

## **FACTOR TWO: LEVEL OF RESPONSIBILITY**

The Tabular Matrix in TAB D contains FACTOR TWO ELEMENTS for determining the LEVEL of RESPONSIBILITY. The four elements: NATURE OF FUNCTIONS; SUPERVISION AND GUIDANCE RECEIVED; PERSONAL WORK CONTACTS; and NATURE AND SCOPE OF RECOMMENDATIONS AND DECISIONS with a short description of each are set forth at the top of pages D-1, D-4, D-6, and D-7, respectively. Each page contains four columns. The first column on the left hand side contains the category of work being performed as set forth in the OPM Standards, i.e., Litigation, Legal Advice and Counsel, etc. The second, third and fourth columns contain excerpts from the OPM Standards for LEVEL A, LEVEL C, and LEVEL E, respectively. As noted above, Levels are described in terms of typical characteristics. Thus, intervening levels B and D are appropriate where the position compares in some respects to the lower and higher levels (A and C, or C and E, respectively) or clearly falls between.

When using the latter three columns, it is suggested that one first analyze a major job duty or typical examples of regular and recurring work against Level C. If it is not fully met, and Level A is exceeded Level B, should be assigned. If Level C is fully met, then determine whether it is exceeded. If it is, then it is at least Level D unless Level E is fully met.

Below is an analysis of the Matrix with regard to Levels C, D, and E. These are important for determining journeyman and higher level positions for attorneys in Office of Counsel and Real Estate. Junior and entrance level positions, Levels A and B, are not in controversy.

### **A. NATURE OF FUNCTIONS**

This element has three subelements against which each major duty or work examples should be analyzed where applicable; namely, Research and Preparation of Documents; Litigation, and Legal Advice and Counsel.

#### **1. RESEARCH AND PREPARATION OF DOCUMENTS:**

Level C attorneys perform legal research referring questions back when further development of the facts is necessary, but sometimes perform both the factual and legal research. The attorney then prepares any necessary legal documents or opinions.

Level E attorneys review or draft final agency decisions for execution by officials who exercise final authority in such matters. Some examples include drafting final decisions for adoption by Contracting Officers regarding settlement/denial of contract disputes, contractor performance evaluations, terminations for default and convenience, mistakes-in-bid releases, and contract reformation due to mutual mistake; drafting the final agency decision or position in agency and/or GAO protests, or requests for upward adjustment of bids due to mistakes; drafting final agency decisions regarding issuance of permits under the Department of the Army Regulatory Permit Program or appeals from denials thereof; drafting decisions for the removal of wrecked vessels from general navigation channels; drafting the agency position on Real Estate claims submitted to GAO; rendering final title opinions by attorneys approved by the Department of Justice; and, drafting documents for outgrants and disposal of real property.

Level D attorneys perform legal research and more than sometimes also perform the requisite factual research. Level D attorneys may also prepare draft final agency decisions which are reviewed by another attorney who in turn makes the recommendation for adoption.

## 2. LITIGATION:

Level C attorneys participate in pretrial or prehearing conferences; prepare, provide, or present technical guidance during the litigation; and may examine or cross examine witnesses; but, not have the full responsibility for the development and presentation of the case.

Level E attorneys must meet three subelements. First, they must be the Principal Attorney in Charge of the litigation. While District Counsels are "accountable" for the work of trial attorneys, individual attorneys (Counsel or Real Estate) may be credited as the principal attorney where they exercise full responsibility for the development and presentation of the case. Thus, depending upon the amount of supervision and guidance received by the staff attorney, either the District Counsel or the staff attorney will be the Principal Attorney in Charge of the case.

This typically occurs in contract appeals from final decisions of the Contracting Officer to both the Armed Services and Corps of Engineers Boards of Contract Appeals. The Chief Trial Attorney at Headquarters USACE and the Department of the Army are not usually involved in the preparation and presentation of such cases

before these Boards of Contract Appeals. They merely review the Rule 4 files, pleadings, motions, and briefs. The standards are concerned with the meat of the trial, i.e. discovery through the use of interrogatories, requests for admissions and production of documents, and depositions: preparation of witnesses and exhibits; and the actual presentation of the case at the hearing. Accordingly, the District Counsel or trial attorney exercises full responsibility for the development and presentation of the case. Similarly, either the District Counsel or trial attorney may be the Principal Attorney in Charge of trying cases before the EEO Commission, MSPB, FLRA or grievance arbitrations.

Either the District Counsel or trial attorney (Counsel or Real Estate) may be the Principal Attorney in Charge of preparing Litigation Reports utilized by the Department of Justice attorneys in trying cases before the courts involving litigation on behalf of or against the United States. These litigation reports lay the complete groundwork for the Government's case by providing the factual background, legal analysis, suggested pleadings, a list of proposed witnesses together with a synopsis of their respective testimony, and other suggested legal documents such as dispositive motions, crossclaims, counterclaims, third-party impleaders, etc.

