

Directive 116.2  
2/7/94

APPEARANCE IN JUDICIAL OR ADMINISTRATIVE  
PROCEEDINGS

I.  
PURPOSE

A. This Directive:

1. States the procedures for the appearance of employees as witnesses in judicial or administrative proceedings.

2. Prescribes the collection and disposition requirements of witness fees, and explains when travel expenses for employees who testify can be paid (see Attachment 1).

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3. Explains the leave status of employees who testify in an official capacity (see Attachment 1).

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4. Explains the leave status of employees who testify in a purely personal capacity or where testimony does not rise out of, or relate to, employment with the U.S. Department of Agriculture (USDA) (see Attachment 1).

II.  
REPLACEMENT  
HIGHLIGHTS

This Directive replaces AMS Directive 116.2, Appearance in Judicial or Administrative Proceedings, dated 7/7/89. Changes are marked with asterisks.

III.  
DEFINITIONS

A. Judicial Proceeding. Any case or controversy pending before any Federal, State, or local court.

B. Administrative Proceeding. Any proceeding pending before any Federal, State, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings.

C. Appearance. Testimony or production of documents which arise out of an employee's official duties with USDA or which relate to his/her employment with USDA. For the purpose of this Directive, an appearance also includes a deposition or an interrogatory.

D. Witness Fees. The amount of money paid to a witness as compensation for attendance at a judicial or administrative proceeding.

E. Travel Expenses. The amount paid to a witness for transportation, lodging, meals, and other related miscellaneous expenses.

F. \* - Valid Summons, Subpoena, or Other Compulsory Process. An order that is served properly and within the legal authority and jurisdictional boundaries of the court, administrative agency, or official that issued it. - \*

IV.  
DELEGA-  
TION OF  
AUTHORITY

\* - The authority to approve or disapprove the appearance of an employee as a witness who is appearing in a judicial or administrative proceeding on behalf of a party other than the United States is maintained by the Administrator and the Office of the General Counsel(OGC). Delegation of this authority is not permitted. - \*

V.  
OFFICIAL  
TESTIMONY

A. Appearance on Behalf of the United States. An employee may appear as a witness in any judicial or administrative proceeding on behalf of the United States without the issuance of a valid summons, subpoena, or other compulsory process. \* - Employees should obtain permission for such an appearance from their immediate supervisor, unless the Agency or OGC has issued other instructions. - \*

B. Appearance as a Witness on Behalf of a Party Other Than the United States Where the United States is Not a Party.

1. \* - An employee may appear as a witness in any judicial or administrative proceeding on behalf of a party other than the United States when that appearance has been ordered by service of a valid summons, subpoena, or other compulsory process issued by a court, administrative agency, or official authorized to compel the appearance only if the employee has obtained approval from the Administrator, with concurrence from OGC.

2. An employee who is requested to appear as a witness in any judicial or administrative proceeding on behalf of a party other than the United States without the service of a valid summons, subpoena, or other compulsory process may appear only if such appearance has been authorized by the Administrator, and approved by the Assistant Secretary for Marketing and Regulatory Programs, and by OGC. - \*

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C. Appearance as a Witness on Behalf of a Party Other Than the United States Where the United States is a Party.

1. \* - An employee who is served with a valid summons, subpoena, or other compulsory process demanding that he/she appear in a judicial or administrative proceeding, or produce records, shall promptly notify the Administrator and OGC through supervisory channels of the existence and nature of the order compelling his/her appearance, or of the document demanding his/her appearance.

