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Appendix 1

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C.

GENERAL COUNSEL

May 20, 2002

MEMORANDUM FOR: Principal Staff

FROM: Richard A. Hauser, General Counsel, C

SUBJECT: Use of Electronic Mail

This is to provide advice on the proper use of internal electronic mail by Departmental employees and the potential for disclosure of information contained in the Department's electronic mail system. Electronic mail should not be used for requesting or rendering formal legal opinions or other documents that are considered Federal records. The Federal Records Act, 64 Stat. 583 (codified as amended in scattered sections of 44 U.S.C.) defines Federal records as any document, regardless of physical form or characteristic made or received by an agency of the United States that evidences the policies, decisions, procedures, operations, or other activities of the Government.

The Department has an established policy for the use of electronic mail that is set forth in Chapter 7 of HUD Handbook 2400.1, Information Resources Management (IRM) Policies, which provides that the "primary purpose of the electronic mail system is to enable users to exchange brief, informal, work-related communication." The Handbook prescribes that the use of electronic mail is limited to the following:

(1) Brief, informal communications, e.g., an exchange of ideas related to government business;

(2) Coordination, e.g., meetings;

(3) In place of the telephone or interoffice mail.

Electronic mail may also be used to transmit spreadsheets, word processing documents and other files, so long as the electronic message is not the official means of clearance of the attached document.

You should be aware, in addition, that electronic mail may be subject to disclosure in connection with litigation brought against the Department and/or through the Freedom of Information Act ("FOIA").

The legal trend is to equate electronic mail with paper documents in litigation discovery requests and FOIA requests. Accordingly, many electronic mail messages and files may be vulnerable to disclosure. Even strict adherence to the Department's current electronic mail policy, as set forth in HUD Handbook 2400.1, does not guarantee that messages will be immune from disclosure.

Disclosure of Electronic Mail pursuant to Litigation Discovery

Where a party to a lawsuit requests a document from the Department, the initial test in determining whether the Department must release the document is a case-by-case determination whether the document is relevant, or would lead to the discovery of relevant evidence in the case. The same test would apply to electronic mail. Since we cannot predict what lawsuits may occur in the future, or which prior electronic mail messages might be relevant, there is no guarantee that a message will be immune from discovery.

Even if a message is relevant to the lawsuit, HUD may object to its disclosure based on 8 judicially recognized privileges. There are three of those privileges that HUD customarily asserts: (1) attorney-client; (2) work product; or (3) deliberative process. HUD may claim the attorney-client privilege when the electronic mail message is a confidential communication between an attorney and a client or between two attorneys of the same client, and the communication's purpose is legal assistance. HUD may claim the work product privilege for electronic mail messages prepared in anticipation of litigation. The message's author need not be an attorney. HUD may claim the deliberative process privilege for electronic mail messages that consist of opinions or mental processes and that are preliminary to an agency decision. Purely factual content, as opposed to opinions or mental impressions, however, may be subject to discovery, unless the facts are inextricably intertwined with the opinions or recommendations. Moreover, before the privilege will apply, the Secretary must assert in writing that disclosure would inhibit the free flow of information in the Department.

Thus, before sending or retaining an electronic mail message, keep in mind the above privileges. If you have doubt as to whether your message may be privileged, exercise caution in sending an electronic mail message that could be subject to discovery in litigation. Also, please note that, even if HUD asserts a privilege, it must disclose the existence of the message. If the privilege is challenged, HUD must disclose the contents of the message to the court to determine whether the message should be released.

Disclosure of Electronic Mail pursuant to the Freedom of Information Act

When processing a FOIA request, HUD must disclose all "agency records" not covered by one of FOIA's 9 specified exemptions. This is so even if no litigation is involved. Personal documents, however, are not subject to FOIA disclosure. Before sending or retaining an electronic mail message that you do not wish to be disclosed, consider whether the message is a disclosable "agency record."

