

Subject: Compliance with Court Orders

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23-10-00 PURPOSE

This chapter states Department procedure for assuring compliance with court orders issued against the Department.

23-10-10 LEGAL BASIS

This chapter and its requirements are based on Secretarial memoranda of November 14, 1977 and March 39, 1982 respectively, subject: Compliance with Court orders Against the Department.

23-10-20 DEFINITIONS

For the purposes of this chapter, these definitions apply:

- A. Court order is any temporary restraining order, preliminary injunction, permanent injunction, or other order of a court.
- B. Reporting units are those HHS organizations which are required to monitor and report as indicated in Section 23-10-30 on their court order compliance activities. These units and their reporting areas are:

<u>Reporting Units</u>	<u>Reporting Areas</u>
Health Care Financing Administration Office of Human Development Services Public Health Service	Health Care Financing Administration Office of Human Development Services Public Health Service except Food and Drug Administration
Food and Drug Administration Social Security Administration	Food and Drug Administration Social Security Administration
Office of Community Services office of Child Support Enforcement	Office of Community Services Office of Child Support Enforcement
Office of Assistant Secretary for Management and Budget	Office of the Secretary except Office for Civil Rights and Office of Assistant Secretary for Personnel Administration
Office for Civil Rights Office of Assistant Secretary for Personnel Administration	Office for Civil Rights Office of Assistant Secretary for Personnel Administration

- C. Reporting area includes headquarters, regional, and field activities of each reporting unit.

23-10-30 COMPLIANCE SYSTEM

- A. Each reporting unit will develop, implement, and maintain a system for assuring compliance with court orders issued against it. Its system will enable the reporting unit to:
1. Identify, log, and notify appropriate officials about each court order upon its receipt **in the** Department.
 2. Provide appropriate officials with an early and thorough analysis of what the court order will require from the Department.
 3. Keep appropriate officials fully informed on the progress of the Department's compliance with the court order.
 4. Report **immediately** to appropriate **officials** on substantive, procedural, or other difficulties that may preclude the Department from complying fully with the court order or may create serious problems for the Department if it complies fully with court order.
 5. Monitor and report on its compliance with each court order that imposes obligations of such a character that continuing oversight of compliance activities is required.
- B. To fully implement its compliance activity, each reporting unit will assign overall responsibility for its compliance system to a senior level official. That official will assure that the system is developed, implemented and maintained, and that it effectively **monitors** and reports on compliance activities. He/she will serve as a liaison with the office of the General Counsel on court order compliance.
- c. The Assistant Secretary for Management and Budget, upon request, will assist each reporting unit in developing, implementing, or modifying its compliance system.

- 23-20-00 Purpose
 - 10 Scope
 - 20 Designation of officers and employees to whom process shall be delivered

23-20-00 PLJRPOSE

This chapter provides information about the service of process upon the Secretary of Health, Education, and Welfare and designates the officers and employees **to** whom such process shall be delivered. This information is published in the Federal Register and is codified in Code of Federal Regulations Title 45, Part 4.

23-20-10 SCOPE

This chapter applies to service of summons, complaints, subpoenas and other process in all litigation in which the Secretary must be served.

23-20-20 DESIGNATION OF OFFICERS AND EMPLOYEES TO WHOM PROCESS SHALL BE DELIVERED

Summons, complaints, subpoenas and other process which are required to be served on or delivered to the Secretary of Health, Education, and Welfare shall be delivered to the Deputy General Counsel, the secretary to the Deputy General Counsel, or the secretary to the General Counsel, Office of the General Counsel, 200 Independence Avenue, S.W., Washington, D.C. 20201.

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FIRST CLASS

TESTIMONY IN PRIVATE LITIGATION

- PHS: 23-30-00 Purpose and Scope
 - 10 Definitions
 - 20 Policy

PHS:
23-30-00 PURPOSE AND SCOPE

This chapter sets forth the policy and procedures governing the testimony by PHS employees in their official capacity in private litigation. The policy is designed to recognize the legitimate needs of private parties and courts in securing necessary testimony in cases, consistent with minimizing the demands of the employees' time and the disruption of their official duties.

This policy does not, however, restrict disclosure of records (including the provision of certified or authenticated copies of records for use in private litigation) where disclosure is otherwise appropriate under the Freedom of Information Act (see 45 CFR Part 5), the Privacy Act (see 45 CFR Part 5b), or other laws.

Nor does this chapter apply to the testimony by PHS employees in litigation in their private capacity done during their own time and not involving disclosure of official information. These activities are generally permissible if undertaken on the employees' own time, subject to compliance with applicable leave policies, and HEW's Standards of Conduct (45 CFR Part 73) governing outside activities. Note that among other limitations, the Standards of Conduct require advance administrative approval to engage in professional and consultative services outside official working hours. For more information on these matters see 45 CFR Part 73, particularly Subpart D, and Subchapter 630 of the Federal Personnel Manual and the appropriate PHS organizational segment's supplementary instructions.

