On May 14, 1997, the Section submitted comments to the General Services Administration regarding its proposed regulations that would amend 41 C.F.R. 105-60.6 by establishing instructions and procedures for the production and disclosure of information by present and former GSA employees in response to subpoenas or similar demands in judicial or administrative proceedings.

The Section expressed concern that the proposed regulations are overreaching and beyond the scope and intent of statutory authority -- specifically the authority provided by 5 U.S.C. 301, known as the Federal Housekeeping Statute. The Section noted that the Federal Housekeeping Statute does not authorize the strictures the proposed regulations would place on former GSA employees and on representatives of the United States in situations where the United States or any of its agencies is a party. To correct this problem, the Section recommended that GSA revise the proposed regulations so that they: (1) do not apply at all in situations where the United States or any of its agencies is a party; and, (2) do not purport to apply to former GSA employees.
all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and therefore, should not be construed as representing the policy of the American Bar Association.

**The GSA's Proposal**

These comments concern the General Service Administration's ("GSA's") plan to amend 41 C.F.R. 105-60.6 by establishing instructions and procedures for the production and disclosure of information by present and former GSA employees in response to subpoenas or similar demands in judicial or administrative proceedings. Because disputes regarding GSA's procurement contracts, if litigated, frequently involve demands for materials and information from current and former GSA employees, the members of the Public Contract Law Section have a special interest in these regulations. In addition, because other government agencies have similar regulations, members of this Section have experience and expertise on this subject.

The proposed regulations require parties seeking information, both oral testimony and the production of material, to "provide, by affidavit or other statement, a detailed summary of the testimony sought and its relevance to the proceedings." Proposed 105-60.605(c). The proposed regulations also instruct GSA employees to refuse to comply with a court ruling or order requiring that information or testimony be provided unless compliance with the ruling or order has been approved by the "Appropriate Authority," at GSA and, under certain conditions, require GSA employees and former employees to defy court orders and to cite as authority to do so the GSA's proposed regulations and the decision United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). Proposed 105-60.607. Beyond that, the regulations allow the Appropriate Authority to require a plan of "all demands reasonably foreseeable." Proposed 105-60-605(c)(3).

Although these "directions" do not apply to Congressional or grand jury subpoenas, they apply to all other responses to subpoenas or similar demands regardless of whether or not the GSA is a party in the proceeding.

**The GSA's Proposed Instructions and Procedures for the Production and Disclosure of Information Are Overreaching and Beyond the Scope and Intent of Statutory Authority.**

GSA has a legitimate interest in coordinating the information it furnishes pursuant to a subpoena or other similar demand, and it has an interest in being free from numerous requests for uncompensated expert testimony. As explained below, however, "housekeeping" regulations that impose burdensome requirements on persons who request information and that authorize withholding of otherwise discoverable information have been challenged successfully in numerous proceedings. Where an agency of the United States or the United States is a party to the proceeding, courts have not allowed such overbroad "housekeeping" regulations to be used to block discovery. Courts recently have gone even further and have refused to allow such "housekeeping" regulations to be used even in situations where the agency or the United States is not a party. The rationale of these decisions generally has been that the Federal Rules of Civil Procedure provide ample protection against burdensome discovery requests and, ultimately, that discovery is best managed by the tribunal.

The Section's position is that, if limited to situations where the GSA is not a party to the underlying proceeding, the GSA may properly adopt housekeeping regulations requiring its current (but not former) employees to coordinate with the appropriate GSA officials the agency's responses to subpoenas or similar demands involving discovery, evidentiary, and testimonial requests. To attempt to reach beyond those limits is not supported by statutory authority and is unnecessary and ill-advised policy. When the GSA is a party to an action in connection with which a demand is made, agency counsel will be in a position to know of any demands through regular litigation channels and can use court (or administrative) processes to protect the GSA's interests. Where the GSA is not a party, required coordination makes sense (particularly with respect to demands for expert testimony), but even then, the regulations should not operate to prohibit disclosure of evidence.
The GSA has the authority to prescribe regulations providing for a centralized process of document production under the Federal Housekeeping Statute.

