



United States  
**Office of Government Ethics**  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

July 12, 2007  
DO-07-019

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Expert Witness Outline

The Office of Government Ethics (OGE) has received several requests recently for advice about the ethical restrictions on expert witnesses. These questions have involved the OGE rule applicable to current employees, 5 C.F.R. § 2635.805, as well as the criminal statute applicable to former Government employees, 18 U.S.C. § 207(a)(1) and (j)(6).

The attached document, "Expert Witnesses: Ethics in Court," is an outline of cases and issues pertaining to expert witnesses and the relevant ethical restrictions. It was prepared originally for a presentation by one of our attorneys at the 2007 National Government Ethics Conference. We are distributing this outline, slightly revised, for the benefit of those unable to attend the presentation at the Conference.

The outline is designed primarily as a legal research aid for ethics officials and attorneys who must deal with expert witness questions in the context of pending litigation. The document is not intended to resolve specific ethical questions but rather to direct agency officials to relevant legal authorities, including case law. In order to present this information in the most efficient manner, we adopted an outline format. While the document, therefore, is only a summary, we believe it digests a large amount of useful information and can serve as a resource if you encounter an expert witness question at your agency.

A key purpose of the outline is to distill some of the recurring themes, issues, and concerns that appear in the

Designated Agency Ethics Officials

Page 2

growing body of judicial opinions in this area. The outline includes practical suggestions for how agency officials can be sensitive to judicial concerns and still uphold the ethical requirements.

As the document emphasizes, OGE encourages ethics officials to coordinate with any trial attorney representing the Government in cases where the expert witness restrictions may be at issue. Agency ethics officials and attorneys also are welcome to consult with OGE if they have questions about the application of the expert witness restrictions in a given case.

Attachment

# EXPERT WITNESSES: ETHICS IN COURT

## Outline of Issues and Cases

I.	PURPOSES OF OUTLINE .....	1
A.	Brief review of ethical restrictions on expert witnesses.....	1
B.	Review of cases .....	1
C.	Practical guidance for ethics officials .....	1
II.	EXPERT WITNESSES – GENERAL.....	1
A.	What is an expert witness .....	1
B.	Not covered .....	2
C.	Questions about status as an expert witness .....	2
D.	Practical considerations about use of expert witnesses .....	3
III.	ETHICAL RESTRICTIONS ON EXPERT WITNESSES.....	3
A.	Restrictions on Current Employees – 5 C.F.R. 2635.805 .....	3
1.	Purposes of 2635.805 .....	3
2.	Prohibition .....	4
3.	Authorization in two circumstances .....	4
4.	Court Order .....	4
B.	Restrictions on Former Employees – 18 U.S.C. 207(a)(1)&(j)(6) .....	5
1.	Purpose .....	5
2.	Prohibition .....	5
3.	Not restricted .....	5
4.	Exception for Court order .....	6
IV.	IMPLEMENTATION OF RESTRICTIONS IN COURT .....	6
A.	Considerations common to both restrictions .....	6
B.	Overview of different courts .....	6
1.	Acceptance by 7 <sup>th</sup> Circuit .....	6
2.	Other authorities less likely to preclude testimony .....	7
a.	5 <sup>th</sup> Circuit .....	7
b.	6 <sup>th</sup> Circuit .....	7
c.	Other courts .....	7
C.	Types of Judicial Concerns .....	8
1.	Maintenance of judicial control .....	8
a.	Extra-judicial efforts .....	8

b.	Orderliness, timing, and fairness .....	8
c.	Perception of witness intimidation .....	9
d.	Judicial control over discovery and evidence .....	9
2.	Privilege/exclusionary rule .....	9
3.	First Amendment implications .....	10
a.	First amendment concerns .....	10
b.	"Related to official duties" .....	10
4.	Displeasure of court .....	10
5.	Ripeness .....	11
6.	Possibility of Government enforcement after testimony .....	11
V.	PRACTICAL ADVICE FOR ETHICS OFFICIALS .....	12
A.	Early consultation with trial attorney .....	12
B.	If Government not represented .....	12
C.	Use judgment about communicating directly with witness .....	12
D.	Can still uphold law .....	13

## I. PURPOSES OF OUTLINE

**A. Brief review of ethical restrictions on expert witnesses:** Outline limits on current and former employees under OGE Standards and criminal post-employment statute.

