



**OFFICE OF GENERAL COUNSEL  
APPEAL PROCEDURES**

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OFFICE OF GENERAL COUNSEL  
APPEAL PROCEDURES

1. Notification of Final Judgments and Other Appealable Orders

When a legal unit receives a final judgment under 28 U.S.C. § 1291, or an order which is appealable under 28 U.S.C. § 1292(a)(1) or 1292(b), the Regional Attorney shall immediately forward copies by facsimile transmission to the Associate General Counsel, Appellate Services, and to the Associate General Counsel, Litigation Management Services (LMS). These individuals should also be notified by e-mail when a jury verdict is received, regardless of whether a judgment has been entered. Where there is doubt whether a given order is a final judgment or otherwise appealable order, the Appellate Services supervisor assigned to the particular legal unit should be consulted immediately.

2. Postjudgment Motions

If a final judgment or order is adverse in any way, the Regional Attorney shall determine whether to file a motion to alter or amend pursuant to Fed. R. Civ. P. 52(b) or 59(e), a motion for judgment as a matter of law under Rule 50(b), or a motion for a new trial under Rule 59(b). If the Regional Attorney determines to file any of these motions, the motion must be filed in the court and served on opposing counsel within 10 days of the entry of judgment. Filing means receipt by the court, not mailing. The Regional Attorney shall provide written notification on the day of filing to the Associate General Counsel of Litigation Management and Appellate Services. The Regional Attorney shall immediately notify Appellate Services when the court rules on the motion.

3. Regional Attorneys' Appeal Recommendations

a. Final Judgments

If a final judgment is adverse in any material way, the Regional Attorney shall make an appeal recommendation to the Associate General Counsel, Appellate Services within 20 days of receipt of the judgment, or, if a postjudgment motion is filed, within 20 days of the court's ruling on the motion. A copy of the appeal recommendation shall be simultaneously sent to the Associate General Counsel, LMS. A recommendation must



be made with respect to all final judgments which are not wholly favorable to the Commission, **whether or not appeal is recommended.**

b. Partial Judgments

Although an order adjudicating fewer than all the claims or the rights of fewer than all the parties is not a final judgment appealable under 28 U.S.C. § 1291, the district court may, under certain circumstances, direct the entry of an appealable final judgment as to those claims or parties pursuant to Rule 54(b), Fed. R. Civ. P. If a Regional Attorney believes that a nonfinal order meets the criteria of Rule 54(b), and an immediate appeal is appropriate, the Regional Attorney shall, within 20 days, make a recommendation to the Associate General Counsel, Appellate Services, to seek entry of a Rule 54(b) judgment. A copy of the recommendation should also be sent to the Associate General Counsel, LMS. The recommendation shall refer to any pertinent local rules, including time limits for requesting judgment, and shall follow the general format for appeal recommendations. The recommendation shall be accompanied by a proposed motion seeking Rule 54(b) judgment, a proposed order, and a proposed supporting memorandum of law. The General Counsel will decide whether to authorize the filing of the proposed motion in the district court.

If the district court enters a Rule 54(b) judgment, it shall be treated the same as a final judgment for purposes of these procedures.

c. Certification of an Interlocutory Order Under 28 U.S.C. § 1292(b)

Interlocutory orders may be appealed at the discretion of the court of appeals where the district court states in writing that: 1) it is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and 2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. If a Regional Attorney believes that an adverse interlocutory order satisfies section 1292(b), and an immediate appeal is appropriate, the Regional Attorney shall, within 5 days of receipt, send a copy of the order to the Associate General Counsels for LMS and Appellate Services. Within 15 days, the Regional Attorney shall make a written recommendation to the Associate General Counsel, Appellate Services, for section 1292(b) certification for immediate appeal of the ruling. The recommendation shall: (1) refer to any pertinent local rules, including time limits for requesting certification; (2) be accompanied by a proposed application seeking section 1292(b) certification, and a proposed memorandum in support; and (3) discuss all facts and legal authority relevant to the question of whether an interlocutory appeal is advisable. A copy of the recommendation shall be sent to the Associate General



Counsel, LMS. Appellate Services shall prepare a recommendation for or against certification and appeal in accordance with the Office of General Counsel (OGC) appeal procedures, and the General Counsel will decide whether to authorize the filing of the pleadings in the district court.

Because a petition for permission to appeal must be filed by Appellate Services in the court of appeals within 10 days of a district court's certification under section 1292(b), trial counsel shall **immediately** notify the Assistant General Counsel assigned to the case, or the Associate General Counsel, Appellate Services, when the district court issues a section 1292(b) certification. An order certified for interlocutory appeal under section 1292(b) shall be treated the same as a final judgment for purposes of these procedures.