Several factors are relevant to the determination whether a message is an "agency record": (1) whether the purpose and use of the electronic mail message was for agency business rather than for the personal convenience of the individual author; (2) whether other HUD employees might receive and rely on the electronic mail message to carry out HUD's business; and (3) whether HUD has exercised institutional control over the electronic mail message mandating its creation or retention.[1] The National Archives and Records Administration has promulgated a rule that federal agencies retain electronic mail that is evidence of the agency's organization, functions, policies, decisions, procedures, operations, or other activities or that contains information of value. 60 Fed. Reg. 44640 (August 28, 1995). See also current Department policy, as set forth in Chapter 7-2, "Records Retention Responsibilities," of HUD Handbook 2400.1.[2]

Even if a message is an "agency record," it may be withheld if it is covered by a specific exemption. FOIA exempts several types of documents from disclosure, including those documents that normally would be privileged under the litigation discovery context discussed above. FOIA's Exemption 5 also includes deliberative process, attorney-client and attorney work product privileges and the standards for protection from disclosure under those privileges of the exemption would apply to documentation created via an electronic format. In

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[1] Draft documents that are circulated on electronic mail systems may be records (36 C.F.R. §1234.24(a)(6)) (2001) if they were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up or to communicate with agency staff about agency business and they contain unique information, such as substantive annotations or comments, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities. (36 C.F.R. §1222.34(c) (2001)).

[2] See also Armstrong v. Executive Office of the President, 810 F. Supp. 335, 340-41 (D.D.C. 1993), substantive communications otherwise meeting the definition of federal records that had been saved on the electronic mail come within the Federal Records Act's purview.

Grand Central Partnership v. Cuomo, 166 F.3d 473, (2nd Cir. 1999), electronic mail was found to be covered by the deliberative process privilege of Exemption 5. However, segregable factual information in electronic mail would be releasable under the Exemption 5 deliberative process privilege. North Dartmouth Properties, Inc. v. HUD, 984 F. Supp. 65 (D. Mass. 1997).

There is no guarantee that electronic mail messages will be immune from disclosure pursuant to either a litigation discovery request or a FOIA request. Moreover, the "issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA."[1] For this reason, please exercise caution before sending messages.[2] Also, be mindful that, even if you delete a message you have sent, the addressee retains a copy of the message and has the discretion to forward that message. Likewise, after receiving an electronic mail message, keep in mind its vulnerability to disclosure before forwarding the message.

I recommend that you circulate this memorandum to your staff. Should you have any further questions concerning this memorandum, please contact Carole Wilson, Associate General Counsel for Litigation, at 708-0300.

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[1] North v. Walsh, 881 F.2d 1088, 1097-1100 (D.C. Cir. 1989); Playboy Enterprises Inc. v. Department of Justice, et al., 677 F.2d 931, 936 (D.C. Cir. 1982).

[2] For example, because of the feature of the electronic mail system which allows the copying of documents to an unlimited number of people, caution should be exercised in copying attorney-client documents. Since the attorney-client privilege pertains to confidential communications, unnecessary or excessive dissemination of copies of attorney-client documents via electronic mail could lead to a challenge to use of the privilege by the Department.

Appendix 2

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C.

GENERAL COUNSEL

May 7, 2002

MEMORANDUM FOR: All Employees[1]

FROM: Richard A. Hauser, General Counsel, C

SUBJECT: HUD Policies on Communications on Litigation-Related Matters

This advice is issued periodically to remind all employees of the importance of observing long-standing HUD policies concerning communications related to litigation matters as set forth in Departmental Regulations and the HUD Litigation Handbook. Simply stated, no employee may produce any materials or information from the files of the Department or provide any testimony relating to official information in response to a subpoena, order or other demand or request without prior consultation with the Office of General Counsel (OGC).

In order for OGC to effectively represent the Department and its officials and employees in litigation, protect sensitive, confidential information and the deliberative processes of HUD, and help ensure the fairness of the judicial process and the public trust by maintaining HUD's impartiality among private litigants, it is critical that each employee be familiar with the role of OGC and the importance of prior OGC consultation concerning the procedures to follow when communicating concerning matters relating to past, current or threatened litigation that may affect the Department. These matters, which are discussed below, include, but are not limited to, responses to subpoenas, requests for expert or opinion testimony, public statements, release of HUD documents or other information, or other public interaction concerning matters in litigation.

