

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 69

Date Signed: April 8, 1993

MEMORANDUM

SUBJECT: Guidance on Section 1 of the Civil Justice Reform
Executive Order No. 12778

FROM: Robert Van Heuvelen
Acting Deputy Assistant Administrator

TO: Regional Counsel, Regions I - X
Enforcement Counsel

Attached is the Office of Enforcement's Guidance on Section I of the Civil Justice Reform Executive Order No. 12778. This Guidance reflects the comments of the Enforcement Counsel, Regional Counsel and the Environmental Enforcement Section of the Justice Department's Environment and Natural Resources Division.

Please direct any questions with respect to this Guidance to my Special Assistant Linda Breggin. She can be reached at (202) 260-4 931.

Attachment

cc: John Cruden
Howard Corcoran

GUIDANCE ON SECTION 1 OF THE CIVIL JUSTICE REFORM
EXECUTIVE ORDER NO. 12776

The following is the Office Of Enforcement's (OE) Guidance on the implementation of Section I of the Civil Justice Reform Executive Order ("Executive Order") entitled "Guidelines to Promote Just and Efficient Government Civil Litigation." Only those Subsections of Section 1 that impact on the procedures to be followed in processing cases and case referrals in affirmative Environmental Protection Agency (EPA) enforcement cases handled by OE and the Offices of Regional Counsel are addressed in this Guidance. This Guidance does not govern administrative actions which are covered by Section 3 of the Executive order. This OE Guidance on Section 1 of the Executive order should be used as a supplement to the Guidance issued by the Department of Justice (DOJ).¹

I. Section I(a): Pre-filing Notice of a Complaint

Section I(a) requires that prior to the filing of a complaint either litigation counsel² or the referring agency must make a "reasonable effort" to notify the disputants about the nature of the dispute and attempt to achieve settlement.

DOJ's Guidance provides that if pre-filing settlement efforts by government counsel require information in the possession of proposed defendants, litigating counsel or client agency counsel may request such information from defendants as a condition to settlement efforts.³ If proposed defendants refuse or fail to provide such information upon request within a reasonable time, counsel shall have no further obligation to attempt to settle the case prior to filing.

As described below in further detail, OE encourages Regional Counsel to provide notice and attempt to achieve settlement with proposed defendants. In the event, however, that notice is not given prior to referral, DOJ will provide the notice and make attempt to achieve settlement.

The Procedures outlined below should be followed by OE Headquarters and Regional attorneys (herein referred to collectively as "attorneys") in implementing Section 1(a) of the Executive Order.

¹ See DOJ Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778. 58 Fed. Reg. 6,015 (Jan. 25,1993).

² For purposes of this Guidance, it is assumed that Agency attorneys do not serve as litigation counsel except in cases that are part of the Pilot Program. OE may issue additional guidance on the Executive order in the event that an Agency attorney becomes litigation counsel due to DOJ's failure to file a complaint within a reasonable time, as set out in Section 9 of the Memorandum of Understanding Between DOJ and EPA.

³ OE encourages its attorneys to request information regarding a defendant's ability to pay inappropriate cases.

A. Exceptions to Notice Requirements:

Attorneys should ensure that the exceptions to the pre-filing notice requirements, which are set out in Section 7(b) of the Executive Order, do not apply. A check list is attached hereto which contains the six circumstances under which pre-filing notice is not required. This check list should be used in each case before providing notice to a proposed defendant, and should be maintained in the case file. In brief, the circumstances under which notice is not required are as follows:

1. In actions to seize or forfeit assets subject to forfeiture or in actions to seize property;
2. in bankruptcy, insolvency, conservatorship, receivership, or liquidation proceedings;
3. in actions in which the assets that are the subject of the action or the assets that would satisfy the judgement are subject to flight, dissipation, or destruction;
4. in actions in which the defendant is subject to flight;
5. in actions in which "exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief;
6. "in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation."

A. Pre-referral Negotiation ("PRN") Policies

The Agency has issued two PRN policies. See memorandum from James M. Strock and Don R. Clay on Pre-Referral Negotiation Procedures for Superfund Enforcement Cases dated October 12, 1990; Memorandum from Thomas L. Adams, Adams, Jr. entitled "Process for Conducting Pre-Referral Settlement Negotiations on Civil Judicial Enforcement Cases, (memo transmits Agreement between EPA and DOJ on the Process for Conducting Settlement Negotiation) dated April 13, 1988.

1. In order to satisfy the notice requirements of the Executive order, Regional Counsel may opt to follow existing PRN policies. The time frames set out in the PRN Policies should be strictly followed. The pre-filing notice and settlement requirements of the Executive Order are met when PRN is pursued but fails to result in the settlement of a case.

2. In the alternative, the streamlined notice procedures outlined in Section D below may be followed in routine cases, in order to comply with the pre-filing notice and settlement requirements of Section 1(a) of the Executive Order.
 - a. However, PRN procedures must be followed, rather than the streamlined procedure, if the PRN Policies provide that formal P RN is mandatory. See, e.g., October 12, 1990 Policy ("procedures are hereby required for all judicial settlements providing for privately-financed remedial activities").

