

1985

In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions

Kenneth R. Levine

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Kenneth R. Levine, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 Fordham L. Rev. 1461 (1985).

Available at: <https://ir.lawnet.fordham.edu/flr/vol53/iss6/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

IN FORMA PAUPERIS LITIGANTS: WITNESS FEES AND EXPENSES IN CIVIL ACTIONS

INTRODUCTION

Civil litigants in federal courts are generally required to pay their own expenses and certain court costs.¹ Inherent in a system that conditions access to justice on an ability to pay² is the risk that the poor will not be able to protect their rights as effectively as the majority of citizens.³ To remedy this systemic defect, Congress enacted an in forma pauperis statute: section 1915 of title 28 of the United States Code,⁴ which allows a

1. Out-of-pocket expenditures are practical necessities of civil litigation in federal courts. These expenses include fees for attorneys' services, reimbursement of witnesses, preparation of evidence expenses, publication costs, costs of printed or typewritten briefs and investigatory expenses. See Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo. L.J. 516, 517 (1968) [hereinafter cited as *Litigation Costs*]; Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 Vand. L. Rev. 25, 28-29 (1973) (hereinafter cited as *Indigent Access*); see, e.g., 28 U.S.C. § 1821 (1982) (witness expenses); Fed. R. Civ. P. 26(b)(4)(C) (fee for opponent's experts for discovery); *id.* 30(b)(4) (steno-graphic transcription). Fees and costs have often been distinguished from expenses. See *infra* note 26 and accompanying text.

2. Because the judicial process is partly funded by those who use it, statutorily exacted fees must be paid before litigation can commence. See P. Wald, *Law and Poverty* 59-63 (1965); *Litigation Costs*, *supra* note 1, at 517; *Indigent Access*, *supra* note 1, at 27. Official charges include filing fees in docketing a case, jury fees, subpoena fees, trial fees, court reporter fees, and judgment and execution fees. See P. Wald, *supra*, at 59-63; *Litigation Costs*, *supra* note 1, at 516-18; *Indigent Access*, *supra* note 1, at 26-27; see, e.g., 28 U.S.C. §§ 1913, 1914, 1917, 1921 (1982 & West Supp. 1984). Costs of the prevailing civil litigant may be taxed against an unsuccessful opponent. See 28 U.S.C. § 1920 (1982) (court may tax fees); Fed. R. Civ. P. 54(d) (costs to prevailing party); see also 28 U.S.C. § 1921 (1982) (marshal's fees); Fed. R. Civ. P. 65(c) (posting security for costs as precondition to restraining order or preliminary injunction).

3. For example, a pauper may lose his day in court altogether if he cannot afford to meet court costs. See *Campbell v. Chicago & N.W. Ry.*, 23 Wis. 490, 490-91 (1868) (dismissal affirmed because plaintiff was unable to pay security for costs); Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 362 (1923) (indigent must be "cast out of court" if he cannot produce "security or a bondsman"). The impoverished litigant may gain access to court but be unable to afford to present evidence. *United States Marshals Serv. v. Means*, 724 F.2d 642, 647 (8th Cir. 1983) (impoverished litigant unable to pay fees necessary to bring witnesses to trial), *aff'd on other grounds on rehearing*, 741 F.2d 1053, 1055 (8th Cir. 1984) (en banc); see *Johnson v. Hubbard*, 698 F.2d 286, 291 (6th Cir.) (affirming dismissal of pauper's civil rights claim for lack of prosecution because litigant could not produce funds to pay witness fees), *cert. denied*, 104 S. Ct. 282 (1983). Further, even if legal services are provided for an impoverished litigant, their quality may be questionable. See F. Marks, Jr., *The Legal Needs of the Poor: A Critical Analysis* 2 (1971); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 805, 807 (1967). For further sentiments on the status of the poor in civil litigation, see H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1-2 (1892) and J. Frank, *Courts on Trial* 94-99 (1949).

4. Act of July 20, 1892, ch. 209, §§ 1-5, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (1982 & West Supp. 1984)). Section 1915 states:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor.

federal district court to waive various costs and fees⁵ that would otherwise create financial obstacles to an indigent civil litigant,⁶ and to provide

Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. (b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the costs of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

5. See 28 U.S.C. § 1915(a), (b) (1982 & West Supp. 1984).

6. This Note does not distinguish between indigents generally and litigants who have been granted in forma pauperis status. See *infra* note 26. In forma pauperis status must be granted by a court to an indigent before the provisions of § 1915 can apply. To gain in forma pauperis status an indigent must file an affidavit asserting that "he is unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a) (1982). There is no statutory prescription regarding the degree of impoverishment necessary for in forma pauperis status. See 28 U.S.C. § 1915 (1982 & West Supp. 1984). Generally, the determination is at the discretion of the courts. See 28 U.S.C. § 1915(a) (1982) ("court . . . may authorize") (emphasis added); see, e.g., *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983) (per curiam) (noting "broad discretion"); *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (per curiam) (same), *cert. denied*, 105 S. Ct. 571 (1984); *Hogan v. Midland County Comm'rs Court*, 680 F.2d 1101, 1103 (5th Cir. 1982) (only limit on broad discretion is that court cannot act arbitrarily or dismiss application on erroneous grounds). The courts have not established any rigid financial requirements for granting in forma pauperis status. See, e.g., *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (per curiam) (denial of in forma pauperis status upheld where service and filing fee of eight dollars was required of prisoner with \$27.40 in his inmate trust account and who received \$30 each month from his family); *In re Smith*, 600 F.2d 714, 716 (8th Cir. 1979) (district court should not deny petitioner in forma pauperis status "simply because of [his] ability to pay for small physical or material comforts"); *Carroll v. United States*, 320 F. Supp. 581, 582 (S.D. Tex. 1970) (dismissal of claim held appropriate where prisoner with personal funds of \$204.90 claimed he could not pay \$15 filing fee). The applicant's affidavit must also state the "nature of the action, defense or appeal and affiant's belief that he is entitled to redress." 28 U.S.C. § 1915(a) (1982). The court can dismiss the case at any time if it is "satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1982); see, e.g., *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979) (district court's authority to dismiss if frivolous or malicious especially broad in civil rights action of prisoners); *Scellato v. Department of Corrections*, 438 F. Supp. 1206, 1207 (W.D. Va. 1977) (district courts vested with discretion to deny in forma pauperis status to state

the litigant with an attorney.⁷

On its face, however, section 1915 does not authorize a court to advance a civil litigant the amounts the litigant must prepay witnesses⁸ under Federal Rule of Civil Procedure 45(c)⁹ or the amounts the litigant

prisoners); *Serna v. O'Donnell*, 70 F.R.D. 618, 620-21 (W.D. Mo. 1976) (can dismiss if frivolous); *Hawkins v. Elliott*, 385 F. Supp. 354, 356-57 (D.S.C. 1974) (court may monitor civil action of in forma pauperis litigant and dismiss at any time to avoid or minimize abuse of prosecution by indigents). Courts have interpreted this to mean that a meritorious claim must be stated in the affidavit. See *Yates v. Wellman*, 373 F. Supp. 437, 438 (E.D. Ky. 1974) (in forma pauperis privilege granted only when court is persuaded that litigant has stated meritorious cause of action); *Rimka v. Fayette County Bd. of Comm'rs*, 360 F. Supp. 1263, 1264 (E.D. Ky. 1973) (same); *Shields v. United States*, 201 F. Supp. 790, 790 (E.D. Ky.) (same), *aff'd*, 310 F.2d 708 (6th Cir. 1962), *cert. denied*, 374 U.S. 837 (1963).

Some courts have held that in forma pauperis status will be granted only in exceptional cases. See, e.g., *In re New Haven Radio, Inc.*, 18 Bankr. 495, 496 (D. Conn. 1982) (leave to proceed in forma pauperis is granted only in exceptional circumstances); *Rhodes v. Houston*, 258 F. Supp. 546, 578 (D. Neb.) (same), *cert. denied*, 383 U.S. 971 (1966), *aff'd per curiam*, 418 F.2d 1309 (8th Cir. 1969), *cert. denied*, 397 U.S. 1049 (1970). Further, even if in forma pauperis status has been granted, the benefits established by § 1915 will be granted at the discretion of the court. See 28 U.S.C.A. § 1915(b) (West Supp. 1984) ("court may direct payment by the United States of the expenses of (1) printing the record on appeal . . . (2) preparing a transcript") (emphasis added); 28 U.S.C. § 1915(d) (1982) ("court may request an attorney") (emphasis added); see, e.g., *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) (per curiam) (decision to appoint counsel for in forma pauperis civil rights litigant rests with trial court), *cert. denied*, 459 U.S. 1214 (1983); *Mosby v. Mabry*, 697 F.2d 213, 214-15 (8th Cir. 1982) (per curiam) (when indigent is familiar with legal issues involved in case, court may deny appointing attorney and subpoenaing witnesses); *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam) (attorney provided only in exceptional cases), *cert. denied*, 455 U.S. 958 (1982); *Turner v. Steward*, 497 F. Supp. 557, 558 (E.D. Ky. 1980) (same). Also, an in forma pauperis litigant is still liable for costs at the conclusion of the trial. See 28 U.S.C. § 1915(e) (1982); *Bartell, Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 565-66 (1984); see, e.g., *Harris v. Forsyth*, 742 F.2d 1277, 1277-78 (11th Cir. 1984) (per curiam) (costs can be assessed against unsuccessful in forma pauperis litigant); *Flint v. Haynes*, 651 F.2d 970, 972 (4th Cir. 1981) (same), *cert. denied*, 454 U.S. 1151 (1982); *Duhart v. Carlson*, 469 F.2d 471, 474 (10th Cir. 1972) (same).