Responses to Subpoenas and Other Demands for Testimony, Production of Documents or Disclosure of Information

HUD regulations specifically describe the procedures to be followed by the Department and its employees for responding to subpoenas and other demands of courts

[1] This does not include Inspector General employees who are governed by their own regulations concerning such communications.

or other authorities[1] and for providing testimony in legal proceedings.[2] Note that in any legal proceeding exclusively among private litigants, no employee of the Department may testify as an expert or opinion witness as to any matter related to his or her duties or the functions of the Department, including the meaning of Departmental documents.[3] Only the Secretary may grant a waiver[4] to this provision, and OGC must concur on all waiver requests.[5]

If you receive a summons, a written or oral, formal or informal request, subpoena, order, or other demand from a court, other authority, or any other person who is not a HUD employee, to testify, produce documents or disclose information gleaned from the files of the Department or acquired as a part of the performance of your official duties or because of your official status about which HUD employees are required to seek prior permission, you must immediately contact Carole Wilson, Associate General Counsel for Litigation (202-708-0614, ext. 5080), or, in her absence, Shari Weaver, Managing Attorney for Litigation (202-708-0614, ext. 5362) for guidance. Testimony includes, but is not limited to, any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

Public Statements and Release of HUD Documents or Information[6]

As the HUD Litigation Handbook points out, no Department official, without concurrence of counsel,[7] shall make or issue any public statement or release any report or other documents about any matter in which litigation is pending or threatened, including information about past litigation if that may affect the Department's litigation ability. In general, this limitation on communications means there shall be no meetings, conferences, correspondence, or conversations with litigants or outside counsel prior to

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[1] 24 C.F.R. § 15.202(b), Subpart C.

[2] 24 C.F.R. § 15.302 and § 15.303, Subpart D. When the Federal Government is not a party, Section 15.303 prohibits Departmental employees from testifying concerning matters related to his or her duties or the functions of the Department.

[3] 24 C.F.R. § 15.303.

[4] 24 C.F.R. § 5.110. Part 5 of 24 C.F.R. states that the Secretary may waive any provision of title 24 upon determination of "good cause."

[5] Waiver of Regulations Issued by HUD; Clarification of Authority During Transition Period, 66 Fed. Reg. 13944 (2001).

[6] The prohibitions in this memorandum do not apply to requests for release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a, Congressional demands and Congressional requests for testimony or records, or demands upon or requests for a HUD employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of HUD. However, you should advise OGC about any such requests as soon as you receive them so that OGC can exercise appropriate oversight and coordination.

[7] Litigation Handbook, 1530.1 Rev-4 Chg-2, (1-3c)(c)(2), 1-6. (1996).

consulting OGC. This includes making any public statements or taking any actions detrimental to HUD's position except as may be authorized by law.[1]

If you are contacted about matters in current or threatened litigation, please advise the party that it is Departmental policy to refrain from commenting on litigation to avoid prejudicing the position of the parties.[2]

Your attention to these important requirements will ensure that the Department and its officials and employees are effectively represented, will assure consistency in the application of HUD's litigation policies and will assist HUD in maintaining the fairness of the judicial process and the public trust.

Finally, if you have any questions about this memorandum or any other HUD policies on litigation-related matters, please contact Ms. Wilson or Ms. Weaver at the numbers above.

[1] Litigation Handbook, 1530.1 Rev-4 Chg-2, (1-3c)(c)(2), 1-7, (1996).
[2] Litigation Handbook, 1530.1 Rev-4 Chg-2, (1-3c)(c)(2), 1-7, (1996).

Appendix 3

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C.

GENERAL COUNSEL

May 3, 2004

MEMORANDUM FOR: All Regional Counsel

FROM: Richard A. Hauser, General Counsel, C

SUBJECT: Delegation of Authority to Regional Counsel

This memorandum is intended to adopt and amend a memorandum of the same subject dated September 4, 1990, by former General Counsel Frank Keating, and a memorandum with the subject "Delegation of Authority – Affirmative Litigation Revision to Litigation Handbook," dated March 7, 1996, by former General Counsel Nelson Díaz. The above-referenced memoranda by General Counsels Keating and Díaz are hereby reaffirmed and strengthened.

Because of the strong desire of both Secretary Jackson and myself to emphasize ethics and enforcement, as well as our desire to give the "field" greater authority and more responsibility, broader litigation authority must be delegated to the Offices of Regional Counsel and corresponding Field Offices. Accordingly, all Offices of Regional Counsel will receive direct litigation authority for the following categories of litigation:

Category A, Delegation to Regional Counsel without prior suit authorization requirement:

1. All complaints for specific performance of the regulatory agreement requirement to provide HUD with required financial reports.