C. Statutorily Required Notice

For those cases that are governed by a law or regulation that contains requirements with respect to notice or settlement negotiations, attorneys should adhere to the procedures set out in the governing statutory or regulatory provisions. See, e.g., Section 122(e) of CERCLA, 42 U.S.C. §9622(e).⁴

D. Notice Procedures

The following notice procedures should be followed in those routine cases⁵ in which the Regional Counsel determined that PRN procedures will not be followed and that there are no applicable statutory notice provisions.

1. OE recommends, in the interest of expediting the filing of enforcement cases, that Regional counsel provide notice and attempt to reach settlement with Potential defendants.⁶ If a Regional Counsel elects to provide the requisite notice, notice should be provided as soon as possible. Cases should not be referred to DOJ until notice and the attempt to achieve settlement have been completed. If a Regional counsel defers to DOJ and does not provide notice prior to the time of referral, the Agency's interests will be best served if notice is given by DOJ as expeditiously as

⁴ In those cases in which the governing statute requires that the State be named as a party even though the State is not the real party in interest, notice does not need to be given to the State because the State lacks the authority to settle the case. See Section 309(e) of the Clean Water Act, 33 U.S.C. §1319(e).

⁵ Routine cases are those cases which: 1) raise no issues of first impression; 2) are single media cases; 3) seek penalties where the statutory maximum is under \$1 million; 4) can be referred directly to DOJ rather than through Headquarters. See GM-69, "Expansion of Direct Referral of Cases to the Department of Justice," January 14, 1988.

⁶ In order to expedite coordinated filing, OE strongly encourages the Regional Counsel to provide notice in cases that are part of cluster filings or initiatives.

practicable after referral, and in a time frame consistent with the Memorandum of Understanding between EPA and DOJ.

2. In providing notice, Regional Counsel should inform the proposed defendant that it must advise EPA in writing within 14 days that it desires to enter into a settlement and the precise terms of its offer. See attached model notice letter. In the event that the proposed defendant does not avail itself of this opportunity, the case must be referred to DOJ.
3. As early as possible in the negotiation process, potential defendants should be presented with a draft consent decree which conforms to all applicable national standards and guidance, and which sets out the terms of a settlement. OE will develop, in consultation with Regional and Program offices, model-consent decrees which should be used to the extent possible. Consent decree terms not previously approved by EPA and DOJ should be approved by Enforcement Counsel, in consultation with the appropriate Assistant Section Chief at DOJ.
4. OE will respond to Regional requests for approval of bottom line penalty amounts and settlement positions within 35 calendar days of receiving the requests. Regional requests should include a full description of the defendant, violations, evidence relied upon, law, injunctive relief, and economic benefit and gravity penalty analyses. A copy should also be forwarded to the appropriate Assistant Section Chief at DOJ.
5. Regional Counsel or Enforcement Counsel should make telephonic contact with the appropriate Assistant Section Chief at DOJ, in an effort to seek informal concurrence on the Agency's proposed settlement positions. DOJ non-concurrence should be promptly reported to OE for final resolution.
6. If a settlement in principle is reached within 30 days of the first meeting with the potential defendant, the Regional Counsel may grant the litigation team an additional 45 days within which to reach agreement on the final terms of the Consent Decree. If necessary, Regional Counsel may extend, with the concurrence of the Director of Civil Enforcement, the settlement period for up to 30 additional days. Agreements in principle should be promptly reported to DOJ.
7. If a final settlement is not reached within the designated time period, the case must be referred to DOJ. All settlements are subject to approval of the Assistant Administrator for Enforcement and/or the Assistant Attorney General for the Environment and Natural Resources Division at DOJ, per the applicable settlement delegations. Complaints should be filed as expeditiously as possible after pre-filing negotiations with proposed defendants have failed, and in a time frame consistent with the Memorandum of Understanding between EPA and DOJ.

8. If a case is referred to DOJ, the following information regarding compliance with the Executive order must be provided in the litigation report:
 - a. Specific considerations that make it unreasonable or unnecessary under the Executive Order to engage in pre-filing negotiations;
 - b. Documentation of any notice and achieve settlement, including copies of the notice letters, and the terms of any settlement offers;
 - c. Descriptions of any consultations with, or concurrences from, OE or DOJ regarding proposed settlement positions;
 - d. The Agency's specific recommendations for injunctive, monetary (including economic benefit of non-compliance), or other relief and a statement of the Agency's minimum settlement requirements (including pollution prevention, audit or other "SEP-type" relief), based on the information available at the time of referral.

II. Section 1(b): Settlement Conferences

Section 1(b) requires litigation counsel to evaluate settlement possibilities and make reasonable efforts to reach settlement throughout litigation. In order to assist DOJ in complying with the Executive Order and to expedite filing and resolution of civil complaints, attorneys should coordinate through the appropriate management structure including through the Regional Counsel and the appropriate OE Enforcement Counsel, to develop initial settlement positions, as well as to provide periodic updates to DOJ on the Agency's settlement positions. These updates should set out the Agency's desired relief and minimum settlement requirements.

