

## CHAPTER 1. GENERAL INFORMATION ON HUD LITIGATION

### 1-1. FUNCTION OF HANDBOOK AND DEFINITIONS

#### a. FUNCTION OF THE LITIGATION HANDBOOK

This handbook describes the responsibilities of the Office of General Counsel for handling and monitoring litigation in which HUD or a HUD Official is a party. Similarly, it describes the responsibilities and duties of Program Officials with respect to such litigation. It includes information about how a HUD Official can influence the position taken in litigation, what an employee should do when served with a summons or a subpoena, and how the filing of a lawsuit affects the conduct of the Department's programs.

This handbook also covers the handling of litigation that does not involve the Department or a Department employee as a party but in which a Department-funded entity is a party.

For Assisted Housing, the authority to enforce these requirements is based in part on various program requirements including the Annual Contribution Contract (for section 8 and Public Housing); 24 CFR Part 85 (as to procurement of legal services with grant funds); OMB Circular A-87 (as to cost reasonableness of legal services funded with grant funds); HUD's authority to monitor and enforce HUD-funded activities and review the eligibility of expenditures; program statutes and regulations on eligible activities; OIG and GAO authorities to review grant funded program records; and PIH Notice 2003-24 (HA), issued September 26, 2003 (including Addendum to Engagement Agreement).

This handbook does not cover:

- (1) cases handled by outside counsel, as authorized by the General Counsel, and/or his/her delegatee and the Department of Justice. It also does not apply to routine affirmative or defensive foreclosure litigation which is handled by the Regional Counsel;
- (2) civil actions for enforcement brought pursuant to Sections 812(o) or 814(a) of the Fair Housing Act, 42 U.S.C. §§ 3612(o), 3614(a);
- (3) bankruptcy proceedings, as such (but see Sub-Section b, below, definitions of Defensive Litigation and Affirmative Litigation, concerning adversary proceedings within Bankruptcy proceedings);
- (4) administrative proceedings brought by, or in which, HUD is a party;
- (5) litigation involving a HUD-funded recipient in which the costs of litigation, settlement and judgment are *entirely* covered by an insurance

policy or indemnity contract; or

- (6) litigation, appeal, settlement, or litigation/legal service contracts that will not be HUD-funded.

b. DEFINITIONS

Affidavit shall mean a statement of facts relevant to issues in the litigation, whether in the form of a notarized statement sworn under oath or an unsworn Declaration executed under penalty of perjury.

Affirmative Litigation shall mean litigation in which the United States, the Secretary, or a representative thereof, functions as a plaintiff or asserts a counterclaim, cross claim, or third-party claim. A Bankruptcy proceeding shall not be characterized as litigation covered by this Handbook, unless HUD is an active participant. For example, filing a proof of claim is not "active participation."

Assistant Secretary shall mean the Assistant Secretary or other official of comparable level with responsibility for the program or activity involved in the litigation.

Associate shall mean the Associate General Counsel to whom a case is assigned for handling or monitoring, unless otherwise noted.

Defensive Litigation shall mean litigation in which the Department or an employee in an official capacity is a defendant. A Bankruptcy proceeding is not litigation, but an adversary proceeding within a Bankruptcy proceeding in which HUD is named as a defendant is Defensive Litigation.

Department shall mean the U.S. Department of Housing and Urban Development.

Department of Justice or DOJ shall mean the Executive Department headed by the Attorney General, including the staff located in United States Attorneys' offices as well as the staff located in Washington, D.C., unless otherwise indicated.

Documents shall mean all forms of data and information recordation in and on all forms of media, including, but not limited to, hard copies, electronic, audio, visual, optical imaging, microfiche/microfilm, which are presently maintained and stored in the Federal Records Centers System, commercial storage facilities, at Headquarters and in Field Offices. See also the "Document Disposition Schedules for Departmental Records and Documents" for further discussions of formal documentary administrative records and defined Official HUD documents.

An Official Record is any documentary material, regardless of physical

form, that is made or received by HUD in connection with the transaction of public business, and appropriate for preservation by HUD, or its legitimate successor, as evidence of the organization, functions, policies, decisions, procedures, operations or because of the value of the information they contain (44 U.S.C. § 3301).

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. (See May 20, 2002 Memorandum from General Counsel, "Use of Electronic Mail").

Employee shall include any official or other individual employed or, as appropriate, formerly employed by HUD.

Federal Party Litigation, as used in this Handbook, shall include all litigation in which the Department or an employee in an official capacity is a party, whether as a plaintiff, defendant or intervenor. It excludes FHA foreclosure actions unless otherwise noted.

HUD Assistance Recipient shall mean any person or entity receiving a loan, grant, or subsidy from HUD but does not include persons or entities whose only connection with HUD is FHA mortgage insurance.

Litigating Associate refers to one of the Associate General Counsel listed in Section 1-2b(2).

Litigation shall include any civil action at law or proceeding in equity involving a program, project or activity receiving HUD assistance, but does not include administrative or criminal proceedings.

Monitor or Monitoring requires that the Associate answer legal and policy questions and provide assistance to a Litigating Associate and a Regional Counsel.

Non-Federal Party Litigation shall include all litigation in which the Department has an interest because of the involvement of a HUD Assistance Recipient's HUD-funded activities but in which neither the Department nor an employee in an official capacity is a party.

Non-routine with respect to a settlement shall mean that the outcome will have a significant impact on policy, legal precedent, Departmental programs or other matters of vital interest to the Secretary and/or Assistant Secretaries, or the dollar amount requires the approval of the General Counsel.

OGC refers to the Office of General Counsel of the U.S. Department of Housing and Urban Development.

Program Associate refers to the Associate General Counsel with responsibility for the HUD program involved in litigation or potential litigation.

Public Housing Agency or PHA shall mean any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) that is authorized to engage in or assist in the development or operation of low-income housing. 42 U.S.C. 1437a.

Routine with respect to a settlement shall mean that the outcome will not have a significant impact on policy, legal precedent, Departmental programs or other matters of vital interest to the Secretary and/or Assistant Secretaries, or the dollar amount does not require the approval of the General Counsel.

Settlement shall mean the resolution of a filed case in federal party litigation prior to a final judgment or the resolution of an affirmative matter after a referral to DOJ has been accepted but before DOJ acts on the referral by filing a pleading or other document.

Threatened Litigation shall include any communication, oral or written, announcing an intention to institute litigation against HUD or a HUD employee, or in the context of Chapter 5 of this Handbook, against a HUD Assistance Recipient.

## 1-2. REPRESENTATION OF THE DEPARTMENT AND ITS OFFICIALS

### a. AUTHORITY

Authority for representing the Department in litigation generally resides in the Department of Justice (DOJ), according to Federal statute, 28 U.S.C. 516. DOJ performs this function through attorneys located in Washington, D.C., and through the various United States Attorneys throughout the country.

HUD attorneys in the Headquarters Office in Washington, D.C., and in the Offices of Regional Counsel have responsibility for developing HUD's position in litigation with the active participation of program offices, representing HUD's position to DOJ, assisting in the preparation of cases, and, by agreement with DOJ, representing HUD's position in court. The Headquarters Counsel and Regional Counsel seek to assure that DOJ provides the most effective representation possible of HUD's policies and interests.

The Department of Justice represents all HUD employees sued in their official capacities. In addition, DOJ will represent any current or former employee sued in an individual capacity who requests such representation, if the employee's

actions were within the scope of his/her employment. See Section 1-5. Similarly, any current or former employee served with a subpoena to testify or produce documents with respect to matters within the scope of his/her employment may request representation by DOJ. See also 24 C.F.R. Part 15, Subparts C and D.

b. DIVISION OF RESPONSIBILITY FOR CONDUCT OF LITIGATION

(1) HUD -- Within HUD, the General Counsel, acting through the several Deputy General Counsel, Associate General Counsel, and Regional Counsel (as more fully described below) has the exclusive authority to direct all litigation affecting the Department and approve all filings to be made on behalf of the Secretary, the Department, or any HUD official in his or her official capacity, in any litigation. If any provision within the Litigation Handbook is inconsistent with any Delegation of Authority by the General Counsel, the Delegation of Authority will prevail.

(2) OGC -- Within the Office of General Counsel, responsibility for the conduct of Federal Party Litigation is divided as follows:

(a) Affirmative Litigation

1. **The Associate General Counsel for Program Enforcement** has the overall responsibility for coordinating and directing the handling of litigation brought to enforce statutes and regulations relating to the Multifamily Housing Program, Public and Indian Housing Programs, the Community Development Block Grant Program, the False Claims Act, and other laws and regulations concerning fraud and malfeasance in any HUD programs.
2. **The Associate General Counsel for Finance and Regulatory Compliance** has the overall responsibility for coordinating and directing the handling of litigation brought by the Department to enforce statutes and regulations relating to the Real Estate Settlement Procedures Act, the Lead-Based Paint Prevention Act, the Interstate Land Sales Full Disclosure Act, the National Manufactured Housing Construction and Safety Act of 1974, proceedings arising from the collection of claims by the Department, and suits involving the Government National Mortgage Association.
3. **The Associate General Counsel for Fair Housing** has the overall responsibility for coordinating and directing the handling of litigation brought to enforce the Fair Housing

Act and regulations, and Section 109 of Title I of the Housing and Community Development Act of 1974 (Title I) (42 U.S.C. § 5309) and its implementing regulation at 24 C.F.R. Part 6.

4. **The Associate General Counsel for Human Resources Law** has the overall responsibility for coordinating and directing the handling of litigation brought by the Department in connection with contracting, bidding, procurement, personnel, Equal Employment Opportunity, Merit Systems, labor relations, and Privacy Act matters.
5. **The Associate General Counsel for Litigation** may bring affirmative litigation to resolve novel issues of importance to the Department, issues significant in their impact on policy, legal precedent or Departmental programs, and other issues of vital interest to the Secretary and Assistant Secretaries.
6. **The Litigating Associate and/or the Regional Counsel** shall initiate affirmative litigation as authorized.

(i) Initiation

The Regional Counsel may initiate affirmative litigation without prior approval of the General Counsel or the Litigating Associate for Category A cases in the Hauser Memorandum (Appendix 3).

(ii) Recommendation

When Regional Counsel believes that affirmative litigation should be initiated, for which he/she is not authorized to initiate, he/she shall send his/her recommendation including reasons to the Litigating Associate with a copy to the Program Associate.

7. For each such affirmative case to be brought, the Associates listed above (hereafter, the "Litigating Associates") will decide whether to retain principal responsibility for handling or assign such responsibility to the appropriate Regional Counsel. For each such affirmative case assigned to be handled by a Regional Counsel, the Litigating Associate shall monitor. See Section 2-3d.

(b) Defensive Litigation

The Associate General Counsel for Litigation has the overall responsibility for coordinating the handling of defensive litigation.

Upon notification of the commencement of Defensive Litigation, the Associate General Counsel for Litigation either retains principal responsibility for handling the case or assigns such responsibility to another Associate General Counsel or to the appropriate Regional Counsel.

The Associate General Counsel for Litigation will monitor or will designate an Associate General Counsel to monitor each case assigned to be handled by a Regional Counsel. See Section 2-3a.

