



BY THE U.S. GENERAL ACCOUNTING OFFICE

## Report To The Attorney General

# Justice Needs Better Controls Over Payment Of Witness Fees

GAO reviewed how three U.S. attorney's offices and three U.S. Marshals Service offices manage the use of and payments to fact witnesses and to experts who testify at trials and/or are used in nontrial activities. GAO found that controls over the payment of government funds to fact and expert witnesses as well as to experts who are used in nontrial activities need improvement.

Accordingly, GAO recommends that the Attorney General emphasize compliance with existing approval and payment policies and develop additional controls for compensating fact and expert witnesses. In addition, GAO recommends that the Attorney General provide guidance for compensating experts who are used in nontrial activities.

In response to GAO's recommendations, Justice has improved controls over the payment of witness fees and said it will consider the need for guidance with respect to experts who are used in nontrial

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UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT  
DIVISION

B-214470

The Honorable William French Smith  
The Attorney General

Dear Mr. Attorney General:

We have reviewed how three U.S. attorney's offices and three U.S. Marshals Service offices manage the use of and payments to fact witnesses and to experts who testify at trials and/or assist with nontrial activities. We understand that the Department of Justice is currently revising its policy in this area and, therefore, we plan no further effort at this time. However, we have identified several matters that should be brought to your attention and have recommended ways to deal with them. These are summarized below and detailed in appendix I.

The objectives of our review were to evaluate the process for approving witnesses and the appropriateness of payments made to them and to experts who assist with nontrial activities. During our review we made no attempt to evaluate the appropriateness or usefulness of witnesses called to testify. Further, we excluded individuals in the witness security program because of the uniqueness of the program and the need to keep secure the information on these types of witnesses.

We performed our review in the Connecticut, Massachusetts, and Rhode Island U.S. attorney's and U.S. Marshals Service offices. These locations were selected because their staff sizes and case volumes varied. We interviewed U.S. attorneys, their assistants, and other staff at the three offices. We also interviewed Marshals Service personnel in the same three locations and Department headquarters officials in Washington, D.C. We examined witness claims involving fiscal year 1982 funds processed in the three locations between October 1, 1981, and December 31, 1982. Further, we reviewed departmental policy statements and guidelines for the use of and payment to witnesses. Our review was performed in accordance with generally accepted government auditing standards. Our work was conducted between February and December 1983.

In each of the three locations we visited, we found at least one area that warranted corrective action. On the basis of our general knowledge of the operation of U.S. attorney's and U.S. marshals offices, as well as discussions with Department personnel in internal audit and financial management positions, we do not believe these three locations are atypical. Therefore, similar conditions could exist in the other U.S. attorney's and U.S. marshals offices.

We found that Department policy regarding the approved use of and payments to fact witnesses is not being followed. Fact witness payments are being processed and paid by the U.S. marshals offices without proper certification. Further erroneous payments are being made by U.S. marshals offices' personnel because of the misinterpretations of fact witness entitlement requirements, arithmetic errors, and the lack of supervisory review of payments.

Currently, a uniformly effective system for notifying fact witnesses of their entitlements does not exist. The ways used for communicating entitlement information are not consistent or uniformly effective in advising witnesses of their entitlements. The Department form (OBD-2) designed to notify witnesses of their entitlements is infrequently used. Consequently, witnesses often do not claim legitimate expenses, or they unintentionally exceed government spending limitations and have to bear the additional costs themselves.

Payments to some expert witnesses were not in compliance with Department guidelines. Some assistant U.S. attorneys did not appear to be concerned about the fees charged by experts. Further, Marshals Service personnel issue checks without verifying or questioning billing information, believing review responsibility rests with the assistant U.S. attorneys. Finally, payments to some expert witnesses were made by U.S. marshals rather than by the Justice Management Division.

With regard to expert consultants who assist with nontrial activities, no clear Department guidance exists to help U.S. attorneys and marshals in calculating their compensation. On the basis of the expert witness guidance, which is sometimes relied upon in the absence of any other guidance, payments to some expert consultants were questionable.

Thus, controls over the payment of government funds to fact and expert witnesses as well as to experts who assist in non-trial activities need improvement.