1. 5 C.F.R. 2635.805: generally bars current employees from testifying as expert in Federal forum where U.S. is party or has direct and substantial interest.

2. 18 U.S.C. 207(a)(1) & (j)(6): generally bars former employees from testifying as expert on same official matter in which participated for Government.

Note: Outline does not cover Touhy regulations or other administrative requirements apart from authority of conflict of interest laws and OGE regulations; see OGE Informal Advisory Letter 90 x 4 (distinguishing ethics rules and Touhy regulations); Krupp v. U.S., 1999 U.S. Dist. LEXIS 17822 (D. Neb. 1999) (illustrating consequences of confusing requirements of agency's Touhy regulations with those of OGE rule).

**B. Review of cases:** Compared to most ethics subjects, expert witness restrictions are subject to relatively frequent litigation; discussion below identifies issues and categorizes concerns raised by courts.

**C. Practical guidance for ethics officials:** How to deal with expert witness questions in context of pending litigation.

## II. EXPERT WITNESSES—GENERAL

### A. What is an expert witness

1. Testimony in form of opinion or otherwise based on scientific, technical, or other specialized knowledge; witness must be qualified, as determined by court. Rule 702, Federal Rules of Evidence (FRE).

2. "Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993).

3. Another key distinction: expert witness, unlike "lay" witness, may answer hypothetical questions based on information presented at or before hearing,

including facts and data not admissible in evidence. Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1202 n.16 (3d Cir. 1995); Rule 703, FRE.

## **B. Not covered**

1. Fact testimony: testifying solely as to facts within witness's personal knowledge.

2. Lay opinion testimony: opinions or inferences rationally based on witness's own perceptions and not based on scientific, technical, or other specialized knowledge within scope of Rule 702. Rule 701, FRE.

## **C. Questions about status as an expert witness**

1. Occasionally disputes may arise as to whether current/former employee is expert or fact witness: e.g., U.S. ex rel. Watson v. Conn. Gen. Life Ins. Co., 2003 U.S. Dist. LEXIS 1344 (E.D. Pa. 2003) (court decides former employee not expert witness because not retained as expert, not paid, and testifying solely about matters "of which he had personal knowledge while working for the government"; therefore no violation of 18 U.S.C. 207).

2. If not yet clear whether person will testify as expert or fact witness, courts may decline to decide in advance whether testimony would violate ethics requirements: see Conrad v. United Instruments, Inc., 988 F. Supp. 1223, 1226 (E.D. Wisc. 1997); see discussion of Ripeness below.

3. In one case, court permitted Government doctor to be "'expert' witness only to a limited extent," i.e., testimony only about own examination of patient and findings after examining patient. DeMarrias v. U.S., 713 F. Supp. 346, 348 (D. S.Dak. 1989); however, case predates OGE Standards of Conduct; moreover, some courts say "treating physician" is not necessarily expert witness, as long as testimony limited to personal observations, including treatment of patient. U.S. v. Henderson, 409 F.3d 1293, 1300 (11<sup>th</sup> Cir. 2005), cert. denied, 126 S. Ct. 1331 (2006).

4. Federal Rules of Civil Procedure (FRCP) require advance disclosure of expert witnesses and provide for pretrial scheduling orders for giving notice; if question as to whether individual will be expert or fact witness, sometimes notice may clarify; see Rule 26, FRCP (discovery, disclosure of experts); Rule 16, FRCP (pretrial scheduling, conferences, orders); note also that failure to comply with scheduling orders may make it unnecessary for court to rule on application of ethics restrictions,

see Estate of Reed v. U.S., 2007 U.S. Dist. LEXIS 34770 (W.D. Mo. 2007)(court may not need to reach issue under 5 CFR 2635.805).