7. See 28 U.S.C. § 1915(d) (1982).

8. Section 1915(a) refers to "fees and costs." See 28 U.S.C. § 1915(a) (1982). This wording was used in the original version of the statute which was adopted in 1892. See Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (1982)). At that time, no federal statute required payment of fees and expenses by litigants to their witnesses. The federal witness fee statute was not enacted until 1926. See Act of Apr. 26, 1926, ch. 183, § 3, 44 Stat. 324 (codified as amended at 28 U.S.C. § 1821 (1982)). Hence, it could be argued that the drafters of § 1915 would have included witness fees and expenses within the statute's scope had they existed. Such an extension is impliedly refuted by Congress' failure to expand § 1915 to include witness fees and expenses in the post-1926 amendments of the statute. See 2A N. Singer, *Sutherland Statutory Construction* § 49.10, at 408 (C. Sands rev. 4th ed. 1964) ("legislative action by amendment . . . to other parts of a law . . . may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law."); see, e.g., Act of Oct. 10, 1979, Pub. L. No. 96-82, § 6, 93 Stat. 643, 645 (amending 28 U.S.C. § 1915); Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (same); Act of Oct. 31, 1951, ch. 655, § 51(b), (c), 65 Stat. 710, 727 (same); Act of May 24, 1949, ch. 139, § 98, 63 Stat. 89, 104 (same).

9. Fed. R. Civ. P. 45(c). Rule 45(c) provides in part:

(c) Service. A subpoena may be served by the marshal, by his deputy, or by

must pay witnesses after trial under section 1821 of title 28 of the United States Code.¹⁰ Unless a party advances funds along with the subpoena, witnesses are not required, nor may they be able, to attend the trial.¹¹ As a result, impoverished civil litigants may be given access to the courts by section 1915 only to have their claims dismissed because they cannot afford to bring along their evidence.¹²

It is unresolved whether there is any authority beyond section 1915 that would permit a federal court to arrange prepayment of witness fees in a civil case.¹³ Since the statute's enactment in 1892, the overwhelming majority of courts have declined to advance witness fees on behalf of impoverished civil litigants, finding no basis for doing so in section 1915¹⁴ or the due process clause of the fourteenth amendment.¹⁵ More

any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

10. See 28 U.S.C. § 1821 (1982).

11. See *Carter v. Jury Comm'n*, 396 U.S. 320, 338 n.43 (1970); *CF & I Steel Corp. v. Mitsui & Co.* (U.S.A.), 713 F.2d 494, 496 (9th Cir. 1983); *Saper v. Hague*, 186 F.2d 592, 593 (2d Cir. 1951); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 45.05[2], at 45-50 to -51 n.45, ¶ 45.06[1], at Supp. 12 n.4 (2d ed. 1982 & Supp. 1985); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2461, at 447 & n.12 (1971).

12. See *United States Marshals Serv. v. Means*, 724 F.2d 642, 647 (8th Cir. 1983), *aff'd on other grounds on rehearing*, 741 F.2d 1053 (8th Cir. 1984) (en banc); *Johnson v. Hubbard*, 698 F.2d 286, 291 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983).

13. The argument has been made that due process requires that all persons are entitled to meaningful access to the courts. Such access would necessitate that indigents be given the opportunity to present evidence in civil cases. See *Johnson v. Hubbard*, 698 F.2d 286, 291-92 (6th Cir.) (Swygert, J., dissenting), *cert. denied*, 104 S. Ct. 282 (1983). *But see Johnson*, 698 F.2d at 288-89. This Note does not address this constitutional issue.

14. *United States Marshals Serv. v. Means*, 724 F.2d 642, 645-46 (8th Cir. 1983), *aff'd on other grounds on rehearing*, 741 F.2d 1053, 1057 (8th Cir. 1984) (en banc); *Johnson v. Hubbard*, 698 F.2d 286, 289-90 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983); *In re forma pauperis* proceedings, 53 Comp. Gen. 638, 645 (1974). Compare *Morrow v. Igleburger*, 584 F.2d 767, 772 n.7 (6th Cir. 1978) (§ 1915 allows court in its discretion to order provision of witness fees to in forma pauperis litigant), *cert. denied*, 439 U.S. 1118 (1979) *with Johnson*, 698 F.2d at 290 & n.4 (dismisses *Morrow* footnote as mere dicta and refuses to follow it) and *White v. Sullivan*, 368 F. Supp. 292, 293 (S.D. Ala. 1973) (mentioning, without explanation, government payment of witness fees and expenses under § 1915(c)).

Similarly, courts have generally denied court advances under § 1915(a) to provide an in forma pauperis litigant with expenses for taking depositions, *see, e.g.*, *Haymes v. Smith*, 73 F.R.D. 572, 574 (W.D.N.Y. 1976); *Sturdevant v. Deer*, 69 F.R.D. 17, 19 (E.D. Wis. 1975), and for copies of transcripts, court orders or other necessary papers, *see, e.g.*, *Douglas v. Green*, 327 F.2d 661, 662 (6th Cir.) (per curiam), *cert. denied*, 379 U.S. 862 (1964); *Harless v. United States*, 329 F.2d 397, 398-99 (5th Cir. 1964) (per curiam); *Hulom v. Kent*, 262 F.2d 862, 863-64 (6th Cir. 1959) (per curiam); *Villanueva v. Gulf Oil Corp.*, 262 F. Supp. 492, 494 (E.D. Pa. 1967); *Diaz v. Chatterton*, 229 F. Supp. 19, 23 (S.D. Cal. 1964).

15. See *Johnson v. Hubbard*, 698 F.2d 286, 289 (6th Cir.) (constitutional "right of access does not encompass a requirement that a court pay a party's witness fees"), *cert. denied*, 104 S. Ct. 282 (1983); *In re forma pauperis* proceedings, 53 Comp. Gen. 638, 645

recently, the United States Court of Appeals for the Eighth Circuit found authorization for prepayment of witness fees¹⁶ in Federal Rules of Evidence 614¹⁷ (Rule 614) and 706¹⁸ (Rule 706), which authorize a court to call, respectively, lay¹⁹ and expert²⁰ witnesses. This approach has apparently never been previously used, and remains unconsidered by other circuits.²¹

This Note argues that subdivision (c) of section 1915, which states that "witnesses shall attend as in other cases," allows courts to seek authorization for the prepayment of witness fees and expenses from other federal statutes.²² Part I of this Note examines section 1915 and concludes that although section 1915 does not itself provide for the prepayment of witness fees by the court in a civil suit, subdivision (c) of the statute leaves the door open for collateral authorization. Part II considers whether Rules 706 and 614 provide such authorization, concludes that they do,

(1974) (no grounds for court providing witness fees in civil cases); *cf. Doe v. Schneider*, 443 F. Supp. 780, 787 (D. Kan. 1978) (constitutional right of access to court does not encompass right of access to information to substantiate claim).

16. *See United States Marshals Serv. v. Means*, 741 F.2d 1053, 1057-60 (8th Cir. 1984) (en banc).

17. Fed. R. Evid. 614. Rule 614 in part provides: "(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."

18. Fed. R. Evid. 706. Rule 706 provides in part:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

19. *See* Fed. R. Evid. 614(a).

20. *See* Fed. R. Evid. 706(a).

21. The Sixth Circuit, in *Johnson v. Hubbard*, 698 F.2d 286 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983), also discussed the issue of witness fees and expenses for indigents but concluded that they were not authorized under federal statute. *See id.* at 291.

22. This Note does not address the question of whether the mechanism provided by Rules 614 and 706 should be available to poor litigants who have not been granted in forma pauperis status. *See supra* note 6.

and argues that a court should have the discretion to tax witness fees to a party immediately or to advance the fees itself and later charge them to the parties in proportions it deems appropriate. Part III examines practical considerations involved in this use of these Rules and concludes that courts should be encouraged to exercise their discretion in aid of indigent litigants who cannot afford to advance expenses to their witnesses.

I. SECTION 1915: IN FORMA PAUPERIS

Congress enacted section 1915 in an attempt to equalize access to the courts of the poor and the wealthy.²³ It has been argued that subdivisions (a) and (c) of the statute can be construed to authorize prepayment of witness fees by the court in civil cases.²⁴

Section 1915(a) states:

(a) Any court of the United States may authorize the commencement,

23. Congress first enacted an in forma pauperis statute in 1892. *See* Act of July 20, 1892, ch. 209, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (1982 & West Supp. 1984)). Congress' purpose in enacting this statute was expressed by the Committee on the Judiciary in the report that accompanied the proposed statute: "This bill proposes to open the United States courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the [federal] courts under their rules." H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892). A major goal of the statute was protection of individuals against corporations. *See id.*; J. Comer, *The Forging of the Federal Indigent Code* 26 (1966). Courts have consistently taken notice of the statute's purpose when applying it. *See, e.g.,* United States Marshals Serv. v. Means, 741 F.2d 1053, 1062 (8th Cir. 1984) (en banc) (Lay, C.J., concurring in part, dissenting in part) ("Congress intended in § 1915 to provide indigents with an opportunity, equal to that of a solvent party, to prosecute or defend a lawsuit in federal court."); Marks v. Calendine, 80 F.R.D. 24, 27 (N.D. W. Va. 1978) (purpose of § 1915 "is to insure that a plaintiff who is unable to pay the necessary costs of bringing and maintaining an action is afforded the same services by the Court and its officers as those who are able to pay"), *aff'd sub nom.* Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982); Harlem River Consumers Coop., Inc. v. Associated Grocers, 71 F.R.D. 93, 96 (S.D.N.Y. 1976) (purpose of § 1915 "is to assure that litigants will not be deprived of access to the judicial system because of their financial circumstances").

24. This view has been expressed in dicta and in minority opinions. *See* United States Marshals Serv. v. Means, 741 F.2d 1053, 1062-63 (8th Cir. 1984) (en banc) (Lay, C.J., concurring in part, dissenting in part) (§ 1915(a) must encompass witness fees and expenses or it is futile); Johnson v. Hubbard, 698 F.2d 286, 291 (6th Cir.) (Swygert, J., dissenting) (§ 1915, when considered in light of constitutional considerations, provides for advance payment of fees and travel expenses for necessary witnesses), *cert. denied*, 104 S. Ct. 282 (1983); Morrow v. Igleburger, 584 F.2d 767, 772 n.7 (6th Cir. 1978) (asserted in dictum without explanation that § 1915 provides for court advancement of witness fees), *cert. denied*, 439 U.S. 1118 (1979); White v. Sullivan, 368 F. Supp. 292, 293 (S.D. Ala. 1973) (28 U.S.C. 1915(c)); Moss v. ITT Continental Baking Co., 83 F.R.D. 624, 626 (E.D. Va. 1979) (same); Marks v. Calendine, 80 F.R.D. 24, 27 (N.D. W. Va. 1978) (stating in dictum that the "obvious purpose of [§ 1915] is to insure that a plaintiff who is unable to pay . . . is afforded the same services by the Court"), *aff'd sub nom.* Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). *But see* Johnson v. Hubbard, 698 F.2d 286, 290 n.4 (6th Cir.) (denying that § 1915 encompasses witness fees and retracting its statement in *Morrow*, calling it dictum), *cert. denied*, 104 S. Ct. 282 (1983).

prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. . . .²⁵

Courts have nearly unanimously held that the term "fees and costs" does not encompass witness fees and expenses.²⁶

25. 28 U.S.C. § 1915(a) (1982).

26. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1056-57 (8th Cir. 1984) (en banc) (plain meaning, structure and legislative history all combine to prevent the court from inferring congressional intent to apply § 1915 to witness fees and expenses); *Johnson v. Hubbard*, 698 F.2d 286, 290 (6th Cir.) (read in light of its criminal law counterpart, 28 U.S.C. § 1825, § 1915 does not cover witness expenses in civil trials), cert. denied, 104 S. Ct. 282 (1983); *Ball v. Woods*, 402 F. Supp. 803, 809-10 (N.D. Ala. 1975) (neither § 1915(a) nor § 1915(c) provides authorization for waiver or advancement of witness fees), aff'd mem. sub nom. *Ball v. Shanblin*, 529 F.2d 520 (5th Cir.), cert. denied, 426 U.S. 940 (1976); *In re forma pauperis* proceedings, 53 Comp. Gen. 638, 645-46 (1974) (no legal basis for government payment of civil rights petitioner's fact or expert witness expenses); see also *Andrews v. Atkins*, 100 F.R.D. 762, 764 (D. Kan. 1984) (finding no statutory provision allowing a court to subpoena witnesses in a civil case at government expense where plaintiff is proceeding in forma pauperis); *Hudson v. Ingalls Shipbuilding*, 516 F. Supp. 708, 709 (S.D. Ala. 1981) (same); *United States ex rel. Keith v. Sioux Nation Shopping Center*, 488 F. Supp. 496, 501-02 (D.S.D.) (refusing to make United States pay for plaintiff's witnesses' fees and expenses), aff'd, 634 F.2d 401 (8th Cir. 1980).

Interpretation of a statute should begin with its language. *Kosack v. United States*, 104 S. Ct. 1519, 1523 (1984); 2A N. Singer, *supra* note 8, § 46.01, at 73-74; see also *United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488, 1492 (1984) (plain language determinative). Judicial debate has focused on the definition of "fees and costs" as used in § 1915. If the language of a statute is unambiguous, it is conclusive evidence of the statute's meaning, absent contrary legislative intent. See *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983); 2A N. Singer, *supra* note 8, § 46.01, at 74.

Courts have narrowly construed the term "fees and costs" to encompass only certain fees and costs that the court would collect from the parties in return for court services. See *Miller v. United States*, 317 U.S. 192, 197 (1942); *United States v. Fair*, 235 F. 1015, 1016-17 (N.D. Cal. 1916); *Perkins v. Rich*, 198 F. Supp. 615, 615 (D. Del. 1961) (quoting *Miller*, 317 U.S. at 197); *Indigent Access*, *supra* note 1, at 29.

"[F]ees or costs," within the meaning of 28 U.S.C. § 1915(a), has been held to include particular items such as the filing fee that the clerk of each district court collects for instituting any civil action, suit, or proceeding, see *Marks v. Calendine*, 80 F.R.D. 24, 28 (N.D. W. Va. 1978), aff'd sub nom. *Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982); *Ex parte Hall*, 31 F. Supp. 86, 87 (N.D. Cal. 1940), the fee paid to the district court clerk upon the filing in that court of a notice of or petition for appeal, see *Williford v. California*, 329 F.2d 47, 48-49 (9th Cir. 1964), the fee charged by the Court of Appeals clerk for docketing a case on appeal, see *id.*; *Jones v. United States*, 266 F.2d 924, 925 (D.C. Cir. 1959) (per curiam); *Barkeij v. Ford Motor Co.*, 230 F.2d 729, 731 (9th Cir. 1956), costs and disbursements incurred by reason of the removal of an action from a state court to a federal court, see *Pasquarella v. Santos*, 416 F.2d 436, 437 (1st Cir. 1969), and the filing fee for appellate review that a referee in bankruptcy is authorized to collect under the Bankruptcy Act, see *O'Brien v. Trevethan*, 336 F. Supp. 1029, 1031-32 (D. Conn. 1972).

The term "fees and costs" has been held not to include such particular items as transcripts, see *Lucas v. United States*, 423 F.2d 683, 684-85 (6th Cir. 1970) (per curiam); *Ketcherside v. United States*, 317 F.2d 807, 808 (6th Cir. 1963) (per curiam); *United States v. Houghton*, 388 F. Supp. 773, 774 (N.D. Tex. 1975), depositions, see *Sturdevant v. Deer*, 69 F.R.D. 17, 19 (E.D. Wis. 1975); *Ebenhart v. Power*, 309 F. Supp. 660, 661 (S.D.N.Y. 1969) (mem.), and copies of court records, see *Douglas v. Green*, 327 F.2d

The report submitted by the House Committee on the Judiciary in

661, 662 (6th Cir.) (per curiam), *cert. denied*, 379 U.S. 862 (1964); *Hullom v. Kent*, 262 F.2d 862, 863-64 (6th Cir. 1959); *In re Fullam*, 152 F.2d 141, 141 (D.C. Cir. 1945) (per curiam).

As used in federal statutes other than § 1915, "costs" has been interpreted in two different ways. Costs have been "defined to be the expenses of a suit or action which may be recovered by law from the losing party." G. Bradner, *Practice in Matters of Costs* 1 (1894). Such a definition would include both lay and expert witness expenses because they are enumerated in the list of items to be taxed in the court's discretion after trial found in 28 U.S.C. § 1920(3) (1982). See *infra* notes 64-65 and accompanying text. Costs also has been defined narrowly to exclude items beyond amounts paid directly to the court such as witness fees and expenses. See *Villanueva v. Gulf Oil Corp.*, 262 F. Supp. 492, 493-94 (E.D. Pa. 1967) (construing 28 U.S.C. § 1916, which provides costs for seamen involved in federal litigation, court denied costs for deposition and copies of transcripts); *Walsh v. Marine Navigation Co.*, 34 F.R.D. 25, 26 (S.D.N.Y. 1963) (construing § 1916 to exclude expense of defense attorney in taking depositions). See generally *Bartell*, *supra* note 6, 101 F.R.D. at 567-98 (defining "costs" as used in 28 U.S.C. § 1920).

Section 1915(a) established a public grant of a legal benefit. Generally, public grant statutes bestow an advantage on an individual or group as against the general public. See 3 C. Sands, *Sutherland Statutory Construction* § 63.01, at 79 (1974). It is well established that such legislative grants should be strictly construed against the grantee. *Id.* § 63.02, at 81. The phrase "fees and costs" as used in § 1915 should therefore be interpreted narrowly.

Such an interpretation suggests that the costs referred to by the statute encompass those faced by the court rather than the litigant. The language of the statute supports this approach. A court may authorize commencement of a suit "without prepayment of fees and costs." 28 U.S.C. § 1915(a) (1982). Subdivision (a) does not suggest that any affirmative assistance should be made by the court. See *Beard v. Stephens*, 372 F.2d 685, 690 (5th Cir. 1967); cf. *Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 Val. U.L. Rev. 21, 36 (1967) (no state in forma pauperis statute provides for "auxiliary charges" because they are beyond typical fee-waiver arrangement). This narrows the definition of costs to one that would not encompass advancement of fees and expenses for witnesses.

Nevertheless, the argument has been made that the language in § 1915(a) allows prepayment of such fees and expenses. See *supra* note 24 and accompanying text. The statute authorizes "commencement, prosecution or defense of any suit . . . without prepayment of fees and costs." 28 U.S.C. § 1915(a) (1982). It can be argued that the prosecution or defense of a claim necessarily includes presentation of evidence. This rationale has never been accepted by any court and is not supported by the statute's legislative history. See *infra* notes 27-33 and accompanying text.

Another reason advanced for expanding the scope of subdivision 1915(a) is that unless witness fees are included within the statute's grant of authority, the statute's attempt to provide "access to the courts" is meaningless. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1062-63 (8th Cir. 1984) (en banc) (Lay, C.J., concurring in part, dissenting in part); *Johnson v. Hubbard*, 698 F.2d 286, 291 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983); *id.* at 292 (Swygert, J., dissenting). It has been asserted that because the statute authorizes waiver of prepayment of fees and costs for initiation of a suit, service of process, and appointment of an attorney, the statute must implicitly enable the indigent to present evidence. *Id.*

Though logical, this assertion fails to recognize that the right to appear in forma pauperis is wholly statutory. See *Seltzer v. State*, 517 F. Supp. 1253, 1254 (E.D. Mo. 1981), *rev'd per curiam on other grounds sub nom.* *Seltzer v. Ashcroft*, 675 F.2d 184 (8th Cir. 1982) (per curiam), *cert. denied*, 104 S. Ct. 185 (1983); *Smith v. Firestone Tire & Rubber Co.*, 255 F. Supp. 905, 907 (E.D. Pa. 1966). Prior to the statute's enactment in 1892, the Supreme Court refused to acknowledge that the poor possessed any common law right of civil access to the courts. The year before Congress enacted the in forma pauperis statute, the Supreme Court stated:

1892 acknowledged that the statute's goal was to solve the problem that "persons with honest claims may be defeated, and doubtless often are, by wealthy adversaries."²⁷ It has been argued that in order to fulfill this purpose, subdivision 1915(a) must be interpreted to encompass witness fees.²⁸ In its report of 1892, however, the committee indicated that the statute was intended only to open the door to give the poor "entrance" to the courts.²⁹ Furthermore, the committee never mentioned expenses or disbursements, choosing instead to limit its discussion to "costs" and "security for costs."³⁰ Such careful diction indicates that witness expenses were not intended to fall within the statute's scope.³¹ This conclusion is strongly supported by the committee's statement that the federal in forma pauperis statute was intended to "keep pace" with similar statutes already enacted by the states.³² In 1892, no state in forma pauperis statute provided for prepayment of witness fees for an indigent.³³

There is . . . no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners. The object of the [sixth amendment] was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government.