(c) Litigation Assistance

For cases handled by an Associate General Counsel, Regional Counsel provide assistance as requested. For each case assigned to a Regional Counsel for handling, the designated Associate General Counsel monitors and provides guidance on policy issues. Field Office counsel perform such duties in connection with litigation as the Regional Counsel or an Associate may request. For each affirmative case assigned to be handled by a Regional Counsel, the Litigating Associate who recommended initiation of the action shall monitor.

(d) Non-Federal Party Litigation

Regional Counsel have principal responsibility with respect to all Non-Federal Party Litigation but may call upon the Associates for advice and assistance.

(3) DEPARTMENT OF JUSTICE -- The Department of Justice is only involved in Federal Party Litigation and referrals for Federal Party Litigation, or Non-Federal Party Litigation where necessary to protect the Government's interest. The DOJ attorneys in Washington and in the United States Attorneys' Offices generally share responsibility for cases, with one office having principal responsibility and the other providing supervision and/or assistance.

(4) INTERACTION BETWEEN HUD OGC AND THE DEPARTMENT OF JUSTICE -- HUD OGC provides recommendations to the Department of Justice concerning:

- (a) initiation of litigation;
- (b) intervention in ongoing litigation;

- (c) defense of litigation;
- (d) proposals for settlement;
- (e) appeals from adverse judgments; and
- (f) requests for *amicus curiae* participation.

Recommendations on all appeals and Non-routine Settlements require the approval of the General Counsel.

In addition, HUD OGC attorneys gather factual information relevant to the issues in the case from Program Officials and staff, develop pleadings, and participate in discovery and hearings. The duties involved in providing such assistance are described in more detail in Chapters 2 and 3.

It is essential that the HUD OGC attorneys coordinate closely with their counterparts at the Department of Justice and Program Officials and staff. The HUD attorney with principal responsibility for the case should be listed on all court papers as "Of Counsel," or, by agreement with DOJ, as "Co-Counsel." If necessary, the HUD OGC attorney with principal responsibility for the case may, by appointment by the United States Attorney, be delegated responsibility for a case and be designated and appear as a Special Assistant United States Attorney.

### 1-3. ROLE OF DEPARTMENT OFFICIALS REGARDING FEDERAL PARTY LITIGATION

Cooperation between Program Officials and HUD OGC attorneys preparing the Department's position in litigation is vital to effective representation of HUD and a favorable outcome.

#### a. HOW TO INITIATE LITIGATION

When a Headquarters Program Official wishes to initiate suit on behalf of the Department or the United States he/she shall direct the recommendation to the Associate with responsibility for the program or activity involved. A Field Office official shall direct such a recommendation to the Regional Counsel for evaluation and transmittal to the Associate with responsibility for the program.

#### b. RECEIVING NOTICE OF LITIGATION

When Litigation is brought by or against HUD or HUD Officials, the Office of General Counsel will notify appropriate Headquarters Program Officials, including the Assistant Secretary responsible for the program or activity involved, any other Assistant Secretary whose assistance is indicated and, as appropriate,



the Assistant Secretary for Public Affairs and the Assistant Secretary for Congressional and Intergovernmental Relations.

Appropriate Program Officials in the Field Offices affected will receive notice of Litigation through Regional Counsel. However, such notification may be omitted as to some or all of the aforesaid Officials when, in the opinion of the Associate or Regional Counsel, the litigation is of such a nature as not to require their attention. Appropriate Program Officials and Counsel shall be apprised of significant developments with the case.

c. RESPONSIBILITIES DURING LITIGATION

The Assistant Secretaries and other Program Officials shall have the following responsibilities when notified of the commencement of Federal Party Litigation:

- (1) DEFERRAL OF PROGRAM DECISIONS -- The Program Officials called upon to make any program decision related to the subject of the litigation shall evaluate the advisability of proceeding with the decision.

He/she shall then notify the Associate, a Litigating Associate, or Regional Counsel, as appropriate, of the proposed action and his/her conclusions about proceeding in the face of the litigation, stating reasons for any conclusion to proceed.

No actions approving any program, project or activity challenged in the litigation shall be taken, nor any final determinations made concerning compliance with Department requirements where such compliance is the subject of litigation, after the referral of Federal Party Litigation unless concurred in by the Associate, a Litigating Associate, or the General Counsel, or, in cases for which Regional Counsel is principally responsible, by the Regional Counsel.

- (2) RESTRICTIONS ON COMMUNICATIONS

- (a) No Department Official or employee shall make any communication or release any documents outside of HUD, including to DOJ, about any matter in Litigation, or Threatened Litigation, without the knowledge of the appropriate Counsel. In addition, there shall be no meetings, conferences, correspondence or phone conversations with litigants or their counsel opposing the Department except after consultation with the Litigating Associate or Regional Counsel, as appropriate, including consideration of whether such contacts should occur and whether a representative of such counsel shall participate. *See* May 7, 2002 General Counsel's Memorandum on HUD Policies on Communication (Appendix 2).

- (b) With respect to Congressional demands and requests for testimony or records, or demands upon or requests for a HUD employee to testify as to facts or events that are related or unrelated to his or her official duties or that are related or unrelated to the functions of HUD, employees shall advise the Associate General Counsel for Litigation about any such requests as soon as they are received and shall not respond to any such demands or requests without the concurrence of the Associate for Litigation so that OGC can exercise appropriate oversight and coordination.

(3) ADVICE AND ASSISTANCE TO ATTORNEYS

(a) General

The Associate or Regional Counsel shall seek advice or assistance from Program Officials and Program Counsel in answering the complaint, responding to discovery, preparing affidavits or preparing for trial.

The nature of assistance sought may range from relatively simple tasks such as compiling from program files an administrative record of pertinent agency action, to more complex undertakings of explaining how HUD applies certain provisions of a statute, regulation, handbook, or directive and why certain policies and practices are reasonable.

Program Officials may be called upon to execute Affidavits or Declarations based on their own knowledge and on information supplied to them by their staff or to serve as witnesses at hearings or trials.

Assisting in the conduct of litigation often requires a Program Official to expend considerable time and effort within a rather short time period to meet court deadlines. Program Officials shall give high priority to any request for litigation assistance, since the outcome may have a significant impact on the Department's programs.

(b) Consultation Prior To Settlement

With regard to Federal Party Litigation, the Associate shall seek the views of the appropriate Assistant Secretaries or their designees and other appropriate Associate General Counsel before notifying DOJ of HUD's recommendation concerning a proposal to settle a case out of court.

If there are conflicting views among the Officials consulted, the Associate will initiate discussions to resolve the differences. If after meeting with the General Counsel, an Assistant Secretary is unable to resolve his/her differences with the Office of General Counsel's recommendation, such Assistant Secretary and the General Counsel will submit the matter to the Deputy Secretary for decision. See Section 2-3g.

(c) Notice Of Judgment Or Other Final Disposition

When a case has been completed, the Associate or the General Counsel, (or in cases for which Regional Counsel is principally responsible, the Regional Counsel) shall notify the Assistant Secretary and other appropriate Associates and the General Counsel of the outcome, attaching a copy of any court opinion or settlement stipulation requiring action by the Department or limiting the Department's freedom of action.

However, such notification may be omitted as to some or all of the aforesaid Officials when, in the opinion of the Associate or Regional Counsel, the litigation is of such a routine nature as not to require their attention.

(d) Responsibilities after Judgment or Settlement

Program Officials shall implement the legal obligations imposed by court order, or accepted in a settlement agreement. The notice of final disposition may request the Assistant Secretary to provide status reports on fulfillment of these responsibilities. In the case of an adverse judgment, the notice shall solicit views concerning the merits of seeking an appeal.

If there are conflicting views among the Officials consulted, the Associate will initiate discussions to resolve the differences. If after meeting with the General Counsel, an Assistant Secretary is unable to resolve his/her differences with the Office of General Counsel's proposal, such Assistant Secretary and the General Counsel will submit the matter to the Deputy Secretary for decision.

1-4. SERVICE OF PROCESS

a. SERVICE OF SUMMONSES AND COMPLAINTS UPON HUD OR HUD OFFICIALS SUED IN THEIR OFFICIAL CAPACITIES

Pursuant to Rule 4(i) of the Federal Rules of Civil Procedure, service of summonses and complaints in an action in the United States District Court upon an agency or corporation of the United States, or an officer or employee of the United States sued only in an **official** capacity, is effected by:

- (1) sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation;
- (2) delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought or by sending it by registered or certified mail addressed to the office of the United States Attorney; **and**
- (3) sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia.

The mailing address that should be used to meet the mailing requirement for HUD and all HUD employees sued in an official capacity is:

The Associate General Counsel for Litigation  
Office of Litigation - Room 10258  
U.S. Department of Housing and Urban Development  
451 Seventh Street, S.W.  
Washington, D.C. 20410

b. **AUTHORITY TO ACCEPT SERVICE ON BEHALF OF HUD OFFICIALS**

Any employee sued in his/her official capacity may accept service of all summonses and complaints on his/her own behalf.

Otherwise, however, the power to accept service of all summonses and other judicial, administrative, or legislative process directed to the Secretary or to an employee of the Department in an official capacity is limited to the Associate for Litigation and, in the case of a Field Office employee named in an official capacity, to the appropriate Regional Counsel.

No official or employee of a Field Office is authorized to accept service of a summons and complaint on behalf of the Secretary or any other Headquarters HUD employee.

Authority to accept service of a summons and complaint or other court demand against an employee named in an individual capacity resides only in that employee. Similarly, authority to accept service of a subpoena resides only in the person named.

c. PROCEDURE FOR ACCEPTING SERVICE

Service of a summons and complaint triggers the running of time in which an answer must be filed, and, with respect to suits filed in State court, receipt of the complaint by service or otherwise triggers the time in which to seek removal to Federal Court.

Any employee who accepts service of a summons and complaint, or receives a copy of a complaint, a subpoena for testimony or documents, notice of deposition, or any other judicial demand for participation in litigation shall consult a HUD attorney immediately. A Headquarters employee shall consult the Associate for Litigation and a Field Office employee shall seek advice from Regional Counsel.

Any employee who accepts service of such document shall note on the document the date, hour, and place of service and whether service was by personal delivery or by mail and then forward it, along with any envelope in which it was delivered, immediately to the Associate for Litigation, or, in the case of a Field Office official, to the Regional Counsel.

If a preliminary injunction or temporary restraining order is sought, the employee shall call the Associate for Litigation or Regional Counsel immediately.

With respect to Non-Federal Party Litigation, no employee or former employee of the Department is authorized to respond to a subpoena or other court demand without the prior approval of the Associate for Litigation or Regional Counsel. 24 C.F.R. Section 15.201, *et seq.*

Any employee or former employee required to respond to a subpoena or other court demand for information relating to matters within the scope of his/her employment is entitled to legal representation. The Associate for Litigation or Regional Counsel will arrange for the necessary representation.

Similarly, with respect to Federal Party Litigation, any employee or former employee must consult the Associate or Regional Counsel, whichever has principal responsibility for the case, before responding to a subpoena or other court demand relating to matters within the scope of his/her employment.

d. LEAVE AND COMPENSATION RELATED TO WITNESS SERVICE

Handbook 600.1 REV-3, Chapter 3, Section 8, indicates the type of leave to be taken by an employee giving testimony in an official or non-official capacity, and describes when such person is entitled to witness fees and travel reimbursement.