In such cases, the standards allow credit to be given to the District Counsel or trial attorney as though they had personally tried the case. (See 905 Stds., Pg. 8)

The second subelement is Scope. Type III appeals and litigation are of such scope that they, in many instances, warrant the use of one or two lower-graded attorneys OR specialists in engineering, financial, scientific, or other highly technical areas. Type II appeals or litigation also frequently require the utilization of engineering, scientific or financial experts.

The third subelement is Importance. The highly specialized area of Government Contract law and the areas of environmental, regulatory, water law, admiralty, tort, and inverse condemnation litigation have attracted some of the most distinguished and highly paid legal talent in the country. This is mainly true in the area of Type III cases due to their large dollar value and nationwide interest, and, to some extent, Type II cases where there is nationwide interest. For Level E, all three (Principal Attorney in Charge; Scope; and Importance) must be present.

Level D attorneys either try the case or are credited for trying the case because they lay the complete groundwork therefor, but are not the Principal Attorney in charge of trying the case; or, if they are the Principal Attorney in charge of trying

the case, they do not meet the other two Level E subelements for regular and recurring work.

### 3. LEGAL ADVICE AND COUNSEL:

Level C attorneys participate in negotiations as a member of a team and then draft any necessary legal documents resulting therefrom; or act regularly as the legal advisor on a single program, or activity; or serve as the assigned specialist on a single program or a major phase of several related programs or major activities, (District Claims Officer, Regulatory attorneys, Labor Counselor, etc.); or, reviews for legal soundness and accuracy, program material emanating from operating units of the organization (Environmental Impact Statements, etc.).

Level E attorneys act as legal counsel to the head of a major operating program, e.g. a command (USACE), regional office (Divisions), or a field installation (Districts) which has been delegated unusual authority or authority commonly of a higher echelon. In determining whether the latter is present, one is not constrained to viewing higher echelons within the command's own hierarchy, but may look to other Federal agencies.

The Hamm Study concluded that Corps District Counsels were legal counsel to the head of a major operating program at a field installation and when compared to the other Federal agencies surveyed, had been delegated unusual authority or authority commonly of a higher echelon.

District, Lab, and Center Counsels are thus ordinarily credited with Level E on a programmatic basis. MSC Counsels are also credited with Level E for this subelement of Nature of Functions either on a programmatic or regional basis.

Level D attorneys chair or co-chair negotiating teams; act as the attorney or specialist for more than a single program; or, are responsible for the Office of Counsel or Real Estate position as to the legal soundness and accuracy of assigned program material.

### B. SUPERVISION AND GUIDANCE RECEIVED

This element has three subelements against which each major duty should be analyzed where applicable; namely, Research/Instructions, Litigation, and Supervisor Review.

## 1. RESEARCH/INSTRUCTIONS

Level C attorneys are assigned the routine legal work assignments with instructions on unusual circumstances, background information, and important policy considerations.

Level E attorneys are expected to carry out any assignments without preliminary instructions.

Level D attorneys either perform routine cases without any preliminary instructions, or perform more than nonroutine cases with Level C instructions.

## 2. LITIGATION

For Level C attorneys, before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to insure that proper groundwork has been laid for successful prosecution of the case.

Level E attorneys represent the Government at hearings or trials without any preliminary instructions. Note that unlike the case in Nature of Functions, trying the case is NOT credited here for those attorneys laying the complete groundwork for the Government's case in Litigation Reports.

Level D attorneys lay the complete groundwork for the Government's case, and/or assist the trial attorney at the trial.

### 3. SUPERVISOR REVIEW

For Level C attorneys all written work is SUBJECT TO review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the employing agency.

For Level E attorneys these standards contemplate an attorney supervisor. Completed work in the advisory or regulatory areas IS REVIEWED before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness. Thus, attorneys who are supervised by a nonattorney supervisor, Level E with strengthening characteristics is credited, i.e., E+. (See the discussion below regarding "strengthening characteristics.")

For Level D attorneys, written work is NOT subject to review by an attorney supervisor for soundness of approach and argument, application of legal principles, and consistency with policies, procedures and regulations.

### C. PERSONAL WORK CONTACTS

This element has two subelements against which each major duty should be analyzed where applicable; namely, Litigation and Legal Advice and Participation.

#### 1. LITIGATION

Level C attorneys participate in pretrial or prehearing conferences, explain points of law, and refer suggested settlements or compromise offers to superiors with recommendations.

Level E attorneys try cases before courts or administrative bodies (Boards of Contract Appeals, EEOC, MSPB, FLRA, etc.).

Level D attorneys would go beyond the prehearing or pretrial stage and involve assisting the trial attorney in preparing and trying the case.

#### 2. LEGAL ADVICE AND PARTICIPATION

Level C attorneys: (a) advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording; (b) participate in conferences with representatives of operating programs, state and local governments, industry, private organizations, or other Federal government

agencies; and (c) participates in negotiations with state officials concerning conflicts in state and Federal regulations.

