

Office of Government Ethics

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Letter to a U.S. Attorney dated January 27, 1983

This is in response to your January 20, 1983 request for an opinion on the impact of the applicable statutes and regulations governing employee conduct upon the proposed appearance of [an employee of the Federal Government] as an expert witness in connection with the above-styled case.

You relate that [the employee] would be called to testify on behalf of the plaintiffs and that the United States is presently a primary defendant, as well as a cross and third-party defendant (based on indemnity and contribution claims asserted by other primary defendants) in this action.

Your letter goes on to seek advice as to whether a dismissal with prejudice by the plaintiffs of the United States as a defendant-in-chief (as opposed to a cross or third-party defendant) would resolve such violations, if any.

For the reasons set forth below, we conclude that [the employee] would not be precluded from appearing and testifying as an expert witness, on a limited basis, in the proceeding.

It is not settled by the legislative history surrounding the enactment of the provisions of 18 U.S.C. § 205 whether the "testimony under oath exception" to the prohibitions created by 18 U.S.C. § 205 relating to representational activities by current Government employees applies to testimony given (for which expert opinion compensation is received) in cases in which the United States is a party or has a direct and substantial interest.¹ However, it is clear that such testimony could reasonably give rise to the appearance of making unfair use of current Government employment and affiliation.² In addition, [the employee's agency] Standards of Conduct on Outside Employment, Activity or Compensation, [citation omitted] specifically prohibits outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Under [those regulations] incompatible activities include, but are not limited to, those which:

Conflict with the interests of the [agency] or the Federal Government or can possibly be construed by the public to be official acts of the [agency].

Consequently, an appearance by a current employee [of this agency] as an expert witness in a proceeding in which the United States is named as a defendant-in-chief would be prohibited by the Standards of Conduct Regulations.

If, however, the United States is dismissed as a defendant-in-chief and if plaintiffs' counsel agrees not to offer any evidence against the United States, it does not appear that the plaintiffs' interest in this case would be incompatible with the employee's employment [with this agency] or the interests of the United States. Further, it is our understanding from discussions with representatives of your staff and officials at the Civil Division, Department of Justice, that any appearance of [the employee] in this context would not be incompatible with the position taken by the United States in this litigation or in subsequent matters affecting the United States' current status as a cross or third-party defendant.

Attached to your January 20th letter were copies of two documents provided by plaintiffs' counsel which indicate the basic parameters of [the employee's] proposed testimony. We have reviewed those documents, and based on this review, we believe [the employee's] testimony should be limited to his personal knowledge of occurrences which are relevant to the issues in the proceeding, including those in which he participated, utilizing his expertise.³ He should not engage in answering hypothetical questions posed by plaintiffs' counsel.

The views expressed in this letter have been concurred in by the Designated Agency Ethics Official at the [Agency].

Sincerely,

David R. Scott
Acting Director

¹ See particularly, May 13, 1976 letter from Acting Attorney General Ulman, OLC, to Arthur Kusinski, National Science Foundation-- wherein the

Office of Legal Counsel, Department of Justice has ruled that 18 U.S.C. § 205 would not prohibit an employee of the National Science Foundation from testifying either with or without compensation as an expert witness in a suit filed against the Department of the Interior to enjoin the Federal Government's sale of oil and gas leases off the Atlantic Coast of Long Island.

² See [Agency] Standards of Ethical Conduct and Related Responsibilities, [citation omitted] which tracks Executive Branch Employee Responsibilities and Conduct, 5 C.F.R. § 735.201 based on E.O. 11222, May 10, 1965.

³ See 5 C.F.R. § 737.19(b) for guidelines on expert testimony restrictions on activities of certain former Federal employees.