REGIONAL ATTORNEYS' MANUAL

OFFICE OF
GENERAL COUNSEL

APRIL 2005

REGIONAL ATTORNEYS' MANUAL

PRELIMINARY MATERIAL

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GENERAL COUNSEL

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PRELIMINARY MATERIAL

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STATEMENT OF THE GENERAL COUNSEL

I am pleased to issue the *Regional Attorneys' Manual*, developed by the Equal Employment Opportunity Commission's Office of General Counsel. As indicated in the Introduction, this *Manual* supercedes the *Regional Attorneys' Deskbook*, which is hereby revoked.

Eric S. Dreiband, April 29, 2005

INTRODUCTION

This Equal Employment Opportunity Commission (EEOC or Commission) *Regional Attorneys' Manual* supercedes the *Regional Attorneys' Deskbook* issued in 1990 and revised in 1992. The *Manual* is in four parts. Part 1, *Administrative and Support Information,* contains information on the structure and functions of the EEOC's Office of General Counsel (OGC), OGC policies and procedures, and Commission policies. Part 2, *Initiating Litigation*, discusses prelitigation procedures, delegation of litigation authority, and obtaining approval for cases requiring General Counsel or Commission authorization. Part 3, *Conducting Litigation*, covers various trial practice matters, settlement standards and procedures, appeal procedures, and the professional responsibilities of OGC attorneys. Finally, Part 4, *Resources and Technical Assistance*, contains information on obtaining internal and external expert services, obtaining nonexpert litigation support services, and monitoring contracts. Since the *Manual* is available electronically on the Commission's Web site, it contains references and hyperlinks to resources available on the Commission's Web site as well as elsewhere on the Internet.

The *Regional Attorneys' Manual* has been developed and distributed by the EEOC's Office of General Counsel exclusively to provide internal guidance and practical support to Regional Attorneys in connection with their management of EEOC legal units. The *Manual* shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity against the EEOC or its employees. The *Manual* shall not be construed to create any right to judicial review involving the compliance or noncompliance of the EEOC or its employees with any matter dealt with in the *Manual*.

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ADMINISTRATIVE AND SUPPORT INFORMATION

OFFICE OF
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PART 1

ADMINISTRATIVE AND SUPPORT INFORMATION

SECTION I

OGC ADMINISTRATIVE POLICIES AND PROCEDURES

SECTION I

OGC ADMINISTRATIVE POLICIES AND PROCEDURES

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A. OFFICE SYSTEMS

1. Enforcement Unit Support and Assistance

a. Generally

Legal units should have standard procedures for responding to enforcement unit requests for advice and assistance and processing administrative matters (e.g., written requests for legal opinions, cause reviews, reviews of letters of determinations, reviews of proposed settlement and conciliation agreements, subpoena reviews, determinations on petitions to revoke or modify subpoenas, and defending subpoenas of records and staff). The procedures should include processing times agreed upon by the Regional Attorney and Office Director.

b. Recording Administrative Assignments

The legal unit should keep records of documents received from the enforcement unit requiring legal unit action, and should include at least the following information: date of receipt, type of assignment, legal unit staff member assigned and assignment date, and date of return to the enforcement unit. Use the "administrative cases" entry in the Commission's Integrated Mission System (IMS) regarding the following matters: Cause Review (pre-LOD), Subpoena Review, Draft Subpoena Determination, and Freedom of Information Act (FOIA).

c. Ongoing Advice and Assistance to Enforcement Unit Staff

Regional Attorneys should ensure that attorney staff are available to respond to questions or other requests for immediate assistance from enforcement unit staff. Although an attorney is always free to suggest that an investigator consult his or her supervisor about a question presented to the attorney, there should be no requirements that investigative staff follow any chain of authority or fulfill any other formal conditions before talking to an attorney. Attorneys should be completely accessible to investigators and the Regional Attorney is responsible for establishing an office environment in which investigators are comfortable in approaching attorneys informally on any kind of matter.

d. Subpoena Reviews

These administrative assignments are discussed separately because while they often can be performed quickly, they are sometimes processed under the same timeframes as more complex assignments such as cause reviews and preparation of subpoena enforcement actions, thus unnecessarily delaying investigations. Proposed subpoenas should normally be reviewed and returned to the enforcement unit within a few days of receipt in the legal unit. Legal units should consider having supervisors review proposed subpoenas themselves rather than incurring the administrative delays involved in assigning them to attorneys.

Nothing in this subsection should be read to minimize the importance of careful review of proposed subpoenas, ensuring that issuance of the subpoena is appropriate and that it is worded clearly and requests only relevant information.

2. Support of Enforcement Unit Work in Offices without Permanent Legal Staff

Offices without permanent legal unit staff should be visited by one or more attorneys at least once a month, and every effort should be made to make more frequent trips. Visits should be scheduled sufficiently in advance to enable enforcement staff to plan what to present to the attorney, and should be of sufficient duration to provide all necessary assistance. Attorneys should be formally assigned to the support of staff in these offices and substitutes should be designated on days when the assigned attorneys are not available. Names and telephone numbers of assigned attorneys and substitutes should be provided to enforcement unit staff. Whether or not legal staff are stationed in an office, investigators should be encouraged to contact assigned attorneys frequently and informally. Legal unit timeframes for processing administrative matters received from enforcement unit staff are the same regardless of whether the enforcement unit has permanent legal staff (see subsection 1.a. above).

3. Review of Attorney Work

Review of trial attorney work by a supervisor is essential to the consistent production of quality legal work. This includes review of matters such as preparation for depositions and negotiations, all written work other than routine correspondence, and preparation for all hearings and trials. Such review must be performed regardless of the ability of the trial attorney. The objective is not simply to ensure that legal work is

performed competently (which is required by professional ethical rules, *see* ABA Model Rules of Professional Conduct 1.1 (requiring competent representation) and 5.1 (holding legal managers and supervisors responsible for their staffs' compliance with the rules of professional conduct)), but that it is of the highest quality that the combined efforts of the legal unit staff can produce. Where legal work is performed by a supervisory trial attorney it should be reviewed by the Regional Attorney or another supervisory trial attorney.

4. Managing Attorneys in Offices without Supervisory Staff

Where attorneys are stationed in offices without supervisory staff, procedures must be established to ensure the same degree of review of their legal work that occurs for attorneys stationed in field legal units with onsite management. In addition, for each suit on which such an attorney is lead counsel, a complete set of the litigation and correspondence files described in subsection 9. below should be maintained in the legal unit where the Regional Attorney is stationed as well as in the office where the attorney is stationed.

5. Discovery Plans

A written discovery plan should be prepared prior to the filing of each suit. No particular format is required, but the plan should contain the following information: the elements of proof required for each claim, the evidence necessary to establish each element, the expected sources of the evidence, and the order (and to the extent possible the timing) in which through discovery or other means the evidence will be obtained. The plan should be modified as necessary as the litigation progresses.

6. Case Conferences

Regional Attorneys are required to conduct quarterly conferences on each case in litigation and to ensure that timely reports of the conferences are prepared. Copies of the reports should be submitted to the legal unit's Litigation Management Services (LMS) liaison by the 15th of the first month of each quarter. At the case conference, the Regional Attorney should meet with the assigned supervisory trial attorney and trial attorney(s) and discuss what has occurred in the case since the last conference and what activities are planned for the upcoming months. This is also a good time to ensure that the case files are complete and the indexes up to date. The Regional

Attorney should of course be involved in litigation planning on an ongoing basis, with the case conference being only one of many discussions he or she will have on each active case during the quarter. The requirement that formal case conferences be held has two purposes: first, to insure that at least once a quarter a structured meeting is held on each case, at which the merits of the case are carefully evaluated, litigation strategies are explored, and future activities are planned and scheduled; and second, through the reports of the conferences, to provide an accessible source of information for other agency staff on the course of the litigation.

The Regional Attorney will decide which of the participants is to prepare the report of the conference, but the Regional Attorney is responsible for the quality and uniformity of the unit's reports. A recommended format for the report is provided in the appendix to this subsection. The body of the report should contain the following information: a brief description of what the case is about (this should consist of more than just a conclusory statement of the claims; it should set out the principal facts on which the claims are based); significant activities by each party since the last report; an assessment of the merits of the case in view of the discovery conducted thus far; anticipated proof problems, procedural issues, and similar matters warranting comment; schedules set by the court for discovery and other pretrial and trial matters; the state of settlement negotiations, including an appraisal of the prospects for settlement; and projected future litigation activities. Future activities should be described with as much specificity as possible and dates provided for when each activity is expected to take place. The report should be easily understandable by a third party.

7. Case Status Sheets

For each case in litigation, a document should be maintained that records chronologically every court filing, every discovery request and response, and all other significant litigation activities such as court orders of any kind and court conferences and hearings. Litigation related activities such as communications with claimants and opposing counsel and office strategy meetings should be recorded on case conference reports rather than on case status sheets, which are meant to serve as an easy to follow record of formal litigation activities. Case status sheets should be submitted quarterly to your LMS liaison together with the case conference reports.

8. Mail

All mail should be reviewed by a supervisor and distributed to the attorney assigned to the matter as early as possible on the date of receipt. Although copies of litigation-related mail must be made for the office's litigation filing system, this must not delay distribution to the assigned attorney. If necessary to avoid delays in distribution, one copy of the document can be made immediately following supervisory review, with additional copying and the filing itself taking place later. Distribution to the assigned attorney should not be delayed if the supervisor will not be able to review the document immediately or if the supervisor's review will take more than a few minutes. In either of these situations, the assigned attorney should be given a copy of the document prior to supervisory review.

With the ever-increasing reliance on electronic communications today, communications that used to be mailed or faxed are now likely to be sent only by e-mail. Such e-mails are considered Commission "records" subject to EEOC Order 201.001, *Records Management*. Recipients of litigation-related e-mails should print copies of them for filing in the office's litigation filing system. (See discussion in *Manual* Part 1, section I.B., *Records Management: File Creation, Maintenance, and Disposition*, at subsection 3.b.) Like delays in distributing regular mail, delays in distributing e-mail -- especially e-mail that contains critical information or a deadline – should also be avoided. If an attorney is away from the office and will not be checking e-mail, the supervisor should have a contingency plan for screening the attorney's e-mail for critical and time-sensitive communications.

9. Litigation Filing System

Legal units should maintain court documents and discovery materials centrally in clearly marked and indexed binders. Legal units should maintain litigation related correspondence in separate centrally located files. Centralized files should not be removed from the office, and attorneys should generally work from copies of documents rather than the centrally maintained files.

Litigation files and litigation related correspondence files are considered Commission "records," subject to EEOC Order 201.001, *Records Management*. The *Order* sets forth procedures for creating, maintaining, retiring, and preserving litigation and other records. (See discussion in this Part of the *Manual*, section I.B., *Records Management: File Creation, Maintenance, and Disposition*, at subsection 4.a.)

10. Processing of Freedom of Information Act Requests

FOIA requests should be logged into IMS on the date of receipt and processed within the regulatory time limits. These time limits must be strictly followed. FOIA request files are Commission "records" that must be created, maintained, retired, and eventually destroyed as set forth in EEOC Order 201.001, *Records Management*. (See discussion in this Part of the *Manual*, section I.B., *Records Management: File Creation, Maintenance, and Disposition* at subsection 4.b.)

11. Library

A legal unit staff member should be assigned responsibility for filing library materials and keeping the library in order. All library materials should be filed within a week of receipt.

APPENDIX

CASE CONFERENCE REPORT

CASE NAME:

CASE NUMBER:

COURT:

DATE COMPLAINT FILED:

JUDGE:

MAGISTRATE:

STATUTE:

BASIS:

ISSUES:

CLASS OR INDIVIDUAL:

JURY OR BENCH TRIAL:

ATTORNEY:

SUPERVISOR:

DEFENDANT'S ATTORNEY:

DATE OF REPORT:

DATE OF LAST REPORT:

BRIEF DESCRIPTION OF CASE:

REPORT:

PLAN:

COMMENTS:

B. RECORDS MANAGEMENT: FILE CREATION, MAINTENANCE, AND DISPOSITION

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B. RECORDS MANAGEMENT: FILE CREATION, MAINTENANCE, AND DISPOSITION

EEOC Order 201.001, *Records Management*, dated December 3, 2003, sets forth procedures governing the creation and receipt, maintenance and use, as well as preservation or destruction of EEOC records. Subsection 1 sets forth the authority for EEOC's records management program. Subsection 2 defines "record" and subsections 3 and 4 explain requirements for creation, maintenance, preservation, or destruction of various types of OGC records. Subsections 5 and 6 summarize procedures for transmitting records to and retrieving records from a Federal Records Center (FRC). Subsection 7 gives procedures for transmitting records to the Washington National Archives. Subsection 8 sets forth the penalties for unauthorized destruction of federal records. Finally, subsection 9 has links to related information on the Internet.

1. Authority

Authority for the EEOC's records management program derives from the Federal Records Act and from regulations promulgated thereunder.

a. National Archives and Records Administration

In an amendment to the Federal Records Act, Pub. L. 98-497, Congress created the National Archives and Records Administration (NARA) and in so doing transferred responsibility for preservation and management of federal government records to NARA from the General Service Administration's National Archives and Records Service. 44 U.S.C. § 2102. Congress charged NARA with promulgating "standards, procedures, and guidelines" to assist federal agencies in their records management and disposition practices. 44 U.S.C. §2904 (a), (b), and (c)(1). NARA's regulations are codified at 36 C.F.R. Chapter XII. Part 1220 of the regulations concern records management programs by federal agencies. NARA has also promulgated extensive *General Records Schedules*, available on NARA's Web page. *General Records Schedules* provide disposal authorization for temporary administrative records common to several or all agencies of the federal government.

b. Office of the Chief Financial Officer and Administrative Services (OCFO/AS)

The Federal Records Act also spells out federal agencies' duties to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency." 44 U.S.C. § 3102. The Office of the Chief Financial Officer and Administrative Services (OCFO/AS) is responsible for administering the EEOC's records management program. Under this authority, the EEOC's Chief Financial Officer issued revised EEOC Order 201.001, *Records Management*, on December 3, 2003. The revised *Order* responds to NARA's directive that EEOC preserve significant records for historical purposes.[1] The Order also reflects the new reality that many Commission "records" are now electronic.

2. What Are Records?

The Federal Records Act and its implementing regulations define "record" and "nonrecord material," as well as "permanent record." Since the definitions are not enumerated in EEOC's *Records Management* Order, they are set forth below:

a. Record

The Federal Records Act defines "record" at 44 U.S.C. 3301 to include:

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved

[1] The revised Order replaces Order 201.001, *EEOC Records Disposition Program*, dated June 17, 1980, EEOC's *Interim Guidance on Records Retention*, issued in April 1997, and EEOC Order 201.001, *Disposition of Personal Papers and Official Records*, dated April 15, 1991.

only for convenience of reference, and stocks of publications and of processed documents are not included.

b. Nonrecord Materials

NARA's regulations, at 36 C.F.R. § 1220.14, define "nonrecord materials" as:

> those Federally owned informational materials that do not meet the statutory definition of records (44 U.S.C. 3301) or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.

c. Permanent Record

NARA's regulations, at 36 C.F.R. § 1220.14, define "permanent record" as:

> any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States. Permanent records include all records accessioned by NARA into the National Archives of the United States and later increments of the same records, and those for which the disposition is permanent on [Standard Form 115[2]], Request for Records Disposition Authority, approved by NARA on or after May 14, 1973.

After a specified period of time, all permanent records are transferred to NARA for permanent retention. The EEOC's *Records Management* Order classifies litigation files as permanent records.

d. Temporary Record

While not defined in NARA's regulations, materials that are classified as records but not as permanent records are temporary records. After a specified period of time, all temporary records are to be destroyed. The EEOC's *Records Management* Order classifies most of OGC's administrative and other files as temporary records.

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[2] For more information on Standard Form 115 (SF 115), see subsection 4, *infra.* For a copy of SF 115, see appendix 4, hereto.

3. Records Management Requirements

EEOC's *Records Management* Order sets forth some general records management requirements applicable to all headquarters and field offices. These are summarized briefly below.

a. General Requirements

EEOC's *Records Management* Order sets forth some general records management requirements applicable to all headquarters and field offices. One is that offices are to maintain all files on a calendar year basis (except for litigation and charge files and some financial and accounting records). *Order* at 3. When files are deemed "inactive" (see subsection 4, below), offices are to move them to a separate file drawer, shelf, or cabinet for storage until it is time to destroy them. *Order at 3*. The *Order* requires offices to annually inventory their files and report the volume of records held, disposed of, or retired to OCFO/AS.[3] *Order at 4*.

b. Electronic Records

The *Records Management* Order has instructions for electronic records that are subject to the Order. They are to be printed in hard copy and stored using the procedures summarized above, copied to a network share drive for backup and storage, stored on CDs or other electronic media format, or "[s]tored as data within an EEOC information system (database, document management system) which automates EEOC's record retention policies and schedules." *Order* at 4.

c. Personal Papers

The *Order* also has instructions regarding personal papers. Personal papers are not "records" covered by the Federal Records Act. Personal papers are to be maintained in an employee's office and filed separately from Commission records. When the same document contains both private matters and Commission business,

[3] The *Order* states that offices must report the results of their annual inventory of files to OCFO/AS using EEOC Form 163, *Annual Summary of Records Holding*. *Order at 4*. According to OCFO/AS, EEOC Form 163 is now obsolete, due to a change in procedures. The revised process for annual reviews will ensure the proper disposal of agency records.

extract or copy the portion of the file that relates to Commission business and store it with other Commission records. Extra copies of Commission records kept for reference are not personal papers. Employees may keep extra copies of documents that they drafted, reviewed, or acted upon, unless doing so will diminish the official records of the Commission or violate confidentiality. *Order* at 8.

4. Rules for Types of Records

Appendix A to EEOC Order 201.001, *Matrix by Office of Primary Responsibility for Commission Program Records, Including Administrative Records Common to All Offices* (appendix A to the *Order*), "establishes individual office records management responsibility on a record-by-record basis among the headquarters and their subordinate field offices." *Order* at 5. In other words, appendix A to the *Order* sets forth requirements for each EEOC office governing the creation and receipt of records, their maintenance and use, the length of time that particular records may be stored at EEOC, disposal authority, and retirement of temporary and permanent records. Offices may recommend changes to their responsibilities under the *Order* by submitting a justification memorandum along with a Standard Form 115 (SF 115), *Request for Records Disposition Authority*, to OCFO/AS. *Order* at 9. (See appendix 4, hereto, for a copy of SF 115).

For the purposes of this discussion, the OGC files enumerated in appendix A to the *Order* have been categorized as litigation files, Freedom of Information Act (FOIA) files, and administrative and other files. Each type is described below.

a. Litigation Files

OGC-HQ and the Regional Attorneys are responsible for 3 categories of litigation files. They are general litigation files, EEOC defendant case files, and EEOC plaintiff case files. These files are described in more detail in appendix 1 to this section of the *Manual* and in the *EEOC's Records Management* Order, at A-7 through A-9.

(1) Creating and Maintaining Litigation Files

OGC is responsible for creating and maintaining the Commission's general litigation file, which is to be arranged by issue or subject matter. Each field office litigation program as well as Systemic Litigation in OGC-HQ is responsible for creating and maintaining EEOC plaintiff case files, while OGC Internal Litigation bears responsibility for setting up and maintaining EEOC defendant case files. EEOC plaintiff

and defendant case files are to consist of one (or more) folder for each case, organized alphabetically by defendant name. (*Order* at A-8 - A-9).

(2) Retaining and Permanently Storing Inactive Litigation Files

All OGC litigation file folders are subject to the same retention and storage requirements. For the first year after the final court or Commission action in a case, its folders are to remain with the active files. Thereafter, the case is considered inactive and its folders may be moved to locked filing cabinets specifically designated for the Commission's closed files. Alternatively, OGC may move them to a Federal Records Center (FRC) with concurrence of OCFO/AS. Two years after the final action in the case, OGC should transfer all of the folders to NARA (through OCFO/AS) for permanent storage.

b. Freedom of Information Act Files

Appendix A to the *Records Management* Order describes 4 categories of FOIA files. While one category is in the exclusive domain of the Office of Legal Counsel (OLC), Regional Attorneys as well as OLC are responsible for maintaining and disposing of FOIA files in the 3 remaining categories: FOIA requests file, FOIA control file, and FOIA administrative file. These files are described in more detail in appendix 2 to this section of the *Manual* and in the EEOC's *Records Management* Order at A-14 through A-15.

(1) Creating and Maintaining FOIA Files

Each folder in the FOIA requests file consists of the original request for information under FOIA, a copy of the reply thereto, and all related supporting files, including copies of withheld or redacted records. The FOIA control file is a master list of FOIA requests that the office has handled. The FOIA administrative file consists of records related to implementation of FOIA. The EEOC's *Records Management* Order explains what documents should be stored in each type of FOIA file, but does not give particulars about how the files are to be organized.

(2) Retaining and Destroying Inactive FOIA Files

Requirements for retention and destruction of FOIA files vary depending upon the type of file. The EEOC *Order* requires offices to destroy FOIA requests files 2 years after the Commission's reply if: (a) the Commission granted access to all documents requested, (b) the documents did not exist, (c) the requester's descriptions were

inadequate, or (d) the requester failed to pay reproduction costs. On the other hand, if the Commission denied the request and the requester did not file an appeal, OGC may not destroy the documents until 6 years after the Commission's reply. OGC should destroy the FOIA control file 6 years after the date of last entry or 6 years after the final action by the Commission. Finally, OGC should destroy any records in the FOIA administrative file that are 2 years old.

c. Administrative Files and Other Materials

Appendix A to the EEOC's *Records Management* Order lists 8 broad categories of administrative files and other materials that OGC-HQ and the Regional Attorneys are responsible for. These are: (i) general correspondence files; (ii) office administrative files; (iii) schedules of daily activities; (iv) suspension (or "tickler") files; (v) transitory files; (vi) tracking and control records; (vii) finding aids (or indexes) for records authorized for destruction by NARA; and (viii) electronic mail and word processing system copies. These materials are described in more detail in appendix 3 to this section of the *Manual* and in the EEOC's *Records Management* Order at A-6 and A-140 through A-143.

(1) Creating and Maintaining Administrative Files

OGC's general correspondence files should contain all of the original incoming communications and initialed record copies of outgoing and interoffice correspondence arising from the functions for which OGC exists. Material in this file is to be arranged chronologically and alphabetically by issue and subject matter. The general correspondence files do not include material that is part of an official case file. In contrast to the general correspondence files, OGC's administrative files should consist of copies of records created and received by OGC relating to its internal administration or housekeeping activities instead of the functions for which it exists. Examples of OGC's administrative files include files regarding travel, training, budget reports, supply requests, staffing records, and facsimile machine logs. For details on creating and maintaining additional OGC files, see appendix 3 to this section of the *Manual* and the *Order* at A-6 and A-140 through A-143.

(2) Retaining and Destroying Inactive Administrative Files

OGC's general correspondence and administrative files can be destroyed after 3 years and after 2 years, respectively. For the first year, the files must remain with OGC's active files. After the first year, OGC may destroy all unofficial files and copies that are no longer needed for reference and may move the record file folders to locked

filing cabinets specifically designated for OGC's closed files. Alternatively, with concurrence of OCFO/AS, OGC may move the general correspondence and administrative files to a FRC until their respective destruction dates. Schedules of daily activities and tracking and control records are also scheduled to be destroyed after 2 years. Electronic copies of records may be deleted from hard disks and network drives 180 days after the record was produced. Transitory files may be destroyed after 3 months. Records in the suspense (or "tickler") file may be destroyed as soon as the action to which the record relates has been taken. Finally, finding aids for records that have been sent to NARA pending destruction may be destroyed when the related records are destroyed.

5. Transferring Records to Federal Records Center

NARA operates FRCs nationwide. According to the EEOC's *Records Management* Order, use of these FRCs play an important role in records management by save space and equipment costs. *Order* at 6. The *Order* directs offices to select files for transfer if: "(1) they are no longer needed to carry out day-to-day office operations and (2) they are ineligible for destruction for at least three (3) years from the date of transfer." *Order* at 6.

After selecting appropriate files for transfer, the legal unit should prepare a Standard Form 135 (SF 135), *Records Transmittal and Receipt*, and if necessary, a continuation sheet, SF 135-A. (Copies of SF 135 and 135-A are attached in appendices 5 and 6 to this subsection). The forms will serve as a packing list and to will be used to control the location and disposition of the files at the FRC.

a. Washington National Records Center

Offices served by the Washington National Records Center, located in Suitland, Maryland, are to forward all copies of the SF 135 to OCFO/AS. OCFO/AS will assign and record accession numbers on all copies of the SF 135 and will return them to the submitting office. The transferring office will then send the original and 2 copies of the SF 135 to the Washington National Records Center. These forms should arrive 2 or more weeks before the records shipment date. The Records Center approves the transfer by returning 2 copies of the SF 135 to the transferring office. Headquarters offices are to notify OCFO/AS to make arrangements to transfer the files to the Washington National Records Center. Non-HQ transferring offices must ship the records (by the lowest cost shipping method possible) to the Records Center within 30

days or will be required to resubmit the paperwork. Offices must also forward an annotated copy of the SF 35 to OCFO/AS for filing. *Order* at 6-7.

b. Field Federal Records Centers

Offices served by 1 of the FRCs in the field are to forward a copy (not the original) of the SF 135 to OCFO/AS. OCFO/AS will review the SF 135 to determine whether the proposed records transfer is appropriate and will notify the office by telephone or e-mail of acceptance or rejection of the request. The transferring office will then send the original and 2 copies of the SF 135 to the FRC. These forms should arrive 2 or more weeks before the records shipment date. The FRC will approve the transfer by recording the accession numbers on the forms and returning 2 copies of the SF 135 to the transferring office. The transferring office then must ship the records (by the lowest cost shipping method possible) to the FRC within 30 days or it will be required to resubmit the paperwork. It must also forward an annotated copy of each SF 135 to OCFO/AS for filing. *Order* at 7.

For information on what kind of boxes to use for storage, how to pack, label and seal the boxes, and for more information on shipping the records, see the *Order* at 7.

6. Retrieving Records from a Federal Records Center

To retrieve records from a FRC, the requesting office should complete an Optional Form 11 (OF 11), *Reference Request - Federal Records Center*, identifying the records requested by accession number. (A copy of OF 11 is attached as appendix 7). Requests from HQ offices must be sent to the FRC through OCFO/AS. Field offices may send requests directly to the FRC storing the records, but must send a copy to OCFO/AS for review and approval. *Order* at 8.

7. Transfer of Records to National Archives

All litigation records, as well as other Commission records of permanent historical or archival value, must be transferred to the National Archives. To initiate the transfer, the transferring office must prepare a Standard Form 258 (SF 258), *Agreement to Transfer Records to the National Archives of the United States*, and forward the form to OCFO/AS for review, approval, and further instructions. *Order* at 8. (For a copy of SF 258, see appendix 8).

8. Damage to or Unauthorized Destruction of Records

"The maximum penalty for the willful and unlawful destruction, damage, or alienation of Federal records is [a] $2,000 fine, 3 years in prison, or both (18 U.S.C. 2071)." *Order* at 10.

9. Web Resources

Title	Description and Web Address
Form 11	Text of Optional Form 11 (OF 11), *Reference Request - Federal Records Center,* on: • NARA's Web site in pdf http://www.archives.gov/records_center_program/of_11.pdf • General Services Administration's (GSA's) Web site in Accessible FormNet Version and pdf http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?formType=ALL
Form 115	Standard Form 115 (SF 115), *Request for Disposition Authority* on NARA's Web site: • text in pdf http://www.archives.gov/records_management/pdf/sf115.pdf • instructions in html http://www.archives.gov/records_management/policy_and_guidance/standard_form_115.html

Title	Description and Web Address
Form 135 and Form 135a	Standard Forms 135 (SF 135) and SF 135a, *Records Transmittal and Receipt* and continuation sheet • SF 135 on NARA's Web site in microsoft word and in pdf, with instructions for the Federal Records Centers and for Washington National Record Center http://www.archives.gov/records_center_program/forms/sf_135_intro.html • SF 135 and 135a on GSA's Web site in pdf, Accessible FormNet Version, and FormFlow version 1.1 http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?formType=ALL
Form 258	Text of Standard Form 258, *Agreement to Transfer Records to the National Archives of the United States* • on NARA's Web site in pdf http://www.archives.gov/records_center_program/sf_258.pdf • on GSA's Web site in pdf, Accessible FormNet Version, and FormFlow version 1.1 http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?formType=ALL
General Records Schedules	Schedules for retention, preservation, and destruction of documents on National Archives and Records Administration's Web page http://ardor.nara.gov/grs/index.html
GSA Forms Library	GSA Forms Library - main Web page for GSA Forms Library. Has links to Standard, Optional, and GSA Forms, including OF 11, SF 115, SF 135, and SF 258 http://www.gsa.gov/Portal/gsa/ep/formsWelcome.do?pageTypeId=8199&channelId=-13253
Law on Records Management by Federal Agencies	Law on records management by federal agencies on NARA's Web site http://www.archives.gov/about_us/basic_laws_and_authorities/federal_agencies.html

Title	Description and Web Address
NARA	Main Web page of NARA - contains information on management and disposition of federal records http://www.archives.gov/welcome/index.html
NARA Electronic Forms and Resources	NARA's Web page for electronic forms and resources related to records management, including OF 11, SF 135, and SF 258 http://www.archives.gov/records_center_program/forms/forms.html
NARA Law	Law establishing NARA on NARA's Web site http://www.archives.gov/about_us/basic_laws_and_authorities/nara.html
NARA Records Center Program	NARA's main Web page for Records Center program http://www.archives.gov/records_center_program/index.html
NARA Records Management	NARA's main Web page for records management information http://www.archives.gov/records_management/index.html
NARA Regulations	NARA regulations on NARA's Web site http://www.archives.gov/about_us/regulations/regulations.html

APPENDIX 1

OGC LITIGATION FILES (PERMANENT RECORDS)

Description	Maintenance and Contents	Disposition
General Litigation Files (*Order* at A-7)	A litigation folder containing the official record copy of litigation records for each case. [OGC] initiates or coordinates. Arranged by issue/subject.	**Retain** for **1 year** in office after final court or Commission action in the case, at which time files are considered inactive. After 1st year, record copies of the files may be stored elsewhere in agency in locked storage or sent to a federal storage facility. **2 years** after final action in case, OGC transfers all folders to NARA (through OCFO/AS) for **permanent storage**.
EEOC Defendant Case File (*Order* at A-8)	Folders containing the official record copy of all the litigation records for all cases where the Commission is the defendant and is represented by OGC (OGC-HQ Internal Litigation). Arranged alphabetically by defendant's name.	
EEOC Plaintiff Case File (*Order* at A-9)	Folders containing the official record copy of all the litigation records for all cases where the Commission is the plaintiff and is represented by OGC (OGC-HQ Systemic Litigation and OGC field litigation). Arranged alphabetically by defendant's name.	

APPENDIX 2

OGC FOIA FILES
(TEMPORARY RECORDS)

Description	Maintenance and Contents	Disposition
FOIA Requests File (*Order* at A-14)	The original requests for information under FOIA, a copy of the reply thereto, and all related supporting files, including copies of withheld or redacted records.	**Destroy 2 years** after Commission's reply if Commission granted access to all documents requested, the documents did not exist, the descriptions were inadequate, or the requester failed to pay reproduction costs. **Destroy 6 years** after Commission's reply if Commission denied the requested and the requester did not appeal. For FOIA appeals see *Order* at A-14 - A-15.
FOIA Control File (*Order* at A-15)	Registers and similar records listing date, nature, and purpose of request and name and address of requester.	**Destroy 6 years** after date of last entry or **6 years** after final action by Commission.
FOIA Administrative File (*Order* at A-15)	Records of the Commission relating to its implementation of the FOIA, including notices, memoranda, routine correspondence, and related records.	**Destroy** when file is **2 years** old.

APPENDIX 3

OGC ADMINISTRATIVE AND OTHER FILES (TEMPORARY RECORDS)

Description	Maintenance and Contents	Disposition
General Correspon-dence Files (*Order* at A-6)	All of the original incoming communications and initialed record copies of outgoing and interoffice correspondence arising from the functions for which the Office of General Counsel exists. The file does not include material that is part of an official case file, or materials arising from OGC's internal administration or housekeeping activities. Arranged chronologically and alphabetically by issue/subject.	**Retain** for **1 year** in office, then destroy all unofficial files and copies when no longer needed for reference. After 1st year, record copies of the files may be stored elsewhere in agency in locked storage or sent to a federal storage facility. **Destroy** when files are **3 years** old.
Office Administrative Files (*Order* at A-140)	Copies of records created and received by the office related to the internal administration or housekeeping activities of the office rather than the functions for which it exists. Examples include files regarding travel, training, budget reports, supply requests, staffing records, and facsimile machine logs. Excludes any reports or other materials that do not serve as unique documentation of the programs or functions of the office.	**Retain** for **1 year** in office, then destroy all unofficial files and copies when no longer needed for reference. After 1st year, record copies of the files may be stored elsewhere in agency in locked storage or sent to a federal storage facility. **Destroy** when files are **2 years** old.

Description	Maintenance and Contents	Disposition
Schedules of Daily Activities (*Order* at A-141)	Calendars, appointment books, schedules, logs, diaries, and other records documenting meetings, appointments, telephone calls, trips, visits, and other activities by office managers, supervisors, and employees while serving in a personal capacity. Excludes personal materials.	**Retain** for **1 year** in office, then destroy all unofficial files and copies when no longer needed for reference. After 1st year, record copies of the files may be stored elsewhere in agency in locked storage or sent to a federal storage facility. **Destroy** when files are **2 years** old.
Tracking and Control Records (*Order* at A-143)	Logs, registers, and other records used to control or document the status of correspondence, reports, or other records authorized for destruction by NARA.	**Retain** until **2 years** old or until **2 years** after the last entry, whichever is applicable, then **destroy**.
Electronic Mail and Word Processing System Copies (*Order* at A-143)	Electronic copies of records created on electronic mail and word processing systems and used solely to generate a recordkeeping copy.	**Delete** electronic copies from hard disks, network drives, shared network drives, etc., **180 days** after recordkeeping copy was produced if not of further administrative value.
Transitory Files (*Order* at A-142)	Documents of short-term interest which have no documentary or evidential value. Examples include notices of holidays or bond campaigns.	**Destroy** after **3 months**.

Description	Maintenance and Contents	Disposition
Suspense Files (*Order* at A-142)	Notices or other reminders for office that an action is required by the office on a given date or that a reply to an action is expected and, if not received, should be traced on a given day. Arranged in chronological order.	**Destroy** records relating to action after action has been taken, as long as suspense copy is a duplicate.
Finding Aids (Or Indexes) (*Order* at A-143)	Indexes, lists, registers, and other finding aids used only to provide access to records authorized for destruction by NARA.	**Destroy** when related records are destroyed.

APPENDIX 4

STANDARD FORM 115:
REQUEST FOR RECORDS DISPOSITION AUTHORITY

APPENDIX 5

STANDARD FORM 135:
RECORDS TRANSMITTAL AND RECEIPT

RECORDS TRANSMITTAL AND RECEIPT

Complete and send original and two copies of this form to the appropriate Federal Records Center for approval prior to shipment of records. See specific instructions on reverse.

1. TO *(Complete the address for the records center serving your area as shown in 36 CFR 1228.150.)*

Federal Records Center

5. FROM (Enter the name and complete mailing address of the office retiring the records. The signed receipt of this form will be sent to this address)

2. AGENCY TRANSFER AUTHOR-IZATION	TRANSFERRING AGENCY OFFICIAL *(Signature and Title)*	DATE
3. AGENCY CONTACT	TRANSFERRING AGENCY LIAISON OFFICIAL *(Name, office and telephone No.)*	
4. RECORDS CENTER RECEIPT	RECORDS RECEIVED BY *(Signature and Title)*	DATE

Fold Line

6. RECORDS DATA

ACCESSION NUMBER									COMPLETED BY RECORDS CENTER			
RG *(a)*	FY *(b)*	NUMBER *(c)*	VOLUME *(cu. ft.)* *(d)*	AGENCY BOX NUMBERS *(e)*	SERIES DESCRIPTION *(With inclusive dates of records)* *(f)*	RESTRIC-TION *(g)*	DISPOSAL AUTHORITY *(Schedule and item number)* *(h)*	DISPOSAL DATE *(i)*	LOCATION *(j)*	SHELF PLAN *(k)*	CONT. TYPE *(l)*	AUTO. DISP. *(m)*

INSTRUCTIONS FOR COMPLETION OF STANDARD FORM 135

FOR COMPLETION BY THE TRANSFERRING AGENCY

Items 1, 2, 3, and 5 are self-explanatory. Specific instructions for item 6 are as follows:

Col. ***Accession Number.*** **A separate accession number is required for each series of records listed on the form. A series consists of records having the same disposal authority and disposal date that are transferred together to the records center. The accession number is entered in three parts, consisting of:**

(*a*) **The NARA record group number assigned to the records of the agency making the transfer;**

(*b*) **The last two digits of the current fiscal year; and**

(*c*) **A four digit sequential number obtained in advance from the records center. (Arrangements may be made with the center to have these numbers assigned by the agency records officer or other official.)**

(*d*) ***Volume.*** **Enter the volume in cubic feet of each series of records being transferred.**

(*e*) ***Agency Box Numbers.*** **Show the inclusive box numbers for each series of records being transferred. The agency shall number each carton sequentially as follows: 1 of 25, 2 of 25, 3 of 25, etc. (Each new series of records should begin with carton number 1.) To facilitate control of the records and future reference service, the agency also shall mark each container with the assigned accession number prior to shipment.**

(*f*) ***Series Description.*** **Describe the records in sufficient detail to allow the records center to check for proper application of the disposal schedule. Inclusive dates of the records should be indicated. Show the organizational component that created the records when it is other than that shown in item 5.**

(*g*) ***Restriction.*** **Enter one of the following codes to show a restriction on use of the records. Restrictions other than (or in addition to) security classifications, such as limiting access to certain agency officials, are to be specified by a statement in the Series Description column (f).**

Code	*Restrictions*
Q	**Q security classification**
T	**Top Secret security classification**
S	**Secret security classification**
C	**Confidential security classification**
R	**Restricted use - witnessed disposal not required (specify in column (f))**
W	**Restricted use - witnessed disposal required (specify in column (f))**
N	**No restrictions.**

(*h*) ***Disposal Authority.*** **For each series of records, cite the agency schedule and specific item number authorizing disposal. Cite the NARA disposal job and item number if it has not been incorporated into an updated agency schedule.**

(*i*) ***Disposal Date.*** **Applying the disposal authority previously cited in column (h), enter the month and year in which the records may be destroyed.**

FOR COMPLETION BY THE RECORDS CENTER

Item 4 is self-explanatory. Specific instructions for item 6 are as follows:

Col.

(*j*) ***Location.*** **The records center annotates the shelf location of the first carton for each series of records.**

(*k*) ***Shelving Plan.*** **The records center enters the appropriate code from Chap. 7-10e, HB, Records Center Operations (NAR P 1864.1A), to reflect the shelving system.**

(*l*) ***Container Type.*** **The records center enters the appropriate code from Chap. 7-10h, NAR P 1864.1A, to reflect the type of container in which the records are retired.**

(*m*) ***Automatic Disposal.*** **The records center enters either *Y* (yes) to indicate automatic disposal applies or *N* (no) indicating that the agency wishes to receive disposal concurrence notice prior to destruction of the records. Automatic disposal is applied only when previously agreed upon by the agency.**

Use Standard Form 135-A, Records Transmittal and Receipt Continuation, when additional space is required for listing records data.

APPENDIX 6

STANDARD FORM 135-A:
RECORDS TRANSMITTAL AND RECEIPT
(CONTINUATION)

RECORDS TRANSMITTAL AND RECEIPT (Continuation)	This form is to continue listing of Records Data when space on SF 135 is not adequate. Instructions for completion of SF 135 apply.	TRANSFERRING AGENCY'S NAME	DATE	PAGE OF PAGES

ACCESSION NUMBER			VOLUME (cu. ft.)	AGENCY BOX NUMBERS	SERIES DESCRIPTION (With inclusive dates of records)	RESTRIC-TION	DISPOSAL AUTHORITY (Schedule and item number)	DISPOSAL DATE	COMPLETED BY RECORDS CENTER			
RG	FY	NUMBER							LOCATION	SHELF PLAN	CONT. TYPE	AUTO. DISP.
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)

APPENDIX 7

OPTIONAL FORM 11:
REFERENCE REQUEST - FEDERAL RECORDS CENTERS

REFERENCE REQUEST - FEDERAL RECORDS CENTERS

NOTE: Use a separate form for each request.

SECTION I - TO BE COMPLETED BY REQUESTING AGENCY

ACCESSION NO.	AGENCY BOX NUMBER	RECORDS CENTER LOCATION NUMBER
	OF	

DESCRIPTION OF RECORD(S) OR INFORMATION REQUESTED

☐ BOX

☐ FOLDER (include file number and title)

REMARKS

NATURE OF SERVICE

☐ FURNISHED COPY OF RECORD(S) ONLY ☐ PERMANENT WITHDRAWAL ☐ TEMPORARY LOAN OF RECORD(S) ☐ REVIEW ☐ OTHER (Specify)

SECTION II--FOR USE BY RECORDS CENTER

☐ RECORDS NOT IN CENTER CUSTODY ☐ RECORDS DESTROYED

☐ WRONG ACCESSION NUMBER - PLEASE RECHECK

☐ WRONG BOX NUMBER - PLEASE RECHECK

☐ WRONG CENTER LOCATION - PLEASE RECHECK

☐ ADDITIONAL INFORMATION REQUIRED TO IDENTIFY RECORDS REQUESTED

☐ MISSING *(Neither record(s), information nor charge card found in container(s) specified)*

☐ RECORDS PREVIOUSLY CHARGED OUT TO *(Name, agency and date):*

REMARKS

SAMPLE ONLY

DATE	SERVICE	TIME REQUIRED	SEARCHER'S INITIALS

SECTION III--FOR USE BY RECORDS CENTER

NAME OF REQUESTER	TELEPHONE NO. ☐ FTS	DATE	RECEIPT OF RECORDS

NAME AND ADDRESS OF AGENCY

(Include street address, building, room no., and ZIP Code)

(In Washington, D.C. area also include STOP number)

Requester please sign, date and return this form, for file item(s) listed above, *ONLY* if the block to right has been checked by the Records Center. ☐

SIGNATURE	DATE

REFERENCE REQUEST - FEDERAL RECORDS CENTERS

NOTE: Use a separate form for each request.

SECTION I - TO BE COMPLETED BY REQUESTING AGENCY

ACCESSION NO.	AGENCY BOX NUMBER	RECORDS CENTER LOCATION NUMBER
	OF	

DESCRIPTION OF RECORD(S) OR INFORMATION REQUESTED

☐ BOX

☐ FOLDER (include file number and title)

REMARKS

NATURE OF SERVICE

☐ FURNISHED COPY OF RECORD(S) ONLY ☐ PERMANENT WITHDRAWAL ☐ TEMPORARY LOAN OF RECORD(S) ☐ REVIEW ☐ OTHER (Specify)

SECTION II--FOR USE BY RECORDS CENTER

☐ RECORDS NOT IN CENTER CUSTODY ☐ RECORDS DESTROYED

☐ WRONG ACCESSION NUMBER - PLEASE RECHECK

☐ WRONG BOX NUMBER - PLEASE RECHECK

☐ WRONG CENTER LOCATION - PLEASE RECHECK

☐ ADDITIONAL INFORMATION REQUIRED TO IDENTIFY RECORDS REQUESTED

☐ MISSING *(Neither record(s), information nor charge card found in container(s) specified)*

☐ RECORDS PREVIOUSLY CHARGED OUT TO *(Name, agency and date):*

REMARKS

SAMPLE ONLY

DATE	SERVICE	TIME REQUIRED	SEARCHER'S INITIALS

SECTION III--FOR USE BY RECORDS CENTER

NAME OF REQUESTER	TELEPHONE NO. ☐ FTS	DATE	RECEIPT OF RECORDS

NAME AND ADDRESS OF AGENCY

(Include street address, building, room no., and ZIP Code)

(In Washington, D.C. area also include STOP number)

Requester please sign, date and return this form, for file item(s) listed above, *ONLY* if the block to right has been checked by the Records Center. ☐

SIGNATURE	DATE

NSN 7540-00-682-6423

AGENCY SUSPENSE FILE COPY

OPTIONAL FORM 11 (Rev. 7-87)
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
36 CFR 1228.162

REFERENCE REQUEST - FEDERAL RECORDS CENTERS

NOTE: Use a separate form for each request.

SECTION I - TO BE COMPLETED BY REQUESTING AGENCY

ACCESSION NO.	AGENCY BOX NUMBER	RECORDS CENTER LOCATION NUMBER
	OF	

DESCRIPTION OF RECORD(S) OR INFORMATION REQUESTED

☐ BOX

☐ FOLDER (include file number and title)

REMARKS

NATURE OF SERVICE

☐ FURNISHED COPY OF RECORD(S) ONLY ☐ PERMANENT WITHDRAWAL ☐ TEMPORARY LOAN OF RECORD(S) ☐ REVIEW ☐ OTHER (Specify)

SECTION II--FOR USE BY RECORDS CENTER

☐ RECORDS NOT IN CENTER CUSTODY ☐ RECORDS DESTROYED

☐ WRONG ACCESSION NUMBER - PLEASE RECHECK

☐ WRONG BOX NUMBER - PLEASE RECHECK

☐ WRONG CENTER LOCATION - PLEASE RECHECK

☐ ADDITIONAL INFORMATION REQUIRED TO IDENTIFY RECORDS REQUESTED

☐ MISSING *(Neither record(s), information nor charge card found in container(s) specified)*

☐ RECORDS PREVIOUSLY CHARGED OUT TO *(Name, agency and date):*

REMARKS

SAMPLE ONLY

DATE	SERVICE	TIME REQUIRED	SEARCHER'S INITIALS

SECTION III--FOR USE BY RECORDS CENTER

NAME OF REQUESTER	TELEPHONE NO. ☐ FTS	DATE	RECEIPT OF RECORDS

NAME AND ADDRESS OF AGENCY

(Include street address, building, room no., and ZIP Code)

(In Washington, D.C. area also include STOP number)

Requester please sign, date and return this form, for file item(s) listed above, *ONLY* if the block to right has been checked by the Records Center. ☐

SIGNATURE	DATE

NSN 7540-00-682-6423

RECORDS CHARGE OUT COPY

OPTIONAL FORM 11 (Rev. 7-87)
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
36 CFR 1228.162

APPENDIX 8

STANDARD FORM 258:
AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES

AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES

1. INTERIM CONTROL NO. *(NARA Use Only)*

TERMSOF AGREEMENT

The records described below and on the attached _____ pages are deposin the National Archives of the United States in accordance with 44 U.S.C. 2107. The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.

In accordance with 44 U.S.C. 2108, custody of these records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256 and such other rules and regulations as may be prescribed by the Archivist of the United States (the Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the *Guide to the National Archives of the United States*. The Archivist may destroy, donate, or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other nonrecord material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have been copies in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.

2A. AGENCY APPROVAL

Signature_____ Date_____

2B. NAME, TITLE, MAILING ADDRESS

3A. NARA APPROVAL

Signature_____ Date_____

3B. NAME, TITLE, MAILING ADDRESS

RECORDS INFORMATION

4A. RECORDS SERIES TITLE

4B. DATE SPAN OF SERIES

(Attach any additional description.)

5A. AGENCY OR ESTABLISHMENT

5B. AGENCY MAJOR SUBDIVISION

5C. AGENCY MINOR SUBDIVISION

5D. UNIT THAT CREATED RECORD

5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS

Name_____

Telephone Number (____) _____

6. DISPOSITION AUTHORITY:

7. IS SECURITY CLASSIFIED INFORMATION PRESENT? ☐ NO ☐ YES

LEVEL: ☐ Confidential ☐ Secret ☐ Top Secret

SPECIAL MARKINGS: ☐ RD/FRD ☐ SCI ☐ NATO ☐ Other _____

INFORMATION STATUS: ☐ Segregated ☐ Declassified

8. CURRENT LOCATION OF RECORDS

_____ Agency (Complete 8A only)

_____ Federal Records Center (Complete 8B only)

8A. ADDRESS

_____

_____

_____

9. PHYSICAL FORMS

☐ Paper Documents ☐ Posterss

☐ Paper Publications ☐ Maps and Charts

☐ Microfilm/Microfiche ☐ Arch / Eng Drawings

☐ Electronic Records ☐ Motion / sound / Video

☐ Photographs ☐ Other *(specify)*: _____

10. VOLUME: CONTAINERS:

Cu. Mtr.——— (Cu. Ft. ———) Number ——— Type ———

11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES

12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE?

☐ YES ☐ NO *(If no, attach limits on use and justification.)*

13. ARE RECORDS SUBJECT TO THE PRIVACY ACT?

☐ YES ☐ NO *(If yes, cite Agency system Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)*

14. ATTACHMENTS

☐ Agency Manual Excerpt ☐ Listing of Records Transferred

☐ Additional Description ☐ NA form 14097 or Equivalent

☐ Privacy Act Notice ☐ Microform Inspection Report

☐ Other *(specify)*: _____ ☐ SF(s) 135

8B. FRC ACCESSION NUMBER CONTAINER NUMBER(S) FRC LOCATION

NARA PROVIDES

15. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION

RG

16. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES

Signature_____ Date _____

17. NATIONAL ARCHIVES ACCESSION NO.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

SF 258 (9/95)
Prescribed by NARA 36 CFR 1226

INSTRUCTIONS

GENERAL: This form may be initiated by the transferring agency or the National Archives and Records Administration (NARA). Prepare a separate SF 258 for each series or SF 115 item being transferred.

WHEN INITIATED BY AN AGENCY: The agency completes blocks 2 and 4 through 14 using the instructions below. Block 2 must be signed and dated. Send the original to the appropriate address 60 days before the records are to be transferred to the National Archives.

WHEN INITIATED BY NARA: NARA completes blocks 1 and 4 through 14 and sends the original to the transferring agency's records officer. The agency completes block 2, completes or corrects blocks 4 through 14. Block 2 must be signed and dated. The agency sends the original to the appropriate address 60 days before the records are to be transferred to the National Archives.

MAILING ADDRESS: Mail the completed form to either the address below or the appropriate National Archives regional archives.

Accessions Control Staff (NN-E)
Office of the National Archives
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

If you do not know the address of the appropriate regional archives, telephone the Accessions Control Staff at 301-713-6655.

* * * *

1. INTERIM CONTROL NUMBER: *Leave blank.* NARA will fill in.

2. AGENCY APPROVAL: The agency records officer having the delegated authority to transfer the records with NARA should sign and date the form here (2A) and provide his/her name, title and mailing address (2B).

3. NARA APPROVAL: When a proposal to transfer records to the National Archives of the United States is approved, the appropriate NARA official completes 3A and 3B.

4A/B. RECORDS SERIES TITLE/DATE SPAN OF SERIES: The information provided should include a records series title, a statement of how the records are arranged, dates of coverage, and sufficient detail to describe the body of records being transferred. If access to the records is gained or facilitated through an index, box list, or other finding aid, include it with the records being transferred. Indicate the appropriate disposition authority number if the index is scheduled separately. If the records are in a Federal records Center (FRC) attach each applicable SF 135, Records Transmittal and Receipt. For electronic records, describe any related documentation.