To address these areas, we recommend that you take several corrective actions. First, we recommend that you direct the Justice Management Division to develop guidance for U.S. attorneys and marshals to use in negotiating fees and making payments to experts who are used in nontrial activities. Second, we recommend that you emphasize the need to comply with approval and payment policies by directing U.S. attorneys and U.S. marshals offices personnel that

- all fact witness claims must be properly completed before payments are made and must include approved certifying signatures;
- departmental approval must be obtained prior to obtaining the services of expert witnesses;
- expert witnesses must be paid only by the Justice Management Division; and
- fees paid to experts used for nontrial purposes must be in compliance with Department policies once they are promulgated.

In addition, we further recommend that you require personnel of the U.S. attorney's and U.S. marshals offices to

- make supervisory reviews of payments to fact witnesses to ensure they are accurate and comply with Department guidelines and
- routinely notify fact witnesses of their entitlements and provide each of them a copy of the Department form OBD-2 before they make their travel arrangements.

In commenting on these recommendations, the Justice Department listed specific actions which it plans to take to address our recommendations regarding approval and payment policies for fact and expert witnesses. The Department said it will consider the need and desirability for developing guidance for paying experts who are used in nontrial activities. Appendix II contains Justice's full comments on this report.

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We wish to thank you for the cooperation extended to us during our review. As you know, title 31 U.S.C. §720 requires the head of a federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on

B-214470

Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of this report and to the House and Senate Appropriations Committees with the agency's first request for appropriations made more than 60 days after the date of this report.

We are providing copies of this report to the Deputy Assistant Attorney General for Administration. Additionally, we are sending copies of the report to congressional committees which have a jurisdictional interest in the matters discussed and we will provide copies to others upon request.

Sincerely yours,

A handwritten signature in black ink that reads "W. J. Anderson". The signature is written in a cursive style with a large initial "W" and a distinct "J".

William J. Anderson  
Director

BACKGROUND

In fiscal year 1983, the Department spent approximately \$32 million in fees and expenses for witnesses who appeared on behalf of the government in all cases to which the United States was a party. These expenditures were for fact witnesses, expert witnesses, and protected witnesses. We excluded individuals in this latter category because of the uniqueness of the program and the need to keep the information on these individuals secure. In addition to testifying, experts are used by the Department as consultants to assist in nontrial activities such as the preparation of complex or technical cases. Generally, U.S. attorney personnel authorize the expenditure of money, and the Marshals Service, through the offices of the district U.S. marshals, controls, accounts for, and disburses the funds for such payments. Expert witnesses, however, are to be paid by the Justice Management Division.

A fact witness is entitled to \$30 per day attendance fee, transportation expenses, and a subsistence allowance when the witness is required to be away from his/her residence overnight. An expert witness is entitled to a negotiated fee and reasonable travel and miscellaneous expenses deemed necessary to the case. The amounts of such transportation and subsistence reimbursements are subject to the same limitations spelled out in the Government Travel Regulations applicable to government employees in travel status, although excess travel expenses will be paid if complete justification is provided. Although the payment guidance for expert witnesses is sometimes used for payments to experts obtained as consultants during case preparation, no clear guidance exists for calculating their compensation.

DEPARTMENT PROCEDURES AND PROPER  
CONTROLS ARE NOT BEING OBSERVED

Department procedures for the approval of payments to fact witnesses were not being followed in one of the three offices visited, while the procedures for obtaining the services of expert witnesses were not being fully followed in any of the three offices. Although we found no evidence that the breakdown of internal controls resulted in a net loss to the government, there is potential for loss unless internal controls are strengthened and departmental policies are followed.

Documentation supporting payments to fact witnesses is not adequate in the Massachusetts office

Documents supporting payments to fact witnesses in the Rhode Island and Connecticut offices were, with a few exceptions, properly completed. However, we found numerous deficiencies in the Massachusetts office. The Marshals Service paid witnesses despite deficiencies in authorization documents.

The U.S. Attorney's Manual (Title 3, Chapter 2, Section 3-2.130) provides for attendance certification by the U.S. attorney on a Witness Attendance Fee, Travel, and Miscellaneous Expense Claim (Justice Form OBD-3) which also serves as the witness payment voucher. The manual further states that payments are made by the U.S. marshal for the district in which the trial or hearing is held, or by the Justice Management Division, Department of Justice, if the case has been handled by the legal divisions at headquarters. The U.S. Marshals Service's Administrative and Financial Procedures Training Manual requires that the attendance of a witness should be certified by the signature on the OBD-3 of either the U.S. attorney, assistant U.S. attorney, U.S. magistrate, or the legal division attorney handling the case. The Marshals Service's manual further states that a signature card should be maintained for each individual authorized to certify the OBD-3 form and that signatures should be validated prior to any disbursement. The witness also must sign the OBD-3.

