

**FDA STAFF MANUAL GUIDES, VOLUME III - GENERAL ADMINISTRATION**

**PROCUREMENT AND SUPPLY MANAGEMENT**

**PROCUREMENT**

**OBTAINING SERVICES OF EXPERT OR FACT WITNESSES**

Transmittal Number 98-37 -- Date: 07/29/1998

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**1. PURPOSE**

This Guide states policy, responsibilities and procedures to be followed by the Food and Drug Administration in the acquisition of services of expert or fact witnesses.

**2. AUTHORITY**

Federal Acquisition Regulations, Part 37, The Competition In Contracting Act of 1984, Title VII, Public Law 99-369, Small Business and Federal Procurement Competition Act of 1984, Public Law 98-577 authorizes the purchases for services of expert or fact witnesses, Office of Federal Procurement Policy Act 41 U.S.C. 416(c), and Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253 (c)).

### **3. POLICY**

- A. It shall be the responsibility of FDA Headquarters and field offices to obtain the best qualified expert witnesses and case support available, provided such support is in the best interest of the Government for the preparation and/or presentation of a case before the courts or for the conduct of hearings. When feasible, maximum use should be made of Federal personnel as witnesses, particularly employees of other agencies. Headquarters' centers and assigned field compliance officers have the joint responsibility for the identification of expert/fact witnesses. The assigned General Counsel attorney, has the final selection, determination of adequacy, conduct of interviews, and preparation of affidavits on all cases requiring the utilization of experts.
- B. Offices in charge of court cases or hearings shall thoroughly familiarize themselves with court or hearing proceedings in an effort to determine that the use of Federal personnel would in no way be prejudicial to the Government's case.
- C. In an effort to expedite the handling of court cases and hearings and to maintain good public relations, FDA personnel will afford every possible courtesy to witnesses.
- D. Offices responsible for handling or preparing the court case or hearing shall identify prospective fact witnesses to determine availability and ability to do the work required. Headquarters program and compliance personnel will assist field offices, when necessary, in determining the best qualified witnesses available.

### **4. DEFINITION**

- A. Expert witnesses are physicians, scientists, or other professional people who are considered authorities in their specialized field. However, the principal consideration is the testimony, not the professional standing of the witnesses.

An individual qualifies as an expert witness when testimony covers opinions based on hypothetical situations, diagnoses, unique analysis of facts, or development of conclusions (all of which involve technical experience, competence, or specialized knowledge). This means that deduction, or an application of special knowledge, is expert testimony.

- B. Fact witnesses are those who give testimony as to facts relating to specific instances or occurrences.

## **5. FDA PERSONNEL**

- A. Travel and per diem for FDA field personnel required as witnesses in court cases or hearings will be authorized and paid for by the FDA office having jurisdiction over the case or hearings.
- B. Travel and per diem for FDA Headquarters personnel required as witnesses will likewise be funded by the FDA office having jurisdiction over the case or hearings.

Exception: Headquarters program or compliance offices will fund all travel of their consumer safety offices

## **6. OTHER FEDERAL PERSONNEL**

- A. Services of employees of other Federal agencies are to be obtained through "Interagency Agreements (IAG's)," i.e., a formal written agreement with the employing agency that includes the reimbursement terms for salary, transportation and other expenses. IAG's shall be developed by the Center or Office having predominant interest in the Agreement and shall be reviewed, signed and administered by the Division of Contracts and Procurement Management, ORA Support & Assistance Branch, Office of Facilities, Acquisitions and Central Services(HFA-521). (Refer to FDA Staff Manual Guide 2810.1 for procedures to initiate an IAG).
- B. FDA prefers to issue the travel order, the transportation requests, and pay the travel voucher. However, if the lending agency so indicates in the agreement, it may pay the expenses and bill FDA for the costs on Standard Form SF-1080, "Voucher for Transfers Between Appropriations and/or Funds," or SF-1081, "Voucher and Schedule of Withdrawals and Credits," or transfer funds through the one-line payment and collection (OPAC) system.

