	DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS **POLICY AND PROCEDURE**	**EFFECTIVE DATE:**	June 5, 2013	**Page 1 of 8**
		SUPERSEDES:	1440.1D September 9, 2011	
		OPI:	DIRECTOR	
		REVIEW DATE:	June 5, 2014	
		Approving Authority	Thomas Faust Director	
	SUBJECT:	**LAWSUITS AGAINST INDIVDUAL EMPLOYEES**		
	NUMBER:	**1440.1E**		
	Attachments:	Attachment A		

SUMMARY OF CHANGES:

Section	Change

APPROVED:

Signature on File

_____ _____06/05/2013_____

Thomas Faust, Director ***Date Signed***

1. **PURPOSE AND SCOPE.** To establish procedures for providing legal representation for employees who are subject to civil litigation due to circumstances emanating from the scope of their employment.

2. **POLICY.** It is the policy of the Department of Corrections (DOC) to provide legal representation, upon request, to its employees who are subject to civil litigation emanating from circumstances relevant to the scope of their employment. The District of Columbia Office of the Attorney General will act as legal counsel for employees involved in such litigation.

3. **APPLICABILITY.** This directive shall apply to all DOC employees.

4. **PROGRAM OBJECTIVES.** To provide service of process guidelines that will meet the DOC employees' constitutional right to due process. When requested, the D.C. Office of the Attorney General will provide legal representation to employees in civil litigation matters that stem from their official capacity as DOC employees (not personal capacity).

5. **NOTICE OF NON-DISCRIMINATION**

   a. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., (Act) the District of Columbia does not discriminate on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

6. **DIRECTIVES AFFECTED**

   a. **Directives Rescinded**

      1) PS 1440.ID Lawsuits Against Individual Employees (08/09/11)

   b. **Directives Referenced.** None

7. **AUTHORITY**

   a. D.C. Code § 24-211.02 Powers, promulgation of rules

   b. D.C. Code § 1-608.52 Creation of the Legal Service

   c. Fed R. Civ. P. 4 (2007), Summons

   d. Fed R. Civ. P. 55 (2009), Default; Default Judgment

   e. Fed R. Civ. P. 45 (2007), Subpoena

   f. U.S. Const. amend. V

   g. U.s. Const. amend. XIV, § 1.

8. **STANDARDS REFERENCED**

   a. American Correctional Association 4th Edition Standards for Adult Local Detention Facilities: 4-ALDF-7A-02.

9. **DEFINITIONS.** For the purpose of this directive, the following definitions shall apply:

   a. **Service of Process**. The summons plus the complaint which are the instruments for commencing a civil action.

   b. **Summons**. A document issued by the Court at the time of a lawsuit is filed that contains instructions for the defendant as to the need to file a response to the complaint initiated against them.

   c. **Subpoena.** A *writ* issued by a government agency that has authority to compel testimony by a witness or production of evidence, the agency most often a court, under a penalty for failure. A *subpoena* ad *testificandum* orders a person to testify before the ordering authority or face punishment. A

subpoena *duces tecum* orders a person to bring physical evidence before the ordering authority or face punishment.

d. **Complaint**. The first or initiatory pleading on the part of a plaintiff in a civil action. Its purpose is to give the defendant information of all material facts and the legal basis on which the plaintiff relies to support his demand. It should contain the following:

1) The title of the case, specifying the name of the court in which the action is to be brought and the names of the plaintiff(s) and defendant(s).

2) A concise statement of facts and each material allegation.

3) A demand for relief sought by the plaintiff and/or the amount of damages.

e. **Default.** A failure to respond to a summons and complaint served on a party in the time required by law. If a legal answer or other response is not filed, the suing party (plaintiff) can request a default be entered on the record, which terminates the rights of the defaulting party to defend the case.

10. **DELEGATION OF AUTHORITY.** The Office of the General Counsel for the DOC shall coordinate legal representation between DOC employees and the D.C .Office of the Attorney General. DOC employees who receive subpoenas and informal requests for pre-trial and witness conferences shall refer such matters to the DOC Office of the General Counsel (OGC) before complying with such requests.

11. **PROCEDURES**

a. *Service of Process*. Notice of a civil action is accomplished by service of the summons and complaint upon the defendant by the plaintiff.

b. *Personal Service***.** For the purpose of this Policy and Procedure, personal service is the appropriate manner by which notice of a civil action should be accomplished. Supervisors and coworkers will not accept service for other employees named as defendants; a contrary practice may result in a charge of “contempt of court.” The procedures enumerated below are to be followed by Department employees in accepting services of process:

1) If the Department of Corrections and/or the Director in his/her official or

individual capacity is named as the defendant in the civil action, the service of process of the summons and complaint can be accepted by the DOC General Counsel.

2) If an employee other than the Director issued in his or her official capacity only (not personal capacity), service of process can be accepted by the DOC General Counsel.