The basic system for processing claims was similar in each location. In each state the U.S. attorney's office provides the initial data including witness name, address, and dates of court attendance; case name and number; and basic information about the witness' expenses. Once claims are prepared, they are forwarded to the U.S. marshals office where the fees and reimbursable expenses are calculated and checks for payment are issued.

The witness attendance claims processed and paid from fiscal year 1982 funds by the marshals offices in Rhode Island and Connecticut, with a few exceptions, were properly prepared and completed prior to payment. Of a total of 1,062 fact witness claims (totaling \$83,403) we reviewed in these two offices, we found that only 6 claims (totaling \$199) were processed and paid without properly completed claim forms.



In the Massachusetts office, 532 of the 2,469 fact witness claim forms (totaling \$236,050) processed and paid from fiscal year 1982 funds were paid even though the signature of a certifying official was either missing or not on file as that of a valid certifying official. Of the 532 claim forms, 76 (totaling \$9,243) either lacked a certifying signature (59) or had illegible signatures (17) which could not be matched to a signature card. The remaining 456 had signatures from 28 officials for which no signature card was on file. We identified 14 of these individuals as assistants currently on the U.S. attorney's staff. Of the remaining 14, several were identified by U.S. Marshals and U.S. attorney's personnel as special assistants not on staff. The others could not be identified.

In addition, in Massachusetts we found that there were no signature cards on file with the marshals office for 20 of the 38 attorneys (including the 14 previously identified) currently on the U.S. attorney's staff, including the U.S. attorney and his first deputy. Without such cards, marshal office personnel cannot verify the authenticity of a certifying signature.

A marshals office official, who is responsible for processing and paying claim forms, told us that he does not question the claims or the supporting documentation forwarded to him by the U.S. attorney's office even when certifying signatures are missing or questionable. He further stated that he does not verify signatures. He said he accepts the claim forms as valid when delivered by someone from the U.S. attorney's office. He stated that returning claim forms to the U.S. attorney's office would only delay payment and, in his opinion, aggravate the attorneys. While the Marshals Service's Administrative and Financial Procedures Training Manual requires a certifying signature, it does not prescribe the action to be taken if the signature is not provided or is not appropriate.

When presented with our findings, the Chief Deputy Marshal for the Massachusetts office advised us that he had received a new, complete set of signature cards from the U.S. attorney's office. He stated that he received them only after his repeated complaints and threats to stop processing payments. The cards were prepared and submitted after we spoke with the U.S. attorney's administrative officer. The Chief Deputy also advised us that, even though he has no clear authority to do so, he will be returning all improperly prepared claim forms to the U.S. attorney's office for completion.

Proper completion of witnesses' claim forms is necessary to maintain proper internal control. Without such safeguards, the Department will have difficulty in protecting against fraud, defalcation, or simple error. We believe payments to witnesses should be supported by proper documentation and certified by an authorized official.

In some cases prior approvals were not obtained and payments were made by the inappropriate office when expert witnesses were used

Department Order 2110.25 requires that U.S. attorney's offices obtain approval in advance from the Department when using expert witnesses. We found that the three locations visited were not complying with this policy. The same order also requires that all payments to expert witnesses be made by the Justice Management Division. Two locations were not complying with this policy.

In the three locations visited, we identified 49 instances where expert witnesses were used in fiscal year 1982. These witnesses were paid a total of about \$34,240. We found that in at least 28 of the 49 instances, the assistant U.S. attorneys used expert witnesses before obtaining Department approval. Some approvals were obtained after the fact, as much as 6 months after the witness' services were received. In these 28 cases, the experts were paid about \$18,100. The individual payments to the experts ranged from \$50 to about \$3,060, for an average of about \$650 each. We were unable, because of incomplete records in two of the offices, to determine if prior approval was obtained in 13 cases in which the expert witnesses were paid a total of \$13,621. Prior approval was obtained in the remaining eight instances.

The U.S. attorney for Connecticut advised us that he believed the majority of expert witnesses used by his office without prior approval were involved in a single major medical malpractice case. Circumstances required quick action by an assistant attorney who either did not have the time or overlooked the need for approval. The U.S. attorney stated that flexibility was necessary at times and prior approval was not always practical.

