

UNCLASSIFIED

Date: 05/23/97 (Regulations may contain various dates)

Category: 7 - Management

OPR: OGC

Title: AR 7-9 LEGAL REPRESENTATION PROVIDED TO AGENCY EMPLOYEES

This regulation was written by the Office of General Counsel, (secure).

(b)(3)

9. LEGAL REPRESENTATION PROVIDED TO AGENCY EMPLOYEES

SYNOPSIS. This regulation sets forth the policy and procedures under which Agency employees may be provided legal counsel by the Department of Justice or private counsel at Government expense in State criminal proceedings and in civil and congressional proceedings in which they are sued or subpoenaed in their individual capacities. Policy also is set forth regarding indemnification for the reasonable costs of legal representation by private counsel and for the amount of any judgment or fine entered against an employee or certain independent contractors. *(NOTE: Boldfaced text in the regulation indicates revisions.)*

- a. **AUTHORITY.** Sections 6 and 8 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403g and 403j); and Title 28, Code of Federal Regulations, Sections 50.15 and 50.16.
- b. **GENERAL.** Pursuant to the Department of Justice policy and guidelines published in Title 28, Code of Federal Regulations, Sections 50.15 and 50.16, Department of Justice legal counsel or private counsel (as specified below) may be provided to Agency employees who are involved as individuals in employment-related judicial or congressional proceedings. For purposes of this regulation, the term "employee" includes **present and former** CIA officers and employees. **These provisions of 28 C.F.R. are summarized below.**
- c. **POLICY.** An employee may be represented by Department of Justice attorneys or private counsel at Government expense (as specified below) in State criminal proceedings and in civil and congressional proceedings in which the employee is sued or subpoenaed in his or her individual capacity if the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of his or her employment.
- d. **RESPONSIBILITIES AND PROCEDURES**
 - (1) Any employee who believes he or she is entitled to such representation must submit a request, accompanied by all relevant legal documents, to the Office of General Counsel (OGC), hereby designated the recipient of such requests for these purposes.

- (2) OGC will investigate as necessary and submit to the Department of Justice a statement as to whether the actions were performed within the scope of employment and a recommendation as to whether Department of Justice representation should be provided. Upon receipt of these materials, the Department of Justice has the responsibility to determine whether the employee's actions reasonably appear to have been performed within the scope of his or her employment and whether providing legal representation is in the interests of the United States. The employee will be notified of the Department of Justice determination.
- (3) In emergency situations, the Department of Justice may initiate conditional representation after communication by telephone with OGC. However, appropriate written data must be provided subsequently.
- (4) Where there is the possibility of a Federal criminal investigation or indictment relating to the same subject matter for which representation is sought, the Department of Justice will determine whether the employee is either a **subject** of a Federal criminal investigation or a defendant in a Federal criminal case.
- (5) If it is determined that the employee is not the **subject** of a criminal investigation concerning the act or acts for which representation is sought or if there is an ongoing investigation but into an unrelated matter, representation may be provided.
- (6) If it is determined that the employee is the **subject** of a criminal investigation concerning the act or acts for which representation is sought but no decision to seek an indictment or issue an information has been made, a private attorney may be provided at Federal expense.
- (7) In some situations where conflicts exist between the legal or factual positions of various employees in the same case, separate Department of Justice representation or private counsel at Federal expense may be provided.
- (8) Once undertaken, representation will continue until all appropriate proceedings, including applicable appellate proceedings, have ended or until any of the bases for withdrawal **set forth in 28 C.F.R. § 50.15** are found to exist. If withdrawal occurs, it will be done in the least prejudicial manner.
- (9) **Representation generally is not available to a Federal employee where the representation requested is in connection with a Federal criminal proceeding in which the employee is a defendant.**
- (10) Representation is not available to a Federal employee **where**:
 - (a) The employee is a **subject** of a Federal criminal investigation on the same subject matter.
 - (b) The act or acts with regard to which the employee desires representation do not reasonably appear to have been performed within the scope of his or her employment with the Federal Government.
 - (c) It is otherwise determined by the Department of Justice that it is not in the interest of the United States to represent the employee.

- (11) **In certain situations where Department of Justice attorneys may not represent the employee, the Department may provide private counsel or reimburse the employee for the fees of private counsel. In such cases, the following procedures will apply:**
- (a) The Department of Justice must approve in advance any private counsel to be retained under this regulation. Where national security interests may be involved, the Department of Justice will consult with OGC.
 - (b) Federal payments to private counsel for an employee will cease **if the private counsel violates any terms of the retention agreement** or if the Department of Justice:
 - (1) Decides to seek an indictment of or to issue an information against that employee on a Federal criminal charge relating to the act or acts concerning which representation was undertaken.
 - (2) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his or her employment.
 - (3) Resolves any conflict described in Title 28, Code of Federal Regulations, Section 50.15(a)(6), **(9), or (10)** and tenders representation by Department of Justice attorneys.
 - (4) Determines that representation is not in the interest of the United States.
 - (5) Terminates the retainer with the concurrence of the employee-client for any reason.
- (12) All communications on these matters between an employee and OGC or any Department of Justice attorneys who represent the employee, even should that representation be discontinued for any reason, is governed by the attorney-client privilege.
- (13) In all instances, legal representatives must possess security clearances or security access approvals consistent with the national security classification or other access requirements of information that will be shared with the attorney provided or retained. OGC will ensure that appropriate clearances or access approvals are certified or granted.

e. AGENCY INDEMNIFICATION

- (1) Any person described in paragraph (2) below who, as a result of activities carried out within the scope of his or her employment, is sued, subpoenaed, or investigated in his or her individual capacity, or is subjected to investigatory, administrative, professional, or State proceedings of any nature, **may** be indemnified under Section 8 of the Central Intelligence Agency Act of 1949, as amended, for the costs of legal representation by private counsel and for the amount of any judgment or fine entered against that person if the General Counsel, in his **or her** sole and unreviewable discretion, determines that the person appears to have been acting in good faith and within the scope of his or her employment, that such indemnification would be in the interests of the Agency, and under all of the circumstances, taking into account the legal expenses and the amount of any judgment or fine, the indemnification would be fair and reasonable. Any decision regarding indemnification of the General Counsel shall be made by the Director of the Central Intelligence Agency in his sole and unreviewable discretion.

(2) This paragraph applies to all Agency officers and employees and to any independent contractor with the Agency whose contract contains an indemnification provision.