

5 *Case Management*

5.1 General Case Management

The FDIC's goal is to obtain the best resolution of legal matters at the lowest reasonable cost. Consistent with that goal, we expect you to manage time carefully.

The FDIC will not pay for costs associated with:

- Excessive conferencing;
- Unnecessary review of documents or files;
- Unnecessary polishing of documents;
- The "learning curve" for FDIC matters; and
- Unfocused legal research.

You are required to discuss staffing with your Oversight Attorney and assign no more attorneys or paraprofessionals than are necessary to adequately represent the FDIC. You must refrain from rotating assignments away from attorneys knowledgeable about FDIC matters or using FDIC projects for the purpose of training firm personnel.

Cost-effective representation on every matter requires that you:

- Consult with your Oversight Attorney on strategic, tactical, or cost-related decisions on a matter, including pre-filing review of pleadings by your Oversight Attorney.
- Have a clear understanding of your role and the role of your Oversight Attorney.
- Insist that your Oversight Attorney define the goals and objectives to be achieved.

- Send your Oversight Attorney copies of all correspondence, pleadings and other filings promptly upon receipt unless instructed otherwise.
- Make effective use of Legal Division resources, including its attorneys and the FDIC Legal Research Bank (described below), to the greatest extent possible.
- Develop a case plan and budget that will achieve the FDIC's goals and objectives and obtain the written approval of the Legal Division for it, as well as for any increase in the total budget amount.
- Promptly advise your Oversight Attorney of all significant developments.

Special Issues

A number of legal issues are of special interest to the FDIC either because they are peculiarly related to FDIC activities and rights, or because of the need for a uniform, nationwide approach. These “special issues” include such matters as interpretation of the Federal Deposit Insurance Act, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), or other federal statutes, as well as matters involving the status of the FDIC in its conservatorship, receivership, or corporate capacities.

Outside Counsel representing the FDIC, FDIC asset servicers, or other FDIC related interests are required to be alert to these issues in matters referred for representation. You must contact the FDIC Oversight Attorney before undertaking any research or drafting with respect to these issues. Relevant research or statements of agency policy concerning “special issues” will frequently be provided to you and, in many cases, the Legal Division may wish to handle those portions of a matter directly or in cooperation with the firm.

Special Issues List

The Special Issues List, which is provided for illustrative purposes, includes without limitation:

Special Issues List
Actions involving the Federal Deposit Insurance Corporation and another state or federal financial institution regulator or federal agency.
Agency status of FDIC or Resolution Trust Corporation ("RTC").
Agricultural and Small Business Administration loans.
Bankruptcy proceedings involving a special issue from this list.
Bridge banks.
Bulk sales.
Challenges to FDIC conservatorship, receivership or corporate powers.
Challenges to or novel applications of the claims procedure.
Challenges to and interpretations of FDIC or RTC regulations or policy statements.
Conflicts between insolvent institutions.
Constitutional challenges to actions taken by FDIC officials.
Constitutionality of statutes affecting the FDIC or RTC.
Crime Control Act of 1990 ("CCA").
<i>D'Oench Duhme</i> , and 12 U.S.C. § 1823(e).
Employee benefit litigation.
Environmental issues including, but not limited to: CERCLA, RCRA, USTs, asbestos, lead-based paints, wetlands, endangered species, and NEPA.
ERISA.
Estoppel.
Executory contracts and leases.
Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA").
Federal Home Loan Bank Board/FSLIC; especially challenges to powers.
Federal Trade Commission Act.
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"); especially retroactivity of provisions.
Freedom of Information Act.
FSLIC Resolution Fund.
Guaranteed loans.
Historic properties preservation.
Holder in due course doctrine.
Indemnification of employees, officers or directors of failed institutions.
Jurisdiction, removal, or venue.
Least-Cost test; 12 U.S.C. §1823(c) (4).

Special Issues List
Lender liability.
Letters of Credit.
Loan participations.
Multi-receivership sales initiatives (securitizations, auctions).
Mutual to stock conversions.
National depositor preference.
National impact: issues that may have national impact.
Privacy Act.
Pro-rata vs. pro tanto settlement bar rule.
Prudential mootness.
Publicity: any case likely to generate publicity.
Punitive damages.
Purchase and Assumption documentation.
Qualified Financial Contracts; including derivatives, repurchase agreements, and swaps.
Racketeer Influenced and Corrupt Organizations Act.
Removal of state court appeals.
Repudiation of contracts where measure of damages, notice, timing or reasonableness may be at issue.
Retroactivity involving FIRREA, CCA or FDICIA.
Section 1821 (j) of the FDI Act.
Section 1825(b) of the FDI Act.
Securities acts: Securities Act of 1933 and Securities Exchange Act of 1934.
Senior Executives: Lawsuits involving agency executives whether as named parties, deponents or witnesses.
Subsidiaries of failed insured depository institutions.
Tax matters – both income tax and property tax.
Termination of pension plans.
Termination of receiverships.
Tort claims that may implicate the Federal Tort Claims Act.
Trust departments.

