CONTRACTS—CONTINGENT FEE FOR FACT WITNESS—[Federal].—An attorney and an accountant brought suit to recover $1,000 in fees for services rendered in the trial of a suit by the defendant. Before that trial the attorney for the defendant informed the plaintiffs that he wished their help and that if the case should be won he would ask for $75,000 in addition to the fees already agreed upon, of which the plaintiffs would get 10 per cent to be divided between them. Neither of the plaintiffs took any part in the trial except to testify to facts which they had previously learned as agents and attorneys of the defendants. The district court allowed the fees, and the defendant appealed. *Held,* reversed. The contract was invalid. Any agreement to pay an ordinary witness compensation in addition to that provided by law is void as contrary to public policy and as lacking in consideration. *Alexander* v. *Watson.*[1]

It has been held that attorneys should avoid testifying in behalf of their clients except when their testimony is essential to the ends of justice[2] or merely concerns formal matters.[3] The better practice is for the attorney to withdraw from the case as soon as it is apparent that he will have to testify.[4] However, if he does testify, his testimony is not incompetent, and the fact that he is retained in the case goes only to the weight of his testimony.[5] Of course, when he has definitely and completely severed his professional connections with the party in the case, he is not disqualified.[6]

1. Alexander v. Watson (C. C. A. 4, 1942) 128 F. (2d) 627.

2. Sengebush v. Edgerton (1935) 120 Conn. 367, 180 Atl. 694; Moody v. Norton (1915) 192 Ill. App. 8; Ferraro v. Taylor (1936) 197 Minn. 5, 265 N. W. 829.

3. Canons of Professional Ethics of the American Bar Association §19, (1937) 62 A. B. A. 1112. First Calumet Trust & Savings Bank v. Rogers (C. C. A. 7, 1923) 289 Fed. 953; Freund v. Johnson (C. C. A. 7, 1931) 46 F. (2d) 272; Nanos v. Harrison (1922) 97 Conn. 529, 117 Atl. 803; Ropkins v. Frasctore (1922) 97 Conn. 708, 118 Atl. 129; Miller v. Urban (1937) 123 Conn. 331, 195 Atl. 193; Nye Odorless Incinerator Corp. v. Felton (1931) 35 Del. 236, 162 Atl. 504; In re Normand's Estate (1911) 88 Neb. 767, 130 N. W. 571; Cox v. Kee (1922) 107 Neb. 587, 186 N. W. 974; Penczak v. Penczak (1927) 238 Mich. 97, 213 N. W. 117; Burnett v. Taylor (1927) 36 Wyo. 12, 252 Pac. 790.

4. Callas v. Independent Taxi Owners' Ass'n (App. D. C. 1933) 66 F. (2d) 192; Nanos v. Harrison (1922) 97 Conn. 592, 117 Atl. 803; Jennings v. Di Genova (1928) 107 Conn. 491, 141 Atl. 866; Onstott v. Edel (1908) 232 Ill. 201, 83 N. E. 806, 13 Ann. Cas. 28; Cuvelier v. Town of Durmont (1936) 221 Iowa 1016, 266 N. W. 517; State v. Woodside (1849) 31 N. C. 496; Inman v. Inman (1932) 158 Va. 597, 164 S. E. 383; Connolly v. Straw (1881) 53 Wis. 645, 11 N. W. 17; Allen v. Ross (1929) 199 Wis. 162, 225 N. W. 831; Interior Woodwork Co. v. Buhler (1932) 207 Wis. 1, 238 N. W. 822.

5. Newman v. Bradley (U. S. 1788) 1 Dall. 240; French v. Hall (1886) 119 U. S. 152; Sorrin v. Pacific Finance Corp. (D C. S. D. N. Y. 1941) 37 F. Supp. 527; Wollschlaeger v. Mix (1936) 364 Ill. 207, 4 N. E. (2d) 89; Shlensky v. Shlensky (1938) 369 Ill. 179, 15 N. E. (2d) 694; *In re* Stephens' Estate (1940) 207 Minn. 597, 293 N. W. 90; In Pennsylvania it is held that it is for the discretion of the trial court whether the attorney may participate in the trial after testifying as a witness in that case. See Pentimall v. Bankers' Auto Finance Corp. (1927) 92 Pa. Super. 110; Security Trust Co. of Pottstown v. Stapp (1938) 332 Penn. 9, 1 A. (2d) 236.

