



Statement # 16

Right to Consult with Counsel in Agency Investigations

(Adopted December 9, 1993)

In recent years, Congress has attached sanctions to an increasingly wide range of regulatory violations, causing federal administrative agencies to become involved more routinely in investigations that lead to civil or criminal prosecution. The Administrative Conference has completed a study that explores the procedures that govern the relationship between the agency and a person compelled to appear before the agency in such investigations.

The Administrative Procedure Act at section 555(b) provides that “[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.” This brief reference to counsel in the APA leaves a number of questions open. The Act, for example, does not specify the types of actions attorneys may take in representing their clients during agency investigative proceedings. It also does not indicate precisely which persons coming in contact with an agency may invoke the right to counsel.¹

Because the roles of investigators in federal agencies and the methods by which witnesses or parties appear before agencies vary considerably, the Administrative Conference does not believe it can develop a uniform set of recommendations concerning these procedures. However, the Conference believes it would be valuable to provide a statement on some of the issues raised in such investigations concerning the role of counsel so that those government officials involved can be made aware of the issues and seek additional guidance where warranted.

¹ The 1941 Attorney General's Report on Administrative Procedure in Government Agencies is strangely taciturn on the subject of legal representation. Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941). The report throughout refers to the presentations and contentions of “parties,” without any indication whether parties would or would not have the benefit of legal counsel. Statements in both House and Senate committee reports regarding this provision of the APA state simply that it is “designed to confirm and make effective” the “statutory and mandatory right” of interested persons to appear personally or with counsel before the agency. Sen. Doc. No. 248, 79th Cong., 2d Sess. 205, 263 (1946).



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I. Agency Exclusion of Counsel

Although courts construing the APA's right-to-counsel provision have held that the right includes the power to retain counsel of one's own choosing, some federal agencies have, by rule or order, reserved the power to exclude counsel who represents a person compelled to appear before an agency representative during an investigation. They have done so out of a concern that the particular attorney may impair the effectiveness of the investigation, especially where the attorney represents either multiple witnesses, or a witness and his or her employer.

Agencies should consider whether, in most situations, a person compelled to appear in agency investigative proceedings ought to have the discretion to choose his or her own counsel, even where counsel represents multiple witnesses or parties in the matter. As courts have held, an agency must have "concrete evidence" that an investigation will be impaired before it may exclude counsel.² Thus, the mere fact of multiple representation, an employment relationship between the witness and some other party involved in the investigation, or past dealings between the agency and a particular attorney should not be considered, in and of themselves, a sufficient basis for excluding the counsel of a witness.

Regardless of an agency's decision on the above matter, it has the power to exclude counsel for disruptive or obstructionist behavior during the proceedings, and to take action in situations where the attorney is suspected of personal involvement in the potential violations or matters under investigation.

II. Consultation with Auxiliary Experts

Because of the highly technical nature of many regulatory fields, attorneys who advise witnesses or parties in some agency investigations must consult with accountants, engineers, economists, or other experts in order to provide effective legal assistance. The prevailing practice among federal agencies is to allow such consultation with auxiliary personnel, either by allowing the expert to attend the proceedings or by allowing the attorney a reasonable opportunity during the proceeding to consult with the expert about the substance of the investigation. Agencies that do not currently provide this opportunity should consider whether to allow counsel representing a person compelled to appear before the agency reasonable

² See *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976); *Professional Reactor Operator Society v. NRC*, 939 F.2d 1047 (D.C. Cir. 1991).



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access to auxiliary experts, regardless of whether the investigation involves civil or criminal sanctions.

III. Informing Persons of Their Right to Counsel

Agencies should be sensitive to the right to counsel that persons compelled to appear before it are granted under the APA and other statutes, and should consider when it is appropriate to advise such an individual of this right. Where necessary, agencies should consider providing training on this subject to field investigators. In the interest of maintaining an effective working relationship between federal regulatory agencies and regulated parties, agencies should consider whether it is appropriate to conduct a compelled investigative proceeding in the absence of legal counsel when it is apparent that a person is unaware of his or her right to counsel.

Citations

59 FR 4677 (February 1, 1994)

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