United States v. Van Duzee, 140 U.S. 169, 173 (1891). This alone justifies a refusal to extend grants of section 1915 beyond those expressly provided for by the statute. Consequently, when an indigent has sought prepayment of witness fees under § 1915(a), courts, lacking statutory authority to do otherwise, have denied such requests. See *Johnson v. Hubbard*, 698 F.2d 286, 291 (6th Cir.), cert. denied, 104 S. Ct. 282 (1983); cf. *In re forma pauperis* proceedings, 53 Comp. Gen. 638, 639, 645 (1974) (no legal basis for government payment of civil rights petitioner's fact or expert witnesses).

27. H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892).

28. See *Johnson v. Hubbard*, 698 F.2d 286, 292 (6th Cir.) (Swygert, J., dissenting), cert. denied, 104 S. Ct. 282 (1983).

29. H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892).

30. *Id.* at 1-2.

31. The penultimate paragraph of the 1892 committee report, however, can be interpreted to expand the scope of section 1915 to include witness fees and expenses. The paragraph states that "[t]he Government will not determine questions involving the liberty of the citizen without furnishing him his witnesses on his demand. Property is next in importance, and the less a man has the more important it is to him, and the more reprehensible to deprive [him] of it unjustly." *Id.* at 2. If this statement is interpreted to mean that property is equivalent to liberty, a court may have to provide a civil litigant with witnesses. See *infra* notes 106-09 (discussing due process guarantees in criminal cases). More likely, however, the comparison merely indicates that because no federal in forma pauperis statute existed at that time, this statute should be enacted to protect indigents in civil cases in a similar manner, but to a lesser degree, than they were protected in criminal trials.

32. H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892).

33. In an article published in 1923, all state in forma pauperis statutes existing at that time were analyzed. The article concluded that although "[t]he suggestion that the state or county treasury should financially assist poor persons to summon their witnesses and meet other cash expenses of litigation had been made," such an idea "may not be feasible at this time." Maguire, *supra* note 3, at 403. In 1967, another survey of the state in forma pauperis statutes concluded that "[n]one of the statutes makes any provision for auxiliary charges. . . as distinguished from official charges." Silverstein, *supra* note 26, at 36. Additionally, an analysis of state in forma pauperis statutes in 1973 found that only Louisiana provided for witness fees in its statute. See *Indigent Access*, *supra* note 1,

Even though the legislative history of section 1915(a) indicates that it does not provide for the prepayment of witness fees,³⁴ the statute does not foreclose altogether the possibility of such prepayments. Because subdivision (a)'s purview is limited to "fees and costs,"³⁵ it could be inferred that Congress intended to preclude waiver or advancement of any expenses not enumerated in the statute.³⁶ The drafters of section 1915, however, included in subdivision (c) that "[w]itnesses shall attend as in other cases."³⁷ This language indicates that if another federal statute provides a mechanism for the payment of witness fees, it should be fully applicable to cases involving in forma pauperis litigants.³⁸ When section 1915 was enacted, no federal statute provided for prepayment of witness fees.³⁹ Congress, through subdivision (c), left the door open for indigent litigants to avail themselves of any provisions that might be enacted in the future. Section 1915(a) should therefore not be construed to prohibit reference to federal laws that allow prepayment or waiver of witness fees.

II. FEDERAL PROVISIONS AND PREPAYMENT OF WITNESS FEES

If section 1915(c) is to aid indigent litigants, some authority outside section 1915(c) must authorize advancement of witness fees by someone other than the party. The United States Court of Appeals for the Eighth Circuit, the only court to address the issue, has held that Federal Rules of Evidence 614 and 706 allow a court to charge a court-called witness' expenses and fees to the parties in the proportion that the court deems appropriate.⁴⁰

at 29 n.13, 30 n.17. On the basis of these histories of state in forma pauperis statutes, it can be assumed that when the committee report submitted with the federal in forma pauperis statute indicated that the statute was intended to "keep pace" with the state statutes, see H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892), it was not intended that the statute would extend to encompass expenses such as witness fees.

34. See *supra* notes 27-33 and accompanying text.

35. See *supra* notes 25-33 and accompanying text.

36. The maxim *expressio unius est exclusio alterius*, see 2A N. Singer, *supra* note 8, § 47.23, which means the expression of one thing is the exclusion of another, Black's Law Dictionary 521 (5th ed. 1979), could be applicable to § 1915(a). The maxim is particularly applicable when a statute enumerates the instances in which it applies or the specific benefits it bestows, 2A N. Singer, *supra* note 8, § 47.23, as in the case of § 1915. See 28 U.S.C. § 1915 (1982).

37. See Act of July 20, 1892, ch. 209, § 3, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915(c) (1982)).

38. The maxim *expressio unius est exclusio alterius*, see *supra* note 36, is limited in its application. 2A N. Singer, *supra* note 8, §§ 46.05, 47.25. Other subdivisions of section 1915 refer explicitly to expenses not encompassed by subdivision (a)'s provision for "fees and costs." 28 U.S.C. § 1915(a) (1982); see 28 U.S.C. § 1915(b)-(e) (1982). As a result, those expenses explicitly mentioned in the other subdivisions of section 1915 should be immune from application of the maxim.

39. See *supra* notes 36-38 and accompanying text.

40. United States Marshals Serv. v. Means, 741 F.2d 1053, 1057-60 (8th Cir. 1984) (en banc).

Section 1825 of title 28 of the United States Code, 28 U.S.C. § 1825 (1982), has also been interpreted to permit a district court to authorize payment of witness fees of an

A. Rules 614 and 706

Rule 614 states that the court "may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."⁴¹ Rule 706 authorizes a court to "appoint expert witnesses of its own selection."⁴² Because Rule 614 applies to lay witnesses, it will often be more helpful than would Rule 706 to an indigent litigant's presentation of evidence.⁴³

indigent in civil litigation in which the United States was a party. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1060-62 (8th Cir. 1984) (en banc) (Gibson, J., concurring on additional grounds), *aff'd on other grounds on rehearing* 724 F.2d 642, 646-48 (8th Cir. 1983). But see *Johnson v. Hubbard*, 698 F.2d 286, 290 & n.3 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983).

The first paragraph of § 1825 applies only when the United States is a party to the litigation. See 28 U.S.C. § 1825 (1982). In such an instance, the United States marshal for the district, on the issuance of an appropriate certificate "shall pay all fees of witnesses." *Id.* The language is unclear on whether the statute is meant to encompass all witnesses or just those on behalf of the United States. The second paragraph provides that on the certificate of the presiding judge in an in forma pauperis proceeding for a writ of habeas corpus or in a proceeding to vacate sentence under § 2255 of title 28, "the United States marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis." *Id.* On its face, this second paragraph makes no reference to the first paragraph's requirement that the United States must be a party to the action. See *id.*

In a panel opinion, the Eighth Circuit held that, because the United States was a party to the case, the district court could order the United States Attorney to certify payment of witness fees for an in forma pauperis opponent. See *United States Marshals Serv. v. Means*, 724 F.2d 642, 646-48 (8th Cir. 1983), *aff'd on other grounds on rehearing*, 741 F.2d 1053 (8th Cir. 1984) (en banc). In the opinion the panel dismissed the argument that § 1825 was intended to apply only to criminal trials. See *id.* at 646-47.

Such an interpretation of § 1825 has never been accepted by another court. In fact, when the *Means* case again reached the Eighth Circuit after remand, see *United States Marshals Serv. v. Means*, 741 F.2d 1053 (8th Cir. 1984) (en banc), the court did not even mention § 1825 in the majority opinion. See *id.* Only the two concurring judges, Judge Gibson and Judge Bright, would have affirmed their earlier panel opinion on the same grounds. See *id.* at 1060-63 (Gibson, J., concurring on additional grounds). By arguing that § 1825 applies in civil cases, *id.* at 1061 (Gibson, J., concurring), the concurrence sheds light on the reason the majority refused to base its holding on § 1825.

The legislative history of § 1825 does not support its application to civil cases. The second paragraph of § 1825 was added by amendment in 1965. See Act of Sept. 2, 1965, Pub. L. 89-162, 79 Stat. 618 (codified at 28 U.S.C. § 1825 (1982)). The Senate report on the amendment strongly suggests that Congress did not consider § 1825 as it read then nor the proposed amendment as providing for witness fees in civil cases. See S. Rep. No. 615, 89th Cong., 1st Sess. 3-4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 2901, 2902-03. The report cited the comptroller general as stating that witness fees were not available in civil cases under § 1825. See *id.*, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 2902-03. The report concluded that "[t]he provisions of [the amendment] would grant legislative approval of current practice." *Id.*, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 2903. This statement conclusively refutes the *Means* panel opinion: First, Congress in 1965 accepted the premise that the first paragraph of § 1825 does not provide "any basis to charge the United States with witness costs in civil proceedings." *Id.*, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 2903. Second, the amendment, which became the second paragraph of § 1825, was not intended to alter this conclusion.