5. Fully identify the unit (5D) that created or organized the records. Usually this is not the agency's records management office. Place the creating unit within its organization hierarchy (5A-5C). For example, the responsible unit is a branch (5D), within a division (minor subdivision) (5C), within an office (major subdivision) (5B), and within the agency or major component of a department (5A). Block 5A should be the official or legal name of the agency or bureau as published in the *U.S. Government Manual*. In block 5E include the name and telephone number (including the area code) of a person who should be contacted if NARA has any questions about the records. If the originating agency no longer exists, provide the name of the contact person at the successor agency.

6. DISPOSITION AUTHORITY: This citation must be included. It can be either the item number assigned to the records within a records disposition schedule (SF 115) approved by NARA or the item number assigned to the records within an agency records disposition manual based on a NARA-approved SF 115. If the agency manual number is used, attach a copy of the pertinent pages from the agency manual.

7. IS SECURITY CLASSIFIED INFORMATION PRESENT? If the records contain security classified information, check "Yes" and indicate the highest level of classification present. Indicate any additional applicable national security special access restrictions (e.g., Sensitive Compartmented Information - SCI or North Atlantic Treaty Organization - NATO). Restricted Data and Formerly Restricted Data - RD/FRD - refers to information subject to the Atomic Energy Act of 1954. Check "Segregated" to indicate that security classified records have been segregated from unclassified records or information subject to special access restrictions has been segregated from other classified information. Check "Declassified" to indicate whether any records have been declassified, and provide both the authority for declassification and a description of the declassified records.

8. CURRENT LOCATION OF RECORDS. Check the appropriate box for the current location of the records. If the records currently are in a Federal records center, complete 8B. If the records are located in the transferring agency or other location, complete 8A.

8A. For records located in the transferring agency or other location, provide a complete address.

8B. For records located in a Federal records center, name the center, provide the FRC accession number and container number(s), and the FRC location.

9. PHYSICAL FORM(S): Check all the boxes that apply to the records included in the transfer.

10. VOLUME: Include both the cubic feet of the records and the number and type of containers holding the records. For example:
Cu. ft. 15: Number 15: Type FRC boxes.
Provide separate volume figures for each physical type of records, continuing on a separate sheet as necessary.

11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES: Indicate the date the records are eligible for deposit in the National Archives. This date is determined by the disposition instructions for each item in the approved SF 115 or agency manual.

12. ARE THE RECORDS FULLY AVAILABLE FOR PUBLIC USE? If the records are exempt from release pursuant to the FOIA, 5 U.S.C. 552(b)91)-(9) and (c)(1)-(3), this must be fully justified. List all exemptions that apply. If exemption (b)(1) is cited, complete block 7 accordingly. If (b)(3) is cited, include the full citation for the relevant statute. If the records are subject to copyright, identify affected items and the copyright holder.

13. ARE THESE RECORDS SUBJECT TO THE PRIVACY ACT? The National Archives is required to notify the public, through the *Federal Register*, when it takes custody of records subject to the provisions of the Privacy Act, 5 U.S.C. 552a. The originating agency should use this block to indicate whether the records covered by this SF 258 are part of a Privacy Act "system of records" and include a citation to an a copy of the Privacy Act notice published by the agency for the system. NARA will use the transferring agency's notice to inform the public, through the *Federal Register*, that the records have been transferred to the National Archives and that no further modification of them is possible.

14. ATTACHMENTS: Check the appropriate box(es) and indicate the attachment(s) being submitted with this form.

15. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION: NARA uses this space to provide shipping instructions relating to transfers.

16. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES: The appropriate NARA representative signs block 16 after the records have been received at a NARA facility and NARA has confirmed that the records received are the records described in block 4. Transfers to NARA are not final until NARA has signed block 16. NARA sends the agency a copy of the completed form.

17. NATIONAL ARCHIVES ACCESSION NO.: NARA assigns this unique, permanent control number to each transfer of records.

C. DISSEMINATION OF INFORMATION TO THE PUBLIC ABOUT CASES IN LITIGATION

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C. DISSEMINATION OF INFORMATION TO THE PUBLIC ABOUT CASES IN LITIGATION

1. Introduction

Title VII prohibits disclosure to the public of charges filed with the EEOC, and of information obtained in the agency's investigation of charges, prior to the institution of a suit under Title VII involving such information. See 42 U.S.C. §§ 2000e-5(b), 2000e-8(e); 29 C.F.R. §1610.17(b), (c).[1] After a lawsuit has been filed, professional ethics rules impose limitations on publicity regarding the case. This portion of the Manual discusses the type of information discloseable during litigation and the procedures to follow in disseminating that information to various outside sources.

2. Content of Discloseable Information Concerning Litigation

a. Ethical Restrictions on Disclosures

American Bar Association Model Rule of Professional Conduct 3.6, Trial Publicity, addresses the type of information appropriate to disclose about a case in litigation. Center for Professional Responsibility, American Bar Association, Model Rules of Professional Conduct 83-86 (2004 ed.); see Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct 373-79 (5th ed. 2003). In sum, the rule provides that a lawyer participating in litigation of a matter should refrain from making extrajudicial statements that the lawyer knows or reasonably should know will become public information and will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Comment [5] to Rule 3.6 lists subjects that are more likely than not to materially prejudice a proceeding, particularly where there will be a jury trial. These include: statements relating to the character, credibility, reputation, or criminal record of a party or witness; statements regarding the expected testimony of a party or witness; or information that is likely to be inadmissible as evidence and that if disclosed would create a substantial risk of prejudicing an impartial trial. Model Rule 3.6 expressly permits, notwithstanding possible prejudice, a statement of the claim or defense involved, information in a public

[1] The ADA incorporates these Title VII provisions, and the Commission generally applies them to the ADEA and EPA.

record, the scheduling or result of any step in litigation, and requests for assistance in obtaining information.

The great majority of jurisdictions have adopted some version of the Model Rules of Professional Conduct. A few states have retained a version of the earlier and stricter Trial Publicity rule from the Model Code of Professional Responsibility, Disciplinary Rule 7-107(G), which prohibits extrajudicial statements, other than a quotation from or reference to public records, that could become public information and that relate to, among other matters, the following: evidence regarding the occurrence or transaction involved, the character or credibility of a party, the lawyer's opinion regarding the merits or defenses of a party, or "[a]ny other matter reasonably likely to interfere with a fair trial of the action." Center for Professional Responsibility, American Bar Association, Model Code of Professional Responsibility and Code of Judicial Conduct 77 (1986). Thus, in these jurisdictions press releases about new case filings should contain only information contained in the complaint or elsewhere in the public record.

The above ethical rules apply to both written and oral comments about a case. EEOC attorneys should be familiar with the rules applicable in the jurisdictions in which they litigate.[2] When in doubt, consult with the Associate General Counsel, Litigation Management Services (LMS), or your LMS liaison before making any statements.

b. Quotes from EEOC Officials

If you would like to include a quote from the Chair in a press release (whether on a new case being filed or a lawsuit resolution), contact the Office of Communications and Legislative Affairs (OCLA) or the Chair's office for assistance and/or approval prior to issuance. You should allow at least 2 business days to obtain an approved quote. Similarly, if you would like a quote from the General Counsel, contact your LMS liaison.

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[2] Also keep in mind that a court could apply stricter standards to government attorneys. *See* Restatement (Third) of the Law Governing Lawyers § 109 cmt. *e* (2000) ("Lawyers who serve as prosecutors or otherwise as government lawyers have significantly diminished free-expression rights to comment publicly on matters in which they are officially involved as advocates. Accordingly, prohibitions against pretrial and trial comment by such lawyers can be more extensive.")

c. Media Statements Regarding Victims of Discrimination

Give appropriate attention to the privacy concerns of the charging party and other victims of the alleged discriminatory conduct when drafting a press release, particularly in sexual harassment, disability, or other cases where the conduct or the victim's condition could cause the public to view the victim unfavorably. Unless you have the express consent of the individual, do not include the name or other personally identifying characteristics of a victim of discrimination in a press release.

3. Requests for Information from Outside Sources

Below are the procedures that OGC headquarters and field legal unit employees are to follow in handling inquiries from members of Congress, congressional staff including staff of congressional agencies (except the General Accounting Office, inquiries from which always should be referred to the agency point of contact), reporters and other media professionals, and the general public, including interest group representatives. In all situations, if a matter appears particularly sensitive during your conversation with an outside source, you should discuss it with the Office Director and inform the Associate General Counsel, LMS, or your LMS liaison, and OCLA.

a. Congressional Inquiries

Routine congressional and White House inquiries received by field offices – e.g., questions about a case in litigation or the agency's procedures – should be handled directly by the office. Be sure to inform the Office Director about such inquiries and the legal unit's responses. Other inquiries, whether by telephone or mail, should be referred to OCLA's Legislative Affairs Staff. Phone calls that OCLA should respond to may be handled either by transferring the call to 202-663-4900 or by taking a message, including the caller's name, office, phone number, and nature of the call, and relaying it to the Legislative Affairs Staff Director.

If in regard to an inquiry made or referred to OCLA, congressional staff need to speak directly with personnel in OGC-HQ or a field legal unit, OCLA will contact the Deputy General Counsel or the Regional Attorney of the field office involved about the inquiry.

b. Media Inquiries

The above procedures for responding to congressional inquiries should be followed with respect to inquiries from news reporters or other media representatives, except that OCLA referrals should be to OCLA's Communications Staff. All contact with national media sources, e.g., The New York Times, The Washington Post, The Wall Street Journal, Time, Business Week, and nationally broadcast television and radio news and news magazine programs, should be coordinated with OCLA's Communications Staff. Set out below are guidelines for OGC staff in responding to media inquiries:

(1) If a media inquiry has been forwarded to you for response, before calling the media representative, find out, if possible:

(a) the nature of the issues to be discussed, and

(b) the extent of any prior contact with Commission personnel concerning the subject matter of the interview.

(2) If there is a basis for expecting that an interview or media contact may cover a particularly sensitive or controversial subject, OGC personnel may request that an OCLA representative sit in during the interview or participate by telephone to take notes and provide technical assistance. Generally, however, an interview will be conducted by the designated OGC representative who should take notes on the principal questions and the answers provided during the interview.

(3) Always return a reporter's call as soon as possible the same day. Even if you have no information, or insufficient time to respond in full that day, the courtesy of a call back to advise the reporter is necessary.

(4) Assume every conversation you have with a reporter or media representative is on the record and that anything you say may end up in the newspaper or the evening news. Ask the reporter to call back and read all quotes he or she intends to attribute to you before publication to ensure that you are quoted accurately.

(5) Be as accurate as possible in your responses. If you don't know the answer to a reporter's question, say so. If you can find out with reasonable effort, offer to call back. Remember to ask about the reporter's deadline, and meet it, if you promise to call back.

(6) Remember that all information about a charge in investigation must be kept confidential by statute. Even confirming that a charge has been filed violates this rule.

(7) If you believe you should not comment, don't. Reporters are often persistent in their attempts to gather information but don't let that influence you into commenting when you shouldn't.

(8) Reporters who cover EEOC often cover other news beats and thus may not be well informed about the Commission. Take time to explain processes and procedures to reporters when appropriate. A more accurate story could well be the result.

(9) Do not hesitate to call OGC-HQ or OCLA Communications Staff for any guidance or other assistance you feel is needed.

c. Inquiries from the Public

Attorneys may refer any phone call or letter requesting publicly disseminated publications and information to OCLA's Communications Staff for handling. Also, requests for statistics from the National Data Base should be forwarded to OCLA. However, in keeping with EEOC's Customer Service initiatives, simple requests from the general public may be processed more efficiently by the office that receives the request. Phone requests for EEOC public information documents (*e.g.,* posters, brochures, pamphlets) may be referred to the agency's Publications Distribution Center's (PDC) toll free number: 1-800-669-3362 or the TTY number for the hearing impaired, 1-800-800-3302. You may also refer callers to the agency's web site at www.eeoc.gov for a listing of all publications available through the PDC, many of which are on the web site.

Requesters seeking written legal interpretations from the Commission should be referred to the procedures in the Commission's regulations, 29 C.F.R. §§1601.91-93. An attorney responding verbally to a request for legal information, should begin by stating that she cannot give legal advice. It is appropriate to discuss the laws the Commission enforces and the agency's procedures and to refer individuals to specific cases that are part of the public record. Members of the public can also be referred to the EEOC Web site, which contains the text of the statutes the agency enforces, agency regulations, policy guidance, press releases and much additional information about employment discrimination laws and the agency's enforcement activities.

4. Press Releases about New Case Filings

OCLA and OGC-HQ must receive advance notice when a lawsuit is about to be filed to enable staff to prepare for inquiries about the suit. Thus, at least 2 full days prior to filing suit, legal units should e-mail a draft press release to the Director of Communications in OCLA (or other contact person in that office) and to your LMS liaison, both of whom will verify receipt. OCLA or OGC will contact you if there are any questions or concerns about the content of the draft release. When the legal unit anticipates that a lawsuit will receive national attention or significant local publicity, you should notify OGC-HQ and OCLA as far in advance as possible of your intention to file suit.

To ensure that OCLA does not inadvertently publicize a case before it is filed, advance copies of press releases must be in the following format: (1) not on letterhead, (2) not dated, and (3) with "**DRAFT**" printed on the top of the press release. Only after suit is filed can OCLA include the press release in the daily News Clips and respond to inquiries from the public. Before the suit is filed, disclosure of information about the case is prohibited by statute. See 42 U.S.C. §§ 2000e-5(b), 2000e-8(e); 29 C.F.R. §1610.17(b), (c).

Once a suit is filed, a final version of the press release should be e-mailed to OCLA and your LMS liaison. To distinguish this press release from the advance notice release, it should be (1) on press release letterhead, and (2) dated (with the draft notation eliminated). OCLA will include this version in the Clips. Send the final press release to OCLA and OGC-HQ the same day that you issue the press release from your office.

5. Publicity about Suit Resolutions

It is not necessary to inform OGC-HQ and OCLA of every case resolution in advance. However, if the following circumstances apply, you must provide OGC-HQ and OCLA with as much advance notice as possible that the case is nearing resolution, and you should maintain contact until there is a date certain and the press release is issued:

- the settlement of a lawsuit is expected to involve significant monetary or injunctive relief;

- you anticipate a favorable jury verdict or court decision; or

- the resolution is likely to receive national or significant local attention due to the notoriety of the defendant, ongoing media interest in the lawsuit and/or issues involved, or other factors that may have spurred significant media scrutiny.

OGC authorization to finalize a suit does not in itself constitute this notice if the timing for finalizing the settlement is uncertain when OGC authorization is granted.

For those cases filed and resolved under Regional Attorney authority, notice of impending significant resolutions is especially important because OGC-HQ may not have had any advance notice that a settlement is about to occur. Notice that settlement negotiations are ongoing does not constitute notice that a case resolution is about to be finalized. Even when you do not have a date certain, as resolution approaches, e.g., when the parties have agreed in principle and the legal unit is preparing final settlement documents for the court's approval, bring the impending resolution to the attention of OGC-HQ and OCLA.

Before submitting settlement papers to the court for approval of a significant resolution, notify your LMS liaison and OCLA. Courts have sometimes approved a settlement virtually on the spot, taking the field office, OGC-HQ, and OCLA by surprise.

E-mail final press releases on all settlements and favorable court resolutions to your LMS liaison and OCLA the same day you issue the press release from your office.

6. Press Conferences

Field offices must obtain advanced approval for all press conferences from OGC-HQ and OCLA.

Use discretion in recommending press conferences; they should be held sparingly. In most cases, a press release and thorough followup with the media is the appropriate means for communicating "newsworthy" EEOC litigation activity. Press conferences should be reserved for cases that have significant public interest implications. Be sure the importance of the information to be announced rises to the level of the need for a press conference.

If you receive calls from Commissioners or other non-OGC headquarters personnel requesting participation in a press conference, please refer the call to the Office of the Chair, which will determine how the field office should proceed on the

matter. To facilitate coordination, please also notify the Associate General Counsel, LMS, of such calls.

Substantial advance notice of impending significant resolutions will of course facilitate the Commission's ability to conduct successful press conferences in those cases warranting high profile publicity.

D. REPORTING TO OGC

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D. REPORTING TO OGC

With the advent of EEOC's Integrated Mission System (IMS), legal unit reporting has been simplified. While legal units must still submit a few reports and documents to the Office of General Counsel headquarters (OGC-HQ), other reports will be automatically generated in IMS. Set out below are the required IMS entries as well as the reports and documents legal units are required to submit to OGC-HQ, the times of entry or submission, and the individuals (or position titles) to whom submissions should be sent. In designating a case as class or individual in IMS or on a report, treat as class **only** cases meeting the following criteria: (1) cases challenging a policy that applies to a group of similarly situated individuals; or (2) cases challenging a practice that affects a group of similarly situated individuals. The number of identified claimants in a case is not determinative of whether it should be considered class; for example, a case involving two or more individuals whose claims viewed together do not evince a policy or practice affecting similarly situated individuals should not be designated class, while a case challenging a policy applicable to a protected group should be treated as class even if no affected individuals have been identified.

1. Filing Suit

a. Court-stamped complaint - Copy to Rodney Bynum, Director of Administrative and Technical Services Staff (ATSS) within 2 days of receipt from the court.

b. Entry into IMS of the "Complaint Filed" event, including a narrative description* of the issues in the Note field, within 2 days of filing in court. (Appendix 1 to this section is a screen shot of the "Complaint Filed" screen.)

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* The comments need only be one or two sentences for each claim, but should note the defendant's business, the charging party's (CP's) job, and the jobs at issue in hiring, promotion, and classification cases. If the allegations involve an "other" category, specify the race, national origin, religion, or disability. Also, additional information regarding disabilities may be necessary (e.g., the impairment and substantial limitation in record of and regarded as cases). In ADEA cases, the CP's age and class age groups should be included.

2. Remand from a Court of Appeals

Entry into IMS of the "Appellate Remand" event within 2 days of notice of the remand.

3. Trial Scheduled

Entry into IMS of the "Trial Date Set" event within 2 days of notice from the court.

4. Settlement

a. Consent decree or settlement agreement - Within 2 days of receipt from court, copy to Rodney Bynum, Director of ATSS, of court-stamped consent decrees upon execution by the court and of settlement agreements upon receipt of dated stipulation of dismissal or dismissal order, which should be submitted with the settlement agreement.

b. Entry into IMS of the resolution event, including a narrative description of the settlement, and the benefits received on the Benefits tab. (Appendix 2 to this section is a screen shot of the "Resolutions" screen.)

5. Trial

Report form 6, *Trials Conducted* - Within 2 business days of completion of a trial, e-mail report form 6 to Associate General Counsel, LMS, Associate General Counsel for Appellate Services, and Jerome Scanlan, Assistant General Counsel, LMS. (Appendix 3 to this subsection is a blank report form 6.)

6. Judgment

a. Court decision and judgment - Upon receipt from court, copy of the decision to Director of ATSS, Associate General Counsel, LMS, Associate General Counsel for Appellate Services, and Jerome Scanlan, Assistant General Counsel, LMS, and copy of the judgment when received to the same individuals.

b. Jury verdict - For jury verdicts, copy of the judgment upon receipt from the court to Rodney Bynum, Director of ATSS, the Associate General Counsel, LMS, and the Associate General Counsel for Appellate Services. Entry into IMS of the "Jury Verdict" event and the resolving event, Favorable Court Order or Unfavorable Court Order. (Appendix 2 to this section is a screen shot of the "Resolutions" screen.)

7. Case Conference Reports and Case Status Sheets

Case Conference Reports and Case Status Sheets - Submit case conference reports and case status sheets by either e-mail or regular mail to your Litigation Management Services (LMS) liaison by the 15th of the first month of each quarter.

8. 396 Reports

Legal portion of 396 report - E-mail legal unit portion of the 396 report, including staffing chart, to the Director of ATSS and Jerome Scanlan, Assistant General Counsel, LMS, at time of submission of entire report to the Office of Field Programs.

APPENDIX 1

IMS: COMPLAINT FILED

Case ID		
Case Name		
Case Type	❑ Class	❑ Individual
Litigation Type	❑ Direct ❑ Agreement Enforcement ❑ Subpoena ❑ EEO Reporting	❑ Intervention ❑ TRO ❑ Recordkeeping
Civil Action		
Court		
Date Filed		
Narrative (see n.*, *infra*)		

APPENDIX 2
IMS: RESOLUTIONS

Case ID		
Case Name		
Type	❑ Consent Decree Expires: _____ ❑ Settlement Agreement	❑ Favorable Order ❑ Merits ❑ SJ ❑ Unfavorable Order
Date		
Money	☐ Back pay ☐ Frontpay ☐ Interest ☐ Liquidated	☐ Non-Pecuniary ☐ Pecuniary ☐ Punitive ☐ Costs and Fees
Non-Monetary	❑ New Hire ❑ Promotion ❑ Reinstatement/Recall ❑ Policy Change ❑ Training/Apprenticeship ❑ Religious Accommodation	❑ Seniority ❑ Job Referral ❑ Union Membership ❑ Other Non-Monetary ❑ EEO Notices ❑ Reasonable Accommodation
Narrative		

APPENDIX 3

REPORT FORM 6 – TRIALS CONDUCTED

Case name:

(a) civil action number:

(b) court and city:

(c) statute(s), bases, and issues:

(d) attorneys participating:

(e) dates on which trial took place and whether bench or jury:

(f) description of evidence presented by each party:

(g) date of decision or verdict (and judgment if applicable):

(h) outcome, including description of relief where applicable:

E. AUTHORIZATION TO FILE MOTION FOR CONTEMPT, ATTORNEY'S FEES, OR SANCTIONS

The Regional Attorney may not file a motion for contempt, attorney's fees, or sanctions against a party or its counsel without authorization from the Office of General Counsel's Sanctions Officer, who is the Associate General Counsel for Litigation Management Services (LMS). This requirement applies to EEOC motions under Fed. R. Civ. P. 11, and under other authority such as Fed. R. Civ. P. 26(g), 28 U.S.C. § 1927, or the court's inherent powers. First, the Regional Attorney should discuss the matter with his or her LMS liaison attorney. The Regional Attorney should then discuss the intended motion with the Sanctions Officer. The Sanctions Officer may require a memorandum outlining the nature of the abusive practices, including supporting case law or other authorities, and may require that the motion and memorandum be sent to him or her for approval prior to filing.

The Regional Attorney may file a motion for expenses or sanctions, other than contempt, under Fed. R. Civ. P. 37 without prior approval from the Sanctions Officer.

F. NOTIFICATION REGARDING SANCTIONS OR FEES AGAINST EEOC

1. Opposing Counsel's Intent to Seek Sanctions or Fees Against EEOC

The Regional Attorney must immediately notify the Sanctions Officer of the Office of General Counsel (OGC) if it receives a written communication (including by electronic mail) from opposing counsel indicating an intent to move for contempt, or to seek sanctions, expenses, or attorney's fees against the Commission or its attorneys under Rule 11, Fed. R. Civ. P., or other authority such as Fed. R. Civ. P. 26(g), 28 U.S.C. § 1927, or the court's inherent powers. OGC's Sanctions Officer is the Associate General Counsel, Litigation Management Services (LMS). The Regional Attorneys must first notify the OGC Sanctions Officer by telephone or e-mail and must then fax or e-mail the communication to the Sanctions Officer. Notice to the Sanctions Officer is not required for written communications indicating an intent to seek sanctions or expenses under Rule 37, Fed. R. Civ. P.

2. Opposing Counsel's Motion for Sanctions or Fees Against EEOC

The Regional Attorney must notify the OGC Sanctions Officer if opposing counsel files a motion for contempt, for sanctions, expenses, or attorney's fees under Fed. R. Civ. P. 11 or 26(g), 28 U.S.C. § 1927, or other authority, or for attorney's fees under 42 U.S.C. § 2000e-5(k) or the Equal Access to Justice Act. Notice to the Sanctions Officer is not required of motions for sanctions or expenses against EEOC under Fed. R. Civ. P. 37., but the office's LMS liaison attorney should be notified of motions seeking sanctions under Rule 37(b)(2), (c), or (d).

3. Court's Finding of Contempt or Sanctions Against EEOC and Awards of Attorney's Fees

When the court finds EEOC or one of its attorney's in contempt, sanctions EEOC or an attorney, or awards attorney's fees against the Commission or an attorney, the Regional Attorney must notify the OGC Sanctions Officer immediately by telephone or e-mail, and fax or e-mail a copy of the court order.

The Department of the Treasury is the federal agency responsible for paying attorney's fees and expenses assessed against the EEOC. Section I.G. of this Part of

the *Manual*, *Requesting Payment of Fees, Costs, and Sanctions Assessed Against EEOC*, explains the process.

G. REQUESTING PAYMENT OF FEES, COSTS, AND SANCTIONS ASSESSED AGAINST EEOC

The Commission must submit an application for payment to the Department of the Treasury, Financial Management Services (Treasury/FMS), when a court assesses attorney's fees, costs, or sanctions against it. Litigation Management Services (LMS) in OGC-HQ and the EEOC's Debt Collection Officer in the Office of Legal Counsel (OLC) serve as intermediaries between the legal unit and Treasury/FMS. Here is the process:

1. Prepare Application Package and Submit to LMS

The first step the legal unit attorney must take to obtain payment of attorney's fees, costs, or sanctions assessed against the Commission is to prepare an application package requesting payment and send it to his or her LMS liaison for review. In order to ensure that payment is submitted and processed in a timely manner, the legal unit must provide the following information to LMS:

- brief summary of the case, including a statement that no appeal will be taken
- name and address of defendant
- tax id # (SSN or EIN) of the defendant (please note that FMS will make checks payable only to defendants, not their attorneys).
- name, address, and telephone number of defendant's counsel
- name and address of recipient of the check

The legal unit should attach the following documents to the memorandum:

- copy of the complaint
- copy of the judgment, if applicable
- copy of any court order assessing fees, sanctions, or costs

- copy of bill of costs, if applicable
- copy of clerk of court assessment of costs, if applicable

2. Review by Litigation Management Services

The second step in obtaining payment of attorney's fees, costs, or sanctions assessed against the Commission is LMS review of the application package prepared by the legal unit. Once the package is complete, the LMS liaison will forward it to the EEOC's Debt Collection Officer.

3. Review by Debt Collection Officer and Submission to Treasury/FMS

The third step is review of the application package by the EEOC's Debt Collection Officer in OCFOAS's Financial Management Services. The Debt Collection Officer is responsible for reviewing and forwarding the legal unit's completed package to Treasury/FMS.

4. Processing by Treasury/FMS

Once the EEOC's Debt Collection Officer files the application for fees, costs, or sanctions with Treasury/FMS, the EEOC has little control over the process. FMS processing normally takes 4 to 6 weeks, but can take as long as several months. FMS will not issue a check if the package is incomplete; therefore, it is critical that all of the necessary information and documents be provided at the outset. If payment to opposing counsel is delayed, defendant may be awarded an interest payment on the initial award amount.

If you need additional information, please contact your LMS liaison.

REGIONAL ATTORNEYS' MANUAL

PART 1

ADMINISTRATIVE AND SUPPORT INFORMATION

SECTION II

PERSONNEL

SECTION II

PERSONNEL

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A. STRUCTURE OF OFFICE OF GENERAL COUNSEL

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A. STRUCTURE OF OFFICE OF GENERAL COUNSEL

1. Mission and Function Statement

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to provide for a General Counsel, appointed by the President and confirmed by the Senate for a 4-year term, with responsibility for conducting the Commission's litigation program. Following transfer of enforcement functions from the U.S. Department of Labor to the Commission under a 1978 Presidential Reorganization Plan, the General Counsel was also given responsibility for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). With the enactment of the Americans with Disabilities Act of 1990 (ADA), the General Counsel was given responsibility for conducting Commission litigation under the employment provisions of that statute (Title 1; effective July 1992).

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and to ensure compliance with the statutes that EEOC is charged with enforcing. Under Title VII and the ADA, the Commission can sue nongovernment employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees) and the EPA (no employee minimum) includes state and local governmental employers as well as private employers. Title VII, the ADA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate the statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees, and provides legal advice to the agency on employee-related matters.

2. Responsibilities of the General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all the components of OGC, including field office legal units. In directing the litigation program, the General Counsel is responsible for developing litigation strategies designed to attain maximum compliance with federal laws prohibiting discrimination in employment. The General Counsel recommends cases for litigation to the Commission and approves other cases for filing under

authority delegated to the General Counsel under the Commission's 1996 National Enforcement Plan. (The General Counsel has redelegated some of his delegated litigation authority to the Regional Attorneys in charge of the field legal units; see section IV. of Part 2 of the *Manual*.) The General Counsel also reports regularly to the Commission on litigation activities, including issues raised in litigation which may affect Commission policy, and advises the Chair and Commissioners on litigation strategy, agency policies, and other matters affecting the enforcement of the statutes within the Commission's authority.

3. Headquarters Program Areas and Functions

a. Deputy General Counsel

The Deputy General Counsel serves as the alter ego of the General Counsel and as such is charged with the daily operations of OGC. The Deputy is responsible for supervising and managing all programmatic and administrative functions of OGC, including overseeing the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

b. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the Commission's field legal units. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of field legal units into the investigative enforcement structure of the field offices.

LMS is directed by an Associate General Counsel. There are three Assistant General Counsels assigned to LMS for field oversight. Each Assistant General Counsel directs a staff of one or more attorneys and is responsible for the field office legal units within one of OGC's three geographic divisions, overseeing cases in litigation and the legal units' interaction with investigative enforcement units. The Assistant General Counsels' litigation oversight responsibilities include reviewing proposed suit filings under Regional Attorneys' redelegated litigation authority, providing advice and guidance on ongoing litigation, and, in complex cases, matters such as reviewing expert procurements and evaluating proposed settlements. Oversight of legal/enforcement interaction includes discussions with OFP staff and visits to field offices.

In addition to its oversight of field legal unit litigation and office operations, LMS provides ongoing support to the field's litigation activities. LMS staff members provide direct litigation assistance to field legal units as needed, draft guidance, develop training programs and materials, and maintain litigation materials on the Commission's internal Web site. LMS is also responsible for maintaining and updating the *Regional Attorneys' Manual*. LMS prepares and distributes a monthly report summarizing all court decisions on the merits, trials conducted, and significant settlements.

LMS also has an Assistant General Counsel for Technology who is responsible for providing technical guidance and oversight to OGC headquarters and field offices on the use of technology in litigation, the development of OGC's computer systems, and the operation of the Commission's Integrated Mission System. The Assistant General Counsel for Technology also serves as OGC's representative to the agency's Technology Steering Committee, consults with field staff on statistical and technical issues in litigation, and conducts field training on matters such as data analysis, statistics, and use of computers.

c. Internal Litigation Services

Internal Litigation Services (ILS), represents the Commission and its officials on administrative claims and litigation brought by applicants and Commission employees, and provides legal advice to the Commission and agency management on employee-related matters. ILS has two divisions, each under the direction of an Assistant General Counsel who reports to the Deputy General Counsel.

d. Litigation Advisory Services

Litigation Advisory Services (LAS) is headed by an Assistant General Counsel who reports to the Deputy General Counsel. LAS evaluates litigation proposals in cases that must be approved by the General Counsel or the Commission and drafts recommendations to the General Counsel for approval or submission to the Commission. LAS also represents OGC during Commission meetings on cases under consideration for litigation. In addition, LAS responds to Commissioner inquiries on cases under consideration for litigation, acting as OGC's liaison and contact point between the Commissioners and the field legal units. Lastly, LAS performs special assignments as requested by the General Counsel.

e. Appellate Services

Appellate Services is responsible for conducting all appellate litigation where the Commission is a party, and participates as OGC amicus curiae in both appellate and district court cases involving novel issues or developing areas of the law. Appellate Services also represents the Commission in the United States Supreme Court through the Solicitor General. (See Part 3, section V. of the *Manual* for a detailed description of Appellate Services' appeal procedures.)

In every case in which the EEOC receives an adverse judgment, Appellate Services submits a written analysis and recommendation to the General Counsel, who makes the decision on whether to appeal. In amicus cases, Appellate Services drafts a memorandum recommending Commission participation which, if approved by the General Counsel, is submitted to the Commission for authorization under a notice and hold procedure.

Appellate Services also makes recommendations, subject to General Counsel approval, to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes the Commission enforces. In addition, Appellate Services reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Office of Legal Counsel, prior to their issuance by the agency.

Appellate Services is directed by an Associate General Counsel. Appellate Services has three Assistant General Counsels, each of whom supervises a team of attorneys.

f. Research and Analytic Services

Research and Analytic Services (RAS) is headed by a Director who reports to the Deputy General Counsel. RAS is the major source inside the EEOC of expert and analytical services for cases in litigation, and also assists EEOC attorneys in obtaining expert services from outside the agency. (See Part 4, section I.B. of the *Manual* for a detailed description of services provided by RAS.) RAS has a professional staff with backgrounds in the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides expert and analytic support to field staff investigating charges in the administrative process, and performs special research projects for other agency offices. Other important functions of RAS include providing expert and technical advice in implementing the Uniform Guidelines on Employee Selection Procedures (UGESP); creating EEO-1 databases

and making them available to headquarters and field staff; developing and maintaining special census files by geography, race/ethnicity and sex, and detailed occupations; developing labor market availability estimates; constructing large employer personnel data files and work history records by coding and converting paper records into computer files; and conducting statistical analyses of complex employment practices.

g. Administrative and Technical Services Staff

The Administrative and Technical Services Staff (ATSS) is headed by a Program Analysis Officer/Director, who reports to the Deputy General Counsel. ATSS provides administrative and technical services to all headquarters components of OGC. It acts as the liaison between OGC and the EEOC's service organizations such as the Office of the Chief Financial Officer and Administrative Services on financial concerns and the Office of Human Resources for personnel matters. ATSS is also responsible for preparing the OGC budget request to the Chair for the Office of Management and Budget and Congress as well as for handling various budget execution duties such as transferring funds to field offices and monitoring expenditures.

ATSS's technical unit maintains files on all OGC litigation and verifies data entered by field offices into the litigation component of the agency's Integrated Mission System. To enable OGC managers to assess various aspects of EEOC's nationwide litigation activity, ATSS prepares periodic and ad hoc reports and studies on the number and types of lawsuits filed and resolved as well as on the monetary and injunctive relief obtained through litigation. Additionally, ATSS provides litigation reports to the Office of Research, Information and Planning and responds to inquiries from OGC managers and other offices within EEOC. ATSS prepares responses to inquiries from Congress, other governmental agencies, and the media for information on Commission litigation. ATSS, through the Office of Legal Counsel, also prepares responses to Freedom of Information Act requests for litigation data.

4. Field Legal Units

Legal units are under the direction of Regional Attorneys, who report to the General Counsel through the Associate General Counsel for Litigation Management Services. Regional Attorneys manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel. Legal unit attorneys conduct Commission litigation in the geographic area covered by the field office and provide legal advice and other support to the field enforcement unit staff responsible for investigating charges of discrimination. Legal unit attorneys also participate in outreach

efforts, and in most offices the legal unit is responsible for responding to Freedom of Information Act requests.

B. ATTORNEY PRACTICE AND ETHICAL ISSUES

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B. ATTORNEY PRACTICE AND ETHICAL ISSUES

1. Commission Payment of Expenses for Bar Review Course, Bar Examination, and Court Admission

a. The Former Rule: Prohibition on Payment of Fees

Until December 2001, the Comptroller General of the United States had consistently held that a federal employee was responsible for obtaining the qualifications to perform his or her official duties, and if a license was required for that purpose, the employee was obligated to procure the license at his or her own expense. 22 Comp. Gen. 460 (1942) (court admission fees); 47 Comp. Gen. 116 (1967) (same); 61 Comp. Gen. 357, 359 (1982) (law school tuition, bar review course, court admission fees). The only exception was where another law expressly permitted payment.

b. Narrow Exception: Discretion to Pay Bar Review Course Fees

In 1976, the Comptroller General construed the Government Employees Training Act (GETA), 5 U.S.C. §§ 4101, et seq., to allow an agency to pay for bar review expenses in limited circumstances. GETA allows the head of an agency to use appropriated funds to pay all or part of the expenses of "training" that will "improve individual and organizational performance and assist in achieving the agency's mission and performance goals." *Id.* at 4101 (4). This includes payment or reimbursement of the employee for the tuition for a course, as well as travel, per diem, books, and other fees directly related to the training. *Id.* at 4109 (a)(2). In *Matter of Payment of Expenses for Bar Review Course, Bar Examination, and Court Admission*, B-187,525 (1976), 1976 WL 9595 (Comp Gen.) (unpublished opinion), the Comptroller General responded to an Interstate Commerce Commission (ICC) query regarding whether it could pay for the bar review course, bar exam, and court admission fees for an associate regional counsel. A newly adopted district court rule required that the attorney be admitted to the California bar. Because the attorney had already qualified for the position he was serving in (he was a member of another state's bar) and the agency had not changed the requirements for the job or reclassified it, the Comptroller General determined that "the costs of attending a bar review course are properly payable when the head of an agency determines, under [GETA], that members of his legal staff should take a bar review course." *Id.* at *2. The Comptroller General determined that the agency could not pay for the attorney's bar exam fees or his court admission fees. *Id.* at *2-*3.

c. The New Rule: Discretion to Pay Bar Exam and Court Admission Fees

On December 28, 2001, Congress amended Title 5 of the U.S. Code (Government Organization and Employees) to give federal agencies discretion to pay the fees for bar exams and court admissions. The new Code section, entitled "payment of expenses to obtain professional credentials," states:

> (a) An agency may use appropriated funds or funds otherwise available to the agency to pay for - -
> (1) expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and
> (2) examinations to obtain such credentials

5 U.S.C. § 5757(a).

In *Matter of Pension Benefit Guarantee Corp. – Court Admission Fees,* the Comptroller General recognized the change in the law, ruling

> if the PBGC determines that payment of court admission fees is necessary to carry out its statutory mission and wishes to pay the fees pursuant to the discretion granted the agency under section 5757(a), our Office will not object to the PBGC using its appropriated funds to pay them.

B-289,219 (2002), 2002 WL 31478833 (Comp. Gen.) at *2 (unpublished decision). The PBGC's 80 attorneys worked in Washington, D.C., but litigated ERISA cases throughout the country and had to pay a one-time admission fee to practice before each district court. The agency wanted to pay the court admission fees for its attorneys and successfully argued that the benefit of the multiple court admissions inured to PBGC rather than the individual attorneys.

d. EEOC's Policy Regarding Expenses for Necessary Professional Credentials

Ordinarily EEOC attorneys are responsible for the expenses of obtaining the professional credentials required to perform their official duties. Where special circumstances exist, EEOC will consider paying some or all of the expenses necessary for an attorney to obtain admission to a bar. One situation where EEOC might pay

such expenses is where an already licensed attorney agrees to seek admission to an additional state bar because the EEOC needs a licensed attorney in that jurisdiction.

2. Outside Practice of Law[1]

a. Introduction

_____ In 1992, the United States Office of Government Ethics (OGE) promulgated *Standards of Ethical Conduct for Employees of the Executive Branch* (*Standards of Ethical Conduct*), codified at 5 C.F.R. Part 2635. *Standards of Ethical Conduct* replaced many individual agency ethical conduct standards with uniform standards, while giving individual agencies authority to issue supplemental regulations where necessary. *Standards of Ethical Conduct* is based on *Principles of Ethical Conduct for Government Officers and Employees* contained in Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (Oct. 17, 1990).

b. The Prohibition on Outside Employment

One of the enumerated principles both in the Executive Order and in *Standards of Ethical Conduct* is:

> Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

5 C.F.R. § 2635.101(b)(10). *Standards of Ethical Conduct*, Subpart H, set forth detailed standards on the prohibition against engaging in outside employment and other activities that conflict with official duties. *Id.* at § 2635.801, et seq. Subpart H includes a number of examples.

EEOC has issued regulations, *Supplemental Standards of Ethical Conduct for Employees of the Equal Employment Opportunity Commission* (*Supplemental Standards*), at 5 C.F.R. Part 7201, supplementing OGE's regulations. EEOC's regulations specifically prohibit all employees, including attorneys, from "receiv[ing]

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[1] This guidance on the outside practice of law is drawn in part from a January 13, 1993, memorandum from OLC to all EEOC employees, *New Standards of Ethical Conduct for the Executive Branch*.

compensation for representational services, or the rendering of advice or analysis, regarding any equal employment law or its application." *Id.* at § 7201.102 (b). The regulations also prohibit EEOC attorneys from outside employment with someone who is substantially affected by the employee's performance of his or her official duties. *Id.* at § 7201.102 (a). In addition, employees generally are barred from outside involvement (whether paid or unpaid) with any matters pending at the EEOC or to which the EEOC or the Federal Government is a party. *Id.* at § 7201.102 (c)). Two exceptions apply. First, an employee may provide behind-the-scenes help to an immediate family member in an EEOC matter or a matter in which the Federal government is a party. *Id.* Second, an employee also represent "another EEOC employee in an administrative equal employment opportunity complaint against EEOC." *Id.* For both exceptions, the employee must receive prior approval and may not receive any compensation. *Id.*

c. The Requirement for Prior Approval

EEOC's *Supplemental Standards* provide that before engaging in **any** outside employment, whether pay or unpaid, the employee "must obtain written approval from his or her Deputy Ethics Counselor or designee." 5 C.F.R. § 7201.103 (a). The EEOC's regulations define "employment" broadly to include paid and unpaid activities, such as serving as an officer or director, attorney, consultant, teacher, or speaker, or writing for publication. However, the regulations exempt most activities performed for nonprofit charitable organizations. *Id.* at § 7201.103 (d).

Employees must also obtain prior written approval of the Designated Agency Ethics Official or designee to engage in outside employment for pay, "the uncompensated practice of law," or unpaid outside activity "that involves representation or the rendering of advice or analysis regarding any equal employment law, or serving as an officer or director of an organization whose activities are devoted substantially to equal employment opportunity matters." 5 C.F.R. § 7201.103 (b).

The EEOC's ethics officials are identified in subsection 4, below.

3. Recusal Obligations of an Attorney Whose Spouse is an Attorney Engaged in the Private Practice of Employment Law[2]

a. The Recusal Requirements

Generally, the attorney recusal requirements emanate from the criminal financial conflict of interest statute that applies to federal employees and from OGE's *Standards of Ethical Conduct* (discussed in subsection 2.a., above). The financial conflict of interest statute prohibits any federal employee from participating personally and substantially in any matter in which the employee or the employee's spouse has a financial interest, if the matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208(a). OGE's *Standards of Ethical Conduct* contain a similar financial conflict of interest provision, 5 C.F.R. § 2635.401, and also, at 5 C.F.R. § 2635.502(a), contain a broader impartiality conflict of interest provision:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee . . .

Since EEOC attorneys have "covered relationships" with their spouses' employers and their spouses' clients, the *Standards of Ethical Conduct* provision require recusal under the following circumstances.

- EEOC attorneys must recuse themselves from any charge or lawsuit in which their spouse's law firm represents a party, regardless of whether the spouse is the attorney on the case.

- EEOC attorneys must recuse themselves from any case in which any client of the spouse is a party, whether or not the spouse's firm is representing the client in the EEOC case.

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[2] This guidance on recusal obligations is based on an Advisory Memorandum from OLC, dated December 22, 2000.

However, EEOC attorneys are not required to recuse themselves from cases involving a client of the spouse's firm (not the spouse's client), as long as the firm is not representing that client in the EEOC matter. If the EEOC attorney's spouse leaves the firm or no longer represents the client and does not plan to represent that client in the future, then the EEOC attorney's obligation to recuse himself or herself ends.

With respect to attorney referral programs, EEOC attorneys should not participate in decisions to add their spouses or their spouses' firms to a referral list or in decisions to refer charging parties to their spouses or their spouses' firms, unless the entire list is provided or referrals are made automatically and without the exercise of discretion.

b. Questions about Recusal

Should an employee have any questions about whether other circumstances might raise a question about his or her impartiality, the *Standards of Ethical Conduct* recommend seeking the assistance of the employee's supervisor, an agency ethics official, or the agency designee. 5 C.F.R. § 2635.502(a)(1). The EEOC's ethics officials are identified in subsection 4, immediately below.

4. EEOC Ethics OfficialsWho to Contact Regarding Ethics/Conflicts Issues

Designated Agency Ethics Official . . . . . Peggy R. Mastroianni
Acting Legal Counsel

Alternate Designated Agency Ethics Official . . . Thomas J. Schlageter, Director
Advice and External Litigation
Division, OLC

Deputy Ethics Counselors

For all field legal unit employees . . . . . Office Directors

For OGC-HQ employees . . . . . James L. Lee
Deputy General Counsel

Informal Advice . . . . . Liaison Attorneys
Advice and External Litigation
Division, OLC

5. Web Resources on Ethical Issues

Title	Description and Web Site Address
Hatch Act for Federal Employees	Discussion of restrictions on political activity by federal government employees under the Hatch Act, on the Web site of the U.S. Office of Special Counsel. http://www.osc.gov/hatchact.htm
Principles of Ethical Conduct for Government Officers and Employees, Executive Orders 12674 and 12731	*Principles of Ethical Conduct for Government Officers and Employees*, Executive Order 12674 (1989), as amended by Executive Order 12731 (1990), on Web site of U.S. Office of Government Ethics (OGE). http://www.usoge.gov/pages/laws_regs_fedreg_stats/exec_orders.html
Standards of Ethical Conduct for Employees of the Executive Branch	*Standards of Ethical Conduct for Employees of the Executive Branch*, at 5 C.F.R. Part 2635 - rules on gifts, conflicting financial interests, seeking other employment, and other issues. Indexed on OGE's Web site with section-by-section links to the regulations on the Web site of the Government Printing Office (GPO). http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html
Supplemental Standards of Ethical Conduct, 5 C.F.R. Part 7201	EEOC regulations, 5 C.F.R. Part 7201, *Supplemental Standards of Ethical Conduct for Employees of the Equal Employment Opportunity Commission*, on GPO's Web site. http://www.access.gpo.gov/nara/cfr/waisidx_02/5cfr7201_02.html
U.S. Code	Current version of U.S. Code on GPO's Web site. http://www.gpoaccess.gov/uscode/index.html

REGIONAL ATTORNEYS' MANUAL

PART 1

ADMINISTRATIVE AND SUPPORT INFORMATION

SECTION III

COMMISSION POLICIES

SECTION III

COMMISSION POLICIES

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A. INTRODUCTION TO COMMISSION POLICIES

Over the years, the Commission has adopted various policies and procedures that have influenced the agency's litigation program. Some of the main policies currently in effect are summarized below.

1. Priority Charge Handling Procedures

In June 1995, the Commission adopted new Priority Charge Handling Procedures (PCHP) designed to give field personnel flexible procedures for processing charges, including discretion to decide the appropriate level of resources to be used for each charge, and permitting settlement in appropriate cases. PCHP requires field offices to classify charges into three categories: A charges include charges which fall within the national or local enforcement plan and other charges where further investigation will probably result in a cause finding; B charges include charges that initially appear to have some merit but will require additional evidence to determine whether continued investigation is likely to result in a cause finding and charges where it is not possible to make a judgment regarding the merits; and C charges are those in which the office has sufficient information to conclude that it is not likely that further investigation will result in a cause finding. A charges will receive priority treatment; B charges will be investigated as resources permit; and C charges will be dismissed.

2. National Enforcement Plan and Local Enforcement Plans

The Commission adopted the National Enforcement Plan (NEP) in February 1996 to identify priority issues and set out a plan for administrative enforcement and litigation of the laws within its jurisdiction. In the NEP, the Commission stated its commitment to "a three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement." The NEP established national enforcement priorities; set general parameters for the development of Local Enforcement Plans (LEPs) by field offices that tailor their priorities to the specific needs of the communities they serve; and delegated to the General Counsel authority for approving litigation of many types cases. (The NEP is set forth in section III.B. of this Part of the *Manual*).

3. Plans and Reports under the Government Performance and Results Act of 1993

The Commission has adopted other policies and procedures in response to Congressional enactment of the Government Performance and Results Act of 1993 (GPRA), 31 U.S.C. 1101, et seq. GPRA requires agencies to prepare a strategic plan setting forth goals and objectives and to track progress toward meeting those goals and objectives in annual reports. The Commission's current Strategic Plan sets forth goals and objectives for performance for each year in the period FY 2004 through FY 2009. In addition to the five-year strategic plan, the Commission has adopted interim (annual) performance plans and has prepared annual reports on performance under the strategic plan. The Commission's annual performance plans and reports and other strategic planning documents are available on the EEOC's public Web site at http://www.eeoc.gov.

4. Five-Point Plan

The Five-Point Plan is the strategic framework through which the EEOC is to accomplish Chair Cari M. Dominguez's vision for the agency. The Five-Point Plan focuses on key, interrelated, program elements: "proactive prevention, proficient resolution, strategic enforcement and litigation, enhanced mediation and Alternative Dispute Resolution (ADR), and EEOC as a model workplace." It builds upon what EEOC has done to improve its operations and seeks to broaden the agency's reach through increased education, outreach, mediation, and strategic enforcement and litigation. (The Five-Point Plan is set forth in section III.C. of this Part of the *Manual*).

5. Web Resources

Title	Description and Web Address
EEOC Annual Performance Plans	EEOC Annual Performance Plans - strategic plans for the Comission's performance under GPRA, on the EEOC's Web site. http://www.eeoc.gov/abouteeoc/plan/

Title	Description and Web Address
EEOC Annual Performance Reports	EEOC Annual Performance Reports - annual reports on the Commission's performance under GPRA, by fiscal year, on EEOC's Web site. http://www.eeoc.gov/abouteeoc/plan/
Government Performance and Results Act of 1993	Government Performance and Results Act of 1993 (GPRA), 31 U.S.C. 1101, et seq., on U.S. House of Representatives' Web site. Requires agencies to prepare a strategic plan setting forth goals and objectives and to track progress toward meeting those goals and objectives in annual reports. http://uscode.house.gov/usc.htm
National Enforcement Plan	Text of the Commission's National Enforcement Plan (Feb. 1996), on EEOC's Web site. http://www.eeoc.gov/abouteeoc/plan/nep.html
Planning and Strategic Reports	The Commission's strategic plans, its reports on implementing those plans, and other reports, on EEOC's Web site. http://www.eeoc.gov/abouteeoc/plan/
Report of Charge Processing Task Force and Litigation Task Force	Reports of the Commission's Priority Charge Handling Task Force and Litigation Task Force (March 1998), on EEOC's Web site. http://www.eeoc.gov/abouteeoc/task_reports/pch-lit.html

B. NATIONAL ENFORCEMENT PLAN*

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* This is a reproduction of the National Enforcement Plan, adopted by the Commission on February 8, 1996.

B. NATIONAL ENFORCEMENT PLAN

I. Introduction

In a motion unanimously adopted on April 19, 1995, the Commission directed the development, for its approval, of a National Enforcement Plan identifying priority issues and setting out a plan for administrative enforcement and litigation of the laws within its jurisdiction: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans With Disabilities Act (ADA). Also on April 19, 1995, the Chairman directed District Directors and Regional Attorneys in each field office to develop Local Enforcement Plans that will be consistent with the National Plan and that will tailor their priorities to the specific needs of the many different communities served by the Commission.