The GSA cites two laws as statutory authority for the proposed instructions and procedures: 40 U.S.C. § 486(c), authorizing the Administrator to issue regulations;[1] and 5 U.S.C. § 301, known as the Federal Housekeeping Statute. The latter authorizes the head of each executive department to prescribe regulations governing the procedure by which its records will be made available to the public.

Besides this statutory authority, the GSA relies on the text of the proposed regulations themselves, upon the Supreme Court case United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), and the rules GSA proposes are very similar to the Touhy regulations. In Touhy, a habeas corpus proceeding, the Supreme Court upheld the validity of departmental regulations centralizing the process of document production, and ruled that a lower level government official could not be held in contempt for refusing to produce documents that by regulation could only be released by the head of the agency (there, the Attorney General). The Supreme Court, however, expressly refused to decide "the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession." 340 U.S. at 467. It is this "ultimate" question that has been the focus of subsequent litigation over the years.

The Housekeeping Statute is not meant to bestow any substantive rights to agencies to withhold information.

The statutory authority for the "housekeeping" regulations is different today from the statute before the Supreme Court in United States ex rel. Touhy v. Ragen. The Federal Housekeeping Statute, 5 U.S.C. § 22, under which the Supreme Court decided Touhy, was amended in 1958 by adding what is now the second sentence. Thus the Housekeeping Statute, which is now found at 5 U.S.C. § 301, currently provides as follows:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1986) (emphasis added). As is apparent, the second sentence of the current Housekeeping Statute is very significant in evaluating the legitimacy of the proposed GSA regulations. Congress added the second sentence precisely to make clear that the government may not withhold information otherwise available to the public by virtue of this section:

According to the legislative history, Congress was concerned that the statute had been "'twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress."
[citations omitted] The House Report accompanying the 1958 amendment explained that the proposed amendment would 'correct' a situation that had arisen in which the executive branch was using the housekeeping statute as a substantive basis to withhold information from the public. [citation omitted].

Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 777 (9th Cir. 1994). The Exxon court concluded that the statute, its legislative history, and the Supreme Court case law interpreting it do not support a broad reading of the statute that would authorize agency heads to withhold documents or testimony. Id.; accord Ralph Construction, Inc., ASBCA No. 35633, 88-2 BCA § 20,731 ("The Supreme Court's decision in [Touhy] is a very narrow decision merely upholding the authority of the Attorney General under [5 U.S.C.
In the only case that has allowed use of regulations comparable to the Touhy regulations to block disclosure of information, the Eleventh Circuit upheld an agency's use of its "housekeeping" regulations to deny the release of agency information and the use of agency employees as expert witnesses in a private proceeding to which the United States was not a party. Moore v. Armour Pharmaceutical Co., 927 F.2d 1194 (11th Cir. 1991). In Moore, a private product liability action filed in district court, plaintiffs subpoenaed testimony from two physicians who worked for the Center for Disease Control ("CDC") regarding, inter alia, the evolution of the AIDS epidemic. Pursuant to its version of the Touhy regulations, HHS denied permission to the plaintiffs to depose the CDC employees based upon reasons such as the cumulative impact of granting such a "one time" request. The court upheld the agency's use of its regulations restricting employee testimony in the private litigation context.[2] The court noted that a thorough investigation of the employee's knowledge on this broad topic would be "similar to asking a Federal Aviation Administration employee, in an airline crash case, to detail the evolution of airline safety since the Wright brothers." Id. at 1197.

The Housekeeping Statute is not meant to bestow any substantive rights to agencies to restrict access to former agency employees.

The proposed regulations provide instructions for both present and former GSA employees to follow in response to subpoenas and other demands for information. However, neither the express language of the Housekeeping Statute nor its underlying purpose support this broad reach of authority to regulate the speech and conduct of former employees of government agencies. The Eastern District of Pennsylvania addressed this issue in 1979 when litigants challenged the Federal Energy Administration's ("FEA's") regulations which, like those proposed by GSA, purported to restrict a litigant's access to former agency personnel. The Court stated as follows:

[W]e fail to see the applicability of the [FEA's] regulations since . . . [they] are based upon 5 U.S.C. 301, which on its face applies only to employees and not former employees of government agencies and departments. It thus appears that the FEA regulations are inapplicable to [the two former employees].

Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 917 (E.D. Pa. 1979). Thus, the Housekeeping Statute does not authorize the GSA to restrict access to former personnel in judicial or administrative proceedings.

Court and administrative tribunal rules provide adequate protection against burdensome discovery, and issues of discovery are best left for the tribunal to decide.

It is a fundamental principle that the public "has a right to every man's evidence." See e.g., Blackmer v. United States, 284 U.S. 421, 438 (1932). The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature." Fed. R. Civ. P. 1. Courts have expressly stated that the Federal Rules supersede an agency's regulations.[3] See e.g., Metrex Research Corp. v. United States, 151 F.R.D. 122, 124 (D. Colo. 1993) (in a case involving the federal government as a party, the court found that an FDA regulation requiring plaintiff to obtain the FDA Commissioner's approval before deposing employees "does not supersede the Federal Rules of Civil Procedure" and that "[w]hen discovery of FDA personnel is relevant in civil litigation, it can be ordered despite the regulation.").

The ability to conduct discovery is a critical component of a party's litigation preparation, and even when the party from whom discovery or testimony is sought is the government, the Federal Rules provide sufficient protection from the harms that regulations comparable to those at issue in Touhy are intended to prevent.[4] See McElva v. Sterling Medical, Inc., 129 F.R.D. 510 (W.D. Tenn. 1990) (interviewing witnesses is a necessary part of preparation for litigation and Touhy does not provide authority to promulgate regulations restricting the release of documents sought pursuant to the Federal Rules of Civil Procedure). For example, Fed. R. Civ. P. 30(d)(1) deals with the assertion of privilege issues, and Fed. R. Civ. P.

30(d)(3) prevents burdensome discovery requests. Rule 26(c) expressly provides protective orders to limit discovery. Rule 45(c) protects persons subject to subpoenas, including persons who are not parties to the litigation (see Rule 45(c)(3)(B)(iii)). Additionally, Rule 26(b)(2) provides for limitations on discovery for various reasons. 

In cases where the United States is a party, courts have uniformly held that Touhy regulations are superseded by the Federal Rules of Civil Procedure.

The validity of Touhy regulations varies depending on whether the government is an uninvolved and uninterested party being asked to use its valuable resources to assist private litigation, or whether the government is itself involved in the underlying litigation. Where the government is a party in the proceeding, it possesses no greater rights than a private party has. See United States v. Procter & Gamble Co., 356 U.S. 677, 680 (1958) (“the government as a litigant is, of course, subject to the rules of discovery’’); Exxon Shipping Co. v. U.S. Dept. of Interior, supra, at 777 (Federal Rules apply where the United States is a party). This rule makes sense because the government's counsel will be aware of discovery requests and will, as discussed above, have the protection of the Federal Rules from discovery abuses.

As such, in cases where an agency of the United States was a party, courts have struck down the agency's refusal to produce information pursuant to its Touhy regulations. For example, in McElya v. Sterling Medical, Inc., supra, the plaintiff sued the United States and the Navy alleging negligence in a consolidated medical malpractice suit. The Navy attempted to require the plaintiff to comply with its "housekeeping" regulations. The court held that "discovery in this case should proceed solely pursuant to the Federal Rules of Civil Procedure without the application of [the Navy's housekeeping regulations]." The court pointed out "that we are not dealing here with a situation where one of two litigants, neither of whom are, or have been, connected with the [n]avy, is seeking to compel the expert opinion of a [n]avy employee."

Similarly, the United States Court of Federal Claims issued an order directing Department of Defense ("DoD") employees who were potential witnesses in a case to disregard DoD Directive 5405.2, which contains Touhy requirements similar to that of the GSA's proposed regulations. The Court's order ("Notice") to employees stated in part:

Therefore, the purpose of this Notice is to let you know that you may cooperate with plaintiffs' attorneys or not, as you wish. The court's interest is in seeing that neither party to this case has a procedural advantage over the other. Your informal interview may help counsel prepare this very complex case more efficiently, and this Order and Notice permits you to cooperate without regard to any contrary limitations of DOD Directive 5405.2 which might otherwise apply.