Careful review of the annual reports provides a broad and useful preventive measure, which enables HUD to ascertain violations and diversions before they reach an acute state.

2. All complaints for specific performance of the regulatory agreement requirement to maintain books and records in a manner for reasonable inspection or audit by the Department.

3. All suits to compel the mortgagor to provide monthly financial statements where this is required.

4. All suits to require the removal and discharge of an unauthorized second lien or

encumbrance, but only in those circumstances where the mortgagor is no longer insured but rather the mortgage is held by the Secretary.

5. All suits for unauthorized use of multifamily projects income or assets that do not exceed an aggregate damage claim of $1,000,000. (Amount sought after doubling must not exceed $1,000,000.)

The first course of action for these Category A cases will be for the appropriate housing official to send to the proposed defendant a 30-day demand letter for compliance. This letter must be either prepared or reviewed and concurred upon by your office. Your review should consider specifically whether both the violation and the type of corrective action to be taken are specifically and accurately stated and to assure that the proper party (the owner, not the management agent) is addressed. A copy of this letter shall simultaneously be forwarded to the Associate General Counsel for Program Enforcement and the Associate General Counsel for Housing.

In the event that the 30-day time period has elapsed with no compliance, you may proceed to litigation. The terms of the Regulatory Agreement specifically state that the Secretary need not provide further notice to the mortgagor. This "default" notification is a decision to be left to your litigation attorney. The Office of Regional Counsel should prepare and transmit a complaint and referral, in essence a litigation report, to the U.S. Attorney. These documents must be sent to the Program Enforcement Division at least two weeks prior to the transmittal to the U.S. Attorney so that the case can be reviewed and monitored. A copy must be sent to the Department of Justice so that a member of the Commercial Litigation Branch staff can be assigned to monitor the case. The copy should be sent to:

J. Christopher Kohn, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, DC 20044

You should continue to keep the Program Enforcement Division informed and copied. All judicial decisions must be sent to the Associate General Counsel for Program Enforcement or his designee, and the procedure prescribed in the Litigation Handbook for appeals will be observed.

Category B, <u>Delegation to Regional Counsel with prior suit authorization requirement</u>:

1. Suits for unauthorized use of multifamily project income or assets that exceed an aggregate damage claim of $1,000,000.

The reason for this sum of $1,000,000 is that $1,000,000 is the limitation of the U.S.

Attorney to bring suit without obtaining prior approval from the Department of Justice. Specific authority for suits that exceed an aggregate claim of $1,000,000 must be given by both the Program Enforcement Division and by the Department of Justice. Your proposed litigation report to the U.S. Attorney must contain a detailed statement of the nature of the claim, the dates when the diversions occurred, and the date or dates when the Department

became aware of the diversions. We would also require that you identify any argument that could be made that HUD had prior constructive knowledge of the diversions and identify what assets the proposed defendant has to satisfy a judgment for double damages.

2. All cases involving the enforcement of HUD's prior demand upon a mortgagor to remove a management agent and hire HUD-approved management.

Please be sure that the Handbook requirement of 30 days notice has been followed. Accordingly, the 30-day notice letter to the mortgagor should identify the cause and your review of this information should satisfy you as to its legal sufficiency.

Generally, Category B cases will be routinely approved after the Program Enforcement Division has reviewed the proposed complaint and litigation report to the United States Attorney. The turn-around for this review will be 15 business days or less unless there are substantive problems. In those rare cases, Regional Counsel will be advised by phone within 10 days so that needed clarification and revisions can be quickly obtained.

The procedure for handling Category B cases is as follows:

The Regional Counsel will provide the Program Enforcement Division with a proposed complaint and a litigation report that will include a statement of the nature of the case along with a detailed description of the violations, the type of HUD program involved, the nature of the relief sought and a proposed 30-day demand for compliance letter. These shall be accompanied by a transmittal memorandum that will be signed by the Regional Counsel and that will have the written concurrence of the Director of the Multifamily Housing HUB. For cases involving diversions of assets, the proposed litigation report must contain the documentation of the unauthorized distribution, identification of whether the cost is ineligible or questioned, the provision of the Regulatory Agreement, HAP contract or other handbook violations and any correspondence with the mortgagor concerning the diversions.