This motion was adopted at a special meeting convened on April 19, 1995, to consider recommended reforms to enforcement policies that had been established by the Commission over a decade ago. The recommendations had been developed by the Task Force on Charge Processing (Task Force) created by Chairman Gilbert F. Casellas and led by Vice Chairman Paul M. Igasaki which was charged with reviewing and analyzing the private sector charge processing system. More recently, partially as the result of the Commission's increased statutory responsibilities, the number of persons filing charges annually with the EEOC has risen from less than 64,000 in fiscal year 1991 to more than 95,000 in fiscal year 1995, a 49% increase. More funding to support additional staffing and other resources necessary to meet these new challenges has not been forthcoming.

The Task Force recognized that the Commission's effectiveness as a law enforcement agency had been reduced by the overwhelming increase in its inventory of individual charges of discrimination, by the lack of financial resources needed to address the increased workload, and by a failure to strategically utilize its resources to pursue its mission through vigorous investigation, conciliation, and litigation. In the 1980's, a number of enforcement processing and litigation policies based on principles of "full investigation and enforcement" were implemented.

The Task Force concluded that the policies and practices now prevented the agency from using its limited resources strategically to pursue its mission of eradicating workplace discrimination. To address this problem, it recommended the adoption of policies that would permit the agency to make the most prudent use of its resources to accomplish its mission. One of these recommendations was that the Commission

develop National and Local Enforcement Plans that prioritize issues of discrimination for Commission action.

Given the comprehensive scope of the National Enforcement Plan, the Commission consulted with a broad range of external and internal stakeholders. Through this process, the Commission sought and received recommendations from dozens of representatives of the employer, employee, labor, and civil rights communities at both the national and local levels. In addition, the then-Acting General Counsel and then-Acting Director of the Office of Program Operations (OPO) consulted with several District Directors and Regional Attorneys who, in turn, facilitated comments and suggestions from a wide range of EEOC staff, including union representatives.

Based upon this extensive consultative process and after its own careful consideration of the issues, the Commission adopts the following National Enforcement Plan (NEP), which will form the cornerstone of the Commission's efforts to achieve its statutory mission of eradicating discrimination from the workplace. The NEP recognizes that the Commission must use its limited resources more strategically to deter workplace discrimination, guide the development of the law, resolve disputes, and promote a work environment in which employment decisions are made on the basis of abilities, not on the basis of prejudice, stereotype and bigotry. The Commission also recognizes that regardless of resource issues, the development of this Plan is consistent with good management and reinventing government.

With this Plan, the Commission articulates the general principles governing the Commission's enforcement efforts, establishes national enforcement priorities, sets general parameters for the development of the Local Enforcement Plans, and delegates significant litigation authority to the Office of General Counsel so that the Commission can most effectively and efficiently accomplish its enforcement objectives.

II. Governing Principles

The National Enforcement Plan incorporates the following principles, which have guided its development and will govern its implementation.

A. The Commission is committed to an enforcement plan that encompasses a three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement.

First, the Commission recognizes that achieving its fundamental mission -- the eradication of employment discrimination -- requires not only enforcement of the law, but also prevention of the problem through public outreach and education. Therefore, within current resource limitations, the National Enforcement Plan encourages that public education, outreach, and technical assistance be conducted at both the national and local level to support and enhance the enforcement activities directed by the NEP.

Second, the Commission is committed to the voluntary resolution of disputes where appropriate and feasible. The Commission recognizes that negotiated agreements that resolve claims of discrimination can directly advance the Commission's enforcement objectives, in addition to benefitting the parties to a particular dispute. The Commission believes that the use of Alternative Dispute Resolution (ADR) significantly furthers the Commission's mission as a law enforcement agency. Accordingly, the Commission strongly encourages its use as an integral part of our enforcement process.

Finally, the Commission is fully committed to firm and fair enforcement, including litigation, where voluntary efforts to achieve compliance fail. The Commission recognizes that an effective litigation program is critical to the furtherance of the Commission's enforcement agenda by enjoining current violations, deterring future violations, and providing remedies to victims of employment discrimination.

B. The Commission recognizes that given budget constraints under which it operates, it cannot be all things to all of its various constituencies. Moreover, the Commission must be candid with the public regarding the decisions that it makes. The adoption of this National Enforcement Plan and the subsequent adoption of Local Enforcement Plans will take critically important steps in this direction.

C. The combination of limited resources and increasing demands on the Commission requires a carefully prioritized and coordinated enforcement strategy. Strategic enforcement will assure the most effective use of the Commission's resources by assuring that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity. As part of this strategic enforcement strategy, the Commission is committed to the strategic and proactive use of its limited enforcement resources through, among other things, systemic investigations and litigation.

D. The Enforcement Plan must assure fair, aggressive and credible enforcement of all of the statutes enforced by the Commission regardless of the basis of discrimination or the issue.

E. Determination of whether a case should be pursued under the National Enforcement Plan will be based both on the issue raised and an assessment that the strength of the case supports the decision to proceed.

F. The Commission's enforcement activities will not be limited exclusively to the enumerated priority areas. With regard to charge processing, the Commission will issue cause findings in all cases in which it determines that it is more likely than not that discrimination has occurred and will proceed to conciliation in such cases. With regard to litigation, the Commission may pursue certain cases in which it has found cause, even though those cases do not fall clearly within an enumerated enforcement priority. At the same time, the Commission will not pursue litigation on every charge which falls within the NEP or the Local Enforcement Plans (LEPs). The Commission recognizes that it will be required to forgo litigating some good cases in order to devote adequate resources to other cases. At every stage of the process, the Commission will assess the available facts to determine whether the strength of the case and the nature of the issue supports the decision to proceed.

G. Enforcement efforts must be directed to the resolution of the Commission's pending inventory, in addition to the approximately 100,000 new cases which are projected to be filed over the next year. The Commission's recently implemented charge prioritization policies have already significantly reduced the Commission's current inventory, and it is anticipated that this trend will continue barring unforeseen circumstances. Both the National and Local Enforcement Plans must provide immediate strategies for continuing to reduce the existing inventory of cases. Such strategies should not ignore each office's need also to provide the resources necessary to support priority cases and address new filings. The backlog of cases is unfair to charging parties and respondents alike, diminishes EEOC's credibility as a law enforcement agency, and consumes valuable resources.

While the charge prioritization policies reflected in the NEP will permit the Commission to dedicate significant resources towards the Commission's goal of achieving a manageable inventory, the Commission recognizes that without a significant increase in resources, this goal will remain elusive.

III. Enforcement Priorities

Based on the above principles, the Commission has identified three major categories of priorities, which include a series of subcategories, that will provide the foundation of the National Enforcement Plan. These priority categories will apply, as

appropriate, to investigation, conciliation, and litigation, including both trial and appellate practice, as well as the EEOC's amicus curiae and intervention representation.

The Commission sets forth the following areas as priorities under the National Enforcement Plan. These priorities will apply to each of the statutes enforced by the Commission and to all persons protected by these statutes.

A. Cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, which by their nature could have a potential significant impact beyond the parties to the particular dispute.

1. Cases involving repeated and/or egregious discrimination, including harassment, or facially discriminatory policies.

2. Challenges to broad-based employment practices affecting many employees or applicants for employment, such as cases alleging patterns of discrimination in hiring, lay-offs, job mobility, including "glass-ceiling" cases, and/or pay, including claims under the Equal Pay Act.

B. Cases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission.

1. Claims presenting unresolved issues of statutory interpretation under one or more of the statutes enforced by the Commission, as follows:

a. Claims presenting unresolved questions regarding the allocation of burdens in disparate treatment cases as set forth in St. Mary's Honor Center v. Hicks.

b. Claims presenting questions regarding the scope of liability under the statutes enforced by the Commission, including issues of employer liability in harassment cases and individual liability.

c. Claims of national origin discrimination involving language issues, including accent discrimination and restrictive language policies or practices.

d. Claims clarifying the Title VII duty to reasonably accommodate religious practices.

e. Claims raising unresolved questions under the Americans with Disabilities Act regarding the meaning of "reasonable accommodation" and the term "qualified individual with a disability," as well as the defenses of "undue hardship" and "direct threat."

f. Claims presenting questions regarding the interpretation of the prohibition of disparate impact discrimination under the Civil Rights Act of 1991, the Age Discrimination in Employment Act, and the Americans With Disabilities Act.

g. Claims based on the intersection of two or more prohibited bases of discrimination (e.g., discrimination against women of color, older women, or minority persons with disabilities).

h. Claims addressing the legality of agreements that mandate binding arbitration of employment discrimination disputes imposed as a condition of initial or continued employment.

i. Claims presenting unresolved issues regarding the provision of employee benefits, including claims arising under Title I of the Older Workers Benefits Protection Act, and the Americans With Disabilities Act.

j. Claims of comparable significance identified and approved in the Local Enforcement Plans.

2. Cases involving legal issues where there is a conflict in the federal circuit courts on a Plan priority or in which the Commission is seeking Supreme Court resolution of such issue.

C. Cases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges.

1. Cases involving allegations of retaliation against persons for participating in Commission proceedings or opposing unlawful employment discrimination, particularly cases where the scope of the statutory protection against retaliation is at issue.

2. Cases presenting challenges to Commission policy declarations, such as guidelines, regulations or policy guidance.

3. Cases protecting Commission access to information, including subpoena enforcement proceedings and proceedings to preserve or prevent the loss or destruction of evidence, except as set forth in paragraph 5 below.

4. Cases involving allegations of a material breach of an agreement to which the Commission was a party settling an earlier proceeding.

5. Cases involving alleged violations of the Commission's recordkeeping and reporting requirements where there is reason to believe that there may be another violation of statutes enforced by the Commission.

With the adoption of these priorities, and pursuant to a Motion unanimously adopted by the Commission on April 19, 1995, the Commission hereby withdraws all Priority Issues Lists that have previously set out priority issues for Commission consideration.

IV. Local Enforcement Plans

Each District Director and Regional Attorney shall develop a Local Enforcement Plan (LEP) and a supporting document detailing its plan to implement the LEP. These documents shall be submitted concurrently to the Commission, the General Counsel and Director of the Office of Program Operations (OPO), for approval no later than forty-five (45) days from the date of the adoption of the National Enforcement Plan. In turn, the General Counsel and Director of OPO shall review the LEPs and submit their recommendations to the Chairman no later than twenty-one (21) days from the date the LEPs are submitted by the District Offices. The Commissioners may also submit their comments to the Chairman on the LEPs and the implementation documents, as well as on the recommendations submitted by OGC and OPO, no later than thirty-five (35) days from the date that the LEPs are submitted by the District Offices. Then, the Chairman shall have thirty (30) days to determine whether to approve the LEPs. LEPs are to be consistent with the National Enforcement Plan, but their specific goals and objectives should be tailored to reflect legal and factual issues specific to the communities served by each office, as well as each office's resources. In particular, LEPs shall include the following critical components:

A. An evaluation and strategy to address the provision of Commission services to underserved populations and geographic regions, as well as employment practices of particular importance in the region served by each District Office.

B. A description and identification of the local issues which are on the NEP.

C. A description of each office's plan to resolve the pending cases in the office's inventory, including the long-term plans of the District Office to use ADR techniques as a part of its charge processing activities.

D. In addition, each District Office shall develop an implementation document supporting the LEP. This document shall describe the District Office's strategy for utilizing its resources and give Headquarters information critical for planning, staffing, and the allocation of resources in the field. This document shall:

1. Prioritize and justify the issues identified in the LEPs as to severity and need for local impact, taking into account industries, constituencies, and geographic areas involved;

2. Identify pending charges/suits or proposed charges/suits which fall within the local priority list and indicating those which would have the greatest impact;

3. Identify which of those current charges/suits can be pursued with available resources, as well as those others that could be pursued if additional resources were available; and

4. Describe how the plan results will be achieved, including time lines.

Given that disclosure of the implementation documents would seriously circumvent the Commission's pending and proposed enforcement efforts, they will be treated by the Commission as confidential.

V. Delegation of Authority to General Counsel

The Commission, by resolution of April 19, 1995, delegated litigation authority in certain cases to the General Counsel until such time as the Commission adopts the National Enforcement Plan. With the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of our litigation program, the Commission now provides such delegation as follows:

First, the Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

a) Cases involving a major expenditure of resources, e.g., cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;

b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

c) Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and

d) All recommendations in favor of Commission participation as amicus curiae which shall continue to be submitted to the Commission for review and approval.

Second, the Commission ratifies its decision to give the General Counsel the authority to redelegate to Regional Attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

Finally, the Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. Regional Attorneys are encouraged to consult informally with designated "point of contact" attorneys at the Department of Justice regarding significant legal issues that arise in processing state and local government charges that appear to have litigation potential.

The General Counsel will report to the Commission quarterly on each new case filed pursuant to the delegated authority procedure set out above. The report will briefly describe the issue, basis, and scope of the case, and indicate whether authority to file it had been delegated to the Regional Attorney by the General Counsel. The General Counsel's report shall include an assessment of how the delegation authority has been exercised and whether the Commission's stated goals have been better achieved as a result of the delegation. Such reports shall be presented for discussion at the first regularly scheduled Commission meeting after the Report is prepared. The General Counsel will establish procedures for monitoring the performance of Regional Attorneys and will report to the Commission on such effectiveness once each year.

VI. Settlement and Alternative Dispute Resolution

The Commission's Policy Statement on Alternative Dispute Resolution (ADR), adopted on July 17, 1995, as well as the Commission's policy regarding settlements adopted on April 19, 1995, will apply to the implementation of the National and Local Enforcement Plans.

In the ADR Policy Statement, the Commission confirmed its strong commitment to using voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process, where appropriate and feasible. ADR is fully consistent with EEOC's mission as a law enforcement agency and is squarely grounded in the statutes enforced by the Commission. Used properly and in appropriate circumstances, ADR can provide less expensive, less contentious, and faster results in eliminating workplace discrimination.

ADR must be viewed as an integral component of its comprehensive enforcement program. ADR will complement current charge processing systems by facilitating early resolution of disputes where agreement is possible, thereby freeing up resources for identifying, investigating, settling, conciliating or litigating other matters. Improvements in the Commission's enforcement efforts should enhance the Commission's credibility as a law enforcement agency.

The Commission recognizes that negotiated agreements that resolve claims of discrimination can benefit the parties to a dispute as well as directly advance the Commission's enforcement objectives. While encouraging the use of ADR, the Commission recognizes that it must remain vigilant in assuring that ADR, as used by the Commission, does not conflict with or undermine our enforcement objectives.

Within these limitations, and in conjunction with ADR programs which it may itself implement, the Commission reemphasizes the important role of settlement and conciliation as an integral component of its comprehensive enforcement program.

VII. Enforcement Partnership with State and Local Fair Employment Agencies

On May 22, 1995, the Commission resolved to establish a new partnership with the state and local fair employment practices agencies (FEPAs), recognizing our common mission to eliminate and prevent employment discrimination and to provide timely and effective redress for individuals who have been discriminated against. The Commission adopted the EEOC/FEPA Task Force's recommendation that the

Chairman should take actions to forge this partnership by eliminating duplication of effort that might exist with respect to the processing of charges. As part of this process, the Chairman requested the Director of OPO to consult with field offices and FEPAs to explore the feasibility of joint investigative and enforcement activities.

The FEPAs' enforcement efforts must be viewed as an integral component of the Commission's enforcement efforts. To enhance the roles of the FEPAs in the Commission's enforcement efforts, the Chairman suggested that the Director of OPO, in consultation with the FEPAs, review and discuss the recommendations of the Task Forces on Charge Processing and Alternative Dispute Resolution, exploring ways in which the principles and recommendations, particularly those concerning priority charge handling and the measurement of results, may be used to further our joint mission of eradicating and preventing discrimination. Therefore, the District Offices are encouraged to solicit suggestions from the FEPAs in developing and implementing their LEPs in an effort to minimize duplication of efforts.

VIII. Implementation

While this plan does not, and is not intended to, define the operational implementation of the enforcement priorities, the following considerations should guide implementation steps:

1. The top priority for charge processing (Category A), includes Enforcement Plan cases and, within resource constraints, other cases in which it appears more likely than not that discrimination has occurred.

2. A determination that a charge falls within the Enforcement Plan requires a determination that the issue raised is an Enforcement Plan priority as well as an assessment that the strength and potential impact of the case supports the decision to proceed.

3. Although it will be possible to categorize some charges as Enforcement Plan cases immediately upon receipt of the charge, the categorization of other cases will require further evaluation and investigation. The Commission is committed to devoting the appropriate level of resources to the evaluation and investigation of all cases potentially falling within the priorities enumerated in the NEP or Local Enforcement Plans. Nonetheless, District Offices should endeavor to identify Enforcement Plan cases at the earliest possible time following receipt of charge.

4. Offices should develop procedures to assure routine and effective consultation between legal and investigative personnel in all phases of the identification and development of Enforcement Plan cases.

5. Cases falling under the enumerated priorities in the NEP and/or Local Enforcement Plans should be accorded priority in investigation with respect to speed, depth, and other measures of dedication of resources in order to assure that the investigation will support a subsequent and timely enforcement action if appropriate.

6. The Commission recognizes that some cases that fall within the enumerated priorities will require a commitment of substantial resources from the District Office and may diminish that office's ability to pursue other cases in litigation.

7. In addition to charges filed by individuals, Commissioner's charges under Title VII and the ADA and directed investigations under the ADEA and EPA provide important enforcement tools under the Enforcement Plans.

8. All District Offices with responsibilities under the Enforcement Plans should conduct outreach and educational activities and obtain on a regular basis input from stakeholders and interested groups on the effectiveness of the implementation of the National and Local Enforcement Plans. These offices should also conduct regular assessments of the communities they serve to identify any special needs or employment discrimination issues that may otherwise not be addressed.

9. The Commission recognizes that it may not be able to litigate every case that fails conciliation, including cases which fall within the National and Local Enforcement Plans. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to work closely with the private bar, which continues to play a critical role in civil rights enforcement.

10. All components of all offices in headquarters and the field will work together cooperatively to efficiently and effectively accomplish the mission of the agency.

IX. Reporting

The General Counsel and the Director of the Office of Program Operations shall report quarterly to the Commission on the effectiveness of their efforts under the Enforcement Plans. These reports will include recommendations for amendments to the National

Plan or Local Plans where appropriate for the Commission's consideration and, with respect to the General Counsel, the matters set forth in Section V, pages 14-15.

Equal Employment Opportunity Commission

National Enforcement Plan

[SEAL]

Gilbert F. Casellas
Chairman

Paul M. Igasaki
Vice Chairman

Joyce E. Tucker
Commissioner

Paul Steven Miller
Commissioner

C. Gregory Stewart
General Counsel

February 1996

C. FIVE-POINT PLAN*

EEOC's Five-Point Plan provides the framework for accomplishing our agency's mission and is central to our three overarching Strategic Objectives. The Five-Point Plan places a premium on coordination, innovation and results. Under the Plan, all facets of EEOC's work will be viewed with an eye toward being more proactive and more effective. Each element of the Five-Point Plan is described below.

1. Proactive Prevention

The best way to combat discrimination is to prevent it from happening in the first place. We will work to proactively prevent discrimination by providing information and solutions to members of the public that will help them identify and solve problems before they escalate. We will serve as a clearinghouse of reports and best practices to encourage learning and understanding among employers and employees. We will also introduce new and innovative outreach activities, such as: teleconferences, technical assistance visits, flexible training opportunities, an enhanced Web site, information dissemination through public radio and television, cyber forums, and partnerships and strategic alliances to strengthen efforts and build support. In essence, we will work to promote healthy workplace practices and to instruct managers in an effort to find the "cure" for discrimination.

2. Proficient Resolution

Providing quality services that are fair, prompt, and cost effective, is vital to the EEOC's mission. We will ensure that our work is consistent, accurate and timely. The EEOC will evaluate and improve every stage of the private sector charge process and will collaborate with other federal agencies in our effort to make the federal complaint process more efficient. The EEOC will also introduce new performance techniques to streamline procedures, while enhancing the integrity of our processes.

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* EEOC Chair Cari M. Dominguez adopted the Five-Point Plan in 2001. The description of the Five-Point Plan printed here is from the EEOC's *Strategic Plan for Fiscal Years 2004 - 2009*, which is available on the Commission's website (http://www.eeoc.gov/abouteeoc/plan/strategic_plan_04to09.html).

3. Promote and Expand Mediation/Alternative Dispute Resolution (ADR)

Promoting and expanding mediation and other types of ADR is the centerpiece of the EEOC's Five-Point Plan. Our private sector mediation program has demonstrated that disputes can be settled quickly, amicably and cost-effectively through ADR techniques.

We will build on earlier successes through the continued development of a comprehensive agency-wide ADR program. We will review the pool of private sector charges eligible for mediation and offer mediation at various stages of the private sector charge process. We also will work to expand the number of private employers participating in Universal Agreements to Mediate, which allow EEOC to attempt mediation in all cases involving an employer so long as the charging party consents.

EEOC will also expand the use of ADR in the federal sector program by continuing to explore new and different ADR methods, identifying ADR methods that prove most efficient and cost effective at the hearings stage of the federal complaint process, and evaluating the results of an appellate-stage mediation program piloted in 2002. We will continue to expand and improve our Federal Sector ADR web page, which serves as a clearinghouse about ADR for federal employees.

4. Strategic Enforcement and Litigation

We must use all research tools available to us, and deploy agency resources strategically, if we want to have a meaningful impact on discrimination in today's workplace and the workplace of the future. We will examine emerging workplace trends and issues in both the private and federal sectors and use this information to make reasoned and calculated decisions about what issues merit our attention and how we can better integrate our policy guidance, investigative, litigation and federal coordination functions. In determining where the agency needs to concentrate its enforcement and litigation efforts, the EEOC will establish baseline information on investigation, litigation and federal sector activities; examine recent court decisions; consult with agency staff and stakeholders; evaluate the agency's outreach activities; and conduct annual reviews of economic indicators, demographic trends, employer practices, industry literature and legislative initiatives. Finally, we will continue to strengthen partnerships between EEOC investigators and attorneys and between the EEOC and other federal agencies.

5. EEOC as a Model Workplace

The President's Management Agenda (PMA) provides the roadmap for the final point of the agency's Five-Point Plan. The President's agenda addresses important enhancements to internal agency operations and its interface with the public. The integration of our Five-Point Plan and other Administration and agency initiatives will help build a model workplace where we can effectively and efficiently accomplish our goals in an environment conducive to good employment practices.

The very principles and standards we promote to employers should be readily apparent in our own operations. To achieve our aims, we will build an organization committed to providing opportunities for EEOC employees to grow professionally. We will accomplish this through occupational and leadership development, performance management programs, the use of enabling technologies and a flexible, adaptable work environment that is conducive to teamwork. We will build a model workplace with programs and practices worthy of emulation.

REGIONAL ATTORNEYS' MANUAL

PART 2

INITIATING LITIGATION

OFFICE OF
GENERAL COUNSEL

APRIL 2005

PART 2. INITIATING LITIGATION

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REGIONAL ATTORNEYS' MANUAL

PART 2

INITIATING LITIGATION

SECTION I

EEOC LAWS, REGULATIONS, AND GUIDANCE ON THE WEB

SECTION I
EEOC LAWS, REGULATIONS, AND GUIDANCE ON THE WEB

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A. STATUTES ENFORCED BY EEOC

The EEOC enforces the Age Discrimination in Employment Act of 1967 (ADEA), Titles I and V of the Americans with Disabilities Act of 1990 (ADA), the Equal Pay Act of 1963 (EPA), Sections 501 and 505 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964 (Title VII). The EEOC's Web site, http://www.eeoc.gov/, has the text of these statutes (http://www.eeoc.gov/abouteeo/overview_laws.html) as well as summary information on the groups and types of discriminatory practices covered by the statutes.

B. EEOC REGULATIONS

The Commission's regulations implementing and interpreting the statutes it enforces are printed at 29 C.F.R. Parts 1600 through 1691. For the text of EEOC's regulations, see the EEOC's Web site at http://www.eeoc.gov/policy/regs/index.html. For the *EEOC's Questions and Answers on the Uniform Guidelines on Employee Selection Procedures*, see http://www.uniformguidelines.com/questionandanswers.html.

C. EEOC GUIDANCE AND OTHER RESOURCES

Most of the EEOC's recent enforcement guidance and related documents are available on the EEOC's Web site at http://www.eeoc.gov/policy/guidance.html. New sections of the EEOC's Compliance Manual are available at http://www.eeoc.gov/policy/compliance.html. Text of memoranda of understanding entered into between EEOC and other agencies (including the Department of Labor, the Department of Justice, the National Association of Attorneys General, and the National Labor Relations Board) regarding various EEO issues are available at http://www.eeoc.gov/policy/mou.html.

REGIONAL ATTORNEYS' MANUAL

PART 2

INITIATING LITIGATION

SECTION II

PREFILING PROCEDURES

SECTION II
PREFILING PROCEDURES

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A. TRANSMISSION OF CONCILIATION FAILURES TO DEPARTMENT OF JUSTICE

In transmitting Title VII and ADA conciliation failures against public employers to the Department of Justice for litigation consideration, the legal unit should prepare as an attachment to EEOC Form 256 a memorandum recommending for or against litigation containing a sufficient discussion of the facts and law to support the recommendation. A copy of EEOC Form 256, *Transmittal of EEOC Case to the Department of Justice,* is shown in the appendix hereto.

APPENDIX

EEOC FORM 256:
TRANSMITTAL OF EEOC CASE TO THE DEPARTMENT OF JUSTICE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TRANSMITTAL OF EEOC CASE TO THE DEPARTMENT OF JUSTICE
(The attached charge involves state/local government or political subdivisions, including public educational institutions.)

TO:	FROM: *(District name/address)*
THE ATTACHED ☐ CHARGE ☐ THIRD PARTY CHARGE IS REFERRED FOR A DETERMINATION TO SUE PURSUANT TO: ☐ *Section 706 (f)(1) or* ☐ *Section 706 (f)(2)*	

EEOC CHARGE NUMBER

NAME/ADDRESS OF CHARGING PARTY TO WHOM NOTICE IS TO BE ADDRESSED	NAME/ADDRESS OF AGGRIEVED PERSON TO WHOM NOTICE IS TO BE SENT

NAME/ADDRESS OF RESPONDENT(S)

DISTRICT DIRECTOR/REGIONAL ATTORNEY RECOMMENDATIONS/REMARKS

DATE	TELEPHONE NUMBER *(Use FTS number)*	DISTRICT DIRECTOR *(Typed Name)*	SIGNATURE

FOR DEPARTMENT OF JUSTICE USE

DATE EEOC FORM 256 RECEIVED	DATE NOTICE ISSUED TO PARTIES

STATUS

B. FILING SUIT IN STATE COURT

Regional Attorneys must receive approval from the General Counsel before filing suit in state court, even if the case is otherwise within the Regional Attorney's redelegated litigation authority.

C. PRESUIT INTERVIEWS OF CHARGING PARTIES AND OTHER CLAIMANTS

Charging parties should be interviewed by a legal unit attorney prior to submission of a presentation memorandum or notice of intent to file under the Regional Attorney's redelegated authority. Where practicable, other individuals who will have significant roles in the litigation as either witnesses or claimants should also be interviewed before litigation is recommended or a notice of intent submitted.

Interviews should be conducted in person where possible, even if this requires out of city travel by either the attorney or the claimants. At a minimum a telephone interview must take place. The interview should explore the individual's basis for recovery as well as other knowledge he or she may have relevant to the suit, such as information on the respondent's operations and employment practices and on other individual and class claims.

The attorney should also discuss with the claimant the relief to which he or she may be entitled (including the effect of any personal bankruptcy on such relief), and should obtain at least general information on backpay accrual, mitigation, and any pecuniary compensatory damages the claimant may have incurred. The attorney should discuss the standards for obtaining nonpecuniary compensatory damages and the kinds of inquiries the defendant will be entitled to make about the claimant if such damages are sought. (See the legal discussion on nonpecuniary compensatory damages in subsection D. of this section of the *Manual*.) A copy of the information sheet on nonpecuniary compensatory damages in the appendix that follows should be given to the claimant at the end of the interview. Although the Commission brings suit to further the public interest in preventing employment discrimination, the considerations relevant to seeking compensatory damages for a particular individual are unique to that person. Thus, claims for nonpecuniary compensatory damages should be made only for individuals who have given their express consent following a thorough discussion with a legal unit attorney regarding the possible consequences of such a claim, and who have had at least a week to think about the matter after receiving the information sheet.

Finally, the attorney should explain during the interview the Commission's public interest role in the litigation, the possibility that the Commission's and the claimant's interests may diverge during the litigation, and the claimant's individual suit and intervention rights, if any. In ADEA and EPA cases, the claimant should be informed

that EEOC's suit will cut off any private right of action he or she may have. See the discussion of these matters in subsection E. of this section of the *Manual*.

APPENDIX

INFORMATION SHEET ON NONPECUNIARY COMPENSATORY DAMAGES

When the EEOC files a lawsuit alleging that a defendant engaged in intentional discrimination, the agency generally may seek monetary recovery for injuries which individuals suffered as a result of defendant's unlawful conduct. The monetary relief may include what are known as "nonpecuniary compensatory damages." These are damages for intangible injuries such as emotional distress, mental anguish, inconvenience, and similar harm suffered by a victim of discrimination. The monetary relief an individual may be awarded for such intangible injuries may not exceed a specified amount that depends on the number of people employed by the defendant.

When the EEOC files a lawsuit, EEOC attorneys, in consultation with the individuals for whom the agency will be seeking relief, will determine whether these individuals have claims for nonpecuniary compensatory damages under appropriate legal standards, and if so, whether such damages should be sought from defendant. The EEOC will seek these damages on behalf of an individual only if he or she agrees that EEOC may do so.

There are a number of issues which you, as an individual harmed by defendant's discriminatory conduct, should carefully consider before deciding whether to ask the EEOC to seek nonpecuniary compensatory damages on your behalf. First, the EEOC will have to be able to prove at trial that you suffered the injuries for which the damages are sought. This means that you must be prepared to testify in great detail at a deposition,[*] and possibly before a judge and jury, about the injuries you suffered. These injuries may, in some instances, relate to highly personal and private matters. For example, defendant's unlawful discrimination may have caused marital problems between you and your spouse, or you may have sought counseling or medical treatment for emotional problems caused by the discrimination. While the EEOC trial attorney will object to improper questions, procedural rules generally permit the defendant to ask very detailed questions concerning the damages claim. Some

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[*] Depositions are pretrial proceedings in which you are placed under oath and defendant's attorney is permitted to ask you any questions he or she believes are relevant to your claim. Your responses are recorded by a court reporter and can be introduced at trial.

individuals may not wish to testify about such matters, and therefore would not want to seek recovery for such injuries.

Often, your detailed testimony alone will not be enough to prove the damages and you will be asked to identify witnesses who can corroborate that you suffered the injuries. Such witnesses might include your family members, friends, coworkers, and physician or therapist. Defendant will be permitted to ask these witnesses the same kinds of questions about your personal life that it will be asking you.

Also, in some instances where such damages are sought, the defendant may be able to seek information concerning seemingly unrelated matters. You are not entitled to compensatory damages unless EEOC can prove that defendant's unlawful actions actually caused your injuries. Therefore, defendants are generally given an opportunity to prove that some other situation in your life caused the claimed damages. Based on this general rule, the defendant may be permitted to inquire into a variety of personal matters, including those involving your family, friends, and coworkers. For example, if you contend that defendant's unlawful actions caused you mental anguish and depression, defendant may be able to ask you and your witnesses about personal matters that may have caused such depression, such as family problems or illness. Defendant, however, is not permitted to delve into such issues solely to harass or embarrass you, and the EEOC trial attorney will ask the court to terminate such questioning.

Finally, depending on the type of damages claimed, defendant may be able to have the court require you to be examined by a physician designated by defendant. You would be required to respond to the physician's questions, and the examination would be disclosed to defendant and might become part of the public record in the case.

In sum, by seeking nonpecuniary compensatory damages, you and possibly your family, friends, coworkers, and physicians or therapists may be required to provide testimony concerning matters of a personal, private, or sensitive nature. The extent to which this may be required depends upon the specific damages claimed, the facts of the case, defendant's strategy, and the court's view on these matters. The EEOC trial attorney will seek to limit such inquiries to only those the EEOC believes are permissible under the applicable rules and case law, but it is up to the judge to decide the ultimate scope of these inquiries.

Assuming you have a valid claim for nonpecuniary compensatory damages, as determined by the EEOC attorneys assigned to the case, you should very carefully

consider all of the above issues in deciding whether or not to have the EEOC assert such a claim. This may include, if you wish, consulting with others who may be impacted by your decision, such as your spouse or other family members. Once you have made your decision, you should advise the EEOC trial attorney, so that he or she may include the appropriate damages claim, if any, in the EEOC's suit. Finally, bear in mind that while a claim for these damages may generally be removed from the case as litigation progresses and the case develops, it may be difficult to add a claim for damages which was not initially included in the suit.

D. NONPECUNIARY COMPENSATORY DAMAGES: ISSUES FOR REVIEW WITH CLAIMANTS PRIOR TO FILING SUIT

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D. NONPECUNIARY COMPENSATORY DAMAGES: ISSUES FOR REVIEW WITH CLAIMANTS PRIOR TO FILING SUIT

1. Introduction

This memorandum is intended to assist trial attorneys in preparing for and conducting interviews of charging parties and other claimants on the question of whether to seek nonpecuniary compensatory damages, as provided in the Civil Rights Act of 1991 (42 U.S.C. §1981a). See subsection C. of this section of the *Manual*, *Presuit Interviews of Charging Parties and Other Claimants*.

2. Areas of Inquiry as to Scope of Damages

There are a variety of nonpecuniary compensatory damage claims which may be asserted on behalf of a claimant. To assess whether such a claim should be made, trial attorneys must discuss with each claimant the type and extent of damages he or she incurred. After briefly explaining the nature of nonpecuniary compensatory damages, the trial attorney should review the specific types of damages individuals in employment discrimination cases may allege, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, fright, shock, humiliation, indignity, apprehension, marital strain, loss of self-esteem, anxiety, depression, loss of respect of one's friends and family, isolation, and grief.

There are a number of common observable physical consequences to these types of injuries, such as increased use of alcohol, crying, sleeplessness, fatigue, headaches, gastrointestinal problems, and sudden and uncharacteristic loss of weight. This list is not inclusive and claimants who identify emotional distress type injuries should be subjected to careful inquiry as to any possible physical manifestations in order to determine whether they have sustained compensable injuries. Before asking claimants to discuss their personal situations, the trial attorney should remind claimants that seeking compensatory damages is a choice and that they are not obligated to discuss their injuries and other personal matters if they decide not to seek such damages. See *Presuit Interviews of Charging Parties and Other Claimants*, in subsection C. of this section of the *Manual*.

Claimants should be advised that the amount of damages awarded, if any, will likely be determined largely by the nature and severity of their proven injuries, and of course, the statutory caps. *Compare, e.g., Smith v. Northwest Mutual Financial Acceptance, Inc.*, 129 F.3d 1408, 1416-17 (10th Cir. 1997) (jury award of compensatory damages was reduced to the statutory cap, but otherwise upheld, where the plaintiff testified that her termination caused "nausea, migraines, humiliation, degradation, loss of self respect, consumption of sleeping pills, frequent crying, loss of a loan officer career, and stress in [her] relationship with her daughter," and "[t]he record reveal[ed] that plaintiff's testimony was in part corroborated by independent, objective testimony" from "two of plaintiff's co-workers [who] testified from personal knowledge"), *with Vadie v. Mississippi State University*, 218 F.3d 365, 375-77 (5th Cir. 2000) (jury award of nonpecuniary compensatory damages was reduced to the statutory cap by the district court; however, the Fifth Circuit reversed the award and ordered that the case be "remand[ed] for a new trial on retaliation damages unless [the plaintiff] accepts a remittitur . . . reducing the damages award to $10,000," because "the award is entirely disproportionate to the injury sustained," where the plaintiff testified merely that he "bec[a]me sick, physically, mentally, and everything" when informed that he was not selected a permanent position on the faculty, and where "none of [his claims were] corroborated by medical evidence or any other witnesses"). *See also Evans v. Port Auth. of New York & New Jersey*, 273 F.3d 346 (3d Cir. 2001) (in a Section 1981 and Title VII failure to promote race discrimination case, jury awarded $1.15 million in pain and suffering damages which was remitted to $375,000; appellate court affirmed reduced award reasoning that jury award was excessive and while $375,000 is "well above most emotional distress awards," *id.* at 355, "this was not a typical case." *Id.* at 356; award was supported by plaintiff's testimony about the physical and emotional toll of working under discriminatory conditions as well as the demeanor and testimony of the employer's witnesses.)

3. <u>Areas of Inquiry as to Proof of Damages</u>

a. Evidence of Damages

(1) Proof Standards

It is important that the claimant understand that nonpecuniary compensatory damages will not be awarded solely based on proof of an unlawful employment practice. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416-17 (5th Cir. 1998) (Title VII and Section 1981; "compensatory damages for emotional distress and other forms of intangible injury will not be presumed from mere violation of constitutional or statutory

rights"). Nor will damages be awarded solely based on an assertion that the claimant suffered mental anguish as a result of defendant's unlawful conduct. *Bailey v. Runyon*, 220 F.3d 879, 881 (8th Cir. 2000) ("Conclusory statements give the finder of fact no adequate basis from which to gauge the nature and circumstances of the wrong and its effect on the plaintiff"). *See, e.g., Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) (reversing an award of emotional distress damages, where "plaintiff's testimony did not identify and describe the kind of severe emotional distress that warranted the award [where she] suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress"). Nonetheless, mere assertions of nonpecuniary compensatory damages may be sufficient in a few instances where defendant's conduct is particularly severe, long-term, and egregious. *See e.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999) (Title VII and Section 1981; "in appropriate circumstances the infliction of emotional distress may be inferred from the circumstances of the violation," and "courts may properly . . . award damages to compensate for that distress"; upholding "extremely modest awards . . . rang[ing] from $2,500 to $25,000," based on the testimony of 18 African-American "claimants, who were experienced [construction workers], [that they] suffered emotional distress by having to subject themselves to an unnecessary training program for up to two years before being permitted to take the union entrance exam").

In all cases, the EEOC bears the burden of proving that the claimant actually suffered the damages alleged, and that the defendant's unlawful conduct caused the injuries. *See Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) ("To be eligible for compensatory damages, [the plaintiff] was required to prove that [defendant] caused her emotional distress"); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (the testimony of plaintiff and her treating psychologist "tied [plaintiff's] depression and emotional stress to her job-related problems" and provided "adequate proof of causation"). Where evidence shows that the unlawful employment practice was only a partial cause of the claimant's injuries, the recovery of nonpecuniary compensatory damages may be affected. *See Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576, 581 (7th Cir. 1996) ("[W]e reject the defendant's argument that [the plaintiff] was required to quantify how much of her distress was due to her firing, or even establish that most of her distress stemmed from the firing [; however,] the only rational reading of the record is that [defendant] was only partially responsible for [her] emotional harm [and i]n such circumstances, damages must be reduced accordingly"; award of damages reduced by 25 percent).

(2) Claimant's Testimony

The testimony of the claimant alone, if sufficiently specific, may be enough to meet the burden of proving an actual injury caused by the defendant. *See, e.g., Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 836-37 (8th Cir. 2001) (holding that a reasonable jury could have found that plaintiff was entitled to compensatory damages even though the only evidence he presented was his own testimony that immediately after he was terminated he felt "empty," like he lost his best friend and that there was "a hole in his chest"; despite the absence of medical or expert evidence, a plaintiff's own testimony may provide ample evidence when heard in combination with the circumstances surrounding the plaintiff's termination); *Mathieu v. Gopher News Company*, 273 F.3d 769, 782-83 (8th Cir. 2001) (testimony by a former customer services manager that he lost his job of thirty-four years, was forced to reduce his standard of living, and had become depressed was sufficient to support a jury's award of $165,000 for emotional distress, despite the fact that he did not offer expert testimony; the testimony of a medical expert is not a prerequisite for recovery for emotional harm and a plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden); s*ee also Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (based on a comprehensive survey of circuit case law, the court concluded that "a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress"); *Williams v. Trader Publishing Co.*, 218 F.3d 481, 486 (5th Cir. 2000) (upholding a jury award of $100,000, where plaintiff "testified specifically as to her emotional distress due to the [sex discriminatory] discharge from her position [with defendant] resulting in sleep loss, beginning smoking, and a severe loss of weight"; "[s]uch evidence, although solely the testimony of the plaintiff, is sufficiently specific to support the jury's determination of compensatory damages"). *But cf. Brady v. Fort Bend County*, 145 F.3d 691, 720 (5th Cir. 1998) ("When a plaintiff's testimony is particularized and extensive, such that it speaks to the nature, extent, and duration of the claimed emotional harm in a manner that portrays a specific and discernable injury, then that testimony alone may be sufficient"; court, however, "affirm[ed] the district court's decision to grant judgment as a matter of law in favor of the [employer] on the mental anguish awards," where "the plaintiff's testimony in this case is vague, conclusory, and uncorroborated[, and thus] cannot legally support mental anguish damages").

(3) Corroborating Witnesses

As the cases demonstrate, a claimant is more likely to prevail on a claim for nonpecuniary compensatory damages where the damages are corroborated in some

fashion, whether by a spouse or other family members, co-workers, friends, a therapist and/or a physician. *See, e.g., O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1257 (10th Cir. 2001) (Title VII and Section 1981; upholding a jury award of $300,000 for emotional distress, where the plaintiff "testified at trial that he began seeing a psychiatrist before being terminated but could not afford further treatment after his termination; [h]e further testified about his inability to sleep and loss of appetite which continued through trial. [His wife] corroborated [his] statements, testifying that his condition had gotten worse since his termination[, and] that her husband was more worried and very unhappy"); *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189 (8th Cir. 2001) (holding that personal testimony of terminated supervisor who had prevailed on retaliation claim was sufficient to establish $75,000 emotional distress damages award where corroborated by husband); *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 532 (10th Cir. 2000) (Plaintiff "testified that he has trouble sleeping and wakes up with his heart pounding, not knowing where he is. In addition, he testified that he worked very hard to position himself well in America after immigrating to this country, but has felt that he was not recognized for his efforts. After having worked for [defendant] for 18 years, [plaintiff] feels it is too late for him to start his career over with another employer. [Plaintiff] has sought the counsel of his wife, minister and friends to deal with these issues, and their testimony supports his claims of emotional distress. All of that evidence forms a sufficient basis to support the jury's award of emotional distress damages in the amount of $125,000"); c*f. Giles v. General Electric Company*, 245 F.3d 474, 487-89 (5th Cir. 2001) (held that testimony by machinist with back problem and testimony from co-worker regarding the physical and mental problems that employers' refusal to allow return to work had caused plaintiff, although specific enough for an award of compensatory damages, was not sufficient to merit an award of $300,000; plaintiff testified that he had trouble sleeping, suffered headaches and marital difficulties, lost the prestige and social connections associated with his position and his service as treasurer of the local union; his co-worker testified that the plaintiff appeared "despondent, depressed, down and absolutely utterly discouraged about not being able to come back to work"; court ordered award reduced to $150,000 or a new trial on damages).

Corroboration may be especially important where the employer questions a claimant's assertion of nonpecuniary compensatory damages by presenting witnesses who challenge his testimony. *See Bruso v. United Airlines, Inc.*, 239 F.3d 848, 857 (7th Cir. 2001) ("It is within the jury's province to evaluate the credibility of witnesses who testify as to emotional distress, and we shall not disturb those credibility determinations on appeal. If the jury disbelieved [the plaintiff's] challenged testimony regarding the humiliation, anger, and depression he experienced following his demotion, as it was free to do, it was not obligated to award him compensation"). Psychotherapists often

provide invaluable corroboration of a claimant's assertion of nonpecuniary compensatory damages. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1298 (8th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998) ("this court and others have recently noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress"). However, "[m]edical or other expert evidence is not required to prove emotional distress." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065, 75 FEP Cases 1741 (8th Cir. 1997) (upholding an award of $100,000 "for mental anguish and loss of enjoyment of life," where the claimant, "his wife and his son testified about the anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation he suffered after he was [unlawfully] not promoted and [suffered retaliation] after he filed the employment discrimination charge"). *But cf. Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 35-36 (1st Cir. 1999) ("Although testimony from a mental health expert is not required to sustain an award for emotional distress, the absence of such evidence is useful in comparing the injury to the award of damages"; thus, even though the plaintiff "had trouble sleeping and was anxious" and his "family life suffered" during his temporary furlough, the court ordered a large remittitur in lieu of a new trial, because "[t]here was no evidence that [plaintiff] ever sought medical treatment or suffered any long-term depression or incapacitation").

It is important to ascertain from the claimant whether he or she knows of witnesses to substantiate compensatory damages, whether such witnesses may be willing to testify, and perhaps most importantly, whether the claimant is prepared to have such testimony elicited not only in a deposition, but in court before a jury. To the extent that the claimant is able to provide corroborative witnesses, the EEOC's ability to prove damages will be significantly enhanced.

b. Permissible Scope of Defendant's Inquiries

(1) Waiver of Psychotherapist-Patient Privilege

The claimant should be advised that as a general rule, the defendant will be able to probe in discovery and at trial with respect to all elements of the claimant's nonpecuniary compensatory damages claim. By including a physical, mental or emotional condition as an element of claimant's damages, the claimant is essentially waiving any claim of privilege or confidentiality with respect to evidence relevant to the nature and extent of the damages. This waiver may be especially troubling to claimants in the context of psychotherapy treatment.

The Supreme Court has "h[e]ld that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are

protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (action under Section 1983). Like other testimonial privileges, such as those between physician and patient or attorney and client, the *Jaffee* Court acknowledged in a footnote that "the patient may of course waive the protection." 518 U.S. at 15, n.14.

Most courts have found waiver of the psychotherapist-patient privilege where the plaintiff alleges severe emotional distress and seeks monetary damages for psychological injury in an action brought under Title VII and/or the Americans with Disabilities Act. *See, e.g., Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) ("a plaintiff waives the psychotherapist-patient privilege by placing his or medical condition at issue"; upholding discovery sanctions and dismissal of a Title VII action alleging sex discrimination, sexual harassment and retaliation, "with allegations of extreme emotional distress," where plaintiff refused to provide signed medical releases for any doctors, psychiatrists, psychologists, and counselors she had consulted during the period covered by her complaint); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 (D. N.J. 2000) (holding that a "plaintiff waives the psychotherapist-patient privilege by placing his/her mental or emotional condition at issue;" requiring the plaintiff in a Title VII race discrimination case to produce mental health records up to the time of trial, where damages sought for alleged continuing emotional distress; but stating in dicta that a garden-variety emotional distress claim does not trigger the patient-litigant exception); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D. Cal. 1999) (same in an ADA case; "[Plaintiff] can testify to her emotions near the incident, and the defendant is free to cross examine her about the depth of her emotional damage and other factors in her life at that time. But to insure a fair trial, particularly on the element of causation, the court concludes that defendant should have access to evidence that [plaintiff's] emotional state was caused by something else. Defendant must be free to test the truth of [plaintiff's] contention that she is emotionally upset because of the defendant's conduct. Once [she] has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to an element of her claim"); *EEOC v. Danka Indus., Inc.*, 990 F.Supp. 1138, 1142 (E.D. Mo. 1997) ("Plaintiffs in this action are seeking damages for emotional distress resulting from sexual harassment. Therefore, the mental condition of the plaintiffs is directly related to the issue of damages. Defendant is entitled to discover to what extent the plaintiffs' mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which they now seek damages"); *Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F.Supp. 346, 349-350 (C.D. Ill. 1997) (Title VII sexual harassment; "Plaintiff has waived the psychotherapist-patient privilege by placing her mental condition in issue and by disclosing [her therapist] as an expert witness who will give opinion testimony at trial. All documents relating to the treatment of plaintiffs, including [the therapist's] personal

notes, must be disclosed"); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (Title VII and ADA; where the plaintiff seeks damages for injury to her mental condition, "to hide . . . behind a claim of privilege when that condition is placed directly at issue would simply be contrary to the most basic sense of fairness and justice").

Other courts have adopted a narrower interpretation of whether the psychotherapist-patient privilege is waived by assertion of a claim for compensatory damages. In *Ruhlmann v. Ulster County Department of Social Services*, 194 F.R.D. 445, 450 (N.D. N.Y. 2000) (ADA), the court held that "a party does not put his or her emotional condition in issue by merely seeking incidental, 'garden variety,' emotional distress damages, without more." *See id.* at n.6 ("[G]arden-variety emotional distress . . . is ordinary or commonplace emotional distress . . . which [is] simple or usual [in a discrimination case]. In contrast, emotional distress that is not garden-variety may be complex, such as that resulting in a specific psychiatric disorder, or may be unusual, such as to disable one from working"). The court rejected "the purported broad view [that] seeking emotional distress damages is sufficient to bring emotional condition into issue, opening the door for discovery into psychiatric records." *Id.* at 449 ("[a] close reading . . . reveals that many of the cases espousing the broad view distinguish between cases in which significant emotional harm is alleged or the mental condition is at the heart of the litigation, and a claim for 'garden variety emotional distress."); *Krocka v. City of Chicago*, 193 F.R.D. 542 (N.D. Ill. 2000) (holding that the plaintiff could retain the psychotherapist-patient privilege by limiting his claim for emotional distress damages to embarrassment and humiliation); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 308-09 (N.D. Ill. 1999) (holding that the plaintiff preserved the psychotherapist-patient privilege by self-imposed limitations on the scope of her emotional distress claim; plaintiff would only be permitted to testify to humiliation, embarrassment, anger and upset brought about by defendant's discriminatory actions; no testimony allowed with regard to plaintiff's symptoms, i.e., sleeplessness, nervousness, depression); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997) (federal and state gender discrimination and retaliation claims; court held that the psychotherapist-patient privilege is waived only where the plaintiff either calls her therapist as a witness, or introduces in evidence the substance of any therapist-patient communication).

(2) Rule 35 Examinations

Claimants should also be advised that the defendant may be able to require that a claimant submit to a physical or mental examination in accordance with Rule 35(a) of the Federal Rules of Civil Procedure. Rule 35(a) permits a court to order such an examination "on motion for good cause shown" when the mental or physical condition of a person is "in controversy." Thus, if a claimant alleges some physical or mental

injury as part of a compensatory damage claim, the court may find that the claimant's mental and/or physical condition is in controversy and that defendant should be permitted an independent assessment of that condition. *See, e.g., Greenhorn v. Marriott Intern., Inc.*, 2003 WL 1697765 * 2 (D. Kan. March 27, 2003) (granting defendant's motion to compel Rule 35 exam of sexual harassment plaintiff where allegations of emotional distress are "sufficiently serious and sweeping such that the average lay person might not be able to evaluate properly the nature, extent and cause of the injuries" and because plaintiff identified her own expert witness to testify as to her depression and post traumatic stress disorder); *Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320 (N.D. Ga. 2000) (the court granted defendants' motion "to compel plaintiff to submit to an examination by a licensed psychiatrist . . . assisted by a licensed psychologist" in a case "alleging gender discrimination and retaliation in violation of Title VII," where "[p]laintiff also asserted state law claims of intentional infliction of emotional distress," and sought compensatory damages based on "claims that she suffered extreme and severe emotional distress," *id.* at 321; "[g]iven the nature of plaintiff's claims, the fact that she has squarely placed her mental condition in controversy, and because of the existence of treating health care professionals who may testify on plaintiff's behalf, and the existence of other life events that may be contributing factors to her emotional distress, the court finds that defendants have affirmatively established good cause for the mental examination." *Id.* at 323).

