

# FEDERAL LAW

## Current Issues in Medicolegal Practice

Jeffrey Green, JD, MBA

### **Dual compensation and the ethics rules**

Mark Twain once said, "always do right. This will gratify some people, and astonish the rest." Complying with the Standards of Ethical Conduct for Employees of the Executive Branch should not only gratify some people but should not astonish the rest. Compliance should be the standard.

Compliance as to use of Government facilities and time arises as questions for Federal employees with two jobs and was at issue in a recent Federal court case regarding copyright infringement, but not the Federal ethics laws. The case in the United States Court of Federal Claims styled *Victor Herbert v. United States*, 36 Fed.Cl. 299 (1996), provides a rare instance when a Federal judge rules on issues regarding official time and use of Government facilities.

In this case, a dispute arose over a contract between the National Institutes of Health (NIH) and the National Academy of Sciences. Under the contract, the Academy was to develop the 10th edition of the Recommended Dietary Allowances (RDA Works or RDA). Dr.

Herbert volunteered to participate on the volunteer committee to help prepare the 10th RDA works. Dr. Herbert contributed work to the Committee on iron, folate and vitamin B-12. For other reasons, the overall Committee report was not delivered to the NIH. Dr. Herbert subsequently revised and published his works and had them copyrighted. The Committee was subsequently reformed without Dr. Herbert, and issued its new RDA report, including information Dr. Herbert previously provided to the Committee. Dr. Herbert brought a copyright infringement action against the Government since he registered his copyright prior to release of the report.

In order to prevail in a copyright action, Dr. Herbert (as does any plaintiff) had the burden to prove that (I) he was not in the employment or service of the United States where the copyrighted work was prepared as part of his official functions, or (II) he did not use Government time, material, or facilities in preparation of the copyrighted work. 28 U.S.C. sec-

tion 1498(b). The Government prevailed, and the Court's rationale is instructive as to what constitutes "official functions" and "Government time or facilities."

First, the Court addressed the issue of whether or not Dr. Herbert was a Government employee. He was employed at a Federal agency and, as a second job, at an affiliated university medical center. He argued that at the time he created the RDA works, he was a doctor treating patients for the Government and that all his research was performed at the affiliated university. The Court ruled that the evidence showed his primary job to be with the Government, where he worked at least 80 hours every two weeks on Government responsibilities in a Government office. In addition, the Court stated that Dr. Herbert included his Government affiliation first before his university status on his publications. The Court concluded that all of these factors indicate his primary employment is with the Government.

Then, the Court turned to the question of whether or not producing the copyright works was a part of Dr. Herbert's official duties or functions. The Court noted that he was known for his research as well as his patient care at the Federal agency. He won an award for research at the Government agency. Also, another Government employee testified that it is impossible to characterize the research of one doctor as being part of either his Government or affiliated university duties.

Dr. Herbert argued that the assignment to write and publish the 10th RDA works was not a specific duty or condition of employment. The Court stated, "the specific task need not be individually assigned in order to qualify as part of the official functions of a Government

employee." The Court found that the research was part of Dr. Herbert's duties and that the type of research and writing involved in the creation of the 10th RDA works was part of his official functions as a Government employee. Further, the Court held that the Government funded the Committee, and therefore, Dr. Herbert was in the service of the Government.

The Court next considered the use of Government facilities. Dr. Herbert claimed that the equipment he used was his or the affiliated university's even though some of his work was performed in a Government building. The Court held that the walls, floor, and ceiling of the laboratory are enough to qualify as Government facilities. Further, the Court stated that Dr. Herbert produced no evidence to show that the 10th RDA work was done anywhere other than his VA office or laboratory. The Court concluded that Dr. Herbert used Government facilities and time in the preparation of his 10th RDA writings.

While it is a copyright infringement case that dealt with many issues that are not discussed in this article, this case is instructive of how a Federal judge might determine use of Government time and facilities when someone is a Government employee and working a second job. Rather than attempt to "astonish" others, Federal employees that are uncertain as to use of Government time and facilities when working a second job may want to consider this case or call their agency ethics official.

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# LETTERS TO THE EDITOR

## Patents and the federal employee

**A**ttorney Jeffrey Green addresses an important issue in these days of cost containment and downsizing (Current Issues in Medicolegal Practice, *Federal Practitioner*, March 1998; 71-72).

In the early 1980s, I asked the VA if it had interest in seeking U.S. patent protection for my invention useful in quality assurance of some Technetium-99m radiopharmaceuticals. The creative work was done as a part of my duties, with supplies provided totally by VA. The VA expressed "insufficient interest" in pursuing a patent, but granted me permission to apply for one as an individual. A patent was issued to me in April 1985.

Not mentioned by Green are the substantial costs incurred by the employee. For example, fees to a private patent attorney for evaluating and drafting the application, plus fees for initial filing and periodic maintenance, can total several thousands of dollars. So, the inventor must determine if the patent is worth the expense and time required.

There are significant benefits to the federal employee-inventor who personally seeks patent protection. First, there are the poten-

tial financial royalties if the invention is commercialized, or merely used inadvertently by others. Second, there is enhanced professional prestige accompanying personal ownership of a clinically relevant patent. Last, but not least, is the personal satisfaction of having achieved a technical advancement in one's profession, documented by a legal grant to finite exclusivity by the national patenting authority:

The government also stands to benefit financially, should the patent be commercialized, through receiving licensing or royalty payments from users. So, patenting by the individual appears to be a "win-win situation" for all concerned.

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