The Program Enforcement Division will put the demand letter in final form, meet with the Office of Housing or the appropriate program office to obtain suit authorization and will copy the Office of Regional Counsel with the signed 30-day demand letter. Receipt of this letter will constitute suit authorization from the Program Enforcement Division.

The same procedure for referring the case to the Office of the U.S. Attorney for litigation will be followed as for Category A except that all pleadings will be forwarded to the Program Enforcement Division for review and approval prior to transmittal. If there are no difficulties with these documents, the Program Enforcement Division will process the

litigation request within 15 business days of receipt except in those extraordinary situations where more time is needed. Where circumstances dictate, the Associate General Counsel for Program Enforcement or the Assistant General Counsel for Program Enforcement has the authority to have a Category A or B delegated case returned to the Office of Program Enforcement for handling.

SETTLEMENT

Settlement offers in Category A cases shall be approved by the Regional Counsel with the concurrence of the Director of the Multifamily Housing HUB. In specific cases the Associate General Counsel for Program Enforcement may require prior approval of settlements of Category A cases.

In the event of a settlement offer in Category B, prior approval must be obtained from the Program Enforcement Division. To this end, the Regional Counsel shall submit a written recommendation and include a memorandum from the client program office, if available.

IMPLEMENTATION

The Program Enforcement Division will designate a monitoring attorney for each case that has been delegated to the Region and Field Office. This attorney will be available to offer assistance through all stages of the litigation.

HUD's Field Offices should be encouraged to prepare such referrals to be submitted through your office. To this end we would like you to identify those Field Offices and the present numbers of attorneys who can conduct such litigation with the help of either the Program Enforcement Division or the Office of the U. S. Attorney.

This procedure for delegation of handling of affirmative litigation is for immediate implementation.

Appendix 4

DEPARTMENT OF JUSTICE
WASHINGTON

June 26, 1975

Robert R. Elliott, Esquire
General Counsel
Department of Housing and Urban
Development
Washington, D.C. 20410

Dear Mr. Elliott:

Reference is made to your letter dated June 6, 1975, responding to our letter dated March 19, 1975, advising that you desire to come to an arrangement on establishing specific guidelines concerning representation in State court eviction and rent collection proceedings.

Apparently you agree with the specific guidelines set forth in our letter dated March 19, 1975, with the exception of the $1,000 limitation for rent collections. Accordingly, we are formalizing an arrangement for specific guidelines concerning representation in State court eviction and rent collection proceedings as follows:

(1) The Department of Housing and Urban Development is authorized to institute actions in the Superior Court of the District of Columbia and the appropriate courts of the various states to recover possession of property and to collect claims for delinquent rent where the amount of the claim does not exceed $5,000, where no question of title is involved and where no novel or important question is presented.

(2) Any case in which a novel or important question develops or in which a judgment adverse to the United States is entered shall be brought to the attention of this Department. Further procedure and responsibility for handling the case will then be determined.

We trust this arrangement will be satisfactory to you.

Sincerely,
/s/
Wallace H. Johnson
Assistant Attorney General
Land and Natural Resources Division

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

February 17, 1981

MEMORANDUM TO: All Regional Counsel

FROM: Gershon M. Ratner, Office of General Counsel, GT

SUBJECT: Eviction/Rent Collection Claims in Single-Family and Multifamily Secretary-Owned Properties

By agreement between the Lands Division of the Department of Justice (DOJ) and HUD in June 1975, HUD is authorized to retain private counsel to represent HUD as plaintiff in litigation which meets the following criteria:

1) is filed in State court;

2) involves evictions or collection of rent delinquencies not exceeding $5,000;

3) does not involve questions of title; and

4) does not present novel or important questions of law or policy.

Under the agreement, HUD is obligated to notify DOJ of all adverse judgments rendered in cases in which private counsel has been retained and to notify it whenever a novel or important issue arises

Please review the practices within your jurisdiction to assure that area management brokers, project managers and their attorneys are following Departmental policy described above. Attached for your assistance is a copy of a memorandum from Regional Counsel Marvin H. Lerman to Field Counsel dated January 14, 1981 on this subject.