1-5. LITIGATION SEEKING RELIEF AGAINST EMPLOYEES IN AN INDIVIDUAL CAPACITY

a. SUITS TREATED AS AGAINST EMPLOYEES IN OFFICIAL CAPACITY

Actions are frequently brought against employees of the Department, either as separate actions or in conjunction with claims against the Department. Such suits usually are against the employees in their official capacity, that is, they seek to compel the employees to perform their delegated functions or to prohibit the exercise of such functions. These suits are treated as suits against the Department and are handled as described in Section 1-3. In addition, civil actions against employees in their individual capacity concerning actions taken within the scope of their employment that do not seek money damages are treated as suits against them in their official capacity.

b. SUITS TREATED AS AGAINST EMPLOYEES IN INDIVIDUAL CAPACITY

An employee who is sued in his/her individual capacity should be aware of the following:

(1) OPTIONS FOR REPRESENTATION -- An employee sued in his/her individual capacity has the following options for representation:

(a) DOJ Representation

An employee sued in his/her individual capacity may be represented by DOJ if, under DOJ regulations at 28 C.F.R. 50.15, DOJ determines that:

1. the acts which are the subject of the proceeding reasonably appear to have been performed within the scope of employment; and
2. providing representation is in the best interest of the United States.

(b) The employee may also retain private counsel at his/her own expense.

(c) If DOJ undertakes representation, communications with DOJ attorneys are privileged and the employee shall communicate directly with the DOJ attorney.

(d) No HUD attorney will participate in representing an employee as an individual, and no attorney-client relationship is created between that HUD attorney and HUD employee.

(2) OBTAINING REPRESENTATION -- If an employee sued in an

individual capacity desires DOJ representation he/she must submit a written request, including a statement as to whether the employee was acting within the scope of employment, countersigned by his/her immediate superior, together with all pleadings, or other court papers served upon him/her and any supporting documentation of the action being within the scope of employment. A Field Office employee shall forward this request to the Regional Counsel. A Headquarters employee shall forward the request for representation to the Associate for Litigation. Upon receiving such a request, that Regional Counsel or Associate shall forward the request to the appropriate DOJ Official.

Upon the approval of representation of an employee, the employee will be contacted by the DOJ Attorney to whom the employee's representation has been delegated, and required to sign and return the Department of Justice's Acknowledgement of Conditions of Department Representation.

(3) PAYMENT OF JUDGMENT

- (a) If the action is brought against the employee based on state common law torts allegedly committed while acting within the scope of employment (e.g., the negligent performance of job duties which causes injury to others), the United States will be substituted as the defendant and any judgment recovered or settlement reached would be paid by the United States, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, and 1346(b).
- (b) On the other hand, if the suit is based on the alleged commission of wrongful acts or omissions which violated clearly established statutory or constitutional rights, the employee will be personally responsible for the satisfaction of an adverse judgment or settlement entered against himself/herself. However, the employee may request indemnification for any verdict, judgment or other monetary award which is rendered against him or her, provided the Secretary or his or her designee determines that the conduct which gave rise to the verdict, judgment or award was done within the scope of his or her employment with the Department and such indemnification is in the interest of the United States. See 24 C.F.R. § 18.1.

1-6. SUBPOENAS, DEMANDS AND REQUESTS FOR DEPARTMENTAL FILES, INFORMATION FROM FILES, AND TESTIMONY OF EMPLOYEES

a. ACTION TO BE TAKEN UPON RECEIPT OF SUBPOENAS, DEMANDS AND REQUESTS

Demands or requests are occasionally made for employees of the Department to

produce materials, or disclose information, from files of the Department, or to provide testimony, for use in Non-Federal Party legal proceedings. Such demands may take the form of subpoenas or other orders of a court or other authority. No employee of the Department shall comply with any such subpoena, demand or request without the prior approval of the Secretary (acting through a delegatee), the procedures and standards for which are set forth in 24 C.F.R. Part 15 sub-parts C and D.

Subpoenas, demands or other requests to produce files, or information from files, or for testimony for use in Non-Federal Party Litigation, which are delivered to Headquarters employees, should be immediately hand delivered to the Associate for Litigation for referral to the appropriate Associate General Counsel who, as the Secretary's delegatee, will determine the appropriate response. Similarly, such subpoenas, demands or other requests received by Regional or Field Office employees should be referred to the Regional Counsel for the Region in which the files are located or the employee is employed for appropriate response by the Regional Counsel as the Secretary's delegatee.

Employees who work in one Region and who work for a multi-jurisdictional component in another Region shall deliver a subpoena or other request for information to the Regional Counsel for the Region in which they are located. The Regional Counsel receiving the subpoena or other request for information will coordinate the response with the Regional Counsel serving the multi-jurisdictional component.

b. AUTHENTICATION OF DOCUMENTS

When it is determined by the Secretary's delegatee that the appropriate response to a subpoena, demand, or other request is the production of files, or other records of the Department, the Department's procedure for authenticating documents by a keeper of the records shall be the Department's method for response. 24 C.F.R. § 15.202(d). The following is a list of employees of the Department who have been designated as Attesting Officers and authorized to cause the seal of the Department of Housing and Urban Development to be affixed to such documents as may require its application:

1. Each Assistant Secretary;
2. President, Government National Mortgage Association;
3. Inspector General;
4. General Counsel;
5. Chief Financial Officer;



6. The Director of each Headquarters Office;
7. Each Deputy Assistant Secretary;
8. Each Regional Director;
9. Each Field Office Director;
10. Each Deputy General Counsel;
11. Each Associate General Counsel;
12. Each Assistant General Counsel;
13. Each Regional Counsel;
14. Each Chief Counsel; and
15. The Docket Clerks, in the Office of General Counsel.

## **CHAPTER 2. OFFICE OF GENERAL COUNSEL FUNCTIONS**

### **2-1. INTRODUCTION**

#### **a. FUNCTION OF CHAPTER**

This Chapter describes the functions and responsibilities of the Office of General Counsel (OGC) with regard to Litigation, identifies the offices within the Office of General Counsel that are generally responsible for various categories of litigation, and specifies functions to be performed by those offices.

#### **b. ROLE OF OGC IN FEDERAL PARTY LITIGATION**

The goal of the Office of General Counsel in Federal Party Litigation is to assure the best possible representation of the Department's interests in civil legal proceedings. To accomplish this, the General Counsel and the Associates must consult Program Officials, Regional and Field Office counsel and DOJ attorneys. See Chapter 1, Sections 1-2 and 1-3.

#### **c. ROLE OF OGC IN NON-FEDERAL PARTY LITIGATION**

The Office of General Counsel has a much more limited role in the conduct of non-Federal Party Litigation. The goal is to promote a uniform interpretation of HUD regulations, policies and directives by HUD Assistance Recipients and the courts to enhance consistency in the administration of nationwide programs.

All Associates are available for consultation by HUD assistance recipients and their counsel as well as by Field Office Counsel for guidance on the agency's regulations, handbooks and other directives relevant to issues arising in such litigation.

However, the major contact point for these HUD Assistance Recipients and their counsel with respect to such litigation is the Regional Counsel. Regional Counsel shall advise the Associate for Litigation of major problems or trends in adverse decisions encountered in monitoring Non-Federal Party Litigation. The Associate for Litigation will then take appropriate action, including consultation with the Program Associate, concerning a remedial course of action. In addition, to protect the Federal interest, Non-Federal Party Litigation could require the initiation of action by HUD and would be covered by this handbook.

### **2-2. LITIGATION MANAGEMENT RESPONSIBILITIES**

#### **a. DEFENSIVE LITIGATION**

The Office of Litigation has responsibility for managing all litigation brought against the Department and its employees sued in their official capacities,

including cases handled by other offices within OGC. To carry out this responsibility, the Associate General Counsel for Litigation performs the following functions:

- (1) Serving as the official designated to receive service of process on behalf of the Secretary and other Headquarters employees;
- (2) Maintaining a central docket for all defensive Federal Party Litigation;
- (3) Assigning responsibility for handling and monitoring all defensive Federal Party Litigation;
- (4) Serving as a contact for non-HUD Government attorneys, including DOJ, concerning motions for temporary restraining orders or preliminary injunctions in such Defensive Litigation;
- (5) Reviewing concurrence requests from the Associate, on non-routine settlement proposals in defensive Federal Party Litigation and on all appeal recommendations, in cooperation with Assistant Secretaries and Program Associates, prior to action on the requests by the General Counsel;
- (6) Monitoring implementation of all settlements and adverse judgments in defensive Federal Party Litigation;
- (7) Serving as an informational resource regarding litigation problems; and
- (8) Taking other actions to manage defensive Federal Party Litigation.

b. AFFIRMATIVE LITIGATION

The Litigating Associates, and Regional Counsel have the overall responsibility for coordinating and directing the handling of affirmative litigation brought by the Department within their respective jurisdiction and delegated authority.

To carry out these responsibilities, each Litigating Associate performs the following functions:

- (1) Making requests, as appropriate, in consultation with Program Officials, and other program Associates, to the Department of Justice to bring affirmative litigation;
- (2) Maintaining appropriate docket systems or methods for tracking all affirmative Federal Party Litigation which they direct;
- (3) Assigning responsibility for handling and monitoring all affirmative

Federal Party Litigation which they have respectively initiated;

- (4) Serving as a contact for Government attorneys concerning motions for temporary restraining orders or preliminary injunctions in such litigation;
- (5) Preparing or reviewing concurrence requests on settlement proposals and appeal recommendations in affirmative Federal Party Litigation which they have respectively initiated, in cooperation with Assistant Secretaries and Program Associates, prior to action on the requests by the General Counsel;
- (6) Monitoring implementation of all settlements and adverse judgments in all affirmative Federal Party Litigation which they have respectively initiated;
- (7) Serving as an informational resource regarding affirmative litigation problems within their respective program areas; and
- (8) Taking other actions to manage affirmative Federal Party Litigation within their respective program areas.

c. DEFENSIVE LITIGATION TRACKING

The Office of Litigation maintains a central docket system (known as the Defensive Litigation Tracking System, or "DLTS"). The Litigating Associates and Regional Counsel must input immediately into the system the case data as set forth below for all defensive Federal Party Litigation. As the Office is notified of the initiation of a suit by service of a summons and complaint or otherwise, it establishes a docket record for the case and assigns it a central docket number in the DLTS.

- (1) CONTENTS -- The DLTS shall contain a separate docket record for each pending case.
  - (a) For each case such docket shall contain:
    1. The full caption of the case, as shown on the complaint, and the DLTS docket number furnished by the Office of Litigation.
    2. The date the complaint was filed and the date the case was docketed in that office, i.e., when the summons and complaint were received by the office.
    3. The project or activity affected, the name and project number of any specific project, and the locality involved.

4. A brief summary of the issues.
  5. The names and telephone numbers of the attorney(s) assigned to the case.
  6. The names and telephone numbers of counsel for other parties to the case.
- (b) For all federal party cases, the docket shall also contain a brief notation of all rulings on the merits made by the court.
- (2) CLOSING --The "Closed" notation shall be made on the docket record after:
- (a) Judgment has been entered and all avenues of appeal have been exhausted by all parties, and, in the case of an adverse decision, responsibility for carrying out the terms of the decision has been transferred to an appropriate Program Official, whose name and title shall be stated on the docket record.
  - (b) Voluntary dismissal of the complaint.
  - (c) Settlement has been reached, an appropriate disposition has been made by the court, and responsibility for carrying out the terms of the settlement has been transferred to an appropriate Program Official whose name and title shall be stated on the docket record.
- (3) DISPOSITION OF HEADQUARTERS CLOSED CASE FILES -- OGC official litigation case files are to be retained in Headquarters for one year from the date of closing. At that time, the Associate determines whether the case is precedent setting. If it is, he/she should indicate on the Federal Records Center transmittal that it should be retained for the longer period of time designated for litigation case files of "unusual significance for the Department." See HUD Handbook 2225.6, Appendix 2.