#### **D. Practical considerations about use of expert witnesses**

1. Parties and judges invest considerable time and resources in preparation, and last minute efforts to exclude expert may upset schedule of court and parties.

2. Attorneys may resist efforts to limit witness to fact testimony: not only greater latitude for expert to offer opinions and answer hypotheticals, but wide belief that "experts" can carry greater weight with juries; see, e.g., Simard & Young, Daubert's Gatekeeper: The Role of the District Judge in Admitting Expert Testimony, 68 Tul. L. Rev. 1457, 1459-60 (1994) (many reasons expert witnesses have extraordinary opportunity to influence jury).

3. Ethics officials can find themselves in middle of broader discovery dispute, and "temperature" of attorneys and judge may already be high: highlights need for early consultation with Government trial attorney if possible—see Practical Advice below.

### **III. ETHICAL RESTRICTIONS ON EXPERT WITNESSES**

#### **A. Restrictions on Current Employees—5 C.F.R. 2635.805**

##### **1. Purposes of 2635.805**

a. Prevent use of public office for private gain of employee or private party: fact of witness's Government employment can be persuasive; even greater concern where expertise relates to Government duties; 56 Fed. Reg. 33777, 33789 (July 23, 1991); see also OGE 83 x 1 (pre-dates OGE standards); 90 x 4 (same).

b. "Logical extension" of concerns embodied in 18 U.S.C. 203/205, e.g., use of influence or information acquired from Government service, 56 Fed. Reg. at 33789.

Note, however: expert testimony not prohibited by these criminal statutes, which contain exceptions for testimony under oath or statements under penalty of perjury, 18 U.S.C. 203(f), 205(g), see DeMarrias, 713 F. Supp. at 347; OLC has stated that, in order for section 205 to apply, "expert witness must assume

additional duties and functions beyond those associated with the preparation and offering of expert testimony." 13 OLC 317, 319 (1989).

## **2. Prohibition**

a. Employee may not serve as expert witness

b. for anyone except U.S.

c. in proceeding before U.S. court or agency—state proceedings not covered, although employees still must follow more general rule prohibiting use of public office for private gain, 5 C.F.R. 2635.702; cf. 5 C.F.R. 2635.802 (Example 2) (use of official position to obtain outside work related to official work)

d. in which U.S. is party or has direct and substantial interest—look to post-employment regulations for guidance, 5 C.F.R. 2637.201(c)(5), 2637.204(f).

e. Compensation not element.

f. Less restrictive provisions for SGEs—see OGE 00 x 1, at 20.

## **3. Authorization in two circumstances**

a. DAEO may determine service is in interest of Government—must consult with agency representing U.S. in proceeding or (if U.S. not party) with DOJ and agency most interested in case.

b. In alternative, DAEO may determine that testimony does not relate to employee's official duties—uses relatedness test in OGE teaching/speaking/writing rule, 5 C.F.R. 2635.807(a)(2)(i).

## **4. Court Order**

a. Unlike post-employment statute (18 U.S.C. 207(j)(6), see below), section 2635.805 does not contain express exception permitting expert testimony pursuant to court order.

b. As practical matter, however, several courts have granted requests to permit expert testimony by current employees, under various procedural mechanisms, such as:

1) granting motion to compel discovery, DeMarrias, 713 F. Supp. at 348 (pre-section 2635.805); cf. U.S. ex rel. Roby v. Boeing Co., 189 F.R.D. 512 (S.D. Ohio 1999) (granting motion for protective order against Government interference with expert; although case involved Touhy regulations, court relies on 2635.805 precedent); but see Young v. U.S., 181 F.R.D. 344, 346 (W.D. Tex. 1997) (denies motion to compel, absent consent by employee to act as expert);