A majority of courts "will not require a plaintiff to submit to a medical examination unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of her claim for emotional distress damages; and (5) plaintiff concedes that her mental condition is 'in controversy' within the meaning of F. R. Civ. P. 35(a)." *Fox v. Gates Corp.*, 179 F.R.D. 303, 307 (D. Colo. 1998) (ruling that "[p]laintiff shall not be required to submit to an independent medical examination" in an ADA case, where she only "makes what some courts refer to as a 'garden variety' claim for emotional distress damages resulting from defendant's refusal to hire her," *id.* at 309, 307), citing, *inter alia, Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995) (Title VII and state law allegations of race and sex discrimination; the court ruled that plaintiff had "not placed her mental condition 'in controversy' within the meaning of Rule 35(a) . . . [merely] by claiming damages for 'humiliation, mental anguish, and emotional distress' . . . which she says that she suffered as a result of defendants' actions alleged in her complaint," *id.* at 98). *Accord, Ricks v. Abbott Laboratories*, 198 F.R.D. 647, 649-50 (D. Md. 2001) (Title VII and ADA; "agree[ing] with the *Fox* standard and apply[ing it [in a] garden variety case" where

"plaintiff has expressly stated that she 'does not intend to introduce expert psychiatric evidence;'" the court thus refused to order that plaintiff submit to a mental examination, but also ruled that "[p]laintiff is prevented from introducing expert testimony as to her mental state[, or] lay testimony to establish that she suffers from any disorder or that she experienced unusually severe emotional distress as a result of defendant's actions"). The trial attorney should inform the claimant that the EEOC will oppose independent medical examinations that we believe are not appropriate under applicable case law, but that the court will make the ultimate decision as to whether a Rule 35 exam is permissible.

(3) Preexisting Conditions and Intervening Circumstances

(a) In General

Perhaps the issue of greatest potential concern to claimants will be the extent to which private, personal and seemingly unrelated matters are likely to become issues in litigation. It is important that claimants be advised that defendants will likely argue that issues such as alcohol use, intimate relationships, etc., are relevant and permissible areas of inquiry. A plaintiff seeking an award for compensatory damages must prove that the damages were caused by defendant's misconduct. Defendant will seek to avoid plaintiff's damage claim by showing that the injuries at issue were caused by some intervening incident or pre-existing situation, and not by defendant's actions. Thus, defendant will likely be entitled to some discovery with respect to whether its alleged unlawful conduct actually caused the claimed injuries, or whether the injuries may be attributed to some other cause. Instructive in this regard are the many court decisions requiring claimants to disclose their psychotherapy records (see discussion above) because the defendants' successful discovery requests in those cases overrode a recognized privacy privilege.

(b) Fed. R. Evid. 412

In any case presenting allegations of sexual harassment or other sexual misconduct, Rule 412 of the Federal Rules of Evidence limits the admissibility of evidence at trial on issues concerning the claimant's sexual activities. Courts have unanimously "h[e]ld that Rule 412, which explicitly includes civil cases involving sexual misconduct, encompasses sexual harassment lawsuits." *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000); *see Adams v. Goodyear Tire & Rubber Co.*, 184 F.R.D. 369, 375 (D. Ky. 1998) ("The Advisory Committee Notes [on the 1994 revision] make clear that Rule 412 now applies to civil cases involving sexual misconduct, and to Title VII sexual harassment cases in particular"). *See, e.g.*, *Holt v. Welch Allyn, Inc.*, 2000 WL

98118 (N.D. N.Y. January 11, 2000) (in Title VII sexual harassment case, court held that evidence governed by Rule 412 regarding either plaintiff's workplace conduct or conduct with named defendant would be admissible at trial but evidence of nonwork-related sexual conduct was inadmissible); *Socks-Brunot v. Hirschvogel Inc.,* 184 F.R.D. 113 (S.D. Ohio 1999) (applying the rule to bar the admissibility of sexual conduct evidence offered by defendant in a case where plaintiff alleged that she was subjected to a hostile work environment based upon sexual harassment in violation of Title VII and state law). Moreover, "[a]lthough Rule 412 controls the admissibility of evidence rather than its discoverability, numerous courts have applied the rule to decide discovery motions." *Williams v. Bd. of County Commissioners*, 192 F.R.D. 698, 704 (D. Kan. 2000) (in sexual harassment lawsuit, plaintiff not required to answer interrogatory seeking information about sexually transmitted diseases, the age at which she first had intercourse and the names and addresses of those persons with whom she had been sexually active within the last five years; court found that marginal relevance of information sought was outweighed by potential harm to plaintiff including unjustified invasion of privacy, potential for public and private embarrassment and likelihood of significant prejudice based on improper sexual stereotyping); *Howard v. Historic Tours of America*, 177 F.R.D. 48, 51 (D. D.C. 1997) (plaintiff in sexual harassment action was not compelled to answer interrogatory asking whether she had sexual relationships with employees not named as harassers; court stated that "[o]ne of the purposes of Fed.R.Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sexual harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history. This shame and embarrassment . . . exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing").

Despite the protections of Fed. R. Evid. 412, however, "relevance not admissibility is the appropriate inquiry with regard to whether or not the information sought by [defendant] is discoverable." *Herchenroeder v. Johns Hopkins University*, 171 F.R.D. 179, 181 (D. Md. 1997) (allowing discovery on the plaintiff's "past sexual behavior" in the workplace, where the court was "persuaded that the information sought . . . has some relevance, as contemplated by Fed. R. Civ. P. 26(b), to [plaintiff's] Title VII and defamation claims against the defendants, and is also relevant with respect to the credibility of [plaintiff and a] critical witness on her behalf," *id.* at 182); *see Muniu v. Amboy Neighborhood Center, Inc.*, 2001 WL 370226 (E.D. N.Y. March 11, 2001) (despite plaintiff's objections, court allowed defendant to question plaintiff about her alleged past sexual conduct in the workplace because Rule 412 governs admissibility of evidence of victim's sexual behavior but not discoverability of information). Where the claimant seeks compensatory damages under Title VII for emotional distress allegedly caused by sexual harassment, courts have allowed such discovery if it appears that

specific lines of inquiry are relevant to its defense against damages claims, and the information sought may be admissible under the exceptions in Fed.R.Evid. 412(b)(2). *See Barta v. City and County of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996) (where an alleged sexual harassment victim claimed that her values as a strict Mormon made her especially vulnerable to the infliction of emotional distress due to sexual harassment, the court permitted discovery regarding her sexual conduct while on duty at the workplace and conduct involving the alleged harassers, but otherwise barred discovery relating to her conduct off duty and outside the workplace); *Sanchez v. Zabihi*, 166 F.R.D. 500 (D. N.M. 1996) (permitting certain "narrowly tailored" inquiries into the plaintiff's sexual activities in the workplace, where she claimed to have suffered emotional distress due to unwelcome sexual advances, but the defendant claimed that she was "the sexual aggressor" who made advances toward the defendants). It should be noted that in all of these cases, protective orders were issued to bar disclosure of sexual-conduct information obtained through discovery. *Herchenroeder*, 171 F.R.D. at 182-83; *Barta*, 169 F.R.D. at 137-38; *Sanchez*, 166 F.R.D. at 502-03.

In *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620 (D. Kan. 1999), the plaintiff argued that Fed. R. Evid. 412 also applied to a mental examination sought pursuant to Fed. R. Civ. P. 35, and thus fought to bar defendant's psychiatrist "from inquiring into her private, nonwork-related sexual activities" (*id.* at 626). The court rejected this attempt to limit the mental examination, because plaintiff's psychologist "has opined that alleged actions or inactions of defendant proximately caused the emotional distress of plaintiff[; t]o validly assess her mental state, the examiner must have leave to make relevant inquiries[; t]o prohibit inquiry into private sexual activities may unreasonably restrict exploring the history of plaintiff relevant to this case[; and, i]nquiries about private, non-work-related sexual activity appear relevant to evaluate the cause and extent of psychological injuries alleged by plaintiff" (*id.* at 627-28).

(c) Affect on Damages

Discovery, including Rule 35(a) examinations, may disclose to defendant that a claimant had pre-existing conditions or intervening situations which could have been the cause of claimant's damages. Defendant will attempt to use such conditions or situations to argue against an award of compensatory damages or to reduce the size of any award. *See, e.g., Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576, 581 (7th Cir. 1996) (reducing an award of compensatory damages by 25 percent, where evidence "makes clear that [defendant's] retaliation was just one of several factors which affected [plaintiff's] emotional state[; o]ther factors relating to her emotional distress during this tumultuous period in her life, but unrelated to defendant, included the death of [plaintiff's] father, being evicted from her apartment, and being unable to

find a suitable job [after she was fired for nondiscriminatory reasons]"); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999) (discussing cases where monetary awards for emotional harm were reduced or reversed based on evidence of pre-existing conditions and intervening situations which either contributed to or were the proximate cause of the plaintiff's injuries).

Because pre-existing or intervening conditions will likely impact any compensatory damages award, trial attorneys should carefully review with claimants any and all personal problems and situations which defendant may contend are the actual cause of any claimed injuries for which compensatory damages may be sought. Claimants should be explicitly advised that these otherwise personal areas of their lives will likely be subject to disclosure both in discovery and at trial. On the other hand, the "egg-shell plaintiff" theory is likely to apply in these cases, and defendant should be held accountable for compensatory damages due to a particular claimant's unusual or heightened sensitivity resulting in more substantial damages than might typically be expected. *See, e.g., Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) (upholding a statutory-cap award of damages for emotional injuries suffered due to a Title VII and Pregnancy Discrimination Act violation) (finding that plaintiff, as a young, unwed mother who was walking an 'economic tightrope' and who had just discovered she was pregnant for a second time, was in a particularly vulnerable position and was highly dependent on her job. Vulnerability is relevant in determining damages . . . [and] is particularly relevant in this case, because her supervisors had direct knowledge of her vulnerability before they discharged her. The trial judge did not err, therefore, in considering the unusual economic and emotional sensitivity of this plaintiff.").

4. Conclusion

Prior to filing a complaint, trial attorneys should devote sufficient time to reviewing with claimants issues that may arise relating to a claim for nonpecuniary compensatory damages. Trial attorneys must work with claimants to determine if such damages were suffered, and the nature of the injuries should be reviewed in detail. The trial attorney should then carefully explore all factors which may have a bearing on proving such damages, including the availability of corroborating witnesses or documentary evidence, and the extent to which pre-existing or intervening conditions have a bearing on damages. The applicable damage cap and the variability of compensatory damages awards should be discussed. The trial attorney should also ensure that the claimant fully understands that by claiming compensatory damages,

certain aspects of his or her personal life will likely be subject to disclosure during discovery and at trial.

E. NOTICE TO CHARGING PARTIES OF COMMISSION SUITS

Prior to filing suit under any of the statutes the Commission enforces, a legal unit attorney should notify the charging party(ies) by telephone. In ADEA and EPA cases charging parties should be reminded that the Commission's suit will terminate their right to file a private action under those statutes.

Within a week of filing suit in Title VII and ADA cases, the legal unit attorney should send a letter to the charging party(ies), enclosing a copy of the filed complaint and explaining their statutory right to intervene in the action. The letter should describe the Commission's claims and, where applicable, the relief the Commission will be seeking for the charging parties, but should also explain that the agency's purpose in filing suit is to further the public interest in preventing employment discrimination and that it is possible the Commission's objectives and the charging parties' interests will diverge during the litigation. Although charging parties should not be encouraged to intervene, the letter should explain that if they do intervene they will be able to pursue individual relief separately if at any point in the litigation the agency's interests do diverge from theirs. The letter should also inform the charging parties that although they have a statutory right to intervene, the court could deny intervention if their request is made too long after the Commission's suit is filed. A model letter is attached in the appendix.

Related Resources on Web

Title	Description and inSite Address
ADA	Text of Titles I and V of the Americans with Disabilities Act of 1990 (ADA). http://www.eeoc.gov/policy/ada.html
Title VII of the Civil Rights Act of 1964	Text of Title VII, a statute enforced by the EEOC. Title VII bars employment discrimination based on race, color, national origin, sex, and religion. http://www.eeoc.gov/policy/vii.html

APPENDIX

MODEL LETTER NOTIFYING CHARGING PARTY OF COMMISSION TITLE VII/ADA SUIT

[CP's name and address]

RE: [case name, civil action number, and court]

Dear [Mr./Ms._____]

On [filing date] the United States Equal Employment Opportunity Commission filed a lawsuit under Title VII of the Civil Rights Act of 1964 [or ADA] against [defendant's name] based upon the charge of employment discrimination you filed with the EEOC on [date]. The EEOC's suit alleges [claims in complaint]. The suit was filed in [court], and is styled [case name and civil action number]. A copy of EEOC's complaint is enclosed. Under section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), you have a right to intervene as a party in the EEOC's suit and to be represented by your own attorney.

EEOC will be seeking the following individual relief for you in its suit against [defendant's name]: [relief sought for CP]. However, EEOC's primary purpose in filing this suit is to further the public interest in preventing employment discrimination. It is possible that at some point in the EEOC's prosecution of the suit, you will disagree with the agency's decisions regarding the relief to which you are entitled in the case, or with some other aspect of EEOC's litigation strategy. Because EEOC's first obligation is to the public interest, the agency may decide to act in a manner that you believe is against your individual interests. If you have intervened in the suit, you will be able pursue your individual interests separately if the EEOC's interests diverge from yours at any point.

You should try to make your decision regarding intervention fairly soon, because even though you have an unconditional right to intervene if you do so in a timely manner, the court can deny you the right to intervene if the case has progressed substantially by the time you request intervention. Feel free to call me at [trial attorney's

phone number] if you have any questions about the EEOC's suit. I look forward to working with you in this case.

Sincerely yours,

[trial attorney's name and title]

Enclosure

F. ADDING PARTIES TO PREVIOUSLY APPROVED ACTIONS

Regional Attorneys must receive approval from the Office of General Counsel before adding parties to any case approved by the General Counsel or the Commission or to a case previously submitted as a notice of intent to file within the Regional Attorney's redelegated litigation authority.

REGIONAL ATTORNEYS' MANUAL

PART 2

INITIATING LITIGATION

SECTION III

DELEGATED LITIGATION AUTHORITY

SECTION III
DELEGATED LITIGATION AUTHORITY

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A. DELEGATION OF LITIGATION AUTHORITY TO THE GENERAL COUNSEL UNDER THE NATIONAL ENFORCEMENT PLAN

In section V. of the National Enforcement Plan (NEP), the Commission delegated litigation authority to the General Counsel "[w]ith the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of [the Commission's] litigation program." Section V. provides in relevant part:

> [T]he Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:
>
> a) Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;
>
> b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
>
> c) Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and
>
> d) All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.
>
> [T]he Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

B. REDELEGATION OF LITIGATION AUTHORITY TO THE REGIONAL ATTORNEYS

1. Scope of Redelegation

The General Counsel has redelegated authority to Regional Attorneys to file and settle direct suits raising claims under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act that meet the following criteria:

- projected costs of litigation through trial are less than $50,000;
- relief is sought for fewer than 20 individuals, including charging parties and other individuals who have been identified or are expected to be identified as victims of discrimination;
- the case does not fall within any of the categories of cases identified in the NEP over which the Commission has retained sole authority to approve litigation.

Prior to filing suit under their redelegated authority, Regional Attorneys must comply with the notice of intent procedures described in subsection C. below.

2. Limits of Redelegation

The following categories of cases, although delegated to the General Counsel under the NEP, are not redelegated to the Regional Attorneys and must be submitted to the Office of General Counsel for a litigation determination by the General Counsel:

- all interventions;
- all cases raising a claim under the Americans with Disabilities Act;
- cases in which the projected costs of litigation through trial equal or exceed $50,000;
- cases seeking relief for 20 or more individuals, regardless of projected costs.

C. FIVE-DAY NOTICE PROCEDURE FOR REDELEGATED CASES

1. Notice of Intent to File under Redelegated Authority

Prior to filing a case within his or her redelegated authority, a Regional Attorney must submit to Litigation Management Services (LMS) a notice of intent to file under redelegated authority. A copy of the notice form is attached as an appendix to this subsection of the *Manual*.

2. Notice Procedure

E-mail the notice of intent to file under redelegated authority to the legal unit's LMS liaison (or designated substitute if he or she is out of the office), who will acknowledge receipt by return e-mail. If an OGC headquarters staff member does not contact the legal unit about the case, the Regional Attorney may file suit following the expiration of 5 business days from LMS' acknowledgment of receipt of the notice. If someone in OGC contacts the legal unit prior to the expiration of the 5-day period, the Regional Attorney can file suit only if expressly authorized by OGC.

APPENDIX

NOTICE OF INTENT TO FILE UNDER REDELEGATED AUTHORITY

(a) Name of proposed defendant(s):

(b) Charge Information:

(1) Charging party's name;

(2) Charge number;

(3) Filing date.

(c) Court in which case will be filed:

(d) Statute(s):

(e) Bases and issues:

(f) Whether case is class or individual:

(g) Case Description:

(1) Respondent's operations, including the jobs held or sought by the claimants and an estimate of the size of the workforce at the facility where the violations occurred;

(2) Facts supporting EEOC's claims;

(3) Respondent's principal defenses and EEOC's responses;

(4) Legal issues or proof elements that may pose particular difficulties.

(h) Conciliation:

(1) Date(s) LOD(s) issued, conciliation proposal(s) mailed, and conciliation failure letter mailed;

(2) Relief requested by EEOC (for monetary relief, break out, as appropriate, (a) punitive damages, (b) compensatory damages, (c) damages cap, (d) back pay, including basis for back pay amount, and (e) any other monetary relief);

(3) Relief offered by Respondent;

(4) Reasons for conciliation failure.

(i) Projected litigation budget (expenses you expect to incur during the current fiscal year and next fiscal year):

(1) Current fiscal year;

(2) Next fiscal year.

(j) Indicate whether the case creates a potential for controversy or adverse publicity and, if so, explain. This includes controversies arising from local newsworthiness as well as from the nature of the claims in the suit:

D. PRESS RELEASES

As with all new case filings, legal units must provide a draft press release on redelegated cases to LMS and the Office of Communications and Legislative Affairs (OCLA) at least two full days prior to filing the case in court. After filing the complaint, the final press release should be sent to LMS and OCLA at the time of its distribution to the public. Section I.C.4. of Part 1 of the *Manual* contains detailed instructions regarding issuance of press releases on new case filings.

REGIONAL ATTORNEYS' MANUAL

PART 2

INITIATING LITIGATION

SECTION IV

LITIGATION REQUIRING HEADQUARTERS APPROVAL

SECTION IV
LITIGATION REQUIRING HEADQUARTERS APPROVAL

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A. APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Except where related to pending litigation, field legal units must obtain approval from the Office of General Counsel (OGC) before filing an Application for a Temporary Restraining Order (TRO) or a Preliminary Injunction, even if the type of case otherwise falls under the Regional Attorney's redelegated authority. Contact your liaison attorney in Litigation Management Services to discuss the reason(s) why you want to seek a TRO or preliminary injunction and when you would like to file. Your liaison attorney will let you know what written information you need to submit to OGC.

B. SUITS REQUIRING AUTHORIZATION BY THE COMMISSION OR GENERAL COUNSEL

For suits requiring authorization from the Commission or the General Counsel, the legal unit must submit a presentation memorandum (PM) to the Office of General Counsel.* The appendix to Part 2, section IV.C. of the *Manual* contains the PM format.

Section V. of the Commission's National Enforcement Plan (NEP) describes four categories of cases in which the Commission has reserved litigation authority. These are set out in Part 2, section III.A., above. In addition, the General Counsel has retained litigation authority in the categories of delegated cases described in subsection III.B.2., above. When in doubt regarding whether a case requires authorization from the Commission or the General Counsel, consult your Litigation Management Services liaison.

* Mail three hard copies of the PM file to the supervisor of Litigation Advisory Services. Simultaneously e-mail him or her a copy of the text of the PM.

C. PRESENTATION MEMORANDA

The presentation memorandum (PM) is the legal unit's assessment of a case to the General Counsel or Commission, and is one of the few legal unit work products reviewed by the Commissioners. It is important that the PM be analytically sound and factually accurate, as well as candid. All significant problems in a case should be addressed.

For PMs submitted to the Office of General Counsel (HQ), use the format in the appendix that follows.*

* To recommend intervention, submit a separate cover memorandum with the PM that provides all of the information specified in Part 2, Section IV.D. of the *Manual*.

APPENDIX

PM FORMAT

Presentation Memorandum

To: _____
General Counsel

From: _____, **Regional Attorney**
_____ **Field Office**

Subject: **EEOC v. [Name of Respondent]**
Charge No. _____

I. PRELIMINARY INFORMATION

A. Proposed claims[1]

B. Court where suit will be filed

C. Proposed defendant(s)

1. Name of each proposed defendant

2. Location of facility

---

[1] Reference to applicable statutory provisions should be included here. Specify whether the recommended claims challenge a policy or are on behalf of an individual or class and, if class, define the scope of the class and the approximate number of putative claimants. *See* Part 1, section I.D. of the *Manual* (*Reporting to OGC*) for the definition of a "class" case. Also, for each basis indicated, identify the race, ethnicity, gender, religion, age, or impairment.

3. **Size of workforce**[2]

4. **Nature of business**

D. **Name of charging party**

E. **Justification for filing suit**[3]

II. ADMINISTRATIVE HISTORY

A. **Date of charge**

B. **Date of letter of determination**

C. **Claims determined cause**[4]

D. **Conciliation history**

a. **Date of conciliation failure**

b. **EEOC's proposal**[5]

---

[2] Be as specific as possible; "more than 15 employees" is not sufficient.

[3] Include a discussion of whether the claims recommended for litigation raise strategic or emerging issues or National Enforcement Plan priorities, and how the case fits within your office's litigation docket. In addition, where applicable, identify whether the case involves an underserved population or would be filed in an underserved geographic area.

[4] If litigation is not recommended on any issue on which the Commission found cause in the letter of determination, explain why here.

[5] Include the amount of monetary relief sought for each category of damages and the nature of injunctive relief sought, and briefly explain the basis for the proposal.

c. Respondent's best offer

d. Reason for rejection of Respondent's best offer

III. SUMMARY AND ANALYSIS OF PROPOSED SUIT

A. Summary of theory of liability[6]

B. Anticipated defenses[7]

C. Chronology of facts[8]

---

[6] This section should summarily outline how we will prove our claims. In ADA cases, this section should state the theory(ies) for ADA coverage. For example:

> "The Commission's primary theory of ADA coverage is that Charging Party is actually disabled in that she has mental impairments (PTSD and depression) that substantially limit the major life activities of sleeping, eating, caring for herself and thinking/concentrating. In the alternative, we would argue that she has a record of or was regarded as having a disability. We would argue that Respondent's denial of continued leave for her hospitalization supports a claim of failure to accommodate and disparate treatment."

[7] This section should summarily outline all anticipated defenses, including defenses which, although not yet raised by respondent, may be expected to be asserted at trial. For example:

> "Respondent may argue that Charging Party is not substantially limited in any major life activity, and that her sporadic need for lengthy amounts of leave rendered her unqualified. Respondent may also argue that it satisfied its duty of reasonable accommodation by granting leave for her earlier hospitalizations and that granting any additional leave would have created an undue hardship."

[8] The discussion of facts generally should be in chronological order. The discussion should identify and discuss significant facts in dispute, as well as facts that

D. Legal Analysis[9]

E. Relief sought

F. Confirmation of charging party interview and credibility assessment[10]

G. Breakdown of estimated litigation costs[11]

IV. LIST OF ATTACHED DOCUMENTS[12]

A. Charge(s) and charging party's statement(s)

B. Respondent's position statement(s)

---

conflict with applicable theories of liability. The discussion should also identify evidentiary gaps, discuss any significant credibility issues, and incorporate any significant facts learned after the investigation closed.

[9] This section should include a discussion of all key substantive and procedural issues. Cite to significant authority, including case law and the Commission's position as set forth in regulations, policy guidance, and the compliance manual. In ADA cases, whether the charging party and any other claimants are disabled is always a key issue. The discussion of disability status should identify all major life activities affected and how the evidence shows a substantial limitation in each identified major life activity.

[10] Identify whether the charging party was interviewed in person by the legal unit. If the legal unit has not interviewed the charging party in person, include an explanation in this section. *See* Part 2, section II.C. of the *Manual* (*Presuit Interviews of Aggrieved Parties*).

[11] Include itemized costs through trial for depositions, expert witnesses, travel expenses, and other significant items. If the use of expert witnesses is anticipated, specify the type of expert and briefly explain the role of the expert.

[12] Each page of the attachments should be numbered.

C. Investigative memoranda

D. Letter(s) of determination

E. Other key documents[13]

F. Draft complaint

V. FIELD OFFICE CONTACTS

cc: _____, Office Director

[13] Other key documents generally include documents relevant to significant legal issues, significant factual disputes, and credibility.

D. STANDARDS FOR COMMISSION INTERVENTION IN PRIVATE ACTIONS

1. Form of Request

All recommendations for intervention require a presentation memorandum (PM). In a separate cover memorandum to the PM, the legal unit should set out background information about the private lawsuit, an explanation of the case's general public importance, an assessment of the other factors supporting intervention, and a discussion of the legal unit's understanding with private counsel regarding the Commission's role in the litigation. The background information provided about the private lawsuit should include the following: 1) name, court, and civil action number; 2) date of court filing; 3) claims alleged in private lawsuit; 4) date charge(s) was filed and a description of the Commission's investigative efforts on the charge(s); 5) furthest stage reached in the administrative process and an explanation of why the private action was filed before the Commission was in a position to file suit; 6) current status of private lawsuit; and, 7) name of private counsel.

2. Certification of Public Importance

Under both Title VII and the ADA, intervention by the Commission is contingent on the agency's certification that the case is of "general public importance." The certification consists of a statement executed by the General Counsel, an example of which is contained in the Appendix that follows. An original certification for the General Counsel's signature should be included with all Title VII and ADA PMs. Certifications are not required for interventions in ADEA and EPA cases, but those cases should generally meet the same public importance standard.

Normally, to be considered of "general public importance," a case should directly affect a large number of aggrieved individuals, involve a discriminatory policy or practice requiring injunctive relief, or have potential for addressing significant legal issues.

3. Other Factors Relevant to Intervention

The factors listed below should be considered in determining whether to recommend intervention and should be discussed in the cover memorandum to the PM. They are not exhaustive, and any other relevant factors should also be discussed. The

conditions for certifying that the case is of general public importance must be met before considering the factors in this section.

a. The Commission's contribution to the success of the litigation – This is the most important factor, and can include personnel and financial resources. For example, if a case that warrants litigation by the Commission is filed by the charging party before the agency has completed its administrative processes, there is no reason in principle why the Commission should not expend as much resources litigating as an intervenor as it would have spent filing on its own, if its participation is necessary to a successful resolution of the case. However, the Commission should never intervene principally to fund a case. The work of Commission attorneys on the case must be substantial both in time spent and in the importance of their tasks. Where a trial occurs, Commission attorneys should have significant roles in the courtroom.

b. Private counsel's ability to litigate the case effectively without the Commission's participation – This is related to a. above, and includes general competence as an attorney, related litigation experience, and financial resources. Even where private counsel is highly skilled and able to fund the case adequately, Commission intervention may be appropriate if it significantly increases the likelihood of success in an important case. This may be true, for example, if the case is particularly large or complex, or if there is a need for injunctive relief beyond that being sought by the private plaintiff(s). But if the results of the private action are not likely to be affected by the Commission's participation, intervention should not be recommended.

c. Relationship to the private bar – It is in the Commission's interest for private attorneys to accept meritorious cases under the statutes the agency enforces. To the extent that intervention in a particular case may encourage such private litigation (separate, of course, from the particular case in question), this is a factor favoring intervention.

d. Whether a motion to intervene would be considered timely by the court – Where factor a. above is satisfied, this should seldom be a consideration, since intervention will normally have to occur early in the case for the Commission to play a significant role in the litigation.

4. Relationship with Private Counsel

Prior to recommending intervention, the legal unit must have a firm understanding with private counsel regarding the Commission's role in the litigation,

including personnel and financial commitments, litigation strategy, relief sought, and the Commission's nonconfidentiality policy on settlements. Although it is not possible to guarantee the absence of disagreements later in the litigation, particularly regarding matters such as the value of the private plaintiffs' claims, the clearer the understanding between the parties prior to the Commission's decision regarding intervention the better. Where the Commission and the private plaintiffs are not in agreement on a fundamental aspect of the litigation, intervention should not be recommended, although it may be appropriate in such circumstances to recommend amicus curiae participation.

In the PM, the legal unit should confirm that the above matters were discussed with private counsel and should summarize the understanding between the parties.

As with all litigation related matters, feel free to discuss potential intervention recommendations with your Litigation Management Services liaison attorney prior to deciding whether to submit a PM.

5. Web Resources

Title	Description and Web Address
Federal EEO Laws	Text of the statutes enforced by the EEOC, on the Commission's web site. http://www.eeoc.gov/abouteeo/overview_laws.html

APPENDIX

MODEL CERTIFICATE OF PUBLIC IMPORTANCE FOR TITLE VII AND ADA INTERVENTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

[Name of Plaintiff],	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Civil Action No. _____
	)	
[Name of Defendant(s)],	)	**CERTIFICATION OF GENERAL**
	)	**PUBLIC IMPORTANCE PURSUANT**
Defendant(s).	)	**TO 42 U.S.C. §2000e-5(f)(1)**
	)	
_____	)	

CERTIFICATION

Upon review of the facts of this case, I have determined that it raises issues of general public importance regarding allegations that the defendant(s) violated [Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. or Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.] by [set out claim(s)].

DATED THIS _____ day of _____ 200 ___.

_____
General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1801 L Street, NW.
Washington, DC 20507

E. COMMUNICATING WITH COMMISSIONERS ON CASES PENDING LITIGATION AUTHORIZATION

If a field office unit legal unit receives an inquiry from a Commissioner's office concerning a case that has been submitted to the Office of General Counsel in headquarters for litigation authorization, but has not yet been authorized, the legal unit should consult with Litigation Advisory Services (LAS) staff before responding unless this is impracticable under the circumstances. The legal unit should inform LAS staff of the substance of any conversation with a Commissioner's office immediately following such conversation.

F. NOTIFICATION OF LITIGATION AUTHORIZATION

No suit that must be authorized by the General Counsel or the Commission may be filed without written authorization from the Office of General Counsel in headquarters.

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

OFFICE OF
GENERAL COUNSEL

APRIL 2005

PART 3. CONDUCTING LITIGATION

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REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION I

CIVIL JUSTICE REFORM

SECTION I
CIVIL JUSTICE REFORM

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A. OFFICE OF GENERAL COUNSEL GUIDANCE ON CIVIL JUSTICE REFORM, EXECUTIVE ORDER NO. 12988

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A. OFFICE OF GENERAL COUNSEL GUIDANCE ON CIVIL JUSTICE REFORM, EXECUTIVE ORDER NO. 12988 61 FED. REG. 4729 (FEB. 7, 1996)

1. Introduction

President Bush signed the initial Civil Justice Reform Executive Order, No. 12778, on October 23, 1991. The Office of General Counsel (OGC) issued Preliminary Guidance on this Executive Order on January 27, 1992, and included it in Volume II, Section I, pages 13-20 of the prior edition of the *Regional Attorneys' Manual*. On February 5, 1996, President Clinton signed Executive Order No. 12988, which revoked Executive Order 12778. Like Executive Order No. 12778, Executive Order No. 12988 became effective 90 days after the date of signature and is applicable to litigation commenced subsequent to its effective date (May 6, 1996). This Guidance on Executive Order No. 12988 supersedes OGC's Preliminary Guidance on Executive Order No. 12778.

A copy of Executive Order No. 12988 is in Part 3, Section I. B. of the *Manual*. All OGC attorneys should read the Executive Order and be familiar with its requirements, particularly those concerning the conduct of civil litigation by federal government attorneys. This guidance expands on some of the provisions in section 1, and where relevant indicates changes from Executive Order No. 12778. Section 5 of Executive Order No. 12988 provides that the Attorney General shall coordinate efforts by federal agencies to implement sections 1, 2, and 4 of the Order, and authorizes the Attorney General to issue guidelines for the Department of Justice (DOJ) implementing sections 1 and 4 of the Order, which shall serve as models for internal guidelines of other agencies. DOJ has issued interim guidelines implementing sections 1 and 4(a) of the Order, 62 Fed. Reg. 39,250 (1997),1997 WL 404811 (F.R.).[*]

The Executive Order refers throughout to the conduct of "litigation counsel," which is defined in section 6(b) of the Order as "trial counsel or the office in which such trial counsel is employed." All Commission trial attorneys assigned to a case and all Supervisory Trial Attorneys and Regional Attorneys are considered "litigation counsel" within the meaning of the Order.

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[*] The Office of Legal Counsel at the Justice Department confirmed in April 2003 that the Justice Department has not issued final guidelines.

2. Presuit Settlement Efforts

Section 1(a) of Executive Order No. 12988 requires notice and an attempt at settlement prior to filing suit, unless the agency has previously used its conciliation processes, which of course will have occurred in Commission cases. But even though not required by the Executive Order, OGC believes presuit settlement efforts should be considered in every case where a decision to file suit has been made, whether the decision was the Commission's, the General Counsel's, or the Regional Attorney's under his or her redelegated authority. Any resolution agreed to through presuit negotiations must be filed with the court together with a complaint, and this requirement should be made clear to the prospective defendant(s) at the time settlement efforts are initiated. Presuit settlement negotiations can sometimes save the parties substantial time and expense, and as long as the Commission insists on a court settlement, attempts at presuit resolutions should not undermine the Agency's conciliation processes.

Section 8(b)(5) of the Executive Order exempts from the prefiling notice requirements situations where litigation counsel determines that "exigent circumstances make providing such notice impracticable, or such notice would otherwise defeat the purpose of the litigation," and gives as examples actions seeking temporary restraining orders or preliminary injunctive relief. Even where the facts support issuance of a TRO, however, notice and an attempt at settlement should normally take place prior to filing a petition with the court, and Fed. R. Civ. P. 65(b) requires a certification to the court where notice has not been provided prior to seeking a TRO (notice is always required prior to issuance of a preliminary injunction (Rule 65(a)(1)). One obvious situation where notice would "defeat the purposes of the litigation" is where record destruction may occur as a result of the notice. You are required to contact your Litigation Management Services (LMS) liaison attorney prior to seeking a TRO or preliminary injunctive relief, and discussion of possible reasons for proceeding without notice and settlement efforts should take place at that time.

3. Postfiling Settlement Efforts

Section 1(b) of the Executive Order requires that as soon as practicable after filing suit, and throughout the litigation, litigation counsel should evaluate settlement possibilities and make reasonable settlement efforts. This section also requires that

such efforts "include offering to participate in a settlement conference or moving the court for a conference pursuant to [Fed. R. Civ. P.] 16." Even where presuit settlement negotiations have occurred, litigation counsel should initiate settlement efforts as soon after filing as there appears any potential for resolving the suit. Counsel should make additional settlement efforts as the litigation progresses.

It is important to remember that ethical rules require an attorney to inform his or her client promptly of the substance of settlement offers. See Center for Professional Responsibility, American Bar Association, Model Rules of Professional Conduct 1.2(a) & 1.4(a)(1) & Comment [2] to Rule 1.4 (2004 ed.). See also Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct 31-33, 54 (5th ed. 2003). Thus, even where defense counsel has indicated no interest in settlement, conveying a specific proposal to him or her will ensure that the client has an opportunity to consider the Commission's terms of resolution.

4. Alternative Methods of Dispute Resolution

Section 1(c) of Executive Order No. 12988 requires litigation counsel to make reasonable attempts to resolve disputes expeditiously and properly before trial. Section 1(c)(1) directs litigation counsel to suggest use of an appropriate alternative dispute resolution (ADR) technique "[w]here the benefits of [ADR] may be derived." Section 1(c)(2) states that use of ADR to resolve claims is appropriate "after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims."

The above provisions obviously leave a great deal of discretion to litigation counsel. OGC believes litigation counsel is in the best position to determine whether it would be appropriate to use a formal ADR technique in a particular case and therefore, with the exception noted in the next paragraph, the Regional Attorney has authority to agree to the use of formal ADR processes in any case. However, in cases where the General Counsel has retained settlement authority, the other parties and the court should be informed prior to a decision to use a formal ADR process that any agreement reached through the process is subject to the approval of the General Counsel.

There are two significant changes from the ADR section of the prior Executive Order. First, section 1(c)(1) of Executive Order No. 12778 provided that "[w]henever

feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than . . . any formal or structured [ADR] process or court proceeding." The otherwise identical sentence in section 1(c)(1) of Executive Order No. 12988 eliminates the reference to "structured [ADR] process." This change can be read as additional encouragement to use formal ADR processes. More important, an express prohibition in the initial Order on the use of "binding arbitration or any other equivalent ADR technique" (section 1(c)(3)) was eliminated from the current Order. Before agreeing to any ADR technique that would bind the Commission to follow the decision of a third party other than a court (or a magistrate exercising jurisdiction under Fed. R. Civ. P. 73), obtain approval from OGC, even where the Regional Attorney otherwise has settlement authority.

5. Discovery

Section 1(d) of Executive Order No. 12988 provides: "To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control." Executive Order No. 12778 contained provisions in this section requiring litigation counsel to agree to exchange certain "core information" with other parties. These provisions were not included in Executive Order No. 12988, most likely because of the disclosure provisions added to Fed. R. Civ. P. 26(a) in 1993. The provisions in the prior Executive Order on review of document requests and on attempting to resolve discovery disputes with opposing counsel are retained in Executive Order No. 12988, and are discussed below.

Section 1(d)(1) of Executive Order No. 12988 requires each agency to "establish a coordinated procedure for the conduct and review of document discovery in litigation," which "shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing." The DOJ guidelines provide that the person designated to perform this review function "should have both substantial experience in document discovery and supervisory authority." Thus, either a Supervisory Trial Attorney or the Regional Attorney should review all EEOC document requests before they are served. Where an individual in either of these positions prepares the document request, no further oversight is necessary. The Executive Order provides that the review determine:

> that the request[s] [are] not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive taking into account the requirements of the litigation, the amount in controversy, the importance

of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

Section 1(d)(2) of Executive Order No. 12988 requires that before filing discovery motions or requesting sanctions for discovery abuses, litigation counsel attempt to resolve the dispute with opposing counsel, and that when a motion is filed over a discovery dispute, litigation counsel represent in the motion that the resolution attempt was unsuccessful or impracticable under the circumstances. Fed. R. Civ. P. 26(c) and 37(a)(2), (a)(4)(A), and (d) have similar requirements, as do most local district court rules . While applicable court rules must of course be followed, the Executive Order sets minimum requirements that must be met regarding any court filing over a discovery dispute.

6. Expert Witnesses

Executive Order No. 12778 contained a section on expert witnesses which dealt with standards for expert testimony, conditions for disclosure of expert witness information, and prohibitions on contingency fees. This section was not included in Executive Order No. 12988. Subsequent to the initial Executive Order, standards for the reliability of expert testimony were established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). All Commission attorneys should be familiar with *Daubert* and the related cases of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Also, see the December 1, 2000, amendments to Fed. R. Evid. 701, 702, and 703. Disclosure of expert information was addressed in the 1993 amendments to Fed. R. Civ. P. 26. Payment of contingency fees to experts – that is, the linking of expert compensation to the results of the litigation – is prohibited in Commission litigation.

7. Sanctions

Executive Order No. 12988 requires litigation counsel to take steps to seek sanctions against opposing counsel and parties where appropriate. The Order also provides that prior to filing a motion for sanctions, litigation counsel must submit the motion for review by the agency's Sanctions Officer, or his or her designee. In OGC, the Sanctions Officer is the Associate General Counsel for Litigation Management

Services. Before submitting a proposed motion to the Sanctions Officer, the Regional Attorney should contact his or her LMS liaison attorney to discuss the matter.

The above review requirements do not apply to motions for expenses or sanctions under Fed. R. Civ. P. 37, other than contempt motions. The Sanctions Officer must review all contempt motions and motions for sanctions sought under authority such as Fed. R. Civ. P. 11(c) or 26(g), 28 U.S.C. § 1927, or the court's inherent powers. When in doubt about whether a proposed sanctions motion is subject to the Executive Order, contact your LMS liaison attorney. See Part 1, Section I.F. of the *Manual* for more information.

The Executive Order also requires that the agency's Sanctions Officer review sanctions motions filed against litigation counsel or against the agency or its officers. Motions filed against the Commission seeking sanctions under Fed. R. Civ. P. 37, other than for contempt, do not have to be submitted to the Sanctions Officer, but the field legal unit's LMS liaison attorney should be notified of motions seeking sanctions against the Commission under Rule 37(b)(2), (c), or (d). The legal unit should also notify OGC's Sanctions Officer of all other motions seeking sanctions against litigation counsel or the agency and of all motions for contempt against litigation counsel or the agency. Also, under OGC's separate guidance in Part 1, Section I.F. of the *Manual*, Regional Attorneys are required to notify the Sanctions Officer upon receipt of a letter from opposing counsel indicating an intention to seek sanctions.

OGC concurs with the statement in DOJ's interim guidelines that "[s]anctions motions should not be used as vehicles to intimidate or coerce counsel when the dispute can be resolved on a reasonable basis." Further, Commission attorneys should not retaliate in kind when opposing counsel file frivolous sanctions motions. The best response to such conduct is to ensure that the court is aware of it and then continue to act responsibly in representing the Commission's interests.

8. Improved Use of Litigation Resources

Section 1(f) of the Executive Order requires that litigation counsel "employ efficient case management techniques and . . . make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control." The following directions from DOJ's interim guidelines apply to Commission attorneys:

Litigation counsel must move for summary judgment where appropriate to resolve litigation or narrow the issues to be tried. This rule is not intended to suggest, however, that summary judgment should be sought prematurely in a manner that will permit opposing counsel to defeat summary judgment.

Litigation counsel are also to make reasonable efforts to stipulate to facts that are not in dispute, and must move for early trial dates where practicable. . . . Litigation counsel should seek agreement to fact stipulations as early as practicable, taking into account the progress of discovery and their sound judgment as to the most appropriate and efficient timing for such stipulations.

At reasonable intervals, litigation counsel shall review and revise submissions to the court to ensure that they are accurate and that they reflect any narrowing of issues resulting from discovery or otherwise, and shall apprise the court and all counsel accordingly. Litigation counsel also should make an effort, where appropriate, to involve the court early in case management and issue-focusing. This effort may include apprising the court, during conferences under Federal Rule of Civil Procedure 16, of core issues and contemplated methods of resolution, such as settlement, ADR, stipulation, dispositive motion, or trial. . . .

These requirements are not intended to suggest that litigation counsel should concede facts or issues as to which there is reasonable dispute or uncertainty, or which cannot be corroborated.

9. Resources on the Web

Title	Description and Web Address
Civil Justice Reform, Executive Order 12988	Text and history of Executive Order 12988, Civil Justice Reform, 61 Fed. Reg. 4729 (1996), on the National Archives' web page for Executive Orders. http://www.archives.gov/federal_register/executive_orders/1996.html
Civil Justice Reform, Interim Guidance	Interim Guidance by the Department of Justice on Executive Order 12988, Civil Justice Reform, 62 Fed. Reg. 39250 (1997) on Government Printing Office's web site (to retrieve, click on volume "62," then enter page 39250). http://www.gpoaccess.gov/fr/retrieve.html

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B. EXECUTIVE ORDER 12988
CIVIL JUSTICE REFORM

61 Fed. Reg. 4729 (Feb. 7, 1996)

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

2. Government Pro Bono and Volunteer Service. All Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.

3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation, as appropriate--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear legal standard for affected conduct;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation, as appropriate--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of OMB and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Agency Review. The agencies shall review such draft legislation or regulation to determine that either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All Federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All Federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All Federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the

action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the purposes of this order.

9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

12. Revocation. Executive Order No. 12778 is hereby revoked.

WILLIAM J. CLINTON

THE WHITE HOUSE,

February 5, 1996.

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION II

DELIBERATIVE PROCESS PRIVILEGE

SECTION II
DELIBERATIVE PROCESS PRIVILEGE

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A. PROCEDURES FOR ASSERTING AND DEFENDING THE DELIBERATIVE PROCESS PRIVILEGE

1. Introduction

The deliberative process privilege protects certain predecisional, internal agency information, such as recommendations and analysis, from disclosure during litigation. EEOC attorneys may assert the deliberative process privilege in litigation on their own authority (e.g., in responding to discovery requests or defending depositions), but whenever the applicability of the privilege becomes an issue before a court (for example, on motions to compel, for protective orders, or to quash subpoenas), the privilege must be formally asserted by the head of the agency.

2. The Deliberative Process Privilege

The United States Government may withhold evidence in litigation in any of the following circumstances: (1) where a statute makes certain documents or information confidential; (2) where a privilege or objection is available to any other litigant under the Federal Rules of Civil Procedure (e.g., relevance, undue burden, attorney-client privilege); or (3) where a special privilege exists unique to the government (e.g., informer privilege, deliberative process privilege).[1]

The EEOC typically asserts the deliberative process privilege in litigation in order to protect the confidentiality of internal, deliberative material, such as documents containing the analyses, opinions, or recommendations of enforcement unit staff, and attorney memoranda containing analysis or recommendations. The procedure for asserting the deliberative process privilege depends on the stage at which the privilege is raised.

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[1] *See generally Association for Women v. Califano*, 566 F.2d 339, 343-44 (D.C. Cir. 1977) (listing various privileges available to the government); Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 509 (2d ed. 2003). *Cf.* Freedom of Information Act, 5 U.S.C. § 552(b) (setting out nine statutory exceptions to producing government documents).

3. Asserting the Privilege in Depositions or Discovery Responses

Attorneys in the Office of General Counsel (OGC) may assert the deliberative process privilege at depositions or in discovery responses without obtaining prior permission from headquarters. From a practice standpoint, making the initial claim is treated no differently than asserting the attorney-client or attorney work product privileges.

4. Asserting and Defending the Privilege Before the Court

Once the deliberative process privilege is at issue in a motion before a court, attorneys in OGC must obtain authorization from OGC-HQ and a declaration signed by the Chair of the EEOC to formally assert the privilege.[2] The Chair's declaration should: (1) describe the documents being withheld with reasonable particularity; (2) affirm that he/she has reviewed the documents; and (3) explain why the documents fall within the privilege. The declaration (and accompanying exhibit) should be sufficiently detailed to permit the court to assess whether the documents are covered by the privilege.

a. Approval of Regional Attorney or Associate General Counsel

Once the deliberative process privilege is at issue in a motion before a court, the Regional Attorney must personally approve assertion of the privilege for cases being litigated in the field. For cases being litigated in headquarters, the Associate, or where applicable, Assistant General Counsel must approve assertion of the privilege.

b. Review and Approval by OGC-Headquarters

Once the Regional Attorney has approved assertion of the privilege, the legal unit attorney should contact Litigation Management Services (LMS) to let his/her LMS liaison attorney know that a declaration package will be forthcoming. The LMS liaison attorney will be the person responsible for shepherding the declaration through the approval process.

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[2] The attorney-client privilege and the attorney work product privilege may be asserted before a court without consultation with OGC, even where those privileges cover documents or information also protected by the deliberative process privilege.

The attorney will then prepare and transmit to the LMS liaison attorney a package consisting of: (1) a cover memorandum to LMS, (2) the Chair's declaration, (3) an exhibit describing any documents withheld or redacted, and (4) copies of any documents withheld or redacted. Where the declaration is sought in connection with a deposition notice, the attorney will also include a copy of the notice and any accompanying subpoena in the package. **E-mail** the cover memorandum, draft declaration, and exhibit to the LMS liaison. The cover memorandum should include any pertinent information about the declaration, such as the court filing date for the declaration and the date on which the legal unit must receive the signed declaration in order to file it on time. For samples of declarations and accompanying exhibits, see sections II.B., C. and D. of this Part of the *Manual*. Concomitantly, the legal unit attorney should **mail** a complete (unredacted) set of the documents described in the exhibit to the LMS liaison. (Retain your original set of documents.) Label the documents you submit to correspond to the paragraph numbers in the exhibit (e.g., No. 1, No. 2, No. 3), using pencil or post-its to allow for changes. Use square brackets to indicate those portions of the documents that you intend to redact, again using pencil.

The LMS liaison will review the package submitted by the legal unit and will contact the legal unit if additional information is necessary. Where the local court rules allow, OGC-HQ should have no less than 3 working days for its review. Once OGC-HQ has approved the package, the liaison will forward it to the Chair for action.

c. Approval and Signature of Chair

After OGC has forwarded the declaration and supporting documents to the Chair for review and signature, the LMS liaison will respond initially to any questions from the Chair, but may need to consult with the legal unit attorney during this process. If the Chair signs the declaration, your LMS liaison attorney will inform you immediately and return the declaration to you.

Where possible under the local court rules, the Chair should have no less than 7 working days to review the deliberative process privilege declaration and supporting materials. Where the local rules require filing of a response prior to the Chair's completion of her review, the legal unit attorney should consult with OGC on what to tell the court about the status of the declaration.

B. MODEL DECLARATION OF CHAIR AND EXHIBIT

IN THE UNITED STATES DISTRICT COURT
FOR THE _____DISTRICT OF _____
_____ DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
	)
	) CASE NO.
PLAINTIFF,	)
	)
V.	) DECLARATION OF
	) EEOC CHAIR
	)
	)
	)
DEFENDANT,	)
_____	)

DECLARATION

I, Cari M. Dominguez, state the following:

1. I am the Chair of the United States Equal Employment Opportunity Commission (the "Commission"). The Commission is responsible for the administration, interpretation, and enforcement of, among other statutes, _____. [*Insert here the title and statutory reference for the law(s) enforced in this action.*] As Chair, I am responsible for the implementation of Commission policy and the overall operation and administration of the Commission. I am authorized to invoke on behalf of the Commission the governmental privilege for deliberative processes.

2. The operation of the Commission as a law enforcement agency requires the free expression by Commission employees of analyses, advice, recommendations, and conclusions regarding charges processed by the Commission. I have personally reviewed the documents and portions of documents described in Exhibit A to this Declaration. The documents described in Exhibit A contain predecisional analyses, recommendations, and conclusions of Commission investigatory and legal personnel regarding the investigation of Charge No. _____. *[The wording of the preceding sentence should be adapted to the documents being withheld.*]

3. I conclude that disclosure to individuals outside the Commission of the documents and portions of documents described in Exhibit A would inhibit the free expression of opinions by Commission employees, thereby impairing the Commission's ability to enforce the statutes within its authority. *[The wording of the preceding sentence should be adapted to reflect the documents being withheld and/or the portions of documents being redacted.*]

4. For the reasons stated in the preceding paragraph, I hereby claim, on behalf of the Commission, the governmental deliberative processes privilege for the documents and portions of documents, described in Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 200___ .

_____
Cari M. Dominguez, Chair
Equal Employment Opportunity
Commission
1801 L. Street, N.W.
Washington, D. C . 20507

EXHIBIT A

1. Portions of a _____ page memorandum, dated _____, from _____ Investigator, _____ Office, to _____ , Director, _____ Office, regarding Charge No. _____. These portions of the memorandum, which appear on pages _____ , contain the investigator's analysis of the information obtained during his/her investigation of Charge No. _____, his/her conclusions regarding the merits of the charge, and his/her recommendations to the Office Director regarding the Commission's determination on the charge.

2. Entry dated _____, made by _____, Investigator,_____ Office, in the case log of the Commission's investigative file for Charge No. _____. This case log entry contains _____ regarding the investigator's conclusions about the credibility of an individual he/she interviewed as part of the investigation of Charge No. _____.