2-3. ASSIGNMENT OF RESPONSIBILITY FOR FEDERAL PARTY LITIGATION

a. GUIDING PRINCIPLES

The Associate for Litigation and the Litigating Associates may draw upon the resources of Regional Counsel.

The Office of Litigation generally retains for direct handling those cases which present novel issues of importance to the Department, issues significant in their impact on policy, legal precedent or Departmental programs, and other issues of vital interest to the Secretary and Assistant Secretaries.

The Offices of the Litigating Associates generally retain for handling those affirmative cases which present issues of importance to the Department, issues significant in their impact on policy, legal precedent or Departmental programs, and issues of vital interest to the Secretary and Assistant Secretaries, or which may involve recovery of threshold amounts determined by the Associate.

Due to the large volume of Federal Party Litigation, most cases will be handled by Regional Counsel.

The Associate for Litigation transfers principal responsibility for defensive cases not retained in the Office of Litigation to: (1) one of the Litigating Associates; (2) Regional Counsel with monitoring by a Program Associate; or (3) Regional Counsel with monitoring by the Office of Litigation. The first two categories of transfers are made along the subject matter lines described in Section 2-3b below.

b. SUBJECT MATTER SPECIALIZATION

Each Associate General Counsel has areas of specialization as described below:

- (1) OFFICE OF INSURED HOUSING -- Litigation presenting issues arising under the programs authorized under the National Housing Act (other than Title III), the Multifamily Assisted Housing Reform and Affordability Act of 1997; the Low Income Housing Preservation and Resident Homeownership Act of 1990; the Single Family Mortgage Foreclosure Act; the Multifamily Mortgage Foreclosure Act; and the FHA property disposition programs.
- (2) OFFICE OF ASSISTED HOUSING AND COMMUNITY DEVELOPMENT -- Litigation presenting issues under the community development formula grant programs, including the community development block grant program, HOME, and the Emergency Shelter Grant program, and community development and discretionary assistance programs, including McKinney Act programs for the homeless and section 108 loan guarantees; disputes relating to relocation payments and claims for other relocation benefits; issues relating to development and operation of projects under the low-rent public housing program; section 8 program; tenant complaints under assisted housing programs; issues relating to supportive housing for the elderly under the section 202 program and supportive housing for the disabled under the section 811 program; HOPE VI program, authorized by section 24 of the United States Housing Act of 1937; and issues relating to homeownership by lower income families, including the HOPE 1, HOPE 3, section 5(h) programs, and section 8(y) of the United States Housing Act of 1937.
- (3) OFFICE OF HUMAN RESOURCES LAW -- Suits involving grievances,

adverse actions, standards of conduct, and other personnel matters; contract disputes and bid protests; procurement claims; complaints seeking relief under the Privacy Act; compliance with the labor standards provisions governing HUD programs; suits arising from the collection of claims by the Department; suits arising under collective bargaining agreements or otherwise involving labor relations; compliance with Equal Employment Opportunity Executive Orders.

- (4) OFFICE OF FINANCE AND REGULATORY COMPLIANCE -- Litigation arising under the Interstate Land Sales Full Disclosure Act; actions arising under the Real Estate Settlement Procedures Act; litigation involving Mobile Home Safety Standards and other consumer programs; and proceedings arising from the collection of claims by the Department; suits involving GNMA, and the Secretary's regulatory responsibilities with regard to Government Sponsored Enterprises.
- (5) OFFICE OF PROGRAM ENFORCEMENT -- Suits involving enforcement actions relating to Multifamily Housing Programs, Public and Indian Housing Programs, and the Community Development Block Grant Program, the False Claims Act, and other laws and regulations concerning fraud and malfeasance in any HUD programs; contests to the debarment or suspension of contractors or other sanctions under 24 C.F.R. Part 24; contests to determinations by the Multifamily Participation Review Committee; challenges to actions of the Mortgagee Review Board.

c. PROCEDURE FOR ASSIGNING DEFENSIVE LITIGATION

- (1) INITIAL ASSIGNMENT -- When the Associate for Litigation receives a complaint by service of process or otherwise, he/she will determine promptly whether to retain it or reassign it to another Litigating Associate or Regional Counsel.

The Associate for Litigation assigns a case to another Litigating Associate for handling by transmittal slip enclosing a copy of the complaint. A copy of both the transmittal slip and the complaint will be forwarded simultaneously to the appropriate Regional Counsel. This transmittal slip has a line on which the name of the attorney assigned to the case is to be inserted.

The Associate for Litigation assigns cases to Regional Counsel for handling by transmittal slip enclosing a copy of the complaint. Duplicates are sent simultaneously to the Program Associate who will monitor the case.

The Regional Counsel and the Litigating Associate shall return the transmittal slip promptly to the Associate for Litigation and to each other

with the name of the attorney assigned to handle or monitor the case. Any change in the attorney assigned shall be reported in writing immediately after the change to those offices originally notified.

- (2) REASSIGNMENT -- After a case has been assigned, there may be limited circumstances which will warrant the Associate for Litigation reassigning the case. In such event, the Associate may take responsibility for handling it directly if he/she decides that under his/her guidelines the case requires such handling.

In such event, the Associate shall notify the Regional Counsel by memorandum of his/her intent to handle the case directly, stating the name of the Headquarters attorney handling the case. A copy of this memorandum shall be furnished to the Associate for Litigation.

Similarly, if a case has been assigned to an Associate for direct handling which the Associate believes requires handling by Regional Counsel under the Associate's guidelines, he/she may request that the Associate for Litigation reassign the case.

After a case has been assigned to another Associate or to Regional Counsel, the Associate for Litigation may take responsibility for handling it directly if he/she decides that under the guidelines specified in Section 2-3a, the case requires such handling.

d. INITIATING AFFIRMATIVE LITIGATION

The Associates may, after consultation with the appropriate Program Officials, recommend initiation of an action to DOJ without the concurrence of the General Counsel as to any category of cases except:

- (1) Enforcement of an Annual Contributions Contract involving takeovers of PHAs;
- (2) Any novel uses of affirmative litigation or attempts to establish the Department's authority to enforce its rights or responsibilities in court; and
- (3) Any other issues having significant impact on policy, legal precedent, Departmental programs and other matters of vital interest to the Secretary and/or Assistant Secretaries.

No recommendation concerning the initiation of litigation under categories (1) and (2) shall be transmitted to DOJ without the concurrence of the General Counsel. The General Counsel will determine which Associate will handle any case in the above categories approved by the General Counsel.



When Program Associates or Regional Counsel wish to recommend that affirmative litigation be initiated, they should follow the procedures described in Sections 2-6(c)(1) and 3-2a(2)(b).

e. INITIATING AFFIRMATIVE LITIGATION BY REGIONAL COUNSEL WITHOUT PRIOR CONCURRENCE OF THE GENERAL COUNSEL

The Regional Counsel may initiate Affirmative Litigation without prior approval of the General Counsel for Category A cases in the Hauser memorandum (see Appendix 3).

f. CONTACT POINT ON MOTIONS FOR INTERLOCUTORY RELIEF

Hearings on motions for temporary restraining orders (TROs) or preliminary injunctions (PIs) often take place before the Associate for Litigation becomes aware of the existence of a defensive lawsuit and has an opportunity to assign responsibility for the case to any particular office. Since the Associate for Litigation has responsibility for the overall management of defensive litigation of the Department and hearings on motions for TROs and PIs often shape the course of the litigation in a dispositive manner, any Government attorney who learns of the imminence of a hearing on a TRO or PI in Federal Party Litigation should immediately contact the Office of Litigation.

The Office of Litigation shall consult with such appropriate Headquarters or Field Office staff as can be reached in time to provide assistance before the hearing. Such assistance may include advice concerning the basis for a legal defense, the types or names of witnesses who should be presented on behalf of the Department, lines of questioning for witnesses, or whether to agree to actions sought in the motion on an interim basis.

g. SETTLEMENTS, APPEALS AND ATTORNEY'S FEES

(1) SETTLEMENT AND APPEALS OF FEDERAL PARTY LITIGATION

(a) Routine

The Litigating Associate may, after consultation with the appropriate Program Officials, Program Counsel, and Regional Counsel (see paragraph 1-3c(3)(b)), recommend to DOJ whether to approve Routine Settlements.

Regional Counsel may, after consultation with the appropriate Program Officials and Program Counsel, recommend to DOJ whether to approve Routine Settlements of all cases that they are handling except where the settlement involves more than \$1

million.

In Affirmative Litigation, the Regional Counsel may, after consultation with appropriate Program Officials and Program Counsel, recommend to DOJ whether to approve Routine Settlements.

(b) Non-Routine

Recommendations to DOJ on whether to approve Non-Routine Settlements and whether to appeal any adverse judgment, shall not be made without consultation with the appropriate Program Officials, Program Counsel, Regional Counsel and the concurrence of the General Counsel.

The Litigating Associate and/or the Regional Counsel shall seek concurrence of the General Counsel at least five working days before DOJ must have HUD's recommendation.

In Federal party cases when HUD is not asked to join in a settlement proposed by other parties, the attorney handling the case shall consult the Program Associate on the terms of such a settlement so that he/she may inform DOJ and the Court of HUD's position.

- (2) SETTLEMENT AND APPEALS OF NON-FEDERAL PARTY LITIGATION -- In Non-Federal Party Litigation, the Program Associate's concurrence is required before the Regional Counsel may approve any PHA's proposal to appeal, any settlement, including fees and costs, which include any reduction in the agency's claim against the opposing party as well as any payment by the agency to the opposing party, which would exceed \$500,000, and any Non-Routine Settlement. See also Sections 3-3b (4) and (5.).
- (3) PRIVATE ATTORNEY'S FEES INCURRED BY PUBLIC HOUSING AGENCIES -- No contract for attorney's fees for litigation services entered into by any PHA which calls for an estimated maximum fee in excess of \$300,000 may be approved by Regional Counsel without the prior concurrence of the Program Associate. See also Sections 3-3b(3) and 5-4.
- (4) PRE-FILING SETTLEMENT OF AFFIRMATIVE MATTERS
- (a) During the period after a recommendation has been made to DOJ to initiate an action but before DOJ has accepted that recommendation, the Associate or Regional Counsel who made the recommendation may resolve the matter by notifying DOJ that no

further action is to be taken on the recommendation.

- (b) Such notification may be provided only after:
  - 1. consulting with the Program Official(s) who approved the initial recommendation and;
  - 2. obtaining the approval of any Associates who concurred in that recommendation.
- (c) In addition, if the General Counsel concurred in the recommendation that action be initiated, the General Counsel must also concur in the request that such action be terminated.
- (d) If, after DOJ has accepted a recommendation but before the case has been filed, the recommending Associate or Regional Counsel determines that no further action should be taken, the procedure described above should be followed, but the matter cannot be resolved without DOJ's concurrence.

h. MONITORING IMPLEMENTATION OF JUDICIAL OBLIGATIONS

The Office of Litigation maintains a central monitoring system to assure that the Department complies with continuing obligations under adverse orders and settlements.