2) denying Government motion in limine to prevent expert testimony, Krupp, 1999 U.S. Dist. LEXIS 17822;

3) denying Government motion to quash subpoena of employee to testify as expert, Dean v. VA Regional Office, 151 F.R.D. 83, 85 (N.D. Ohio 1993);

4) appointing plaintiff's witness as "court expert" and enjoining Government from further action to enforce ethics rules, FDIC v. Refco Capital Corp., 46 F. Supp. 2d 1109 (D. Colo. 1999).

c. Note that such courts do not always guarantee employee will be free from possible subsequent disciplinary action—see discussion of Government enforcement after testimony below.

## **B. Restrictions on Former Employees—18 U.S.C. 207(a)(1) & (j)(6)**

1. **Purpose:** Similar to purposes of section 207 generally; most consistently cited purposes: protection against abuse of influence and inside information.

### **2. Prohibition**

a. Expert witness prohibition attaches only to permanent ban in 18 U.S.C. 207(a)(1), per section 207(j)(6)(A).

b. Thus, former employee may not serve as expert witness (except for U.S.) in any party matter in which he or she participated personally and substantially for Government, if U.S. is party or has direct and substantial interest; see OGE 04 x 11, Attachment at 3-5 (discussing elements of permanent ban).

c. Compensation not element.

**3 Not restricted:** May serve as expert witness notwithstanding any other prohibition in 18 U.S.C. 207 besides permanent ban, regardless of compensation; contrary statements in old OGE opinions, e.g., 89 x 20, and old post-employment regulations, 5 C.F.R. 2637.208, are superseded by statutory amendments.

**4. Exception for Court order**

**a.** Former employee may serve as expert witness "pursuant to court order," 18 U.S.C. 207(j)(6).

**b.** Mere subpoena not sufficient, cf. Doe v. DiGenova, 779 F.2d 74, 85 (D.C. Cir. 1985) (similar language in Privacy Act does not cover subpoena).

**c.** Mere order qualifying individual as an expert not sufficient.

**d.** Standard for issuing order: "The statute is silent," EEOC v. Exxon Corp., 202 F.3d 755, 758 (5<sup>th</sup> Cir. 2000); standard in old OGE regulations, 5 C.F.R. 2637.208, inapplicable because of significant statutory change; proposed new OGE regulation does not attempt to instruct court as to proper standard, 68 FR 7843, 7865 (2/18/03); but OGE believes orders should not be routine, as that would eviscerate prohibition—68 FR at 7865, 7887 (Example 4); note that order upheld in case limited testimony only to "publicly-known information," 202 F.3d at 757, so Government might seek similar limitation in future cases as appropriate.

**e.** Compensation does not preclude order, Exxon, 202 F.3d at 758.

**IV. IMPLEMENTATION OF RESTRICTIONS IN COURT**

**A. Considerations common to both restrictions:** Although the elements of 5 C.F.R. 2635.805 and 18 U.S.C. 207 differ, courts often apply similar principles, sometimes even same precedents, regardless of whether expert is current or former employee; e.g., Dean, 151 F.R.D. at 85 (in addressing effect of 2635.805, court relies on two cases involving 18 U.S.C. 207), citing McElya v. Sterling Medical, Inc., 129 F.R.D. 510 (W.D. Tenn. 1990) and In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 399 (E.D. Mich. 1989); Young, 181 F.R.D. at 347(same).

