Contingent Compensation of Expert Witnesses in Civil Litigation*, 52 IND. L.J. 671 (1977).

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (Proposed Final Draft 1981). The proposed MODEL RULES did not expressly prohibit contingent fees for witnesses but prohibited an offer of inducement to a witness that is prohibited by law. This would allow the common law in each jurisdiction to govern while affording the courts discretion as to the definition of "inducement." However, this Code was recently rejected by the American Bar Association.