Decisions that should be made only in consultation with your Oversight Attorney (absent exigent circumstances) include, without limitation:

- Hiring experts and other professional service providers;
- Secretarial overtime;

- Use of law clerks or summer interns;
- Travel;
- Contacts with FDIC business staff;
- Legal research; and
- Staffing at conferences, court appearances, depositions, or meetings.

The Legal Division expects timely, cost-effective solutions. Failure to conform to the required cost-saving measures noted above may result in disallowance of the billed amounts by the Legal Division.

Reports

FDIC management procedures require that you keep your FDIC Oversight Attorney fully informed as to the status of each matter you are handling. Reporting will vary by type and size of case, by region and by firm. A status report shall be submitted as often as directed to your Oversight Attorney for each matter you are handling.

Reports should:

- Be brief but meaningful;
 - Emphasize developments since the last report;
 - Review whether the case is proceeding in line with the case plan and budget; and if not
 - Explain why actual costs differ from projected or budgeted amounts.
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5.2

FDIC Legal Research Bank

To avoid duplication of legal research and to obtain the benefits of previous legal research, the Legal Division established the FDIC Legal Research Bank ("Legal Research Bank"), designed to centralize substantive briefs, unpublished opinions, and other legal research materials utilized in FDIC cases.

The Legal Research Bank is intended to assist you in representing the FDIC by making legal research materials readily available to you and to reduce the FDIC's legal research bills.

Documents in the Legal Research Bank are available in full-text in a private FDIC database on Westlaw (the "Legal Research Bank Database" or "Database"). Each law firm with a current Legal Services Agreement is eligible to open an account for on-line research in the Legal Research Bank Database.

You are required to minimize legal research costs on FDIC matters. Thus, you must check the Legal Research Bank Database at the beginning of every authorized legal research project. Failure to consult the Database may result in disallowance of associated charges for unnecessary legal research.

You are required to submit promptly your final, substantive FDIC legal work product (e.g., briefs, legal research memoranda, as well as significant court opinions in FDIC cases) directly to the Legal Research Bank staff at the address indicated below for inclusion in the Legal Research Bank.

In representing FDIC, you authorize the FDIC to include those materials (and any other written materials prepared in the representation of the FDIC) in the Legal Research Bank. You also consent to the reproduction, dissemination, distribution, or other use of such written materials (including the use of those materials in other documents prepared for the Legal Division) by any authorized user of the Legal Research Bank.

Inquiries about the Legal Research Bank Database should be directed to the Legal Research Bank staff at (202) 736-0246 and work product should be sent to: Legal Research Bank, 550 17th Street, NW, Room H-10079A, Washington, D.C. 20429-9990.

5.3

Alternative Dispute Resolution (“ADR”)

The FDIC is committed to the use of alternative dispute resolution (“ADR”) in appropriate cases. The FDIC views such techniques as potentially less costly, less time consuming, and a more effective means of facilitating negotiated settlements. Thus, throughout the course of a lawsuit you are required to periodically review the case to determine whether ADR is appropriate and to explore all opportunities for utilizing non-judicial dispute resolution approaches.

Generally, the Legal Division does not favor the use of binding ADR, such as arbitration, preferring non-binding approaches, such as mediation or "mini-trials." When settlement negotiations reach an impasse, particularly if technical or factual issues are central to a dispute, the use of ADR and a third-party neutral should be considered.

When ADR is used, you are expected to comply with current corporate ADR policy. The corporate ADR policy can be found in the Federal Register at 62 Fed. Reg. 1456 (January 10, 1997). Refer to [Appendix Q](#). Your Oversight Attorney can provide information on use of binding arbitration and the selection and payment of neutrals.

Claims between FDIC-controlled institutions (including receiverships, conservatorships, acquired or assisted institutions, asset servicers, and bridge banks) must immediately be brought to the attention of your Oversight Attorney. These claims must be resolved through the use of the FDIC's internal ADR program unless otherwise directed by your Oversight Attorney. Costs incurred in the unauthorized litigation of such claims may be disallowed.

5.4 FDIC as a Litigant

The FDIC's litigation philosophy is to pursue an aggressive, forthright, and consistent approach with our overall objective of resolving litigation in an expeditious and cost-effective manner.

The Legal Division avoids extreme advocacy positions that are not likely to have a substantive impact on the outcome of litigation. Coercive, delaying, or obstructive tactics also are to be avoided.

We discourage excessive motion practice unless there is a clear strategic advantage to be gained. Where appropriate, however, motions to dismiss, for judgment on the pleadings, or for summary judgment should be employed to resolve or refine as many of the issues in dispute as possible.