## **7. OTHER THAN FEDERAL PERSONNEL**

- A. Authorization. Costs of witnesses will be authorized and funded by the FDA office having jurisdiction over the case of hearing. As a matter of policy, the Compliance Officer (or other appropriate official) responsible for handling the case or hearing shall take the lead in guarding against unauthorized procurements. The Compliance Officer shall ensure that FDA has executed the proper documentation before committing the Government to payment of funds. (Refer to Paragraph 8., "Processing Requests for Authorization-Documentation of Contractual Agreements."
- B. Fees and Expenses.

1. Hourly Rate and Daily Rate.

Rates of pay should be computed as follows:

Rates of pay should be computed on a hourly or daily rate. Daily rates should be negotiated in cases where service of more than two hours in any one day is anticipated. Hourly rates may be negotiated if the total cost for one day does not exceed the maximum daily rates set for in the Schedule of Rates. (See Exhibit C)

To determine reasonableness of fees to be paid to witnesses at least two witnesses should be contacted to determine availability and ability to do the work required and to negotiate a tentative rate of payment. The Schedule of Rates should be used as a guide. The Compliance Officer or other appropriate official should obtain the services of a witness at the lowest possible rate. If the negotiated rate is higher than those in the Schedule of Rates, a written statement which describes the attempt to obtain a lower rate must be submitted. Negotiated rates above those in the Schedule of Rates shall be submitted to the Director, Office of Facilities, Acquisitions and Central Services, HFA-500 for approval.

2. Preparation Rate and Court Attendance Rate.

The potential witness may want to negotiate different rates for the time spent in preparing the testimony and for the time actually spent testifying in court. Different rates for preparation and testimony are set forth in the Schedule of Rates.

3. Travel.

If the potential witness anticipates any travel in connection with the work, travel shall be allowed in accordance with the Federal Travel Regulations, Federal Property Management Regulations (FPMR) 101-7, and GSA Bulletin FPMR A-40. The principal documents are: HHS-1, "Travel Order," SF-1169, "U.S. Government Transportation Requests," and SF-1012, "Travel Voucher." Travel and per diem required will be authorized by the FDA office having jurisdiction over the case or hearing. Headquarters program or Compliance Offices will fund all travel of their respective employees. Travel and per diem for FDA field personnel required as witnesses in court cases or hearings will be authorized and paid for by the FDA office having jurisdiction over the case or hearing.

4. Miscellaneous Expenses.

Potential witnesses should consider and provide the Compliance Officer with an estimate of any other relevant expenses such as secretarial support, research support, computer time, reproduction costs, mailing fees, and similar items.

## **8. PROCESSING REQUIREMENTS FOR AUTHORIZATION-DOCUMENTATION FOR CONTRACTUAL AGREEMENTS**

It is most important that Contractual agreements be documented before the Government is committed to payment of funds for services. Failure to do so results in an unauthorized procurement which require extensive justification before, and if, they can be ratified. In the event an unauthorized procurement cannot be justified, the individual making the commitment may be held personally liable for making payment of these funds.

When an individual has agreed to serve as a witness in a court case, hearing, or for case preparation, the FDA office having jurisdiction over the case shall formalize and document such agreement as follows:

### **1. Field Offices**

Prepare a Memorandum "Request for Expert/Fact Witness Services," (see Exhibit A), before the actual use of a witness. This memo is essential support documentation for the acquisition of witness services, and should indicate approval of an authorized purchasing agent. The original completed memo shall be retained in the field office purchase file.

A copy of the memo should be retained in the field office fiscal unit, as part of the official file.

Form OF-347 or FDA-3303, "Order for Supplies or Services," (See Exhibit B), is used for request and authorization for fees and expenses of witnesses.

### **2. Headquarters Offices.**

The appropriate administrative officer (AO) of the office having jurisdiction over the preparation of a court case or hearing will notify the Division of Contracts and Procurement Management, Office of Facilities, Acquisitions and Central Services, (HFA-520) in advance of a given, upcoming court trial. This notification will be in the form of a Memorandum, "Request for Expert/Fact Witness Services," (See Exhibit A). A copy of this memo, indicating approval by an authorized purchasing agent, will be returned to the AO. National Center for

Toxicological Research (NCTR) would contact the NCTR Contracts Branch.