PHS:
23-30-10 DEFINITIONS

- A. Employee includes commissioned officers in the PHS Commissioned Corps as well as regular and special PHS employees (except FDA employees, as cited in paragraph F of this section).
- B. Expert testimony means testimony concerning opinion or belief of the person so testifying based upon the individual's expertise in a given field and not upon personal observation or examination of the individual, occurrence, or subject of the litigation. For example, an opinion as to the cause of an injury or death based solely upon the review of medical records or an autopsy report is expert testimony.

- C. Factual testimony means testimony based upon personal observation or examination of the individual, occurrence, or subject of the litigation. For example, an opinion on the cause of an injury or death based upon actual provision of medical care to the patient is factual testimony.
- D. Official information means any information and knowledge (whether or not in record form) acquired by an employee in connection with the performance of his or her official duties.
- E. Official capacity and official duties mean the status (or conduct) of an employee when acting within the scope of his or her employment.
- F. PHS means all of the Public Health Service excluding the Food and Drug Administration. (The regulations governing testimony by FDA employees are published in CFR §20.1.)
- G. Private litigation means lawsuits and other actions brought before courts and Government bodies in which the United States is not a party and, except to the extent as may be determined in paragraph PHS: 23-30-20C, has no substantial interest.
- H. Testify and testimony include both in-person, oral statements before a court and statements made pursuant to depositions, interrogatories, affidavits, or other formal participation.

PHS:
23-30-20 POLICY

A. General

1. Employees may not testify in their official capacity in private litigation, without first being served with a valid subpoena or court order to do so.
2. Where private parties seek only expert testimony, employees may testify only with the approval of ASH and only when a substantial Government interest would be served by this testimony.
3. Employees who are approached by private parties or their lawyers must indicate that they may not participate in private litigation except as authorized by this chapter. The specific policies are set forth in paragraphs B through D of this section.
4. Where feasible under the circumstances, employees shall request private parties to take their testimony outside of court by means of a deposition or interrogatories under subpoena or court order, in lieu of a personal appearance before the court or other body. These proceedings shall be arranged at a time and place convenient to PHS.

B. Factual Testimony

Employees may give factual testimony, which is not otherwise privileged, in accordance with the terms of a valid subpoena or court order. Where testimony relates to an individual whose address is known, the employee shall see that the person (or his or her representative) is notified by mail, telephone, or other reasonable means of the demand for information. Unless otherwise required under Federal law or regulation, the assertion of any available defense against disclosure (such as physician-patient privileges) shall generally be the responsibility of the affected individual or representative, under the rules of the court or other body. If, in the process of giving factual testimony, the employee is asked to give expert testimony (as defined), the employee shall respectfully advise the court or other body that this is prohibited under the PHS policy which is intended to prevent the public's misconstruing the possible variances between the personal opinions of the employee and the official position of PHS. If the employee is nevertheless ordered to testify, the employee shall testify.

C. Expert Testimony

1. Approval Requirement

Except as provided in paragraph PHS: 23-30-20B above, where expert testimony is desired by private parties in connection with private litigation, the employee may testify only with the prior approval of ASH, and only when a substantial Government interest will be served by the employee's testifying. If the employee is served with a subpoena or court order to give such testimony, he or she shall notify the Office of the General Counsel (OGC)/OS. If prior approval to testify is not granted (and the subpoena has not been quashed, withdrawn, or modified), the employee shall appear at the appropriate time, call the court's attention to this policy, and respectfully decline to testify without the approval of ASH. Whenever possible, the employee shall be accompanied by a Government attorney.

2. Approval Procedures

Persons desiring the expert testimony of employees must make a written request to ASH stating (a) the nature of the case, (b) the need for the testimony and why equivalent testimony cannot reasonably be obtained elsewhere, and (c) how the testimony will serve a substantial Government interest above that of merely assisting the private parties obtain their ends. Any approval to testify granted by ASH may include reasonable conditions as to the time, place, and manner for giving the testimony.

D. Inquiries for Assistance

Employees who receive inquiries concerning assistance in private litigation must respond to these requests in a manner that is consistent with the provisions of this chapter. Although the employee may be asked, initially, to "testify," sometimes all that is wanted is to review medical records, or to arrange an informal meeting between a patient, his attorney, and the treating physician for the purpose of exploring a future course of action. There is no objection to this kind of disclosure of information, as long as the patient consents. Where appropriate, persons seeking expert assistance in litigation may be referred to potential sources in the private sector and to any published literature. Each situation must be handled on its own merits. Advice on these matters may be sought from the Public Health Division, OGC.