41. Fed. R. Evid. 614(a).

42. Fed. R. Evid. 706(a).

43. Federal Rule of Evidence 702 sets forth when a witness may be called as an ex-

Although it is well settled that under Rule 614 a court may call a witness as its own at the request of a party,⁴⁴ only the Eighth Circuit has held that the Rule grants a court the discretion to call lay witnesses on behalf of an in forma pauperis litigant in a civil trial.⁴⁵ An examination of the common law basis for the Rule demonstrates that such an exercise of discretion is justified. Prior to the adoption of Rule 614, the common law permitted a court to call witnesses as its own at the request of a party.⁴⁶ This practice developed in response to the rule that a party vouched for the credibility of its own witnesses and thus could not impeach them.⁴⁷ The court itself could call witnesses to impart relevant testimony that, because of the impeachment bar, might not otherwise be heard.⁴⁸ Although the voucher rule was abolished before the adoption of

pert: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Although civil litigants may have a need for specialized expert testimony, more often they will need lay witness testimony. It can be argued that lay witnesses are experts under Rule 702 because their observations are "specialized knowledge . . . [and the] witness [is] qualified . . . by knowledge [and] experience." *Id.* The advisory committee's note to Rule 702, however, endorsed a test to determine when expert testimony is admissible: "[W]hether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Fed. R. Evid. 702 advisory committee note (quoting Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952)). Hence, most fact witnesses cannot be characterized as experts. See G. Lilly, *An Introduction to the Law of Evidence* § 104 (1978); C. McCormick, *McCormick on Evidence* § 13 (3d ed. 1984); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02] (1984).

44. See C. McCormick, *supra* note 43, § 8, at 15-16; 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 614[02], at 614-4 to -6; see, e.g., *United States v. Leslie*, 542 F.2d 285, 288-89 (5th Cir. 1976) (court may call a witness at the suggestion of a party); *United States v. Ostrer*, 422 F. Supp. 93, 103 n.11 (S.D.N.Y. 1976) (indicating that court was not required to call witness as its own under Rule 614 because "[n]o application was made" by either party); see also Fed. R. Evid. 614(a) advisory committee note (Rule 614 codifies common law notion that court may call witness as its own at request of party).

45. *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1057-60 (8th Cir. 1984) (en banc).

46. See, e.g., *Smith v. United States*, 331 F.2d 265, 274 (8th Cir.) (under common law, court called lay witnesses as its own upon request of government), *cert. denied*, 379 U.S. 824 (1964); *Fielding v. United States*, 164 F.2d 1022, 1023 (6th Cir. 1947) (court refused to call witnesses upon request of a party while indicating that it was within its discretion to do so); *People v. Laster*, 413 Ill. 224, 230-31, 108 N.E.2d 421, 424 (1952) (court called witness as its own at request of assistant State's Attorney); *People v. Johnson*, 333 Ill. 469, 471, 473-75, 165 N.E. 235, 236, 237-38 (1929) (though court can call a witness as its own on the request of a party, it is error to do so where the witness' testimony is immaterial); see also Fed. R. Evid. 614(a) advisory committee note (Rule 614 codifies common law notion that court may call witnesses as its own at request of party).

47. See Fed. R. Evid. 614(a) advisory committee note.

48. *Id.*; see *United States v. Lutwak*, 195 F.2d 748, 754 (7th Cir. 1952) (court may call witness where neither party will vouch for his veracity), *aff'd*, 344 U.S. 604 (1953); *Steinberg v. United States*, 162 F.2d 120, 124 (5th Cir.), *cert. denied*, 332 U.S. 808 (1947) (same); *Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co.*, 143 F.2d 826, 829 (5th Cir. 1944) (in a civil trial, court called witnesses that parties were unwilling to risk calling); *Litsinger v. United States*, 44 F.2d 45, 47 (7th Cir. 1930) (court called witness when

Rule 614,⁴⁹ the Rule can be applied to analogous situations⁵⁰ so that "the judge [will] not [be] imprisoned within the case as made by the parties."⁵¹ When used in a case involving an indigent litigant, Rule 614 should allow the court, in the interests of justice, to expose to the jury relevant evidence that would not otherwise be presented because of the indigent's inability to satisfy the statutory requirement of advancement of fees and expenses to witnesses.⁵²

Rule 706 affords the court the advantage of expert testimony.⁵³ Typically, parties select and pay their own experts.⁵⁴ Rule 706 often allows

government would not do so because of impeachment bar); Fed. R. Evid. 614(a) advisory committee note.

49. See Fed. R. Evid. 607 & advisory committee note.

50. See Fed. R. Evid. 614(a) advisory committee note; 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 614[02], at 614-4 to -5.

51. Fed. R. Evid. 614(a) advisory committee note.

52. Cf. J. Frank, *supra* note 3, at 94-99 (noting that a litigant is severely handicapped if proceeding without necessary evidence; proposes that impartial government officials should discover and present significant evidence to the courts); Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice*, 7 Santa Clara Law. 7, 8 (1966) (trial judge has a duty to call a party's attention to evidence which should have been presented); Comment, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 Nw. U.L. Rev. 761, 767-68 (1957) (court can call witnesses to clarify evidence presented by parties) [hereinafter cited as *Trial Judge's Power*].

53. A court may call expert witnesses on its own motion or on the motion of any party. Fed. R. Evid. 706 & advisory committee note; see C. McCormick, *supra* note 43, § 17, at 43; 2 J. Wigmore, *Evidence* § 563, at 763-65 (Chadbourn rev. ed. 1979); 2 C. Wright, *Federal Practice and Procedure* § 452, at 623-24 (2d ed. 1982); see also 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-6 to -7 (referring to court's right to call expert witnesses).

54. Litigants may select their own expert witnesses. See Fed. R. Evid. 706(d); 2 C. Wright, *supra* note 53, § 453, at 626. For a discussion of the common law roots of expert witnesses, see Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901). Experts are entitled to the statutorily required fees of § 1821. See 28 U.S.C. § 1821 (1982). Section 1821's reference to witnesses, see 28 U.S.C. § 1821 (1982), encompasses both lay and expert witnesses. See, e.g., *Quy v. Air Am., Inc.*, 667 F.2d 1059, 1063-64 (D.C. Cir. 1981) (expert witness authorized to receive fees in the amount allowed under § 1821); *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 865 (7th Cir. 1981) (same); *Adams v. Carlson*, 521 F.2d 168, 172 (7th Cir. 1975) (same). Fees for experts, however, are usually set by contract between the litigant and the witnesses. See Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witnesses*, 29 S. Cal. L. Rev. 195, 198-99 (1956). Expert witness fees can be very expensive. See, e.g., *Illinois v. Sangamo Constr. Co.*, 657 F.2d 857, 863 (\$9,777.98 in expert witness fees); *Burgess v. Williamson*, 506 F.2d 870, 879-80 (5th Cir. 1975) (\$20,000 in expert witness fees); *Brager & Co. v. Leumi Sec. Corp.*, 530 F. Supp. 1361, 1363-64 (S.D.N.Y.) (accounting firm preparing as expert witness had charges of \$177,888), *aff'd*, 697 F.2d 288 (2d Cir. 1982). See generally H. Drinker, *Legal Ethics* 75-76 (1953) (witness may receive compensation in excess of statutory fees); Comment, *Compensation of Witnesses by Lawyers*, 1 J. Legal Prof. 149 (1976) (general discussion of compensation for witnesses).

Selection and payment of experts by litigants raise the suspicion that expert witness testimony will be biased. See C. McCormick, *supra* note 43, § 17, at 42 (party is "naturally . . . interested in finding, not the best scientist, but the 'best witness'"); 2 J. Wigmore, *supra* note 53, § 563, at 762 ("paid partisan experts"); Morgan, *Suggested Remedy For Obstructions To Expert Testimony By Rules Of Evidence*, 10 U. Chi. L. Rev. 285, 286, 293 (1943) (the expert has become an advocate rather than a witness, and the witness

the court to hear the testimony of impartial experts.⁵⁵ Because expert witnesses can be expensive,⁵⁶ but important, to many cases, indigents are at a distinct disadvantage when expert testimony is necessary.⁵⁷ Under Rule 706, a court can solve one of the problems an indigent must face in federal court by exposing the jury to the testimony of its own experts.⁵⁸

B. *Prepayment of Witness Fees Under Rules 614 and 706*

Section 1821 of title 28 of the United States Code⁵⁹ sets forth amounts that witnesses in federal courts are entitled to receive as fees and expenses.⁶⁰ Parties need not make such payments until the end of the trial, except for advancements mandated by Federal Rule of Civil Procedure 45(c).⁶¹

Because witnesses called by the court pursuant to Rules 614 and 706 would not be in attendance had the court not called them, they should be viewed as witnesses of the court rather than as witnesses of a party. Indeed, under both Rules, it is the court that "calls" the witnesses.⁶² The cost of having these witnesses at trial is similar to other expenditures made by the court in the course of a trial.⁶³ Section 1920(3) of title 28 of the United States Code⁶⁴ allows a court to tax as costs to the parties at the end of the trial "[f]ees and disbursements for . . . witnesses."⁶⁵

"frequently shades his testimony to the advantage of the party paying his fee"); Sink, *supra*, at 196-97 ("hired lying" and "partisan associations").

55. Under Rule 706 the court can choose the experts it calls. Fed. R. Evid. 706 advisory committee note. It is hoped that court calling of expert witnesses can "restore impartiality [and] eliminate venality." 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-6 to -7. Use of Rule 706 might even have a "sobering effect" on litigants' use of experts. Fed. R. Evid. 706 advisory committee note.

56. See *supra* note 54.

57. If indigents have to pay for their experts themselves, see *supra* notes 53-54 and accompanying text, presentation of such evidence may not be possible. For a proposed solution to this problem, see Comment, *Contingent Fees for Witnesses*, 8 J. Legal Prof. 237 (1983), which suggests that expert witnesses should be allowed to testify under contingent fee agreements.

58. See *infra* Pt. II.B.

59. 28 U.S.C. § 1821 (1982).

60. See *id.*

61. The only provision for advance payment of witness fees is found in Federal Rule of Civil Procedure 45(c). See *supra* note 11.

62. Federal Rule of Evidence 614 is entitled "Calling and Interrogation of Witnesses by Court" and subdivision (a) is entitled "Calling by court." See Fed. R. Evid. 614. The notes of the advisory committee refer to these witnesses as the "court's witnesses." See Fed. R. Evid. 614 advisory committee note. Federal Rule of Evidence 706 is entitled "Court Appointed Experts." See Fed. R. Evid. 706.

63. For example, a court may appoint an interpreter or a master and disburse its own funds, and either tax the parties immediately or subsequently. See Fed. R. Civ. P. 43(f), 53(a).

64. 28 U.S.C. § 1920(3) (1982).

