UNITED STATES OF AMERICA	)	
	)	
v.	)	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES**
	)	
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**Enclosure 4**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**12 December 2012**

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
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*** This section is current through the December 6, 2012 ***
*** issue of the Federal Register ***

TITLE 5 -- ADMINISTRATIVE PERSONNEL
CHAPTER XVI -- OFFICE OF GOVERNMENT ETHICS
SUBCHAPTER B -- GOVERNMENT ETHICS
PART 2635 -- STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH
SUBPART H -- OUTSIDE ACTIVITIES

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5 CFR 2635.805

§ 2635.805 Service as an expert witness.

(a) Restriction. An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) Additional restriction applicable to certain special Government employees. (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

(i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) Authorization to serve as an expert witness. Provided that the employee's testimony will not violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

HISTORY: *[57 FR 35042,* Aug. 7, 1992; *62 FR 48746, 48748,* Sept. 17, 1997]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, *54 FR 15159,* 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, *55 FR 42547,* 3 CFR, 1990 Comp., p. 306.

NOTES: [EFFECTIVE DATE NOTE: *62 FR 48746, 48748,* Sept. 17, 1997, amended the introductory text of paragraph (c), effective Sept. 17, 1997.]
NOTES APPLICABLE TO ENTIRE TITLE:
Title 5 of the United States Code was revised and enacted into positive law by Public Law 89-554, Sept. 6, 1966. New citations for obsolete references to sections of 5 U.S.C. appearing in this title may be found in a redesignation table under title 5, Government Organization and Employees, United States Code.

LexisNexis (R) Notes:

CASE NOTES

CASE NOTES Applicable to entire Part:Part Note

United States Ex Rel. Liotine v. Cdw Gov't, Inc., 2012 U.S. Dist. LEXIS 94837 (SD Ill July 10, 2012).

Overview: *Defendant was denied summary judgment on relator's claim under FCA, 31 U.S.C.S. § 3729(a)(1)(A), alleging that defendant engaged in fraudulent conduct in connection with its sales to government, because genuine issues of material facts existed as to whether defendant knowingly sold government products in violation of Trade Agreements Act.*

- A private party lacks standing to claim a violation of *5 C.F.R. § 2635.805(a)*, (c), (d). Go To Headnote

United States v. Lecco, 495 F. Supp. 2d 581, 2007 U.S. Dist. LEXIS 50340 (SD W Va Apr. 6, 2007).

Overview: *The safe-harbor provisions of the Ethics In Government Act, 18 U.S.C.S. §§ 203, 205, and 207, most likely protected a part-time government psychiatrist from prosecution under the Act for testifying as a defense-selected expert in the mitigation phase of a death penalty case, despite his lack of authorization to testify under 5 C.F.R. § 2635.805(c).*

- Testimony contrary to the provisions of *5 C.F.R. § 2635.805* invites prosecution for a violation of the Ethics In Government Act, *18 U.S.C.S. § 207.* Moreover, because of the possibility of prosecution, a federal employee whose testimony would violate *5 C.F.R. § 2635.805* may invoke his or her Fifth Amendment privilege against self-incrimination in order to avoid giving testimony which could subject him or her to prosecution. In other words, the government has the power to criminalize unauthorized, non-compelled expert testimony by its employees, and the employees have a right to avoid criminal prosecution by invoking the Fifth Amendment. Go To Headnote

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FDIC v. Refco Group, 46 F. Supp. 2d 1109, 1999 U.S. Dist. LEXIS 6339 (D Colo Apr. 28, 1999).

Overview: *Court had authority to determine whether regulation prohibiting federal employees from serving as expert witnesses other than for the United States would bar testimony, on defendant's behalf, of expert who was employed by plaintiff agency.*

- A court, rather than the relevant agency, is the final authority to determine the applicability of *5 C.F.R. § 2635.805(a)* to prevent testimony by agency employees other than on behalf of the United States in any proceedings in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency. Go To Headnote

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