- (1) All Litigating Associates and Regional Counsel shall send a copy of each adverse final order, stipulation, consent decree or other judicially created obligation to the Office of Litigation accompanied by a cover memorandum which identifies:
  - (a) the program office and legal office with primary responsibility for implementing the judicially created obligation;
  - (b) the termination date of the obligation, if any, or an indication that the obligation is open ended; and
  - (c) the respective deadlines for each specific action required.
- (2) Attorneys in the Office of Litigation will prepare a similar memorandum on their cases.
- (3) The monitoring system contains:
  - (a) A record of each operative judicially created obligation organized by program subject and, within each program, alphabetically by the last name of the principal plaintiff;

- (b) A tickler system for all specific deadlines; and
- (c) A file on status reports.

The Office of Litigation will follow up on any apparent failure to comply with these judicially created obligations.

i. INFORMATIONAL RESOURCE

The Office of Litigation serves as a resource for attorneys with questions about legal precedents, strategy, policy and procedural matters. Lawyers should feel free to contact the Office.

2-4. PROCESSING DEFENSIVE LITIGATION

a. THREATENED LITIGATION

Threatened Litigation shall be promptly brought to the attention of the Associate for Litigation.

b. SERVICE OF PROCESS

Copies of all summonses and complaints received by HUD employees in connection with their employment shall be forwarded by Regional Counsel or sent directly by Headquarters employees to the Associate for Litigation who will make the determination concerning responsibility for the case. See Section 1-4.

c. COMMUNICATIONS WITH CLIENT

- (1) NOTICE OF LITIGATION -- Within 7 working days after a Litigating Associate receives principal responsibility for handling a case he/she shall send a memorandum accompanying a copy of the complaint, to the Assistant Secretary and other appropriate HUD officials giving notice of the commencement of the litigation. Copies of this memorandum shall be furnished to the other Associates whose program areas may be affected.

Regional Counsel shall follow this procedure, except that the notification shall be sent to the appropriate Regional Program Official.

- (a) General The notice shall describe who the plaintiffs are, the nature of the claims, and any information needed from program staff. The Litigating Associate or Regional Counsel will determine at this stage whether there are factual, policy, or legal issues which require further analysis. If so, the initial notice shall indicate that another memorandum addressing those issues shall be

forthcoming. The notice will also state the name of the HUD attorney who is assigned to the case. In preparing this notice, attorneys are advised that the more specific they can be in their requests for information, the more valuable the response is likely to be.

The Associate or Regional Counsel shall advise the appropriate Program Official of important developments so that he/she can contribute appropriate information and opinions concerning the Department's position.

(b) When Interlocutory Relief Is Sought The Litigating Associate or Regional Counsel shall advise the responsible Program Official whenever a temporary restraining order or preliminary injunction is sought and shall request him/her to furnish any necessary information or assistance. If a temporary restraining order or a preliminary injunction is granted, the Litigating Associate or Regional Counsel shall notify the responsible Program Official concerning the restraints upon his/her authority, and see that appropriate follow-up measures are adopted to assure compliance with the court order.

(2) INFORMAL CONTACT -- To determine the scope of the issues raised in litigation and the extent to which they have been considered by Departmental officials, the attorney should generally make direct contact with appropriate Program Officials. This informal contact will help the attorney evaluate what officials would be the best witnesses in discovery or at trial and identify who would be the appropriate persons to execute Affidavits in support of any motions to be filed. The more information that can be gathered by interviews with appropriate staff, the less likely it will be that discovery sought by an opponent will uncover surprises. All documentation concerning these conversations with staff members shall be included in the litigation file.

(3) ANALYTICAL MEMORANDUM -- If significant policy or legal issues are raised at any time by the litigation, a memorandum to appropriate Program Official may be prepared setting forth the issues, the background, and a legal and policy analysis which evaluates the merits of the various options within the legal framework of the Constitution, statutes, regulations and case law. This memorandum shall discuss possible bases for defending existing policy and, where appropriate, possible changes in Departmental policy or practice which would improve the Department's defensive posture.

d. COMMUNICATIONS WITH OTHER ATTORNEYS

Each HUD attorney working on a case shall record on the outside of the litigation file folder the names of the attorneys described below.

- (1) REGIONAL COUNSEL -- The attorney responsible shall promptly call the Regional Counsel's Office to determine whether that office has received a copy of the summons and complaint and the name of the attorney assigned to the case. This contact provides the Headquarters attorney an opportunity to discuss the types of assistance which may be requested from Regional Counsel.

The first written communication should seek the Regional Counsel's assistance in assembling the facts. See Section 2-5f(3).

In addition, the Regional Counsel shall be included on the copy list for correspondence within HUD and major correspondence with DOJ.

- (2) DEPARTMENT OF JUSTICE -- The attorney responsible shall promptly telephone the Department of Justice to ascertain whether the summons and complaint have been received and, if so, the name of the attorney assigned to the case. If the complaint has not been received, a copy should be forwarded immediately for docketing and assignment. The daily messenger service between the HUD Office of Litigation and the Department of Justice Civil Division, Federal Programs Branch, can be used to expedite this procedure if that Branch is likely to be assigned the case.

The attorney should discuss possible divisions of the work between HUD and DOJ and possible litigation strategies.

- (3) COUNSEL FOR PHA -- Counsel for a PHA which is a co-defendant in litigation often want to discuss matters with the HUD attorney, even though he/she may not be attorney of record. Because of the longstanding relationship between PHAs and HUD, and the advisory and supervisory functions which the Department performs with respect to their operations, this contact is encouraged. However, all contacts with local counsel shall be closely coordinated with DOJ.

The possibility of a conflict between the interests of the PHA and the Department must be considered in each instance. If the Associate finds that the PHA has clearly violated HUD requirements or is otherwise at fault, the cost of the agency's defense will not be authorized from HUD program funds. See Chapter 3. In such a case, the Department may consider realigning itself as a party plaintiff or bringing a cross-claim, if the PHA is not willing to negotiate a settlement or take satisfactory corrective action.

- (4) OPPOSING COUNSEL AND OPPOSING PARTIES -- No HUD employees, including attorneys, shall discuss pending Federal Party Litigation with opposing counsel or opposing parties without the concurrence of DOJ. Generally, the HUD attorney should attend any meetings between HUD employees and opposing counsel touching on the litigation.
- (5) OTHER ASSOCIATES -- As discussed under Section 2-5f, the attorney shall consult members of other Offices whose programs or activities are affected and shall keep other Associates informed of developments in the litigation by including them in the copy list on correspondence with HUD and on major correspondence with DOJ. Since more than one program or activity may be affected, e.g., low-rent housing and fair housing, more than one Associate may need to be included in the copy list.

e. COMMUNICATIONS WITH MEMBERS OF CONGRESS AND MEMBERS OF PUBLIC

Once litigation has been initiated, no response to any communications about the litigation from Congress or the public may be made without the concurrence of the Associate General Counsel for Litigation, so that OGC can exercise appropriate oversight and coordination.

Public discussion of a matter pending in litigation in any extrajudicial forum which goes beyond a mere recitation or reference to a public record may interfere with or prejudice a fair trial of the action. See generally, Section 1-3c(2).

f. DEVELOPMENT OF POSITION

- (1) FAMILIARITY WITH PROGRAM -- To develop the Department's position, an attorney must become familiar with the programs involved. This may be accomplished by consulting other attorneys in the appropriate Office, by reading materials prepared by other attorneys in similar litigation, by reading applicable handbooks and regulations, and by consulting appropriate program staff.
- (2) LEGAL RESEARCH -- The attorney's legal research may begin with locating a recent brief or litigation report dealing with the program or issue involved. Cases involving statutory and constitutional provisions should be researched to allow an evaluation of the factual record when it is received and to evaluate initially whether settlement should be explored.
- (3) COMPILATION OF FACTS -- Although Headquarters attorneys are often able to rely upon Regional Counsel or the Assistant Secretary's staff to assemble the facts, the attorney may have to go directly to Field Office or Headquarters staff and/or files to gather information and materials, if

required. The attorney must prepare a summary of all pertinent facts surrounding the challenged program, project, or activity. He/she shall assemble all relevant documents. Overall, this compilation must be sufficient to answer the complaint, prepare any dispositive motions, form the basis for affidavits needed to support any motions, support a settlement or take other action to be recommended to DOJ.

- (4) RESOLUTION OF DISAGREEMENT OR INCONSISTENCIES -- The factual compilation may disclose disagreements or inconsistencies about alleged facts. In addition, there may be disagreements or inconsistencies as to Departmental policies or practices. If it is not possible to resolve these problems informally, a memorandum shall be sent to the appropriate Program Officials seeking resolution.
- (5) EVALUATION OF THE NEED FOR DISCOVERY -- As soon as possible in the course of the litigation, the attorney should consider the usefulness of undertaking discovery. Interrogatories exploring the basis for contentions made in the complaint may be advisable. This is an appropriate topic for initial conversations with the DOJ attorney so that any discovery requests may be filed early to allow development of the Government's case before the plaintiff files papers requiring responses from HUD.
- (6) SEEKING RELIEF AGAINST OTHER PARTIES -- The Litigating Associate or Regional Counsel may, after consultation with the appropriate Program Officials and other Associate General Counsels, recommend to DOJ that a counter-claim, cross-claim, or third party complaint be filed on behalf of the Secretary. Initiation of such claims must follow the procedures for initiating affirmative litigation described in Sections 2-3d and 2-6.

g. PAPERS SUBMITTED TO DOJ

The Department of Justice may request that HUD submit a litigation report or a draft court papers. The form of the communication should be negotiated with the DOJ attorney, but any response must be timely provided. One of the following formats is normally used.

- (1) LITIGATION REPORT -- This report includes:
  - (a) Identification of parties and brief summary of complaint;
  - (b) Facts relating to service of process on HUD officials;
  - (c) Summary of material facts and chronology of events concerning the program, project or activity involved;



- (d) Copies of all relevant documents from HUD files attached as exhibits;
- (e) Discussion of program background, including citations to relevant statutes, regulations and preamble, if relevant, and handbooks;
- (f) Recommended defenses and counterclaims, including arguments, citations to cases and other legal authority;
- (g) Suggestions for appropriate discovery;
- (h) Discussion of settlement potential, if any;
- (i) Names of persons familiar with the facts who may be called upon to serve as witnesses or affiants; and
- (j) A proposed answer to the complaint.

If the DOJ attorney agrees, draft motions and memoranda may be substituted for a litigation report.

(2) DRAFT COURT PAPERS

- (a) Answer A draft answer is nearly always provided and it must be furnished in a timely fashion so that DOJ can file it within the 60 day period permitted the Government for filing a response.

The Federal Rules of Civil Procedure should be consulted.

- (b) Dispositive or Other Motions In lieu of an Answer, a Dispositive Motion and supporting brief may be filed.

- (c) Affirmative Discovery To discover the nature of plaintiffs' evidence or to narrow the issues, the attorney should consider drafting factual or contention interrogatories, requests for admissions or for production of documents and should consider taking depositions. HUD's use of discovery in the early stages of litigation is particularly productive when it enables HUD to file a dispositive motion.

