REGIONAL ATTORNEYS' MANUAL

PART 3

CONDUCTING LITIGATION

OFFICE OF
GENERAL COUNSEL

APRIL 2005

PART 3. CONDUCTING LITIGATION

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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.G. 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

B. EXECUTIVE ORDER 12988
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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 alternative 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 it 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 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 to a Rule 50(a) motion that 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, it 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. If an inconsistency in verdicts arises as a result of jury instructions and the jury's answers, that 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.

- A party waives the right to a JMOL if the motion is made at the close of the opponent's case, and thereafter the moving party introduces evidence in its own behalf. If that occurs, the moving party may renew the motion at the close of all the evidence. If the party fails to renew the motion, that party may not make a later motion for JMOL after the verdict is delivered, nor may that party claim error on appeal from a denial of the motion at the close of the opponent's evidence.

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 at the close of all the evidence.

- 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 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 ten days after entry of judgment or, if a verdict was not returned, within 10 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 Rule 50 motions. 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 Rule 50 motions. 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 10 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 10 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 Rule 50(a), Fed. R. Civ. P., 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 adverse 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 at the close of the evidence 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. Format of Appeal Recommendations

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) the date of judgment or other appealable order;

(2) the dates of filing and court action on postjudgment motions, if any;

(3) the date that notice of appeal must be filed (generally 60 days from entry of final order (see Rule 4, Fed. R. App. P.).

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 Rule 52, Fed. R. Civ. P.; a mixed issue of law and fact; or an issue involving an abuse of judicial discretion.

c. Background and Factual Statement

The recommendation should identify all background and evidentiary facts relevant to each appealable issue. The history of the litigation and the district court's

decision should each be briefly summarized. The summaries should include record citations and a discussion of evidence supporting the court's findings, particularly on issues subject to "clearly erroneous" review.

d. Analysis

The recommendation should give the legal, factual, and policy considerations militating for and against appeal. Relevant legal authorities must be cited.

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.

D. PROTECTING CONFIDENTIALITY OF AGENCY INFORMATION

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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