

Federal Rules of Civil Procedure require that some objections to subpoenas must be made either within 10 days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require consultation with the Department of Justice, timely notice is essential.

§ 725.10 Response to requests or demands in conflict with this instruction.

(a) Except as otherwise provided in this paragraph, DON personnel, including former military personnel and civilian employees, shall not produce, disclose, release, comment upon, or testify concerning any official DOD information in response to a litigation request or demand without prior written approval of the appropriate DON official designated in § 725.6. If a request has been made, and granted, in whole or in part, per 32 CFR part 97 and this part, DON personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in the request and properly approved by the determining authority designated in § 725.6. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(b) If, after DON personnel have received a litigation request or demand and have in turn notified the appropriate determining authority described in § 725.6, a response to the request or demand is required before instructions from the responsible official have been received, the responsible authority designated in § 725.6 shall notify the Deputy Assistant Judge Advocate General or Associate General Counsel (Litigation) who has cognizance over the matter. That official will furnish the requester, the court, or other authority that the request or demand is being reviewed in accordance with this part and seek a stay of the request or demand pending a final determination.

(c) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken under § 725.10(b), or if such court or other authority orders that the request or demand must be complied with, notwithstanding the final decision of the

appropriate DON official, the DON personnel upon whom the request or demand was made will, if time permits, notify the determining authority of such ruling or order. That authority will notify the Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation) having cognizance over the matter. After due consultation and coordination with the Department of Justice, as required by the Manual of the Judge Advocate General, that official will determine whether the individual is required to comply with the request or demand and will notify the requester, the court, or other authority accordingly. The witness shall, if directed by the appropriate DON official, respectfully decline to comply with the demand. Legal counsel for the command concerned should accompany and advise DON personnel during any court proceedings involving the foregoing circumstances.

(d) It is expected that all DON actions in the foregoing paragraphs will be taken only after active consultation with the appropriate component of the Department of Justice. Generally, DON personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DON personnel in question.

§ 725.11 Fees.

(a) *Generally.* Except as provided below, determining authorities shall charge reasonable fees and expenses to parties seeking official DON information or testimony under this instruction. Pursuant to 32 CFR 288.4, 288.10, these fees should include all costs of processing a request for information, including time and material expended. Travel for active duty members summoned as witnesses is governed by Joint Travel Regulations, Vol. I, Chap. 7, pt. E. and Navy Travel Instructions, Chap. 6, pt. E.¹³ Travel for civilian personnel summoned as witnesses is governed by the Joint Travel Regulations, Vol. II, Chap. 4, pt. E.¹⁴

(1) *When DON is a party.* No fees normally shall be charged when the DON

¹³ See footnote 1 to § 725.1.

¹⁴ See footnote 1 to § 725.1.

is a party to the proceedings, and the activity holding the requested information or employing the witness shall bear the expense of complying with the request.

(2) *When another federal agency is a party.* No fees shall be charged to the requesting agency. Travel and per diem expenses may be paid by the requesting agency, or by the Navy activity to which the requested witness is assigned, subject to reimbursement from the requesting agency.

(3) *When neither DON nor another federal agency is a party.* Fees shall be charged to the requester for time taken from official duties by DON personnel who are authorized to be interviewed, give testimony, or escort persons on views and visits of installations. At the discretion of the cognizant command, DON personnel need not be made available during duty hours unless directed by subpoena. Time which DON personnel spend in court testifying, or waiting to testify on factual matters shall not be charged. Fees should be charged, however, for expert or opinion testimony based upon the witness's education, training, or experience. Testimony by a treating physician called to testify about his personal knowledge of a specific case is considered fact not expert testimony. Fees are payable to the Treasurer of the United States for deposit in the Treasury's miscellaneous receipts. Rates for uniformed personnel are published in NAVCOMPT Notice 7041 series.¹⁵ Pursuant to 32 CFR 288.4, charges for civilian personnel should include the employee's hourly rate of pay, as well as allowances and benefits. Except as provided in § 725.11(b)(4), no funds may be expended for travel or per diem of active duty members when an agency of the Federal Government is not a party. The requesting party is responsible for travel arrangements and funding. Government funding of travel and per diem for civilian employees is authorized.

(b) *Special circumstances—(1) Refusal to pay fees.* In cases in which a subpoena has been received and the requester refuses to pay appropriate fees, it may become necessary to request the Department of Justice to take appro-

appropriate legal action before the court issuing the subpoena. Determining authorities should consult promptly with the OJAG General Litigation Division or the Navy Litigation Office of the General Counsel if this course of action appears necessary, because some objections to subpoenas must be made either within ten days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require timely consultation with the Department of Justice. If no subpoena has been issued, the determining authority must decide whether to deny the request or, if appropriate, waive the fees.

(2) *Waiver or reduction of fees.* The determining authority may waive or reduce fees pursuant to 32 CFR 288.4, 288.9, provided such waiver or reduction is in the best interest of the DON and the United States. Fee waivers and reductions shall not be routinely granted, or granted under circumstances which might create the appearance that DON favors one party over another.

(3) *Witness fees required by the court.* Witness fees required by the rules of the applicable court shall be paid directly to the witness by the requester. Such amounts are to defray the cost of travel and per diem. In a case where the Government has paid the cost of travel and per diem, the witness shall turn over to his or her supervisor any payment received from a private party to defray the cost of travel that, when added to amounts paid by the Government, exceed the actual cost of travel. The supervisor shall forward the amount turned over by the witness to the Office of the Comptroller of the Navy for appropriate action.

(4) *Exceptional cases.* If neither the DON, nor an agency of the Federal Government is a party, appropriated funds may be used to pay, without reimbursement, travel and per diem of DON personnel who are witnesses in criminal or civil proceedings, provided, the case is directly related to the Armed Services, or its members, and the Armed Services have a genuine and compelling interest in the outcome.

¹⁵ See footnote 1 to § 725.1.