

**Functional Series 100 – Agency Organization and Legal Affairs  
ADS 151 - Reporting and Management of Litigation**

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\* An asterisk indicates that the adjacent material is new or substantively revised.

## **ADS 151 - Reporting and Management of Litigation**

### **151.1 OVERVIEW**

This chapter establishes policy directives and required procedures for the reporting and management of litigation filed against USAID and by USAID against others both in foreign courts and in the U.S.

### **151.2 PRIMARY RESPONSIBILITIES**

- a. Within the Office of the General Counsel, the Office of the Assistant General Counsel for Litigation and Enforcement (GC/LE) is responsible for Agency litigation.
- b. Missions are responsible for reporting overseas litigation to GC/LE.
- c. The Bureau for Management, Office of Financial Management, Payroll Division (M/FM/P) is responsible for processing orders for garnishment of wages for child support, student loans, taxes, and other debts of direct-hire employees.

### **151.3 POLICY DIRECTIVES AND REQUIRED PROCEDURES**

#### **151.3.1 Foreign Litigation Against USAID**

\*Foreign litigation includes lawsuits, orders to appear, demands for testimony, garnishment, and other orders issued by foreign courts and other administrative entities. This includes litigation against employees for acts within the scope of their employment as well as labor, property, commercial, and personal injury claims. For purposes of appearances before foreign courts and tribunals, neither USAID nor the Department of State has juridical personality or capacity independent from the United States. The Department of Justice (DOJ) represents the United States before foreign courts and tribunals, including training, instructing, and directing local counsel. In cases involving USAID, it is the practice of DOJ to work closely with the Mission and GC/LE in Washington.

##### **151.3.1.1 Reporting Foreign Litigation**

- a. **Duty to Report.** Missions must report to GC/LE all foreign litigation as soon as possible after the Mission first learns of the matter. The Mission must send the report first by fax or e-mail and then by cable. It may not be clear whether suits against employees relate to official duties; therefore, it is best to report all suits involving employees. Even when a suit is personal in nature, there may be an effort to involve USAID through the attachment of salary or other means. The Mission must consult immediately with the Regional Legal Advisor (RLA) assigned to the Mission, whether resident at post or not, who is responsible for making the report. Where that is not possible or would result in a delay, the Mission must designate someone else to make the report.

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**b. Fax or e-mail.** The Mission must fax (202-216-3058) or e-mail (**wbuckhold@usaid.gov**) the following information to GC/LE:

- (1) Name of plaintiff(s) and defendant(s);
- (2) Court or tribunal where the suit was filed and any case caption and docket number;
- (3) How (mail, hand delivery, diplomatic channels, etc.) and to whom notice of suit was served (USAID, Embassy, contractor, etc.);
- (4) Date of service (on the notice itself) and date service was received by the Mission or Embassy;
- (5) Time period provided in which to appear or respond;
- (6) Description of documents received;
- (7) Name, telephone, e-mail address, and fax numbers of Mission contact person;
- (8) Short description of the nature of the legal suit, proceeding, or action;
- \***(9)** Approximate date when a complete report of the facts of the case will be sent to GC/LE;
- \***(10)** Approximate date when all relevant documents will be sent to GC/LE; and
- \***(11)** Name, address, telephone, fax number, and hourly rate of any attorney the Mission wishes to recommend to handle the case.

The fax or e-mail should be headed "ATTORNEY/CLIENT PRIVILEGED COMMUNICATION" and, if sent by an RLA or other USAID attorney, "ATTORNEY WORK PRODUCT."

\***c. Cable.** The Mission must cable the information in **a** and **b (1)** through **(8)** above and a complete report of the facts of the case to GC/LE, with copies to DOJ/OFL (Department of Justice, Director, Office of Foreign Litigation) and State/L/DL (Department of State, Office of Legal Adviser, Office of Diplomatic Law and Litigation). For Department of State routing purposes, "KLIG" should be included in the TAGS line on cables concerning foreign litigation.

### 151.3.1.2 Managing Foreign Litigation

**a. Take No Action.** Missions must not take any action directly or indirectly with the court or other body until directed to do so by GC/LE. Even a factual inquiry to a court about the suit or other proceeding may be regarded or misunderstood as an "appearance" before the court by the Mission or Mission personnel, undermining objections that may later be made through diplomatic channels.

**b. Department of Justice (DOJ).** Only the DOJ (usually the Office of Foreign Litigation) can represent the U.S. or its agencies and instrumentalities in foreign litigation.