65. *Id.* The Sixth Circuit, in *Johnson v. Hubbard*, 698 F.2d 286 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983), firmly asserted that § 1920(3) does not provide for taxing of lay witness fees. See *id.* at 291 n.5. This assertion is incorrect. Courts have consistently held that § 1920(3) allows taxing of lay witness fees and expenses. See, e.g., United States

Although a court cannot normally tax the prevailing party in a civil suit with the costs incurred by the opposition,⁶⁶ a court has wide discretion to tax its own costs against either or both parties.⁶⁷ The financial status of the parties should be a consideration in this decision.⁶⁸

Marshals Serv. v. Means, 741 F.2d 1053, 1057 n.2 (8th Cir. 1984) (en banc) (specifically rejecting the *Johnson* footnote); *Quy v. Air Am., Inc.*, 667 F.2d 1059, 1061, 1063-64, 1065 (D.C. Cir. 1981) (expenses of army investigator taxable); *United Cal. Bank v. THC Fin. Corp.*, 557 F.2d 1351, 1361 (9th Cir. 1977) (witness costs taxable for four witnesses, only one of whom was an expert); *Pate v. General Motors Corp.*, 89 F.R.D. 342, 345-46 (N.D. Miss. 1981) (fees for fact witnesses allowed); *Christian v. Tackett*, 86 F.R.D. 220, 221-22 (N.D. Miss. 1979) (court taxed fees of both lay and expert witnesses); *Morris v. Carnathan*, 63 F.R.D. 374, 377-79 (N.D. Miss. 1974) (taxing fees for five witnesses, then, in separate discussion, limiting taxing of fees and expenses of expert witnesses).

Analysis of the sources cited by the Sixth Circuit to support its holding that § 1920(3) does not encompass lay witness fees, see *Johnson*, 698 F.2d at 291 n.5, also belies that court's view. See *Means*, 741 F.2d at 1057 n.2. In *Moss v. ITT Continental Baking Co.*, 83 F.R.D. 624 (E.D. Va. 1979), the court stated that "[w]itness disbursements . . . may be taxed as costs under 28 U.S.C. § 1920(3)." *Id.* at 626. The *Moss* court cited *United States ex rel. Helwig v. Cavell*, 171 F. Supp. 417 (W.D. Pa.), *aff'd sub nom. United States ex rel. Helwig v. Maroney*, 271 F.2d 329 (3d Cir. 1959), *cert. denied*, 362 U.S. 954 (1960), as support. See *Moss*, 83 F.R.D. at 626. In *Helwig*, the court ordered the United States as a party to advance witness fees to eyewitnesses subpoenaed on behalf of its opponent and stated that those funds would ultimately be taxed against the nonprevailing party. 171 F. Supp. at 424. As a result, it would be incorrect to suggest that *Moss* supports a contention that lay witness fees are not taxable under § 1920(3). Further, the citation in the *Johnson* footnote to Moore's Federal Practice, see 6 J. Moore & J. Lucas, *supra* note 11, ¶ 54.77[5.-3], at 1735 (2d ed. 1982), does not support the Sixth Circuit's proposition. The section referred to by the *Johnson* court concerns taxing expert witness expenses in excess of the statutory per diem fee, mileage, and subsistence allowance. See *id.* ¶ 54.77[5.-3], at 1734-35. In fact, this same source, in a section entitled "Ordinary Witnesses" states that the "fees and disbursements [authorized by 28 U.S.C. § 1821] may be taxed as costs, pursuant to § 1920(3)." *Id.* ¶ 54.77[5.-1], at 1726.

66. *Lewis v. Precision Optics, Inc.*, 612 F.2d 1074, 1075 (8th Cir. 1980) (quoting *Lewis v. Precision Optics, Inc.*, No. CV77-0-369, slip op. at 2 (D.C. Neb. May 17, 1979)); see *Bartell*, *supra* note 6, 101 F.R.D. at 563-65 (listing specific circumstances, which courts have taxed costs against the prevailing party).

67. Compensation for individuals appointed by the court to serve during the trial may generally be fixed in amount by the court and charged to one or more of the parties in the proportion and at the time the court directs. See *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313, 316 (D.N.J. 1976) (court can order a party, including the United States, to compensate expert witnesses appointed by the court pursuant to Rule 706); Fed. R. Civ. P. 24(b)(4)(C) (discovery of expert witnesses), 43(f) (interpreter), 53(a) (master, including referee, auditor, examiner, commissioner, and assessor); Fed. R. Evid. 706(b) (expert witnesses).

68. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984) (en banc).

Courts have broad discretion when taxing costs under section 1920(3). See, e.g., *Koppinger v. Cullen-Schiltz & Assocs.*, 513 F.2d 901, 911 (8th Cir. 1975) (wide discretion); *United States v. Ernst & Whinney*, 557 F. Supp. 1152, 1156 (N.D. Ga. 1983) (same); *Dasher v. Mutual Life Ins. Co.*, 78 F.R.D. 142, 144 (S.D. Ga. 1978) (broad discretion); see also *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 624 F.2d 7, 9 (3d Cir. 1980) (wide discretion under Rule 54(d)); *Bartell*, *supra* note 6, 101 F.R.D. at 559-60 (broad but not unfettered discretion). This discretion includes acknowledgment of a party's indigency in the court's award of costs. See *Cagle v. Cox*, 87 F.R.D. 467, 471 (E.D. Va. 1980); *Maldonado v. Parasole*, 66 F.R.D. 388, 390 (E.D.N.Y. 1975); *Bartell*, *supra* note 6, 101 F.R.D. at 561-62. Further, the official comment to Rule 410 of the

Often, the most difficult expense for an indigent to meet is the prepayments that must be made to the indigent's witnesses. Under Federal Rule of Civil Procedure 45(c),⁶⁹ witnesses are required to attend the trial only if the fees for one day's attendance and mileage are tendered with the subpoena.⁷⁰ Because unpaid witnesses may disregard the subpoenas,⁷¹ the indigent who cannot tender the statutory fee may lose the case. If court-called witnesses under Rules 614 and 706 are to be considered witnesses of the court,⁷² it can be argued that the required prepayment of fees and expenses to witnesses before trial is waived by a federal rule. Rule 45(c) states that "[w]hen the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."⁷³ An argument can be made that when a witness is called on behalf of a court under Rule 614 or Rule 706, the subpoena has been issued on behalf of the United States in the form of the district court.⁷⁴ Thus, the prepayments required by Rule 45(c) are waived and become

Model Code of Evidence (1947), which served as the basis of Rule 706, *see* United States Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc); Fed. R. Evid. 706 advisory committee note, strongly indicates that the financial status of the parties should be considered when a court charges its own costs against one or both parties:

No doubt in the usual case the judge will provide that the expense of the experts shall be taxed as costs and paid by the loser. He may require the parties to contribute proportionate shares of the fee in advance. He may think it wise to excuse an impecunious party from paying his proportionate share.

Model Code of Evidence Rule 410 comment (1942).

69. Fed. R. Civ. P. 45(c).

70. *See supra* note 11 and accompanying text.

71. The language of Rule 45(c) requires both delivery and tendering of fees as conditions for a subpoena to be considered served. Fed. R. Civ. P. 45(c). As a result, if fees are not tendered as required, the subpoena can be quashed. *See supra* note 11 and accompanying text.

72. *See supra* note 62.

73. Fed. R. Civ. P. 45(c). The language and history of the Rule are silent on this issue.

74. In most cases, subpoenas are issued by the court on behalf of a party. When a court calls a witness under Rule 614 or 706, the witness is called on behalf of the court. *See supra* note 79 and accompanying text. Hence, "the subpoena [has been] issued on behalf of the United States or an officer or agency thereof." Fed. R. Civ. P. 45(c).

The language of Federal Rule of Criminal Procedure 17(d) is substantially the same as that of Rule 45(c). *See* Fed. R. Crim. P. 17(d) advisory committee note. The phrase "United States or an officer or agency thereof" is also included in 28 U.S.C. § 1825 (1982). Courts have apparently never delineated the scope of this phrase under any of the three statutes. Under Rule 45(c), courts have suggested that government agencies do not have to advance fees along with a subpoena. *See* Donovan v. Mehlenbacher, 652 F.2d 228, 230 (2d Cir. 1981) (Secretary of Labor need not advance fees with subpoena); *Bowles v. Bay of N.Y. Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945) (administrative subpoena, issued by Price Administrator subject to provisions of Rule 45(c), does not require advancement of fees). Such interpretations do not preclude including a court within the exception to advancement of witness fees of Rule 45(c). The history of Rule 45(c) is silent on this issue. The advisory committee's note to Rule 45(c) does not discuss the issue. Additionally, records of symposia held prior to the Rules' enactment add nothing to the interpretation of the final sentence of Rule 45(c). *See* Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1938 (1938).

costs to be taxed after trial.⁷⁵ Nevertheless, even if Rule 45(c) is interpreted to exclude courts from the prepayment waiver, a court can still advance the required fees and expenses itself and recover them later under section 1920(3) as court costs.⁷⁶ These costs can be taxed between the respective parties in the proportion the court deems appropriate.⁷⁷

Arguably, however, because witnesses called by the court enable the indigent to present or defend a claim, they should be considered witnesses of the indigent. Under this theory, if the indigent prevails, the nonindigent opponent should be taxed with both those fees and expenses already paid to witnesses and the fees and expenses still owed under section 1821.⁷⁸ The situation is more complex if the in forma pauperis litigant loses the case. Subdivision (e) of section 1915 states that the United States cannot be liable for any of the costs of an in forma pauperis litigant.⁷⁹ Because the United States can be taxed for costs when it appears as a party,⁸⁰ the term "United States" in section 1915(e) must refer to the federal courts. Hence, section 1915(e) may be interpreted to mean that the court must ultimately tax to the parties any expenses it advances.⁸¹

Because the merit of an indigent's claim or defense is considered in the initial determination of in forma pauperis status under section 1915,⁸² claims or defenses of indigents are likely to have more merit than those that the court has not examined. In any event, courts have consistently held that costs may be taxed against an indigent after trial.⁸³ A grant of in forma pauperis status only temporarily releases an indigent from his

75. See *supra* notes 62-68 and accompanying text.

76. See *supra* notes 62-65 and accompanying text.

77. See *supra* notes 66-68 and accompanying text.

78. See 28 U.S.C. § 1920(3); Fed. R. Civ. P. 54(d). Of course, if an indigent party receives a large money award as a judgment, the court may wish to tax the indigent for witness fees. See *supra* notes 64-68 and accompanying text.