3. Memorandum of _____ pages, dated _____, from Regional Attorney, _____ Office, to _____, Director,_____ Office, regarding Charge No. _____. This memorandum contains the legal unit's analysis of the investigation of Charge No. _____, the legal unit's conclusions regarding the merits of the charge, and the Regional Attorney's recommendations to the Office Director regarding the Commission's determination on the charge.

C. SAMPLE DECLARATIONS OF CHAIR

1. Declaration for Response to Motion to Compel Investigative Materials

In this declaration, former Chairwoman Ida Castro asserted the deliberative process privilege for a memorandum prepared in response to the legal unit's guidance to the investigator regarding information to obtain in the investigation and for other documents containing the investigator's analyses and investigative strategy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	CIVIL ACTION NO. _____
v.	)	Judge _____
_____,	)	
Defendant.	)	

DECLARATION

I, Ida L. Castro, state the following:

1. I am the Chairwoman of the United States Equal Employment Opportunity Commission (the "Commission"). The Commission is responsible for the administration, interpretation, and enforcement of, among other statues, Title VII of the Civil Rights Act of 1964, §§ 2000e *et seq*. As Chairwoman, I am responsible for the implementation of Commission policy and the overall operation and administration of

the Commission. I am authorized to invoke on behalf of the Commission the governmental privilege for deliberative processes.

2. The operation of the Commission as a law enforcement agency requires the free expression by Commission employees of analyses, advice, recommendations, and conclusions regarding charges processed by the Commission. I have personally reviewed the documents described in Exhibit A to this Declaration. The documents described in Exhibit A contain predecisional analyses and conclusions of Commission investigatory personnel regarding the investigation of Charge Numbers _____ and _____.

3. I conclude that disclosure to individuals outside the Commission of the documents described in Exhibit A would inhibit the free expression of opinions by Commission employees, thereby impairing the Commission's ability to enforce the statutes within its authority.

4. For the reasons stated in the preceding paragraph, I hereby claim, on behalf of the Commission, the governmental deliberative process privilege for the documents described in Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2000.

_____
Ida L. Castro, Chairwoman
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1801 L Street, N.W.
Washington, D.C. 20507

EXHIBIT A

1. Twelve page memorandum (Documents Bates Stamped Numbers E0060-E0071) to file titled "_____'s Memo," dated 6/2 written by _____, at the time an investigator with the _____ Office of the Equal Employment Opportunity Commission ("EEOC"). This memorandum was prepared in response to directions from _____, a supervisory trial attorney in the _____ Office's legal unit, regarding information to obtain in the investigation of Charge Numbers _____ and _____, and contains Ms. _____'s strategy for further investigation of these charges.

2. Six page Case Development Plan (Documents Bates Stamped Numbers E0263-E0268), undated, prepared by _____, at the time an investigator with the EEOC's _____ Office, containing Ms. _____'s analysis of information obtained during her investigation of Charge Number _____, her opinions and conclusions regarding the merits of the charge, and strategies for her investigation of the charge.

3. Five page memorandum to file (Documents Bates Stamped Numbers E0350-E0354) titled "Investigator's Assessment and Analysis of Charge Receipt Information," dated 1/22/98, prepared by _____, at the time an investigator at the EEOC's _____ Office, containing Ms. _____'s analysis of

information regarding Charge Number _____ and strategies for her investigation of the charge.

2. Declaration in Support of Motion for Protective Order Regarding Deposition of Agency Staff

In this declaration, Chair Cari Dominguez asserted the deliberative process privilege in support of a motion for protective order opposing defendant's Fed. R. Civ. P. 30(b)(6) deposition notice. Defendant sought to depose Commission staff regarding the field office's investigative strategies, the basis of the cause determination, and the reasons for the Commission's decision to file suit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	Civil Action No. _____
v.	)	Judge _____
_____,	)	
Defendant.	)	
_____	)	

DECLARATION OF EEOC CHAIR CARI M. DOMINGUEZ

I, Cari M. Dominguez, state the following:

1. I am the Chair of the United States Equal Employment Opportunity Commission ("The Commission"). The Commission is responsible for the administration, interpretation, and enforcement of, among other statutes, Titles I and V of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.* As Chair, I am responsible for the implementation of Commission policy and the overall

operation and administration of the Commission. I am authorized to invoke on behalf of the Commission the governmental privilege for deliberative processes.

2. The operation of the Commission as a law enforcement agency requires the free expression by Commission employees of analyses, advice, recommendations, and conclusions regarding charges processed by the Commission, including decisions to initiate litigation on such charges. I have personally reviewed the Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6) in the above-designated case served on the EEOC on February 26, 2002, which is attached as Exhibit A. The items in the Notice of Deposition relating to the EEOC's methods and strategies in conducting its investigation of the charge on which the above-designated suit is based, the bases of EEOC's reasonable cause finding on the charge, and the reasons for EEOC's decision to file suit on the charge relate to pre-decisional analyses, advice, recommendations, and conclusions of Commission employees.

3. I conclude that disclosure to individuals outside the Commission of the information described in paragraph 2. above would inhibit the free expression of opinions by Commission employees. Such disclosure would materially impair the Commission's ability to enforce the statutes within its authority.

4. For the reasons stated above, I hereby claim, on behalf of the Commission, the governmental deliberative processes privilege with respect to deposition inquiries that relate to EEOC's methods and strategies in conducting its investigation of the

charge on which the above-designated suit is based, the bases of EEOC's reasonable cause finding on the charge, and the reasons for EEOC's decision to file suit on the charge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____ day of March, 2002.

_____
Cari M. Dominguez, Chair
Equal Employment Opportunity
Commission
1801 L. Street, N.W.
Washington, D.C. 20507

D. EXCERPTS FROM EXHIBITS TO CHAIR'S DECLARATIONS

1. Confidential Third-Party Information

In the following excerpt, the Chair asserted the deliberative process privilege for a document containing analysis of confidential third-party information regarding arrest records obtained by the investigator in the course of the investigation.

Exhibit A

1. Four page memorandum containing confidential third party information regarding arrest records, undated, from _____, Investigator, _____ Office, regarding charge number _____. This chart contains the investigator's analysis of the information obtained during her investigation of this charge, and her conclusions regarding the merits of the charge.

* * * * *

2. Portions of Investigator's Memorandum

In the following excerpt, the Chair asserted the deliberative process privilege for redacted portions of a memorandum from the investigator to the Office Director containing analyses, conclusions, and recommendations regarding the charge.

Exhibit A

Exhibit A is a two (2) page memorandum, dated June 23, 1997, from _____, Investigator, _____ Office, to _____, Supervisor, _____ Office, and to _____, Enforcement Manager, _____ Office, regarding Charge No. _____, from which the following items have been redacted:

(1) The fifth paragraph on page 1, consisting of twenty-two lines, and ending on page 2; and

(2) a two-line recommendation on page 2.

The redacted portions of the memorandum include the investigator's analysis of the information obtained during her investigation of Charge No. _____, her conclusions regarding the merits of the charge, and her recommendations to the _____ Director regarding the Commission's determination on the charge.

* * * * *

3. Communications with a Commissioner's Office

In this excerpt, the Chair asserted the deliberative process privilege for a memorandum from the EEOC Commissioner discussing the merits of charge and making recommendations on it. She also asserted the privilege for a memorandum from a Philadelphia legal unit trial attorney to the Commissioner's office discussing the merits of the charge.

Exhibit A

* * * * *

5. Memorandum of two pages, dated April 27, 1997, by EEOC Commissioner _____, regarding Charge Nos. _____ and _____. This memorandum contains the Commissioner's discussion of the merits of the charge, and his recommendations regarding the Commission's determination on the charge.

6. Memorandum of three pages, with six pages of attachments, dated May 1, 1997, from _____, Trial Attorney, _____ Office, to _____, Special Assistant to Commissioner _____, regarding Charge Nos. _____ and _____. This memorandum contains the _____ Office legal unit's conclusions regarding the merits of the charge, and the Trial Attorney's recommendations to the Commissioner regarding the Commission's determination on the charge.

* * * * *

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION III

MOTIONS FOR NEW TRIALS AND FOR JUDGMENT AS A MATTER OF LAW

SECTION III
MOTIONS FOR NEW TRIALS AND FOR JUDGMENT AS A MATTER OF LAW

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A. INTRODUCTION

This section of the *Manual* discusses the standards and procedures for motions for judgment as a matter of law and motions for a new trial, and indicates some of the circumstances in which Commission attorneys should consider moving for judgment as a matter of law. As emphasized in subsection E., the Commission cannot base an appeal on the lack of sufficient evidence to support the jury's verdict unless the Commission has made a motion for judgment as a matter of law under Fed. R. Civ. P. 50 at the appropriate times and the motion includes the specific grounds relied on. **In situations where there are insufficient grounds for requesting judgment as a matter of law, trial attorneys should still consider moving for a new trial under Fed. R. Civ. P. 59.** As indicated in subsection D. below, the standard for a new trial is much more lenient than for judgment as a matter of law. Where a Rule 59 motion is made on the ground that the verdict is against the weight of the evidence, the court is free to weigh the evidence and can grant a new trial "[i]f, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2806, at 75 (2d ed. 1995).

B. RULE 50 PRACTICE: MOTION FOR JUDGMENT AS A MATTER OF LAW

1. The Rule

- Rule 50(a) provides for a motion for judgment as a matter of law (JMOL) which may be made at any time before submission of the case to the jury. This was previously known as a motion for a directed verdict. It allows the trial court to determine whether there is any question of fact to go to the jury and whether any finding other than the one requested would be erroneous as a matter of law.

- Rule 50(b) allows the court to reserve decision on the question of law until after the case has been submitted to the jury and the jury has reached a verdict or is unable to agree. If the court decides the initial motion should have been granted, it may set aside the verdict of the jury and enter judgment as a matter of law. This was previously known as judgment notwithstanding the verdict. Rule 50(b) also allows a motion for a new trial under Rule 59 to be joined in the alternative with a renewed motion for judgment as a matter of law..

- The 1993 amendment to Rule 50 makes clear that JMOL may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of an entire claim or defense.

- If the party with the burden of proof has established the elements of its case by testimony that the jury is not at liberty to disbelieve, JMOL in that party's favor may be granted on motion. However, entering JMOL for the party bearing the burden of proof on an issue is generally viewed as an extreme step, to be taken only "when the evidence favoring the claimant is so one-sided as to be of overwhelming effect." *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997); *see Grey v. First Nat'l Bank in Dallas*, 393 F.2d 371 (5th Cir.), *cert. denied*, 393 U.S. 961 (1968); 9A C. Wright & A. Miller, Federal Practice and Procedure, § 2535, at 325-29 (1995).

2. Standard of Sufficiency

- The question of whether the evidence is sufficient to create an issue of fact is a question of law and is the same regardless of whether the motion is being considered before or after submission to the jury.

- The standard for evaluating the sufficiency of the evidence under Rule 50 is the same as the standard for reviewing a motion for summary judgment as well. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). **But even where a court has denied a motion for summary judgment it can still enter judgment as a matter of law.**

- The court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. It must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences that may be drawn from the evidence.

- The court must review all of the evidence in the record, not just the evidence favorable to the nonmoving party, *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149-51 (2000); however, "it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

- Thus, "the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, at 300 (2d ed. 1995)).

- **The analysis is the same in the trial court and on appeal.**

C. PRACTICE POINTS

1. Opposition to Defendant's Rule 50 Motion

- Always object where a Rule 50(a) motion does not specify the factual and legal basis for the proposed judgment as a matter of law (JMOL).

- When the motion is renewed after the verdict under Rule 50(b), object if the grounds proposed differ in any material way from the grounds previously offered. It is settled law that "where a party did not object to a movant's Rule 50(b) motion specifically on the grounds that the issue was waived by an inadequate Rule 50(a) motion, the party's right to object on that basis is itself waived." *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997) (collecting cases).

2. Rule 50(a)

- The motion must specify the judgment sought and the law and facts on which the moving party is entitled to the judgment. **This is mandatory.** Failure to state the specific grounds relied on is in itself a sufficient basis for denial of the motion.

- A court can consider a motion for JMOL made at the close of the opponent's case and a similar motion made at the close of all the evidence together to determine whether specific grounds were made sufficiently clear.

- Statement of one ground precludes a party from later claiming the motion should have been granted on a different ground.

- While it is preferable that the motion be in writing, this is not mandatory under the rule, so an oral motion based on the record can suffice.

- The court will not err if it denies a motion for JMOL that does not state the grounds sufficiently and the **moving party cannot complain about the denial on appeal.**

- If the court grants a motion for JMOL that does not state the ground sufficiently, and the opposing party did not object to the lack of grounds in the trial court, **the opposing party may not raise this point in the appellate court**.

- A trial court should usually submit a case to the jury even if it thinks the evidence insufficient because then if it grants JMOL on a renewed motion after the verdict and the appellate court holds that the trial court was in error in its appraisal of the evidence, the appellate court can reverse and order judgment on the verdict of the jury without the need for a new trial.

- The grounds for JMOL in the Rule 50(a) and (b) motions must be identical. An inconsistency in verdicts arising as a result of jury instructions and the jury's answers gives rise to a basis for a postverdict motion for a new trial or for further deliberation by the jury under Rule 49(b), not for a renewed motion for JMOL.

3. Rule 50(b) -- Renewed Motion for JMOL After the Verdict

- A postverdict motion cannot be made unless a previous motion for JMOL was made by the moving party prior to submission of the case to the jury.

- If the evidence was insufficient as a matter of law to support the verdict but no motion for JMOL was made under Rule 50(a), even though the court cannot grant a Rule 50(b) motion, it can set aside the verdict and order a new trial.

- The renewed motion for JMOL must state the grounds on which it is made and it cannot assert a ground that was not included in the earlier motion.

- The standard is precisely the same as for the presubmission motion.

- The party who moved for JMOL at the close of all the evidence under Rule 50(a) may make the renewed post-verdict motion under Rule 50(b) within 28 days after entry of judgment or, if a verdict was not returned, within 28 days after the jury has been discharged. This time period cannot be enlarged by the court or by stipulation of the parties, and an untimely motion cannot be considered.

D. ALTERNATIVE MOTION FOR NEW TRIAL

- Rule 50(b) permits joinder of a Rule 59 motion for a new trial with a renewed motion for judgment as a matter of law (JMOL). Any grounds that would support a motion for a new trial can be asserted and will be tested under the same standards that would apply if the motion were made independently under Rule 59.

- One ground that should ordinarily be included in every alternative motion for a new trial under Rule 50(b) is that the verdict is contrary to the clear weight of the evidence. The standard for a new trial is obviously much more lenient: the court may consider the credibility of witnesses and the weight of the evidence and may set aside a verdict supported by substantial evidence where the court thinks it is contrary to the clear weight of the evidence or is based upon evidence which is false.

- The district court has to rule on both branches of the alternative motions. If it grants the motion for JMOL, it is required to specify the grounds for granting or denying the motion for new trial.

- Appellate review of these rulings is complex, but should be considered to assure all procedural steps have been taken to maximize success on appeal. Basically there are four possible outcomes in ruling on the alternative motions under Rule 50(b):

  - The trial court may deny the motion for JMOL and grant a new trial. If it does, the order is not appealable and the new trial will proceed. In practice, this means there is no appellate review of the ruling because it is difficult to show on appeal following the second trial that even if the denial of the motion for JMOL was erroneous it had a prejudicial effect in the second trial.

  - The court may deny both the Rule 50(b) motion and the motion for a new trial. If it does, the jury's verdict stands and the appeal is from the judgment entered on the verdict. Both the refusal of JMOL and errors of law in the trial court may be raised on appeal. **Review is de novo**.

    - If the appellate court concludes it was error to deny the motion for JMOL, it has the same choice among ordering entry of judgment for the moving party,

ordering a new trial, or remanding for the trial court to determine whether there should be a new trial that it has whenever it reverses a denial of a motion for judgment.

◆ It will consider but is not limited to any grounds that the winning party below has asserted as appellee for the grant of a new trial in the event the decision below on the motion for judgment is reversed.

◆ If the appellate court concludes that the district court was correct in denying the motion for judgment it may also consider whether the court erred in denying the alternative motion for new trial.

- The court may grant both the Rule 50(b) motion and the motion for a new trial. If it does so, the grant of a new trial is conditional and becomes effective only if the appellate court reverses the grant of JMOL. Though conditional, the judgment is final and appealable.

◆ The party for whom the verdict was returned is entitled to urge that trial errors entitle him to a new trial rather than to entry of judgment against him. That party may move for a new trial within 28 days after the entry of the JMOL, and whether the party has moved for a new trial or not, may argue on appeal that a new trial should be granted rather than judgment entered against him.

◆ If the appellate court affirms the grant of JMOL, the case is ended.

◆ If it reverses the grant of that judgment, the new trial must proceed unless the appellate court orders otherwise.

◆ In passing on the conditional new trial grant, the appellate court may consider only reviewable matters. The grant of a new trial on the ground that the verdict is against the weight of the evidence is generally not reviewable, so the new trial order cannot be examined absent a finding of abuse of discretion below.

- The trial court may grant the motion for JMOL and conditionally deny the new trial.

◆ The party for whom the verdict was returned is entitled to urge that trial errors entitle him to a new trial rather than to entry of judgment against him. That party may move for a new trial within 28 days after the entry of the JMOL, and whether the party has moved for a new trial or not, may argue on appeal that a new trial should be granted rather than judgment entered against him.

◆ The party in whose favor the motion for JMOL was granted may argue on appeal as appellee, as an alternative to affirmance, that the denial of the alternative new trial motion was error, and **that party need not take a cross-appeal** to do so. If the denial of the new trial is challenged in this fashion, the appellate court, after reversing the grant of judgment, will determine whether judgment should be entered on the jury verdict or whether there should be subsequent proceedings.

E. CIRCUMSTANCES IN WHICH EEOC ATTORNEYS SHOULD CONSIDER RULE 50 MOTIONS AND MOTIONS FOR NEW TRIAL

● Motions for judgment as a matter of law (JMOL) under Fed. R. Civ. P. 50(a), and for new trial after verdict under Rule 59, should be made on any issues on which the defendant bears the burden of proof, for example (**this list is illustrative only)**:

- Bona fide occupational qualification (BFOQ) defenses to discriminatory policies or qualification standards under Title VII or the Age Discrimination in Employment Act (ADEA)

- Reasonable factor other than age (RFOA) defense under the ADEA

- Waiver under the Older Workers Benefits Protection Act (OWBPA)

- Statutory defenses under the Equal Pay Act (EPA)

- Business necessity defense in disparate impact cases under Title VII or the ADEA

- Less discriminatory alternative rejected under Title VII or the ADEA in an impact case

- Undue hardship in religious accommodation cases

- Americans with Disabilities Act (ADA) accommodation cases – failure to participate in interactive process where accommodation exists; undue hardship

- ADA qualification cases – business necessity for standard; direct threat

- Harassment cases (any basis) – in supervisor harassment context, *Faragher-Ellerth* defense

In these cases if we are entitled to JMOL because the defendant failed to establish one of these defenses, we would ordinarily be entitled to judgment on liability.

- Motions for JMOL should be made, where appropriate, even in cases involving shifting burdens of proof, despite the fact that the EEOC bears the ultimate burden of persuasion. Since the burden of persuasion is merely proof by a preponderance, we should consider arguing that we have met that standard as a matter of law in **disparate treatment cases** where the employer's assertion of a nondiscriminatory reason is weak and/or our evidence is strong on **pretext**; in any cases with **direct evidence** in which the employer has not asserted an affirmative defense and proven by a preponderance of the evidence that it would have made the same decision absent the prohibited motive; and in any cases involving **facially discriminatory policies** where proffered defenses are weak.*

Remember -- the sufficiency of the evidence is not reviewable on appeal unless a motion for JMOL has been made in the trial court prior to submission of the case to the jury and renewed on the same ground after an adverse verdict. Nor is sufficiency of the evidence reviewable if the trial court denied a motion that does not state specific grounds as required by Rule 50(a). Only in rare cases will an appellate court look at the sufficiency of the evidence to support a verdict absent a motion for JMOL–when it would constitute plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice.

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* As indicated in the Introduction to this section (see section III.A., above), even where sufficient grounds for JMOL are absent, the legal unit should consider moving for a new trial under Rule 59 where the verdict is against the weight of the evidence.

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION IV

SETTLEMENT GUIDANCE

SECTION IV
SETTLEMENT GUIDANCE

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A. SETTLEMENT STANDARDS AND PROCEDURES

1. Settlement Authority

a. General Counsel

Congress assigned the General Counsel the "responsibility for the conduct of litigation" for the agency. 42 U.S.C. § 2000e-4(b)(1). Subject to the limitation that the General Counsel may initiate new litigation only "at the direction of the Commission," § 2000e-4(b)(2), the General Counsel controls the agency's litigation, and therefore has the authority to decide whether to settle Commission lawsuits and on what terms. The General Counsel may delegate that authority in any case or class of cases as he or she deems appropriate.

b. Delegation of Settlement Authority to Regional Attorneys

Where suit is filed within the Regional Attorney's redelegated authority, the Regional Attorney also has settlement authority unless the Office of General Counsel (OGC) has indicated otherwise in a particular case. Where litigation is authorized by the General Counsel or Commission, the notice to the Regional Attorney of litigation authorization will specify whether, and on what conditions, if any, settlement authority is delegated from the General Counsel to the Regional Attorney. In any case where the General Counsel has retained settlement authority, the legal unit cannot voluntarily dismiss the suit, or any claim in the suit, without approval of the General Counsel.

Where the Regional Attorney would otherwise have settlement authority pursuant to the preceding paragraph, settlements should be submitted to the General Counsel for approval in the following circumstances: (1) the settlement provides specific affirmative relief, such as preferences regarding hiring or promotion, for protected class members not identified as victims of defendant's discriminatory practices; (2) the settlement could be interpreted to preclude litigation by other legal units of charges raising claims related to those resolved; or (3) the settlement contains a provision that could create unfavorable precedential effects for the agency in future suits or resolutions.

c. Requests for Settlement Approval

Requests for settlement approval should be sent to the Associate General Counsel for Litigation Management Services. The request should be in the form of a memorandum containing a discussion of the case prosecution, the legal unit's opinion of the merits of the case, the settlement terms, and the reasons for settlement on those terms. All relevant resolution documents, including claimant releases, should be included with the memorandum. See subsection B. of this section of the Manual for further discussion of requirements for memoranda recommending settlement approval.

d. Cases on Appeal

All settlements of cases on appeal must be approved by the General Counsel whether or not the Regional Attorney had settlement authority at the trial court level.

e. Informing Other Parties Regarding Settlement Authority

In cases in which the General Counsel has not delegated settlement authority to the Regional Attorney, Commission counsel should inform the other parties early in settlement negotiations that any agreement is subject to the General Counsel's approval. It should be made clear to the parties that the General Counsel will make an independent review of the adequacy of the proposed settlement and reserves the right to request significant changes in its terms. Regional Attorneys should apprise OGC as early in the settlement process as possible of proposed settlement terms in order to minimize any later disagreements between OGC and the legal unit over the adequacy of a recommended settlement.

f. Presence at Local Settlement Conferences of Representatives with Full Settlement Authority

Where a Regional Attorney has not been delegated settlement authority and the court requires the presence of a Commission representative with full settlement authority at a conference or at mediation, the Regional Attorney should discuss the case with OGC as early as possible. Where sufficient information is available for OGC to determine the elements of adequate relief, settlement authority within those parameters will be delegated to the Regional Attorney. Where it is not possible to delegate settlement authority to the Regional Attorney, the Regional Attorney should raise with the court the impracticability of attendance by a representative of the General Counsel's office, pointing to authority such as In re M.P.W. Stone, 986 F.2d 898 (5th Cir. 1993), a case involving the Department of Justice, where the court held that the

district court "abused its discretion in routinely requiring a representative of the government with ultimate settlement authority to be present at all pretrial or settlement conferences." Id. at 905. Where appropriate, the Regional Attorney can also point to the Advisory Committee Notes to the 1993 amendments to Fed. R. Civ. P. 16(c), which, in discussing settlement authority at pretrial conferences, state that "in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility."

g. Presuit Settlements

The Regional Attorney has discretion to engage in presuit settlement efforts in any case, whether filed under his or her redelegated authority or authorized by the General Counsel or Commission. Resolutions agreed to through presuit negotiations must be filed with the court together with a complaint, and this requirement should be made clear to the prospective defendant(s) at the time settlement efforts are initiated.

As indicated in OGC Guidance on Civil Justice Reform, Executive Order No. 12988 (see Part 3, section I. of the Manual), presuit settlement efforts should be considered in every case as they sometimes can save the parties substantial time and expense. As long as the Commission insists on a court settlement that is consistent with the settlement standards set forth in subsection 2. below, attempts at presuit resolutions should not undermine the agency's conciliation processes.

2. Settlement Standards

a. Form

To ensure effective enforcement of Commission resolutions, the agency's practice is that settlements be in the form of a consent decree.

b. Terms

(1) In General

Settlements should be carefully drafted and as complete as is practicable under the circumstances. Because of the public policy implications of Commission resolutions, care in drafting is even more important than in most private agreements.

Attorneys should use precise language and avoid ambiguities. Although it is often helpful to review and sometimes even incorporate language from prior settlements, this should not be done without careful consideration of the applicability of the language to the instant case. (Also, negotiated language in prior agreements will seldom be appropriate for use in proposed agreements; Commission attorneys should keep a file of their initial settlement proposals for use when a model is needed in drafting a new agreement.) Drafting resolution documents should never be treated as a routine task, regardless of the apparent simplicity of what the parties consider the essential provisions.

(2) Injunctive Relief

Injunctive provisions should specifically address the conduct alleged to be discriminatory. They should be drafted with a view to effective enforcement if similar conduct recurs. Where the evidence shows a history of discriminatory practices, injunctions should be permanent.

Resolutions should not contain affirmations of defendant's prior or ongoing legal conduct, such as "defendant will continue to comply with Title VII" or "defendant restates its policy of nondiscrimination in employment." This does not preclude Commission agreement to nonadmission clauses in appropriate circumstances. But the legal unit should not accept defendant's statements of continuing legal conduct in place of explicit provisions requiring future compliance with the law.

(3) Individual Affirmative Relief

Individual affirmative relief, such as instatement, reinstatement, wage increases, promotions, transfers, and training, should be sought in all cases unless, as sometimes occurs with instatement and reinstatement, the affected individuals no longer desire such relief. Where applicable, relief should include retroactive seniority and any other lost benefits, such as pension accruals. (With respect to pension accruals, attorneys should be aware of employees' rights to "hours of service" under ERISA for backpay received. See Anderson v. Western Conference of Teamsters Pension Trust Fund, 62 Fair Empl. Prac. Cas. (BNA) 835 (E.D. Cal. 1993).) Individual affirmative relief should not be waived without strong reasons, as it is important to effective enforcement of discrimination laws that victims attain their rightful place in the workforce.

(4) Monetary Relief

Monetary relief on Commission claims can be allocated to backpay, interest, frontpay, damages, and liquidated damages in accordance with the agreement of the parties as long as the particular relief was sought in the complaint, the allocations are reasonably related to the harm or loss caused by the discriminatory conduct, and damages awards do not exceed the applicable caps. Taxes and the employee's share of Social Security and Medicare contributions (and other mandatory deductions on wages) should be withheld on amounts allocated to backpay and frontpay. (It should be made clear at the time of agreement on amounts of backpay or frontpay relief that the employer cannot deduct its share of Social Security and Medicare contributions from the award.) Other forms of monetary relief (with the exception noted below) are also taxable, but withholding is not required; the employer should determine in what circumstances it is required to provide a Form 1099 for such relief. Compensatory damages for personal physical injuries or physical sickness are not taxable; however, emotional distress cannot be treated as a physical injury or physical sickness, except that damages paid for medical care attributable to emotional distress are not taxable.

(5) References

For claimants who were employed by the defendant but are not being reinstated, it is important to secure as positive a reference as the defendant can honestly provide. Where there are compelling reasons to agree to a "neutral" reference, such as where the defendant has had a firm, prior policy of providing only basic employment information, the legal unit should obtain defendant's agreement to include with the reference a statement that it is defendant's policy in all cases to provide only such limited information.

(6) Record Retention and Reporting

It is essential that the Commission have access to all information necessary to evaluate defendant's compliance with the resolution. Thus, the consent decree should specifically identify information to be compiled and records to be retained during its term. In addition, information necessary for ongoing monitoring of defendant's compliance should be submitted to the Commission on a periodic basis. Considerable thought should go into the content of these periodic reports, striking a balance between what the agency needs to know to determine possible violations of the settlement and what the legal unit can reasonably expect to be able to review carefully in a timely manner. Where appropriate, the reports should be submitted in electronic form. The resolution document should also contain provisions permitting the Commission, upon

reasonable notice, to inspect or require production of relevant documents and to interview employees, including managers, who may possess relevant information.

(7) Other Provisions

The settlement should fully address the discriminatory practices alleged in the complaint. For example, in hiring and promotion cases where defendant's selection procedures may have contributed to the exclusion of members of the protected class, the procedures should be revised to eliminate their discriminatory effects. Where appropriate, policies and complaint procedures addressing harassment should be created or revised. Where training of defendant's managers and officials is necessary, the settlement should be specific regarding the content of the training and should permit Commission review of the trainer(s) and materials. Notices generally should contain specific references to the Commission's suit, the allegations in the complaint, and the terms of the resolution; legal units should not agree to notices that merely restate defendant's statutory obligations.

The above are just a few examples of specific relief that may be necessary to an effective resolution. Attorneys should ensure that every case is treated as unique and that the settlement contains carefully drafted provisions designed to provide full redress for the discriminatory practices at issue and to minimize the likelihood of their recurrence.

(8) Successor Liability

Successor employers may be held liable for the discriminatory practices of their predecessors. See, e.g., EEOC v. MacMillan Bloedel Containers, Inc. and Local 544, United Paperworkers International Union, AFL-CIO, 503 F.2d 1086, 1089-92 (6th Cir. 1974); Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1235-37 (7th Cir. 1986). An important factor in establishing successor liability is notice of the claim to the new employer prior to the transfer of ownership. To assure that the obligations imposed by a settlement are carried out in the event of a transfer in ownership of the defendant, or a transfer of all or a portion of its assets, the following provisions should be included in resolution documents: a statement that the defendant will provide prior written notice to any potential purchaser of defendant's business, or a purchaser of all or a portion of defendant's assets, and to any other potential successor, of the Commission's lawsuit, the allegations raised in the Commission's complaint, and the existence and contents of the settlement.

c. Scope

The consent decree should contain a statement that it resolves only the claims raised in the Commission's complaint. If the Commission has agreed to waive additional claims, such as claims on which the agency found cause but decided not to litigate, or claims in pending charges where the charges were resolved as part of the settlement, these other claims should be specifically identified. Where the parties do not intend to resolve all claims in the complaint, the decree should clearly describe the claims that are subject to further litigation by the Commission. The decree should contain language reserving the Commission's right to file suit on pending charges not resolved by the decree and on subsequently filed charges alleging violations occurring prior to entry of the decree.

Because the Commission does not represent charging parties and other claimants for whom it seeks relief, the consent decree should never contain language waiving their rights to pursue their individual claims. (Charging parties and other claimants should not be signatories to the decree, as (with the exception of intervenors) they are not parties to the action.) Individuals receiving benefits under Commission settlements can be required to sign separate releases waiving legal claims for which they received relief in the settlement (see subsection 2.d. immediately below).

d. Claimant Releases

Individual relief in Commission actions cannot be conditioned upon a waiver of legal claims other than those asserted in the Commission's complaint. A claimant represented by private counsel can agree to a broader waiver, but in the absence of such an agreement, a represented claimant's recovery on the Commission's claims cannot be conditioned on the release of any other claim(s). Congress gave the Commission suit authority in 1972 in part to "bring about more effective enforcement of private rights," General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 325-26 (1980). Conditioning an individual's relief in a Commission suit on the release of separate claims would diminish rather than enhance his or her rights. Further, because the Commission could not have recovered on these separate claims if it prevailed at trial, the relief received in a Commission settlement cannot constitute consideration for a release of the claims.

Even though the Commission is not a party to releases executed by claimants, EEOC attorneys are responsible for ensuring that no individual's relief is conditioned on waiver of any legal claim beyond those brought by the Commission. (As indicated in the preceding paragraph, a represented claimant can agree to a broader waiver.

However, this requires actual representation; simply informing a claimant of his or her right to private counsel is not sufficient, even if the claimant expressly declines to exercise the right.) Thus, individual waivers of common law claims or other statutory claims (including claims under state fair employment practices laws) are not permitted even where the factual basis of the claim is identical to that pled in the Commission's action. This means that the release language must not only be limited to the factual claims in the Commission's complaint, but must also refer to the statute(s) under which the claims were brought. The appendix contains model release language.

In addition, no individual can be required as a condition of obtaining relief on a Commission claim to agree to refrain from seeking future employment with the defendant or to keep the terms of his or her recovery confidential. (As with the waiver of separate claims, a represented claimant can agree to such conditions, but his or her right to relief on the Commission's claims cannot be conditioned on such an agreement.)

e. Nonconfidentiality

Once the Commission has filed suit, the agency will not enter into settlements that are subject to confidentiality provisions, it will require public disclosure of all settlement terms, and it will oppose the sealing of resolution documents. The principle of openness in government dictates that Congress, the media, stakeholders, and the general public should have access to the results of the agency's litigation activities, so that they can assess whether the Commission is using its resources appropriately and effectively. Additionally, one of the principal purposes of enforcement actions under the antidiscrimination statutes is to deter violations by the party being sued and by other entities subject to the laws. Other entities cannot be deterred by the relief obtained in a particular case unless they learn what that relief was.

Therefore, resolutions of Commission suits must contain all settlement terms and be filed in the public court record. Further, the Commission must be free to respond fully to inquiries regarding the suit and resolution, and to provide upon request the resolution documents and any nonprivileged case related documents. Commission attorneys should oppose attempts to seal or otherwise prevent public access to resolution documents, and if, over the Commission's objections, a court issues an order preventing such access, the Regional Attorney should notify the Associate General Counsel for Litigation Management Services immediately and submit a written recommendation regarding appeal of the order.

f. Notice to Affected Individuals

Although the Commission determines appropriate relief in suits it files, claimants in Commission cases should be consulted regarding relief the Commission is considering accepting and should be notified prior to execution of a final agreement of the relief they will receive in the settlement. Exceptions to the first requirement can be made in class matters involving large numbers of claimants; however, charging parties should always be consulted before acceptance by the Commission of relief offers. (There should of course be ongoing contact between Commission attorneys and claimants throughout the litigation.) Where the Commission and a claimant disagree on the proper recovery and the Commission believes that continued prosecution of the case is not in the public interest, the Commission should notify the claimant of its intention to settle the case on the terms indicated and provide him or her the opportunity to proceed individually.

In class matters, the Commission should consider asking the court to hold a fairness hearing at which affected individuals can present objections to the Commission's proposed settlement. See subsections C. and D. of this section of the Manual for a discussion of the factors relevant to requesting fairness hearings and the procedures for conducting such hearings.

g. Notice of Breach

Defendants often seek to negotiate settlement provisions that require a party to notify the opposing party prior to seeking court intervention over an alleged breach of the agreement. In addition to requiring notice of an alleged breach, these provisions typically provide each party a specified time period in which to remedy its noncompliance before the complaining party contacts the court. Such notice provisions become problematic in situations where the defendant's noncompliance may result in harm to the Commission or claimants if a breach is not remedied immediately. Thus, notice of breach provisions should expressly provide for exceptions to the waiting period in situations where a delay in seeking court enforcement may cause harm to the Commission or claimants.

h. Press Releases

The Commission's practice is to issue a press release upon settlement of a Commission suit. Neither the issuance nor the content of the press release should be the subject of negotiation. If agreement has been reached on all terms of a settlement but the defendant refuses to execute the settlement without a commitment from the

Commission not to issue a press release, the Regional Attorney should contact the Office of General Counsel before proceeding further.

3. Monetary Relief in Class Matters

a. Identification of Affected Individuals

Efforts should be made to identify likely victims of discrimination in settlements involving classwide discrimination. For example, in hiring cases where affected individuals cannot be identified from the defendant's application records, or where relief was sought for nonapplicants (see subsection 3.c.(3) below), external sources should be used to identify potential victims, and publication of notices to encourage class members to identify themselves or participate in claims procedures should be considered.

b. Determining Monetary Entitlement

The consent decree should describe at least generally the process used to determine the amount of the settlement fund. The decree also should describe the method used to determine apportionment of the fund to aggrieved individuals, including: (1) criteria individuals must meet to be eligible for monetary relief; and (2) where applicable, factors or formula used to determine individual shares of the fund. Wherever possible, aggrieved individuals should be identified and their monetary awards determined prior to the execution of the consent decree, and this information should be included in the decree. Where it is impractical to complete this process prior to filing the consent decree, the decree should provide a procedure through which to identify aggrieved individuals and determine their monetary awards. See the discussion of notice and claims procedures in subsection D. of this section of the Manual.

c. Statistical Cases

(1) Estimating Lost Employment Opportunities

When discrimination is inferred from a statistical disparity, backpay may be based on the "shortfall" in positions to which members of the affected group would have been entitled absent defendant's unlawful conduct. Shortfalls should be calculated as the difference between the number of positions obtained (or in layoff and discharge cases, retained) by members of the affected group and the number they would have

received had they been selected in proportion to their availability for such positions.* Thus, by this approach, if the statistical evidence showed, for example, a shortfall of 10 positions, total gross backpay would be calculated as the money earned during the liability period by a representative employee working in one of the positions, multiplied by 10.

(2) Allocating Backpay Among Affected Individuals

Where relief is based on a statistical shortfall, there may be more claimants than the number of missed employment opportunities, making it difficult to determine with certainty who would have received the positions at issue absent the unlawful discrimination. Where the positions require special skills or qualifications and there are significant differences in the backgrounds of the claimants, or where there are other reasons to believe that some claimants were more likely than others to have been discrimination victims, an attempt usually should be made to determine which of the claimants would have had the best opportunity of obtaining the positions at issue absent discrimination. Backpay can then be apportioned in a manner that will better account for the probability that a particular individual was adversely affected by the defendant's discriminatory practices.

Where formulas of some kind are used in determining individual awards, the criteria on which the formulas are based must be relevant to the size of an individual's loss. Examples of possible relevant criteria are: seniority, work experience, job assignment, performance evaluations, education and training, date of application, and whether a claimant applied for a position at issue. Criteria used should be as objective and easy to apply as possible. Examples of formulas are: assigning points to claimants based on their meeting particular criteria (or on the degree to which they meet the criteria) and then according a monetary value to each point by dividing the total points into the settlement fund; and the separation of claimants into subgroups based on

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* The shortfall should **not** be calculated (as defense counsel sometimes argue) by determining the number of lost positions above the figure used to demonstrate statistical significance – two standard deviations, for example. The legal consequence of a finding of statistical significance is that an inference of discrimination can be drawn from the disparity between the representation of the affected group in the availability pool and the rate at which group members were selected for the positions at issue. If discrimination occurred, the defendant is liable for the entire number of positions that, given proportionate selection, would otherwise have gone to members of the affected group.

various criteria, with a claimant's share of the fund determined in whole or in part by the subgroup to which he or she is assigned. As indicated in subsection B.3.b. above, the criteria and formulas should be described in the resolution document.

Where large individual gross backpay awards are involved, efforts generally should be made to determine claimants' mitigation efforts and interim earnings. Where awards are smaller, particularly where claimants' backgrounds indicate that their interim employment opportunities likely would have been similar (employment in minimum wage jobs, for example), such individual determinations may not be necessary. Where there is substantial uncertainty regarding which claimants would have obtained positions absent discrimination, consideration should be given to capping the maximum backpay award that an individual claimant can receive. In appropriate circumstances, minimum backpay awards should be considered as well.

The primary consideration is overall fairness to claimants individually and as a group. Exactness is not required, but the process should to the extent practicable apportion awards according to the likely backpay losses discrimination victims actually suffered.

(3) Recovery for Nonapplicants in Hiring Cases

It is sometimes appropriate in hiring cases to seek relief for individuals who did not apply for the positions at issue. (This of course may also be true in transfer and promotion cases, and the individualized determinations mentioned below will be necessary in those cases as well.) For example, individuals in the protected class may not have applied because of the defendant's reputation for engaging in discriminatory employment practices; or an employer's recruitment methods may have excluded protected class members from the applicant pool.

Nonapplicants should receive relief only if the legal unit is satisfied that they possessed the relevant qualifications for the positions at issue and would have applied but for the defendant's discriminatory practices or the consequences of those practices. This information can be obtained by determining, for example, whether an individual was in the job market during the time period at issue, applied for similar jobs with other companies in the same geographic area during the period (or was willing to relocate to that area), possesses any special skills or education required for the position, or previously worked in the same or similar industries. Decisions to seek relief for nonapplicants will necessarily require careful individual determinations.

d. Reversions

No portion of the monetary relief agreed to in a settlement should revert to the defendant. Funds which cannot be distributed because of an inability to identify or locate claimants, or for any other reason, should where feasible be reallocated among identified victims. Where funds still remain, they should be contributed to programs which have the purpose of enhancing the employment opportunities of the group(s) affected by defendant's unlawful practices. Settlements should contain provisions identifying the program(s) receiving the funds (or describing how the program will be selected) and explaining the purposes for which the funds will be used.

e. Distribution of Monetary Relief

Commission personnel should not assume responsibility for distribution of individual monetary awards provided to claimants in settlements or judgments and should not handle funds, in any form, that are intended for claimants. Awards to claimants should be distributed by the defendant or a mutually agreed upon third party escrow agent. The costs of distribution, including the cost of any escrow arrangement, should be borne by defendant; distribution costs should not be deducted from the award fund (or from interest on the fund). Monetary distribution tasks should be well defined and subject to clear time limits, and a procedure should be established for the Commission to verify that the required distributions took place. Defendant should inform the Commission when the checks are mailed and should provide the Commission with copies of the recipients' canceled checks or other evidence showing that the checks were cashed.

APPENDIX

MODEL RELEASE LANGUAGE

In consideration for $ _____ paid to me by _____, in connection with the resolution of EEOC v. _____, I waive my right to recover for any claims of [bases and issues] arising under [statute] that I had against _____ prior to the date of this release and that were included in the claims alleged in EEOC's complaint in EEOC v. _____.

Date: _____ Signature: _____

B. GUIDANCE ON CONTENTS OF JUSTIFICATION MEMORANDA FOR SETTLEMENTS REQUIRING HEADQUARTERS APPROVAL

1. Summary

Begin every justification memorandum by summarizing the nature of the case and the terms of the proposed settlement. The summary should state the statute, the bases and issues, and the amount of monetary relief and types of nonmonetary relief. If a settlement does not provide relief on an allegation contained in the Commission's complaint, it should be expressly noted in this section. Also make express note of potentially controversial provisions, such as goals and timetables, in this section.

2. Background

a. Charge

Provide the name of the charging party (or parties). This subsection should be used to provide any information about the charging party, or the charge, which may be necessary to understanding the case and the settlement. This subsection should also be used to provide any relevant information about the defendant(s).

b. Complaint

State whether the Regional Attorney, General Counsel, or Commission approved filing the complaint and provide the date of any Office of General Counsel memorandum informing the Regional Attorney of the approval of litigation. State the date on which the Commission's complaint was filed and provide any necessary procedural information. List and, where necessary, explain the substantive claims raised by the complaint.

c. Litigation History

Provide a narrative of the developments leading up to the proposed settlement, including key dates. This subsection should be utilized to explain any court decisions, or results of discovery processes, which affected the prospects for success at trial and which led to acceptance of less than full relief. This subsection should also be utilized

to briefly explain the settlement negotiations. Specify timeframes for the close of discovery, approval of settlement, and trial.

3. Terms of the Settlement

Summarize and briefly explain all of the major terms of the consent decree in this section. Use separate subsections, as appropriate, to summarize and explain any injunction (or other prohibitions of discrimination and/or retaliation), specific forms of nonmonetary relief for aggrieved individuals or class members (e.g., recruitment, hiring, job assignment, promotion, reinstatement), monetary relief (including backpay calculations and explanations for amounts representing compensatory and punitive damages), training, recordkeeping and reporting, monitoring, notice posting, and duration of the consent decree. Explain provisions for goals and timetables or other controversial provisions in detail.

4. Justification for Settlement

Present a narrative explanation of why the Regional Attorney agreed to the proposed settlement. Where the settlement provides less than full relief on any substantive claim raised by the complaint, set forth the factual and legal considerations for limiting relief or narrowing the suit. Discuss the evidence and relevant case law, as appropriate, including citations to key decisions which influenced the settlement.

5. Attachments

The Justification Memorandum should be accompanied by a copy of the proposed consent decree (including attachments or exhibits such as release forms or a class notice), draft press release(s) concerning the settlement, and the Commission's complaint or amended complaint.

C. CONSIDERATIONS IN REQUESTING A FAIRNESS HEARING

In class case settlements, it may be appropriate to request that the court conduct a fairness hearing before it approves the consent decree. Although there is no requirement that a fairness hearing be requested in any particular type of case, the legal unit should always consider fairness hearings in resolving class litigation. This section provides guidelines for the exercise of the Regional Attorney's discretion regarding whether to request a fairness hearing.

1. Factors Favoring Fairness Hearing

The following factors, none of which is dispositive, may weigh in favor of requesting a fairness hearing:

- There are numerous prospective claimants or classes of claimants, and/or there has been difficulty locating claimants, and a fairness hearing would provide the parties with an additional opportunity to ensure that all prospective claimants and groups of claimants share in the relief obtained.

- The nature of the formula or formulas used to distribute the settlement fund is complicated or some other complexity of the settlement increases the likelihood of mistake or error and a fairness hearing might help resolve any such issues.

- There is reason to believe that there will be persons who wish to object to the settlement amount, method of distribution, or other aspects of the resolution.

- It is important that certain claimants or class members have an opportunity to have their day in court. This sometimes occurs where a case has been particularly adversarial or emotionally charged.

- When for reasons such as controversy associated with the litigation, it is important for EEOC and/or defendants to have the court's stamp of approval given in open court.

2. Factors Weighing Against Fairness Hearing

The following factors, none of which is dispositive, may weigh against requesting a fairness hearing:

- EEOC has had contact with each class member and is certain that each is satisfied with the settlement.
- The class is small and easily identified.
- The relief calculations are simple and without controversy.
- A fairness hearing would unduly delay distribution of settlement funds.

D. NOTICE AND CLAIMS PROCEDURES IN THE SETTLEMENT OF CLASS CASES

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D. NOTICE AND CLAIMS PROCEDURES IN THE SETTLEMENT OF CLASS CASES

1. Notice to the Class of Aggrieved Persons

a. Introduction

When the Commission has reached an agreement with defendant to resolve a class case, the settlement will be by consent decree. In many – or most – large cases, the legal unit will not have had contact with all the persons who were harmed by the defendant's conduct and thus entitled to relief. In some cases effective communications will have been developed with a core group of aggrieved persons, but the office will have been less effective in communicating with the balance of those who are aggrieved. We want and need to give actual and effective notice to all affected persons of the claims in our class lawsuits; the fact of resolution of those claims; the specific types of relief obtained and how an aggrieved person can claim entitlement to each; a summary of the important terms of the settlement; and the bases for distributing any money obtained. This is done in a notice to the class.

The notice is generally an exhibit to the consent decree, which itself is approved by the court (either preliminarily when there is to be a fairness hearing, or finally, if there is not). The notice is sent to all persons covered by or affected by the lawsuit. When the issues in the case dictate it, notice can also be given by other means, such as by advertising in the newspaper (for instance, in a failure to hire case where the aggrieved persons are not readily identifiable), by distributing the notice to employees with paychecks, or by posting the notice at the employer's facilities or in union halls. Literacy and language considerations should be taken into account in determining the best means of providing effective notice. With the proliferation of computers with Internet access, posting also could be via the Internet. Because the notice is a part of the decree, its form and contents are generally the subject of negotiation with the defendant.

b. Contents of Notice

(1) Claims in the Lawsuit

This is a brief statement reciting the claims as they were written in our complaint. Hopefully they were framed with enough specificity and in clear enough language that the average layperson can understand what the lawsuit was about.

(2) Defendant's Disclaimer or Defenses

These are typically not included. If included, it should be a brief statement of defendant's denial of the claims asserted, or its affirmative defenses, always couched as "defendant claims" or "defendant asserts" or in similar language.

(3) Explanation of Efforts to Resolve the Lawsuit

It is sometimes important (for instance, when there have been lengthy negotiations, bitter depositions, or several very hotly litigated issues) to include a brief description of the resolution process. By way of example, if there were several mediation attempts prior to the parties reaching any agreement, a statement to that effect informs the aggrieved persons that the settlement is the result of arms-length negotiations and is not the result of being outgunned or outspent or of outright capitulation.

(4) Explanation of Why the Notice is Being Sent to Particular Aggrieved Persons

A brief statement telling the aggrieved person that the notice is being sent because he or she has been identified in the defendant's data as having been laid off, having worked in the specific department, or otherwise meeting the criteria to participate in the settlement can be helpful where there has been little or no prior contact and where the class definition is open to interpretation. It is also helpful to include a statement that if the person does not meet the criteria to participate in the settlement, he or she should notify us to that effect.

(5) Summary of Key Relief Provisions of Decree

Simple descriptions of the kinds of injunctive relief obtained, the kinds of individual relief obtained, and any other relief about which the aggrieved persons might have an interest should be included in plain language in the notice.

A separate section should deal with any monetary relief obtained, including disclosure of the full amount obtained. If any premiums are to be paid to specific charging parties or others who assisted in the litigation, disclosure of that fact should be made as well.

(6) Explanation of How Allocation and Distribution of Money Were Made

The notice should explain whether and how the full settlement amount has been divided for allocation to different groups of persons (for instance, there may be a larger settlement fund for persons laid off in earlier years than the settlement fund for those laid off in later years); how allocation of monies within any fund or subfund will be made; how, and an estimate of the date when, distribution will occur; and an estimate of the amount the aggrieved person will obtain or a simple formula the aggrieved person can use to estimate his own recovery. The goal is to make it clear to a layperson that we are distributing money based on the best available evidence of harm, or the best available substitute for evidence of harm, or our best judgment as to degree of harm. An aggrieved person can disagree with our judgment, but so long as we have exercised care and reason in an objective way, the allocation and distribution will likely be left undisturbed.

(7) Explanation of Steps to Claim Entitlement to Any Category of Relief

The notice should very clearly inform each aggrieved person of each step she must take in order to claim entitlement to any category of relief, including individual affirmative relief such as reinstatement; other relief, such as being put on a mailing list for notification of future vacancies or training opportunities; and monetary relief.

If there is a release, it should be discussed fully and attached as an exhibit to the notice.

(8) Explanation of Process Issues

Where there will be a fairness hearing, the notice should contain a brief statement explaining that the court has approved the sending of the notice, that there will be an opportunity for each aggrieved person to have a say should he or she choose to do so, and that the court's approval of the decree and settlement is preliminary.

(a) Objections

The right to object is a key part of any fairness hearing. It is important to explain carefully in the notice how aggrieved persons may make their views known to the court should they choose to do so. This means that the notice must contain:

- any time deadlines for submitting written objections

- the address where objections should be sent (generally the court, and sometimes one of the parties, who will agree to copy and distribute the objections to other parties if the court clerk's office does not routinely do so. It may be burdensome to require a layperson to send the objections to all the parties.)