Please advise us by March 11, 1981 as to the results of your review and describe any modifications to existing policy which you believe could improve the handling of such litigation.

Thank you for your assistance.
/s/
Gershon A. Ratner
Associate General Counsel for Litigation

Attachment

Appendix 5

Format for Letters of Recommendation to the Solicitor General
Recommending For or Against Appeal[1]

TIME LIMITS

Indicate date notice of appeal must be filed, which under Rule 4, Federal Rules of Appellate Procedure, is ordinarily sixty (60) days after entry of the district court's judgment.

RECOMMENDATION

State whether you are recommending for or against appeal.

QUESTION PRESENTED

State the question presented as it would appear in an appellate brief.

STATEMENT

Give a brief statement of the pertinent facts. This ordinarily should be no more than a one or two page statement of the basic facts in the case.

DISCUSSION

Give the basic reasoning supporting your recommendation. Ordinarily this section of the memorandum should not exceed three pages—the length, of course, will depend upon the nature of the problem. Routine "no appeal" cases can often be disposed of in several sentences, e.g., "Appeal is not warranted because the issues presented by this case are entirely factual and the district court's findings of fact are not clearly erroneous. A significant sum of money is not involved."

[1] The same format should be followed with respect to memoranda recommending for or against certiorari.

Appendix 6

U. S. Department of Housing and Urban Development
Office of Public and Indian Housing

Special Attention of:	NOTICE PIH 2003-24 (HA)
Public Housing Agencies; Regional Directors; Regional Counsel; State/Area Coordinators; Public Housing Directors; FO Counsel	Issued: September 26, 2003 Expires: September 30, 2004

Cross Reference: 24 CFR Part 85; HUD Handbook 7460.8 REV 1, Procurement Handbook for Public Housing Agencies (REV 2 pending); HUD Litigation Handbook 1530.1 REV-4, dated May 8, 1981, as amended (CHG 1, February 17, 1994; CHG 2, February 15, 1996).

Subject: Procurement of Legal Services by Public Housing Agencies

1. Purpose and Applicability. This Notice sets forth procedures for the procurement of legal services by Public Housing Agencies (PHAs). This Notice supersedes similar guidance previously provided to HUD staff and PHAs including PIH 90-47, Procedures for Procuring Professional Services. This Notice is not intended as the primary source of guidance in this area, but is provided to remind all HUD Offices and PHAs of the proper procedures for procuring legal services and to briefly review areas of common interest and concern. This Notice applies to all PHA procurements of legal services that are funded in whole, or in part, with HUD grant funds subject to 24 CFR part 85 (e.g., Operating Fund subsidies and Capital Fund).

2. Background. PHAs obtain required outside legal services through procurement contracts. Such procurement is subject to the requirements set forth in 24 CFR Part 85, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," in particular, 24 CFR § 85.36. In accordance with 24 CFR § 85.22, the costs of legal services incurred under HUD grants (including those obtained under contract) must be reasonable and necessary. Section 85.22(b) incorporates the Office of Management and Budget (OMB) Circular A-87, which contains a set of cost principles that PHAs must use for determining the allowability of costs they incur under Federal grants and provides guidance in their use. Contracts for litigation services are also to meet the requirements of the HUD Litigation

Handbook 1530.1 REV-4 dated May 8, 1981 (the "Litigation Handbook"), as amended (CHG 1, February 17, 1994; CHG 2, February 15, 1996).

3. Methods of Procurement. Section 85.36(d) permits PHAs to use all of the contracting methods listed below. PHAs are expected to choose the method of procurement, which is reasonable based on the facts surrounding the particular situation. The methods of procurement outlined in section 85.36(d) are:

Small purchase procedures (85.36(d)(1)). Those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than $100,000 (the simplified acquisition threshold fixed at 41 U.S.C. 403(11) and currently set at $100,000) in the aggregate or a lower dollar amount as established by the PHA (e.g., to conform to State law). If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

Sealed bids (85.36(d)(2)). This method is normally not appropriate for securing legal services. Sealed bidding may only be used when it is possible to quantify the costs of the required services (e.g., number of hours) to permit the submission of firm bids and award a firm fixed-price contract to the lowest responsive and responsible bidder considering only price and price-related factors. In addition, it is often critical to consider other factors besides price (e.g., experience) when selecting a legal services contractor. Sealed bidding does not permit the use of other factors.

