

TESTIMONY IN PRIVATE LITIGATION

- PHS: 23-30-00 Purpose and Scope
  - 10 Definitions
  - 20 Policy

PHS:  
23-30-00 PURPOSE AND SCOPE

This chapter sets forth the policy and procedures governing the testimony by PHS employees in their official capacity in private litigation. The policy is designed to recognize the legitimate needs of private parties and courts in securing necessary testimony in cases, consistent with minimizing the demands of the employees' time and the disruption of their official duties.

This policy does not, however, restrict disclosure of records (including the provision of certified or authenticated copies of records for use in private litigation) where disclosure is otherwise appropriate under the Freedom of Information Act (see 45 CFR Part 5), the Privacy Act (see 45 CFR Part 5b), or other laws.

Nor does this chapter apply to the testimony by PHS employees in litigation in their private capacity done during their own time and not involving disclosure of official information. These activities are generally permissible if undertaken on the employees' own time, subject to compliance with applicable leave policies, and HEW's Standards of Conduct (45 CFR Part 73) governing outside activities. Note that among other limitations, the Standards of Conduct require advance administrative approval to engage in professional and consultative services outside official working hours. For more information on these matters see 45 CFR Part 73, particularly Subpart D, and Subchapter 630 of the Federal Personnel Manual and the appropriate PHS organizational segment's supplementary instructions.

PHS:  
23-30-10 DEFINITIONS

- A. Employee includes commissioned officers in the PHS Commissioned Corps as well as regular and special PHS employees (except FDA employees, as cited in paragraph F of this section).
- B. Expert testimony means testimony concerning opinion or belief of the person so testifying based upon the individual's expertise in a given field and not upon personal observation or examination of the individual, occurrence, or subject of the litigation. For example, an opinion as to the cause of an injury or death based solely upon the review of medical records or an autopsy report is expert testimony.

- C. Factual testimony means testimony based upon personal observation or examination of the individual, occurrence, or subject of the litigation. For example, an opinion on the cause of an injury or death based upon actual provision of medical care to the patient is factual testimony.
- D. Official information means any information and knowledge (whether or not in record form) acquired by an employee in connection with the performance of his or her official duties.
- E. Official capacity and official duties mean the status (or conduct) of an employee when acting within the scope of his or her employment.
- F. PHS means all of the Public Health Service excluding the Food and Drug Administration. (The regulations governing testimony by FDA employees are published in CFR §20.1.)
- G. Private litigation means lawsuits and other actions brought before courts and Government bodies in which the United States is not a party and, except to the extent as may be determined in paragraph PHS: 23-30-20C, has no substantial interest.
- H. Testify and testimony include both in-person, oral statements before a court and statements made pursuant to depositions, interrogatories, affidavits, or other formal participation.

PHS:  
23-30-20 POLICY

A. General

1. Employees may not testify in their official capacity in private litigation, without first being served with a valid subpoena or court order to do so.
2. Where private parties seek only expert testimony, employees may testify only with the approval of ASH and only when a substantial Government interest would be served by this testimony.
3. Employees who are approached by private parties or their lawyers must indicate that they may not participate in private litigation except as authorized by this chapter. The specific policies are set forth in paragraphs B through D of this section.
4. Where feasible under the circumstances, employees shall request private parties to take their testimony outside of court by means of a deposition or interrogatories under subpoena or court order, in lieu of a personal appearance before the court or other body. These proceedings shall be arranged at a time and place convenient to PHS.

## B. Factual Testimony

Employees may give factual testimony, which is not otherwise privileged, in accordance with the terms of a valid subpoena or court order. Where testimony relates to an individual whose address is known, the employee shall see that the person (or his or her representative) is notified by mail, telephone, or other reasonable means of the demand for information. Unless otherwise required under Federal law or regulation, the assertion of any available defense against disclosure (such as physician-patient privileges) shall generally be the responsibility of the affected individual or representative, under the rules of the court or other body. If, in the process of giving factual testimony, the employee is asked to give expert testimony (as defined), the employee shall respectfully advise the court or other body that this is prohibited under the PHS policy which is intended to prevent the public's misconstruing the possible variances between the personal opinions of the employee and the official position of PHS. If the employee is nevertheless ordered to testify, the employee shall testify.

## C. Expert Testimony

### 1. Approval Requirement

Except as provided in paragraph PHS: 23-30-20B above, where expert testimony is desired by private parties in connection with private litigation, the employee may testify only with the prior approval of ASH, and only when a substantial Government interest will be served by the employee's testifying. If the employee is served with a subpoena or court order to give such testimony, he or she shall notify the Office of the General Counsel (OGC)/OS. If prior approval to testify is not granted (and the subpoena has not been quashed, withdrawn, or modified), the employee shall appear at the appropriate time, call the court's attention to this policy, and respectfully decline to testify without the approval of ASH. Whenever possible, the employee shall be accompanied by a Government attorney.

### 2. Approval Procedures

Persons desiring the expert testimony of employees must make a written request to ASH stating (a) the nature of the case, (b) the need for the testimony and why equivalent testimony cannot reasonably be obtained elsewhere, and (c) how the testimony will serve a substantial Government interest above that of merely assisting the private parties obtain their ends. Any approval to testify granted by ASH may include reasonable conditions as to the time, place, and manner for giving the testimony.

D. Inquiries for Assistance

Employees who receive inquiries concerning assistance in private litigation must respond to these requests in a manner that is consistent with the provisions of this chapter. Although the employee may be asked, initially, to "testify," sometimes all that is wanted is to review medical records, or to arrange an informal meeting between a patient, his attorney, and the treating physician for the purpose of exploring a future course of action. There is no objection to this kind of disclosure of information, as long as the patient consents. Where appropriate, persons seeking expert assistance in litigation may be referred to potential sources in the private sector and to any published literature. Each situation must be handled on its own merits. Advice on these matters may be sought from the Public Health Division, OGC.