- if the parties have negotiated it, a provision telling objectors that notice of objection must also be sent to the party who is responsible for distributing it to other parties

- if the parties have negotiated a form of objection, that form should be included in the notice. (Please note that a form is not recommended, since the notice package is generally quite large without it, and each additional attachment is another opportunity to overlook including a document.)

Be careful to point out to potential objectors that they must nonetheless complete the appropriate claim forms in order to participate in whatever settlement the court may finally approve. Merely objecting will not preserve their rights to participate without the execution of the agreed upon forms. Explain that objecting does not mean they must give up any rights to participate in the settlement that may be approved, and conversely, that signing the claim form does not mean they are giving up their rights to object. Where claimants are being asked to sign releases at this stage of the process, the notice should explain that individuals objecting to the settlement are not required to sign the release until after the court has ruled on their objections.

(b) Notice of Fairness Hearing

The notice must contain the date, time, and place of the fairness hearing. The notice should set forth that each aggrieved person is entitled to appear at the fairness hearing, and participate, provided that the person follows whatever preliminary steps have been negotiated. If the parties have negotiated a process that requires objectors to file a written objection prior to being allowed to speak at the fairness hearing, that should be clearly articulated in the notice. If there are time limits on the presentations that aggrieved persons can make at the fairness hearing, those should also be set forth.

(9) Attachments

(a) Claim Form for Monetary Relief

This may require a verification by the claimant that he or she meets the definition of an "aggrieved person" (*e.g.*, was born before January 1, 1945; worked for defendant during blank time period and was laid off on or before blank date, etc.) and, where appropriate, meets other criteria for relief.

(b) Release

Defendants generally want a signed release from each person who receives monetary relief as part of the settlement, and releases are sometimes included with the notice materials. The Commission's policy on the scope and content of releases is set forth in section IV.A.2.d. of Part 3 of the *Manual*. Briefly, unless a claimant has private counsel, her recovery under the settlement cannot be conditioned on a release of any claim beyond those asserted in the Commission's complaint or on a promise to refrain from seeking future employment with defendant or to keep her recovery confidential.

In addition, the decree itself should clearly set forth that the execution of a release will be effective only if the decree is approved finally.

(c) Claim Form for Other Benefits

This attachment should be used as the record of an aggrieved person's claim for, or interest in, other benefits of the decree, such as training opportunities, reinstatement, transfer, or the like.

(10) Statement Identifying Person to Call or Write with Questions

At the end of the notice, always list the name, affiliation, title, address, telephone number, and e-mail address of a person or persons who can answer questions about the notice and the claims procedure.

2. Procedure for Giving Notice

a. Who Gives Notice

The decree should provide that defendant will retain the services of a third party, preferably an accounting firm or some other business that is responsible and careful, who will send out the notices, receive the claim forms and releases, keep track of undeliverables, provide the parties with copies of all correspondence, handle other administrative matters, and answer nonsubstantive questions from aggrieved persons. Generally, absent an agreement for retention of a third party, EEOC will perform these activities. In some cases it is permissible for the defendant to handle the mailing of notices and receipt of appropriate releases, claim forms, and the like, provided there are safeguards in place to assure that matters are carefully and correctly handled.

b. Timing

Sufficient time must be allowed to copy and mail notices; deliver them; permit a meaningful opportunity for aggrieved persons to review and question the contents of the notice and object, if desired; submit claim forms and releases; answer objections (if the parties have agreed that objections sent to the court will be answered to the court before a fairness hearing occurs); remail undeliverables, if possible; and calculate actual distribution amounts based on timely claim forms submitted, if that is necessary. Generally the legal unit will need *at least* 60 days from the date the court preliminarily approves the decree to the date set for a fairness hearing to accomplish these tasks. To be safe, you should ask for 90 days.

3. Objections to the Consent Decree

In general, objections come in two common varieties: mistake or on the merits.

a. Mistake

The first variety of objection to the consent decree is the objection based on mistake. The mistake can be ours, the defendant's, or the aggrieved person's.

(1) Ours

When we have misidentified a person, failed to include a person, erroneously included a person, or included a person in the wrong subgroup or with the wrong relief, our negotiations with the defendant should have left us with enough flexibility to make adjustments and corrections for our mistakes, either unilaterally, or with notice to the defendant. If we have not left ourselves room to correct our mistakes, it may be necessary to move the court for an amendment to the decree or its exhibits. This creates unnecessary work and time delays that could have been avoided by careful negotiations.

(2) Defendant's (see (1) above)

(3) Aggrieved Person's

When it is clear that an aggrieved person has made a mistake, the Commission should speak directly with the aggrieved person to try to clear up whatever misunderstanding there may be. It is worth spending the time and energy to do this, rather than leaving the aggrieved person with the wrong impression of the settlement or his participation in it. When you ignore objections on the theory that the aggrieved person simply doesn't understand and you can explain it in a written response or at the fairness hearing, you do so at your own peril.

b. On the Merits

The other common variety of objection has to do with the objector's individual recovery. For example, when a formula approach has been used to distribute the proceeds of the settlement, there will be persons who were harmed, or may claim to have been harmed, in an amount that exceeds their entitlement to settlement proceeds using the formula. Generally those persons will object on grounds that the money is not enough. Also, from time to time, objectors question the inclusion of others they believe were not harmed by the alleged discrimination, or otherwise are not entitled to relief. So long as our distributions are fair, reasonable, and applied in an evenhanded manner, our use of a formula is likely to survive such challenges.

4. Fairness Hearings

Although a fairness hearing is not required in every Commission class case, it should always be considered, and should be done whenever appropriate (see factors

listed in section IV.C. above). The public has an interest in the outcome of our litigation. Fairness hearings generate publicity, which can serve several important functions, including reaching "lost" aggrieved persons, helping to educate employers and employees about the law, preventing future violations, and encouraging victims of discrimination in other settings to step forward. Moreover, active court involvement in reviewing and approving our resolutions heightens the judiciary's awareness of EEOC's important role in enforcement, enhances our credibility with the courts and the public, and gives the judiciary's seal of approval to our settlement, an outcome that can have particular importance in rancorous or controversial litigation.

A major disadvantage of fairness hearings is that the procedure is generally time-consuming. It delays distribution of compensation and other relief to persons who may already have been waiting for a long time. Moreover, if a particular judge is so inclined, she may make or require modifications to the decree to one or both parties. This could mean that the parties must reopen negotiations, thus further delaying resolution of the lawsuit, or even jeopardizing resolution. While issues raised by the judge can be helpful to our position, it is equally possible this will disadvantage our pursuit of relief.

The fairness hearing process is one that defendants generally will not suggest. If the agency wants such a process, we will need to include it in our first draft of a proposed consent decree. The process has advantages for defendants, including a resolution that may diminish the likelihood of further litigation by anyone who is included in the definition of persons who can recover under the decree. Once the parties have an agreement to proceed to a hearing, they should consider submitting a joint proposed order to the court that sets out the basic order and flow of the fairness hearing, including any time constraints on the duration of the hearing or the amount of time parties and objectors may speak.

Before the actual fairness hearing, the parties should try to agree to a joint stipulation of facts to be filed with the court and on which both parties will rely. The Commission may submit a brief in support of entry of the final consent decree, which should address the pertinent legal standards for approval of such a decree. If the legal unit did not earlier answer any objections in a separate pleading, it should address them in its brief in support of entry of the decree.

At the fairness hearing, the Commission's attorney will generally make a statement briefly explaining our claims; the course of discovery; our expert and other evidence; the course of settlement negotiations, including their arms-length nature; the terms of the settlement; the reasons for the settlement; the fact of the approval of the

settlement by the Office of General Counsel; and any other facts or arguments that are pertinent for the court's consideration.

Defendant generally speaks next, then objectors, and then the court may ask for responses to any written or oral objections made. Typically the court will take the matter under submission rather than rule from the bench if there are objections. The decree itself should have a final approval signature line and date for the court.

E. MONITORING AND ENFORCING CONSENT DECREES

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E. MONITORING AND ENFORCING CONSENT DECREES

The legal unit's responsibility for a case does not end when the court enters a consent decree. The next step is monitoring defendant's implementation of the resolution and, if necessary, taking steps to obtain compliance either informally or formally. For both monitoring and enforcement, it is important that the consent decree sets forth clearly what the defendant is required to do, when the defendant is required to do it, and the consequences for failure to do so. An imprecisely drafted consent decree will undermine attempts to monitor and ultimately enforce it. (To review settlement standards and procedures, see *Settlement Guidance* at Part 3, Section IV.A. of the *Manual*.)

1. Monitoring Consent Decrees

The initial step in monitoring is identifying what the decree requires defendant to do and when. The next step is determining whether the defendant is complying with the terms of the settlement. The following is a suggested approach based on the practices of the Phoenix legal unit.

a. Compliance Log for Each Case in Monitoring

Legal units should develop procedures for monitoring consent decrees. Generally the assigned attorney will go over the terms of the decree with the assigned paralegal specialist. Using the decree as a guide, the paralegal should then prepare a detailed list of what tasks defendant is required to do and when defendant must do them. A standard practice is to place the information about each case on a compliance monitoring form or log. The compliance log should summarize pertinent information about the case and the requirements of the settlement, such as:

(1) the case name and docket number,

(2) the names of the assigned Commission attorney and paralegal,

(3) the name, phone number, and e-mail address of defendant's attorney,

(4) the name, phone number, and e-mail address of defendant's contact person,

(5) the effective date of the consent decree,

(6) the date on which the consent decree expires,

(7) the specific actions or events required of defendant under the consent decree,

(8) a reference to the paragraph in the consent decree requiring each action,

(9) the date by which each required action must be completed,

(10) the date when defendant took the required action (e.g., mailed backpay checks, submitted a report to the Commission, posted a notice, or held a training session), and

(11) notes or comments.

(A blank compliance log and a sample compliance log used by the Phoenix legal unit are Appendices 1 and 2 to this subsection.) After the paralegal has set up the compliance log, the attorney and paralegal should review it together.

Practice note: The sample compliance log dissects the consent decree paragraph-by-paragraph, clearly laying out the defendant's specific injunctive, monetary, and corrective responsibilities. Using this approach, EEOC can easily determine whether the defendant is in compliance.

The attorney and paralegal should also review the consent decree to identify any potential problem areas. For example, does the decree :

(1) have an internal monitoring procedure or mechanism,

(2) have a specific expiration date,

(3) have periodic reporting times with sanctions for noncompliance,

(4) require the settlement fund to be placed in an interest-bearing account.

(5) provide how and to whom accrued interest is to be paid,

(6) determine what happens with money left after all efforts to distribute the funds have been exhausted,

(7) establish timeframes for identification of claimants and distribution of funds,

(8) establish who pays for costs associated with administration of the consent decree,

(9) contain a dispute resolution procedure (but see section IV.A.2.(g) of this Part of the *Manual*), and

(10) have an internal enforcement procedure or mechanism.

b. Compliance File for Each Case in Monitoring

As part of the legal unit's compliance monitoring procedures, the Regional Attorney should have the paralegal maintain a separate file for each case in monitoring. The file should contain documents that the paralegal or attorney may need to refer to in monitoring. These will vary according to whether the case was resolved by consent decree.

The monitoring file for each case resolved by consent decree should contain a copy of the following documents:

(1) the consent decree.

(2) the order entering the decree.

(3) any memoranda to the court in support of entry of the decree, if separate, and any other pertinent court documents.

(4) a compliance monitoring log (see above and appendix 1).

(5) the justification memorandum for the consent decree.

(6) an example of the format in which defendant is to submit its reports (for example, affidavits, letters of compliance, or charts).

(7) reports and all other settlement-related correspondence or communications from the defendant, filed chronologically or by subject. Where defendant is required to provide monetary relief, the file should contain the payment schedule as well as records documenting each payment (for example, copies of canceled checks). Where defendant is required to provide injunctive or other affirmative relief, the file should contain records substantiating compliance with the injunctive provisions (for example, the sign-in sheets showing attendance at a required training session, proof of adoption and dissemination of new policies, etc.)

(8) settlement-related correspondence and other communications received from claimants, and their counsel, if any.

(9) EEOC correspondence to the defendant (for example, acknowledging defendant's reports) or to claimants and their counsel.

(10) all documents relating to enforcement, if any.

c. Noncompliance Report

Defendant's failure to comply with the consent decree may take various forms, some more serious than others. For example, defendant may completely fail to submit required reports or make required payments. On the other hand, defendant may be in partial compliance, having submitted late payments or incomplete reports. Defendant may also be in noncompliance if it changes or adds conditions for performing under the decree (for example, requiring claimants to execute a release that is more exacting than the one found in the decree before it will pay them).

All incidents of noncompliance should be addressed quickly. The decree may contain language specifying what the legal unit must do if it believes that defendant is in noncompliance, and when it must do so. If the legal unit does not act promptly, and in accordance with the decree's terms, it may waive its right to object to noncompliance. Generally, the legal unit's first step will be to notify the defendant that it believes defendant is not in compliance with the decree. The notice to defendant should identify the provision(s) in question (by section or paragraph number) and should state with particularity why the legal unit believes that defendant has not complied (or has only partially complied) with the provision(s). This effort may be sufficient to bring defendant into compliance.

What if defendant refuses to come into compliance with the consent decree after the legal unit has notified it of noncompliance? In that case, the assigned legal unit paralegal should prepare a report for the assigned attorney or the Regional Attorney identifying areas of noncompliance or partial compliance and documenting efforts to obtain compliance. The noncompliance report should also identify the defendant's contact person and attorney, giving the name, address, telephone number, e-mail address, and fax number for each.

d. Legal Unit Monitoring Log

In addition to maintaining case-specific monitoring records, the legal unit may want to have a paralegal prepare and maintain a log or tickler list encompassing due dates for all cases in monitoring. In addition to due dates, the legal unit's monitoring log should list the case names, and the names of assigned attorneys and paralegals. The legal unit's monitoring log may also track compliance with the required actions. (Appendices 3 and 4 are a blank legal unit monitoring log and a sample monitoring log used by the Phoenix legal unit.)

2. Enforcing Consent Decrees

Where a defendant fails to comply with a settlement, the legal unit must take whatever steps are necessary to remedy the situation. Obtaining court enforcement will go most smoothly when: (1) the settlement document sets forth in detail each of the things that defendant has agreed to do and provides a due date for each (or a means for calculating it) and (2) the legal unit has documented the noncompliance and any attempts to obtain compliance before seeking court enforcement.

a. Establish Noncompliance

Evidence of noncompliance or partial compliance usually includes the documents which support the paralegal's noncompliance report, such as affidavits, correspondence to and from the defendant, reports made by defendant, and correspondence from charging parties, claimants, and their counsel, if any.

b. Consider Alternatives to Court Enforcement

Before initiating enforcement proceedings, EEOC should also consider alternatives to court enforcement:

(1) The consent decree may contain a dispute resolution procedure. Where applicable that procedure should, of course, be used first.

(2) EEOC should also attempt to negotiate with defendant to resolve questions of noncompliance, as long as this can be done without violating the principles of the resolution.

(3) The parties may want to use the services of a mediator or other neutral third party.

c. Provide Notice to Defendant

Before filing for enforcement, the Commission should give the defendant reasonable notice of its intent to seek enforcement. The consent decree may specify the manner in which EEOC must notify defendant. If so, the legal unit is bound to follow this procedure. If the settlement document is silent on notice to defendant, notice will be sufficient if it comes from a Commission attorney via telephone or a letter.

d. File for Enforcement

Where appropriate, the legal unit may file an action to enforce a consent decree (or other agreement resulting from a court order). Normally, the court will expressly retain jurisdiction over the operation of a consent decree, but even where this is not so, the court has inherent power to effectuate its orders. In addition to seeking enforcement of the terms of a consent decree, the legal unit may seek other relief including attorneys' fees and contempt sanctions, as appropriate.

If the consent decree is about to expire, and defendant is not in compliance, the legal unit will also want to move the court to extend the term of the settlement. The motion and accompanying draft order should be drafted so as to give the court continuing jurisdiction over the action throughout the enforcement proceeding. Alternatively, where the defendant is in partial compliance, the legal unit may move the court to extend the period of time for performance of specific settlement provisions.

The Commission may seek a court order enforcing a consent decree through any of several procedural devices, such as an "Application for an Order to Show Cause Why Defendant Should Not Be Held in Contempt of Court."

The relief that will be appropriate will depend on the circumstances. At the very least, the legal unit should seek compliance with the terms of the settlement or an

appropriate modification to the settlement to ensure that compliance will be practicable. The legal unit may seek additional relief to compensate the claimants for delayed compliance (such as interest on back pay that is in arrears, etc.) and to insure defendant's future compliance. The EEOC should seek an award of attorneys' fees and the costs of the action.

Depending upon the gravity of the noncompliance with a consent decree or other court order, EEOC may ask the court to impose sanctions on defendant for contempt of court. Such sanctions should be tailored to the noncompliance in question. Before filing such a motion, the Regional Attorney must receive authorization from the Office of General Counsel's Sanctions Officer. (See *Manual* Part 1, Section I.F., *Authorization to File Motion for Contempt, Attorney's Fees or Sanctions*, for the requirements.) An example of a successful contempt action is the Phoenix legal unit's proceeding against Wal-Mart Stores for noncompliance with a consent decree entered in an ADA action. *EEOC v. Wal-Mart Stores, Inc.*, 2001 U.S. Dist. LEXIS 8722 (June 13, 2001). Although Wal-Mart hired and trained the two hearing impaired charging parties and provided them with the agreed upon monetary relief, it failed to comply with other decree provisions, including filing timely affidavits confirming its compliance, providing interpreters and TTY communications for the charging parties, training staff in ADA requirements and methods of communicating with the hearing impaired, and development of a version of its computer-based learning modules in American Sign Language (ASL). The court imposed contempt sanctions on Wal-Mart, including the following:

- payment of a penalty of $750,200 ($100 for each of 22 stores per day of noncompliance) payable to an advocacy organization for people with disabilities, which had represented the charging parties;

- payment to EEOC and the advocacy organization of attorney's fees and costs in gaining full compliance with the decree;

- preparing and airing advertisements on television stating that Wal-Mart had violated the ADA;

- development of computer-based learning modules in ASL and compensation of an expert to evaluate the accuracy and accessibility of the ASL translation;

- payment of a $150 per store penalty for every day of future noncompliance; and
- extending the consent decree by 18 months.

APPENDIX 1

COMPLIANCE LOG

[Case Name]
[Case Number]
Consent Decree

EEOC Atty: [Name and telephone number] Filed/Entered: [Date]
Defendant's Atty: [Name, phone no., fax no., and e-mail] Expires: [Date]

REQUIREMENTS			COMPLIANCE	
¶ [or §]	Provision	Due Date	Date Rec'd	Comments

APPENDIX 2

SAMPLE COMPLIANCE LOG

EEOC v. _____
Civ. No. _____
Consent Decree

EEOC Atty: Filed: November 28, 2000
Defendant's Atty: Expires: November 28, 2003

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
1	Resolves all claims.			
	INJUNCTION			
2	Permanently enjoined for duration of Decree from (a) sexually harassing employee and (b) retaliating against employee.			
	MONETARY RELIEF **$132,500 - Total Relief**			
3	First Payment: $54,375 - (Name 1) $11,875 - (Name 2)	12-01-00	12-01-00	paid
3	Second Payment: $54,375 - (Name 1) $11,875 - (Name 2)	01-16-01		
4	Issue 1099 tax forms for all payments.			

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
5	First payment mailed directly to addresses supplied by Commission by certified mail. Copy of checks and correspondence.	12-06-00		
5	Second payment mailed. Copy of checks and correspondence.	01-19-01		
	OTHER RELIEF			
6	Institute and carry out policies and practices to keep work environment free from sexual harassment and retaliation. Take actions provided in Paragraphs 7-14.			
	DEFENDANT'S CORRECTIVE POLICIES AND PRACTICES			
7	Post Exhibit A Notice.			
8	Provide training on sexual harassment and retaliation - 3 live seminar training sessions each year. All Defendant employees will attend each session. May be videotaped – duplicative videotaped sessions allowed to accommodate staffing needs.			
8	Submit name(s), address(es), telephone number(s) and resume(s) of proposed consultant/lecturer(s), together with the dates of the proposed training session and an outline of the contents of the training to RA.	01-28-01		

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
8	Commission has 30 days from date of receipt of information to accept or reject the consultant/lecturer and/or the contents of the seminar.	02-28-01		
8(B)	Witten notification of date, time and place of the first training session (10 days beforehand).	03-19-00		
8(B)	First training date.	03-29-01		
8(B)	Witten notification of date, time and place of the second training session (10 days beforehand).	03-19-02		
8(B)	Second training date (10 to 13 months).	03-29-02		
8(B)	Witten notification of date, time and place of the third training session. (10 days beforehand).	03-19-03		
8(B)	Third training date (10 to 13 months)	03-29-03		
8(C)	Seminar – training sessions shall be no less than 1-½ hours, plus 15 - 30 minutes of questions and answers. All employees will both register and attend the sessions. Registry of attendance retained for duration of Decree. Responsible for duplication cost.			
8(D)	Seminar subject criteria. Review and explain policies set out in ¶ 12.			

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
8(E)	Live training sessions - Defendant's President and owner will speak to employees about discipline of violators, Defendant policies, personal commitment and investigation of complaints.			
9	Hire outside trainer/consultant who is approved by EEOC to train each individual who is designated to investigate sexual harassment charges. Should employee designated to investigate charges leave Defendant, then Defendant must appoint a new person to such position within 30 days and provide new employee with training.	01-15-01		
10	Revise written policy concerning sexual harassment and retaliation. **Submit policy to EEOC for review.**	12-14-00		
10	Distribute policy to each current employee. Distribute to all new employees when hired and reissue to each employee once a year for the term of this Decree.	12-28-00		
10	Post policy in a prominent place frequented by the employees.	12-28-00		
11	Procedures to evaluate supervisors, managers and applicable human resources personnel on their performance in enforcing, following and responding to complaints. Failure to enforce will result in disciplinary action.	12-14-00		

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
12	Promptly investigate all complaints of sexual harassment and retaliation. Must include a finding of whether sexual harassment occurred, credibility assessment, if necessary, interviews, witnesses identifed and notes.			
13	No investigation documents will be retained in any of the complaining employees' personnel file. All disciplinary actions will be retained in harasser's personnel file. In those cases of no conclusion, investigation documents will remain in alleged harasser's file.			
14	Inform vendors and suppliers of sexual harassment policy and that failure to conform to the policy will bar them from conducting business with Defendant. All new vendors must be notified with 30 days of Defendant's use.	12-28-00		
	REPORTING BY DEFENDANT AND ACCESS BY EEOC			
15	EEOC has right to attend and fully participate in training sessions. Will provide Defendant with intent to attend.			
16	Reports due - A-C required.	05-28-02		
16	Reports due - A-C required.	11-28-02		
16	Reports due - A-C required.	05-28-03		
16	Reports due - A-C required.	11-28-03		

REQUIREMENTS			COMPLIANCE	
¶	Provision	Due Date	Date Rec'd	Comments
17	Right to enter and inspect premises to insure compliance with Decree (reasonable notice).			
	COSTS AND DURATION			
18	Each party bear own costs.			
19	Expire by its own terms at the end of 36 months without future action.			
20	Agree to entry of Decree.			

APPENDIX 3

LEGAL UNIT CONSENT DECREE
MONITORING LOG AS OF [DATE]

DUE DATE	CASE NAME	ATTY/ PARA	REQUIREMENT OR ACTION	RESOLUTION

APPENDIX 4

SAMPLE LEGAL UNIT CONSENT DECREE MONITORING LOG AS OF [DATE]

DUE DATE	CASE NAME	ATTY/ PARA	REQUIREMENT OR ACTION	RESOLUTION
11/05/00	Case 1	AAA/BBB	4th Report - Consent Decree Expires	
11/15/00	Case 2	CCC/DDD	26th Payment	
11/15/00	Case 3	EEE/FFF	Payments and copy to EEOC	
11/20/00	Case 2	CCC/DDD	Copy to EEOC	
11/27/00	Case 4	GGG/BBB	2nd training	6 months after 1st training. ¶5(b)
11/28/00	Case 5	III/BBB	CD Entered	
12/08/00 CD Expires **EXTENDED**	Case 3	EEE/FFF	Report Due - Consent Decree Expires	**Extended due to noncompliance 12-08-00**
12/15/00	Case 2	CCC/DDD	27th Payment	
12/15/00	Case 3	EEE/FFF	Payments and copy to EEOC	
12/20/00	Case 2	CCC/DDD	Copy to EEOC	
12/27/00	Case 4	GGG/BBB	Copy to EEOC	¶5(c) send EEOC the registry of persons attending training.
12/29/00	Case 6	JJJ/HHH	Copy of check to EEOC	
01/12/01	Case 2	CCC/BBB	3rd Year Training	

DUE DATE	CASE NAME	ATTY/ PARA	REQUIREMENT OR ACTION	RESOLUTION
01/15/01	Case 2	CCC/BBB	28th Payment	
01/20/01	Case 2	CCC/BBB	Copy to EEOC	
02/15/01	Case 2	CCC/BBB	29th Payment	
02/20/01	Case 2	CCC/BBB	Copy to EEOC	
02/27/01 CD Expires	Case 7	JJJ/HHH	6th Report - Consent Decree Expires	
03/02/01 CD Expires	Case 8	AAA/HHH	Consent Decree Expires	
03/15/01	Case 2	CCC/BBB	30th Payment	
03/20/01	Case 2	CCC/BBB	Copy to EEOC	
04/15/01	Case 2	CCC/BBB	31st Payment	
04/15/01	Case 9	AAA/HHH	Copy of Posted Policy	
04/20/01	Case 2	CCC/BBB	Copy to EEOC	
05/03/01 CD Expires	Case 10	CCC/BBB	only notice required to be posted no reporting	
05/15/01	Case 2	CCC/BBB	32nd Payment	
05/20/01	Case 2	CCC/BBB	Copy to EEOC	
06/15/01	Case 2	CCC/BBB	33rd Payment	
06/20/01	Case 2	CCC/BBB	Copy to EEOC	
07/15/01	Case 2	CCC/BBB	34th Payment	
07/20/01	Case 2	CCC/BBB	Copy to EEOC	
08/15/01	Case 2	CCC/BBB	35th Payment	
08/20/01	Case 2	CCC/BBB	Copy to EEOC	

DUE DATE	CASE NAME	ATTY/ PARA	REQUIREMENT OR ACTION	RESOLUTION
09/15/01	Case 2	CCC/BBB	36th Payment	
09/20/01	Case 2	CCC/BBB	Copy to EEOC	
10/22/01	Case 2	CCC/BBB	6th Report	
01/12/01 approximate	Case 2	CCC/BBB	4th Year Training	
04/22/02	Case 2	CCC/BBB	7th Report	
10/22/02 CD Expires	Case 2	CCC/BBB	8th Report - Consent Decree Expires	
11-28-03	Case 5	III/BBB	CD Expires	

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION V

APPEAL PROCEDURES

SECTION V
APPEAL PROCEDURES

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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 Ruly 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 Counsels 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 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.

REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

SECTION VI

PROFESSIONAL RESPONSIBILITY

SECTION VI

PROFESSIONAL RESPONSIBILITY

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A. INTRODUCTION

EEOC attorneys, as counsel for an agency of the Federal Government, must at all times conduct themselves in an ethical and professional manner. See, e.g., Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992) (finding that lawyer representing government agency had more stringent obligation to end "easily resolvable" litigation); United States v. Witmer, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993) ("government attorney must be held to a higher standard than private attorney"); Silverman v. Ehrlich Beer Corp., 687 F. Supp. 67, 69-70 (S.D.N.Y. 1987) (in awarding attorney's fees against NLRB for bringing contempt action without investigating employer's compliance, court said that lawyer for government in civil litigation is held to higher standard than ordinary lawyer); see also Reid v. INS, 949 F.2d 287, 288 (9th Cir. 1991) (admission of error by government lawyer appropriate where government lawyer in civil litigation has interest "only in the law being observed, not in victory or defeat").* As these authorities indicate, courts generally expect a higher level of ethical behavior from Federal Government attorneys than from attorneys representing private clients.

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* Restatement (Third) of The Law Governing Lawyers § 97 cmt. *f* (2000) provides in part:

> A government lawyer may occasionally bear special disabilities or obligations because of responsibility to maintain public trust in government. Thus, courts and disciplinary agencies commonly apply more exacting standards of conduct for government lawyers and occasionally exercise discretion to impose harsher sanctions when a violation of such standards is found (see also Comment *h* hereto [and Reporter's Note to cmt. *h*]).

B. ETHICAL OBLIGATIONS OF FEDERAL GOVERNMENT ATTORNEYS

1. In General

Lawyers representing the Federal Government are subject to the ethical rules of the states in which they are licensed and the courts in which they practice. *See* ABA Model Rule of Professional Conduct 8.5 (lawyers are subject to the disciplinary authorities of the jurisdictions in which they are admitted to practice and the jurisdictions in which they provide legal services); *cf*. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 n.64 (1995) (concluding from the Department of Justice Appropriation Authorization Act requirement that attorneys "be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia" that lawyers representing the Federal Government are governed by state ethical rules). Attorneys practicing on behalf of the Federal Government are also subject to the Civil Justice Reform Executive Order referenced below.

2. Executive Order 12988 - Civil Justice Reform

Signed into law on February 5, 1996, this executive order provides guidelines for Federal Government attorneys with the purpose of promoting "just and efficient government civil litigation." The order, which revokes and replaces a 1991 executive order on the same subject, sets forth the litigation practices expected of attorneys litigating on behalf of the United States, including appropriate presuit and postfiling settlement efforts and use of Alternative Dispute Resolution, streamlining discovery, seeking sanctions for opposing counsel misconduct, and using litigation resources efficiently. A copy of Executive Order 12988 and OGC Guidance on its implementation are located at Part 3 section I. of the *Manual*.

3. Citizen Protection Act - 28 U.S.C. § 530B[1]

In response to efforts by the Department of Justice (DOJ) to exempt its lawyers from state ethics rules, Congress enacted the Citizen Protection Act on October 21, 1998 (effective April 19, 1999), which specifically made DOJ attorneys subject to state

[1] This legislation is also referred to as the McDade Amendment.

ethics rules governing attorney conduct. Section 530B of Title 28, entitled "Ethical Standards for Attorneys for the Government," states in pertinent part:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

See 28 C.F.R. pt. 77 (2003) implementing 28 U.S.C. § 530B.

While the act covers only DOJ attorneys,[2] EEOC lawyers should be cognizant that this statute was passed because of DOJ's attempts to set its own standards for ex parte contacts of represented persons and parties and its view that its attorneys should be exempt from the ex parte contact rules of the states in which they are licensed and in which they practice. *See generally* Charles A. Weiss, *Lawyers Bypassing Lawyers*, 28 Litigation, Winter 2002, at 42.

[2] *See* definition of "attorney for the government" at 28 C.F.R. § 77.2(a) (2003).

C. ABA MODEL RULES OF PROFESSIONAL CONDUCT

The great majority of jurisdictions have adopted some version of the American Bar Association's Model Rules of Professional Conduct, and although federal law controls the ethical standards of attorneys in federal court, *see Kitchen v. Aristech Chemical*, 769 F. Supp. 254, 258 (S.D. Ohio 1991) (citing *In re Synder,* 472 U.S. 634, 645 n.6 (1985)), courts often apply the ethical rules and standards adopted by the state in which the court sits. *See* Restatement (Third) of The Law Governing Lawyers § 1 cmt. *b* (2000) ("Federal district courts generally have adopted the lawyer code of the jurisdiction in which the court sits, and all federal courts exercise the power to regulate lawyers appearing before them.").[*] Accordingly, EEOC attorneys should familiarize themselves with the Model Rules of Professional Conduct as well as the ethics rules governing attorneys in the jurisdictions in which they are admitted and in which they practice.

[*] A number of federal courts have adopted the American Bar Association's Model Federal Rules of Disciplinary Enforcement (1978), which deal principally with the grounds and procedures for imposing discipline on lawyers admitted to federal courts, but also provide (in Rule IV B) that except as otherwise provided by a specific court rule, the federal court adopts as Rules of Professional Conduct the Rules of Professional Conduct adopted by the highest court of the state in which the court sits.

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D. PROTECTING CONFIDENTIALITY OF AGENCY INFORMATION

1. Introduction

Legal units must at all times remain mindful of the importance of protecting confidential and privileged information from unauthorized disclosure. All EEOC staff, including temporary employees and contract workers,[1] must be specifically informed of the duty to keep information confidential both during the time they are doing work for the Commission and afterwards.

2. Confidential Information

Pursuant to Rule 1.6 of the Model Rules of Professional Conduct (MRPC), a lawyer must not reveal information relating to the representation of a client[2] without the client's informed consent, subject to very limited exceptions. Comment [16] to Rule 1.6 states that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are

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[1] The terms "temporary employee" and "contract worker" are used in this section of the *Manual* to include any nonlawyer assistants, including clericals, paralegals, or legal interns, working in an EEOC office on a temporary or contractual basis. Also, experts, private investigators, and other independent contractors doing work outside of EEOC offices often will be acting as agents of the Commission (*see* Restatement (Second) of Agency § 14 N. (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor.")) and should similarly be advised of the duty to keep information confidential.

[2] The professional ethics provisions referred to in this discussion use the terms "client" and "client information" because they address the responsibilities of lawyers and their agents to the lawyers' clients. These provisions are relevant, however, to the obligations of legal unit staff to ensure the confidentiality of information obtained from or relating to individuals and entities involved in any way in an EEOC investigation.

subject to the lawyer's supervision." The duty of confidentiality continues after the attorney-client relationship has ended. Comment [18].

A lawyer must make reasonable efforts to ensure that each of the lawyer's nonlawyer assistants maintains conduct compatible with the professional obligations of the lawyer. Section 11 of the Restatement (Third) of The Law Governing Lawyers (2000) imposes general supervisory obligations on all lawyers within a firm or legal organization with respect to nonlawyer assistants. *See* Comment *f.* Pursuant to MRPC 5.3, lawyers with managerial authority must make reasonable efforts to ensure that there are measures in effect to assure that nonlawyers' conduct is compatible with the professional obligations of the lawyer.[3] Comment [1] to Rule 5.3 provides: legal

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[3] Rule 5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

secretaries, clericals, investigators, law student interns, and paraprofessionals, "whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services"; the lawyer must provide appropriate instruction and supervision concerning the ethical aspects of legal assistants' employment, "particularly regarding the obligation not to disclose information relating to representation of the client"; the lawyer "should be responsible for [assistants'] work product"; and "measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline."

Section 60 of the Restatement (Third) of The Law Governing Lawyers (2000) requires that lawyers not use or disclose confidential client information (defined in § 59 as information relating to representation of a client that is not generally known) if a client's material interests may be adversely affected, and that they take reasonable steps to protect such information from impermissible use or disclosure by the lawyer's associates or agents. Comment *f* to § 60 states that "[a]gents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client." Comment *d* to § 60 states in pertinent part (cross-references omitted):

> A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it.[4] This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality. . . .

Rule 5.3(a) applies to lawyers in corporate and government legal departments and legal service organizations who have managerial authority comparable to partners and shareholders in private law firms. Comment [2] to MRPC 5.3, referencing definition of managerial authority in Comment [1] of MRPC 5.1.

[4] Comment *f* to § 60 provides that a lawyer has authority to disclose confidential client information to persons assisting the lawyer in representing the client, including employees such as secretaries and paralegals, independent contractors such as investigators and prospective expert witnesses, and public courier companies and photocopy shops.

> A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties.

3. Privileged Matters and Waiver

There are a number of privileges that can be used to protect the EEOC's work from disclosure in litigation. Communications made between EEOC legal staff and individuals for whom EEOC is seeking relief in litigation are protected by the attorney-client privilege.[5] The attorney-client privilege also protects certain communications made between EEOC employees. The work product doctrine protects from disclosure most communications and documents generated by Commission attorneys in anticipation of or during litigation. Finally, the deliberative process privilege shields communications and documents pertaining to the Commission's internal decisionmaking processes.

Disclosure of privileged material to nonattorney EEOC staff, including temporary employees and contract workers, does not waive the privilege,[6] but disclosure by such

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[5] *See* the discussion of this privilege in subsection D.2. of this section of the *Manual*.

[6] *See* Restatement (Third) of The Law Governing Lawyers § 70 (2000). Comment *g* of § 70 provides in part:

> A lawyer may disclose privileged communications . . . with appropriate nonlawyer staff – secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law office assistants. . . . The privilege also extends to communications to and from the client that are disclosed to independent contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client and not for the purpose of testifying.

See authorities cited in the Reporter's Note to Comment *g*. *See also* Comment *d* to § 73 of the Restatement discussing applicability of the attorney-client privilege to

staff to individuals outside the agency could constitute a waiver. *See* Restatement (Third) of The Law Governing Lawyers § 79 (2000). For example, the attorney-client privilege is waived if the client's attorney or another authorized agent of the client discloses the communication acting under "actual or apparent authority." Comment *c* to § 79. Comment *c* states further that "[w]hether a subagent of the client or lawyer has authority to waive [the privilege] is governed by agency law." By way of example, the comment states that a file clerk in a law firm would not have implied authority to disclose a privileged communication. Legal units should take a safe approach and assume that all temporary employees and contract workers in the legal unit, as well as the agency's regular employees, have authority to waive the Commission's privileges.

4. Implementing Procedures to Protect Confidential Information from Disclosure and to Prevent Waiver of Privileges

Legal units using temporary employees or contract workers should implement procedures designed to protect confidential information from disclosure and ensure that privileges are not waived. The Regional Attorney, or his designee, must discuss with a temporary employee or contract worker *at the time the person begins work*, the obligation to keep confidential all information protected from disclosure by statute (e.g., charge or conciliation information) or for which the Commission may assert a privilege. The Regional Attorney must also inform the temporary employee or contract worker that his obligation to maintain confidences is the same as it would be for a permanent EEOC employee and that this obligation continues even after he is no longer doing work for the Commission.

Of additional concern is the possibility that some temporary employees or contract workers were previously employed by law firms who represent clients involved in EEOC matters. In such cases, the Regional Attorney and her staff must be alert to any potential conflicts of interest that may exist due to the person's prior employment. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-1526 (1988). The Regional Attorney or designee should specifically instruct all newly hired temporary employees and contract workers to immediately alert an EEOC supervisor to any potential conflicts of interest, e.g., where the temporary employee worked on a client matter during prior employment with a law firm and that client is now involved in an EEOC matter to which the temporary employee may be assigned. The Regional Attorney should specifically caution temporary employee or contract worker that she

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communications to or by agents of organizational clients.

should not (1) disclose any information relating to the representation of a client of her former employer, and (2) work on any matter on which she worked for her prior employer or on which she has information relating to the representation of a client of her former employer. If the Regional Attorney or her staff become aware of a potential conflict, she must take steps to ensure that the temporary employee or contract worker does not work on matters that she worked on in the prior employment.

When utilizing outside vendors for such functions as photocopying, data storage and retrieval, printing, computer servicing and paper disposal, legal unit staff must ensure that the vendor has in place, or will establish, reasonable procedures to prevent disclosure of confidential information. *See, e.g.,* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995) (addressing the ethical implications of an arrangement between a law firm and a computer maintenance company in which the maintenance company would have 24-hour access to the firm's client files via the firm's computer network, the Committee found that MRPC 5.3 requires a lawyer retaining an outside service provider to make reasonable efforts to ensure that the vendor will not make unauthorized disclosures of client information and has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access and that it fully understands its obligations in this regard).

E. WEB RESOURCES ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Listed below are some Internet resources relating to professional responsibility of federal government attorneys and ethical obligations of federal employees, including some requirements pertaining solely to attorneys.

Title	Description and Web Address
Civil Justice Reform, Executive Order 12988	Text and history of Executive Order 12988, Civil Justice Reform, 61 Fed. Reg. 4729 (1996), on the National Archives' Web page for Executive Orders. http://www.archives.gov/federal_register/executive_orders/1996.html
Civil Justice Reform, Interim Guidance	Interim Justice Department guidance on Executive Order 12988, Civil Justice Reform, 62 Fed. Reg. 39250 (1997), on Web site of Government Printing Office (GPO) (to retrieve, click on "1997 Federal Register, Vol. 62," then enter page 39250). http://www.gpoaccess.gov/fr/retrieve.html
Hatch Act for Federal Employees	Discussion of restrictions on political activity by federal government employees under the Hatch Act, on the Web site of the U.S. Office of Special Counsel. http://www.osc.gov/hatchact.htm
Principles of Ethical Conduct for Government Officers and Employees, Executive Orders 12674 and 12731	Principles of Ethical Conduct for Government Officers and Employees, Executive Order 12674 (1989), as amended by Executive Order 12731 (1990), on Web site of U.S. Office of Government Ethics (OGE). http://www.usoge.gov/pages/laws_regs_fedreg_stats/exec_orders.html
Standards of Ethical Conduct for Employees of the Executive Branch	Standards of Ethical Conduct for Employees of the Executive Branch, at 5 C.F.R. Part 2635 - rules on gifts, conflicting financial interests, seeking other employment, and other issues. On OGE's Web site. http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html

Title	Description and Web Address
Supplemental Standards of Ethical Conduct, 5 C.F.R. Part 7201	EEOC regulations, Supplemental Standards of Ethical Conduct for Employees of the Equal Employment Opportunity Commission, 5 C.F.R. Part 7201, on GPO's Web site. http://www.access.gpo.gov/nara/cfr/waisidx_02/5cfr7201_02.html
Stnd Form 278, Public Financial Disclosure Report	Text of Stnd Form 278, Public Financial Disclosure Report, on OGE's Web site in several formats (including electronically fillable). http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg3.html
Stnd Form 326, Semiannual Report of Payments Accepted from a Non-Federal Source, and 326a, Continuation Sheet	Text of Stnd Form 326 and 326a, Semiannual Report of Payments Accepted from a Non-Federal Source, in General Services Administration's forms library. • Form 326 (3 formats including pdf): http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?viewType=DETAIL&formId=D05E06507A1BDD9E85256A3F000286D7 • Form 326a (3 formats including pdf): http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?viewType=DETAIL&formId=2A8273F9FE68767A85256A3F0002C0C6
Stnd Form 450, Confidential Financial Disclosure Report	Link to text of Stnd Form 450, Confidential Financial Disclosure Report, on OGE's Web site in several formats (including electronically fillable). http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg3.html

REGIONAL ATTORNEYS' MANUAL

PART 4

RESOURCES AND TECHNICAL ASSISTANCE

OFFICE OF
GENERAL COUNSEL

APRIL 2005

PART 4. RESOURCES AND TECHNICAL ASSISTANCE

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OBTAINING EXPERT AND OTHER SERVICES

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OBTAINING EXPERT AND OTHER SERVICES

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A. INTRODUCTION: OBTAINING EXPERTS AND OTHER SERVICES

One of the most important initial steps in the litigation process is identifying the litigation support needs of each case. As soon as practicable after being assigned a case for litigation, and whenever possible prior to filing the complaint, the trial attorney should consult with his/her supervisory trial attorney, the Regional Attorney, and, if necessary, OGC Litigation Management Services (LMS) and/or Research and Analytic Services (RAS), to determine the services needed to support the litigation.

Litigation support services fall into two basic categories: nonexpert and expert services. Nonexpert litigation support services may include such items as: (1) court reporter services; (2) copying services; (3) services that assist in identifying and locating claimants and/or witnesses; (4) database construction services; and (5) process and subpoena servers. Expert services involve the retention of individuals to testify at trial and/or to consult during trial preparation. Experts may be medical doctors, psychologists, statisticians, economists, sociologists, or individuals with other areas of expertise. Some litigation support services are available internally, while others may only be obtained through a contract with an outside vendor.

The purpose of Part 4, section I of the *Manual* is to describe what litigation support services are available and how the trial attorney can obtain them. Some services are available internally, through RAS in OGC and through the Office of Research, Information and Planning (ORIP). Finally, this section of the *Manual* sets forth the federal and EEOC procedures for procuring nonexpert and expert contracts in some detail. Each subsection of Part 4, section I of the *Manual* is summarized below:

1. Services Provided by Research and Analytic Services

RAS is an arm of OGC with a small staff. Its staff members (who have advanced degrees in the fields of social science, psychology, economics, and statistics) are available to testify as trial or consulting experts in selected cases brought by the Commission and to provide assistance generally in their areas of expertise. RAS staff members are also skilled in analyzing data, and creating and managing large computerized databases. For more information about the services that RAS can provide and how to obtain them, please refer to *Manual* Part 4, section I.B., *Services Provided by Research and Analytic Services*.

2. Services Provided by the Office of Research, Information and Planning

ORIP also provides analytic and technical support to Commission staff. ORIP generally provides support to Commission staff conducting class investigations, not litigation. For more information about ORIP's services, please refer to *Manual* Part 4, section I.C., *Services Provided by the Office of Research, Information and Planning*.

3. EEOC Procedures for Procuring Expert Litigation Support Services

Except where available in-house through RAS, the Commission must contract for expert litigation support services using the federal acquisitions process. The steps for obtaining an expert contract are described in *Manual* Part 4, Section I.D., *EEOC Procedures for Procuring Expert Litigation Support Services*. Legal staff who have been employed at EEOC since prior to 1994 may remember that competitive bidding was once required for most expert contracts. At that time, an attorney was not allowed to discuss the facts of the case with prospective experts. The Acquisitions Streamlining Act of 1994 simplified the expert procurement process and did away with the requirement for "full and open competition" in procuring litigation experts. The procedures for obtaining an expert contract for $25,000 or less are quite simple and can be completed in the legal unit, generally in a few days. When the expert contract is for more than $25,000, the procurement package must go through a headquarters review process. Such contracts will generally take more than 30 business days (about six weeks) to complete.

4. EEOC Procedures for Procuring Nonexpert Litigation Support Services[1]

The legal unit must use the federal acquisitions process to enter into contracts for nonexpert litigation support services. The basic steps for contracting for nonexpert support services are described in *Manual* Part 4, Section I.E., *EEOC Procedures for Procuring Nonexpert Litigation Support Services*. The usual EEOC nonexpert contract is bid competitively, unless it is for $2,500 or less.[2] The procedures for obtaining a nonexpert support services contract for $25,000 or less are quite simple and can be completed in the legal unit, generally in a few days. When the nonexpert support services contract is for more than $25,000, the procurement package must go through a

[1] In the unusual case, an attorney may be able to obtain expert services from another federal agency. *See* Part 4, Section I.D.2.b., at note 2.

[2] In contrast to the $2,500 threshold for procuring services noncompetitively, the threshold for supplies is $3,000 and for construction is $2,000.

lengthy headquarters review process and the procurement procedures will generally take 4 to 6 weeks to complete. Section I.E. also explains the narrow exceptions to the requirement for "full and open competition" for nonexpert services over $25,000 and how the procurement procedures change when an attorney seeks to invoke the "sole source" exception to this requirement.

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B. SERVICES PROVIDED BY RESEARCH AND ANALYTIC SERVICES

1. RAS Expertise and Services

Research and Analytic Services (RAS) was primarily established to provide analytic support for Title VII, EPA, and ADEA class and pattern or practice cases in litigation and enforcement. The unit was originally created as one of three divisions in the Office of Systemic Programs in 1979. Since then, RAS has provided "case-in-chief" experts to testify at trial as well as both consulting and rebuttal experts. The primary focus of RAS has always been on large, complex, class cases and charges.

RAS senior staff typically consists of social scientists, such as psychologists, economists, statisticians and social science analysts; the support staff primarily consists of research and statistical assistants. All of the senior staff have one or more advanced degrees and the majority of them have Ph.D.s. In addition to the specialized areas of expertise of the RAS staff, most are highly skilled in obtaining, creating, processing and managing large, computerized data bases. RAS staff are also highly skilled in analyzing data and in presenting their results through graphs and charts, expert reports, and deposition and trial testimony.

2. Obtaining RAS Services

Before developing a formal request for expert or other technical services, begin the process with preliminary discussions with the Director of RAS as to (1) what types of experts or other support might be needed for a case or charge, (2) what time-frames might be expected, and (3) what costs might be incurred. These discussions should occur at the earliest time possible, irrespective of whether or not RAS would be expected to provide the expert or other support services. For years, RAS had a requirement that requests for expert services in support of litigation be discussed with RAS at least three months prior to the close of discovery. The principle of discussing analytic proof and support issues with RAS at the earliest possible time is still good practice. This advice is particularly true for the development of interrogatories and requests for the production of documents.

After the initial discussions, a Regional Attorney, Assistant General Counsel, or field office manager must submit a written request to the Director of RAS for all services expected to require more than 16 hours of support. Only those requests requiring less than 16 hours of assistance can be accepted orally. Written requests for RAS services for either cases or charges must (1) state the name of the defendant or respondent; (2)

provide an outline of the legal issues or theories; (3) estimate the time-frames for developing the analytic proof; and (4) indicate any due dates, such as those already set by the court. The remainder of the request should be devoted to presenting the basic facts of the case or charge and suggesting how RAS might most effectively contribute to the enforcement effort.

After receiving the request for expert or other services, RAS will discuss the legal issues and possible analytic approaches to the case or charge with the attorneys and/or investigators assigned to it. Based on RAS' (1) understanding of the case or charge; (2) an initial assessment of the availability of RAS staff; (3) an evaluation of the financial requirements for the case or charge; and (4) a review of the expected time-frames, RAS will develop a Memorandum of Understanding (MOU). This document will be developed by RAS in coordination and consultation with the requesting legal or enforcement unit. The MOU will (1) identify the RAS expert or experts to be assigned to the case or charge, (2) specify the tasks that they or the support staff are to perform, (3) identify the records and other information that are to be obtained or created for the experts, and (4) specify tentative steps and completion dates for each of the major sub-tasks for the requested services. Before any work is to be done by RAS, the MOU must be signed by the Regional Attorney, Associate General Counsel or field office manager and returned to RAS. If there are any major changes in expectations or time-frames and in required information or resources after the initial discussions, the effect of these differences will have to be discussed and resolved prior to the development of an initial or, perhaps, subsequent MOU.

The basic intent of this guidance is to help ensure that legal and enforcement units requiring the development of analytic proof begin the planning for this process at an early stage in the case or charge and that both RAS and the legal or enforcement unit will know what to expect from each other during the development of the case or charge.

3. Procedures for the Review of Tests and Other Selection Procedures

Attorneys and investigators should consult the industrial/organizational psychologists in RAS when employment tests or other selection procedures are at issue in a case or charge. These include any selection procedures which appear to have had an adverse impact against members of a protected group. Typical examples include written tests, physical ability tests, structured interviews, and other procedures or criteria used to rank or exclude applicants.

The psychologists in RAS are available to consult with EEOC staff regarding the validation of selection procedures and statistical methods for determining adverse impact. The selection procedures must be validated when adverse impact has been demonstrated. The RAS psychologists can also consult on disparate treatment resulting from the use of tests. They work with attorneys as consultants and expert witnesses during employment litigation and review adverse impact data and test validation studies during EEOC investigations.

RAS psychologists review charges that arise from the use of tests or other selection procedures. There should be an initial review of available data to determine whether the test has an adverse impact against a protected group. In a multi-stage selection process, each individual component as well as the total selection procedure should be examined for adverse impact.

For a given charge or case, the requesting office may, if it prefers, perform its own statistical adverse impact analyses. All EEOC offices should have copies of the **EEOSTAT** software package of statistical programs related to employment discrimination. The **AVAIL** and **SQUARE** programs contained within **EEOSTAT** provide simple statistical analyses of data from class-based discrimination claims. In most situations involving the use of tests, where either applicant flow data or testing pool data are available, either the **SQUARE** or **AVAIL** procedures might be used, where appropriate. Contact your local computer specialist for details for information on obtaining and using **EEOSTAT**. Also, if necessary, RAS will perform the required adverse impact analyses upon request.