Level E attorneys actually confer or negotiate with top administrative personnel in the agency, private business, or State, local, or foreign governments on important legal and policy questions.

Level D attorneys are responsible for negotiations (instead of merely advising negotiating officials) and exercise a lead role in conference participation. Level D is also credited where the attorney confers or negotiates with top administrative personnel on routine legal and policy questions, or vice versa.

Note that some major duties may not involve personal work contacts, other than with associates in Offices of Counsel or Real Estate. In such cases, the Classification Standards provide that the Level of Responsibility will be controlled by the other three elements and will not be diminished because of the lack of personal work contacts.

#### D. NATURE AND SCOPE OF RECOMMENDATIONS AND DECISIONS

This element has two subelements against which each major duty or work examples should be analyzed where applicable; namely, Litigation and Legal Advice and Counsel.

##### 1. LITIGATION

Examples include: whether to initiate litigation; settlement of claims; the organization, order of presentation, and line or argument to be used in the presentation of cases or hearings; or settlement of suits brought by the Government against others.

##### 2. LEGAL ADVICE AND COUNSEL

Examples include: replies to requests for legal advice or interpretation of law arising out of the day-to-day operations of the office; proposed substantive changes to legislation, policies, and regulations to make them more equitable, responsive, or easier to administer; and, whether to approve a contract or other legal document in its proposed form and content.

##### 3. LITIGATION AND LEGAL ADVICE AND COUNSEL

Level C attorneys make recommendations to those outside the agency or to administrative officials at higher levels normally through the supervisor.

Level E attorneys make similar recommendations as set forth for Level C attorneys above. The major difference is that at this level advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, members of congress, or representatives of State and local governments. Recommendations that are tantamount to final decisions made through the supervisor are also Level E.

Level D attorneys make similar recommendations as Level C attorneys but make them directly to those outside the agency or to administrative officials at higher levels. The major difference is that such recommendations are not made through the supervisor and do not reach Level E.

#### E. STRENGTHENING CHARACTERISTICS

This is a classification concept that may assist in raising the overall Level of Responsibility. For example, if analysis of a major duty or work examples determines that Level C for one of the elements is greatly exceeded and approaches, but does not fully meet Level E, then Level D "with strengthening characteristics" is credited, i.e. D+. The same can be true for the intervening Level B yielding a B+. The following illustrates this importance:

NOF	D	D
S&GR	B	B
PWC	D	D+
NSR&D	C	C
OVERALL LEVEL IS	C	D

In the first instance, the Personal Work Contacts "D" and Supervision & Guidance Received "B" equate to a "C." Since we are then left with this "C" and a Nature of Function "D" and an Nature and Scope of Recommendations & Decisions "C", the overall Level is credited with Level "C." However, in the second case we have a Personal Work Contacts "D+" with a Supervision & Guidance Received "B" which exceeds "C" and thus equates to a "D." Since we are then left with this "D," a

Nature of Function "D", and a Nature and Scope of Recommendations & Decisions "C," the overall Level is credited with Level "D."

#### F. DISCUSSION OF JOB TITLE

In classifying a position, you must be able to correctly identify the job title. While this does not impact the grade determination, it is a prerequisite to correct job classification. The position title consists of a functional title and a subject matter title. The latter is shown in parenthesis. These are on pages 2-4 of the classification standard. There are four functional titles, namely: (a) Trial Attorney, which involves duties of preparation for trial, trying cases, or providing technical guidance; (b) Attorney-Advisor, which includes rendering advice and services; (c) Attorney-Examiner, which includes Hearing Officers; and (d) General Attorney when two or more of the above functional titles are applicable, i.e., Trial Attorney and Attorney-Advisor.

The listed subject matter titles are shown in parenthesis, e.g. Attorney-Advisor (Real Property) or General Attorney (Contracts). Attorney-Advisor (General) is used where there are two or more subject matter areas or the subject matters are not listed, such as Environmental or Regulatory. Remember that you should not use General Attorney (General). The parenthetical is eliminated in such cases.

## G. CONCLUSION

All of the foregoing culminate in an Evaluation Statement which determines the appropriate position title, series, and grade for major duties or examples of regular and recurring work. Set forth in TAB F are two separate Evaluation Statements with supporting work examples or major duties for a GS-14 position performing contract claims, labor counselling, and general law duties and a GS-13 Real Estate attorney position. Using the methodology presented in this Supplementary Guidance should reflect accurate classifications to ensure that our attorneys in Offices of Counsel and Real Estate are being paid at the correct grade level for the work actually being performed.

Prior to the examples of the two complete Evaluation Statements set forth in TAB F, set forth next in TAB C, and TAB D are the matrixes for typing cases and level of responsibility, respectively. TAB E follows using the information in the matrixes and setting forth a detailed analysis of the methodology that should be utilized for determining both the Type of Case and Level of Responsibility for three separate and particular Major Duties, namely: (1) Labor Counselor, (2) Contract Claims, and (3) Real Estate.