**B. Overview of different courts:** Following is general breakdown of treatment by various courts.

**1. Acceptance by 7<sup>th</sup> Circuit:** 7<sup>th</sup> Circuit case in 2002 held "5 C.F.R. § 2635.805 defines the circumstances under which a federal employee . . . may be an expert witness as opposed to a fact witness," and district court must apply regulation during trial on remand, Ueland v. U.S., 291 F.3d 993, 999 (7<sup>th</sup> Cir. 2002); very brief discussion, and court did not address contrary authorities; basis seems to be duty of courts to "implement federal regulations, no less than federal statutes," id.; note, however, other courts have found possible conflict between ethics rules and other Federal rules governing discovery and admissibility of evidence, e.g., Dean, 151 F.R.D. at 85 (Federal Rules of Civil Procedure) and McElya, 129 F.R.D. at 514 (same); impact unclear on prior district court opinion within 7<sup>th</sup> Circuit that raised First Amendment question about application of 18 U.S.C. 207 to prevent expert testimony, Conrad, 988 F. Supp. at 1226.

**2. Other authorities less likely to preclude testimony:**

**a. 5<sup>th</sup> Circuit:** Exxon case concluded that section 207 applied but still upheld trial court order permitting expert testimony, under 207(j)(6), see 202 F.3d at 759; another 5<sup>th</sup> Circuit case held that Texas state restriction on expert testimony by employees violated First Amendment, Hoover v. Morales, 164 F.3d 221 (5<sup>th</sup> Cir. 1998); see also Kinney v. Weaver, 367 F.3d 337, 361 (5<sup>th</sup> Cir.)(en banc), cert. denied, 543 U.S. 872 (2004) (First Amendment interests of Government independent contractors in testifying as experts); earlier district court case within 5<sup>th</sup> Circuit stated, in dicta, that Federal ethics requirements do not provide basis for court to exclude testimony of expert witnesses (although Government not precluded from taking subsequent enforcement action), Young, 181 F.R.D. at 347-48; another 5<sup>th</sup> Circuit case upheld sanctions against agency attorney for threatening employee with prosecution under 18 U.S.C. 203 and 205 if he served as witness, although opinion does not indicate that employee would have been expert as opposed to fact witness, Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5<sup>th</sup> Cir. 1994).

**b. 6<sup>th</sup> Circuit:** Several district courts within 6<sup>th</sup> Circuit have held that section 207 and section 2635.805 provide no basis to exclude testimony or curb discovery: Dean, 151 F.R.D. at 87; McElya, 129 F.R.D. at 514; Air Crash Disaster, 737 F. Supp. at 405; see also Roby, 189 F.R.D. at 516-17 (reaching same conclusion with regard to Touhy regulations, and citing cases involving section 207 and section 2635.805); in another case, court imposed certain measures to mitigate impact of government attorney's "unprofessional conduct" in causing employee to withdraw as expert witness for fear of violating section 2635.805, Hansen v. U.S., 2005 U.S. Dist. LEXIS 8524 (N.D. Ohio 2005); finally, one 6<sup>th</sup> Circuit case held private attorney could be liable for certain torts for causing withdrawal of agency employee as opposing party's

witness/consultant by contacting agency about situation, Matthews v. Storgion, 2006 U.S. App. LEXIS 9835 (6<sup>th</sup> Cir. 2006).

**c. Other courts:** Refco, 46 F. Supp. 2d at 1111 (section 2635.805 does not prevail over orderly processes of court; agency enjoined from taking enforcement action against expert witness); Krupp, 1999 U.S. Dist. LEXIS 17822 (expert testimony permitted even though section 2635.805 not strictly followed); DeMarrias, 713 F. Supp. at 347-48 (permits testimony by employee; pre-dates section 2635.805, but court declines to follow OGE 83 x 1, in part because employee was "'expert' witness only to a limited extent"); see also Swartzwelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002) (enjoins enforcement of Pittsburgh expert testimony restriction on First Amendment grounds); In re Cary, 167 B.R. 163 (Bankr. W.D. Mo. 1994) (court compels expert to testify notwithstanding Missouri state policy prohibiting medical personnel from testifying in civil suits).

