

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE  
AMERICA, INC.'S MOTION IN  
LIMINE NO. 12 TO EXCLUDE  
TESTIMONY BY ATTORNEYS  
FROM THE OFFICE OF THE  
SOLICITOR**

**RECEIVED**

**NOV 15 2019**

**Office of Administrative Law Judges  
San Francisco, Ca**

**ORACLE'S MOTION IN LIMINE NO. 12 TO EXCLUDE ATTORNEY TESTIMONY**

**CASE NO. 2017-OFC-00006**

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## **I. INTRODUCTION**

Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* excluding testimony by lawyers from the Office of the Solicitor in three respects. First, no OFCCP attorney should be allowed to testify regarding any statistical analysis performed. Second, no OFCCP attorney should be allowed to testify regarding the facts that underlie the Second Amended Complaint’s claims of discrimination. Third, no attorney should be allowed to testify regarding what an Oracle employee said to them.

This motion is necessary because the attorneys from the Office of the Solicitor have made representations indicating that they are witnesses to facts such as the statistical analyses performed and the facts underlying OFCCP’s discrimination claims. For example, in response to Oracle’s motion to compel the deposition of OFCCP’s 30(b)(6) witness, OFCCP took the position that Jeremiah Miller, an attorney from the Office of the Solicitor, knew more about the facts and statistical analyses underlying the Second Amended Complaint’s (“SAC”) allegations than anybody at OFCCP. OFCCP subsequently submitted declarations by two attorneys from the Office of the Solicitor—M. Ana Hermosillo and Kiesha Cockett—offering fact-witness testimony regarding their interactions with Oracle’s employees.

Such testimony should not be allowed as it violates the rules of evidence as is set forth below.

## **II. ANALYSIS**

### **A. Attorney Testimony Would Violate the Rules of Evidence**

Attorneys from the Office of the Solicitor should not be called as witnesses at the hearing because they are not proper witnesses.

For example, regardless of whether an attorney from the Office of the Solicitor knows about the statistical analyses contained in OFCCP’s Show Cause Order and Notice of Violation, or SAC, statistical analyses are properly the sole province of experts. 29 C.F.R. § 18.702; *E.E.O.C. v. Republic Servs., Inc.*, 2008 WL 11388658, at \*2-3 (D. Nev. Nov. 26, 2008)

(statistical analyses are not basic math and require expert testimony).<sup>1</sup>

In addition, Ms. Hermosillo and Ms. Cockett should not be heard about what witnesses told them. That is for the witness to say. From Ms. Hermosillo and Ms. Cockett, such recounting would be hearsay. 29 C.F.R. §§ 18.801, 18.802. Moreover, such testimony would deprive Oracle of the ability to cross-examine a witness to determine the full scope—or not—of the employees’ emotions. *See, e.g.*, Fed. R. Evid. Art. VIII, Refs & Annos. (swearing of witnesses, evaluation of demeanor, and cross examination are critical means of evaluating witness testimony). In short, any testimony by an attorney from the Office of the Solicitor would be one step removed from the facts as they are.

Finally, any such testimony by an attorney would be needlessly cumulative, would confuse the issues, and would waste the limited time set for the hearing on this matter. 29 C.F.R. § 18.403. It must therefore be excluded.

**B. An Attorney Cannot Serve as a Witness and an Advocate**

To the extent OFCCP seeks to offer testimony of attorneys representing it at the hearing, that testimony is barred by the witness-advocate rule. *Symonette v. Gold Coast Staffing, Inc.*, Case No. 2001-LHC-02481, at \*5 (OALJ June 9, 2003) (“A lawyer can not ethically serve as a representative and a witness in the same proceeding . . . .”); D.C. R. Prof’l Conduct 3.7; Cal. R. Prof’l Conduct 3.7. Because “judges have inherent authority to refuse to let an attorney testify where doing so would clearly violate the ethical rules, and on this ground testimony by lawyers trying cases can be excluded,” any attempt by OFCCP to offer such testimony would necessitate significant argument on whether such testimony is ethical. *See* Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:3 (4th ed.).

**III. CONCLUSION**

For the foregoing reasons, Oracle respectfully requests that the Court exclude testimony by attorneys from the Office of the Solicitor.

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<sup>1</sup> *See also* Motion in Limine No. 1 to Exclude Untimely Madden Reports.

November 15, 2019

Respectfully submitted,

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