Only half of the 22 U.S. attorneys and their assistants we spoke with said that they were aware of the Department's requirements for prior approval. One assistant said that such

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Only half of the 22 U.S. attorneys and their assistants we spoke with said that they were aware of the Department's requirements for prior approval. One assistant said that such

approval is unnecessary. Justice and U.S. attorney's office personnel advised us that prior approval was not always possible because of the need to respond quickly to rapid in-court developments.

Department officials told us that Department policy regarding expert witnesses is being reevaluated. The most recent proposal calls for delegating the approval of the use of expert witnesses directly to the U.S. attorney as long as total payments to an individual do not exceed \$2,500 and the fee rates do not exceed established Department fee schedules. If the Department does not implement this proposal, then it must require that prior approval be obtained before expert witnesses are used.

In the Connecticut and Massachusetts marshals offices we also found that some expert witnesses were paid by the marshals. According to Department officials, OBD 2110.25 requires that all payments to expert witnesses must be made by the Justice Management Division. This policy was established to provide centralized control over payments to expert witnesses.

On the basis of our review of payment vouchers and supporting documents, we found that 15 expert witnesses were paid by the U.S. marshals offices (9 in Connecticut and 6 in Massachusetts). The payments to these expert witnesses totaled \$13,250.

The most recent proposed revisions to the Department's policies regarding expert witnesses would not alter the requirement that payments to expert witnesses be made only by the Justice Management Division. Therefore, unless the Department takes action to achieve better compliance with its payment policy for expert witnesses, marshals may inappropriately continue to pay expert witnesses.

#### VARIOUS WITNESS PAYMENTS WERE IN ERROR OR QUESTIONABLE

Numerous payments made to fact witnesses were inaccurate or questionable. Errors in the calculation of compensation for fact witnesses resulted in incorrect payments. Further, several payments to expert witnesses were not consistent with Department guidelines.

Payments to fact witnesses  
marred by mistakes

Our examination of fact witness claim forms and supporting documents in the three locations disclosed a number of erroneous payments and/or failures to fairly compensate witnesses. These situations resulted from employee error and the lack of supervisory review prior to payment.

Our review of payment documents for fiscal year 1982 in the Connecticut office showed that witnesses were paid for per diem in a total of 48 instances. Marshals Service personnel miscalculated fees and per diem in 42 of the 48. This resulted in the witnesses being underpaid by about \$2,140. During the same period, the 48 instances where claims were made for per diem were paid a total of \$9,028. Our discussion with the Marshals Service employee supervising the processing of these claims led us to conclude that the miscalculations resulted from a misinterpretation of witness entitlements. The supervisor-in-charge of witness payments informed us that she had explained the travel regulations to the payment clerk and believed that the payments were being calculated correctly. This supervisor indicated that there is no requirement that the employee's work be verified. The Marshal Service's manual does not require that vouchers be reviewed prior to payment. The supervisor also advised us that she had been informed by a headquarters official that the Marshals Service could not now pay the underpaid individuals because the expenses were incurred in a prior fiscal year for which the records had been closed and they are not allowed to pay for such services from current funds.

Likewise, we found that the Massachusetts office's payment documents contained errors. Because of the number of witness payments being processed by the Massachusetts office (2,469 for fiscal year 1982), we did not review all claims involving per diem. Rather, we examined the 52 claim forms with per diem payments processed during March 1982. More claims were processed during this month than any other month in fiscal year 1982. We found that 7 (13 percent) of the claim forms were miscalculated, resulting from mathematical errors. The errors ranged from a \$60 underpayment to a \$70 overpayment.

In the Massachusetts office, a single employee processes all witness claim forms. This includes calculating amounts, determining the allowability of charges, issuing checks, and processing and paying other Marshals Service and U.S. attorney's

bills. This person verifies his own work without any independent review.

The Massachusetts Chief Deputy Marshal, upon being informed of our findings, advised us that he will require that all claim forms be reviewed by a second individual to ensure a higher degree of accuracy, even though the Marshals Service does not require such a review. He further advised us that he will write to the witness overpaid \$70 and attempt to obtain a refund. Regarding the six individuals who were underpaid, he did not believe he could pay them from current year funds because the cost was incurred in a prior fiscal year and the records for that year had been closed.

We believe that the Massachusetts and Connecticut offices may be able to pay the underpaid witnesses, even though the fiscal year in which the underpayments occurred has ended. An unobligated balance of an appropriation available for 1 fiscal year is to be withdrawn at the end of that fiscal year and revert to the Treasury. However, unobligated balances can be restored pursuant to 31 U.S.C. §1552 if the head of the agency decides they are necessary to pay obligations or make adjustments properly chargeable to a prior fiscal year, such as the amounts owed the underpaid witnesses. Therefore, if sufficient withdrawn unobligated balances exist, the underpaid witnesses can be compensated.