III. Section 1(c): Alternative Methods of Resolving Dispute in Litigation

Section 1(c) provides that -in situations in which the use of an alternative dispute resolution (ADR) technique may contribute to the prompt, fair and efficient resolution of a dispute, litigation counsel, in consultation with the referring agency, should suggest the use of an appropriate ADR technique to private parties. Section 1(c) does not apply to any action to seize or forfeit assets subject to forfeiture, or to any debt Collection cases (including any action for civil penalties and taxes) involving an amount in controversy less than \$100,000. In addition, although authorizing the use of arbitral techniques, the Executive Order prohibits the use of binding arbitration or any other equivalent ADR technique.

In order to comply with this requirement, attorneys should include in the litigation reports that accompany all referrals to DOJ the following information:

- 1) Identification of any ADR technique(s) that have been used or proposed by the Agency or proposed defendants to attempt resolution of the dispute prior to referral;

- 2) Description of the status of any ADR used;
- 3) An identification of ADR technique(s) if any, Agency believes may be useful in attempting to resolve the dispute either before or after the filing of a complaint. See Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions (August 14, 1987); Arbitration Procedures for Small Superfund Cost Recovery Claims (54 Fed. Reg. 23,174 (1989)); and related policy statements.

IV. Section 1(d)(1): Disclosure of Core Information

Section 1(d)(1) requires litigation counsel, under certain circumstances, to make reasonable efforts to arrange with other parties for a mutual exchange of a disclosure statement containing core information relevant to the dispute. Core information is defined as "the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case." Core information should not be disclosed in cases while a dispositive motion is pending. In addition, Section 1(d) does not apply to any action to seize or forfeit assets subject to forfeiture, or to any debt collection cases (including any action for civil penalties and taxes) involving an amount in controversy less than \$100,000. DOJ's Guidance explains that litigation counsel "should emphasize that the government is willing to be bound to exchange core information as defined in the section if, and only if, other parties agree to disclose the same core information and the court adopts the agreement as a stipulated order."

DOJ's Guidance provides that referrals to DOJ from the Agency should include core information. The identification of the location of the documents should be specific enough to enable litigation counsel to locate and retrieve the documents, and should specify the name, business address and telephone number of the custodians of the documents. The identification of people having information that is relevant to the claims and defenses should include, if possible, last known telephone numbers. The Guidance provides that [l]itigation counsel is entitled to rely in good faith on the representations of agency counsel as to the existence, extent, and location of core information."

DOJ's Guidance further states that in those cases in which the scope of judicial review is limited to the agency's administrative record, it is sufficient to provide the location of the administrative record and afford defendants access to the record. See, e.g., Section 113(j) of CERCLA 42 U.S.C. § 9613(j) (judicial review of remedy decision limited to the administrative record compiled by EPA).

The Executive Order and DOJ Guidance confirm the requirements of the Agency's Model Litigation Report which already requires attorneys to include core information in every litigation report. See Model Litigation Report §§ 12e and 12f.

V. Section I (d)(2): Review of Proposed Document Requests

Section 1(d)(2) requires agencies that serve as litigation counsel to establish a coordinated procedure for the conduct and review of document discovery in federal civil judicial litigation. The Executive order requires that the procedure include review by a senior lawyer prior to service or filing of the request to determine “that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome or less expensive.”

In order to meet the requirements of Section 1(d)(2) of the Executive Order, litigation reports that accompany civil judicial referrals to DOJ should include a list of the documents, or the categories of documents, that are relevant to the case and that are in EPA's possession. In addition, attorneys should assist DOJ, if requested, in reviewing proposed document requests to verify that the documents sought from the opposing parties are not available from EPA or another convenient source.

VI. Section 1(e): Expert Witnesses

Section 1(e) requires that litigation counsel refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. “Widely accepted” theories are defined as those theories that are “propounded by at least a substantial minority of the experts in the relevant field.” Section 1(e) further requires that litigation counsel present testimony “only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.” Section 1(e) also provides for the mutual disclosure of information regarding experts that the parties expect to call as expert witnesses at trial. Finally, Section 1(e) bans the use of contingency fees for expert witnesses.

DOJ’s Guidance clarifies that expert testimony on newly emerging issues is permissible. It only the theory relied upon by the expert that must be widely accepted, rather than the conclusion reached by the expert. Accordingly, the Guidance explains: “litigation counsel may offer expert testimony that uses a widely accepted explanatory theory to support a conclusion in a novel area based on the qualifications of the expert to testify on that issue, the extent of peer acceptance or recognition of the expert's past work in the field, particularly of any work that is related to the issue on which the testimony is to be offered, and any other available indicia of the reliability of the proffered testimony.”