The FDIC wishes to avoid costly delays that frequently result from abuses of the discovery process. Lengthy interrogatories or requests for extensive document production for the purpose of burdening another party are to be avoided. The Legal Division specifically requests that you consider available remedies and sanctions when another party appears to be abusing the discovery process.

Questions concerning litigation strategies should be addressed to your Oversight Attorney.

Discovery Requests – *FDIC, Other* *Federal or State* *Agencies*

To obtain all requisite authorizations and instructions for coordination of a response, you must immediately contact your Oversight Attorney when you receive a:

- Notice of deposition or subpoena of an employee of the FDIC, or other federal or state agency; or
- Subpoena or request for production of documents generated by the FDIC, the former Resolution Trust Corporation, or another federal entity.

Similarly, you should consult with your Oversight Attorney prior to contacting employees of the FDIC or other federal entities, or obtaining documents generated by another federal entity.

Filing Fees

In the United States District Courts and Courts of Appeals, the FDIC is not required to pay filing fees or post any bond to pursue an appeal 12 U.S.C. 1819(b)(4).

Experts and Other Professional Service Providers

The decision to hire experts and other professional service providers should only be made in consultation and with the approval of your Oversight Attorney (absent exigent circumstances). **It is very important that experts and other professional service providers are screened for conflicts of interest and are eligible to provide services.** Such conflicts screening and approval should be documented. *Refer generally to [Chapter 2](#) and [Appendix C](#) for further information.*

The proposed rates or compensation including reimbursement of expenses should be reasonable in light of the matter for which they are hired and the customary levels for their professions. You should try to obtain discounts when possible.

Under **no** circumstances can compensation be based upon a contingent fee arrangement. Absent express Legal Division permission, experts may only be compensated for expenses in accordance with the requirements of this Deskbook. *Refer to [Chapter 7](#), [Sections 7.3](#) and [7.12](#) for information on reimbursement of these expenses.* The Legal Division considers your oversight of experts and other professional service providers an important duty under your legal referral.

Settlements

The settlement possibilities of each matter should be identified and considered early in the proceedings and at each stage thereafter. Cases should be settled as early as practicable under the circumstances. You will be asked to review the likelihood of success with your Oversight Attorney on an on-going basis so that FDIC will have current information on which to base its decisions.

Generally, Oversight Attorneys are involved in settlement discussions. You must communicate all settlement offers, including any deadlines imposed, to your Oversight Attorney as soon as practicable. Such communications may be oral unless your Oversight Attorney instructs otherwise.

You should advise the opposing party's counsel, and the court, as appropriate, that your Oversight Attorney will review all settlement offers or bankruptcy plans with the appropriate FDIC representatives and obtain necessary decisions.

The time needed to obtain authority to accept or reject a settlement offer may vary. You should provide sufficient notice to the Legal Division to secure FDIC pre-approved settlement authority for court-ordered mediation.

The Legal Division generally assesses proposed settlements on the likelihood of success and the likely net economic recovery, considering, among other factors, the cost of litigation and the amount and collectability of a judgment, using net present-value analysis.

In most cases, the Legal Division will not consider an offer to settle a matter for less than the full amount claimed without verified financial information, on the approved form which will be furnished by your Oversight Attorney. The debtor's disclosure statement and any other available financial information should be supplied in connection with the submission of a bankruptcy plan.

Attach to any settlement offer a description of any material changes that relate to acceptance of the offer (e.g., a change in your estimate of success or timing). When there are no such changes since your last status report, so state.

Do not prepare a detailed analysis of the settlement offer unless specifically requested to do so. Your recommendation(s) will be an important part of the decision-making process, but the FDIC retains the authority to accept or reject a settlement offer.

Appeals

You must promptly notify your Oversight Attorney of any adverse ruling so that a decision can be made regarding appeal. Although you are expected to take all steps necessary to protect the interests and preserve appeal rights of the FDIC, pending a decision whether to appeal, no appeal shall be taken without the prior approval of the Legal Division.

5.5 Criminal Referrals

The Legal Division has a responsibility to notify and, where appropriate, assist law enforcement officials including the Office of Inspector General in investigating conduct that may constitute a violation of criminal statutes. You must immediately forward any information that indicates possible criminal behavior to your Oversight Attorney. Your Oversight Attorney may either file a Suspicious Activity Report form with your assistance, or instruct you to do so under Legal Division guidelines.

The FDIC does not have authority or responsibility for instituting, conducting, or disposing of criminal proceedings. As a matter of policy, the settlement of civil litigation on behalf of the FDIC may not, expressly or by implication, extend to the disposition of any criminal charges or recommendations with respect to such charges, or to the disposition of any potential criminal or civil liability for fraud against the FDIC or the United States. Furthermore, in conducting civil litigation, including settlement negotiations, under no circumstances may you agree to withhold from law enforcement authorities any information relating to a possible criminal violation or investigation.

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