Payments to some expert witnesses and consultants were questionable

We found that some payments made to expert witnesses did not comply with Department requirements. Expert witnesses were at times compensated for charges not allowed by Department directives or were paid fees that exceeded Department guidelines. Assuring compliance with Department procedures and guidelines was not a high priority with assistant U.S. attorneys in the three locations we reviewed. Regarding payments to expert consultants, no guidance exists to aid U.S. attorneys or marshals in determining proper compensation. On the basis of the guidelines for expert witnesses' compensation, which are the only guidelines potentially applicable for expert consultants, some payments to expert consultants were also questionable.

U.S. attorneys can obtain the services of expert witnesses to testify at trials or of expert consultants to advise and assist their offices in various nontestimony ways. Regardless of the manner in which an expert is to be used, the U.S. attorney and his/her assistants are responsible for selecting experts and arranging for their compensation.

As previously stated, U.S. attorneys are required to obtain approval before hiring expert witnesses to testify at trials. Department Order OBD 2110.13A establishes rates to be paid expert witnesses and provides guidance regarding the payment of expert witnesses.

The guidance in OBD 2110.13A is not, however, always followed. For example, even though Department guidelines prohibit the payment of expert fees for time spent in travel, the Connecticut office paid an expert witness for time spent in travel. A physician traveled by commercial aircraft from Boston, Massachusetts to Hartford, Connecticut; returned the same day; and charged the government for 10 hours at \$250 per hour, including travel and consultation time. We believe the actual time spent traveling was about 5 hours. The total bill for this trip was \$2,680.69.

This situation raises an additional issue--the maximum daily reimbursement rate. Department guidelines establish maximum hourly and daily rates for expert witness fees. Department policy requires U.S. attorneys to use the daily rate when an expert witness' service exceeds 3 hours in 1 day. Clearly, in the situation cited above, the physician's fee exceeded the \$500 daily maximum in effect at the time. In addition, we identified another situation where the expert's fee exceeded the daily rate. In this situation, a physician serving as an expert witness billed the Connecticut U.S. Attorney's Office \$1,300 for 3-1/4 hours (a rate of \$400 per hour) for work on a deposition. Although the guidelines do permit fees to exceed the rate schedule when approval is obtained, in neither situation did we find evidence that an approval had been granted.

U.S. attorneys are authorized to hire expert consultants for nontestimony purposes without prior Department approval. However, a Department official advised us that there were no specific guidelines in effect regarding payment to experts employed for nontestimony purposes. When attorneys or marshals have asked about guidance to use for paying expert consultants, officials within the Justice Management Division have advised



them that no guidance exists but that the guidelines for expert witnesses might be useful as a guide.

We believe that some guidance should be available to U.S. attorneys and marshals regarding payments to experts who are obtained to assist in nontrial areas. The fact that attorneys and marshals have inquired about such guidance suggests that it would be useful. Lacking any guidance, the best that attorneys and marshals can do is rely on the guidelines for expert witnesses or their own judgments.

Using the expert witness guidelines, we found that expert consultants are sometimes paid fees for time spent in travel just as expert witnesses are sometimes compensated for travel time contrary to guidance. In one case, an expert consultant charged \$70 for 2 hours of travel. In another case, an expert consultant charged 5 hours for consultation with a defendant and travel. While we could not determine from agency records what portion of the 5 hours was travel time, we believe it would have been approximately 2 hours on the basis of the distance between travel points and the normal driving times between them.

In all of these cases involving questionable payments whether to expert witnesses or experts used as consultants, the Marshals Service's office made the payments. As noted earlier, according to Department policy the payments to expert witnesses should have been made by the Justice Management Division. Marshals office personnel told us that they issue checks solely on the recommendation of the U.S. attorney's office. They said they do not attempt to verify the accuracy of billing information, including time charges and rates, because they believe review responsibility rests with the U.S. attorney's office.