If significant adverse impact is found, the respondent or defendant should be asked for evidence which demonstrates that the selection procedure is job related. The evidence provided will typically take the form of a validation report. The report should be examined to see whether it contains a separate "job analysis" section which, in most instances, should be included. After receiving the validation report, it is recommended that the investigator or attorney discuss it with an RAS psychologist. If no significant adverse impact is found, there is usually no need to request a validity report or a validity review.

The technical standards for the review of validation reports are those of the 1978 Uniform Guidelines on Employee Selection Procedures (UGESP), at 29 C.F.R. § 1607, as well as current generally accepted professional testing standards, such as the 1999 Standards for Educational and Psychological Testing and the 1987 Principles for the Validation and Use of Personnel Selection Procedures. The Uniform Guidelines are intended to be consistent with professional standards (UGESP, Section 5C).

Attorneys and investigators are encouraged to contact RAS psychologists informally to discuss selection procedures at issue in their cases. To make a formal request for RAS assistance in conducting adverse impact analyses and validity reviews, follow the procedures in section I.A.2. of Part 4 of the *Manual*. Memoranda to the Director of RAS requesting services should note any prior discussions with RAS psychologists. Copies of the validation reports and other pertinent documents should be made and forwarded to RAS. Upon receipt of the validation report, the Director of RAS will refer the case to an RAS psychologist. If the psychologist assigned to the case concludes that the validity evidence is incomplete, there may be a need to obtain additional data and information from the employer.

During an EEOC investigation, the RAS psychologist will review the validation report and provide conclusions and recommendations in a memorandum, through the Director of RAS, to the person who requested the review. If the psychologist concludes that the validity evidence does not satisfy the technical standards, additional requests may need to be made of the respondent. If the psychologist concludes that the validity report satisfies the technical standards, and there is no evidence of another selection procedure with equal or greater validity and less adverse impact, the psychologist will conclude that the respondent has satisfied the requirements of the Uniform Guidelines.

If a validity review is requested during litigation, the RAS psychologist will provide consultation and/or expert services, depending upon the needs of the Regional Attorney. In most instances, a Memorandum of Understanding (MOU) between the Regional Attorney and the Director of RAS will need to be drafted and signed. Upon receipt of a litigation-related request, RAS will draft an MOU and submit it to the Regional Attorney for approval. For cases in litigation, the RAS psychologist may provide conclusions and recommendations either in consultation with attorneys or in expert reports and testimony.

The EEOC does not provide prior approval of tests or other selection procedures and does not recommend specific selection procedures. However, a negotiated settlement agreement may require review and approval by an EEOC psychologist.

4. <u>Opposing and Defending Expert Admissibility</u>

Few areas of law affecting OGC litigation have changed as much over the past few years, and continue to evolve as dynamically, as the admissibility of expert testimony. Since 1993, the Supreme Court has issued three major decisions that interpret the Federal Rules of Evidence covering experts (*Daubert, Joiner*, and *Kumho Tire Co*). In February 2000, the Court reiterated that attorneys proffering experts must be aware of the exacting standards of reliability such evidence must meet (*Weisgram*). In December 2000, revised Fed. R. Evid. 702 went into effect, codifying the Court's

expert jurisprudence. The revised Rule reflects Congressional concurrence with the importance of the trial judge's role in evaluating proposed expert testimony. As a "gatekeeper," a district judge is responsible for determining whether a purported expert's testimony is based on principles and methods applied reliably to the at-issue facts.

RAS has closely followed the development of federal court decisions on admissibility of expert testimony and is available to consult with legal units on these issues. Thus, RAS can provide pretrial technical assistance regarding defendants who: (1) challenge the admissibility of experts retained by OGC or (2) seek to admit experts who are unqualified to address the questions at issue or whose opinions will not assist the trier of fact. This assistance may include, but is not limited to, identifying the most current circuit and district court precedent interpreting various admissibility issues. The assistance may also include reviewing OGC strategic options regarding defensive and offensive strategies, drafting memoranda, reviewing draft memoranda supporting motions prepared by OGC staff, and reviewing memoranda supporting defendants' motions and replies. If after initial discussions with RAS, a legal unit requires more extensive assistance, the Regional Attorney must submit a written request to the Director of RAS, similar to what is required for other RAS services pursuant to subsection A.2., above.

In sum, OGC suggests that attorneys unfamiliar with this rapidly developing area of law seek technical assistance from RAS. Because each expert admissibility problem is highly case-specific and idiosyncratic, such direct assistance can save valuable time in the litigation process.

5. Web Resources

Title	Description and Web Address
29 C.F.R. § 1600, et seq.	Index to the Commission's regulations (29 C.F.R. Parts 1600 through 1691) on EEOC's Web site with links to each Part on the Government Printing Office's (GPO's) web site. The Uniform Guidelines on Employee Selection Procedures (UGESP) are at 29 C.F.R. § 1607. http://www.eeoc.gov/policy/regs/index.html

Title	Description and Web Address
Census 2000 External Labor Market Availability Data	Data from the most recent decennial census by detailed race/ethnicity and sex and by detailed occupation and geography. http://www.census.gov/eeo2000/index.html
Uniform Guidelines on Employee Selection Procedures: Questions and Answers	The EEOC's Questions and Answers on the Uniform Guidelines on Employee Selection Procedures. http://www.uniformguidelines.com/questionandanswers.html

C. SERVICES PROVIDED BY THE OFFICE OF RESEARCH, INFORMATION AND PLANNING PROGRAM RESEARCH AND SURVEYS DIVISION

The Program Research and Surveys Division of the Office of Research, Information and Planning (ORIP) fulfills the following functions: it administers the Equal Employment Opportunity Survey (EEO-1 through EEO-6) program; it disseminates data collected in these workforce surveys (described below) to Commission officials at headquarters and in the field, to Congress, to FEPA agencies, and to the public; it provides analytic support for investigations, which involves assisting investigators in obtaining computerized personnel files, constructing large analytic databases, and developing statistical evidence; it conducts research and studies; and it serves as a statistical research source for other areas of the Commission.

ORIP's analytic support for investigations runs the gamut of technical support necessary to conduct a class investigation.

1. Provision of Workforce Data

Nearly every employer in the United States with 100 or more employees is required to file an Equal Employment Survey with the Commission. Private employers file an EEO-1, referral unions file an EEO-3, state and local governments file an EEO-4, elementary and secondary level school districts file an EEO-5, and institutions of higher education currently file an IPEDS report with the Department of Education, which serves as EEOC's EEO-6 report. Therefore a report describing the workforce of any large employer is available upon request.

Aggregate statistics or availability data can be obtained from ORIP through a summary of any of the reports mentioned above or through the 2000 Census data. All of this data (the EEO-1 through EEO-6 and the Census data) are available for various labor market parameters, including job categories and geographic area. ORIP will prepare special computer-generated reports upon request. Additionally, a great deal of this data is aggregated by various labor market characteristics and published annually for private employers and biennially for state and local governments in EEOC's *Job Patterns* books. ORIP also provides technical assistance in assessing EEO-1 data using the EEO-1 Desktop application.

2. Assessment of Targets

ORIP will assist field offices in comparing an employer's profile to aggregated data. This helps predict the possible impact of potential Commissioner Charges, directed age investigations, and charges being considered for expansion to a class investigation. Assistance includes determining appropriate labor markets and applying appropriate statistical tests.

3. Development of Requests for Information

ORIP is available to assist in framing initial requests for workforce information stored on computer systems, and interpreting those responses. ORIP relies on existing Commission guidance in adopting a multi-step approach that first requests a description of the respondent's computer system and then requests specific computerized data. ORIP will recommend language for the initial request, will provide detailed assistance in interpreting the system description, and will assist in drafting the request for the actual information.

4. Construction of Analytic Databases

Class investigations most often involve large employers. A large workforce necessitates the use of complex computerized personnel files. ORIP will convert the data from its raw form or widely used software to databases that can be readily organized, summarized, and analyzed.

5. Data Analysis

ORIP will develop descriptive and inferential statistics that can serve to bolster the evidence developed in an investigation. The statistics range from simple displays of data, calculation of means, and construction of frequency distributions to the conduct of statistical significance tests including regression analyses.

ORIP attempts to provide services in a manner most compatible with the needs and resources of the field office. Any number of approaches can be developed. For example, ORIP can provide independent analysis of specified issues. At the other extreme, ORIP can provide very detailed on-the-job training to enable investigators to independently develop statistical evidence in the future. Inquiries and requests can be

directed to Ron Edwards, Director, Program Research and Surveys Division, at (202) 663-4949.

6. Web Resources

Title	Description and Web Address
EEO-1 Survey	Information on filing EEO-1 report for current year on EEOC's Web site. http://www.eeoc.gov/eeo1survey/index.html
Standard Form 100 Instruction Booklet	Instructions for filling out EEO-1 Report on EEOC's Web site. http://www.eeoc.gov/eeo1survey/2007instruct.html
Job Patterns for Minorities and Women in Private Industry	Several years of data for private employers from EEO-1 reports in aggregated format for major geographic areas and by industry group on EEOC's Web site. http://www.eeoc.gov/stats/jobpat/jobpat.html
Job Patterns for Minorities and Women in State and Local Governments	Several years of data for private employers from EEO-4 reports from 2005 are summarized in aggregated format for States and by job category on EEOC's Web site. http://www.eeoc.gov/stats/jobpat_eeo4/index.html
Special Reports	A number of special reports that utilize and supplement EEO-1 and other data to examine various equal employment opportunity issues. Studies include "Diversity in Law Firms" and "High End Department Stores, Their Access to and Use of Diverse Labor Markets." http://www.eeoc.gov/stats/reports/index.html

D. OGC PROCEDURES FOR PROCURING EXPERT LITIGATION SUPPORT SERVICES

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D. OGC PROCEDURES FOR PROCURING EXPERT LITIGATION SUPPORT SERVICES[1]

1. Introduction

A significant number of litigation support procurement requests are for obtaining expert services. The Commission usually retains experts to testify in plaintiff's case-in-chief at trial, to consult during trial preparation, and/or to testify as a rebuttal witness at trial. Over the years, the legal units have worked with experts in diverse fields, including medical doctors, psychologists, statisticians, economists, individuals with expertise in various aeronautical specialties, etc. This section therefore addresses the procurement processes applicable to the acquisition of those expert services. While there are more similarities to -- than differences from -- the procurement process for nonexpert litigation support services, described in Part 4, section I.E, the entire process is described here to avoid confusion.

EEOC Order 360.001, EEOC Acquisition Policy, Guidelines, and Procedures, dated July 1, 1986, as amended, defines a "contract" as "a mutually binding legal relationship . . . obligating the seller [the contractor] to furnish supplies or nonpersonal services and the buyer [the Commission] to pay for them."[2] The typical EEOC contract is a two-signature document in which the selected contractor signs first ("the offer") and the authorized Commission official signs second (the "acceptance"), resulting in a binding legal relationship. Another form of EEOC contract is a purchase order. With a purchase order, the authorized EEOC official signs first ("the offer"). The purchase order becomes binding when the selected contractor accepts in writing or performs the requested services (the "acceptance"). Contracts and purchase orders for less than $100,000 are called "simplified acquisitions." The procurement process is the same for both, although some of the forms differ.

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[1] Since this section was originally written, the Commission has begun using the Interior Department Electronic Acquisition System - Procurement Desktop (IDEAS - PD) to prepare, process, and track procurement documents. In addition, the Commission has required use of the Integrated Financial Management System (IFMS) since October 2002 for all purchases of $2,500.00 and more and for any purchases (awards, purchase requisitions, contracts, and inter-agency agreements) made with purchase orders. This subsection does not address any changes to the procurement process made subsequent to Commission adoption of IDEAS-PD and IFMS.

[2] See EEOC Order 360.001, pp. 1-2. While this discussion is intended to assist OGC staff in understanding and navigating the sometimes complex area of federal procurement procedure, all OGC staff whose job duties may include involvement in the procurement process should become familiar with EEOC Order 360.001.

Subsection 2., below, addresses the initial steps in the procurement process for all expert services contracts. Subsection 3. describes the required paperwork and procurement process for requests for $25,000 or less (which are approved at the field office level). This is a relatively simple process, which can be completed in several business days. Subsection 4. describes the procurement process for requests for more than $25,000 (which require headquarters approval). This process is somewhat more complicated than the former. Headquarters processing of these requests takes 30 business days (six weeks) or longer.

2. Initial Steps in Expert Procurement Process

Before the trial attorney can prepare the paperwork required to start the expert contract process, the trial attorney will determine what expert services are needed and identify potential experts. These two steps will be the same regardless of the estimated cost of the contract.

a. Identifying the Need for Expert Services

Regardless of whether the request is for $25,000 or less or for more than $25,000, the first step in the procurement process is initiated at the field office level. The trial attorney should as soon as practicable after being assigned a case for litigation, and whenever possible prior to filing the complaint, consult with his/her supervisory trial attorney, the Regional Attorney, and, if necessary, OGC Litigation Management Services (LMS) and/or Research and Analytic Services (RAS), to determine the need for consulting or trial experts.

b. Identifying Potential Experts

Once the trial attorney has decided that an expert is needed, the trial attorney will next identify experts who will be able to perform the needed services. As discussed above, the trial attorney will benefit from discussing the case with legal unit staff and other Commission staff for help in identifying prospective experts. Other potential sources of help with identifying experts include federal law enforcement agencies, individuals and organizations involved in similar civil rights litigation, bar organizations, local colleges and universities, etc.

When the trial attorney anticipates needing expert services, s/he should first check with Research and Analytic Services (RAS) in OGC to see if an in-house expert

is available.[3] See Part 4, section I.B. of the *Manual* for a discussion of the services available from the RAS staff. Legal units should always consider using RAS staff as consulting experts when outside experts are retained to testify. OGC should make full use of this important in-house source of expertise.

For many years, government attorneys were required to retain experts through a "full and open competition" process. The only permissible deviation from that competitive process was known as the "sole source" exception. The Acquisition Streamlining Act of 1994, however, simplified the expert procurement process. Federal government attorneys are no longer required to competitively bid expert contracts;[4] attorneys can now discuss the facts of the case with potential experts and retain experts on an other than "full and open competition" basis.[5]

While the Acquisition Streamlining Act of 1994 eliminates the need for "full and open competition" in the procurement of experts, the Act nevertheless requires government attorneys to promote competition to the maximum extent possible. Therefore, to meet this requirement and ensure selection of a well qualified expert, trial attorneys should attempt to identify at least two or three potential experts who likely would be able to perform the required tasks.

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[3] Occasionally, it may be possible to obtain expert services through other federal agencies. This will save Commission resources and obviate the need for using the procurement process described here. For example, in the early 1980s the EEOC needed an expert in jet flight simulator testing for an action against a major airline. By contacting the Federal Aviation Administration (FAA), the trial attorney was able to obtain the services of a highly competent flight simulator expert with a commercial pilot's license, whose experience before joining the FAA included managerial jobs in the commercial airline industry. This expert worked with the EEOC sporadically for several years until his services were no longer needed. The only costs that the EEOC bore were for travel, lodging, meals, and incidentals. Consider whether a federal government expert could be an asset to your case.

[4] This has also eliminated the requirement to follow the sole-source contracting procedures discussed in Part 4, section I.F.4.b., *supra*, when retaining experts, in virtually all circumstances.

[5] The authority for EEOC to use "other than full and open competition" when the agency retains expert services for any current or anticipated litigation or dispute is provided by 41 U.S.C. § 253(c)(3)(C) and Federal Acquisition Regulation 6.302-3. The statute provides that noncompetitive procedures may be used:

> to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify.

When contacting potential testifying experts, the trial attorney should not limit the discussion to the substantive issues in the case. The trial attorney should assess each potential testifying expert's ability to communicate effectively with a judge and jury. In addition, the attorney should ask each potential expert to provide the following information:

- Relevant qualifications (including references), experience and publications;
- Availability and willingness to do the necessary work, including travel, reports, exhibits, testimony, meeting court-imposed deadlines, etc.;
- Resources available to accomplish the required tasks;
- Use of subcontractors, graduate students, and other support personnel for portions of the work;
- The amount of time the expert expects the work to take;[6]
- Past litigation experience (including prior testimony on the same or related areas or topics) and attorney references regarding that litigation;
- Potential conflicts of interest (current or prior work with the defendant or an entity related to the defendant or with the defense law firm(s));
- The hourly or daily fee the expert has charged in other, similar litigation, including fees for deposition and trial testimony;[7]

[6] If the legal unit interviewing the expert knows, based on past experience, the hours that it expects will be needed to perform each of the tasks that will be part of the expert's work, these estimates should be discussed with the expert to determine whether he or she concurs with this assessment. It will also be important to determine whether there are any other tasks the expert believes will be required for the expert to perform the role expected (for example, tests performed by someone other than the expert or his or her staff).

[7] If the expert has not testified in a similar case, the legal unit should attempt to determine the expert's rate for comparable services in other litigation.

- What increase in the hourly or daily fee the expert might seek in the event the contract must be extended beyond the proposed initial period of performance; and

- Willingness to sign a confidentiality agreement.

3. Procurement Packages for $25,000 or Less

The remaining steps in the procurement process for expert services for $25,000 or less all take place in the field office. The trial attorney prepares the paperwork for the Regional Attorney's approval and then the administrative unit processes the paperwork and issues the purchase order.

a. Preparing the Procurement Request

(1) EEOC Form 123, Requisition for Supplies, Equipment, Services, Furniture

Requests for expert litigation support services are initiated by using an EEOC Form 123, *Requisition for Supplies, Services, Equipment, Furniture.* (See appendix 1 for a copy of a blank Form 123). The Form 123 must contain the following information:

(a) A brief description of the services requested.

(b) The estimated date by which the services are needed.

(c) The name, office, and telephone number of the proposed Contract Monitor, who will be the Commission's point of contact with the selected vendor. As discussed below in Part 4, section II. of the *Manual (Contract Monitors' Duties and Responsibilities*), the Contract Monitor is responsible for reviewing the selected expert's performance under the contract and certifying the acceptability of the services rendered. The Contract Monitor usually will be the supervisory trial attorney or trial attorney.

(d) Whether the request is for a new service or a modification to an existing contract.

(e) The proposed duration of the contract or modification.

(f) The estimated cost of the proposed contract.

(g) Name and identifying information for the proposed expert (or experts).

(h) The signature of the requestor, usually the supervisory trial attorney or trial attorney.

(2) Statement of Work (SOW)

A Statement of Work (SOW) is a clear and comprehensive description of the work to be performed and the contract performance standards to be met. The SOW is the most critical part of the procurement request, as it serves as the foundation for the resultant contract. The tasks set out in the SOW should be specified in sufficient detail that the Contract Monitor will have no difficulty in determining whether the selected expert has complied with the contract. At a minimum, the SOW should contain the following:

(a) An introduction identifying the Commission, the case for which the request is made, and the principal issues in the case.

(b) The purpose of the proposed contract, including the reasons the Commission needs the expert services.

(c) A detailed description of the expert services to be performed. For contracts for $25,000 or less in which the expert will only be required to complete one or two concise, easily identified, tasks, the supervisory trial attorney, after consultation with the Regional Attorney, may determine that a detailed SOW is unnecessary.

(d) The period of performance for the proposed contract.

(e) The quantity and/or due date of all deliverables, such as any reports by the expert on the progress of the work, deposition testimony, final expert report, trial exhibits, and trial testimony.

(f) The identification of the proposed Contract Monitor.

(g) The estimated cost of the contract. Specifically describe the types of services the expert will perform (*e.g.,* review of relevant background documents, deposition preparation, assisting attorney at trail), estimate the number of hours each type of service will take, provide the expert's hourly rate, and calculate a total price for each service. Separately estimate projected travel and lodging costs. Estimates of tasks to be performed and hours required may be revised based on

discussions of the proposed work with the potential expert. Where litigation will be protracted, the contract should be divided into phases to avoiding tying up limited Commission resources. Each contract will contain a clause that will provide the Commission with the option to extend the contract's period of performance, if necessary. Therefore, the cost estimates in the SOW should also include any estimated rate increases that would occur should the Commission need to exercise one or more option(s) to extend the period of performance.

(h) Name and identifying information for the proposed expert(s).

(3) Market Survey

Although, as noted earlier, legal units no longer need to competitively bid for expert services procurements, legal units are nevertheless required to promote competition to the maximum extent possible. The procurement package must include a completed Market Survey indicating what steps were taken to identify prospective experts and whether any particular expert is recommended. (See appendix 2, *Market Survey Form*.) Where legal units have solicited written proposals from a number of potential experts, the legal units prepare evaluation criteria which contain the standards for selecting the expert.

b. Regional Attorney Review and Approval

The Regional Attorney should play an active role in selecting experts. The Regional Attorney should review and approve each request for an expert services contract, regardless of the cost, to ensure that the needed services are correctly identified and the proposed contract costs are reasonable. When the expert services requested are $25,000 or less, the Regional Attorney has authority to approve the contract.

c. Field Office Processing and Issuance of Purchase Order

Once the Regional Attorney approves a request for expert services for $25,000 or less, the package should be forwarded to the field office administrative officer or budget analyst (collectively referred to here as "administrative officer") for processing. In the usual case, where the trial attorney has recommended that a specific expert be awarded the contract, the administrative officer will contact the proposed expert to confirm his/her availability and the costs of the various services that the expert is expected to provide. The administrative officer will then obtain the signature of the Commission's Contracting Officer -- for contracts for $25,000 or less, this is usually the Office Director – and will issue the purchase order.

While it is unusual, the trial attorney may instead identify more than one potential expert without making a specific recommendation. Where this occurs, the administrative officer should prepare a request for proposal (RFP) and forward it to each of the potential experts identified by the trial attorney. Typically the experts will be given five business days to submit their proposals. The administrative officer should then submit the potential experts' proposals to the trial attorney, who will evaluate them and recommend which expert to select to the Regional Attorney. The administrative officer will then complete the contracting process.

4. Procurement Packages for More Than $25,000

Preparing a request for expert services for more than $25,000 is more time consuming than requesting a contract for $25,000 or less. Unlike the expert contract for $25,000 or less, headquarters must approve the expert contract for more than $25,000. In the wake of the simplifications to the federal acquisition process embodied in the Acquisition Streamlining Act of 1994, headquarters approval of these expert contracts usually takes a little bit more than 30 business days (or about six weeks), which is substantially less time than it takes to obtain approval of a nonexpert services contract for a like amount.

a. Trial Attorney Prepares the Procurement Request

The procurement package for more than $25,000 contains the same elements that are required for the expert contract for $25,000 or less, described in subsection 3.a., above, with two permutations. First, when the contract is for more than $25,000, the signature of the requestor on the Form 123 must be that of the Regional Attorney, instead of the supervisory trial attorney or trial attorney. Second, all expert contract requests for more than $25,000 will require a detailed Statement of Work (SOW).

b. Regional Attorney Reviews and Approves Request

Where the legal unit is seeking expert litigation support services for more than $25,000, the Regional Attorney must still review and approve the package. Thereafter, the package must be submitted to headquarters for approval.

c. Office of General Counsel Reviews and Approves Request

After obtaining Regional Attorney approval, the legal unit should forward the request for expert services to OGC's Administrative and Technical Services Staff (ATSS). ATSS is responsible for coordinating procurement requests throughout the process to ensure their timely completion, and questions concerning the process should

be addressed to ATSS. The procurement package should be submitted to ATSS in electronic format as well as hard copy.

ATSS will first review the procurement package to ensure that it is complete. ATSS will return an incomplete package to the field office legal unit for completion. After ATSS's Program Officer approves the procurement package, ATSS will transmit it to LMS and/or RAS[8] for review.

LMS and/or RAS will review the procurement package for sufficiency. This will include determining whether the tasks described in the SOW are appropriate and the estimated costs are reasonable. In the event ATSS, LMS, or RAS determines that the procurement package is incomplete or requires modification, ATSS, LMS or RAS will consult with the Regional Attorney or his/her designee concerning the recommended steps to complete or modify the package. The Regional Attorney or designee should expeditiously complete or modify the procurement package.

Once LMS and/or RAS determines that the procurement package is satisfactory, it will submit a written statement about the appropriateness of the tasks in the SOW and the reasonableness of costs to the Deputy General Counsel. The Deputy then will review the statement and either approve or disapprove the procurement request. Where the Deputy approves the request, ATSS will submit the procurement package to the Procurement Management Division of the Office of the Chief Financial Officer and Administrative Services (PMD), accompanied by the Deputy General Counsel's authorization.

Normally the OGC review process described above takes six business days, four days for the ATSS and LMS/RAS review, including any necessary modifications to the package, and another two days for the Deputy General Counsel's review.

d. Commission Votes to Approve Request, Where Required

Most requests for expert contracts do not require Commission approval. However, the Commission must vote to approve any request for a contract for $100,000 or more. Obtaining Commission approval will take ten to 15 business days.

[8] If the request is for expert services outside RAS' areas of expertise, the request likely will be reviewed solely by LMS. RAS' areas of expertise include economics; labor economics, particularly in the areas of constructing labor markets and availability estimates; data base conversion or construction; computerized data analysis; psychology, including industrial/organizational and personnel psychology; general social science research, such as racial/age stereotyping or sexual harassment; statistics, particularly complex or multivariate analyses; and financial analysis, such as estimating the value of businesses.

e. PMD Reviews Procurement Request and Prepares Request for Proposal

PMD reviews the procurement package, prepares a Request for Proposal (RFP), and solicit proposals from prospective experts within seven business days. During its review of these documents, PMD will consult with the ATSS Program Officer on questions regarding the SOW and on any changes to the procurement package PMD believes are necessary. OGC and/or the Regional Attorney or designee will be required to make any necessary changes before PMD can complete processing of the procurement package. Once PMD is satisfied that the procurement package is satisfactory, it will prepare and submit an RFP to the proposed expert or experts. The RFP contains the SOW and any additional information required by federal acquisition law and Commission policy or otherwise necessary for the expert to respond to the RFP.

f. Experts Submit Proposals

Once PMD forwards the RFP to the proposed expert, PMD normally allows five business days for the expert to submit his or her proposal based on the tasks, estimated number of hours and the other requirements listed in the RFP. If the trial attorney will need an expedited procurement action, s/he should contact PMD, and it in turn will arrange for submission of the proposal in a shorter time.

g. Trial Attorney Evaluates Proposals

Once PMD receives it, PMD will submit the expert's proposal to the trial attorney, who will have three days to review and evaluate it. If the trial attorney is not available during the evaluation period, the Regional Attorney should appoint an alternate evaluator. Using the evaluation criteria contained in the SOW, the trial attorney will evaluate the prospective expert's technical and cost proposals, including travel and other direct costs (*e.g.*, copying and costs to create exhibits) to determine whether they are appropriate. The trial attorney must submit his/her evaluation of the proposal -- including any questions about direct costs -- to PMD in writing.

h. Final PMD Approval and Contract Preparation

Once PMD receives the trial attorney's written evaluation, PMD will have three business days to review it, determine that the proposed labor rates are reasonable, and award the contract. An additional three days may be required if negotiations with an expert are necessary. PMD will confer with the Deputy General Counsel to determine whether the Deputy General Counsel wishes to participate in negotiations on technical or cost matters.

Where the expert services will be provided by a corporation or partnership, the contract should contain "key personnel" clauses that: (1) identify names and/or categories of all personnel considered essential to the work being performed; (2) make all such personnel subject to government review in accordance with the defined labor categories; (3) require the contractor to provide qualified personnel within a set number of days after the contract award; and (4) require that invoices identify hours worked by various personnel either by name or by labor category.

i. OLC Review

Following its approval, PMD will submit the proposed contract to OLC, which has two days to review the proposed contract for legal and technical sufficiency.

j. PMD Execution of the Contract

PMD will have four days from the completion of OLC's review to mail the contract to the selected expert for signature. Once returned, PMD will cause the Commission Contracting Officer -- for contracts for more than $25,000, this is the Director of PMD or his/her designee -- to sign the contract on behalf of the Commission. The contracting process is completed when PMD notifies ATSS of the expert's acceptance of the contract terms and forwards a copy of the executed contract to the trial attorney and/or the Contract Monitor listed in the SOW.

The following is a timetable, beginning with submission of the expert services request to OGC for review and ending with execution of the contract.

Schedule		Allotted Days
1.	OGC review and approval. ATSS, LMS and/or RAS review and approve expert request and send statement on sufficiency, appropriateness and reasonableness to Deputy General Counsel. Deputy General Counsel recommends to PMD that contract be approved.	6
2.	Commission approval (only required with contracts for $100,000 or more).	0 -15
3.	PMD reviews requisition and supporting documentation and develops RFP.	7
4.	Experts submit proposals.	5

Schedule		Allotted Days
5.	Trial attorney evaluates proposals.	3
6.	PMD reviews evaluation, determines reasonableness of cost, selects contractor and prepares contract for award.	3-6
7.	OLC reviews contract for legal and technical sufficiency.	2
8.	PMD mails contract to expert for signature. EEOC signs contract.	4
Total business days to award		30 - 50

As part of its monitoring function, ATSS will be responsible for notifying the Deputy General Counsel and the field office legal unit submitting the procurement request of any significant delay beyond the times outlined in the expert procurement schedule set forth above.

APPENDIX 1:

EEOC FORM 123:

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

INSTRUCTIONS. **(See reverse for instructions on completing this form)**		**FOR PROCUREMENT USE ONLY**
(1) TO: *(Indicate appropriate action office)*	(2) REQUESTING OFFICE	(3) CONTACT *(Name/Division/Phone)*
(4) DELIVER TO: *(Shipping Address)* *(Inside Delivery)* Yes ☐ No ☐	(5) SUGGESTED VENDOR(S) *(Name/Address/Phone No.)*	
(6) DATE ITEM/SERVICE REQUIRED	(a) ☐ SOLE SOURCE *(Justification Required, if over $2,500)* (b) ☐ COMPETITIVE *(Attach list of 3 Names, if over $2,500)*	

(7) ACCOUNTING / APPROPRIATION DATA

The item(s) listed on this request are properly chargeable to the following allotments; the available balances of which are sufficient to cover the cost thereof, and funds have been committed.

(a) REQUISITION NO.	(b) APPROPRIATION CODE	(c) AMOUNT COMMITTED *(Check applicable boxes)* ☐ ORIGINAL ☐ INCREASE ☐ DECREASE ☐ CURRENT YEAR FUNDING ☐ PRIOR YEAR FUNDING	
(d) NAME/SIGNATURE OF ADMINISTRATIVE OFFICER	DATE	(e) NAME/SIGNATURE OF FISCAL OFFICER *(Prior Year Funding ONLY)*	DATE

(8) DESCRIPTION

(a) LINE ITEM	(b) DESCRIBE SUPPLIES/SERVICES/EQUIPMENT REQUIRED: *(Include all pertinent data e.g., Size, Model, Color, Serial No., Type of Material etc.)*	(c) QUANTITY	(d) UNIT	(e) UNIT PRICE	(f) ESTIMATED COST
		(g) TOTAL ESTIMATED COST			

(9) JUSTIFICATION AND SPECIAL INSTRUCTIONS *(Use additional sheet(s) if necessary)*

(10) TYPED NAME/SIGNATURE OF REQUESTOR	DATE	(11) TYPED NAME/SIGNATURE OF OFFICE/PROGRAM DIRECTOR	DATE
(12) SPECIAL ITEM APPROVAL *(Filing Equipment, Copiers, Word Processors, Library Subs., (See EEOC Order 360.001)*	DATE	(13) OTHER APPROVAL *(Specify Name/Title)*	DATE

INSTRUCTIONS FOR COMPLETING EEOC FORM 123

A. PREPARATION (Numbers correspond to block numbers on face of form)

(1) Enter the name of the office to receive and act upon the request.

(2) Enter the office name requesting the service/item.

(3) Enter the name, office breakdown, and telephone number of the contact person to call for additional information.

(4) Enter the complete address, including room number of the office to which the goods/ services are to be delivered. Check appropriate block to indicate if inside delivery is required.

(5) Enter the name, complete address, and telephone number of suggested vendor. Such entry does not mean that the vendor will be chosen.

(a) If the request is for a sole source requirement costing $2,500 or more, attach a justification explaining the need for the noncompetitive procurement.

(b) Competitive requirements exceeding $2,500 should include at least three (3) sources, if available. Provide name, address and telephone number (if known) for each source. Otherwise Procurement Management Division (PMD) will obtain names of vendors.

(6) Enter the latest date that the items/services can be delivered.

(7) To be completed by the designated person responsible for the office's cuff records. Failure to include these items will result in the return of the requisition to the requesting office for completion.

(a) Assign a requisition number for identification control and coding purposes.

(b) Enter the appropriation code consisting of a one-digit numerical code indicating the fiscal year office's Constant Data Code (CDC), and a four-digit sub-object class code to identify what CDC funds will be charged and for what purpose. (See EEOC Order 450.001, Coding Procedures for Financial Transactions and Personnel Actions).

(c) Indicate if the amount committed is an original request or an increase/ decrease to the original request. Also check if request is current year funding or prior year funding.

(d) Enter the typed name, signature, and date signed of the person certifying the availability of funds.

(e) If the request is charged to a previous year's funding then the Agency Fiscal Officer's name and signature is required.

(8) Each request shall contain a complete description of the supplies, material or services required in order to process the request.

(a) Use this column to list different line items from the same vendor. If the services or item is from a different vendor use a separate Form 123 for each type of service or item needed.

(b) Describe the specific services or items to be procured, including the model number, serial number of items to be repaired, color, size, type of material, etc.

(c) Enter the total quantity desired for each item listed.

(d) Enter the unit (single issue) of the quantity desired i.e., ea. for each, doz. for dozen, ctn. for carton, copy for copy, etc.

(e) Enter the estimated cost for one item of issue (e.g., $1,000 each).

(f) Enter the estimated cost for each line item (quantity x unit price = estimated cost).

(g) Enter total estimated cost of all the items listed in column (8)(f).

(9) Provide a detailed justification for all procurement actions for example.:

(a) Request for copiers.

(1) Estimated monthly volume.
(2) Number and kind of current copier, if any, on hand.

(b) Request for procured (cost) services.

(1) Reason for need of service.
(2) If service is listed as sole source, submit a justification with the request. (See EEOC Order 360.001, EEOC Acquisition Policy, Guidelines, and Procedures).

(10) Enter typed name/signature and date of person requesting the service/item.

(11) Enter the name/signature and date of Director attesting to his/her operating budget, specifically, a district director or one of headquarter's office/service directors.

(12) Enter the name of the appropriate office responsible for approving special items as required by EEOC Order 360.001, i.e., filing equipment, copiers, word processors, micrographics equipment, other specialized equipment,library publications/subscriptions, ADP equipment, etc.

(13) Enter typed name, title and signature of other officials required to approve the request before procurement action can be taken. For example, litigation/systemic support items require approval by the Office of General Counsel.

B. ROUTING OF FORM 123

(1) Request for supplies/services charged to the requesting office account shall be routed, if applicable, through the appropriate approving official(s) described in paragraphs 3 and 4 below, to PMD for processing.

(2) Requests for supplies, services, equipment, furniture, library publications/subscriptions, EEOC specialty forms, and purchased forms to be charged to Headquarters 2311 account shall be forwarded to the Director, Financial and Resource Management Services for approval and certification of funds. Upon approval, the request will be routed to PMD for procurement action.

(3) Requests for filing equipment, FAX machines, copiers, and other specialized equipment must be approved by OCFOAS, or if ADP equipment, by Office of Information Technology, before procurement action can be taken.

(4) Requests for litigation/systemic services require approvals as provided by EEOC Order 360.001, before Procurement action can be taken.

(5) Prepare Original and (2) copies. Original to Action Office, 1 copy to Administrative Officer, and 1 copy to Requestor.

APPENDIX 2:

MARKET SURVEY FORM

State which of the following procedures were followed in selecting the particular expert(s). If item one (1) is selected, item two (2) need not be addressed. Item (3) requires a response.

__1. The recommended expert is uniquely qualified to perform the expert services in this case (e.g., the expert is the treating physician in a disability case, the expert has developed a database relevant to his or her testimony in this case). If this box checked, please discuss.

__2. The legal unit has surveyed the expert services market. Describe all efforts made to contact different experts and/or any other attempts to promote competition (e.g., explored other experts with OGC's RAS or LMS; spoke with other attorneys in the Commission, in other Federal Government Agencies or in the private sector; reviewed trade journals; spoke with potential experts at educational institutions).

__3. What efforts were made to obtain the services of minority or women contractors? Please discuss.

E. OGC PROCEDURES FOR PROCURING NONEXPERT LITIGATION SUPPORT SERVICES

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E. OGC PROCEDURES FOR PROCURING NONEXPERT LITIGATION SUPPORT SERVICES[1]

1. Introduction

The trial attorney is likely to need one or more of the following nonexpert support services in prosecuting each case: (1) court reporter services; (2) outside copying services; (3) assistance with identifying and locating claimants or witnesses; (4) database construction services; and (5) process and subpoena servers. Other nonexpert services may also be required from time to time. Generally, the trial attorney will obtain these services through a contract negotiated using the federal and EEOC acquisitions process described in this subsection of the *Manual*.

a. Contract Authority

The EEOC derives its contracting authority from several federal acts and from the Federal Acquisition Regulation or FAR, 48 C.F.R. Chapter 1, the principle regulation governing federal executive branch agencies, that was jointly issued by the Defense Department, NASA, and the General Services Administration. The EEOC has promulgated internal orders governing various aspects of the contracting process. They are:

- EEOC Order 360.001, *EEOC Acquisitions Policy Guidelines*, as amended (July 27, 1994). *See* Appendix A to the Order, *Acquisitions Policies and Procedures Handbook.*

- EEOC Order 360.002, *Small Purchase Procedures Handbook* (Oct. 1, 1993). *See* Appendix A to the Order, which is also called *Small Purchase Procedures Handbook.*

- *EEOC Commercial Purchase Card User Guide* (revised June 2000).

[1] Since this section was originally written, the Commission has begun using the Interior Department Electronic Acquisition System - Procurement Desktop (IDEAS - PD) to prepare, process, and track procurement documents. In addition, the Commission has required use of the Integrated Financial Management System (IFMS) since October 2002 for all purchases of $2,500.00 and more and for any purchases (awards, purchase requisitions, contracts, and inter-agency agreements) made with purchase orders. This subsection does not address any changes to the procurement process made subsequent to Commission adoption of IDEAS-PD and IFMS.

b. Contract Officers

In accordance with federal acquisition law and Commission policy, only officially designated contracting officers may enter into, administer, and/or terminate contracts. The FAR vests EEOC's contracting authority in the Chairperson, who in turn has redelegated it to contracting officers. In the field, Office Directors are the contracting officers, with delegated authority to enter into contracts for $25,000 or less. For contracts over $25,000 the Commission's contracting officer typically is the Director, Procurement Management Division, or his designee. Purchases of under $2,500 may be made without the signature of a contract officer. Any EEOC employee with authority to use a government purchase card may make a purchase of less than $2,500.

c. "Contract" Defined

EEOC Order 360.001, *EEOC Acquisitions Policy Guidelines*, defines a "contract" as "a mutually binding legal relationship . . . obligating the seller [the contractor] to furnish supplies or nonpersonal services and the buyer [the Commission] to pay for them." Appendix A thereto, *Acquisitions Policies and Procedures Handbook*, at p. 1-2. The typical EEOC contract is a two-signature document in which the selected contractor signs first ("the offer") and the authorized Commission Contract Officer signs second (the "acceptance"), resulting in a binding legal relationship. Another form of EEOC contract is a purchase order. With a purchase order, the EEOC Contract Officer signs first ("the offer"). The purchase order becomes binding when the selected contractor accepts in writing or performs the requested services (the "acceptance").

Under the FAR, executive branch agencies must contract through competitive procedures, using what is known as "full and open competition," 41 U.S.C. § 253(a), unless the contract is for less than $2,500 in services or other narrow exceptions apply.

d. Contract Lingo: Micro Purchases, Small Purchases, and Simplified Acquisitions

In its contract guidance, the EEOC uses different terminology to describe contracts, based on contract size (dollar amount) and Contract Officer authority:

- contracts for less than $2,500 are called "micro purchases,"
- contracts for $25,000 or less are called "small purchases," and
- contracts for more than $25,000 and less than $100,000 are called "simplified acquisitions"

e. Overview of this Subsection

This subsection of the *Manual* describes how to obtain nonexpert litigation support service contracts as efficiently as possible.[2] Subsection 2., below, addresses the initial steps in the procurement process for all nonexpert services contracts, identifying the services needed and the potential vendors. Subsection 3. describes two simple ways to purchase services of less than $2,500, which are exempted from the "full and open competition" rule. Section 4. describes the required paperwork and procurement process for requests for $25,000 or less (small purchases). These contracts can be completed within the field office within several business days. Subsection 5. describes the procurement process for contracts for more than $25,000. This is a more cumbersome process and headquarters approval alone may take more than 100 business days (five months). When the trial attorney anticipates needing nonexpert services for more than $25,000, s/he may wish to first find out whether the services are available through the EEOC-DOJ agreement (discussed in Part 4, section I.D.), since the services of DOJ vendors can be secured more quickly and with less paperwork.

2. Initial Steps in Nonexpert Procurement Process

Before preparing the paperwork required to start the contracting process, the trial attorney must determine what nonexpert litigation support services are needed and identify potential vendors. These two steps will be the same regardless of the estimated cost of the contract, although advanced planning is more important for the contracts for more than $25,000 since approval will take more time.

a. Identifying the Need for Nonexpert Litigation Support Services

Regardless of whether the request is for $25,000 or less or for more than $25,000, the first step in the procurement process is initiated at the field office level. The trial attorney should as soon as practicable after being assigned a case for litigation, and whenever possible prior to filing the complaint, consult with his/her supervisory trial attorney, the Regional Attorney, and, if necessary, OGC Litigation Management Services (LMS) and/or Research and Analytic Services (RAS), to determine the need for nonexpert litigation support services.

[2] While this discussion is intended to assist Regional Attorneys and legal unit staff understand and navigate the sometimes complex area of federal procurement procedure, all legal unit staff members whose job duties may include involvement in the procurement process should become familiar with EEOC Order 360.001 and EEOC Order 360.002. These Orders are available in all EEOC field office libraries.

b. Identifying Potential Vendors

Once the trial attorney has identified the needed services, the trial attorney will next identify possible sources for the services. Federal procurement rules and EEOC policy require that a certain percentage of EEOC contracts over the $2,500 micro purchase ceiling and under the $25,000 small purchase ceiling, be reserved for small businesses, including businesses owned by minorities, women, or economically or socially disadvantaged individuals. The Small Business Administration (SBA) and the General Services Administration (GSA) have electronic databases which include vendors meeting these criteria.

As with expert services, the trial attorney will benefit from discussing the requirements of the case with legal unit staff and other Commission staff, and if necessary outside organizations, who should be helpful in identifying prospective vendors.

SBA is also a source of potential vendors. The SBA is responsible for establishing small business standards within each industry, setting size standards by number of employees or millions of dollars. See 13 C.F.R. § 101. SBA also has a program for identifying minority businesses and businesses located in historically underdeveloped zones (HUBZone). Profiles of SBA-certified small businesses (including identification of the business, organization and ownership information, products and services, and the business' performance history) are available on the Central Contractor Registration (CCR) database,[3] at www.ccr.gov. These businesses can be searched by Standard Industrial Classification, business type, location, etc.

GSA is another source of potential contractors. GSA contracts with firms to provide products and services for federal government use through its Multiple Award Schedules Program and various other contracting vehicles at prices associated with volume buying. Currently more than 79 percent of FSS Multiple Award Schedule contractors are small businesses. The small businesses with which GSA contracts include those with minority, veteran, and women business owners, as well as businesses employing blind and disabled employees and HUBZone businesses. EEOC legal units might contract for litigation support services (such as temporary clerical services, document technology services, and foreign language interpretation services) through FSS. See GSA's Web page on Services for more information.

In sum, when the attorney expects that a contract will fall into the small purchase range ($2,500 to $25,000), the attorney should find out whether any of the small

[3] CCR was developed by the Defense Department (DOD). However, the SBA, GSA, and the Office of Management and Budget, are working with DOD to merge their separate databases into CCR, making it into an integrated database of small businesses that want to do business with the government.

businesses listed on the SBA or GSA lists are available and qualified to perform the needed services. If so, bids should be solicited from these small businesses. If a responsible small business is not available, the EEOC contract officer may waive the small business set aside. Chapter 4 of the Commission's *Acquisitions Policies and Procedures Handbook* has more information on the small business program.

3. Micro Purchases (Services of Less than $2,500)

The process of contracting for services of less than $2,500 is quite simple and can be done in the field office. The FAR exempts micro purchases from the requirement for "full and open competition." Therefore, the attorney need identify only one vendor, as long as the vendor's price is reasonable. *See EEOC Small Purchase Procedures Handbook*, p. A-8.

The attorney may make a micro purchase by using a government commercial purchase card or by filling out Optional Form 347, *Order for Supplies or Services.* The government commercial purchase credit card, which is different from the credit card most EEOC employees have received for travel expenses, has been issued to all Directors and field office administrative officers and will be issued to all Regional Attorneys in the near future. Attorneys should ask the Regional Attorney or the field office administrative officer for authority to use a commercial purchase credit card for nonexpert litigation support services for under $2,500. Use of commercial purchase credit cards is governed by the *EEOC Commercial Purchase Card Program User's Guide*. The alternative to using the government commercial purchase credit card is filling out Optional Form 347. A copy of Optional Form 347, *Order for Supplies or Services,* is attached as appendix 1.

4. Small Purchases (Services of $2,500 to $25,000)

Procuring a nonexpert services contract for $2,500 to $25,000 is also simple and can usually be completed within a few weeks or less. The trial attorney prepares the paperwork for the Regional Attorney's approval and then the legal unit support staff or administrative unit solicits price quotations and completes the contracting process.

a. Preparing the Procurement Request

The trial attorney will prepare EEOC Form 123, *Requisition for Supplies, Services, Equipment, Furniture*, to request nonexpert litigation support services.[4]

[4] Generally a Statement of Work (SOW) is not required for contracts for $25,000 or less. However, if the proposed contract would require the vendor to perform multiple tasks, such as different types of

EEOC Form 123, *Requisition for Supplies, Services, Equipment, Furniture* is attached in appendix 2. The Form 123 must contain the following information:

(1) A brief description of the services or supplies requested (e.g., the estimated total number of pages to be copied or the estimated number of depositions to be taken and total deposition pages to be transcribed).

(2) The estimated date by which the services are needed.

(3) The name, office, and telephone number of the proposed Contract Monitor, who will be the Commission's point of contact with the selected vendor. As discussed below in Part 4, section II. of the *Manual (Contract Monitors' Duties and Responsibilities*), the Contract Monitor is responsible for reviewing the selected vendor's performance under the contract and certifying the acceptability of the services or supplies rendered. The Contract Monitor usually will be the supervisory trial attorney or trial attorney.

(4) Whether the request is for a new service or a modification to an existing contract.

(5) The proposed duration of the contract or modification.

(6) The estimated cost of the proposed contract.

(7) A list of suggested vendors.[5] Generally, at least three suggested vendors should be identified to promote competition to the maximum extent practicable. Trial attorneys may contact possible vendors to determine if they could provide the services. Trial attorneys should also ask each vendor to provide an oral estimate of costs. The trial attorney may use the vendors' estimates to calculate the approximate cost of the proposed contract. However, the trial attorney should leave solicitation of price quotations to the legal unit support staff or field office administrative officer, who will solicit price quotations only after the Regional Attorney has approved the procurement package. If only one source is reasonably available, an office may limit its request for quotations to a single source. In this event, the office must prepare a detailed memorandum to the file (called a "Justification for Noncompetitieve Purchase") explaining why only one source was solicited and how the contracting officer

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copying or data inputting, the supervisory trial attorney, after consulting with the Regional Attorney, may ask the trial attorney to prepare a SOW to explain the requested services in more detail. If so, the trial attorney should follow the procedures in subsection 5. a. (1) (b), below, in preparing the SOW.

[5] *See* subsection 2.b., *supra*, which discusses the Commission's policy to award a certain percentage of its contracts in the $2,500 to $25,000 range to small businesses.

determined that the price was fair and reasonable. *EEOC Small Purchase Procedures Handbook* at p. A-9.

(8) The signature of the requestor, usually the supervisory trial attorney or trial attorney.

b. Regional Attorney Review and Approval

The Regional Attorney should review and approve each nonexpert support services request, regardless of the cost, to ensure that the needed services are correctly identified and the proposed contract costs are reasonable.

c. Field Office Processing and Issuance of Purchase Order

Once the Regional Attorney approves a request for nonexpert support services for $25,000 or less, the legal unit support staff or field office administrative officer will solicit cost quotations from the suggested vendors , generally by telephone. If the contract is expected to be for $10,000 or more, the FAR requires the administrative officer to post the proposed acquisition in a "public place," such as on EEOC's Web page or in the field office's public reception area, for a minimum of 10 days. This requirement promotes the goal of competition. The legal unit support staff or field office administrative officer will analyze the bids -- including any from vendors who responded to the posting -- to determine the most reasonable price. Next, the trial attorney will review the vendors' quotations and will make a recommendation. The administrative officer will then prepare a purchase order using Optional Form 347, *Order for Supplies or Services*, for the signature of the Office Director -- the contracting officer for contracts for $25,000 or less -- and will issue the purchase order to the selected vendor. A copy of Optional Form 347, *Order for Supplies or Services,* is attached as appendix 1.

5. Simplified Acquisitions (Services of More Than $25,000)

From start to finish, the process of contracting for nonexpert litigation support services for more than $25,000 (a simplified acquisition) takes more time than that of contracting for services of $25,000 or less. First, the paperwork that the legal unit must prepare is more detailed. Second, the request must be processed and approved by OGC, the Procurement Management Division (PMD) of the Office of the Chief Financial Officer and Administrative Services, and the Office of Legal Counsel (OLC). The headquarters approval process alone may take more than 100 business days (five months). Finally, because federal acquisition law requires "full and open competition" when contracting for nonexpert litigation support services, unless justified, 41 U.S.C. § 253(a), an agency may use noncompetitive procedures for such contracts only if it can invoke narrow exceptions. The procurement process differs depending upon whether

the trial attorney is seeking a competitive or a noncompetitive contract. Competitive and noncompetitive procurements are discussed separately below.

a. Soliciting Contracts through "Full and Open Competition"

As stated above, federal procurement law requires "full and open competition" for almost all nonexpert contracts. This is the process:

(1) Trial Attorney Prepares Procurement Request

The procurement request is more detailed than for the contract for $25,000 or less, described in subsection 4.a. It contains:

(a) EEOC Form 123, Requisition for Supplies, Equipment, Services, Furniture

The Form 123 will contain all of the information listed in subsection 4.a. However, with requests for more than $25,000, the signature of the requestor will usually be the Regional Attorney's rather than the trial attorney's or STA's. The Form 123 must also state that the request is competitive.

(b) Statement of Work (SOW)

A Statement of Work (SOW) is a clear and comprehensive description of the work to be performed and the contract performance standards to be met. The SOW is the most critical part of the procurement request, as it serves as the foundation for the resultant contract. The tasks set out in the SOW should be specified in sufficient detail that the Contract Monitor will have no difficulty in determining whether the selected vendor has complied with the contract. At a minimum, the SOW should contain the following:

(i) An introduction identifying the Commission and the case for which the request is made.