The litigation reports accompanying all case referrals to DOJ that involve expert testimony on behalf of the government, or for which EPA recommends an expert for the pending litigation, should include the following information to the extent that it is available at the time of referral:

- 1) a description of the general and specific qualifications of any expert who is expected to testify;

- 2) if an expert has been retained, the relation of the expert's particular field of expertise to the issues on which his or her testimony will be offered;
- 3) if an expert has been retained, a statement noting the degree of acceptance of the theories on which the expert is expected to rely among experts in the relevant field (i.e., whether the expert's theories are "widely accepted");
- 4) if an expert has been retained, a statement clarifying whether the expert's expected testimony will involve any new or controversial theories, or unsealed issues of science, engineering, or other disciplines, including but not limited to unsettled issues regarding risk assessment, innovative technology, or economic analysis;
- 5) if an expert has been retained, citations to relevant literature and studies, or peer review analysis, supporting or opposing the theories of the anticipated expert testimony.

VII. Section 1(g)(4): Improved Use of Litigation Resources

Section 1(g)(4) requires litigation counsel to make reasonable efforts to expedite civil litigation in the cases to which they are assigned including, inter alia: 1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute; and 2) moving for summary judgment in every case where the movant would be likely to prevail or where the motion is likely to narrow the issues to be tried.

DOJ's Guidance provides for referring agencies to identify facts not in dispute and inform litigation counsel of the lack of dispute and the basis of concluding that there is no factual dispute, as soon as it is feasible to do so.⁷

Accordingly, in preparing litigation reports, attorneys should make sure to include the information required by DOJ's Guidance. To the extent possible, the following should be included in all litigation reports:

- 1) a list of all relevant and material facts that the attorneys believe are unlikely to be disputed and which fact simulations would be appropriate;
- 2) a list of any issues on which the attorneys believe the United States could win summary judgment.

In the event that an attorney receives additional information regarding facts not in dispute, the attorney should notify litigation counsel as soon as possible.

⁷ The Agency's Model Litigation Report, Section 12c, already requires that attorneys indicate if a case has potential for summary judgment and, if so, to describe why, and how the case can be prepared for filing.

VIII. Purpose and Use of This Guidance

This Guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the United States Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this Guidance or its internal implementing procedures.

MODEL NOTICE LETTER

PRIVILEGED AND CONFIDENTIAL – FOR SETTLEMENT PURPOSES ONLY

Ms. Mary Smith
General Counsel
XYZ Corporation
1200 Broadway
New York, New York

Re: XYZ Chemical Facility, Brooklyn, N.Y.

Dear Ms. Smith:

You are hereby notified that the Environmental Protection Agency (EPA) has identified your company has violated/is in violation of the Clean Water Act. Accordingly, it is our intent to refer this matter to the Department Of Justice for appropriate enforcement action in the applicable U.S. federal district court. Specifically, the EPA believes that XYZ Company has violated the Clean Water Act and you should immediately refrain from unpermitted discharges from the XYZ Chemical facility in Brooklyn, N.Y. into New York Harbor. [Give specifics, including dates of offenses. Note, supplemental environmental projects should not be included at this stage].

We would like to extend to the opportunity to settle this matter before litigation, to save both your company and the federal government the burden and expense of litigation. Any settlement, of course, must include the company's agreement to cease its unpermitted discharges and comply with the injunctive relief we are seeking, specifically [describe, if appropriate]. In addition, we will be seeking an appropriate amount of civil penalties for the alleged violations. In that regard, you should note that EPA believes XYZ company has committed 37 violations of the federal permit, for which the statutory penalty is \$25,000 per day. [Stating the statutory maximum does not require advance coordination with the Department of Justice of the Office of Enforcement - however, any specific dollar amount requires advance approval of both offices].

Any settlement must be in the form of a consent decree entered in federal district court, to be filed simultaneously with the governments complaint in this action. [Optional alternative, where appropriate: In order for us to determine an appropriate resolution of this matter, we will need additional information from XYZ Company. Accordingly, your settlement response should express a willingness to provide the additional information, specifically ____].

If you are willing to make the required commitments to settle this case before litigation, please advise the undersigned immediately. Your response must be in writing and include a specific settlement offer that is responsive to the government's settlement requirements outlined above. [Optional: be prepared to complete settlement negotiations within 2 weeks from the date

you receive this letter]. Any settlement agreement we enter will be contingent upon the approval of the Assistant Administrator for Enforcement, EPA, and the final settlement authority of the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice.

If we do not receive what we characterize to be a good faith settlement offer from you by _____, we will proceed to immediately refer this matter to the Department of Justice for their action. Thank you very much for your prompt attention to this important matter.

Sincerely,

Joseph White
Assistant Regional Counsel

cc: Mary Matthews, EPA, Office of Enforcement
Gerald Hobson, EES, Department of Justice

Office of the Attorney General

[Order No. 1658-93]

Memorandum of Guidance on
Implementation of the Litigation Reforms of
Executive Order No. 12778

AGENCY: Department of Justice
ACTION: Notice.

SUMMARY: This notice promulgates a memorandum providing guidance to Federal agencies regarding the implementation of those provisions of Executive Order No. 12778 (Order) that concern the conduct of civil litigation with the United States Government, including the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. The Order authorizes the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation.

EFFECTIVE DATE: This action is effective on January 25, 1993.

