

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

*This is a new ADS chapter

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Chapter 151 - Reporting and Management of Litigation

151.1 OVERVIEW

This chapter establishes policies and 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 AND PROCEDURES

151.3.1 Foreign Litigation Against USAID

Foreign litigation includes lawsuits, orders to appear, demands for testimony, and garnishment orders issued by foreign courts and other administrative entities. It includes litigation including against employees for acts within the scope of employment and typically includes labor, property, and personal injury claims.

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 funds or other means. Where there is a Regional Legal Advisor (RLA) at Mission or otherwise available for consultation, the Mission must consult immediately with the RLA, 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.

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) (OPTIONAL) Approximate date when a complete report of the facts of the case will be sent to GC/LE;
- (10) (OPTIONAL) Approximate date when all relevant documents will be sent to GC/LE; and
- (11) (OPTIONAL) 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, Office of Foreign Litigation) and State/L/DL (Department of State, Office of Legal Adviser, Office of Diplomatic Law and 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 an inquiry to the court about the suit or other proceeding may be regarded or misunderstood as an "appearance"

before the court, 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 1970's that whenever the 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 without DOJ approval. Missions cannot enter into an agreement or obligation with an attorney to represent USAID in litigation without DOJ approval. Missions must send requests to GC/LE, which transmits them to the DOJ for approval. If the Mission is recommending 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. It is the strict and consistent practice of the U.S. 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 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 an employee 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 provide testimony as a witness in civil or criminal trials. While the immunity attaches to the diplomatic agent, the immunity may be waived only by his or her state 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 Chapter 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.
- (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 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

151.5 ADDITIONAL HELP

151.6 DEFINITIONS

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