**C. Types of Judicial Concerns:** Courts have raised various issues and have framed questions in various ways; following is an attempt to categorize concerns or considerations that influenced courts.

**1. Maintenance of judicial control:** Several cases emphasize prerogatives of court over scheduling, discovery process, admission of evidence, and protection of witnesses from possible intimidation; courts may refuse to permit ethics requirements to interfere with judicial control over these areas.

**a. Extra-judicial efforts:** Some courts have criticized efforts by ethics officials and others to stop expert witnesses without first involving court and opposing counsel: Refco, 46 F. Supp.2d at 1111 ("FDIC and its ethics expert were under an obligation to apply to the court, rather than to take independent action as they did"); Hansen, 2005 U.S. Dist. LEXIS 8524 (criticizing "government counsel for her failure to have called this situation to the attention of opposing counsel and the court" before "calling on, and thus invoking, the Agency's ethical machinery"); note also, some courts have concluded that ex parte communications with opposing party's expert can violate legal ethics duties: Erickson v. Newmark Corp., 87 F.3d 298 (9<sup>th</sup> Cir. 1996); Matthews v. Storgion, 335 F. Supp.2d 878, 884 (W.D. Tenn. 2004), aff'd in part and rev'd in part, 2006 U.S. App. LEXIS 9835 (6<sup>th</sup> Cir. 2006); see generally S. Easton, Can We Talk?: Removing Counterproductive Ethical Restraints Upon Ex Parte Communication Between Attorneys and Adverse Expert Witnesses, 76 Ind. L.J. 647 (2001).

**b. Orderliness, timing, and fairness:** Some courts have asserted control based on concerns about orderliness, timing, and fairness to opposing counsel and parties: e.g., Krupp, 1999 U.S. Dist. LEXIS 17822 (court permits expert testimony, where

parties assumed for nearly one year that employee would testify and agency's late denial of authorization under 2635.805 would be "highly prejudicial"); Refco, 46 F. Supp.2d at 1111, 1114 (section 2635.805 "did not prevail over the orderly processes of this court" and court refuses to remove expert witness after enormous discovery and trial preparation); cf. Matthews, 335 F. Supp.2d at 887 (two years after agency employee gave deposition, and after close of discovery, private attorney contacted agency to question propriety; private attorney may be liable for various torts).

**c. Perception of witness intimidation:** Some courts have taken measures to deal with perceived witness intimidation where enforcement action threatened: Refco, 46 F. Supp.2d at 1112ff (among other things, Court protects employee by appointing as expert for court itself and enjoins agency from taking enforcement); Kelly, 26 F.3d at 603 (sanctions for threatening criminal prosecution; employee may have been merely fact witness); Hansen, 2005 U.S. Dist. LEXIS 8524 (criticizes Government for actions leading to employee resignation as expert); in some cases, however, courts have refused to immunize experts from future enforcement action, even after ruling testimony not precluded: Young, 181 F.R.D. at 347-48 (not ruling out future enforcement action by Government); Air Crash Disaster, 737 F. Supp. at 405-06 (section 207 no basis for excluding testimony, but court does not preclude future prosecution); also, as noted below, some courts may view issue of possible enforcement action as unripe for judicial review, e.g., Conrad, 988 F. Supp. at 1226 (Government threatened former employee with prosecution if he testified as expert, but court held issue unripe).

**d. Judicial control over discovery and evidence:** Courts sometimes emphasize judicial, as opposed to executive, control over discovery and admission of evidence: Young, 181 F.R.D. at 347 (excluding experts based on 2635.805 would be "improperly abdicating control over civil discovery to the caprice of executive officers"); Dean, 151 F.R.D. at 85 ("Requiring this Court to quash the subpoena based on 5 C.F.R. § 2635.805, is tantamount to permitting the ethics regulation to restrict this Court's broad discovery powers under Rules 30 and 34 of the Federal Rules of Civil Procedure"); Refco, 46 F. Supp. 2d at 1114 ("The discovery is closed and the case is ready for trial. To excise an expert witness at this juncture in obsequious deference to a bureaucratic regulation of doubtful applicability amounts to an inexcusable preference for form over substance."); this concern often relates to privilege/exclusionary rule issue below.