Prior to the hearing or court date, the AO will prepare a Form HHS-393 "Purchase/Service Stock Requisition" citing specific dates, appropriation data, name, etc., for each witness obtained for any given case. The requisition will then be forwarded to HFA-520 for processing with a copy of the memorandum described in Exhibit A.

The Division of Contracts and Procurement Management, Office of Facilities, Acquisitions and Central Services, (HFA-520) will issue a Form FDA-3303, "Order for Supplies or Services" relating only to the services performed by the witness. The original of the purchase order will be sent to the witness.

#### Emergency Procedures

If an emergency situation makes it impossible to submit the Form FDA-3303 and have it approved before the actual start of preparation or trial attendance by the witness, CALL Director, Division of Contracts and Procurement Management for verbal approval. Submission of the memorandum and Form OF-347 or SF-3303 is still required. Emergency approval can only be secured if rates are within the Schedule of Rates. Requests with rates that exceed the Schedule must be approved in writing and in advance by the Director, Office of Facilities, Acquisitions and Central Services, HFA-500.

## 9. PAYMENTS

### A. Field Offices.

The expert witness should be instructed to submit a properly signed OF-347 or FDA-3303 "Order for Supplies or Services" for payment of services when travel is not involved.

When travel is involved the field office shall complete SF-1012, "Travel Voucher." The SF-1012 should be presented to the witness for review and signature approval and returned for payment. When presenting the completed SF-1012 to the witness, the witness is to be advised of any disallowances made to the claim, and if necessary, requested to furnish additional information or evidence to support the claim.

The purchase order and memorandum "Request for Expert/Fact Witness Services" shall be attached to the approved SF-1012 as part of the permanent file.

B. Headquarters Offices.

The expert witness should be instructed to submit a properly signed OF-347 or FDA-3303 to the Compliance Officer or contract specialist to be forwarded to the Division of Contracts and Procurement Management, Office of Facilities, Acquisitions and Central Services, HFA-520 for payment of services.

**Staff Manual Guide 2610.2, Attachment A**

**Date:**

**From:** Compliance Officer, Administrative Officer or other appropriate official

**Re:** Request for Expert/Fact Witness Services

**To:**

It is requested that the services of the following expert/fact witness(es) be obtained:

1. Name, Address, Telephone Number, Social Security Number.
2. City and State in which services are to be rendered.
3. Estimated Period of Performance.
4. Nature of Services required.
5. Estimated Fees.



**Staff Manual Guide 2610.2 Attachment C**

**RATES FOR EXPERT WITNESSES  
SCHEDULE OF RATES**

<b>TYPE OF EXPERT</b>	<b>HOURLY RATE</b>	<b>DAILY RATE</b>
Asbestos, Lead Examination and Preparation Testimony	\$ 50 to \$125 \$ 50 to \$125	\$400 to \$1000 \$400 to \$1000
Accountant or Auditor Examination and Preparation Testimony	\$ 50 to \$150 \$ 50 to \$200	\$300 to \$1200 \$300 to \$1800
Accident Reconstruction Examination and Preparation Testimony	\$ 40 to \$175 \$ 40 to \$225	\$300 to \$1400 \$300 to \$1800
Appraiser (Real Estate) Examination and Preparation Testimony	\$100 to \$200 \$100 to \$200	\$300 to \$1200 \$300 to \$1600
Appraiser (Stock, jewelry, coins, etc.) Examination and Preparation Testimony	\$100 to \$200 \$100 to \$250	\$300 to \$1000 \$300 to \$1600
Chemist Examination and Preparation Testimony	\$100 to \$175 \$100 to \$200	\$200 to \$ 950 \$225 to \$1200
Economist Examination and Preparation Testimony	\$100 to \$225 \$125 to \$275	\$450 to \$1800 \$450 to \$2200
Engineer Examination and Preparation Testimony	\$ 50 to \$200 \$100 to \$225	\$300 to \$1200 \$300 to \$1800
Forestry Examination and Preparation Testimony	\$100 to \$ 250 \$100 to \$ 200	\$300 to \$1000 \$350 to \$1200
Geologist or Mining Engineer Examination and Preparation Testimony	\$ 50 to \$ 150 \$ 50 to \$ 200	\$300 to \$1200 \$300 to \$1200
Handwriting, Voice Print, Polygraph, Etc. Examination and Preparation Testimony	\$ 50 to \$ 125 \$ 50 to \$ 200	\$150 to \$1000 \$150 to \$1400
Industrial Hygienist Examination and Preparation Testimony	\$ 50 to \$ 150 \$ 50 to \$ 200	\$400 to \$1200 \$400 to \$1600
Interpreter Examination and Preparation Testimony	\$ 15 to \$ 45 \$ 15 to \$ 55	\$120 to \$ 300 \$120 to \$ 350