Discussions with assistant U.S. attorneys indicate that they consider acquiring the services of a desired expert who will contribute to their cases much more important than the cost of the expert. One attorney pointed out that she does not "haggle" over rates or total bills. Assistant U.S. attorneys in Connecticut and Massachusetts indicated that Department rate guidelines were too low for their locales and they would agree to higher rates if necessary to get the expert they desired. One assistant U.S. attorney told us that if an expert wanted a higher rate than could be approved, the expert would just increase the number of hours he claimed he worked. He further stated that not much could be done to control such practices. The U.S. attorney for Connecticut was aware that his office had

not always complied fully with Department procedures and guidelines regarding experts. He believed, however, that his office's actions were justified by the needs of individual cases and that U.S. attorneys required more latitude in such matters. He believes the rates are unrealistic in his, as well as other high cost districts. He did not believe he could obtain the proper expert support without such latitude.

In sum, in the three U.S. attorneys and marshals offices we reviewed we found that controls over the disbursement of funds to expert witnesses and experts used in nontrial activities were inadequate. In some cases expert witnesses were paid by the marshals offices rather than by the Justice Management Division and the actual payments made were contrary to provisions in departmental guidance. For experts used in nontrial activities no guidance existed to aid U.S. attorneys or marshals in establishing compensation. To the extent that the guidelines for expert witnesses are appropriate for calculating expert consultant compensation, some payments to consultants were also questionable.

Because the Department is currently revising the guidance for payments to expert witnesses, we believe consideration should be given to including (1) guidance on payments to be made to experts used in nontrial activities, and (2) the need to fully comply with the new and revised policies regarding payments to experts.

#### WITNESSES ARE NOT ROUTINELY ADVISED OF THEIR ENTITLEMENTS

In the three locations we visited, a variety of policies and practices were being used to inform witnesses of the fees and reimbursements for which they are entitled. These practices ranged from not advising witnesses at all to detailed notification.

We found that witnesses are frequently unaware of what they are entitled to. Marshals Service and U.S. attorney personnel in the Connecticut and Massachusetts offices advised us that unhappy, complaining witnesses are not uncommon. The cost of hotels and meals in areas near some of the federal courts in these districts is frequently high. After testifying, those fact witnesses in a travel status who desire immediate payment will be sent by the U.S. attorney's office along with a claim form to the Marshals Service office. The Marshals Service will complete the claim form, calculating the amount of allowable

them that no guidance exists but that the guidelines for expert witnesses might be useful as a guide.

We believe that some guidance should be available to U.S. attorneys and marshals regarding payments to experts who are obtained to assist in nontrial areas. The fact that attorneys and marshals have inquired about such guidance suggests that it would be useful. Lacking any guidance, the best that attorneys and marshals can do is rely on the guidelines for expert witnesses or their own judgments.

Using the expert witness guidelines, we found that expert consultants are sometimes paid fees for time spent in travel just as expert witnesses are sometimes compensated for travel time contrary to guidance. In one case, an expert consultant charged \$70 for 2 hours of travel. In another case, an expert consultant charged 5 hours for consultation with a defendant and travel. While we could not determine from agency records what portion of the 5 hours was travel time, we believe it would have been approximately 2 hours on the basis of the distance between travel points and the normal driving times between them.

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Discussions with assistant U.S. attorneys indicate that they consider acquiring the services of a desired expert who will contribute to their cases much more important than the cost of the expert. One attorney pointed out that she does not "haggle" over rates or total bills. Assistant U.S. attorneys in Connecticut and Massachusetts indicated that Department rate guidelines were too low for their locales and they would agree to higher rates if necessary to get the expert they desired. One assistant U.S. attorney told us that if an expert wanted a higher rate than could be approved, the expert would just increase the number of hours he claimed he worked. He further stated that not much could be done to control such practices. The U.S. attorney for Connecticut was aware that his office had

not always complied fully with Department procedures and guidelines regarding experts. He believed, however, that his office's actions were justified by the needs of individual cases and that U.S. attorneys required more latitude in such matters. He believes the rates are unrealistic in his, as well as other high cost districts. He did not believe he could obtain the proper expert support without such latitude.

In sum, in the three U.S. attorneys and marshals offices we reviewed we found that controls over the disbursement of funds to expert witnesses and experts used in nontrial activities were inadequate. In some cases expert witnesses were paid by the marshals offices rather than by the Justice Management Division and the actual payments made were contrary to provisions in departmental guidance. For experts used in nontrial activities no guidance existed to aid U.S. attorneys or marshals in establishing compensation. To the extent that the guidelines for expert witnesses are appropriate for calculating expert consultant compensation, some payments to consultants were also questionable.