#### 4. Content of Appeal Recommendations

The purpose of the Legal Unit's Appeal Recommendation is to provide the General Counsel and Appellate Services with its candid and objective assessment of whether to appeal from the ruling at issue. The Appeal Recommendation should be drafted with this purpose in mind, rather than as an "advocacy document." It should address the weaknesses as well as the strengths of the case and the arguments recommended on appeal, in order to enhance the appellate decisionmaking process within OGC.

Set out below is the basic format for the Legal Unit's Appeal Recommendation. This format may be adapted to meet the nature of the particular order which is the subject of the recommendation.

- a. Pertinent Dates and Timeframes
  - (1) date of judgment or other appealable order;
  - (2) dates of filing and court action on postjudgment motions, if any;
  - (3) date that notice of appeal must be filed (generally 60 days from entry of final order (see Fed. R. App. P. 4).



b. Statement of Issues Recommended for Appeal (if Any)

The recommendation should list each issue recommended for appeal and state whether each is an issue of law subject to de novo review; an issue of fact reviewable under the clearly erroneous standard of Fed.

c. Background and Factual Statement

The recommendation should identify all background and evidentiary facts relevant to each appealable issue as they exist in the record and not viewed through the lens of the applicable legal standard to the claim at issue (e.g., "in the light most favorable to the nonmoving party" for summary judgment claims). In other words, regardless of the standard of review, the recommendation should provide a comprehensive and objective view of the facts in the record, whether favorable or adverse to each claim. The factual background section should include as many pinpoint citations to the record as feasible. The history of the litigation and the district court's decision should each be briefly summarized.

d. Analysis

With respect to each issue identified as potentially appealable, the recommendation should give the legal, factual, and policy considerations militating for and against appeal. This discussion should not simply reiterate the arguments made prior to the district court's ruling. The analysis should focus specifically on the ruling, whether or not it was correct and why, and, if appropriate, how the Legal Unit advises overcoming any error on appeal (keeping in mind the standard of review identified in section (b) above). Relevant legal authorities, both positive and negative, must be cited, and the focus should be on controlling circuit court or Supreme Court law to the extent there is any on the issue.

e. Settlement History and Recommendation

The recommendation should include a basic settlement history of the case in chronological order. The settlement history should include past offers from both sides, if any, whether and what types of injunctive relief were discussed, and any other terms that were part of past settlement negotiations. The recommendation should also include the Legal Unit's assessment of the terms of an acceptable appellate settlement in light of the case's current procedural posture, along with its reasoning for that assessment.



5. Transmission of the Record

a. Unless otherwise instructed by Appellate Services, the Regional Attorney is responsible for ensuring that the record is promptly forwarded to Appellate Services once Appellate Services commences processing a case. In situations where the trial court ruled against the Commission in some or all respects, the legal unit should forward the record to Appellate Services no later than 20 days after final judgment or other appealable order is entered. Where the Commission prevailed in the trial court, the record shall be sent to Appellate Services within 20 days of receipt in the legal unit of a Notice of Appeal by another party.

b. For purposes of these procedures, the term "record" means the "record on Appeal" as defined in Rule 10 of the [Federal Rules of Appellate Procedures](#). This consists of: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the clerk of the district court. The "docket entries" referred to in (3) above is an official court document maintained in the district court's clerk's office, commonly known as the "docket sheet." It must be distinguished from a purely internal legal unit document, often referred to by that name, that lists all documents associated with a given trial court matter. It is the court's official listing of the "docket entries" or the docket sheet that Appellate Services requires. The "original papers and exhibits," referred to in (1) above, are easily identifiable through reference to the "docket entries."

c. The legal unit shall transmit the entire record unless otherwise directed by Appellate Services. The legal unit may send to Appellate Services either the originals or legible copies of all documents. The legal unit shall ensure that the exhibits in the record are legible, clearly labeled, and attached to the proper pleading or motion.

d. If there was an evidentiary hearing, the legal unit should order a transcript in every case in which the legal unit recommends in favor of appeal. Appellate Services may request that the legal unit order a transcript in other situations. The Regional Attorney is responsible for arranging payment for transcripts of district court proceedings. Delays in ordering transcripts or in their preparation should not delay the transmission of other parts of the record. Specifically, all court papers and other submissions, referenced in the "docket entries," must be sent in their entirety to Appellate Services within the timeframes specified above. Exceptions may be made only with the agreement of the appellate attorney assigned to the matter.



6. Appellate Services' Appeal Recommendations

Upon receipt of the Regional Attorney's appeal recommendation, Appellate Services shall prepare an appeal recommendation and forward both it and the Regional Attorney's recommendation to the General Counsel and the Associate General Counsel, LMS. A copy of the Appellate Services recommendation shall also be sent to the Regional Attorney.