79. See 28 U.S.C. § 1915(e) (1982).

80. Section 2412 of title 28 of the United States Code states that "a judgment for costs . . . may be awarded to the prevailing party in any civil action brought by or against the United States." 28 U.S.C. § 2412 (1982); see *Bartell, supra* note 6, 101 F.R.D. at 566; see, e.g., *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984) (en banc) (§ 2412 allows taxing of prevailing indigent's costs against the United States as a party); *Pearlstone v. United States*, 649 F.2d 194, 198 (3d Cir. 1981) (fees and costs are taxable against the United States under § 2412 in conformity with 28 U.S.C. § 1920); *Adams v. Carlson*, 521 F.2d 168, 172 (7th Cir. 1975) (same); *United States v. Moss-American, Inc.*, 78 F.R.D. 214, 217 (E.D. Wis. 1978) (same); *Welsch v. Likins*, 68 F.R.D. 589, 595 (D. Minn.) (same), *aff'd*, 525 F.2d 987 (8th Cir. 1975). Further, it has been held that a district court may order the United States, as a party, to advance the fees of lay and expert witnesses called by the court pursuant to Rule 706. See *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313, 316 (D.N.J. 1976).

81. Because the United States can generally be taxed with costs when it appears as a party, see *supra* note 80 and accompanying text, § 1915(e) should not be read as an exception to that statutorily mandated practice without explicit language making that exception. See *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313, 316 (D.N.J. 1976).

82. See *supra* note 6.

83. See *supra* note 6 and accompanying text.

obligation to pay.⁸⁴ As a result, the court will not be ultimately liable for the fees and expenses of the witnesses it calls.⁸⁵ Further, Rule 706(b) provides that compensation for expert witnesses "shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."⁸⁶ A court can consider the relative financial positions of the parties in apportioning costs.⁸⁷ This permits a court to require the nonindigent party to prepay the fees and expenses of a court-called expert witness.⁸⁸ Additionally, the language of Rule 706, by leaving the time for taxing costs within the court's discretion, allows a court to tax in the same manner the remaining witness fees that must be paid under section 1821.⁸⁹

Although Rule 614 is silent on compensation,⁹⁰ there is authority that the compensation provision of Rule 706(b) should apply to Rule 614. This reasoning was used by the Eighth Circuit when it recently held that a court could require the adversary of an *in forma pauperis* litigant to advance witness fees to court-called lay witnesses.⁹¹ It is understandable that the drafters of Rule 706 felt compelled to provide for compensation of court-called experts because the costs and expenses required by expert witnesses greatly exceed those of lay witnesses.⁹²

Furthermore, it has been suggested that when a provision is omitted in one of two related statutes, the provision should be applied to the statute lacking it as long as doing so would not be inconsistent with the purposes of the acts.⁹³ This approach should apply to Rules 614 and 706 because both seek to allow a court, in search of justice, to look beyond evidence presented by adversaries.⁹⁴ Rule 614 would be futile if a court could call lay witnesses but could not compel them to appear by arranging advance-

84. *Id.*

85. In an *in forma pauperis* case, although a court may not be liable for costs, 28 U.S.C. § 1915(e) (1982), it should not be forbidden to decline to tax the parties the funds it has disbursed.

86. Fed. R. Evid. 706(b).

87. See *supra* notes 67-68 and accompanying text.

88. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058-59 (8th Cir. 1984) (en banc).

89. See *supra* notes 62-65 and accompanying text.

90. See Fed. R. Evid. 614.

91. *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058-59 (8th Cir. 1984) (en banc).

92. See *id.* at 1058. See *supra* note 54 and accompanying text.

93. See 2A N. Singer, *supra* note 8, § 51.02, at 453.

94. One of the primary factors in considering whether statutes pertain to the same matter are their respective purposes. See *id.*, § 51.03, at 467. Rule 614 was enacted so that "the judge is not imprisoned within the case as made by the parties." Fed. R. Evid. 614 advisory committee note. See *supra* notes 47-51 and accompanying text. Likewise, Rule 706 allows a court to call impartial expert witnesses and is a response to the problems "of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation." Fed. R. Evid. 706 advisory committee note. See *supra* notes 53-58 and accompanying text.

ment of funds with the subpoena.⁹⁵ Additionally, absent specific language to the contrary, Rule 614 should not be interpreted as an exception to the general federal practice that courts have broad discretion in taxing costs.⁹⁶

Hence, lay and expert witnesses called by courts under Rules 614 and 706 should be considered witnesses of the court⁹⁷ which could, after initially advancing witness fees and expenses,⁹⁸ ultimately tax those costs to the parties under section 1920(3).⁹⁹ Even if these witnesses are considered witnesses of the parties, under Rule 706(b) courts will not be liable for their fees and expenses.¹⁰⁰ In addition, courts may reduce witness fees and expenses by calling only those witnesses that are indispensable to the indigent's case.¹⁰¹ Such discretion is encouraged by section 1915 as well as by Rules 614 and 706.¹⁰²

III. APPROPRIATENESS OF INCORPORATION OF RULES 614 AND 706 INTO SECTION 1915

A. Rules 614 and 706 and the Burden of Production

If a litigant cannot produce evidence to overcome the relevant burden of production, "the trial judge [has] no real option but to dismiss the case

95. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc).

Statutes should be interpreted to avoid futility of their effect. See 2A N. Singer, *supra* note 8, § 45.12, at 54-55. To achieve this end, "an express grant of statutory power carries with it by necessary implication authority to use all reasonable means to make such grant effective." *Id.*, § 55.02, at 599.

96. See *supra* notes 67-68 and accompanying text.

97. See *supra* notes 62-63 and accompanying text.

98. See 28 U.S.C. § 1821 (1982); Fed. R. Civ. P. 45(c).

99. See *supra* notes 64-65 and accompanying text.

100. See *supra* notes 86-96 and accompanying text.

101. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058-59 (8th Cir. 1984) (en banc).

102. Under Rules 614 and 706, a court has broad discretion on whether to call witnesses. See *Fugitt v. Jones*, 549 F.2d 1001, 1006 (5th Cir. 1977) (Rule 706); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334 (Ct. Cl. 1980) (same); C. McCormick, *supra* note 43, § 8, at 15 (judge has power to question witnesses); 9 J. Wigmore, *supra* note 53, § 2484, at 276-77 (1981) (judge has power to investigate); cf. *Smith v. United States*, 321 F.2d 427, 431 (9th Cir. 1963) (decided under common law principle that served as basis for Rule 614); *Fielding v. United States*, 164 F.2d 1022, 1023 (6th Cir. 1947) (same). But see *Johnson v. United States*, 333 U.S. 46, 54 (1948) (Frankfurter, J., concurring in part, dissenting in part) (court should have a duty to call expert witness); *United States v. Karnes*, 531 F.2d 214, 216 (4th Cir. 1976) (in a criminal trial there may be a duty for court to call witness). As a result, the court can use its discretion to call only indispensable witnesses. See *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058-59 (8th Cir. 1984) (en banc).

Because of the open door of § 1915(c), the discretion inherent in these rules of evidence should be incorporated into § 1915. See *supra* notes 36-39 and accompanying text. The statute allows a court broad discretion in bestowing the privileges on an indigent. See *supra* note 6 and accompanying text. A court may even impose conditions on a litigant in return for aid under the statute. See *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981).

for lack of prosecution."¹⁰³ Arguably, it would be improper for a court to call an indigent's witnesses pursuant to Rules 614 and 706 because the court would be rescuing the indigent plaintiff's claim from dismissal or the indigent defendant from a directed verdict.¹⁰⁴ A Fourth Circuit case held that the due process clause of the fourteenth amendment forbids the trial judge in a criminal case from supplying the prosecution with evidence "essential to overcome the defendant's presumption of innocence."¹⁰⁵ That case, however, has limited application to civil cases involving indigent litigants. Although the Constitution may check the judge's discretion in civil trials,¹⁰⁶ these checks are significantly more extensive in criminal cases,¹⁰⁷ where defendants are entitled not only to the protections of the due process clause,¹⁰⁸ but also to those of the sixth amendment.¹⁰⁹ As a result, a judge should have more freedom to call

103. *Johnson v. Hubbard*, 698 F.2d 286, 291 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983); see Fed. R. Civ. P. 41(b), 50(a).

104. This argument was made in a criminal prosecution. See *United States v. Karnes*, 531 F.2d 214, 217 (4th Cir. 1976) (due process is violated when a court produces evidence "essential to overcome the defendant's presumption of innocence") (emphasis in original).

105. *Id.* In *Karnes*, the criminal defendant's conviction was affirmed after the district court had called as its own witnesses a codefendant and his wife under Rule 614. See *id.* at 216. The government had declined to call these witnesses because it could not vouch for their veracity. *Id.* Judge Winter's opinion held on due process grounds that it is reversible error to call a witness whose testimony is indispensable to the prosecution's discharge of its burden of production. See *id.* at 216-17 see generally Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 Va. L. Rev. 1, 67-71 (1978) (general discussion of *Karnes*); Case Comment, 89 Harv. L. Rev. 1906 (1976) (same).

106. One commentator enumerated the elements of procedural due process common to both civil and criminal trials as:

- (1) adequate notice of the charges or basis for government action;
- (2) a neutral decision-maker;
- (3) an opportunity to make an oral presentation to the decision-maker;
- (4) an opportunity to present evidence or witnesses to the decision-maker;
- (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual;
- (6) the right to have an attorney present the individual's case to the decision-maker;
- (7) a decision based on the record with a statement of reasons for the decision.

J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 555-56 (2d ed. 1983); see generally *id.* at 526-81 (chapter on procedural process); L. Tribe, *American Constitutional Law* §§ 10-7 to -19 (1978) (discussion of procedural due process).