2. An employee who is requested to appear as a witness or produce records in any judicial or administrative proceeding on behalf of any party other than the United States without the service of a valid summons, subpoena, or other compulsory

process, may appear only if such appearance has been authorized by a representative of the Department of Justice, the United States Attorney, or other counsel who is representing the United States. - \*

D. Procedures for Obtaining Clearance To Testify in an Official Capacity.

1. An employee contacted by a representative of a party, before or during involvement in a judicial or administrative proceeding, because of employment in the Agency, shall immediately notify his/her supervisor of the requested meeting, statement, or appearance, and provide the following information:

a. The name of the attorney or personal representative, party or parties involved, the court, the status of the case, and the subject matter of the case.

b. The nature of the contact sought (i.e., an informal meeting, a statement, pretrial deposition, appearance in a proceeding, etc.).

c. Whether a subpoena has been or is expected to be issued by a court and, if so, the name of the court.

d. The nature of testimony or documents requested.

e. The time, date, and place proposed for further contact between the employee and the attorney or personal representative.

2. A supervisor who is advised by an employee of his/her pending involvement in a judicial or administrative proceeding shall immediately notify the Division Director, through the normal chain of command.

3. The Division Director shall:

a. Notify the Administrator immediately.

b. Notify and consult with OGC.

c. Arrange for counsel through OGC, if necessary, for an employee who is asked to make a statement, produce documents, testify, or otherwise appear as a witness in any proceeding on behalf of the United States.

d. Obtain the Administrator's determination on whether the

appearance/participation is approved or disapproved.

E. Employee Responsibility Following Official Testimony. After appearance in an official capacity as a witness in a proceeding, excluding grand jury proceedings, and unless prohibited by the court, an employee shall provide the following information, if requested by the supervisor:

1. Names of parties involved.
2. Matter in suit.
3. Nature of the testimony given.
4. Name of the court, body, or official to whom testimony was given.
5. Date and place of appearance.
6. Nature of any record or material produced or disclosed.

F. Disposition of Fees. An employee who attends a judicial or administrative proceeding on behalf of the United States is not entitled to receive fees for such attendance. Fees collected when an employee appears, in his official capacity, on behalf of a party other than the United States, must be remitted to the employing USDA agency.

1. The employee shall forward to the supervisor or officer in charge, a check or money order in the amount received for witness service, made payable to the Agricultural Marketing Service or USDA.
2. The supervisor or officer in charge shall prepare Form AMS-631, Check Transmittal, in accordance with instructions on the form. (For further information on Form AMS-631, contact the Fiscal Operations and Systems Branch, Financial Management Division.)

VI. A. Employees Testifying in a Non-official Capacity. Judicial or administrative proceedings not covered in Section V., above, include:

APPEARANCE IN  
A NON-  
OFFICIAL  
CAPACITY

1. Proceedings in which the State or local government is a party, and the employee is providing expert witness testimony on its behalf, but not in an official capacity.
2. Involvement in private litigation. Employees should make an effort to avoid expert witness testimony in order to avoid the appearance of Agency employees favoring one litigant over another; however, an employee served with a subpoena must appear or be held in contempt of court.

B. Procedures for Obtaining Clearance To Testify in a Non-official Capacity.

1. An employee must obtain official clearance if his/her expert witness testimony will involve the use of information secured as the result of employment in the Department (see Section V.D.1.-3.).

2. An employee need not obtain official clearance to appear if the testimony will not use information received as a result of employment in USDA; however, the employee must secure the appropriate leave approval (see Attachment 1).

VII.  
LEAVE AN  
TRAVEL

Information concerning leave, fee retention, and travel expenses is contained in Attachment 1. (For specifics, see AMS Directives 305.2, Leave; and 467.6, Mileage Allowances for Use of Privately Owned Vehicles; and AMS Handbook 402, Travel Regulations Handbook.)

VIII.  
DISCLO-  
SURE OF  
CERTAIN  
TYPES OF  
MATERIAL  
FORBIDDEN

A. An employee who is directed by a court, body, or official to disclose any record or material classified "For Official Use Only," or any record or material that has not been released for publication, shall decline until permission is granted by the appropriate Division Director. If permission is not granted, the employee shall notify the court, body, or official.

B. The Office of Inspector General must determine whether to release any report it has issued.

C. OGC and the Department of Justice, if applicable, must concur in the release of any information.

L. P. Massaro  
Deputy Administrator, Management

Attachment

Distribution: ML-8

Responsible Office: MRP-HR

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