**2. Privilege/exclusionary rule:** Courts sometimes frame question in terms of whether ethics restrictions create privilege or exclusionary rule that Government can invoke: Young, 181 F.R.D. at 347-48 (section 2635.805 not designed to create evidentiary privilege for Government to exclude testimony, but rather to guide

employee behavior); Dean, 151 F.R.D. at 84-87 (same); McElya, 129 F.R.D. at 512-15 (18 U.S.C. 207 and agency regulations do not create privilege preventing former employee's testimony); Air Crash Disaster, 737 F. Supp. at 405 (section 207 does not "prohibit the admissibility of testimony or evidence presented in violation of its prohibition"); cf. Roby, 189 F.R.D. at 517-18 (same conclusion with Touhy regulations; cites cases involving 2635.805 and section 207); but see Patrick v. Principi, 2004 U.S. App. Vet. Claims LEXIS 135 (Ct. App. Vet. Cl. 2004) (refusing to issue "drastic" remedy of writ of mandamus to compel VA to comply with request for medical opinion from agency doctor; agency asserted ethics rule precluded compliance with request for testimony).

### 3. First Amendment implications

**a. First amendment concerns:** Courts occasionally have raised first amendment concerns about the application of ethical restrictions to prevent expert testimony: Conrad, 988 F. Supp. at 1226 (dicta) (application of section 207 to expert witnesses may "silence former employees who seek to expose incompetence and corruption within the federal government," and Constitution limits "extent to which the government may silence its most knowledgeable critics"); Swartzwelder, 297 F.3d 228 (Pittsburgh restriction on expert testimony by police officers violated First Amendment); Hoover, 164 F.3d at 226 (Texas restriction on expert testimony by state employees violated First Amendment); Kinney, 367 F.3d at 361 (applying public employee speech doctrine to independent contractors who allegedly suffered retaliation by police officials for expert testimony); note, however, "First Amendment protection of public employees' testimony is not absolute," Worrell v. Henry, 219 F.3d 1197, 1205 (10<sup>th</sup> Cir. 2000), cert. denied, 533 U.S. 916 (2001).

**b. "Related to official duties":** 10<sup>th</sup> Circuit recently upheld OGE's rule on teaching, speaking and writing against First Amendment challenge, and that rule uses same "related to official duties" standard as authorization provision in OGE expert witness rule, see Wolfe v. Barnhart, 446 F.3d 1096 (10<sup>th</sup> Cir. 2006); Wolfe also distinguished Swartzwelder, supra, noting that case involved "vague standard" for approval of employee activity that created potential for censorship, Wolfe, at 446 F.3d at 1109; Swartzwelder itself suggested decision may have been different if expert witness restriction at issue had been "limited to testimony related to an employee's official duties," 297 F.3d at 240.

**4. Displeasure of court:** Some courts have expressed displeasure and even taken corrective action against Government for conduct deemed intimidating, unprofessional, or insufficiently considerate of court and opposing counsel, e.g., Kelly,

26 F.3d at 603 (upholding sanctions against government attorney for threatening potential witness with prosecution under 18 U.S.C. 203 and 205; opinion does not indicate witness was expert); Refco, 46 F. Supp.2d at 1112ff (court enjoins agency ethics investigation related to employee's service as expert witness); Hansen, 2005 U.S. Dist. LEXIS 8524 (court criticizes Government for unprofessional conduct where expert witness withdrew after e-mail from ethics attorney); cf. Matthews, 2006 U.S. App. LEXIS 9835 (private attorney could be liable for intentional interference with business relationship and inducement of breach of contract where she contacted agency about employee serving as witness and consultant, thus leading to termination of employee's service for opposing party); also, as noted in discussion of "extra-judicial" efforts above, some courts have indicated that ex parte contacts with opposing party's expert may violate legal ethics duties.