Subject: COMPTROLLER GENERAL DECISIONS

23-40-00	Purpose
10	Background
20	Requesting Officials
30	Requesting Procedure
40	Obtaining Previous Decisions

23-40-00 PURPOSE

This chapter tells HEW officials how they may request decisions from the Comptroller General or obtain copies of previous decisions.

23-40-10 BACKGROUND

Upon request, the Comptroller General renders decisions to officials of executive agencies on questions of authority, either program or administrative, granted to them by the Congress and the circumstances under which they may spend public funds.

23-40-20 REQUESTING OFFICIALS

Only certain officials within the Department may request decisions from the Comptroller General. These officials and the subjects on which they may request decisions are:

- A. The Secretary, Under Secretary, General Counsel, and Inspector General may request decisions on any subject.
- B. The Assistant Secretary for Management and Budget may request decisions on any subject except those related to personnel and personnel compensation matters.
- C. The Assistant Secretary for Personnel Administration may request decisions on personnel and personnel compensation matters.
- D. The Deputy Assistant Secretary for Grants and Procurement may request decisions on questions related to the award of grants and contracts; the protest of contract awards; matters related to cost principles, indirect costs, and the resolution of audit findings; and general grants administration issues.
- E. Certifying and disbursing officers may request decisions on specific vouchers before them for action. They also may request reviews of settlements of their accounts.

No other official in the Department should submit requests directly to the Comptroller General.

23-40-30 REQUESTING PROCEDURE

- A. Requests involving award of contracts and protests of contract awards.
See Section 3-2.407-8, HEW Procurement Regulations.
- B. Requests from certifying and disbursing officers. See Chapter 7-10, Voucher Examination Manual.
- C. Requests from the General Counsel (GC) or the Inspector General (IG).
The GC or the IG may forward requests directly to the Comptroller General. However, if a request involves major policy issues, the GC or the IG should consult with the Secretary or the Under Secretary to determine who should send the request.
- D. All other requests.
 1. Whenever any other official in the Department wishes to obtain a decision from the Comptroller General, he/she should:
 - a. Consult with the relevant program division of the Office of the General Counsel on substantive program matters, or with the Business and Administrative Law Division, OGC, on administrative matters or matters of general law.
 - b. Review previous Comptroller General decisions on the same subject or related subjects. (See Section 23-40-40 of this Chapter.)
 - c. If the issue is still unclear after completing a and b, prepare a letter of request (addressed to the Comptroller General), for the signature of the Assistant Secretary for Management and Budget (ASMB) or the Assistant Secretary for Personnel Administration (ASPER) if the request involves personnel or personnel compensation matters. Include a briefing memorandum to the Assistant Secretary explaining the need for the decision, and submit the request through POC or office head to the ASMB or ASPER.
 2. The ASMB or ASPER will send the request to the Office of the General Counsel and other pertinent OS staff offices for review and analysis before: (a) sending it to the Comptroller General; or, (b) returning it to the requesting POC or office if the question that it raises is satisfactorily resolved within the Department.

NOTE: Any senior official of the Department should consult with the ASMB or ASPER if that official believes the request involves major policy issues and should receive Secretarial review prior to submission to the Comptroller General.
 3. Upon receipt of the Comptroller General's decision, the ASMB or the ASPER will forward copies of the decision to the requesting POC or office and to other concerned offices.

23-40-40 OBTAINING PREVIOUS DECISIONS

The Comptroller General routinely publishes those decisions that GAO considers to be of the greatest interest from the standpoint of general application and precedent. GAO publishes these decisions individually and in quarterly pamphlets and annual bound volumes, both entitled Decisions of the Comptroller General of the United States. GAO also publishes a quarterly listing of its unpublished decisions under these five subject areas: civilian personnel law, military personnel law, procurement, general government matters, and transportation.

Within the Department, the Department law library, OGC program divisions, regional attorney offices, and most POC or agency finance offices normally maintain copies of published decisions and the quarterly listing of unpublished decisions. HEW officials may consult these offices for previous decisions.

Any HEW official who wishes to maintain his/her own copies may request GAO to put his/her name on the mailing list to receive copies of published decisions and/or the quarterly listing by sending a request to:

Special Publications Section
Office of Publishing Service, GAO
Room 4427
441 G Street, N.W. (or Mail Stop 308)
Washington, D.C. 22548

When ordering the quarterly digest of unpublished decisions, specify the subject areas needed.

HEW officials may obtain more information about individual unpublished decisions by calling GAO's Special Publications Section (202-275-5117).

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