FOR FURTHER INFORMATION

CONTACT: Jeffrey Axelrad, Director, Torts Branch, Civil Division, Department of Justice, 601 "D" street NW., Washington, DC 20004-2904 (mailing address: Benjamin Franklin Station, P.O. Box 888, Washington, DC 20044), (202)501-7075.

SUPPLEMENTARY INFORMATION: Executive Order No. 12778 (56 FR 55195, October 25, 1991), which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government. 56 FR 55195. The Order, *inter alia*, mandates reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order requires agencies to implement civil justice reforms applicable to each agency's civil litigation. It provides, in sections 4(a), 4(b) and 7(d), that the Attorney General has both the duty to coordinate efforts by Federal agencies to implement the litigation process reforms and the authority to issue further guidelines implementing the Order, and to provide guidance as to the scope of the order.

Preliminary guidelines were issued as interim direction for applying the Order. A Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778 (Memorandum of Preliminary Guidance) was signed on

January 24, 1992 and has been published in the Federal Register. 57 FR 3640 (January 30, 1992). Agencies were requested to provide comments concerning their experience in carrying out the Order and their recommendations for revising the preliminary guidance. Numerous helpful comments have been received from agencies, United States Attorneys, and other persons and organizations.

The present Memorandum has been prepared after consideration of comments and in the light of experience to date under the Order. This Memorandum incorporates much of the prior Memorandum of Preliminary Guidance. In addition, the present Memorandum also includes elaboration on matters included in the Memorandum of Preliminary Guidance and additional guidance and direction. In particular, additional commentary has been included in the discussion of sections 1(a), 1(b), 1(c), 1(d)(1), 1(e) and 3 of the Order, and in the text pertaining to exclusions from the Order. Thus, the present Memorandum supersedes the prior Memorandum of Preliminary Guidance and should be utilized in lieu of that earlier Memorandum.

During the relatively brief period since the January 21, 1992 effective date of the Order, it has not been possible to assess fully the impact of reforms in the Order as initiated. Therefore, further guidance may be developed in light of experience. Comments on implementation of the Order continue to be welcomed.

By virtue of the authority vested in my by law, excluding Executive Order No. 12778, I hereby issue the following Memorandum:

Department of Justice Memorandum of
Guidance and Implementation of the
Litigation Reforms of Executive Order No.
12778

Introduction

Executive order No. 12778, which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government. 56 FR 55195, October 25 1991. The Order, *inter alia*, mandates reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order authorizes the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation.

The present Memorandum provides guidance for applying the Order's provisions

concerning the conduct of civil litigation involving the United States Government.

Pre-filing Notice of Complaint

[Section 1(a)]

The objective of section 1(a) of the Order is to ensure that a reasonable effort is made to notify prospective disputants of the government's intent to sue, and to provide disputants with an opportunity to settle the dispute without litigation. "Disputants" means persons from whom relief is to be sought in a contemplated civil action.

Section 1(a) requires either the agency or litigation counsel to notify each disputant of the government's contemplated action unless an exception to the notice requirement (set forth in section 7(b) of the Order) applies. The notifying person shall offer to attempt to resolve the dispute without litigation. However, it is not appropriate to compromise litigation by providing pre-filing notice if the notice would defeat the purpose of the litigation.

Under section 1(a), a reasonable effort to notify disputants and to attempt to achieve a settlement may be provided either by the referring agency in administrative or conciliation processes or by litigation counsel. For example, many debt collection cases and tax cases are the subject of extensive agency efforts to notify the debtor and resolve the dispute prior to litigation. If the referring agency has provided notice, it should supply the documentation of the notice to litigation counsel. Such efforts by the agency may well satisfy the requirements of section 1(a). In those cases, litigation counsel need not repeat the notice although litigation counsel should consider whether additional notice may be productive, for example, if a substantial period has elapsed since the prior notice.

The section requires a "reasonable" effort to provide notification and to attempt to achieve a settlement. Both the timing and the content of a reasonable effort depend upon the particular circumstances. However, unless an exception set forth in section 7 of the Order (or otherwise provided for by the Attorney General) is applicable, complete failure to make an effort can not be deemed "reasonable."

If pre-complaint settlement efforts by government counsel require information in the possession of prospective defendants, litigating counsel or client agency counsel may request such information from such defendants as a condition of settlement efforts. If prospective defendants refuse, or fail, to provide such information upon request within a reasonable time, government counsel shall have no further

obligation to attempt to settle the case prior to filing.

The Department of Justice retains authority to approve or disapprove any settlements proposed by the client agency or litigation counsel, consistent with existing law, guidelines, and delegations. The Order confers no litigating or settlement authority on agencies beyond any existing authority under law or explicit agreement with the Department.

Settlement Conference

[Section 1(b)]

Section 1(b) of the Order requires litigation counsel to evaluate the possibilities of settlement as soon as adequate information is available to permit an accurate evaluation of the government's litigation position. Thereafter, litigation counsel has a continuous obligation to evaluate settlement possibilities. Litigation counsel is to offer to participate in a settlement conference or, when it is reasonable to do so, move the court for such a conference.