(ii) The purpose of the proposed contract, including the reasons the Commission needs the services.

(iii) A detailed description of the services to be performed or the supplies to be obtained.

(iv) The period of performance for the proposed contract.

(v) The quantity and/or due date of all deliverables, such as any reports by the vendor on the progress of the work.

(vi) The identification of the proposed Contract Monitor.

(vii) The estimated cost of the contract. Specifically describe the types of services the vendor will perform (*e.g.,* copying, court reporting, data input). Separately estimate the cost for each type of service described. As discussed above, the trial attorney may obtain assistance in estimating costs from legal unit staff (including the Regional Attorney, STAs, and others with experience with similar contracts), other Commission staff (including RAS, LMS, and Systemic Litigation Services), and if necessary outside organizations. Where litigation will be protracted, the contract should be divided into phases to avoiding tying up limited Commission resources. Each contract will contain a clause that will provide the Commission with the option to extend the contract's period of performance, if necessary.

(viii) The Evaluation Criteria. The solicitation should generally describe how the government will evaluate proposals, providing enough information to allow vendors to compete intelligently. Evaluation criteria can include price, technical capability, management capability, prior experience, key personnel and past performance of the offeror. Cost or price must always be considered. The RFP may state the order of importance of the evaluation criteria, and may include numerical points to be assigned to each evaluation factor. Evaluation criteria should be chosen to enable the evaluator of the bids to choose the best bid for the government. In some acquisitions, an evaluation panel is established to consider and rate the proposals submitted by offerors. In all instances, the individual or panel evaluating bids must follow the evaluation criteria established in the RFP.

(ix) List of suggested vendors, if known.

(2) Regional Attorney Review and Approval

Where the legal unit is seeking nonexpert litigation support services for more than $25,000, the Regional Attorney must still review and approve the package. Thereafter, the package must be submitted to headquarters for approval.

(3) Office of General Counsel Review and Approval

After the Regional Attorney has approved the request for nonexpert support services for more than $25,000, the legal unit should forward the request to OGC's Administrative and Technical Services Staff (ATSS). The procurement package should be submitted to ATSS in electronic format as well as hard copy. ATSS is responsible

for coordinating procurement requests throughout the process to ensure their timely completion, and questions concerning the process should be addressed to ATSS.

ATSS will first review the procurement package to ensure that it is complete. ATSS will return an incomplete package to the field office legal unit for completion. After ATSS's Program Officer approves the procurement package, ATSS will transmit it to LMS and/or RAS (if the request involves areas within RAS' expertise such as database construction) for review.

LMS and/or RAS will review the procurement package for sufficiency, including whether the tasks described in the SOW are appropriate and the estimated costs are reasonable. In the event ATSS, LMS, or RAS determines that the procurement package is incomplete or requires modification, ATSS, LMS or RAS will consult with the Regional Attorney or his/her designee concerning the recommended steps to complete or modify the package. The Regional Attorney should expeditiously complete or modify the procurement package.

Once LMS determines that the procurement package is satisfactory, it will submit a written statement about the appropriateness of the tasks in the SOW and the reasonableness of costs to the Deputy General Counsel. The Deputy then will review LMS's statement and either approve or disapprove the procurement request. Where the Deputy approves the request, ATSS will submit the procurement package to PMD, accompanied by the Deputy General Counsel's authorization.

Normally the OGC review process described above takes six business days, four days for the ATSS and LMS review, including any necessary modifications to the package and another two days for the Deputy General Counsel's review. Throughout the entire procurement process, ATSS will be responsible for notifying the Deputy General Counsel and the field office legal unit of any significant delays.

(4) Commission Approval, Where Required

Ordinary requests for contracts for nonexpert support services for less than $100,000 do not require Commission approval, as long as they are bid competitively. But the Commission must vote to approve all requests for contracts for $100,000 or more. Obtaining Commission approval will take 10 to 15 business days.

(5) PMD Reviews Procurement Request, Publishes Notice of Intent to Contract, and Prepares Request for Proposal

PMD's initial role in the procurement process is to review the procurement package, obtain the names of vendors who may be interested in bidding on the contract, and prepare a draft Request for Proposal (RFP). During its review of the

procurement package, PMD will consult with the ATSS Program Officer on questions regarding the SOW and on any changes to the procurement package PMD believes are necessary. OGC and/or the Regional Attorney or designee will be required to make any necessary changes before PMD can complete processing of the procurement package.

Once PMD is satisfied that the procurement package is sufficient, PMD will publish an electronic notice of intent to contract in *Federal Business Opportunities* (*FedBizOps*)[6] for a 30-day period. The notice will summarize the proposed contract and ask prospective vendors to contact PMD if they are interested in receiving a RFP.

During the notice period, PMD will prepare the RFP using Standard Form 33, *Solicitation, Offer, and Award* and a number of attachments. The RFP typically contains the following major items:

(a) Standard Form 33, *Solicitation, Offer and Award*. Form 33 states when proposals are due, and identifies the Commission contact person who is always the Contracting Officer or Contract Specialist assigned by PMD.

(b) The Statement of Work.

(c) Contract clauses required by law.

(d) Instructions on how to submit proposals.

(e) Evaluation Criteria.

(f) Description of all other information that prospective vendors are required to furnish to permit a meaningful and fair evaluation of the vendors' proposals.

(6) OLC Reviews Draft RFP

PMD then submits the draft RFP to the Office of Legal Counsel (OLC), which is responsible for reviewing the RFP for legal and technical sufficiency.

[6] Recently *FedBizOps* was designated in the FAR as the universal electronic point of public access on the Internet to government-wide federal procurement opportunities that exceed $25,000. *See* 66 Fed. Reg. 27,407 (May 16, 2001). As of October 1, 2001, all public notices of procurement actions above $25,000 must appear in *FedBizOps*. Previously, notices were to be placed in the *Commerce Business Daily*.

(7) PMD Issues RFP

After PMD and OLC have approved the RFP, PMD will mail the RFP to all of the prospective vendors who responded to the notice of intent to contract during the 30 days since it appeared in *FedBizOps*.

(8) Vendors Submit Proposals

Prospective vendors have 30 days to submit their proposals to PMD.

(9) Trial Attorney Evaluates Proposals

Once PMD receives the proposals from the prospective vendors, it will evaluate them to make sure that the proposals are responsive and that the vendors are responsible before forwarding the proposals to the attorney. Using the evaluation criteria contained in the SOW, the attorney will evaluate the prospective vendors' technical and cost proposals and make a recommendation as to which vendor should receive the award. The trial attorney will have 15 days to submit a memorandum to PMD that contains a written evaluation of each prospctive vendor and the attorney's recommendation. If the trial attorney is not available during the evaluation period, the Regional Attorney should appoint an alternate evaluator.

(10) PMD Prepares Contract

Once PMD receives the trial attorney's written evaluation and recommendation, PMD will have 14 days to review it and determine which vendor will be awarded the contract. In the event that negotiations with one or more prospective vendors are necessary to resolve differences between the RFP and the proposals, PMD will have approximately 10 to 15 days in which to conduct such negotiations and to receive and review the final revised proposals. PMD's Contracting Officer always leads the negotiation team, and generally is assisted by the trial attorney and an attorney from OLC.

(11) OLC Reviews Proposed Contract

Following its selection of the vendor, PMD prepares the proposed contract and submits it to OLC, which has ten days to review it for legal and technical sufficiency.

(12) PMD Secures Executed Contract

After OLC completes its legal and technical sufficiency review, PMD will have15 days to mail the contract to the selected vendor for signature. Once the vendor signs and returns the contract to PMD, the Contract Officer in PMD will sign the contract on behalf of the Commission. The contracting process is completed when PMD notifies ATSS of the vendor's acceptance of the contract terms and forwards a copy of the executed contract to the trial attorney and/or the Contract Monitor listed in the SOW.

b. Soliciting Contracts through Noncompetitive Procedures

An agency may use noncompetitive procedures (or enter into "sole source" contracts) for nonexpert support services contracts only when:

> (1) the . . . services needed by the executive agency are available from only one responsible source and no other type of . . . services will satisfy the needs of the executive agency; [or]
>
> (2) the executive agency's need for the . . . services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.

41 U.S.C. § 253(c) (exceptions generally inapplicable to EEOC omitted); *see also EEOC Acquisition Policies and Procedures Handbook*, at pp. 2-4 to 2-8.

Because the exceptions are stringent, sole source contracts for nonexpert litigation support services are the exception rather than the rule. Rarely is there only one vendor (i.e., "responsible source") with the requisite skills, experience, staffing, and equipment to provide the required services. It would also be unusual for the need for nonexpert services to meet the "unusual and compelling urgency" standard.[7] Because of the unusual nature of this procedure in EEOC contracting, only the differences between the procedures for described above and the procedures for noncompetitive (or "sole source") contracts and are discussed below.

[7] Lack of litigation planning by the field office legal unit or the potential loss of fiscal year funding will not justify invoking an exception to the requirement for "full and open competition." *See EEOC Acquisition Policies and Procedures Handbook*, at p. 2-5.

(1) Trial Attorney Prepares Procurement Request

The Form 123 will contain all of the information discussed above, except that it must state that the request is noncompetitive (other than "full and open competition"). The Statement of Work will remain unchanged. The trial attorney must also include an EEOC Form 615, *Justification for Other Than Full and Open Competition,* as a part of the procurement package. (A blank copy of EEOC Form 615, *Justification for Other Than Full and Open Competition,* is appendix 3, hereto). The Justification will contain the following information:

(a) The name of the litigation.

(b) A description of the required services, including their estimated costs.

(c) The identification of the statutory authority under which the request is made (the "only responsible source" or "unusual and compelling urgency" standard).

(d) A demonstration that the proposed vendor is the "only responsible source" or the Commission's need is of "unusual and compelling urgency."

(e) A description of the market survey that was conducted to ascertain whether other qualified sources capable of providing the services exist. The market survey usually may be conducted through written or telephonic contacts with persons knowledgeable about the required services.

(f) Any other facts that may support use of noncompetitive procedures.

(g) Certification that the facts supporting noncompetitive procedures are complete and accurate.

(2) Headquarters Processing of Request, Including Justification

PMD will review the Justification for Other Than Full and Open Competition. If PMD disagrees with the Justification, PMD will return the request to the field office legal unit with appropriate comments and recommendations. If PMD agrees with the Justification, it will submit it to OLC for a legal sufficiency ruling. If OLC approves the Justification, PMD will submit the RFP and Justification to the Commission for its approval.

Once the Commission has approved the RFP and Justification, PMD will publish a notice in the FedBizOps stating that the Commission intends to contract for the requested services through other than "full and open competition". The notice must run for 30 days. Before PMD determines if the procurement will be pursued through other than "full and open competition", PMD and the requesting office will consider any responses to the notice. If other than "full and open competition" will be used, the Contracting Officer will certify that the Justification is accurate and complete and PMD will mail the RFP to the proposed vendor.

6. Resources on the Web

Title	Description and inSite or Web Address
Central Contractor Registration	Central Contractor Registration (CCR) - integrated database of small businesses available to contract with federal government agencies. CCC combines the former databases of the Small Business Administration (SBA), Department of Defense, Office of Management and Budget, and the General Services Administration (GSA). http://www.ccr.gov/
Commerce Business Daily Net	Until January 2002, Commerce Business Daily Net (CBD Net) was the electronic database of public notices of government-wide federal procurement opportunities for amounts over $25,000. It has been superceded by FedBizOpps. Maintained by U.S. Government Printing Office. http://cbdnet.access.gpo.gov/index.html
Federal Business Opportunities	As of January 2002, FedBizOpps superceded CBD Net as the electronic database of public notices of government-wide federal procurement opportunities for amounts over $25,000. Maintained by GSA. www.fedbizopps.gov
Federal Acquisition Regulation Net	Federal Acquisition Regulation Net (FAR Net) is a Web site that contains the federal regulations governing acquisitions. It is maintained by the Office of Federal Procurement Policy. http://www.arnet.gov/far

Title	Description and inSite or Web Address
GSA Services	GSA's Web page on services has links to information on the various services and products available to federal government agencies under the GSA Schedules and other programs. http://www.gsa.gov/Portal/gsa/ep/home.do?tabId=3

APPENDIX 1:

OPTIONAL FORM 347:

ORDER FOR SUPPLIES OR SERVICES

ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER

2. CONTRACT NO.

3. ORDER NO.

4. REQUISITION/REFERENCE NO.

5. ISSUING OFFICE *(Address correspondence to)*

6. SHIP TO:

a. NAME OF CONSIGNEE

b. STREET ADDRESS

c. CITY

d. STATE

e. ZIP CODE

f. SHIP VIA

7. TO:

a. NAME OF CONTRACTOR

b. COMPANY NAME

c. STREET ADDRESS

d. CITY

e. STATE

f. ZIP CODE

8. TYPE OF ORDER

☐ a. PURCHASE

REFERENCE YOUR: _____

Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any including delivery as indicated.

☐ b. DELIVERY -- Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

9. ACCOUNTING AND APPROPRIATION DATA

10. REQUISITIONING OFFICE

11. BUSINESS CLASSIFICATION *(Check appropriate box(es))*

☐ a. SMALL ☐ b. OTHER THAN SMALL ☐ c. DISADVANTAGED ☐ d. WOMEN-OWNED

12. F.O.B. POINT

13. PLACE OF

a. INSPECTION

b. ACCEPTANCE

14. GOVERNMENT B/L NO.

15. DELIVER TO F.O.B. POINT ON OR BEFORE *(Date)*

16. DISCOUNT TERMS

17. SCHEDULE *(See reverse for Rejections)*

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	
					0.00	

SEE BILLING INSTRUCTIONS ON REVERSE

18. SHIPPING POINT

19. GROSS SHIPPING WEIGHT

20. INVOICE NO.

21. MAIL INVOICE TO:

a. NAME

b. STREET ADDRESS *(or P.O. Box)*

c. CITY

d. STATE

e. ZIP CODE

17h. TOT. (Cont. pages)

0.00

17(i) GRAND TOTAL

22. UNITED STATES OF AMERICA BY *(Signature)*

23. NAME *(Typed)*

TITLE: CONTRACTING/ORDERING OFFICER

NSN 7540-01-152-8083
PREVIOUS EDITION NOT USABLE

OPTIONAL FORM 347 (REV. 6/95)
Prescribed by GSA/FAR 48 CFR 53.213(e)

Clear Form

SUPPLEMENTAL INVOICING INFORMATION

If desired, this order (or a copy thereof) may be used by the Contractor as the Contractor's invoice, instead of a separate invoice, provided the following statement, (signed and dated) is on (or attached to) the order: "Payment is requested in the amount of $_____. No other invoice will be submitted." However, if the Contractor wishes to submit an invoice, the following information must be provided; contract number (if any), order number, item number(s), description of supplies or service, sizes, quantities, unit prices, and extended totals. Prepaid shipping costs will be indicated as a separate item on the invoice. Where shipping costs exceed $10 (except for parcel post), the billing must be supported by a bill of lading or receipt. When several orders are invoiced to an ordering activity during the same billing period, consolidated periodic billings are encouraged.

RECEIVING REPORT

Quantity in the "Quantity Accepted" column on the face of this order has been: ☐ inspected, ☐ accepted, ☐ received by me and conforms to contract. Items listed below have been rejected for the reasons indicated.

SHIPMENT NUMBER	PARTIAL		DATE RECEIVED	SIGNATURE OF AUTHORIZED U.S. GOV'T REP.	DATE
	FINAL				
TOTAL CONTAINERS		GROSS WEIGHT	RECEIVED AT	TITLE	

REPORT OF REJECTIONS

ITEM NO.	SUPPLIES OR SERVICES	UNIT	QUANTITY REJECTED	REASON FOR REJECTION

APPENDIX 2:

EEOC FORM 123:

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

INSTRUCTIONS. **(See reverse for instructions on completing this form)**		**FOR PROCUREMENT USE ONLY**
(1) TO: *(Indicate appropriate action office)*	(2) REQUESTING OFFICE	(3) CONTACT *(Name/Division/Phone)*
(4) DELIVER TO: *(Shipping Address)* *(Inside Delivery)* Yes ☐ No ☐	(5) SUGGESTED VENDOR(S) *(Name/Address/Phone No.)*	
(6) DATE ITEM/SERVICE REQUIRED	(a) ☐ SOLE SOURCE *(Justification Required, if over $2,500)* (b) ☐ COMPETITIVE *(Attach list of 3 Names, if over $2,500)*	

(7) ACCOUNTING / APPROPRIATION DATA

The item(s) listed on this request are properly chargeable to the following allotments; the available balances of which are sufficient to cover the cost thereof, and funds have been committed.

(a) REQUISITION NO.	(b) APPROPRIATION CODE	(c) AMOUNT COMMITTED *(Check applicable boxes)* ☐ ORIGINAL ☐ INCREASE ☐ DECREASE ☐ CURRENT YEAR FUNDING ☐ PRIOR YEAR FUNDING	
(d) NAME/SIGNATURE OF ADMINISTRATIVE OFFICER	DATE	(e) NAME/SIGNATURE OF FISCAL OFFICER *(Prior Year Funding ONLY)*	DATE

(8) DESCRIPTION

(a) LINE ITEM	(b) DESCRIBE SUPPLIES/SERVICES/EQUIPMENT REQUIRED: *(Include all pertinent data e.g., Size, Model, Color, Serial No., Type of Material etc.)*	(c) QUANTITY	(d) UNIT	(e) UNIT PRICE	(f) ESTIMATED COST
		(g) TOTAL ESTIMATED COST			

(9) JUSTIFICATION AND SPECIAL INSTRUCTIONS *(Use additional sheet(s) if necessary)*

(10) TYPED NAME/SIGNATURE OF REQUESTOR	DATE	(11) TYPED NAME/SIGNATURE OF OFFICE/PROGRAM DIRECTOR	DATE
(12) SPECIAL ITEM APPROVAL *(Filing Equipment, Copiers, Word Processors, Library Subs., (See EEOC Order 360.001)*	DATE	(13) OTHER APPROVAL *(Specify Name/Title)*	DATE

INSTRUCTIONS FOR COMPLETING EEOC FORM 123

A. PREPARATION (Numbers correspond to block numbers on face of form)

(1) Enter the name of the office to receive and act upon the request.

(2) Enter the office name requesting the service/item.

(3) Enter the name, office breakdown, and telephone number of the contact person to call for additional information.

(4) Enter the complete address, including room number of the office to which the goods/ services are to be delivered. Check appropriate block to indicate if inside delivery is required.

(5) Enter the name, complete address, and telephone number of suggested vendor. Such entry does not mean that the vendor will be chosen.

(a) If the request is for a sole source requirement costing $2,500 or more, attach a justification explaining the need for the noncompetitive procurement.

(b) Competitive requirements exceeding $2,500 should include at least three (3) sources, if available. Provide name, address and telephone number (if known) for each source. Otherwise Procurement Management Division (PMD) will obtain names of vendors.

(6) Enter the latest date that the items/services can be delivered.

(7) To be completed by the designated person responsible for the office's cuff records. Failure to include these items will result in the return of the requisition to the requesting office for completion.

(a) Assign a requisition number for identification control and coding purposes.

(b) Enter the appropriation code consisting of a one-digit numerical code indicating the fiscal year office's Constant Data Code (CDC), and a four-digit sub-object class code to identify what CDC funds will be charged and for what purpose. (See EEOC Order 450.001, Coding Procedures for Financial Transactions and Personnel Actions).

(c) Indicate if the amount committed is an original request or an increase/ decrease to the original request. Also check if request is current year funding or prior year funding.

(d) Enter the typed name, signature, and date signed of the person certifying the availability of funds.

(e) If the request is charged to a previous year's funding then the Agency Fiscal Officer's name and signature is required.

(8) Each request shall contain a complete description of the supplies, material or services required in order to process the request.

(a) Use this column to list different line items from the same vendor. If the services or item is from a different vendor use a separate Form 123 for each type of service or item needed.

(b) Describe the specific services or items to be procured, including the model number, serial number of items to be repaired, color, size, type of material, etc.

(c) Enter the total quantity desired for each item listed.

(d) Enter the unit (single issue) of the quantity desired i.e., ea. for each, doz. for dozen, ctn. for carton, copy for copy, etc.

(e) Enter the estimated cost for one item of issue (e.g., $1,000 each).

(f) Enter the estimated cost for each line item (quantity x unit price = estimated cost).

(g) Enter total estimated cost of all the items listed in column (8)(f).

(9) Provide a detailed justification for all procurement actions for example.:

(a) Request for copiers.

(1) Estimated monthly volume.
(2) Number and kind of current copier, if any, on hand.

(b) Request for procured (cost) services.

(1) Reason for need of service.
(2) If service is listed as sole source, submit a justification with the request. (See EEOC Order 360.001, EEOC Acquisition Policy, Guidelines, and Procedures).

(10) Enter typed name/signature and date of person requesting the service/item.

(11) Enter the name/signature and date of Director attesting to his/her operating budget, specifically, a district director or one of headquarter's office/service directors.

(12) Enter the name of the appropriate office responsible for approving special items as required by EEOC Order 360.001, i.e., filing equipment, copiers, word processors, micrographics equipment, other specialized equipment,library publications/subscriptions, ADP equipment, etc.

(13) Enter typed name, title and signature of other officials required to approve the request before procurement action can be taken. For example, litigation/systemic support items require approval by the Office of General Counsel.

B. ROUTING OF FORM 123

(1) Request for supplies/services charged to the requesting office account shall be routed, if applicable, through the appropriate approving official(s) described in paragraphs 3 and 4 below, to PMD for processing.

(2) Requests for supplies, services, equipment, furniture, library publications/subscriptions, EEOC specialty forms, and purchased forms to be charged to Headquarters 2311 account shall be forwarded to the Director, Financial and Resource Management Services for approval and certification of funds. Upon approval, the request will be routed to PMD for procurement action.

(3) Requests for filing equipment, FAX machines, copiers, and other specialized equipment must be approved by OCFOAS, or if ADP equipment, by Office of Information Technology, before procurement action can be taken.

(4) Requests for litigation/systemic services require approvals as provided by EEOC Order 360.001, before Procurement action can be taken.

(5) Prepare Original and (2) copies. Original to Action Office, 1 copy to Administrative Officer, and 1 copy to Requestor.

APPENDIX 3:

EEOC FORM 615:

JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF CHIEF FINANCIAL OFFICER AND ADMINISTRATIVE SERVICES
PROCUREMENT MANAGEMENT DIVISION

JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION (FOR ALL NONCOMPETITIVE CONTRACT ACTIONS EXCEEDING $25,000)

(NOTE: TO COMPLETE THIS FORM, PLEASE SEE INSTRUCTIONS ON PAGE 4. SEPARATE SHEETS MAY BE ATTACHED WHEN ADDITIONAL SPACE IS REQUIRED TO PROVIDE SUFFICIENT BACKGROUND INFORMATION. EACH SHEET MUCH CLEARLY IDENTIFY THE APPLICABLE ITEM NUMBER(S).

1. REQUIRING ACTIVITY:

2. NATURE AND DESCRIPTION OF ACTION BEING APPROVED:

3. DESCRIPTION AND ESTIMATED VALUE OF SUPPLIES/SERVICES REQUIRED:

4. STATUTORY AUTHORITY PERMITTING OTHER THAN FULL AND OPEN COMPETITION (CHECK APPROPRIATE ITEM):

☐ (a) 41 U.S.C. 253(c)(1); FAR 6.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements. (Note: This authority should not be used if 4(b) or 4(c) is applicable).

☐ (b) 41 U.S.C. 253(c)(2); FAR 6.302-2 Unusual and Compelling Urgency. Full and open competition is impractical because any delay in award of this procurement would result in serious injury, financial or other, to the Government. This authority requires offers from as many potential sources as practical under the circumstances.

☐ (c) 41 U.S.C. 253(c)(5); FAR 6.302-5 Authorized or Required by Statute. A statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, e.g., SBA Section 8(a). Purchases from the Blind and other Severely Handicapped, or Federal Prison Industries (UNICOR) and Government Printing and Binding. This Authority shall not be used when a provision of law requires an agency to award a new contract to a specified non-Federal Government entity unless the provision of law specifically: (1) identifies the entity involved; (2) refers to Section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions; and (3) states that award to that entity shall be made in contravention of the merit-based selection procedures in Section 303(h) of the FPR Act.

5. DEMONSTRATION THAT THE ACQUISITION REQUIRES USE OF THE AUTHORITY CITED:
6. DESCRIPTION OF ANY EFFORTS MADE TO ENSURE OFFERS WERE SOLICITED FROM AS MANY POTENTIAL SOURCES AS PRACTICABLE:
7. DETERMINATION THAT ANTICIPATED COST IS FAIR AND REASONABLE:
8. DESCRIPTION OF MARKET SURVEY CONDUCTED AND RESULTS (If a market survey was not conducted, please state reason):
9. OTHER FACTS SUPPORTING THE USE OF OTHER THAN FULL AND OPEN COMPETITION:

10. LIST OF SOURCES EXPRESSING WRITTEN INTEREST IN THIS ACQUISITION, IF ANY:

11. STATEMENT OF ACTIONS THE AGENCY MAY TAKE TO REMOVE OR OVERCOME ANY BARRIERS TO COMPETITION BEFORE TAKING ANY SUBSEQUENT ACQUISITION FOR THE SUPPLIES OR SERVICES:

12. CONTRACTING OFFICER/TECHNICAL CERTIFICATION

I CERTIFY THAT THE ABOVE JUSTIFICATION IS ACCURATE AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

12A. Contracting Officer Certification/Approval:

DATE: _____

_____
(Signature of Contracting Officer)

12B. Technical Official Certification:

DATE: _____

_____
(Signature of Technical Officer)
(If Applicable)

EEOC FORM 615 (Revised) (3/96) Previous Editions of This Form Are Obsolete and Should Not Be Used

INSTRUCTIONS FOR COMPLETING EEOC FORM 615

JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION (FAR 6.302)

BLOCK 1 REQUIRING ACTIVITY. Identify Agency Organization, i.e., service, division and/or program office, for which action is being procured.

BLOCK 2 NATURE AND DESCRIPTION OF ACTION BEING APPROVED. State basis for noncompetitive action, i.e., purchase request from authorized agency personnel and FAR citation of proposed action.

BLOCK 3 DESCRIPTION OF SUPPLIES/SERVICES REQUIRED. Provide a brief narrative description of the specific supplies or services to be procured (Include estimated value).

BLOCK 4 STATUTORY AUTHORITY PERMITTING OTHER THAN FULL AND OPEN COMPETITION. Check appropriate item (a,b, or c). Item must be completed. (NOTE: Selection must meet the criteria relative to circumstances with respect to authority cited under FAR 6.302, permitting the use of other than full and open competition. See FAR 6.303 covering requirements for justifications to support the use of these authorities).

BLOCK 5 DEMONSTRATE THAT THE ACQUISITION REQUIRES USE OF THE AUTHORITY CITED. Provide background data to support the authority cited. For Item (a), describe the unique characteristics of the services or supplies justification, i.e., why these characteristics are essential or mandatory; and why no other source can satisfy the agency needs; For Item (b), demonstrate by time- line and other factors reason there is insufficient time to permit use of full and open competition; For Item (c) cite the specific statute that authorizes or requires this procurement be awarded to the specified source. (Note: Lack of advanced planning should not be used to justify use of other than full and open competition.)

BLOCK 6 DESCRIPTION OF ANY EFFORTS MADE TO ENSURE OFFERS WERE SOLICITED FROM AS MANY POTENTIAL SOURCES AS PRACTICABLE. . Describe action taken to identify sources that can provide comparable or compatible items. Include whether a Commerce Business Daily (CBD) notice was or will be publicized or, if not, which exception under FAR 5.202 applies. When using 4(b), identify other sources solicited or justify reason only one source was solicited.

BLOCK 7 DETERMINATION THAT ANTICIPATED COST IS FAIR AND REASONABLE. (To be completed by Contracting Officer) State basis for determining price is fair and reasonable.

BLOCK 8 DESCRIPTION OF MARKET SURVEY CONDUCTED AND RESULTS. State whether other qualified sources capable of satisfying the government's minimum needs exist in the commercial marketplace and indicate method used, i.e., written or telephonic to conduct the survey. When a survey is impractical, i.e., unusual and compelling urgency, please explain.

BLOCK 9 OTHER FACTS SUPPORTING THE USE OF OTHER THAN FULL AND OPEN COMPETITION. Provide any additional facts not included in Block 5 which support the authority selected. For example, for 4(a), explain why specifications were not developed for competitive solicitation or for 4(b) provide data, estimated cost or other description of the extent and nature of the harm to the government if full and open competition is used.

BLOCK 10 LIST OF SOURCES EXPRESSING WRITTEN INTEREST IN THIS ACQUISITION, IF ANY. List the complete name and address of sources who have indicated, in writing, an interest in providing the required supplies/services.

BLOCK 11 STATEMENT OF FUTURE ACTIONS TO OVERCOME COMPETITIVE BARRIERS. Identify actions, if any, to be taken before subsequent acquisition to reduce or remove any factors, i.e., restricted specifications, that preclude a full and open competitive procurement.

BLOCK 12 CERTIFICATION AND APPROVAL SIGNATURES

12A Contracting Officer Signature and Date required.

12B Technical Official Signature and Date required, if applicable. Signature(s) by Technical or Requirement personnel certifies that any supporting technical data upon which this justification is based, (e.g., verifying agency minimum needs; schedule requirements and/or the rationale for other than full and open competition) is accurate and complete.

REGIONAL ATTORNEYS' MANUAL

PART 4

RESOURCES AND TECHNICAL ASSISTANCE

SECTION II

CONTRACT MONITOR

SECTION II
CONTRACT MONITOR

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CONTRACT MONITOR'S DUTIES AND RESPONSIBILITIES

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CONTRACT MONITOR'S DUTIES AND RESPONSIBILITIES[1]

One of the most important aspects of the procurement process occurs after the actual award of a contract; that is, the monitoring of contracts that have been made by the Government.

1. Definition of Contracting Officer

Contracting Officers are agents of the federal government empowered to execute contracts and obligate government funds. The Contracting Officer has authority delegated from the Chair or Management Director according to Federal Acquisition Regulation 1.603. The Contracting Officer's authority is governed by procurement law, executive orders, regulations and other applicable procedures, clearances and approvals. Only a Contracting Officer is authorized to obligate agency funds. The EEOC's Contracting Officer is located in headquarters in the Office of the Chief Financial Officer and Administrative Services, Procurement Management Division (PMD).[2] The Procurement Management Division Director can be contacted to answer any questions regarding procurement laws or regulations.

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[1] Since this section was originally written, the Commission has begun using the Interior Department Electronic Acquisition System - Procurement Desktop (IDEAS - PD) to prepare, process, and track procurement documents. (See IDEAS-PD *User's Guide*). In addition, the Commission has required use of the Integrated Financial Management System (IFMS) since October 2002 for all purchases of $2,500.00 and more and for any purchases (awards, purchase requisitions, contracts, and inter-agency agreements) made with purchase orders. This subsection does not address any changes to the procurement process made subsequent to Commission adoption of IDEAS-PD and IFMS.

[2] For contracts processed at the field office level (those of $25,000 or less), PMD designates the Office Director as the Contracting Officer.

2. Definition of Contract Monitor

A Contract Monitor is a qualified technical representative recommended by a Program Director for designation by the Contracting Officer to a particular contract. A Contract Monitor is EEOC's point of contact with the Contractor and as such has specific responsibilities. **Neither the Contract Monitor nor any other OGC employee has the authority to obligate agency funds for any purpose.** A detailed description of the Contract Monitor's responsibilities and duties is provided below. All questions concerning the Contract Monitor's duties and responsibilities should be directed to PMD, at (202) 663-4222.

3. Responsibilities of Contract Monitor

OGC in the past has experienced problems with monitoring expert witness procurements. The areas of concern range from the Contract Monitor's failure to request in a timely manner that the Commission exercise its option to extend a period of performance, to the unauthorized commitment of funds. Court imposed litigation deadlines are never a sufficient reason for failing to follow proper procurement procedures.

The Contract Monitor is responsible for the following:

a. Reviewing and assuring the contractor's compliance with the technical requirements of the contract, including providing the Contractor with technical direction, which must remain within the scope of the contract as it is written.

b. Inspecting and certifying acceptability of the services rendered throughout the period of performance in terms of quantity, quality, timeliness and cost as these terms are defined in the contract.

c. Making sure that the Contractor is fully aware of the following:

(1) That the contract shall not cover charges for any items that are not specifically provided for by the contract. The Contractor is to be cautioned that if he or she provides services/supplies during the performance of the contract that are not specifically set forth as priced items in the contract, regardless of who requests them (including the Contract Monitor), payment will not be made for them under the contract;

(2) That the Contractor must notify the Contract Monitor when less than 20% of a particular phase's funds remain unused, and when it is necessary to obtain additional funds for a particular phase.

d. Ensuring that his or her supervisor is informed/consulted when:

(1) The Contractor reports or materials are to be rejected;

(2) The Contractor's performance is not satisfactory or problems with the contractor are anticipated;

(3) The Contractor desires to propose changes to the contract.

[Note: In the case of litigation support contracts for over $25,000, the Deputy General Counsel and the Director, ATSS, must be sent copies of all billing and contract-related information provided to supervisors.]

4. Duties of Contract Monitor

The Contract Monitor acts on behalf of the Contracting Officer by performing the following specific duties:

a. Reviews and approves reports and all materials provided by the Contractor as called for by the contract. Notifies the Contracting Officer and Supervisor if reports or other items submitted are to be rejected and states the basis for rejection.

b. Completes and forwards timely progress reports, and final reports to the Contracting Officer.

c. Certifies the Contractor's invoices for payment, including any credit due the Government. This includes the authority to request the Contractor to make corrections and/or submit new invoices when clerical or other errors are detected.

[Note: The Prompt Payment Act requires notification to the Contractor within 7 days of receipt of an invoice containing errors, and suitable documentation of such notification.]

d. Keeps detailed records of the Contractor's performance, and if it is not satisfactory or if problems are anticipated, notifies the Contracting Officer and

supervisor, in writing, as to the cause and recommends a course of action from a technical standpoint. Immediate notification is essential to assure that the Contracting Officer takes timely and appropriate action to protect the Government's rights under the contract.

e. Provides copies of all correspondence between the Contract Monitor and the Contractor relating to contract issues to the Contracting Officer and supervisor.

f. Prepares memoranda for the record covering all meetings/discussions between the Contract Monitor and the Contractor and forwards copies to the Contracting Officer and supervisor. It is critically important to keep the Contracting Officer informed of the context of all communications with the Contractor to prevent misunderstandings or situations that could affect the contract terms or conditions and become the basis of future claims against the Government.

g. Advises the Contractor that in the event the Contractor desires to propose a change, he or she should submit the request in writing to the Contract Monitor and specifically identify the effect that the proposed change(s) will have on the terms of the contract (technically and/or monetarily). The Contract Monitor will review the proposed change(s) and if he or she agrees that the changes are necessary to achieve the desired outcome, he or she will recommend to the Contracting Officer and supervisor, in writing, that the proposed change(s) should be incorporated into the contract.

h. Assures that changes in work under the contract are not implemented before written authorization or a contract modification is issued by the Contracting Officer. Costs for work performed may not be allowed if not authorized under the contract. No change or commitment should be directed without prior written authorization by the Contracting Officer.

i. Recommends, in writing, to the Contracting Officer through the supervisor any changes in the contract required by the Government with detailed justification for the proposed change.

j. Makes site visits, when appropriate, to the Contractor's facility and checks contractor performance to include:

(1) Actual performance versus scheduled and reported performance. The Contracting Officer and supervisor should be informed of any adverse conditions noted;

(2) Changes in technical performance which may affect the Contractor's financial status, create personnel or labor difficulties, overextend facilities, etc.;

(3) Verification that the employees charged to the contract are actually performing work under the contract;

(4) Verification that all Government Furnished Property (GFP) is being used strictly for the contract and that proper safeguards are in place to protect all GFP from theft or damage.

k. Ensures timely notification by the Contractor of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.

l. Advises the Contracting Officer through the supervisor on the status of the following at the completion of the contract:

(1) Whether all articles and services required to be furnished or performed under the contract have been technically accepted;

(2) The disposition of all Government Furnished Property or materials;

(3) Any other outstanding technical issues.

m. Prepares requests to (i) fund each contract phase, (ii) obtain additional funding, if necessary, for each phase, and (iii) exercise the option contained in most expert services contract to extend the period of performance to ensure successful completion of the expert's services. Before extending the period of performance, the Contract Monitor should confer with the Contractor to determine whether the Contractor intends to exercise an option to increase his or her hourly rates. If so, the Contract Monitor should request additional funding to cover future rate increases. This request shall include a document certifying that funds are available and shall be submitted at least 90 days before the period of performance expires.

n. Although the Contracting Officer is ultimately responsible for the following, the Contract Monitor shall also provide technical support, when requested, in the following areas:

(1) Approving premium overtime;

(2) Debriefing unsuccessful offerors;

(3) Resolving post-award disputes/protests;

(4) Resolving terminations and claims;

(5) Negotiating/issuing time extensions;

(6) Approving key personnel changes;

(7) Issuing suspensions/stop work orders;

(8) Assessing/approving liquidated damages;

(9) Negotiating/issuing equitable adjustments;

(10) Documenting/issuing Contracting Officer's final decisions;

(11) Preparing appeal files;

(12) Determining whether a conflict of interest exists; and

(13) Preparing data/responses for audit/Congressional inquiries.

5. Procedures

The procedures to be used to inspect and accept the work of the Contractor for conformance with terms of the contract are determined by the Contract Monitor. If the goods or services are acceptable, an EEOC Form 112, *Delivery Receipt*, should be prepared immediately and forwarded to:

Financial Management Division
1801 L Street, N.W., Room 2005
Washington, D.C. 20507

A copy of the Form 112 should be sent to ATSS.[3]

An invoice cannot be paid without the delivery receipt. The Prompt Payment Act requires agencies, in the absence of contractually specified payment dates, to pay a proper invoice within 30 days of initial receipt by PMD. OMB Circular A-125, Prompt Payment, requires agencies to make payments as close as possible to, but not later than, the due dates, or if approved, the discount date. Payment will be based on receipt of proper invoices and satisfactory performance of contract items. If an agency takes a discount after the expiration of the discount period or fails to make timely payment, interest penalties must be paid from the funds available for the administration or operation of the program for which the penalty was incurred. The interest penalty must be paid whether the Contractor requests it or not. If the goods or services are unacceptable, the Contracting Officer must be contacted for instructions.

A copy of EEOC Form 112, *Delivery Receipt*, is appendix 1, hereto.

6. Reports

Copies of certified invoices and/or any correspondence dealing with the contract should be sent to:

U.S. Equal Employment Opportunity Commission
Financial Management Division
P.O. Box 33459
Washington, D.C. 20033-0459

7. Reviews

a. For cost-reimbursable type contracts, the Contract Monitor should review weekly the costs of services being provided to determine if the costs will exceed the amount obligated by the contract. Since invoices are usually received long after the fact, monitors have an obligation to request estimated costs from the vendor if it appears that the obligated funds will be exhausted. In those cases where, after review, it appears that the costs will exceed the amount obligated by the contract, the Contract

[3] In the case of litigation support contracts not exceeding $25,000, a copy of Form 112 should be sent to the field office Administrative Officer.

Monitor should immediately prepare an EEOC Form 123, *Requisition for Supplies, Services, Equipment, Furniture*, requesting a contract modification, and transmit the Form 123 to the Contracting Officer. The request for modification must contain adequate justification for the increased costs.

b. For firm-fixed price type contracts, the Contract Monitor, on a regular basis, should review the costs of services being provided to ensure they do not exceed the amount obligated by the contract. In those cases where after review it appears that a change in the scope/requirements of the contract is necessary, the Contract Monitor should immediately prepare an EEOC Form 123 requesting a contract modification, and transmit the Form 123 to the Contracting Officer. The request must contain adequate justification for the requested modification.

c. Contract Monitors are also responsible for continually determining whether the contract is on schedule, estimating whether the work will be completed within the contractually specified performance period, and requesting time extensions, when appropriate, well in advance of the contract termination date.

A copy of EEOC Form 123, *Requisition for Supplies, Services, Equipment, Furniture*, is appendix 2, hereto.

8. Modifications

The EEOC Contracting Officer is the only person who can authorize a modification to the contract. Requests to alter the contract in any manner must be in writing and must be sent to the Contracting Officer. Changes to the contract cannot be honored unless there is a copy of Standard Form 30, *Amendment of Solicitation/Modification of Contract*, signed by both the Contracting Officer for EEOC and, if necessary, an official of the Contractor.

All requests for modifications, especially those involving increased costs, should be submitted as soon as possible. Federal regulations forbid payments in excess of the amount obligated on the procurement documents. Payments in excess of the existing obligation cannot be made even though services have been received unless a modification has been processed obligating the additional amount of money.

A copy of Standard Form 30, *Amendment of Solicitation/Modification of Contract*, is appendix 3, hereto.

APPENDIX 1

FORM 112

DELIVERY RECEIPT

DELIVERY RECEIPT

TO	FROM

DELIVERY				VENDOR	PURCHASE ORDER NO.
	PARTIAL		COMPLETE		

DELIVERED ITEM(S)

ITEM NO.	DESCRIPTION *(Include Item Serial No.)*	QUANTITY ORDERED	QUANTITY RECEIVED	DATE RECEIVED

REMARKS

I certify that the item(s) and/or services listed above have been received/rendered and accepted as of this date: _____

_____ _____

(Typed Name, Title, Address and Telephone No.) **(Signature)**

APPENDIX 2

EEOC FORM 123

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

REQUISITION FOR SUPPLIES, EQUIPMENT, SERVICES, FURNITURE

INSTRUCTIONS. (See reverse for instructions on completing this form)

FOR PROCUREMENT USE ONLY

(1) TO: *(Indicate appropriate action office)*	(2) REQUESTING OFFICE	(3) CONTACT *(Name/Division/Phone)*

(4) DELIVER TO: *(Shipping Address)* *(Inside Delivery)* Yes ( ) No ( )	(5) SUGGESTED VENDOR(S) *(Name/Address/Phone No.)*
(6) DATE ITEM/SERVICE REQUIRED	(a) ( ) SOLE SOURCE *(Justification Required, if over $2,500)* (b) ( ) COMPETITIVE *(Attach list of 3 Names, if over $2,500)*

(7) ACCOUNTING / APPROPRIATION DATA

The item(s) listed on this request are properly chargeable to the following allotments; the available balances of which are sufficient to cover the cost thereof, and funds have been committed.

(a) REQUISITION NO.	(b) APPROPRIATION CODE	(c) AMOUNT COMMITTED *(Check applicable boxes)* ( ) ORIGINAL ( ) INCREASE ( ) DECREASE ( ) CURRENT YEAR FUNDING ( ) PRIOR YEAR FUNDING

(d) NAME/SIGNATURE OF ADMINISTRATIVE OFFICER	DATE	(e) NAME/SIGNATURE OF FISCAL OFFICER *(Prior Year Funding ONLY)*	DATE

(8) DESCRIPTION

(a) LINE ITEM	(b) DESCRIBE SUPPLIES/SERVICES/EQUIPMENT REQUIRED: *(Include all pertinent data e.g., Size, Model, Color, Serial No., Type of Material etc.)*	(c) QUANTITY	(d) UNIT	(e) UNIT PRICE	(f) ESTIMATED COST
		(g) TOTAL ESTIMATED COST			

(9) JUSTIFICATION AND SPECIAL INSTRUCTIONS *(Use additional sheet(s) if necessary)*

(10) TYPED NAME/SIGNATURE OF REQUESTOR	DATE	(11) TYPED NAME/SIGNATURE OF OFFICE/PROGRAM DIRECTOR	DATE
(12) SPECIAL ITEM APPROVAL *(Filing Equipment, Copiers, Word Processors, Library Subs., (See EEOC Order 360.001)*	DATE	(13) OTHER APPROVAL *(Specify Name/Title)*	DATE

INSTRUCTIONS FOR COMPLETING EEOC FORM 123

A. PREPARATION (Numbers correspond to block numbers on face of form)

(1) Enter the name of the office to receive and act upon the request.

(2) Enter the office name requesting the service/item.

(3) Enter the name, office breakdown, and telephone number of the contact person to call for additional information.

(4) Enter the complete address, including room number of the office to which the goods/services are to be delivered. Check appropriate block to indicate if inside delivery is required.

(5) Enter the name, complete address, and telephone number of suggested vendor. Such entry does not mean that the vendor will be chosen.

(a) If the request is for a sole source requirement costing $2,500 or more, attach a justification explaining the need for the noncompetitive procurement.

(b) Competitive requirements exceeding $2,500 should include at least three (3) sources, if available. Provide name, address and telephone number (if known) for each source. Otherwise Procurement Management Division (PMD) will obtain names of vendors.

(6) Enter the latest date that the items/services can be delivered.

(7) To be completed by the designated person responsible for the office's cuff records. Failure to include these items will result in the return of the requisition to the requesting office for completion.

(a) Assign a requisition number for identification control and coding purposes.

(b) Enter the appropriation code consisting of a one-digit numerical code indicating the fiscal year office's Constant Data Code (CDC), and a four-digit sub-object class code to identify what CDC funds will be charged and for what purpose. (See EEOC Order 450.001, Coding Procedures for Financial Transactions and Personnel Actions).

(c) Indicate if the amount committed is an original request or an increase/decrease to the original request. Also check if request is current year funding or prior year funding.

(d) Enter the typed name, signature, and date signed of the person certifying the availability of funds.

(e) If the request is charged to a previous year's funding then the Agency Fiscal Officer's name and signature is required.

(8) Each request shall contain a complete description of the supplies, material or services required in order to process the request.

(a) Use this column to list different line items from the same vendor. If the services or item is from a different vendor use a separate Form 123 for each type of service or item needed.

(b) Describe the specific services or items to be procured, including the model number, serial number of items to be repaired, color, size, type of material, etc.

(c) Enter the total quantity desired for each item listed.

(d) Enter the unit (single issue) of the quantity desired i.e., ea. for each, doz. for dozen, ctn. for carton, copy for copy, etc.

(e) Enter the estimated cost for one item of issue (e.g., $1,000 each).

(f) Enter the estimated cost for each line item (quantity x unit price = estimated cost).

(g) Enter total estimated cost of all the items listed in column (8)(f).

(9) Provide a detailed justification for all procurement actions for example:

(a) Request for typewriters.

(1) Number of typewriters on hand.
(2) Number of clerical positions.
(3) Serial number and age of trade-in.
(4) Service history of trade-in, if unit is less than 12 years.

(b) Request for copiers.

(1) Estimated monthly volume.
(2) Number and kind of current copier, if any, on hand.

(c) Request for procured (cost) services.

(1) Reason for need of service.
(2) If service is listed as sole source, submit a justification with the request. (See EEOC Order 360.001, EEOC Acquisition Policy, Guidelines, and Procedures).

(10) Enter typed name/signature and date of person requesting the service/item.

(11) Enter the name/signature and date of Director attesting to his/her operating budget, specifically, a district director or one of headquarter's office/service directors.

(12) Enter the name of the appropriate office responsible for approving special items as required by EEOC Order 360.001, i.e., filing equipment, copiers, word processors, micrographics equipment, other specialized equipment, library publications/subscriptions, ADP equipment, etc.

(13) Enter typed name, title and signature of other officials required to approve the request before procurement action can be taken. For example, litigation/systemic support items require approval by the Office of General Counsel.

B. ROUTING OF FORM 123

(1) Request for supplies/services charged to the requesting office account shall be routed, if applicable, through the appropriate approving official(s) described in paragraphs 3 and 4 below, to PMD for processing.

(2) Requests for supplies, services, equipment, furniture, library publications/subscriptions, EEOC specialty forms, and purchased forms to be charged to Headquarters 2311 account shall be forwarded to the Director, Financial and Resource Management Services for approval and certification of funds. Upon approval, the request will be routed to PMD for procurement action.

(3) Requests for filing equipment, word processors, copiers, and other specialized equipment must be approved by FRMS, or if ADP equipment, by Information Resource Management Services, before procurement action can be taken.

(4) Requests for litigation/systemic services require approvals as provided by EEOC Order 360.001, before Procurement action can be taken.

(5) Prepare Original and (2) copies. Original to Action Office, 1 copy to Administrative Officer, and 1 copy to Requestor.

APPENDIX 3:

STANDARD FORM 30

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES

2. AMENDMENT/MODIFICAITON NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicble)

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than Item 6)	CODE

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICIATION NO.
		9B. DATED (SEE ITEM 11)
		10A. MODIFICATION OF CONTRACT/ORDER NO.
		10B. DATED (SEE ITEM 11)
CODE / FACILITY CODE		

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a)By completing items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPIRATION DATA (If required)

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA (Signature of Contracting Officer)	16C. DATE SIGNED

INSTRUCTIONS

Instructions for items other than those that are self-explanatory, are as follows:

(a) Item 1 (Contract ID Code). Insert the contract type identification code that appears in the title block of the contract being modified.

(b) Item 3 (Effective date).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed to by the contracting parties.

(3) For a modification issued as an initial or confirming notice of termination for the convenience of the Government, the effective date and the modification number of the confirming notice shall be the same as the effective date and modification number of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the contacting officer's determination of the amount due in settlement of a contract termination, the effective date shall be the same as the effective date of the initial decision.

(c) Item 6 (Issued By). Insert the name and address of the issuing office. If applicable, insert the appropriate issuing office code in the code block.

(d) Item 8 (Name and Address of Contractor). For modifications to a contract or order, enter the contractor's name, address, and code as shown in the original contract or order, unless changed by this or a previous modification.

(e) Item 9, (Amendment of Solicitation No. - Dated), and 10, (Modification of Contract/Order No. - Dated). Check the appropriate box and in the corresponding blanks insert the number and date of the original solicitation, contract, or order.

(f) Item 12 (Accounting and Appropriation Data). When appropriate, indicate the impact of the modification on each affected accounting classification by inserting one of the following entries.

(1) Accounting classification _____
Net increase $ _____

(2) Accounting classification _____
Net decrease $ _____

NOTE: If there are changes to multiple accounting classifications that cannot be placed in block 12, insert an asterisk and the words "See continuation sheet".

(g) Item 13. Check the appropriate box to indicate the type of modification. Insert in the corresponding blank the authority under which the modification is issued. Check whether or not contractor must sign this document. (See FAR 43.103.)

(h) Item 14 (Description of Amendment/Modification).

(1) Organize amendments or modifications under the appropriate Uniform Contract Format (UCF) section headings from the applicable solicitation or contract. The UCF table of contents, however, shall not be set forth in this document

(2) Indicate the impact of the modification on the overall total contract price by inserting one of the following entries:

(i) Total contract price increased by $ _____

(ii) Total contract price decreased by $ _____

(iii) Total contract price unchanged.

(3) State reason for modification.

(4) When removing, reinstating, or adding funds, identify the contract items and accounting classifications.

(5) When the SF 30 is used to reflect a determination by the contracting officer of the amount due in settlement of a contract terminated for the convenience of the Government, the entry in Item 14 of the modification may be limited to --

(i) A reference to the letter determination; and

(ii) A statement of the net amount determined to be due in settlement of the contract.

(6) Include subject matter or short title of solicitation/contract where feasible.

(i) Item 16B. The contracting officer's signature is not required on solicitation amendments. The contracting offier's signature is normally affixed last on supplemental agreements.