3) If an employee other than the Director is sued in his/her "personal" or "individual" capacity, ("individually"), instead of/or in addition to being sued in his or her official capacity, the individual has a right to be served by the process server. The DOC General Counsel cannot accept service without the explicit authorization of the individual defendant. Supervisors and co-workers shall not accept summons for another employee without his/her express written consent.

4) Process serves, including U.S. Marshals, are not provided access to individuals to serve them inside the facilities or headquarters. They must serve them in public places or at their residences just as they would any individual being personally sued.

5) Employees being sued in their official or in their individual capacity for work related matters should not evade service. If the employee evades service, the DOC must disclose the employee's hours of work so that he/she may be personally served just prior to or departing from employment. DOC employee's who intentionally evade service or ignore a properly served summons may be held in "contempt of court", charged with "obstruction of justice," or "make default." Fed. R. Civ. P. 45(e) (2007); Fed. R. Civ. P. 55(a) (2009).

6) The DOC employee should notify his/her supervisor of the service of process as well as immediately contact the DOC General Counsel for instructions on how to proceed. A copy of the complete summons served must be submitted to the General Counsel for review and advice. Delay can result in a default judgment against the individual served therefore prompt referral to the General Counsel (within 48 hours) is strongly advised.

7) When an employee contacts the General Counsel, they may be required to fill out and submit a request for representation after careful review of its terms and signature.

8) If an employee is sued in his or her personal capacity regarding matters involving his or her personal life, unrelated to employment with the DOC, the Department will take no roll or provide legal advice to the employee.

c. *When an Employee is a Witness in a Civil Action Against the District of Columbia Regarding Matters Related to His or Her Employment they shall:*

1) When an employee is requested to testify in a lawsuit in deposition or trial, the request is usually made through the Office of Attorney General, who submits the deposition notice or request to the DOC Office of General Counsel to arrange. The employee will be prepared for the testimony and accompanied by the Office of the Attorney General. Under some circumstances, the employee may decide, or be advised by the Assistant Attorney General, to retain counsel for the testimony, such as where there may be a conflict of interest in the representation, or if the circumstances raise the employee's right against self incrimination or other privileges. These will be addressed by the Assistant Attorney General on the case during the preparation session.

2) If the employee is contacted or served a subpoena directly by an attorney to testify at a trial or in deposition where the District of Columbia/Department of Corrections is a defendant, the employee should notify his or her supervisor and contact the DOC General Counsel immediately for directions on how to proceed.

d. *When an Individual is Subpoenaed or Questioned to Serve as a Witness in a Criminal Case:*

1) Employees of the Department of Corrections may be served a subpoena to testify or be approached for interview by prosecutors, defense attorneys and/or their investigators regarding knowledge they have involving criminal matters arising from their scope of employment, such as the prosecution of inmates for assaults and other Jail disciplinary infractions. If the prosecution or defense seeks to subpoena an individual employee, service of process must be personally accepted by the DOC employee named. Supervisors and co-workers may not accept subpoenas for another employee without his or her express written consent.

2) If the prosecution or defense only seeks to interview the employee regarding the facts and circumstances surrounding an incident relevant to

the employee's scope of employment, the employee is encouraged to cooperate with the criminal justice process. However, the employee may only be compelled to provide information upon service of subpoena or court order.

3) If a subpoena is to be served upon the individual, he or she has the right to be served by the process server. The DOC General Counsel cannot accept service without the explicit authorization of the individual witness. Supervisors and co-workers may not accept a subpoena for another employee without his or her express written consent.

4) The General Counsel shall accept subpoenas on the Department of Corrections and the DOC Custodian of Records and will designate a DOC employee to testify on that basis.

5) Process servers, including U.S. Marshals, are not provided access to individuals to serve them inside the facilities or headquarters. They must serve them in public places or at their residences just as they would any individual being subpoenaed.

6) Employees being subpoenaed for work related matters should not evade service. If the employee evades service, the DOC must disclose the defendant's hours of work so that he or she may be personally served just prior to or departing from employment. DOC employees who intentionally evade service or ignore a properly served subpoena may be held in "contempt of court," and/or charged with "obstruction of justice." Fed. R. Civ. P. 45(e) (2007); Fed. R. Civ. P. 55(a) (2009).

7) DOC employees served subpoenas in criminal cases relevant to the scope of their employment should contact the Office of the General Counsel for advice after receiving the subpoena and other informal requests for pre-trial and witness conferences.

e. *Request for Legal Representation by the Office of the Attorney General(OAG)*

1) An employee who is named as a defendant in a civil action, where the circumstances for the suit derived from the scope of his/her employment, may be represented by the District of Columbia OAG. A second option is for the employee to retain legal counsel at his/her own expense. For the purpose of obtaining information and possible assistance in preparing a request for Legal Representation (Attachment 1), an employee assigned to a correctional facility, who is served with notice of pending litigation,

should report the fact to his/her supervisor, and within (48) hours, to the Department of Corrections' Office of the General Counsel. When an employee not assigned to a correctional facility is served with notice of a civil action, he/she is to inform his/her supervisor before submitting a request for legal representation.