Under section 1(b), settlement possibilities shall be evaluated by litigation counsel at the outset of the litigation. Litigation counsel shall thereafter, and throughout the course of the litigation, use reasonable efforts to settle the litigation, including the use of settlement conferences by offering or moving to do so. However, the most appropriate timing of a settlement conference should be determined by litigation counsel consistent with the goal of promoting just and efficient resolution of civil claims by avoiding unnecessary delay and cost. To that end, in keeping with section 1(g) of the Order ("Improved Use of Litigation Resources"), early filing of motions that potentially will resolve the litigation is encouraged. In those cases, litigation counsel should initiate settlement conference efforts after resolution of dispositive motions, thereby avoiding the cost and delay associated with an unnecessary settlement conference.

Prior to any such conference, litigation counsel should consult with the affected agency and with litigation counsel's supervisor. At the conference, litigation counsel should clearly state the terms upon which litigation counsel is prepared to recommend that the government conclude the litigation, but should not be expected to obtain authority to bind the government finally at settlement conferences. Final settlement authority is the subject of applicable regulations and may be exercised only by those officials designated in those regulations. The Order does not change those regulations regarding final settlement authority.

The Order does not constrain the government's full discretion to determine which government counsel represents the

government at settlement conferences. Normally, a trial attorney assigned to the case will attend on behalf of the United States.

Section 1(b) does not permit settlement of litigation on terms that are not in the interest of the government: while "reasonable efforts" to settle are required, no unreasonable concession or offer should be extended. The section does not countenance evasion of established agency procedures for development of litigation positions.

Alternative Methods of Resolving the Dispute in Litigation

[Section 1(c)]

Section 1(c) of the Order encourages prompt and proper settlement of disputes. The section states: "Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding."

The order does not permit litigation counsel to agree that ADR will result in a binding determination as to the government, without exercise of an agency's discretion. Further, the Order's authorization of the use of ADR does not authorize litigation counsel to agree to resolve a dispute in any manner or on any terms not in the interest of the United States.

Each agency should seek to use the skills of litigation counsel, including skills gained through training, to bring the same high level of expertise to ADR proceedings that they bring to formal judicial proceedings. Disputes will be resolved reasonably if an ADR technique is used when the technique holds out a likelihood of success. Litigation counsel should consult with the affected agency as to the desirability of using ADR if resort to ADR offers a reasonable prospect of success.

When evaluating whether proceeding with ADR is likely to lead to a prompt, fair, and efficient resolution of the action and thus be in the best interest of the government, government counsel should consider the amount and allocation of the cost of employing ADR.

Normally, the costs associated with ADR, such as the neutral's fee and related expenses, will be payable as an ordinary cost of litigation. Litigation counsel can voluntarily agree to share the payment of ADR costs, even when the court mandates ADR. Litigation counsel should assert sovereign immunity when costs are involuntarily imposed on the United States.

Disclosure of Core Information

[Section 1(d)(1)]

Section 1(d)(1) of the Order requires litigation counsel, to the extent practicable, to

make the offer to participate at an early stage of the litigation in a mutual exchange of "core information" (as defined in section 1(d)(1) of the Order). Reasonable efforts shall be made to obtain the agreement of other parties to such an exchange. When making the offer, litigation counsel should emphasize that the government is willing to be bound to disclose core information as defined in the section if, and only if, other parties agree to disclose the same core information and the court adopts the agreement as a stipulated order.

A mutually agreed-upon exchange of core information should occur reasonably early in the litigation, so as to serve the Order's purpose of expediting and streamlining discovery. However, when the government is plaintiff, disclosure of core information need not be requested prior to receipt of opposing parties' answers to the complaint. Litigation counsel should not permit the core information disclosure offer requirement to delay the initiation of necessary discovery on behalf of the government when the parties to whom the offer is directed have not accepted it within a reasonable period of time.

Offers to exchange core information are not mandated if a dispositive motion is pending or if the exceptions to the ADR and core disclosure provisions set forth in section 7(c) of the order (involving asset forfeiture proceedings and debt collection cases involving less than \$100,000) apply. Nothing in section 1(d)(1) requires disclosure of information that litigation counsel does not consider reasonably relevant to the claims for relief set forth in the complaint.

In cases involving multiple opposing parties, the government may agree to exchange disclosures of core information with one or more opposing parties. The government need not delay disclosure pending agreement by all of the parties unless individual exchange of core information would unfairly undermine the government's case.

Except when local practice warrants another means of memorializing the agreement, and agreement to provide core information ordinarily should be in the form of a consent order to ensure enforcement by the court. The consent order should also provide for use of the core information in the same manner as material discovered pursuant to Rules 26 through 36 of the Federal Rules of Civil Procedure.

All referrals from agencies requesting litigation counsel to file suit should include the core information described in section 1(d)(1) of the Order. The identification of the location of documents most relevant to the case should be specific enough to enable litigation counsel to locate and, if necessary, retrieve the documents, and should specify the name, business address, and telephone number of the custodians of the documents.

The identification of individuals having information relevant to the claims and defenses should include, where possible, current or last-known telephone numbers at which such persons can be reached.