Competitive proposals (85.36(d)(3)). This method is generally preferred when procuring professional services because it allows for the consideration of technical quality or other factors (in addition to price) for securing services estimated to cost more than $100,000 or a lower threshold as established by the PHA (e.g., to conform to State law). Competitive offers are solicited, proposals are evaluated and award is made to the offeror whose proposal is most advantageous to the PHA, with price and other factors (as specified in the solicitation) considered. Either a fixed-price or cost reimbursement type contract may be awarded. This method is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the conditions in § 85.36(d)(3) must be followed.

Noncompetitive proposals (85.36(d)(4)). This method may only be used when the other methods of procurement are infeasible and the circumstances described in § 85.36(d)(4) are applicable (e.g., legal services are available from only a single source; public exigency or emergency for the requirements will not permit a delay resulting from competitive solicitation; after solicitation of a number of sources,

competition is determined inadequate; or HUD authorizes the use of noncompetitive proposals. An example of a situation considered to violate the requirements of full and open competition in § 85.36 would be noncompetitive award to an attorney for legal services on a retainer basis.

4. Time and Materials Contracts (85.36(b)(10)). Legal services can be procured on an hourly basis using a type of contract known as time-and-materials (or sometimes, "labor-hour") contracts. Under these contracts, the contractor's services are pre-priced (usually, in terms of hours) in the contract, and the PHA orders services in unit amounts (e.g., hours) as needed until the funds in the contract are exhausted. PHAs may use this type of contract only after the PHA determines that no other contract is suitable; and, if the contract includes a ceiling price that the contractor exceeds at its own risk.

5. Obtaining Legal Services by Procurement or Employment Methods. PHAs may employ an attorney directly (house counsel), or the PHA may enter into a procurement contract with an attorney or firm. The procurement of legal services shall follow the procedures outlined in paragraph 3 above. The employment of house counsel is not covered by 24 CFR § 85.36. PHA house counsel are ineligible to receive procurement contracts for legal services. All services of a PHA house counsel would be part of his/her employment contract and are not to be procured separately. Where legal services are desired outside of the scope of services provided by the PHA house counsel, PHAs may use one of the procurement procedures described in paragraph 3 above.

6. Contracts for Litigation Services.
    a. General Requirements and Regional Counsel Approval.
    In addition to the requirements described above in paragraph 3, the Litigation Handbook sets thresholds for Regional Counsel and Headquarters Program Associate General Counsel approval of litigation service contracts. With the exception of litigation involving a PHA acting as a section 8 private developer, a PHA must submit to HUD Regional Counsel for prior written concurrence any litigation service contract where the fee is expected to exceed $100,000 with a private attorney involving PHA program, project, or activity receiving loan, grant or other subsidy assistance from HUD. Such contracts shall make provision for reasonable fees and reimbursement of necessary expenses. If additional funding or budget revision will be required to cover the cost of litigation services, the PHA shall consult appropriate Field and Regional Offices staff.

    Upon receiving a request for concurrence, if Regional Counsel is satisfied that the PHA has not violated HUD requirements or is otherwise not at fault (Note: In cases where the PHA is at fault, the Regional Counsel may authorize the limited use of program funds for

the PHA's defense to facilitate settlement or obtain judicial definition of the required relief.), the Regional Counsel shall concur in a request received from the PHA for approval of a contract for litigation services if he/she is also satisfied that: the contract contains adequate protection against fraud and abuse; the contract contains all mandatory provisions for professional service contracts for the program or activity giving rise to the litigation; and the contract amount is reasonable. The contract amount will be considered reasonable if it does not exceed the rates prevailing in the same or similar localities for the same or similar services or the PHA can demonstrate special circumstances that require payment of a higher amount. Regional Counsel's concurrence signifies that the attorney's fee (proposed contract price) under the contract is an allowable project expense, but is not a certification that there are sufficient project funds available to cover the contract amount.

b. Headquarters Program Associate General Counsel Approval. No contract for attorney's fees for litigation services entered into by any PHA, which calls for an estimated maximum price in excess of $200,000 may be approved by the Regional Counsel without the prior concurrence of the Headquarters Program Associate General Counsel.

c. Use of Fixed-Price Contracts. Fixed-price proposals will be approved only where the issues are uncomplicated, extensive preparation probably is not required, and any trial that may ensue probably will not be lengthy. Ordinarily, a fixed-price proposal in excess of $100,000 shall not be approved but Regional Counsel may approve a higher amount for good cause. For additional information regarding the above litigation services requirements, consult paragraphs 2-2f(3), 3-3b(3) and 5-4 of the Litigation Handbook.