**\*c. Local Counsel.** It has been the strict policy of the Department of State and DOJ since the early 1970s that whenever the U.S. Government (USG) is made a party to a foreign legal proceeding and is properly served, the United States will retain legal counsel and enter an appearance in court. DOJ's responsibility for foreign litigation includes hiring and instructing local counsel. Unless otherwise instructed by DOJ, DOJ selects the attorney to handle the case and makes the necessary arrangements. Local attorneys used by Missions for non-litigation services cannot be used for foreign litigation as described in this ADS chapter except to the extent that DOJ has retained them to do so, in which event the local counsel will be under the direct supervision of DOJ. Likewise, Missions cannot enter into an agreement or obligation with an attorney to represent USAID in litigation without DOJ approval. Instead, Missions must send requests to GC/LE, which transmits them to DOJ for approval. If the Mission recommends an attorney, the request must include the name, address, phone, and fax numbers of the attorney; a statement of the attorney's general qualifications, experience, and comparative standing/reputation; and an estimate of the cost and time required. (DOJ prefers hourly billing rather than other billing methods.)

**\*d. Sovereign Immunity.** Missions must not claim sovereign immunity through diplomatic channels or instruct local counsel to file a plea of sovereign immunity unless instructed to do so by GC/LE. Claims of sovereign immunity will be asserted by the Department of State or the Embassy through diplomatic channels, or, if in litigation, by DOJ. It is the strict and consistent practice of the United States worldwide not to plead sovereign immunity in foreign courts in instances where, under U.S. law, the United States would not recognize a foreign state's immunity in a U.S. court. An exception to this policy is where local law, as opposed to international law or principles of sovereign immunity, would permit the U.S. to claim immunity.

**\*e. Diplomatic Immunity.** Missions must not claim or waive diplomatic immunity until instructed by GC/LE. Diplomatic immunity protects USAID employees (not Foreign Service Nationals (FSNs) or contractors) from the jurisdiction of the courts of the state to which the employee is accredited. The immunity of an employee is determined by the relevant bilateral agreement and the Vienna Convention on Diplomatic Relations. In general, employees who have diplomatic immunity do not have to provide testimony as a witness in civil or criminal trials. While the immunity attaches to the diplomatic agent,

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the immunity may be waived only by the United States and only if such waiver is clearly and unambiguously expressed. The Department of State (State/L/DL) will authorize limited waivers of testimonial immunity to permit an employee to provide evidence, based on the post's recommendation that testimony would not be contrary to the USG's interests.

**f. Representation and Indemnification of Employees.** See [ADS 153](#), Indemnification of Employees and Representation of Employees by the Department of Justice or Private Counsel at Government Expense.

**g. Acceptable Service of Process.** Generally, to be acceptable

- (1) The suit must be brought against the U.S. Government, not USAID. USAID generally is considered to be a Mission of the USG and not a separate juridical entity subject to suit.
- (2) The service of process must be transmitted through the Foreign Ministry in a diplomatic note or through the Hague Service Convention.
- (3) The service of process must provide at least 60 days after such service before any court appearance or responsive pleading is required.
- (4) The service and any other official documents must be served with an English translation to facilitate a response. In the U.S., such procedures are required in suits against foreign governments in the U.S. courts.

Failure to meet any of the above may be grounds to return the service to the issuing body by a diplomatic note. DOJ makes this determination.

### 151.3.2 Litigation by USAID in Foreign Courts

DOJ must also authorize the commencement of suits on behalf of USAID. To request that DOJ initiate a suit in a foreign court, Missions must send a cable to GC/LE with an explanation of the case, why the suit is recommended, any foreign policy or foreign relations issues, the likelihood of success and collection, and which attorney (if any) is recommended. GC/LE will request authorization from DOJ to initiate litigation.

### 151.3.3 Litigation in the United States

**a. Garnishment of Wages.** The Bureau for Management, Office of Financial Management, Payroll Division (M/FM/P) is responsible for processing orders for garnishment of wages for child support, student loans, taxes, and other debts of direct-hire employees.

**b. Lawsuits.** USAID/W offices must report suits against USAID in U.S. courts to GC/LE. Requests to initiate lawsuits in the U.S. must also be sent to GC/LE. As with

foreign litigation, only DOJ can represent the U.S. or its agencies in litigation in U.S. courts.

**151.4 MANDATORY REFERENCES**

**151.4.1 External Mandatory References**

**151.4.2 Internal Mandatory References**

**a. [ADS 153, Indemnification of Employees and Representation of Employees by the Department of Justice or Private Counsel at Government Expense](#)**

**151.5 ADDITIONAL HELP**

**151.6 DEFINITIONS**

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