- (d) Discovery Responses

1. General Policy On Responses

Responses to discovery requests made by opposing counsel

are to be made consistent with the Federal Rules of Civil Procedure (24 C.F.R. Part 15, Subpart C is intended to apply only to Non-Federal Party Litigation.)

Occasionally, a party may seek information through a Freedom of Information Act (FOIA) request instead of through discovery. In that event, disclosure is governed by 24 C.F.R. Part 15, Subparts A and B. The handling attorney should review any FOIA request relating to a matter in litigation and advise the DOJ attorney prior to release of the information.

## 2. Possible Sanctions

The sanctions for noncompliance with requests for discovery are serious. Members of the bar are expected to observe professional standards of due care, and in rare instances, a judgment may be rendered against an attorney in his individual capacity for a flagrant disregard of his responsibilities under the Federal Rules of Civil Procedure. Therefore, it is important at every step of the way to document compliance with a discovery request and make objections, seek protective orders or seek extensions of time in a timely fashion.

## 3. Procedure

The handling attorney shall prepare an index for all documents that are produced and have a copy of each document made for the Department's litigation files. (when copying documents which contain concurrence blocks, these should be covered when photocopying to reflect appearance of the original and counsel should be informed of this practice.)

Answers to interrogatories or requests for admissions of fact should be forwarded to DOJ by letter or memorandum so that the litigation file will contain a complete record of the action taken by the Department pursuant to a request for discovery. The handling attorney shall fill any gaps in correspondence associated with a discovery request by file memorandum recording what was said and done by each participant in the process.

The attorney assigned principal responsibility for handling a case should generally abide by the following guidelines

in response to discovery requests:

- a. Observe the time limit for service of a response, which is usually 30 days after service of the request. Allowance should be made for the time required to permit the DOJ attorney to accomplish service on the moving party.
- b. Make timely objections to a request for discovery. The most frequent objections are that an item of information: is not available; is privileged; is burdensome to produce; has no conceivable relevance to the issues; or is not required under law to be produced. An argument concerning undue burden may need to be buttressed with estimates of numbers of files and staff hours involved.
- c. State the objections in one of two ways. If they are comprehensive, it is probably better to recommend the filing of a motion for a protective order. If the objections are less significant or relate to only a few items in the request, they may be set forth in the response to the overall request. The moving party is then obliged to move for an order compelling a response to those items, if he/she believes that the objection is not well taken.
- d. Accept responsibility for supervising the development of the entire response although the information and documents may be provided by other sources. If objections are to be made, make timely recommendations to DOJ. If an extension of time is required, promptly report to DOJ the necessity of making a request for an appropriate extension. It must not be assumed that objections, or a request for an extension, will be granted by the court. The attorney should continue to exert his/her best efforts at all times to achieve full compliance within the shortest time feasible.
- e. Obtain draft responses to interrogatories and requests for admissions from the responsible Program Official. Generally, it is his/her staff that has the information necessary to respond or the files from which the information may be culled. A request for assistance should be made in writing,

but time exigencies may dictate that the attorney seek assistance by telephone, in which case the request for assistance should always be confirmed in writing. The answers should be executed by the HUD Official responsible for the records or program operations involved. If more than one official provides information from which the answers are drawn, each may sign a statement indicating which responses he/she supplied. Occasionally, the HUD attorney working on the case will execute the answers, indicating which offices provided responses for various items.

- f. With respect to depositions, make certain that the designated official has authority to speak for the Department on the subject matter of the proposed examination. Prepare the witness by reviewing with him/her the records or policies likely to be the subject of the testimony, as well as advising him/her of the ground rules for depositions, e.g., the necessity of responding only to questions within his/her expertise.
- g. In the case of a request for production of documents, the attorney with principal responsibility for handling the case must ensure that all officials who may possess responsive documents be contacted and that those officials affirmatively document the nature, scope and results of the search. The handling attorney should ensure that the files to be produced are reviewed to assure that no privileged or exempted materials are revealed and then record what materials are produced and make a copy of all documents copied for the other party, as directed by DOJ.

(e) Affidavits

One or more Affidavits or Declarations may be needed to support a motion. If it presents a description of the Department's policy, it will probably necessitate execution by a Headquarters official. Since the employee who executed the Affidavit may be called upon later to present oral testimony in a deposition or a hearing, this should be taken into consideration in selecting the employee.

The Affidavit should include a description of the affiant's official

duties, the source for the information provided, and the purpose of the Affidavit. Since 28 U.S.C. 1746 permits use in Federal courts of unsworn declarations executed under penalty of perjury in lieu of Affidavits signed under oath administered by a notary, that format should be commonly followed.

If documents from HUD files are attached as exhibits to the Affidavit, execution of a separate authentication certificate by the custodian of the records may be necessary, as provided by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, as well as local rules. However, often a reference in the Affidavit to the authenticity of the documents will suffice. See current Federal Register Notice of employees authorized to authenticate documents.

(f) Legal Memorandum

A legal memorandum submitted in support of a dispositive motion should contain many of the elements included in a litigation report, but the information should be presented in an argumentative form. The memorandum should include an identification of the parties, a summary of the nature of the case, discussion of the program background and legal argument. See items a, c, e, and f in Section 2-5g(1) above.

The memorandum is usually submitted with the motion and an Affidavit, attaching exhibits from the Department's files. If discovery has taken place, reference may be made to deposition testimony, admissions, and interrogatory answers of adverse witnesses, as part of the record before the Court.

The HUD and DOJ attorneys working on a case may decide to divide the work on a memorandum. In any event, it is essential that the HUD attorney review the final complete draft prior to filing.

(3) LETTER -- In certain cases, the above papers are not necessary and a letter describing the Department's position will suffice. The following situations are illustrative.

(a) Repetitive Litigation

When a case is similar to one previously filed, a letter indicating the continuing support of the Department for the position advanced in the other litigation with a reference to the name of the case and the nature of the materials previously furnished to DOJ may

provide adequate information.

h. PRESENTATION OF CASE

The presentation of the Department's position at hearings, depositions, status conferences, and other official appearances is a responsibility that is sometimes shared between the DOJ and HUD attorneys working on a case. The consultative process during litigation may also require other types of HUD attorney participation.

- (1) APPEARANCE AT HEARINGS -- With respect to a hearing on a motion for injunctive relief, the HUD attorney is usually expected to select the HUD officials to provide testimony and to assist in preparing them. The eliciting of testimony at the hearing and the presentation of legal argument are functions which the HUD attorney may be asked to perform. In any event, a DOJ attorney conducting these aspects of the hearing may rely upon the HUD attorney for program knowledge and advice on presenting the Department's position in the most persuasive manner.
- (2) PREPARATION OF, AND CONSULTATION ON, ADDITIONAL COURT PAPERS -- Unless a case is resolved at an early stage, it will be necessary for the HUD and DOJ attorneys to consult often on an informal basis concerning litigation strategy, preparation of additional court papers, discovery, and possibly trial. The handling attorney is often involved on a continuing basis in such activities as discovery and formulation of affidavits.
- (3) PREPARATION FOR, AND CONDUCTING, TRIALS -- In addition to discovery, preparation for trial may include some or all of the following:
  - (a) Selecting pertinent documents from HUD files, from discovery responses filed by other parties, and from other available sources.
  - (b) Securing appropriate witnesses by interviewing HUD employees and obtaining approval of the supervisor of persons selected to testify; by selecting experts not affiliated with the Department, where appropriate, and obtaining required approvals for their remuneration; and by obtaining subpoenas for the testimony of other appropriate witnesses.
  - (c) Preparing any pre-trial documents required by the court. A stipulation of facts and the issues to be tried, as well as a witness list, are often components of a pre-trial submission to the court.
  - (d) Preparing a trial working paper for use by the attorney at trial: it should include an outline of the opening argument, the nature of

testimony to be elicited from each witness, including the opponent's witnesses, and an outline of the closing argument. This closing argument outline should include the legal conclusion to be derived from the testimony and documentary evidence, with reference to supporting the case law.

- (e) Preparing witnesses to give testimony by reviewing with them probable questions from all counsel and explaining legal procedures.
- (f) Assuring that all court papers comply with local court rules and that counsel expected to conduct the trial are admitted to practice before the Court of the case and will be permitted by the court to represent HUD. The conduct of trial requires presentation, in admissible form, of testimonial and documentary evidence, and should only be undertaken after thorough preparation of the facts, law and trial procedures.

(4) SETTLEMENTS

(a) Department's Policy On Settlements

It is both HUD's and DOJ's policy to enter a settlement agreement or consent decree only where it is consistent with HUD's authority, and in the Government's interest to do so.

All settlements of Federal Party Litigation must be approved by DOJ.

In suits involving a local public agency as well as HUD, sometimes a settlement proposal can be consummated without having the Government a party to the stipulation or consent judgment, if the other parties are given a clear understanding that there is governmental policy which discourages HUD participation. However, the Department has no objection to submitting a letter expressing its willingness to cooperate in effectuating a settlement reached by other parties to the litigation. The Department is also willing to accord expeditious consideration to an application for technical and financial assistance received from any of the parties. If possible, the plaintiffs and local defendants should proceed with the execution of settlement documents and a separate order of dismissal should be entered as to the Secretary.

(b) Consultation On Settlements

When other parties propose settlement, the Litigating Associate or Regional Counsel shall consult appropriate Program Officials and Program Counsel regarding their recommendations for the Department's position on the offer.

When the Litigating Associate or Regional Counsel desires to initiate a settlement, he/she shall consult appropriate Program Officials and Program Counsel concerning the form and substance of possible settlement elements prior to recommending to DOJ that a settlement offer be made to the other parties.

Program staff and program attorneys shall be consulted during the process of settlement negotiations. In this way, they will be familiar with the background of the settlement and be better able to help implement its provisions. See Sections 1-3c(3)(6), 1-3d and 2-3f.

However, in settlement negotiations the Department should be represented by DOJ and OGC attorneys.

i. ULTIMATE DISPOSITION OF THE CASE

(1) NOTICE TO CLIENT OF DISPOSITION -- The Litigating Associate or Regional Counsel shall promptly notify appropriate Program Officials and other Associates of court decisions and orders. See Section 1-3c(3)(c).

(2) CONSULTATIONS WITH CLIENT AND DOJ

(a) Implementation of Orders and Settlement Agreements

The Litigating Associate or Regional Counsel handling the case shall transfer responsibility for compliance with the terms of court orders and settlement agreements to a program office. Primary responsibility for related legal issues will rest with the Program Associate. The Program Associate shall work with Regional Counsel and the program staff to develop a procedure and time schedule to implement the order or agreement. The responsible Program Official shall report progress to the Program Associate. See Section 1-3d.

(b) Reconsideration and Appeal

If it appears to the Litigating Associate or Regional Counsel that the Department will not be able to comply with any portion of an order or agreement, the Litigating Associate or Regional Counsel shall so advise the Associate for Litigation and proceed to



determine whether to recommend to DOJ that a reconsideration of the order or agreement be sought. The Associate shall seek the Assistant Secretary's views concerning whether to recommend an appeal and shall obtain necessary concurrences. Section 2-3f. The Associate shall prepare the recommendation to DOJ, using the format shown Appendix 5.

