

WITNESSES: THE RULES FOR ARMY-HEALTH CARE PROVIDERS

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I. BACKGROUND

A. Attorneys frequently want Department of the Army (DA) health care providers (HCPs) to serve as witnesses in litigation, which is defined as "[a]ll pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards . . . or other tribunals, foreign and domestic."³ This broad definition also includes "responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation."⁴

B. Types of Litigation:

(1) **Litigation in which the United States has an interest.**⁵ This category encompasses cases where the United States is either named as a party or has an official interest in the outcome of the litigation. Examples include medical malpractice complaints brought under the Federal Tort Claims Act⁶ and suits by the government pursuant to the Medical Care Recovery Act.⁷

(2) **Private litigation.** "Private" litigation occurs when the government is not a party and has no official interest in the outcome of the litigation.⁸ Examples include personal injury cases in which the Army provided medical care, medical malpractice cases, divorce proceedings, child abuse hearings, and competency hearings of retirees or dependents.

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³Dep't of Army, Reg. No. 27-40, Legal Services-Litigation, app. C-3 (19 Sept. 94) [hereinafter cited as AR 27-40].

⁴*Id.*

⁵For a detailed definition of this term, see AR 27-40 Glossary.

⁶28 U.S.C. §§ 2671-2680 and 1346(b).

⁷42 U.S.C. § 2651.

⁸AR 27-40 Glossary.

C. Types of Requested Testimony:

(1) **Expert testimony.** The litigant seeks a *professional* opinion, hypothetical responses, and/or prognosis from the HCP.

(2) **Factual testimony.** Litigant seeks facts from an Army HCP concerning medical care, i.e. treatment, observations, provided to one of the parties.

II. Generally, DA personnel may not appear as witnesses in any litigation absent proper authorization. Such authorization will usually be granted if certain conditions are met.

A. Litigation in Which the United States has an Interest.

(1) When the United States is a party or has an interest in the litigation, there is only one restriction on the testimony of Army HCPs: they may not provide opinion or expert testimony for a party whose interests are adverse to those of the United States.⁹ All requests for Army HCPs to serve as expert or opinion witnesses for the United States are referred to the Litigation Division unless the request involves a matter that has been delegated to an SJA or legal adviser.¹⁰ All requests for interviews or subpoenas for the testimony of Army HCPs are referred to the SJA or legal adviser serving the provider's Military Treatment Facility (MTF).¹¹

(2) Travel arrangements for witnesses for the United States are normally made by the Department of Justice through the Litigation Division, which issues instructions for the witness' travel, including a fund citation, to the appropriate commander. An SJA or legal adviser may make arrangements for the local travel of Army HCPs requested by U.S. Attorneys, or by attorneys representing the government's interests in an action brought under the Medical Care Recovery Act, provided that the HCP is stationed at an installation within the same judicial district or not more than 100 miles from the place where testifying.¹²

⁹AR 27-40, para. 7-10a, 7-13; 32 C.F.R. §§ 516.49(a), 516.52.

¹⁰AR 27-40, para. 7-13; 32 C.F.R. § 516.52.

¹¹AR 27-40, para. 7-8(c); 32 C.F.R. § 516.51.

¹²AR 27-40, para. 7-15b. See also 32 C.F.R. § 516.54(b).

B. Private Litigation.

(1) **Expert or opinion testimony.**

(a) Army HCPs may not provide expert or opinion testimony in private litigation.¹³ That restriction applies even if the HCP is to testify without compensation.¹⁴ Additionally, although certain exceptions apply to other DA personnel,¹⁵ those exceptions apparently do not apply to HCPs. The Chief of the Litigation Division- Torts should be contacted on a case-by-case basis.

(b) If a court or other appropriate authority orders an Army HCP to provide expert or opinion testimony, the witness must immediately notify the Litigation Division. The Litigation Division will determine whether to challenge the subpoena or order and will direct the witness to either testify or to respectfully decline to comply with the subpoena or order.¹⁶

(2) **Factual testimony.**

(a) Army HCPs may provide factual testimony in private litigation concerning patients they have treated, investigations they have made, or laboratory tests they have conducted.¹⁷ Again, however, such testimony must be approved by the SJA or MTF legal advisor and the HCP's supervisor¹⁸. In such cases, the HCP's testimony must be limited to factual matters¹⁹ and it may not extend to hypothetical questions or to a prognosis.²⁰

(3) **Legal representative.** Frequently at depositions or at trial, counsel ask treating physicians to give expert or opinion testimony despite the regulatory

¹³AR 27-40, para. 7-10a; 32 C.F.R. § 516.49(a).