107. Procedural due process protections applicable to criminal trials include those listed in *supra* note 106 plus the following safeguards which are not required in civil trials: "(1) the right to compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial; (6) a burden of proof on the government greater than a preponderance of the evidence standard." J. Nowak, R. Rotunda & J. Young, *supra* note 106, at 556; see generally *id.* at 526-81 (chapter on procedural due process); L. Tribe, *supra* note 106, at §§ 10-7 to -19 (discussion of procedural due process).

108. See U.S. Const. amend. V. See *supra* notes 106-07.

109. See U.S. Const. amend. VI. The sixth amendment establishes the rights to public trial, to jury trial, to speedy trial, to trial in the state and district of the crime, to be informed of the nature of the accusation, to be confronted with witnesses, to have compulsory process and to have assistance of counsel. See *United States v. Sorrentino*, 175 F.2d 721, 722 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949). The amendment applies only to criminal prosecutions. See *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (sixth amendment

witnesses in a civil suit. Furthermore, it would be unconscionable to embrace a constitutional argument that would allow a wealthy litigant to use his wealth to triumph over an indigent while claiming that due process prohibited the judge from helping his opponent. Additionally, while the decision of a prosecutor or nonindigent civil litigant not to call a witness could be based on tactical considerations such as the desire to avoid impeaching one's own witness,¹¹⁰ the indigent's decision would be based not on strategic but on practical considerations: the costs of civil litigation in the federal courts.¹¹¹

B. Policy Considerations

Courts and commentators have advised that the authority granted by the Rules be exercised sparingly because of the dangers inherent in the calling of witnesses by the court.¹¹²

Courts have used Rule 614 more often in criminal cases than in civil ones.¹¹³ In a criminal trial, "both court and counsel [should] endeavor to arrive at the truth and ascertain all circumstances."¹¹⁴ In a civil action, however, the court should act more as a moderator and should not "unnecessarily interfere with the trial strategies devised by counsel."¹¹⁵ As previously noted, however, the indigent's decision not to call witnesses as his own rests on financial rather than tactical reasons.¹¹⁶ A court's use of Rule 614 in an in forma pauperis case would therefore not interfere with counsel's strategies, but rather would enable counsel to implement them.

It has been argued that courts should avoid involving themselves in the presentation of evidence because doing so encroaches on the traditional adversarial system of justice.¹¹⁷ This argument might be persuasive if a pure adversarial system, free of defects, could be achieved. A major flaw in the current system, however, is that an advantage in resources can lead

constitutional right to counsel does not arise until criminal proceedings are instituted); *United States v. Paige*, 421 F. Supp. 1024, 1026 (S.D.N.Y. 1976) (same).

110. See *supra* note 47 and accompanying text.

111. See *supra* notes 2-3, 9-10 and accompanying text.

112. See 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-9 to -12; DeParcq, *Law, Science, and the Expert Witness*, 24 Tenn. L. Rev. 166, 170-71 (1956); Close, *The Right and Duty of a Trial Court to Call Witnesses in Civil Actions*, 25 Ins. Couns. J. 278, 278, 280, 287 (1958); see, e.g., *Smith v. United States*, 331 F.2d 265, 273-74 (8th Cir.) (court calling of witnesses is seldom used and not particularly desirable), *cert. denied*, 379 U.S. 824 (1964); *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) (same); see also *United States v. Ostrer*, 422 F. Supp. 93, 103 n.11 (S.D.N.Y. 1976) (Rule 614 rarely invoked).

113. See Fed. R. Evid. 614 advisory committee note; cf. Close, *supra* note 112, at 278-79 (noting prevalent practice of calling witnesses by court in criminal trials; arguing that judges have "right and duty" to do same in civil trials).

114. *Crespo v. John Hancock Mut. Life Ins. Co.*, 41 Ill. App. 3d 506, 517, 354 N.E.2d 381, 389 (1976).

115. *Id.* at 517-18, 354 N.E.2d at 390.

116. See *supra* notes 8-12 and accompanying text.

117. See 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-8 to -9; DeParcq, *supra* note 112, at 170-71; *Trial Judge's Power*, *supra* note 52, at 771.

to an advantage in litigation.¹¹⁸ Hence, application of Rules 614 and 706 in aid of an indigent does not detract from the adversarial system; it instead cures a weakness inherent in it.¹¹⁹

It has also been suggested that the court's calling of witnesses may result in undue emphasis on their testimony¹²⁰ or give the appearance of bias in favor of the indigent.¹²¹ Although calling a witness may indicate that the court believes that the indigent's claim has merit,¹²² this also occurs when a judge initially grants an indigent in forma pauperis status.¹²³ Furthermore, the danger can be avoided if the jury is not told that the court called the witness.¹²⁴ Even if the jury becomes aware that particular witnesses were called by the court, a jury instruction should cure any prejudice.¹²⁵ This remedy has been held sufficient even when the court has used Rules 614 and 706 in cases not involving indigents.¹²⁶

Another possible problem with using Rules 614 and 706 in in forma pauperis cases arises because the Rules allow both parties to cross-examine the witnesses called by the court.¹²⁷ The indigent could proffer leading questions to friendly witnesses.¹²⁸ This problem is easily curable. A court can, within its discretion, refrain from examining the witness and limit the parties' questioning to that allowable had the indigent him-

118. See *supra* note 3 and accompanying text.

119. See Gitelson & Gitelson, *supra* note 52, at 10-12; *Trial Judge's Power*, *supra* note 52, at 763, 767-68. See *supra* notes 56-58 and accompanying text.

120. See *United States v. Karnes*, 531 F.2d 214, 217 (4th Cir. 1976); Fed. R. Evid. 706 advisory committee note; 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-9; Close, *supra* note 112, at 280; Saltzburg, *supra* note 105, at 66; *Case Comment*, 89 Harv. L. Rev. 1906, 1913 (1976).

121. Commentators have expressed fear that a judge might appear to the jury to be leaning in favor of a particular party. See 9 J. Wigmore, *supra* note 53, § 2484, at 282 (1981); Close, *supra* note 112, at 280; *Trial Judge's Power*, *supra* note 66, at 762 n.7. Courts have also acknowledged that a judge may appear to be biased when comments are made during the course of a trial. See, e.g., *Quercia v. United States*, 289 U.S. 466, 470 (1933) (judge should be careful not to give evidence that is one-sided or misleading); *United States v. Vega*, 589 F.2d 1147, 1153 (2d Cir. 1978) (trial judge must be conscious of special attention and respect he commands, and appearance of impartiality must be maintained); *United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974) (en banc) (judge must "not comport himself in such a way as to 'tilt' or oversteer the jury or control their deliberations"), *cert. denied*, 420 U.S. 911 (1975); *United States v. Nazzaro*, 472 F.2d 302, 303 (2d Cir. 1973) (in a criminal trial, a judge's participation must never indicate to the jury that the judge believes the defendant is guilty).

122. See *supra* notes 120-21 and accompanying text.

123. See *supra* note 6.

124. Rule 706(c) states that it is within the court's discretion whether to "authorize disclosure to the jury of the fact that the court appointed the expert witness." Fed. R. Evid. 706(c). See 3 J. Weinstein & M. Berger, *supra* note 43, ¶ 706[01], at 706-11 to -12. See *infra* notes 127-29 and accompanying text.

125. Cf. *United States v. Vega*, 589 F.2d 1147, 1153 (2d Cir. 1978) (jury instruction cures hostility of court's interrogation of witness).

126. See *id.*

127. See Fed. R. Evid. 614(a), 706(a); *Estrella-Ortega v. United States*, 423 F.2d 509, 511 (9th Cir. 1970); *Smith v. United States*, 331 F.2d 265, 274 (8th Cir.), *cert. denied*, 379 U.S. 824 (1964).

128. See C. McCormick, *supra* note 43, § 7.

self called the witness.¹²⁹

Some problems inherent in the use of Rule 614 do not apply to civil in forma pauperis cases,¹³⁰ and those that do can easily be cured.¹³¹ Therefore, courts should not hesitate to call witnesses in an in forma pauperis case even if doing so would avoid dismissal of the pauper's claim. In fact, judges should be especially willing to exercise their discretion in aid of indigents to repair inequities in the adversarial system,¹³² thereby building trust and confidence in the judiciary.

CONCLUSION

Because civil litigants must pay witness fees and expenses, indigents are often denied meaningful access to the courts. The overwhelming majority of courts have held that section 1915 does not provide for the prepayment of fees and expenses of witnesses in civil cases. Although virtually all courts have ended their inquiry at this point and declined to aid indigent litigants in presenting their witnesses, subdivision (c) of section 1915 opens the door to examination beyond the in forma pauperis statute itself.

Under Rules 614 and 706, a court may call lay and expert witnesses as its own. If the witnesses are considered to be those of the court, their costs should be chargeable to the parties in a proportion chosen by the court. If instead the witnesses are deemed to be those of the indigent, the compensation provision of Rule 706(b) should be read into Rule 614 in order to give it effect. As a result, a court may help an indigent civil litigant to present evidence by immediately taxing the parties if the court does not choose to advance the funds itself.

The problems presented by incorporation of Rules 614 and 706 into section 1915 through subdivision (c) can be easily solved. The compensation provision of Rule 706(b), when applied to Rule 614, allows courts to conform with section 1915(e), which prohibits the United States from assuming liability for witness fees and expenses. In a civil case, court-calling of witnesses is less susceptible to due process restrictions, which are more applicable to criminal cases. Further, consideration of policy issues leads to the conclusion that courts should not hesitate to call witnesses in in forma pauperis cases. The procedures of Rules 614 and 706 can thereby further the purpose of section 1915: equal access to justice.

Kenneth R. Levine

129. Although the advisory committee note to Rule 614 assures litigants of their right to cross-examine court-called witnesses, this right, even in a criminal case, is not absolute. See *United States v. Collier*, 362 F.2d 135, 138-39 (7th Cir.), *cert. denied*, 385 U.S. 977 (1966); *Steinberg v. United States*, 162 F.2d 120, 124 (5th Cir.), *cert. denied*, 332 U.S. 808 (1947); Fed. R. Evid. 611.

130. See *supra* notes 113-16 and accompanying text.

131. See *supra* notes 120-29 and accompanying text.

132. See *supra* notes 117-19 and accompanying text.