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#### WITNESSES ARE NOT ROUTINELY ADVISED OF THEIR ENTITLEMENTS

In the three locations we visited, a variety of policies and practices were being used to inform witnesses of the fees and reimbursements for which they are entitled. These practices ranged from not advising witnesses at all to detailed notification.

We found that witnesses are frequently unaware of what they are entitled to. Marshals Service and U.S. attorney personnel in the Connecticut and Massachusetts offices advised us that unhappy, complaining witnesses are not uncommon. The cost of hotels and meals in areas near some of the federal courts in these districts is frequently high. After testifying, those fact witnesses in a travel status who desire immediate payment will be sent by the U.S. attorney's office along with a claim form to the Marshals Service office. The Marshals Service will complete the claim form, calculating the amount of allowable

reimbursement. A Marshals Service official told us that witnesses who appear in person for payment are frequently outraged when they discover the relatively small amount they are to receive. He further stated that reimbursements are often less than the witness' actual expenses.

In the Rhode Island office, we identified a situation where witnesses, because of their lack of knowledge regarding entitlements, were not obtaining full compensation. We found few witness claims that contained parking fee charges, even though many witnesses claimed mileage for a vehicle and there was no free parking available near the courthouse. The Rhode Island U.S. Attorney's Office administrative officer told us that she has directed office personnel to include parking charges on claims if the witness requests such, but otherwise not to bring the matter up for discussion. The Marshals Service only pays for those items included on the claim form forwarded by the U.S. attorney's office; therefore, it did not pay for parking in most cases.

In the three locations included in our review, we found that about one-third of the attorneys we spoke with inform prospective witnesses of their entitlements as well as what receipts are required for reimbursement. The task to inform a witness is often delegated, informally or formally, to a secretary, receptionist, or case agent from an investigative agency. The Department has developed a form (OBD-2, Notice to Fact Witness Appearing on Behalf of U.S. Government) that may be given to prospective witnesses. The form explains the allowances available to a witness and provides a worksheet for a witness to record expenses. However, the use of the form by U.S. attorneys is optional. We found no indications that two of the districts included in our review used the OBD-2 form; while in the third, a form OBD-2 was provided to prospective witnesses in only a few situations.

The Chief Deputy Marshal in Massachusetts advised us that he believes the form OBD-2 should accompany all subpoenas, but he told us he only sees "2 or 3" subpoenas per year accompanied by the OBD-2 form. A Marshals Service official advised us that many witnesses have stated that they would have made other, more moderate travel and accommodation arrangements had they realized the limitations on reimbursement. Several Marshals Service and U.S. attorney personnel in Massachusetts and Connecticut told us that the cost of hotel rooms convenient to the courthouses frequently exceeds the amount allowable under federal per diem

rates which governs the amounts of reimbursements paid to witnesses.

A system is needed to advise witnesses of their entitlements regarding travel costs. This system should require that officials in the U.S. attorney's offices notify witnesses of their entitlements and provide each of them a copy of form OBD-2 before they make any travel arrangements.



## U.S. Department of Justice

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Washington, D.C. 20530

June 8, 1984

Mr. William J. Anderson  
Director  
General Government Division  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Anderson:

This letter responds to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Justice Needs Better Controls Over the Payment of Witness Fees."

In general, we find the report a constructive criticism of some of the problems the Department has recognized in the past and hopes to resolve by issuance of revised policies and procedures which will strengthen controls over the payment of fees to fact witnesses, expert witnesses, and experts who assist with non-trial activities.

To address the area of payments to fact witnesses, the Department plans to take the following specific actions to improve controls over the processing of witnesses' claims:

1. Revise Order LAA 2110.3, Forms for Processing Fees and Allowances for Regular (Fact) Witnesses. This order notifies witnesses of their fees and allowances and prescribes the procedures for preparing:
  - a. Form OBD-2, Notice to Fact Witness Appearing on Behalf of United States Government; and
  - b. Form OBD-3, Witness Attendance Fee, Travel, and Miscellaneous Expense Claim (Witness Attendance Certification).

The Department's revision to the above order will establish the requirement that officials in U.S. Attorneys' offices notify witnesses of their entitlements and provide each of them with a copy of Form OBD-2 before they make any travel arrangements.