7. Contract Addendum – Legal Services Protocol. As indicated above, recent attention to the key role that attorneys play in PHA activities prompt the following guidance to promote and improve the Department's partnership with PHAs. Attached to this Notice is a form of addendum to an engagement letter, which the Department urges to follow in procuring and utilizing legal services. The form of engagement letter is intended to set a course that will be helpful to both PHA and HUD partners, clarifying a method of operation for HUD's statutory oversight responsibilities while optimizing the statutory directive in section 2(a)(1)(C) of the United States Housing Act of 1937 "to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public."

8. Legal Fee Management Service Contracts. PHAs may also find it helpful to engage a legal fee management firm when heavy

demand or high local priorities or other conditions merit secure oversight of legal services.

____/s/_____
Michael M. Liu
Assistant Secretary
for Public and Indian Housing

Attachment

ATTACHMENT

LEGAL SERVICES CONTRACT PROTOCOL

The Department urges inclusion of the following provisions into all legal services contracts executed and/or administered by Public Housing Agencies, unless no federally provided funds will be used to administer the contract.

* * * *

ADDENDUM TO ENGAGEMENT AGREEMENT

1. The [name of Public Housing Agency] (PHA) and [name of legal service individual or firm] (LSP) engaged to provide professional legal services to the PHA in connection with [briefly and precisely describe the nature, scope and limits of the legal services to be provided by the LSP] agree that the provisions of this Addendum to the Engagement Agreement are hereby incorporated into PHA and LSP's engagement agreement as if they had been set forth at length therein.

2. During the pendency of the legal services engagement, LSP shall not, without HUD approval, represent any officer or employee of PHA, in her/his individual capacity, in connection with potential civil liability or criminal conduct issues related to PHA operations.

3. LSP has an obligation not to, and shall not, interfere with, disrupt, or inappropriately delay or hinder any authorized monitoring, review, audit, or investigative activity of HUD (including the Office of Inspector General), the General Accounting Office (GAO), or the officers and employees of HUD and GAO. Any and all representation by LSP cannot be inconsistent with the foregoing obligation. Specifically, LSP shall not deny access to HUD, GAO, or the officers and employees of HUD and GAO, to PHA records in response to document demands by HUD, GAO, or the officers and employees of HUD and GAO, notwithstanding possible discovery privileges that would otherwise be available to PHA. HUD requires public housing agencies to provide HUD, GAO, or the officers and agents of HUD and GAO, with "full and free" access to all their books, documents, papers and records. See 24 CFR. §85.42(e)(1); HUD Handbook 7460.7 REV-2, §1-2(B)(2).

4. PHA and LSP shall make available for inspection and copying, by HUD (including the Office of Inspector General), GAO, and the officers and employees of HUD and GAO, all invoices, detailed billing statements, and evidence of payment thereof relating to LSP's engagement. Such records constitute "PHA records" and are subject to section 3, above.

5. If HUD or PHA determines that LSP is violating any provision of this Addendum to the Engagement Agreement, it shall timely notify LSP of such violation. LSP will have 48 hours following its receipt of the notice of violation to cease and desist from further violation of the addendum. If LSP fails to adequately cure the noticed violation within 48 hours: (A) HUD, in its discretion, may demand that PHA terminate the professional legal services engagement for breach, or, henceforth, satisfy all costs associated with the engagement with non-Federal funds; and/or (B) PHA, in its discretion, may terminate the professional legal services engagement for breach. Additionally, HUD may sanction LSP pursuant to 24 CFR. Part 24.

6. Should any part, term, or provision of this Addendum to the Engagement Agreement be declared or determined by any court of competent jurisdiction to be illegal or invalid, the validity of the remaining parts, terms, and provisions shall not be affected.

Date: [Enter date]

_____ _____

[Enter name of PHA Exec. Dir.] [Enter name of LSP key partner]