

## MEMORANDUM

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

FROM: M. Scott Smith

DATE: January 10, 2007

SUBJECT: Subpoenas and Expert Testimony

This memorandum is an attempt to provide some guidance to you whenever you are approached by attorneys or other individuals who are seeking assistance in the form of expert testimony in pending litigation. Most often, this request for assistance will come in the form of a subpoena directing you to appear for a deposition or to testify in a trial. Given the nature of your work and your areas of expertise, I think we can anticipate that these requests for assistance will continue in the future. After discussing this carefully with the University's Legal Counsel, I have prepared this memorandum to provide you some guidance in this area. As always, please seek any additional guidance as needed by contacting Jim Lawson. If Jim is not available, Katherine Adams of the University's Legal Office has agreed to provide advice to you regarding this matter.

The manner in which you approach requests for assistance from attorneys depends upon whether you have played any role in the matter that is the subject of the litigation. If you have played no role in the litigation, then the attorney may be asking you to be an unpaid expert witness. This generally occurs when an attorney asks the agent or specialist to review and analyze facts involved in the controversy or lawsuit and provide detailed expert opinions. Unfortunately, this means you become an expert for one party. This places you squarely between the two parties and makes it appear you are favoring one party over the other. I believe this is contrary to the role of the Extension Service. In keeping with our mission, agents and specialists should be factual resources for the community. This does not mean that you can never be involved in litigation, but means that you must be careful to avoid becoming an expert for one party. If you are contacted by an attorney, company, insurance agent or a party in litigation, advise the individual that you will have someone contact him/her. Then contact Jim Lawson.

## MEMORANDUM

Page 2

Often, the request for assistance involves a case in which an agent or specialist, as a part of his or her regular duties, may have provided an opinion or an analysis. Examples would be where an agent or specialist had been asked by a farmer to provide an opinion on possible damage to a crop as a result of drift from a herbicide, on whether a product has performed up to its expectations, or whether damage or injury to crops or livestock may be related to the use of a product. In these situations, the agent or specialist would be a fact witness. As a result, the attorneys involved in the case will frequently want to interview you in anticipation of taking your deposition or asking you to testify at trial. Also, as a part of the interview process, the attorneys may ask to review any report that you have prepared in connection with the matter under investigation or to review any notes or photographs that you prepared regarding the matter. Generally, your files, including any notes or photos, can be discovered in civil litigation if you are served with a subpoena. The attorneys can also obtain copies of most of the documents in your file through an Open Records Request pursuant to state law, although preliminary notes are not generally subject to the Open Records Act.

In these cases where you have provided an opinion or analysis as a part of your job, you should make it clear to the attorneys that you are a fact witness. You can advise the attorney that the Extension Service will need to be compensated at an hourly rate that fairly reimburses the University for your time. You should advise the attorneys that you will be happy to talk about the role of the Extension Service, any report that you have prepared and what you have done. You should also advise that you understand that the documents in your file could be produced pursuant to subpoena, but that to avoid the appearance of any favoritism in litigation, that you have been advised that you may not voluntarily produce any documents from your files. You should also advise the attorney that, since you are a fact witness, you are equally available to talk to any other party in the litigation, on the same terms and conditions.

As you are aware, we have had a long standing policy that agents and specialists are not permitted to consult within the state of Kentucky. If the matter involves a case outside Kentucky then you should follow the steps outlined in the policy regarding consultations.

I trust that the information in this memorandum will be useful as a general guideline. As noted above, you should always contact Jim Lawson at (859) 257-3879 or Katherine Adams at (859) 257-2936 when you are contacted by attorneys or others regarding litigation or threatened litigation. A copy of any subpoena or request for records that you receive should be immediately faxed to Jim at (859) 323-3842 and to the University Legal Office at (859) 323-1062.

cc: Katherine Adams  
Associate Deans