(c) Seeking Publication of Decision

In cases in which a favorable decision is rendered which would be useful as precedent, the Litigating Associate or Regional Counsel shall recommend to DOJ that the court be requested to order publication, stating the basis for the recommendation. In addition, in such cases, the Litigating Associate or Regional Counsel should send a letter to the *Housing and Development Reporter*, *U.S. Law Week*, and other appropriate publications, advising them of the decision and its significance and requesting that they publish a summary of the decision.

- (3) CIRCULATION OF OPINION -- The Litigating Associate or Regional Counsel shall send a copy of any court opinion which states a significant legal rationale to the General Counsel, all Associates, and all Regional Counsel.

2-5. PROCESSING AFFIRMATIVE LITIGATION

a. GENERAL

This section describes OGC's role in pursuing Affirmative Litigation to enforce the statutes, regulations, contracts, and other documents which HUD administers. Affirmative Litigation includes original actions, counterclaims, cross-claims and third party claims. See Section 3-2a(2).

b. EXAMPLES OF AFFIRMATIVE LITIGATION

The Department's Affirmative Litigation includes, but is not limited to, the following:

- (1) Enforcement of civil rights under Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968.
- (2) Injunctive actions and subpoena enforcement actions under the Interstate Land Sales Act the Real Estate Settlement Procedures Act, and the Manufactured Housing Construction and Safety Standards Act.
- (3) Enforcement of Regulatory Agreements entered into pursuant to the

National Housing Act and the Multifamily Assisted Housing Reform and Affordability Act of 1997.

- (4) Enforcement of Annual Contributions Contracts entered into pursuant to the U.S. Housing Act of 1937.
- (5) Enforcement of Housing Assistance Payments Contracts entered into pursuant to the U.S. Housing Act of 1937 (Section 8).
- (6) Enforcement actions under Section 111(b) of the Housing and Community Development Act of 1974 (CDBG).
- (7) Foreclosures of mortgages and deeds of trust.
- (8) Enforcement of subpoenas under the Interstate Land Sales Act and the National Mobile Home Construction and Standards Act of 1974.
- (9) Enforcement of subpoenas under Title VIII of the Civil Rights Act of 1968.
- (10) Enforcement of Section 504 of the Rehabilitation Act of 1973 (nondiscrimination on the basis of handicap).
- (11) Injunctive actions under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act.

c. PROCEDURE

(1) GENERAL

- (a) When an Associate believes that Affirmative Litigation should be initiated, he/she shall consult with the appropriate Program Official and Litigating Associate or Regional Counsel.
- (b) When a Program Official or Regional Counsel recommends initiation of litigation, the Litigating Associate, in consultation with the Program Associate, shall evaluate the evidence to determine whether litigation is warranted.
- (c) If the proposed litigation involves a particular Region, the Associate shall consult with the Regional Counsel prior to recommending filing of an action, except for cases described in Section 2-6b(2) and (8), above.
- (d) If the Associate concludes that litigation is warranted, he/she shall assist in developing the case until it is sufficiently substantiated to

prepare a referral to DOJ with draft pleadings or other necessary documents.

- (e) For procedures relating to settlement after a referral to DOJ but before DOJ has accepted, See Section 2-3f(4).

- (2) EVICCTIONS FROM HUD ACQUIRED PROPERTY – By agreement with DOJ, for routine cases and upon approval by the General Counsel, or his/her delegatee, HUD may retain private counsel to represent it in bringing actions to evict occupants from HUD acquired property, to collect claims for delinquent rent in amounts not in excess of \$5,000, or for other actions approved by the General Counsel or his/her delegatee (see Memorandum of Understanding, Appendix 4).

d. DOCKET

The Litigating Associate and Regional Counsel shall maintain a tracking system for their Affirmative Litigation.

2-6. PROCESSING DEFENSIVE LITIGATION WHERE ASSOCIATE HAS MONITORING RESPONSIBILITY

When an Associate is monitoring a defensive case for which principal responsibility has been transferred to Regional Counsel, he/she shall, if the nature of the case warrants, notify the Assistant Secretary and other appropriate HUD Headquarters officials of the commencement of the litigation, consult with them if necessary as the case progresses, and notify them of the ultimate disposition of the case. The primary function of the Associate in monitoring a case is to assure that its handling is consistent with Departmental policy.

a. MAINTAINING RECORDS

The Monitoring Attorney shall maintain litigation files of all papers forwarded from Regional Counsel, as well as materials originated by the Monitoring Attorney.

b. PROVIDING ADVICE TO REGIONAL COUNSEL

The Associate monitoring the case shall inform Regional Counsel of any new developments in policy or regulations relevant to the litigation. Regional Counsel may call upon the Associate monitoring the case for advice or assistance, which requests shall be answered promptly.

c. COMMUNICATIONS WITH HEADQUARTERS OFFICIALS

The notice to Headquarters Officials which Litigating Associate or Regional

Counsel sends after commencement of the suit shall attach a copy of the complaint, and describe the parties and the issues involved, and state the name of the attorney assigned to handle the case. If the Regional Counsel requests an Associate to obtain views of Headquarters Program Officials, the Associate shall provide appropriate assistance. At the termination of the case, the Litigating Associate or Regional Counsel shall, if the nature of the case warrants, notify appropriate Headquarters Program Officials and Program Counsel. See Section 2-5i(1) and (2).

## 2-7. OTHER ROLES - INTERVENTION AND AMICUS PARTICIPATION

Occasionally a case is brought to HUD's attention in which there is no Federal Party but which raises issues fundamental to the operation of HUD programs. In such a case, one of the parties, or the Department of Justice, may suggest that we participate as an intervenor or as *amicus curiae*.

If, after reviewing copies of the pleading and other papers filed by the parties, an Associate believes that such participation is warranted, he/she shall seek the views of the appropriate Program Official. The Associate shall prepare a letter to DOJ setting forth HUD's interest in participation and the reasons therefore, including the statutory and regulatory back ground of the affected program and the legal arguments. Such a letter requires the prior review of the Associate for Litigation and concurrence of the General Counsel.

## **CHAPTER 3. OFFICES OF REGIONAL AND OTHER FIELD COUNSEL**

### **3-1. INTRODUCTION**

#### **a. FUNCTION OF CHAPTER**

This Chapter describes the functions and responsibilities of the Offices of Regional Counsel, and Chief Counsel/Chief Attorney with regard to Litigation.

#### **b. GENERAL LITIGATION RESPONSIBILITIES OF REGIONAL AND OTHER FIELD COUNSEL**

The primary responsibility for performing litigation functions in Field Offices resides in the Office of Regional Counsel unless explicitly delegated by the General Counsel or Regional Counsel to Chief Counsel/Chief Attorney.

In carrying out the litigation function, Regional Counsel shall:

- (1) As authorized, recommend to DOJ the initiation of cases;
- (2) Handle directly, and assist Headquarters attorneys in handling, Federal Party Litigation;
- (3) Monitor non-Federal Party Litigation in the jurisdiction of the Regional Office relating to issues of interest to HUD;
- (4) Maintain a docket of all Federal Party Litigation and the Non-Federal Party Litigation which he/she is following; the Regional Counsel shall use the Legal Assessment of Workload System (LAWS) for such purpose;
- (5) Accept service on behalf of Field Office employees sued in an official capacity (see Section 1-4b), forwarding the documents immediately to the Associate for Litigation;
- (6) Act upon requests by Field Office employees sued in an individual capacity for representation by the Department of Justice (see Section 1-5(d));
- (7) Act upon subpoenas or court demands for disclosure of information by documents or testimony (see Sections 1-4c, 1-6);
- (8) Approve the legality of issuance of subpoenas pursuant to the Fair Housing Act, 42 U.S.C. 3611 (see 67 F.R. 44234, July 1, 2002);
- (9) Respond to, or refer to the Associate for Litigation for response, any inquiry concerning a matter in litigation (see Sections 1-3c(2) and 2--5e);

and

- (10) Perform such other duties as are necessary and appropriate.

Chief Counsel/Chief Attorney may be called upon by the Offices of General Counsel or Regional Counsel to perform functions in connection with litigation, such as drafting affidavits for Field Office officials and assisting in gathering the facts, selection of witnesses, and appearance at hearings.

### 3-2. PROCESSING FEDERAL PARTY LITIGATION

#### a. CASES WHERE REGIONAL COUNSEL HAS PRINCIPAL RESPONSIBILITY

- (1) DEFENSIVE LITIGATION -- Where Regional Counsel has principal responsibility for handling defensive Federal Party Litigation, he/she shall follow the procedures described in Section 2-4, making the following substitutions where appropriate: "Regional Counsel" for "Associate," "Regional Director" for "Assistant Secretary" and "Regional Office" for "Headquarters."

If Regional Counsel needs assistance from Headquarters, he/she may contact the Headquarters program staff directly.

Procedures for initiating Affirmative Litigation must be followed with respect to filing counterclaims, cross claims, or third party complaints.

Regional Counsel shall furnish to the Associate monitoring the case a copy of any litigation report.

- (2) AFFIRMATIVE LITIGATION

- (a) Initiation

As authorized, the Regional Counsel may initiate Affirmative Litigation without prior approval of the General Counsel for Category A cases in the Hauser memorandum (Appendix 3).

- (b) Recommendation

When Regional Counsel believes that Affirmative Litigation should be initiated, for which he/she is not authorized to initiate, he/she shall send his/her recommendation, including reasons, to the Litigating Associate with a copy to the Program Associate.

Regional Counsel shall have principal responsibility for handling this Affirmative Litigation where the Litigating Associate so

indicates.

(c) OIG Referrals

OIG referrals to DOJ for initiation of civil litigation shall be handled in accordance with the MOU between OIG and OGC approved by the Secretary on April 3, 2003.

- (3) INTERVENTION AND AMICUS -- When Regional Counsel believes that the Department should file a complaint in intervention or brief *amicus curiae*, he/she shall send his/her recommendations, including reasons, to the Associate General Counsel for Litigation. See Section 2-8.

3-3. MONITORING NON-FEDERAL PARTY LITIGATION

a. REPORTING BY HUD ASSISTANCE RECIPIENTS

When Regional Counsel receives from a HUD Assistance Recipient a Complaint which he/she believes is likely to have a significant impact on the operation or activity involved, he/she shall request the recipient to furnish subsequent documents to permit him/her to follow the case. See Section 5-2b. If at any point the Regional Counsel determines that HUD's interest requires active participation or advice to the recipient, he/she shall provide it, consulting the Program Associate when necessary.

Regional Counsel shall respond to requests for appropriate assistance from counsel for a HUD assistance recipient and shall render such assistance as he/she deems appropriate under the circumstances.

b. DUTIES AND RESPONSIBILITIES - PUBLIC HOUSING AGENCY LITIGATION

In the case of litigation involving a PHA program, project or activity funded under an Annual Contributions Contract with HUD, the PHA must receive Regional Counsel's concurrence before taking the actions described below.

- (1) INITIATION OF LITIGATION -- If the PHA requests authority to institute litigation, Regional Counsel shall review the agency's reasons. The Regional Counsel shall concur unless he/she finds that such action would be frivolous as a matter of law, contrary to Departmental policy, or not cost-beneficial. See attached Procurement of Legal Services by Public Housing Agencies (Notice PIH 2003-24 (HA), issued September 26, 2003, (Appendix 6)) and the following Addendum to Engagement Agreement:

## 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]

Regional Counsel shall not concur in any proposal to utilize project or program funds to pay the costs of litigation against the United States or any department or agency thereof.