2) The request, along with the summons and complaint, should be forwarded to OGC within two days (48 hours). The Office of the General Counsel will then transmit the request to the OAG. It is imperative that an employee who has been properly served take measures to defend himself/herself in a civil action.

f. *Request for Representation.* An employee who is requesting legal representation must read the entire Employee Representation Form (Attachment A) prior to submitting the form to OGC. By executing the form, the employee is acknowledging that he/she has read the form in its entirety, understands the contents of the form, and is requesting to be represented by the District of Columbia Office of the Attorney General.

12. **POSTING OF THIS DIRECTIVE.** This Program Statement (PS) will be posted on all employee bulletin boards.

13. **EFFECTIVE DATE.** This directive is effective upon signature of the Director.

14. **ANNUAL REVIEW.** This PS will be reviewed and revised as necessary.

Attachment

Attachment A – Employee Representation Form

Memorandum • **Government of the District of Columbia**

EMPLOYEE REPRESENTATION FORM (Revised 6/30/10)

_____
DATE

MEMORANDUM TO: _____
D.C. GOVERNMENT EMPLOYEE

FROM: _____
Assistant Attorney General

RE: Representation of you in _____ **v.**

_____,

Civil Action No. _____.

You have requested representation by the Office of the Attorney General in the above-referenced lawsuit. You should be aware, in requesting such representation, of the following facts:

1. The Attorney General does not automatically represent any District of Columbia employee, with the exception of the Mayor. All other D.C. employees, including department heads, routinely request representation by the Office. The Attorney General, of course, does automatically represent the Government of the District of Columbia in court.

2. It is important for you to understand that even when this Office does represent you in a case, the primary responsibility of the Attorney General is to protect the interests of the District of Columbia and to ensure enforcement of a laws, rules, and regulations of the District of Columbia. Thus, any discussions between you and any lawyer or support staff in this Office are not privileged or confidential as to the District Government (or the United States Government when it is prosecuting a crime occurring in the District of Columbia), and the attorney handling your case is obligated to convey any relevant information to the appropriate agency of the Government.

3. You are not required to have the District of Columbia Attorney General represent you in this case. Like any other person who has been sued for damages, you are free to retain the counsel of your choice; however, that does not mean that the Government will pay for the attorney. On the contrary, the Government, in almost all cases, will not pay for outside counsel retained by an employee. The only clear exception is a statutory one [D.C. Code §5-115.04 (2001)], which provides that the District of Columbia will pay reasonable attorney's fees (as determined by the court) for a police officer sued in a wrongful arrest case when the Attorney General specifically

declines representation (which is sometimes done because of potential conflicts of interest).

4. Nevertheless, in most cases in which a District of Columbia employee is sued and does request our representation, the Attorney General agrees to represent unless there is a conflict of interest, which would prevent such representation. An example of a potential conflict of interest would be where the employee bas been subjected to an adverse action arising out of the same transaction which gave rise to the lawsuit or where the employee has a claim or lawsuit pending against the District government. In the latter case, representation by a separate division of Attorney General may still be possible, but the question will have to be reviewed on a case by case basis. Of course, there are numerous other ways in which a conflict of interest can arise.

5. If an actual conflict develops, either because of a factual dispute between co-defendants or because of a disagreement regarding settlement, or for any other reason, we will not be able to continue representing the individual employees whose interests are inconsistent with those of the District. Decisions on whether the District will indemnify an employee against an adverse judgment after the District has discontinued representation or after the employee has rejected our representation, and thus deprived the District of control over the defense of the lawsuit, will have to be made on an *ad hoc* basis, given all the circumstances of the particular case.

6. The fact that the District of Columbia Attorney General may represent you in a lawsuit free of charge does not mean that the District of Columbia Government will automatically pay all, or any, of the compensatory damages which may be awarded in the lawsuit. However, most frequently in the past when the District of Columbia was held liable simultaneously with the employee and damages were awarded against the defendants jointly, the District of Columbia has paid the entire award if representation was provided by the Attorney General for all defendants.

7. It is also important to note that the District of Columbia will be even less inclined to pay any punitive damages which may be returned against individual defendants since punitive damages cannot be awarded against the District of Columbia under ordinary circumstances and can only be awarded against other defendants where the fact-finder holds that there has been some form of outrageous conduct. Thus, the D.C. employee must anticipate that if punitive damages are returned against him, even though he is represented by an Assistant Attorney General, the District of Columbia may refuse to pay these damages.