In determining the extent to which compliance with the requirements of section 1(d)(1) of the Order is “practicable” in a given case, litigation counsel shall consider, *inter alia*, the utility of early issue-narrowing motions and devices, and scope and complexity of the disclosures that will be required, the time available to comply with the provisions of the section, the extent to which disclosure of core information will expedite or limit the scope of subsequent discovery, and the cost to the government of compliance.

In cases where the government takes the position that the scope of judicial review of one or more issues involved in the litigation is limited to an agency’s administrative record, identifying and affording access to the administrative record shall satisfy the requirements of section 1(d)(1) with respect to such issues.

Litigation counsel is entitled to rely in good faith on the representations of the agency counsel as to the existence, extent, and location of core information.

Nothing in section 1(d)(1) prevents government counsel from seeking other discovery pursuant to the Federal Rules of Civil Procedure simultaneously with providing, or seeking, disclosure of core information to the section.

Review of Proposed Document Requests

[Section 1(d)(2)]

Under section 1(d)(2) of the Order, government counsel shall pursue document discovery only after complying with review procedures designed to ensure that the proposed document discovery is reasonable under the circumstances of the litigation.

When an agency’s attorneys act as litigation counsel, that agency must establish a coordinated procedure, including review by a senior lawyer, before service or filing of any request for document discovery. The senior lawyer is to determine whether the proposed discovery meets the substantive criteria of section 1(d)(2). Senior lawyers must be designated within each agency to perform this review function. While no particular title, level, or grade of senior lawyer is mandated, the persons designated should have substantial experience with regard to document discovery and should have supervisory authority. This designation should be made forthwith. If the designated senior lawyer is personally preparing the document discovery, further oversight is not necessary.

The designated senior lawyer reviewing document discovery proposals should determine whether the requests are

cumulative or duplicative, unreasonable, oppressive, or unduly burdensome or expensive, and in doing so shall consider the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained in a manner that is more convenient, less burdensome, or less expensive than pursuit of the documentary discovery as proposed. Consideration of whether documents can be obtained in a more convenient, less burdensome, or less expensive manner shall include consideration of the convenience, burden, and expense to both the government and the opposing parties.

In conducting this review of document requests, the senior lawyer is entitled to rely in good faith upon factual representations of agency counsel and the trial attorney. The review system should not be permitted to deter the pursuit of reasonable document discovery in accord with the procedures established in the Order.

Discovery Motions

[Section 1(d)(3)]

Section 1(d)(3) of the Order provides that litigation counsel shall not ask the court to resolve a discovery dispute, including imposition of sanctions as well as the underlying discovery dispute, unless litigation counsel first attempts to resolve the dispute with opposing counsel or *pro se* parties. If pre-motion efforts at resolution are unsuccessful or impractical, a description of those efforts shall be set forth in the government’s motion papers.

Litigation counsel, however, should not compromise a discovery dispute unless the terms of the compromise are reasonable.

Expert Witnesses

[Section 1(e)]

The function of Section 1(e) of the Order is to ensure that litigation counsel proffer only reliable expert testimony in judicial proceedings. This practice, already widely used by the government, will enhance the credibility of the government’s position in litigation and improve the prospects for a reasonable outcome of the disputes warranting utilization of expert witnesses.

Litigation counsel shall use experts who have knowledge, background, research, or other expertise in the particular field of the subject of their testimony, and who base conclusions on widely accepted explanatory theories, *i.e.*, those that are propounded by at

least a substantial minority of experts in the relevant field.

In cases requiring expert testimony on newly emerging issues, litigation counsel shall ensure that the proffered expert and his or her testimony are reliable and meet the requirements of Rule 702 of the Federal Rules of Evidence. In evaluating the reliability of an expert’s conclusions in new areas where there are no established majority or minority views, it is important for the trial attorney to keep in mind that, under section 1(e), only the theory, not the conclusion based on the theory, need be “widely accepted.” Litigation counsel may offer expert testimony that uses a widely accepted explanatory theory to support a conclusion in a novel area, based on the qualifications of the expert to testify on that issue, the extent of peer acceptance or recognition of the expert’s past work in the field, particularly of any work that is related to the issue on which the testimony is to be offered, and any other available indicia of the reliability of the proffered testimony. However, if an expert is unable to support the conclusion with any “widely accepted” theories, the expert’s testimony shall not be offered.

Litigation counsel shall offer to engage in mutual disclosure of expert witness information pertaining to experts a party expects to call at trial. “Expert witness information” within the meaning of section 1(e) of the Order should ordinarily include the information specified in Rule 26(4)(A)(ii) of the Federal Rules of Civil Procedure, the expert’s résumé or curriculum vitae, a list of the expert’s relevant publications, data, test results, or other information on which the expert is expected to rely in the case at issue, the fee arrangements between the party and the expert and any written reports or other materials prepared by the expert that the party expects to offer into evidence.

An agreement to provide expert witness information should be memorialized in a consent order, except when local practice warrants another means of memorializing the agreement, with the same provisions concerning enforceability and use at trial as are provided in consent order for disclosure of core information. The requirements to offer mutual disclosure of expert witness information can be satisfied by an agreement to take depositions of experts that the parties plan to call to testify.

