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MEMORANDUM

TO: Extension Specialists
Department Chairs/Unit Directors
County Agents
District Directors
Regional Coordinators

FROM: Nancy M. Cox *Nancy M. Cox*

DATE: July 23, 2014

SUBJECT: Fact Witnesses and Expert Witnesses

College of Agriculture, Food and Environment staff and faculty members are periodically approached by attorneys or other individuals requesting assistance in the form of testimony in anticipated or pending litigation. Given the nature of the College's work, and the expertise of its staff and faculty, it is reasonable to expect that these requests will continue. How to respond depends largely on what role the staff or faculty members have played in the events that form the basis of the litigation, and what role they are being asked to play in the litigation itself. This memorandum provides guidance on how to appropriately respond to such requests.

As a general rule, there are two types of witnesses in a legal proceeding – lay witnesses and expert witnesses. Lay witnesses are limited to testifying regarding facts of which they have first-hand knowledge. They do not offer opinions, draw conclusions or testify regarding matters other than facts of which they have personal knowledge. Expert witnesses, on the other hand, may not necessarily have first-hand knowledge of relevant facts but, based on expertise, experience, and training, may nevertheless be permitted to offer opinions regarding same. The testimony of lay witnesses is usually secured through the issuance of a subpoena directing the employee or faculty member to appear for a deposition or to testify at trial. The subpoena may arrive without any advance notice, and may give little or no indication of the issue(s) being litigated. Expert witnesses, conversely, are most often retained by a party to the litigation following in-depth discussions about the case, and are paid a fee for their services.

MEMORANDUM

Page 2

In the context of the Cooperative Extension Service, an agent or specialist that, as a part of his or her regular duties, provided analysis on any number of issues (e.g., providing an opinion regarding damage to a crop as a result of drift from a herbicide; whether a product has performed up to its expectations; whether damage or injury to crops or livestock may be related to the use of a product, etc.) may be asked to testify regarding that analysis. In such a case, the agent or specialist is acting as a lay witness and should limit his or her testimony to the underlying facts, the role of the Cooperative Extension Service, and any reports that were prepared. In order to avoid the appearance of favoritism, no opinions should be expressed and any relevant records should only be produced pursuant to a properly issued subpoena or open records request. Furthermore, the agent or specialist should make it clear that, because he or she is simply a fact witness, he or she is equally available to talk to any other party in the litigation on the same terms and conditions.

If the agent or specialist played no role in the facts that formed the basis of the litigation, an attorney requesting assistance may be seeking expert testimony. Unfortunately, becoming an expert witness requires you to align yourself with one party, to the exclusion of the other(s). This creates the appearance of favoritism and is contrary to the role of the Cooperative Extension Service. Agents and specialists are charged with being resources for the entire community and should avoid taking sides in legal disputes that are being or will be litigated in Kentucky. If the litigation is outside Kentucky, it may be permissible to serve as an expert and the agents or specialists should refer to the policy regarding consultations (<http://www.uky.edu/regs/Administrative/ar3.9.htm>).

Regardless of the nature of the requested testimony, College staff and faculty members should contact Tim West (859.257.3879; timothy.west@uky.edu) or Katherine Adams in the University Legal Office at (859.257.2936; kadams@email.uky.edu) if they are approached by an attorney to testify in anticipated or pending litigation. A copy of any subpoena or request for records that you receive should be immediately faxed to Tim West at (859) 323-3842 and to Amy Spagnuolo in the University Legal Office at (859) 323-1062.

cc: Katherine Adams
Associate Deans