

Office of Government Ethics

89 x 12 -- 08/31/89

Letter to a United States Attorney dated August 31, 1989

This is in response to your letter of August 21, 1989, seeking advice regarding the proposed appearance of [a doctor] as an expert witness in the above-referenced case. The case involves a claim against the United States based on allegations of malpractice by employee physicians at [agency] hospitals in [a particular state]. Based on documentation indicating that [the doctor] was appointed in 1982 as a consultant with the [agency] and continues to enjoy hospital privileges, you ask whether it is proper for him to serve as an expert witness on behalf of the plaintiff in an action against the United States.

In connection with your request, you refer to our informal advisory letter 83 x 1 dated January 27, 1983, in which we concluded that a Federal employee could not appear as an expert witness on behalf of plaintiffs in a proceeding against the United States. That opinion is based upon regulations implementing the standards of ethical conduct for Government officers and employees prescribed by Executive Order 11222. These regulations do not apply to any individual who has a contractual relationship with the Government.

We are advised by the [agency] that [the doctor's] present status is that of a contractor rather than an employee. He consults with the [agency] one or two times a month and is paid on a fee basis from a segregated fund for payments to contract physicians. Because he is not an employee, the standards of conduct do not apply to him and he is subject only to those obligations established by contract. We understand that the [agency] does not impose upon its contract physicians any contractual obligation that would preclude them from giving expert testimony, even in a case against the [agency]. Under these circumstances, our opinion of January 27, 1983, is inapplicable and we are not aware of any legal impediment to [the doctor's] service as an expert witness in the above referenced case.

Sincerely yours,

Frank Q. Nebeker

Director