Likewise, in a very recent case, private litigants successfully overcame Touhy regulations where the United States was a party to the litigation. In United States v. United Technologies Corp., Case No. 95-8251-CIV-MARCUS, defendant United Technologies Corp. ("UTC") refused to comply with the requirements of DoD Directive 5405.2 for a "detailed statement regarding the proposed scope of particular depositions" -- requirements that are similar to the procedures proposed by GSA in proposed 105-60.605(c). The Southern District of Florida upheld UTC's refusal to comply with DoD's instructions, and held that the Directive "does not apply to civil discovery requests in cases in which the United States is a party to the case." Order dated May 15, 1996 (emphasis added).[6]

The Ninth Circuit has gone even further, reasoning that the same result should be obtained even when the United States is not a party. In Exxon Shipping Co. v. U.S. Dept' of Interior, supra, the court held that the Federal Housekeeping Statute does not authorize agency heads to prohibit their employees from testifying in any litigation. The court held that district courts should apply the Federal Rules of Civil Procedure when
deciding "on discovery requests made against government agencies, whether or not the United States is a party to the underlying action." Id., 34 F.3d at 780 (emphasis added).

It should be noted that GSA's proposed regulations do take cognizance of the fact that separate treatment is appropriate when the government is a party to litigation. Proposed 105-60.605(b) states, "[t]he Appropriate Authority may waive this requirement for a demand arising out of proceedings to which GSA or the United States is a party." However, this provision does not go far enough, because the waiver is not automatic. In cases where a waiver was not obtained, therefore, the proposed rules would conflict with current law.

Conclusion

There are legitimate reasons why GSA should coordinate the information it furnishes pursuant to a subpoena or other similar demand. The GSA's "housekeeping" regulations must, however, be more narrowly drawn. The regulations should not apply at all in situations where the United States or any of its agencies is a party, and should not purport to apply to former GSA employees. Even in proceedings not involving the United States or any of its agencies, the regulations should be narrowly drawn to apply only to the extent necessary to prevent use of agency employees as expert witnesses in private litigation.

* * *

The Public Contract Law Section[7] appreciates the opportunity to provide these comments, and is available to provide additional information or assistance as you may require.

Sincerely,

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ENDNOTES

1. 40 U.S.C. 486(c) provides, "The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations."

2. The Eleventh Circuit court also analyzed the scope of the subpoena under Federal Rules of Civil Procedure 26(b)(1) and 45(b). Id., at 1197.

3. Similarly, the Armed Services Board of Contract Appeals, ("ASBCA") has stated that "Touhy regulations may not supersede, amend or modify [the Board's] Rules." Inter-Continental Equipment, Inc., ASBCA No. 44840, 94-2 BCA 26,824; see also Ralph Construction, supra ("Discovery requests by litigants before the U.S. Courts and the Board, where the United States is a party, are properly made under the Federal Rules of Civil Procedure and the Rules of this Board, and addressed to the Government trial counsel"); but see Towne Realty, Inc., ASBCA No. 30538, 86-3 BCA 19,104 (DoD directive containing Touhy regulations
authorized and applicable, but ultimate issue of whether discovery requests must be answered and materials produced is for tribunal to decide).

4. The GSA's proposed regulations purport to apply in any proceeding, including actions in state court, in the Court of Federal Claims, and before the Boards of Contract Appeals actions, all which also have rules that provide protection against burdensome discovery requests. See, e.g., GSBCA Rule 15 (regarding general discovery matters, including the scope of discovery and discovery limitations); United States Court of Federal Claims Rule 26 (governing discovery in general).

5. Rule 26(b)(2) provides that discovery may be limited if the court determines that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

6. In the Order, the Court noted that the district court's analysis of the same issue in McElya v. Sterling Medical, Inc., cited above, was "particularly instructive and applicable to the instant case."

7. Council member Mary Ellen Coster Williams did not participate in the preparation of these comments.

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