**5. Ripeness:** Occasionally, courts are asked for declaratory judgment that proposed testimony would not violate ethical restrictions.

a. Two courts found such requests unripe for review, in part because speculative whether Government would take action against witness for violating ethics requirement: Air Crash Disaster, 737 F. Supp. at 402-03; Conrad, 988 F. Supp. at 1225-26.

b. However, one court avoided such questions by re-characterizing motion for declaratory **judgment** as motion to compel discovery, which court granted: DeMarrias, 713 F. Supp. at 348.

**6. Possibility of Government enforcement after testimony:**

a. Some courts that refused to exclude expert testimony nevertheless did not immunize witness from post-testimony disciplinary action or prosecution: Young, 181 F.R.D. at 347-48; Air Crash Disaster, 737 F. Supp. at 405-06; cf. Friedman v. Lehman, 1996 U.S. Dist. LEXIS 12723 (D.D.C. 1996) (upholding public reprimand by Patent and Trademark Office against former employee who violated agency patent practice rule by appearing as expert witness in lawsuit related to patent matter in which he participated as employee).

b. Some courts have left uncertainty as to future enforcement action by permitting testimony but invoking ripeness on question of whether testimony violates ethical restriction; see discussion of Ripeness above.

c. Some courts have allowed discovery or testimony but have not addressed permissibility of future enforcement, e.g., Dean, 151 F.R.D. at 84-87.

d. But some courts have taken measures to prevent, or at least raise cautions about, future enforcement: Refco, 46 F. Supp.2d at 1112ff (court enjoins any agency activity, including investigation and referral for prosecution, related to expert testimony); Conrad, 988 F. Supp. at 1226 (threat of prosecution unripe, but cautioning there may be First Amendment concerns); see discussions of witness intimidation and displeasure of court above.

## **V. PRACTICAL ADVICE FOR ETHICS OFFICIALS**

Various concerns expressed in case law may have practical implications for ethics officials.

### **A. Early consultation with trial attorney**

As soon as possible after receiving information about possible expert witness activity implicating ethical restrictions, contact DOJ attorney in that case (or other agency attorney representing Government, if DOJ not involved); trial attorney is in position to communicate with judge and opposing counsel and will be aware of any scheduling concerns or other judicial sensitivities.

### **B. If Government not represented**

Sometimes, there will be no Government attorney in case, e.g., if purely private lawsuit; try to determine agency most likely to be involved or interested in case, and consult with that agency's attorneys; can contact relevant DOJ office if need to communicate with court; can consult OGE if not sure whom to contact or how to proceed.

### **C. Use judgment about communicating directly with witness**

If possible, let Government trial attorney raise matter with court and opposing counsel, rather than attempt on your own to induce witness to withdraw; try to avoid action that might be perceived as interference or intimidation; does not mean ethics officials should refrain from handling routine requests for advice or prior approval (pursuant to agency supplemental regulation) initiated by employees themselves.

#### **D. Can still uphold law**

Government can assert its interests:

1. Ask court to follow 7<sup>th</sup> Circuit approach in Ueland.
2. Assert importance of ethical restrictions for preventing use of public office for private gain (see discussion of purposes of section 2635.805 and section 207 above).
3. If challenged, assert constitutionality of restrictions, especially in light of nexus to official duties (see discussion of First Amendment above).
4. In cases involving former employees, ask court to issue order under 18 U.S.C. 207(j)(6) only if it finds exceptional circumstances.
5. If court does not preclude testimony altogether, ask for appropriate limitations, such as limit on nonpublic information in Exxon, 202 F.3d at 757.
6. As appropriate, clarify whether court leaves door open for future enforcement for violation of restrictions, even if testimony not excluded.