8. If you have any injuries arising out of the transaction, which gave rise to the lawsuit, we may assert a counterclaim to recover for those injuries in this lawsuit. However, you should be aware that we will not assert such a counterclaim unless it is well-founded (i.e. there is an injury or damage and that injury or damage is the result of the plaintiff's improper conduct), and it is understood that the counterclaim may nevertheless be dismissed at some later stage for tactical or settlement reasons or because it is in the bar interests of our primary client, the District of Columbia (see paragraph numbered 2, above). You must understand that such a dismissal of your counterclaim will forever terminate your right to recover under it. In fact, the failure to assert a counterclaim arising out of the same transaction that gave rise to the lawsuit constitutes a waiver of such a claim since it is deemed compulsory under the Civil Rules both federal and local. If the Assistant Attorney General does not wish to pursue a counterclaim on your behalf in a

particular case and you want such a counterclaim pursued, you will have to obtain independent counsel to represent you at your own expense in accordance with paragraph numbered 2 above. You must understand that a decision to settle a lawsuit, including the dropping of a counterclaim, is in effect a decision that the risks in going ahead with the lawsuit outweigh the potential benefits to be derived from your counterclaim.

9. In making your representation choice, please also bear in mind that the final decisions on settlement matters will be made by the Office of the Attorney General, since these decisions involve the spending of District of Columbia funds and/or the risk of incurring judgments to paid out of District of Columbia funds. District of Columbia funds are directly exposed, even if the District is not named as a defendant, because the District may feel it is appropriate to pay some judgments against its employees arising from actions within the scope of their employment. These factors may result in a case being settled even though you would prefer to go to trial, or in a case being taken to trial despite your desire for the District to settle. If you feel that the District's intention to protect the public fisc by deciding to settle or not settle, in its own discretion and possibly contrary to your wishes, creates an unacceptable conflict of interest, then you are again advised that you are free to obtain independent counsel at your own expense.

10. You must also understand that the Attorney General's Office is required to assert all defenses on behalf of all of its clients, even though that may mean that the District of Columbia Government or another client is dismissed out of a particular case while you may be left in the case alone. In other words, there are certain defenses, such as statutory notice of claim that may be available to the municipal government but are not available to the individual defendant. Even though the Office of the Attorney General represents you, as well as the District of Columbia, the Office will assert those defenses on behalf of the District. It will likewise assert any defenses that are available for you, even if they are not available for the District. Nevertheless, if you feel that the Office's obligation to assert defenses solely available to the District of Columbia is somehow inconsistent with your interests, you of course are free to retain outside counsel at your expense, as suggested above.

11. Litigation Hold Requirement: You must preserve any and all documents and information relevant to the claims in the lawsuit, including, but not limited to written correspondence, internal memorandum related to the allegations in the lawsuit, e-mails, text messages and other electronic communications, word processing documents, spreadsheets, microsoft outlook calendars, databases, relevant statistical data, calendars, notes, diaries, and telephone logs. You cannot delete or destroy any documentation or information (hard copy or electronic) that is in any way relevant to this lawsuit.

12. While the Assistant Attorney General representing you will make every attempt to prevent the imposition of liability upon you, your assistance in the defense is crucial if it is to succeed. In addition to the litigation hold requirement described above, you must also return the attorney's telephone calls promptly, you must appear for witness conferences when you are requested to do so, you must bring with you any documentation that is requested, you must appear prepared to answer questions at depositions as well as at trial, and you must cooperate in general with the efforts of your attorney. In order to accomplish these purposes, you must provide all

contact information for you, as is shown below. You must also advise the attorney handling this case immediately if any of your contact information changes (for example, if you change your place of residence, your place of employment or get a new cell phone number).

Please sign and date this memorandum below, indicating that you understand the points discussed above and agree to our legal representation under the described conditions. Also fill in your home and work address, telephone numbers, and e-mail addresses. If you wish, you may take this form with you and discuss it with independent counsel before signing it. However, you should make your initial representation decision promptly because the time for responding to the complaint may be running.

Thank you.

EMPLOYEE CERTIFICATION AND REQUEST FOR REPRESENTATION

Date _____

I have read and I understand the points discussed in pages 1 through 3, above, and I agree to your legal representation under the described conditions. I have not been prosecuted or disciplined for the actions that gave rise to this lawsuit, and I have no claim or lawsuit pending against the District of Columbia or any of its agencies, except as noted below on this page.

_____	_____
Signature of Client	Name of Client (Printed)
_____	_____
Home Address	Work Address
_____	_____
_____	_____
_____	_____
Home Telephone	Work Telephone
_____	_____
Cellular Telephone	Pager
_____	_____
Home E-mail Address	Work E-mail Address

Identification of any claims or lawsuits I have pending against the District of Columbia.

Name of Case	Court	CA Number
Name of Case	Court	CA Number