2. Revise Order DOJ 2110.39, Responsibilities and Designation of Certifying Officers. We will also issue an OBD order dealing specifically with the requirement for U.S. Attorneys to certify all fact witness vouchers before they can be sent to the U.S. Marshals' offices for payment. The order will require that a voucher examination be performed before a payment can be made to a fact witness. The examination will include a verification of the accuracy of each voucher and a check to assure that each voucher is supported by proper authorization. Requests for

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payment will be rejected if there is no valid signature card on file for the authorizing official. The fact that instances do arise where a signature card is not on file can be attributed, in part, to the turnover of Assistant U.S. Attorneys in U.S. Attorneys' offices.

3. Attempt to identify resources within the Justice Management Division (JMD) which might be available to assist the U.S. Marshals Service in defining and clarifying the precise control mechanisms which they must establish and follow in order to effectively carry out their disbursing function, including the requirement that payments to expert witnesses must be made by the Justice Management Division (JMD).
4. Request the Departmental Audit Staff to perform followup audits at selected U.S. Attorney and U.S. Marshals Service offices to test the effectiveness of the new policies and procedures after they have been in place and operative for a reasonable period of time.

With respect to payments of claims to expert witnesses, the General Accounting Office (GAO) draws certain conclusions in paragraph 4, page 8 of the Appendix regarding a maximum fee when using the fee guidelines contained in Order OBD 2110.13A, dated October 26, 1982. The range of rates listed in the order is intended to provide guidance to attorneys in determining a reasonable or normal fee. Attorneys have the latitude, with adequate justification and higher level signature authority, to exceed the rates on a case-by-case basis if necessary so that they may proceed with their cases. As for the rate guidelines currently established in the order for expert witnesses, a review will be made to determine the need to update the rate structure. Concerning the development of rate structures, GAO suggests that consideration be given to developing guidance for payments to experts used in nontrial activities. The need and desirability for such guidance will be considered during our review of litigation support activities.

We agree with the underlying premise of the report that cost savings could be accomplished through improved negotiations of expert witness fees. In our revision of Order OBD 2110.13A, we are recommending that evaluation/selection of expert witnesses be separated from the negotiation process. This would be accomplished by placing negotiation and award in the hands of administrative personnel in the U.S. Attorneys' offices and legal divisions, and leaving evaluation and selection as the prerogative of the trial attorney. Administrative personnel would be given formal and on-the-job training in the negotiation process, and to a great extent would conduct negotiations as a disinterested party. While we do not envision such measures as resulting in substantial savings, we believe such measures may help to hold down the ever escalating, but necessary, costs of expert witnesses and alleviate possible conflicts of interest.

Commencing near the top of page 4 of the Appendix, GAO discusses the subject of prior approval of expert witness expenses by the Department. The obtaining of prior approval refers to JMD's Special Authorization Unit. The current policy regarding prior approval for use of expert witnesses is clearly delineated in Order OBD 2110.25, consequently we are somewhat surprised by the number of respondents contacted during the audit who told GAO they were not aware of the requirement. The JMD Special Authorization Unit processes approximately 4,000 expert witness actions each year. Although we recognize



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that perfect compliance with agency requirements is difficult to achieve, considerable progress in achieving compliance has been made and our efforts in that direction are continuing. As a reminder, the Executive Office for U.S. Attorneys will be requested to inform U.S. Attorneys' offices of the Department's requirement for prior approvals when using expert witnesses.

To alleviate many of the difficulties experienced by attorneys responding quickly to expert witness needs, revised procedures are being proposed to delegate approval authority to the U.S. Attorneys and legal divisions for requirements under \$2,500 (see first full paragraph, page 5 of the Appendix to GAO's report). This proposal will substantially reduce the paperwork burden but continue to provide prior review of approximately 80 percent of the funds obligated and an after-the-fact review of the remaining 20 percent. Overall, we believe the paperwork burden can potentially be reduced on 70 percent of the actions. In addition, the proposed revision to our order will enhance conformance with procurement regulations and clarify certification and payment procedures. At a later date, the Departmental Audit Staff will be requested to perform followup audits at selected locations to determine the effectiveness of the revised policies and procedures.

In summary, we believe the corrective actions the Department proposes to take will meet the objectives of GAO's recommendations by providing more effective controls over the payment of witness fees and notifying witnesses of their entitlements. In addition, followup audits by the Department's Audit Staff will provide periodic checks as to the extent of compliance with existing policies and procedures over the payment of government funds to witnesses and expert consultants.

We appreciate the opportunity to comment on the report. Should you have any questions regarding our response, please feel free to contact me.

Sincerely yours,



William D. Van Stavoren  
Deputy Assistant Attorney General  
for Administration

(181750)

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