7. Decision Whether to Appeal

The General Counsel shall decide whether an appeal should be pursued. The Associate General Counsel, LMS, or the Regional Attorney may raise with the General Counsel any objection to the Appellate Services recommendation.

8. Responsibilities of the Regional Attorney

a. File the Notice of Appeal

(1) The Regional Attorney is responsible for ensuring that the notice of appeal is timely filed. Upon notification from and as directed by Appellate Services, trial counsel shall file the notice of appeal in the form prescribed by the Federal Rules of Appellate Procedure (Appendix to Forms, form 1) and shall specify therein the name and address of the Appellate Services attorney responsible for the case. The notice shall be accompanied by a certificate of service upon opposing counsel.

(2) The Regional Attorney is responsible for contacting the district court to confirm receipt and filing of the notice of appeal at least one day prior to the filing due date. If the district court has not received the notice, trial counsel shall immediately forward the notice of appeal by express mail. If the notice of appeal is filed late, trial counsel shall confer with the Appellate Services attorney regarding preparation of a motion to extend the time for filing (see Rule 4(a)(5), Fed. R. App. P.).

b. File Record Designations, Docketing Statements, and Statement of Issues

In consultation with Appellate Services and in accordance with Rule 10, Fed. R. App. P. and local appellate court rules, trial counsel shall prepare and file any



designation of record, transcript order form, docketing statement, or statement of issues required to be filed in the district court.

c. Consult with Appellate Services

Legal unit staff should be available to work closely with Appellate Services staff during the appeal process. Legal unit trial counsel should provide whatever assistance the Appellate Services attorney requires during the pendency of the appeal.

9. Procedures for Appeals by Defendants

When a defendant files a notice of appeal, the Regional Attorney shall immediately notify the Associate General Counsel, Appellate Services, and the Associate General Counsel, LMS. Thereafter, the procedures outlined above shall be followed.

10. Writs

Requests to petition for a writ of mandamus or prohibition shall be made orally to the Associate General Counsel for Appellate Services and followed up with a written recommendation pursuant to OGC appeal procedures. Where the Commission is respondent in any such petition, the Regional Attorney shall **immediately** transmit the petition and complete record to the Associate General Counsel for Appellate Services.

11. Legal Unit Appellate Program

a. Designation of legal unit to Represent the Commission.

(1) A Regional Attorney can recommend to either the Associate General Counsel for LMS or the Associate General Counsel for Appellate Services that a legal unit represent the Commission in a case on appeal.

(2) The Associate General Counsel, Appellate Services, has primary responsibility for determining whether appellate cases are appropriate for legal unit representation. Appellate cases most suitable for legal unit representation include cases involving primarily factual issues where the Commission is appellee, subpoena appeals which do not raise novel issues of law, and cases that do not involve complex



legal issues and where the legal issues raised have recently been briefed by Appellate Services. Appellate cases least suitable for legal unit representation include cases where the Commission is appellant and cases involving novel or difficult legal issues.

(3) The Associate General Counsel, LMS, has primary responsibility for determining whether a legal unit should undertake a particular appeal. This determination will be based on an assessment of the quality of the office's legal work and, in consultation with the Regional Attorney, an assessment of the workload of the office and the availability of a qualified attorney.

(4) Disagreements between the Associate General Counsel, LMS, and the Associate General Counsel, Appellate Services, shall be resolved by the General Counsel.

b. Procedure for Legal Unit Appeals

(1) The Associate General Counsel, Appellate Services, has supervisory responsibility for all appeals.

(2) All appellate briefs shall be reviewed and approved by Appellate Services before being filed. Legal units will adhere strictly to deadlines imposed by Appellate Services.

(3) The responsible legal unit attorney will participate in a moot court in Appellate Services.

(4) A copy of the appellate record will be sent to Appellate Services within 20 days of entry of judgment or 20 days after appellee files its Notice of Appeal. Where the Commission is appellee, the Regional Attorney will promptly send Appellate Services a copy of appellant's brief.

12. Settlement and Mediation Activities at the Appellate Level

At the appellate court level, the Appellate Services attorney assigned to the matter will conduct settlement negotiations designed to resolve the case, whether at the initiative of any party or the court. The appellate attorney will represent OGC in any court-sponsored mediation effort or settlement conference. Legal unit trial counsel will be consulted prior to the beginning of negotiations, and as part of his or her discussions with the appellate attorney should inform the latter of prior settlement positions taken by



the legal unit in the case (recognizing that the bargaining strengths of the parties will have changed due to the result in the district court). Appellate Services and the legal unit will attempt to agree on the approach the agency will take in settlement negotiations. Appellate counsel will keep trial counsel apprised of the progress of negotiations and of any changes in Appellate Services' approach to settlement. Trial counsel will be consulted before Appellate Services agrees to submit a tentative settlement to the General Counsel. All settlements at the appellate level must be approved by the General Counsel.