¹⁴*Id.*

¹⁵AR 27-40 7-10b.

¹⁶AR 27-40, para. 7-10d; 32 C.F.R. § 516.49(d). See U.S. ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951).

¹⁷AR 27-40, para. 7-10c(1); 32 C.F.R. § 516.49(c)(1).

¹⁸AR 27-40, para. 7-8c.

¹⁹For example, "observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and contemplated future treatment." AR 27-40, para. 7-10c(2); 32 C.F.R. § 516.49(c)(2).

²⁰AR 27-40, para. 7-10c(3); 32 C.F.R. § 516.49(c)(3).

prohibitions against such testimony. Consequently, a judge advocate or Army civilian attorney "should be present during any interview or testimony to act as legal representative of the Army."²¹ In an interview or deposition, if a question seeks expert or opinion testimony, the legal representative will advise the Army HCP not to answer the question. In the case of court testimony, the legal representative should advise the judge that Department of Defense directives and Army regulations prohibit the witness from answering the question without the approval of DA Headquarters.²²

III. OTHER MATTERS.

A. If, because of off-duty employment, an Army HCP is required to participate in private litigation as either a defendant or as a treating physician, any testimony provided must be limited to factual matters. This limitation ensures that government imprimatur is not given to the HCP's testimony. Under no circumstances are AMEDD personnel allowed to "moonlight" as expert witnesses.²³

B. Army HCPs who are subpoenaed to testify at a deposition or trial, frequently also receive a subpoena duces tecum to produce pertinent medical records. Army medical records are the property of the United States government²⁴ and MTF commanders are the official custodians of medical records maintained at their MTF.²⁵ The Chief of the MTF's Patient Administration Division (PAD) acts for the MTF commander in matters pertaining to medical records.²⁶ Consequently, requests for medical records should be made to the PAD where the request will be processed in accordance with applicable rules and regulations.²⁷ Stricter rules govern the release of alcohol abuse or drug abuse treatment records.²⁸

C. Expert witness fees. All fees provided to Army HCPs for their testimony as expert or opinion witnesses which exceed their actual travel, meal, and lodging expenses, will be forwarded to the Treasurer of the United States.²⁹

²¹AR 27-40, para. 7-9b; 32 C.F.R. § 516.48(b).

²²*Id.*

²³See AR 27-40, para. 7-10c.

²⁴Dep't of Army, Reg. No. 40-66, Medical Record Administration and Health Care Documentation, para. 1-5a (3 May 1999) [hereinafter cited as AR 40-66].

²⁵*Id.* at para. 1-4a.

²⁶*Id.* at para. 1-4f.

²⁷The procedures governing the release of medical records are found in Dep't of Army, Reg. No. 40-68, Quality Assurance Administration, para. 3-5c (20 Dec. 89). See also AR 27-40, paras. 7-4 thru 7-6; 32 C.F.R. §§ 516.43-516.46.

²⁸AR 27-40, para. 7-7b(3); 32 C.F.R. § 516.46(b)(2)(iii).

²⁹AR 27-40, para. 7-10e; 32 C.F.R. § 516.49(e).

REFERENCES:

Federal Statutes/Laws:

28 U.S.C. §§ 2671-2680 and 1346(b).

32 C.F.R. §§ 516.40-516.56.

42 U.S.C. § 2651.

Army Regulations/Circulars/Letters/Pamphlets:

AR 27-40, Chapter 7: Release of Information and Appearance of Witnesses.

AR 40-66, Medical Record Administration and Health Care Documentation.

AR 40-68, Chapter 3: Quality Assurance Administration.

State Laws/State Court Decisions: For local completion.

RELATED TOPICS:

1. Witnesses: A Guide for Health Care Providers.
2. Off-Duty Employment by DoD Health Care Providers.

POINT OF CONTACT: Tort Branch, Litigation Division, DSN 426-1620.