Litigation counsel shall not offer to pay an expert witness based on the success of the litigation. Section 1(e)(4). Similarly, litigation counsel should ordinarily object to testimony on the part of an expert whose compensation is linked to a successful outcome in the litigation and should bring out on cross-examination of the expert such compensation arrangements or agreements.

Sanctions Motions

[Section 1(f)]

Litigation counsel shall take steps to seek sanctions against opposing counsel and parties where appropriate, subject to the procedures set forth in section 1(f) of the Order regarding agency review of proposed sanction filings. Before filing a motion for sanctions, litigation counsel should normally attempt to resolve disputes with the opposing counsel. Sanctions motions should not be used as a vehicle to intimidate or coerce government counsel or counsel adverse to the government when dispute can be resolved on a reasonable basis.

Section 1(f)(2) of the Order mandates that each agency which has attorneys acting as litigation counsel designate a "sanctions officer" to review proposed sanctions motions and motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers. The section also requires that the sanctions officer or designee "shall be a senior supervision attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States." The sanctions officer or his or her designee should be a senior lawyer with substantial litigation experience and supervisory authority. By way of illustration, rather than limitation, a Senior Executive Service level attorney should meet these criteria.

The persons acting as sanctions officers within each agency should be designated specifically by title or name. Action shall be taken forthwith to designate sanctions officers within each agency. Cabinet or subcabinet officers, such as Assistant Attorneys General or Assistant Secretaries, officials of equivalent rank, and United States Attorneys are authorized pursuant to the Memorandum to designate sanctions officers meeting the criteria of this Memorandum.

Improved Use of Litigation Resources

[Section 1(g)]

Litigation counsel are to use efficient case management techniques and make reasonable efforts to expedite civil litigation as set forth in section 1(g) of the Order.

In appropriate cases, litigation counsel should move for summary judgement to resolve litigation or narrow the issues to be tried. This rule is not intended to suggest that summary judgement practice should be used prematurely in a manner which will permit opposing counsel to defeat summary judgement.

Litigation counsel should seek to stipulate to facts that are not in dispute and move for early trial dates where practicable. Referring agencies should identify facts not in dispute and inform litigation counsel of the lack of dispute and the basis for concluding that there is no factual dispute, as soon as it is feasible to do so. Litigation counsel should seek agreement to fact stipulations as early as practicable, taking into account the progress

of discovery and after exercising sound judgement to determine the most appropriate and efficient timing for such stipulations.

At reasonable intervals, litigation counsel should review and revise submissions to the court and should advise the court and all counsel of any narrowing of issues, resulting from discovery or otherwise.

Fees and Expenses

[Section 1(b)]

Section 1(b) of the Order provides that litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties in cases involving disputes over certain federal contracts or in any civil litigation initiated by the United States. Under such an agreement, the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and conditions. This section is to be implemented only "to the extent permissible by law." The section also requires the Attorney General to review the legal authority for entering into such agreement. Because no legislation currently provides specific authority for these agreements, litigation counsel shall not offer to enter into a two-way fee shifting agreement until legislation is enacted or other authority is provided by the Attorney General.

Principles to Promote Just and Efficient Administrative Adjudications

[Section 3]

Section 3 of the Order encourages agencies to implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication" to the extent it is reasonable and practicable to do so (and to the extent it does not conflict with any provisions of the Order). The agency proceedings within the ambit of section 3 are adjudications before a presiding officer, such as an administrative law judge.

The order does not require the application of section 1 to such agency proceedings. However, it has become apparent that application of the relevant provisions of section 1 would have a salutary effect and would be in concert with the reforms required by the Order. Agencies are therefore encouraged to extend the application of section 1 to agency counsel in administrative adjudications where appropriate, for example where an

evidentiary hearing is required by law, and where, in agency counsel's best judgement, such extension is reasonable and practicable.

Exceptions to the Executive Order

The order does not apply to criminal matters or proceedings in foreign courts, and shall not be construed to require or authorize litigation counsel or any agency to act contrary to applicable law. Sections 7(a) and 8.

Attorneys for the Federal Government are obligated to follow the requirements of the Order unless compliance would be contrary to the law. In the event of an overlap between the requirements of the Order and any local rules or court orders, attorneys for the Federal government are obligated to comply with both the provisions of the Order and the provisions of the applicable rules or court orders.

In section 5(a), the Order defines "agency" to include each establishment within the definition of "agency" in 28 U.S.C. 41; establishments in the legislative or judicial branches are excluded. Thus litigation counsel, including private attorneys representing the government, and the agency are subject to the provisions of the Order even where the agency is considered "independent" for other purposes. The President clearly has the authority to supervise and guide the exercise of core executive functions such as litigation by government agencies.

The Order does not compel or authorize disclosure of privileged information or any other information the disclosure of which is prohibited by law. Section 9

Dated: January 15, 1993.
William P. Barr,
Attorney General
[FR Doc. 93-1654 Filed 1-22-93; 8:45 am]
BILLING CODE 4410-01-M