6. Woodward v. City of Waterbury (1931) 113 Conn. 457, 155 Atl. 825; McLaughlin v. Shields (1829) 12 Pa. 283.

While the foregoing refers to the attorney in the role of an ordinary witness, the rule appears to be the same when he testifies as an expert witness with or without a contingent fee.[7]

The fee to be paid to ordinary fact witnesses in the state and federal courts is fixed by law.[8] Contracts for payment of contingent fees in excess of the prescribed amount are held invalid as lacking consideration and against public policy.[9] However, if the witness resides outside the juridiction of the court's process it has been held that there is consideration for the contract to pay him a reasonable amount in excess of the statutory fee.[10] But contracts to compensate the witness for loss of time are invalid, since they, if permitted, might be used by witnesses to extort unreasonable fees for their testimony.[11]

In accordance with these rules the court rightly found that, since the plaintiffs had severed their professional connections with the defendant and testified only as to facts which they had acquired during their employment by the defendant, the plaintiffs were not experts but ordinary fact witnesses and that their contract for witness fees in excess of those required by law was invalid. R. R. N., Jr.

---

7. Wilhelm v. Rush (1937) 18 Cal. App. (2d) 366, 63 P. (2d) 1158; Clifford v. Hughes (1910) 139 App. Div. 730, 124 N. Y. S. 478. For the distinction between fees for expert or opinion testimony which can be required under ordinary subpoena and fees to compensate experts for extra services, see Comment (1941) 27 WASHINGTON U. LAW QUARTERLY 583, 585.

8. Judicial Code and Judiciary Act (1874) R. S. 848; 28 U. S. C. A. §601; R. S. Mo. 1939 §13420; Ill. Revised Statutes, 53, §65.

9. Dawkins v. Gill (1846) 10 Ala. 206; Pelkey v. Hodge (1931) 112 Cal. App. 424, 296 Pac. 908; Dodge v. Stiles (1857) 26 Conn. 463; Walker v. Cook (1889) 33 Ill. App. 561; Boehmer v. Foval (1894) 55 Ill. App. 71; Burchell v. Ledford (1928) 226 Ky. 155, 10 S. W. (2d) 622; Sherman v. Burton (1911) 165 Mich. 293, 130 N. W. 667; Quirk v. Muller (1894) 14 Mont. 467; Sweany v. Hunter (1808) 5 N. C. (1 Murph.) 181; Lyon v. Hussey (1894) 82 Hun. 15, 31 N. Y. S. 281; Cowles v. Rochester Folding Box Co. (1904) 81 App. Div. 414, 80 N. Y. S. 811, 71 N. E. 468 (Aff. 179 N. Y. 87); Clifford v. Hughes (1910) 139 App. Div. 730, 124 N. Y. S. 478; In re Certain Lands (1911) 128 N. Y. S. 999 (Aff. In re New York 97 N. E. 1103); Perry v. Dicken (1884) 105 Penn. 83, 51 Am. Rep. 181; In re Ramschasel's Estate (1904) 24 Pa. Super. 262; Bowling v. Blum (Texas 1899) 52 S. W. 97; Wright v. Corbin (1937) 190 Wash. 260, 67 P. (2d) 868; Pool v. Sacheverel (1720) 1 P. Wms. 675, 24 Eng. Rep. 565. See Note, 16 A. L. R. 1457.

10. Gaines v. Molen (1887) 30 Fed. 27; Lincoln Mountain Gold Min. Co. v. Williams (1906) 37 Colo. 193, 85 Pac. 844; Keown & McEvoy Inc. v. Verlin (1925) 253 Mass. 374, 149 N. E. 115, 41 A. L. R. 1319; State ex rel. Spillman v. First Bank of Nickerson (1926) 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418; Nickelson v. Wilson (1875) 60 N. Y. 362; Armstrong v. Prentice (1893) 86 Wis. 210; Thatcher v. Darr (1921) 27 Wyo. 452, 199 Pac. 938, 16 A. L. R. 1442; Willis v. Peckham (1820) 1 Brod. & B. 515, 129 Eng. Rep. 821.

11. Wright v. Somers (1906) 125 Ill. App. 256; Moor v. Adam (1816) 5 Maule & S. 156, 105 Eng. Rep. 1009; Lonergan v. Royal Exch. Assur. Co. (1831) 7 Bing 729, 131 Eng. Rep. 282.