**Staff Manual Guide 2610.2 Attachment C**

**RATES FOR EXPERT WITNESSES  
SCHEDULE OF RATES**

<b>TYPE OF EXPERT</b>	<b>HOURLY RATE</b>	<b>DAILY RATE</b>
Labor Examination and Preparation Testimony	\$ 50 to \$ 100 \$ 50 to \$ 125	\$300 to \$ 800 \$400 to \$1000
Marine Surveyor Examination and Preparation Testimony	\$ 50 to \$ 100 \$ 50 to \$ 100	\$400 to \$ 900 \$400 to \$1000
Physician (Nonspecialist) Examination and Preparation Testimony	\$100 to \$ 225 \$125 to \$ 275	\$225 to \$1600 \$300 to \$1900
Physician (Specialist Other Than Psychiatrist) Examination and Preparation Testimony	\$200 to \$ 500 \$200 to \$ 550	\$750 to \$3000 \$750 to \$4000
Pilot, Navigation, Air Traffic Examination and Preparation Testimony	\$ 50 to \$ 160 \$ 50 to \$ 180	\$300 to \$ 800 \$300 to \$1200
Psychiatrist Examination and Preparation Testimony	\$ 80 to \$300 \$ 90 to \$300	\$250 to \$1800 \$300 to \$2000
Psychologist Examination and Preparation Testimony	\$ 50 to \$200 \$ 50 to \$225	\$150 to \$1600 \$225 to \$1800
Securities Examination and Preparation Testimony	\$ 80 to \$250 \$100 to \$300	\$400 to \$1600 \$500 to \$2200
Statistician Examination and Preparation Testimony	\$ 50 to \$150 \$ 75 to \$200	\$300 to \$1400 \$750 to \$2250
Toxicologist (non-medical) Examination and Preparation Testimony	\$ 50 to \$100 \$ 50 to \$125	\$400 to \$ 900 \$400 to \$1000
Vocational Rehabilitation Examination and Preparation Testimony	\$ 50 to \$150 \$ 50 to \$200	\$400 to \$1200 \$400 to \$1600
Computer Software Engineer Examination and Preparation Testimony	\$ 50 to \$ 60 \$ 50 to \$ 75	\$400 to \$ 480 \$400 to \$ 600
Clinical Pathologist Examination and Preparation Testimony	\$125 to \$300 \$ 80 to \$300	\$125 to \$ 300 \$ 80 to \$ 300
Nutritionists Examination and Preparation Testimony	\$ 40 to \$ 50 \$ 40 to \$ 65	\$125 to \$ 400 \$125 to \$ 520

**Staff Manual Guide 2610.2 Attachment C**

**RATES FOR EXPERT WITNESSES  
SCHEDULE OF RATES**

<b>TYPE OF EXPERT</b>	<b>HOURLY RATE</b>	<b>DAILY RATE</b>
Microbiologists	\$ 40 to \$ 50	\$125 to \$ 400
Examination and Preparation Testimony	\$ 40 to \$ 65	\$125 to \$ 520