- (2) DEFENSE OF LITIGATION -- Regional Counsel shall not approve expenditure of program funds for a PHA's defense if he/she finds that the PHA has clearly violated HUD requirements or is otherwise at fault.

In this connection, Regional Counsel shall not approve the use of program funds to defend against cases brought by the United States or HUD under the Fair Housing Act.

However, in such cases he/she may authorize the limited use of program funds for the PHA's defense to facilitate settlement or obtain judicial definition of the required relief.

If, after giving original approval, Regional Counsel determines that an agency is barred from using program funds, he/she may withdraw approval of future expenditures by notifying the PHA with a brief statement of the basis for his/her action.

In such an event, Regional Counsel may approve the continuation of representation on a limited basis as described above.

- (3) LITIGATION SERVICES CONTRACTS WITH PRIVATE ATTORNEYS -- With the exception of litigation involving a PHA in the section 8 program, PHAs must obtain the concurrence of Regional Counsel in litigation services contracts with private attorneys where the fee is expected to exceed \$100,000. Upon receiving a request for

concurrence, if Regional Counsel is satisfied that paragraph (2) above is satisfied, he/she shall concur in a request received from the PHA for approval of a contract of litigation services if he/she is also satisfied that: the contract contains adequate protections 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 amount of the fee is reasonable. A fee 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 fee. Regional Counsel's concurrence signifies that the attorneys fee under the contract is an allowable project expense, but it is not a certification that there are sufficient project funds available to cover the fee.

Regional Counsel shall retain in the appropriate litigation file the data considered by him/her in acting upon a fee proposal, such as compilations of HUD approved fees for litigation counsel or data concerning payments made to counsel by other clients. Contracts calling for payment on a per hour or per diem basis, or a combination of both, are required to contain at least an estimated maximum total for budget purposes. Any contract calling for an estimated maximum fee in excess of \$300,000 will be forwarded with Regional Counsel's recommendation to the Program Associate. See Section 2-3f(3).

Lump sum fee 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.

Successive increases in such contracts in excess of the amounts described above require approval by the Regional Counsel, or Associate General Counsel for Assisted Housing and Community Development, respectively, as applicable.

Requisitions for payment of fees under a litigation contract may be reviewed by Regional Counsel prior to payment.

- (4) APPEALS -- Regional Counsel shall confer with the appropriate Program Official and concur in a PHA's request to appeal an adverse decision after consultation with appropriate HUD officials unless he/she finds that an appeal would be frivolous as a matter of law, contrary to Departmental policy, or not cost-beneficial. See Sections 2-3f(2) and 5-3b. If the adverse decision includes an order affecting a HUD-assisted project or activity, Regional Counsel shall promptly convey that information to the appropriate Program Officials and advise them as to the restraints upon the PHA.

- (5) SETTLEMENTS -- Regional Counsel is authorized to approve a proposal for settlement with the concurrence of the appropriate Program Official and without referral to the Program Associate where the amount of the settlement, including fees and costs, will not exceed \$500,000. (Cost includes any reduction in the agency's claim against the opposing party as well as any payment by the agency to the opposing party.)

If Regional Counsel receives adequate documentation of the settlement proposal and determines that the settlement is routine, he/she shall approve it unless he/she finds it is contrary to Departmental policy or not cost-beneficial. When Regional Counsel approves a settlement, he/she shall document the basis for approval in the litigation file and shall forward a copy of that document to the Program Associate.

Approval of any settlements in which the PHA's cost would exceed \$500,000 or which have significant impact on policy, legal precedent, Departmental programs or other matters of vital interest to the Secretary and/or Assistant Secretaries require the concurrence of the Program Associate. See generally Section 2-3f(2). Regional Counsel shall, with the concurrence of the appropriate Program Official, prepare a memorandum to the Program Associate evaluating the proposal and setting forth his/her recommendations. The Program Associate will advise Regional Counsel whether or not to concur in the proposed settlement, and Regional Counsel will communicate the Department's determination to the PHA.

#### 3-4. REGIONAL OFFICE RECORDS

Regional Counsel shall maintain a docket for all cases which his/her Office is handling. Such docket shall contain all of the information as described in Section 2-2c(1); the Regional Counsel shall use the Legal Assessment of Workload System (LAWS) for such purpose. Regional Counsel shall maintain a docket of Non-Federal Party Litigation that the office is following which contains the same information as is required for Federal Party Litigation for which he/she has principal responsibility; the Regional Counsel shall use LAWS for this purpose also. Regional Counsel shall maintain litigation files for court papers separate from those for correspondence for each case. Disposition of these records shall be in accordance with HUD Handbook 2225.

#### 3-5. REPORTING BY REGIONAL COUNSEL

Chapter 4 describes the requirements for reporting by Regional Counsel to the General Counsel concerning litigation. In addition, Regional Counsel shall report to the appropriate Program Associate important events in Non-Federal Party Litigation that he/she is monitoring.

## **CHAPTER 4. REPORTING BY ASSOCIATE GENERAL COUNSEL AND REGIONAL COUNSEL**

### **4-1. REPORTING LITIGATION DEVELOPMENTS**

Litigating Associates and Regional Counsel handling Federal Party or Non-Federal Party Litigation shall report to the General Counsel on major developments (including commencement and conclusion) in significant cases which their offices are handling. Such reports may usually be made by inclusion in the Litigating Associate's or Regional Counsel's regular weekly reports to the General Counsel; however, litigation developments which the General Counsel may, due to their sensitivity or public interest, be consulted by Principal Staff, other Government officials, or the Press, should be brought to the General Counsel's attention by more immediate means, as appropriate.

### **4-2. REPORTING ON LITIGATION FOR FINANCIAL STATEMENT AUDITS**

The General Counsel is regularly requested to provide "Legal Letters" which give information, evaluations, estimates, and certain assurances concerning the handling of all pending and threatened litigation against the Department, in connection with audits of the annual financial statements of the Department, the Federal Housing Administration, and the Government National Mortgage Association. The Legal Letters must be provided in several installments (usually at least interim and final) both during and after the fiscal year, in accordance with statutorily-prescribed reporting dates. Accordingly, all Associate and Regional Counsel are required to provide prompt, up-to-date, accurate information concerning all Defensive Litigation, as well as Affirmative Litigation in which a counterclaim is filed, which they are handling and Threatened Litigation of which they are aware upon request from the Associate for Litigation, the Associate General Counsel for Insured Housing, and the Associate General Counsel for Finance and Regulatory Enforcement.

Professional standards governing the information, evaluations and estimates concerning pending and threatened litigation which may be provided by counsel are prescribed by the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (January 7, 1976) and guidelines provided by the Department of Justice. The Office of Litigation provides advice concerning these standards and guidelines when requests are made.

## **CHAPTER 5. RESPONSIBILITIES OF HUD ASSISTANCE RECIPIENTS**

### **5-1. INTRODUCTION**

#### **a. FUNCTION OF CHAPTER**

This Chapter describes the responsibilities of all HUD Assistance Recipients in reporting and conducting Litigation or Threatened Litigation involving a program, project, or activity receiving such assistance.

#### **b. CONDUCT OF LITIGATION**

Every HUD Assistance Recipient has the responsibility to initiate or defend diligently all litigation involving such program, project, or activity to insure the proper use of federal funds.

### **5-2. SCOPE OF REPORTING REQUIREMENT**

#### **a. INITIAL NOTIFICATION**

Every HUD Assistance Recipient that is engaged in Litigation shall promptly send a copy of the Complaint to the Regional Counsel if the Litigation involves the following:

- (1) Construction or application of: a Federal, or State constitution, statute, or regulation, a HUD assistance contract, or a cooperation agreement; or
- (2) If an adverse judgment would be satisfied from funds obtained at any time from HUD.

Every HUD Assistance Recipient who is threatened with such Litigation shall promptly notify the Regional Counsel of the name, title and address of the complainant, the nature of the complaint, and a factual statement of the Recipient's involvement in the subject of the complaint.

Notification of HUD at the earliest opportunity concerning any proposed, Threatened or Pending Litigation will considerably facilitate the timely processing of a PHA's requests for required HUD concurrences (see Section 5-3 below).

#### **b. SUBSEQUENT REPORTING**

Thereafter, the Recipient shall transmit to the Regional Counsel one copy of such documents as Regional Counsel may request.

Although the Recipient is responsible for the proper conduct of the Litigation, it

may request specific advice or assistance of the Regional Counsel. It may also submit proposed pleadings or briefs for evaluation and comment and may request citations to applicable law on specific questions.

### 5-3. LIMITATIONS ON LITIGATION ACTIVITY

With the exception of litigation involving a PHA in the section 8 program, the following additional requirements apply to Litigation involving a PHA program project, or activity receiving loan, grant, or subsidy assistance from HUD:

#### a. INITIATION OF LITIGATION BY PUBLIC HOUSING AGENCY

A PHA shall not initiate litigation, other than routine eviction actions, without obtaining the prior written concurrence of HUD. The PHA shall communicate in writing any proposal to institute such litigation to the Regional Counsel together with the reasons for the proposed action. The Regional Counsel shall concur unless he/she finds that such action would be frivolous as a matter of law, contrary to Departmental policy, or not cost-beneficial. See Section 3-3b(1).

#### b. APPEALS

The PHA shall not undertake an appeal from an adverse judgment without the prior written concurrence of HUD. At least 15 days before the last day for filing a notice of appeal, the PHA shall forward its written recommendation for or against an appeal to the Regional Counsel. The communication shall set forth the facts, the legal arguments, and other considerations upon which the recommendation is based. The last day to file a notice of appeal shall be clearly indicated. The Regional Counsel shall concur in such recommendation unless he/she finds that an appeal would be frivolous as a matter of law, contrary to Departmental policy, or not cost-beneficial. See Sections 3-3b(4) and 2-2f(2).

#### c. SETTLEMENTS

No settlement arising out of litigation shall be accepted by a PHA without the prior written concurrence of HUD. The terms of any such offer shall be communicated in writing to the Regional Counsel together with the recommendations of the PHA for disposition and the arguments in support of those recommendations.

If the opportunity for a settlement arises in the course of a trial, counsel for the PHA shall inform the court of these requirements, and, in an appropriate case, shall respectfully move for a continuance to allow for an opportunity to obtain HUD concurrence in the terms of the proposed settlement.

### 5-4. CONTRACTS WITH PRIVATE ATTORNEYS FOR LITIGATION SERVICES

With the exception of litigation involving a PHA in the section 8 program, a PHA must submit to HUD Regional Counsel for prior written concurrence any contract with a private attorney for litigation services involving a PHA program, project, or activity receiving loan, grant, or subsidy assistance from HUD. If the services are estimated to cost not more than \$100,000, this concurrence is not necessary. Such contracts shall make provision for reasonable fees and reimbursement of necessary expenses. If additional funding or a budget revision will be required to cover the cost of litigation services, the PHA shall consult appropriate Area and Regional Office staff. The requirements for approval of contact for litigation services are set out at Section 3-3b(3). Successive increases in such contracts in excess of the amounts described above require approval by the Regional Counsel, or Associate General Counsel for Assisted Housing and Community Development, respectively, as applicable.