Government Lawyers and Their Private “Clients” Under the Fair Housing Act

Eugene R. Gaetke  
_EUniversity of Kentucky College of Law, ggaetke@uky.edu_

Robert G. Schwemm  
_EUniversity of Kentucky College of Law, schwemmr@uky.edu_

Follow this and additional works at: [https://uknowledge.uky.edu/law_facpub](https://uknowledge.uky.edu/law_facpub)

Part of the Civil Rights and Discrimination Commons, Housing Law Commons, and the Legal Ethics and Professional Responsibility Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

**Recommended Citation**  

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Government Lawyers and Their Private “Clients” Under the Fair Housing Act

Notes/Citation Information

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/56
Government Lawyers and Their Private "Clients" Under the Fair Housing Act

Eugene R. Gaetke* & Robert G. Schwemm**

In strengthening enforcement of the federal Fair Housing Act, Congress in the 1988 Fair Housing Amendments Act ("FHAA") authorized government lawyers from the Justice Department, the Department of Housing and Urban Development, and state and local civil rights agencies to prosecute cases "on behalf of" persons aggrieved by housing discrimination. This new enforcement scheme has led to a heightened level of administrative complaints and litigated cases in which government lawyers are put in the potentially difficult position of having to represent both their agency and private complainants.

The "triangular" relationships created by the FHAA between government lawyers and their public and private "clients" is not unique to fair housing enforcement, but such relationships—whether they occur in private or governmental practice—are always problematic for lawyers. The problems in fair housing enforcement are made more difficult by the fact that Congress provided virtually no guidance as to how government lawyers are to resolve these problems when a divergence of interests does arise between their employing agency and their private "client."

Experience has shown that these potential conflicts may be quite real in individual cases. When a divergence of interests has occurred, government lawyers invariably have chosen to continue representing their public clients while abandoning the private complainant. This result may leave victims of housing discrimination with less protection than Congress envisioned.

This Article analyzes how the rules governing professional conduct operate in analogous triangular relationships and then offers some insights as to how the particular problems created by the administrative enforcement scheme of the 1988 FHAA might be approached in light of these rules.

Introduction

In enacting the Fair Housing Amendments Act of 1988 ("FHAA"),1 Congress attempted to strengthen the federal law that prohibits discrimination in housing by creating a new enforcement mechanism for handling administrative complaints filed with the Department of Housing and Urban Development ("HUD").2 As part of this effort, Congress provided that gov-

* H. Wendell Cherry Professor of Law, University of Kentucky College of Law; B.A., J.D., University of Minnesota.

** Ashland Oil Professor of Law, University of Kentucky College of Law; B.A., Amherst College; J.D., Harvard University.

1 Pub. L. No. 100-430, 102 Stat. 1619. The FHAA amended the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 73, 81 (1968). The Fair Housing Act, as amended by FHAA, is codified at 42 U.S.C. §§ 3601-3631 (1994). For clarity, the first version of the Fair Housing Act will be referred to as "Title VIII" or "FHA" and the 1988 amendments will be referred to as "FHAA."

2 See FHAA, Pub. L. No. 100-430, § 8, 102 Stat. 1619, 1625-33 (codified at 42 U.S.C. §§ 3610-3612). The FHAA made other significant changes to the FHA; these changes included adjustments in the prior law's enforcement provisions dealing with private lawsuits and cases.
ernment lawyers from HUD, from the Department of Justice ("Justice Department," "Justice," or "DOJ"), and in certain circumstances, from various state and local agencies would engage in litigation on behalf of persons aggrieved by housing discrimination.

These government lawyers are generally knowledgeable about fair housing law, experienced in litigating discrimination claims, and unfettered by the economic demands of private practice. In pursuing FHAA claims, they offer high quality, free legal assistance to individuals who have been victimized by housing discrimination. Such litigation, brought by the government on behalf of aggrieved individuals and prosecuted without cost to complainants, understandably appeals to those favoring strong enforcement of the antidiscrimination law. It is not surprising that this new scheme has resulted in a heightened level of fair housing litigation and a shift from a privately dominated system of enforcement to one in which the government plays a significant role.

At the same time, however, the FHAA’s approach has created significant professional issues for the government lawyers, the agencies that employ them, and the individuals on whose behalf they litigate. These problems arise out of the “triangular” professional relationship created by Congress in directing the lawyers, who are employed by and regularly represent the government, to bring discrimination claims on behalf of private individuals. The government lawyers prosecuting such cases face uncertainty as to which “client” controls the litigation and how they might fulfill their duties of loyalty and zealous representation. Unfortunately, the Congress that enacted the

brought by the Attorney General, see § 8, 102 Stat. at 1625, 1633-35 (codified at 42 U.S.C. §§ 3613-3614), and the addition of “handicap” and “familial status” to Title VIII’s list of prohibited bases of discrimination, see § 6, 102 Stat. at 1620-22 (codified at 42 U.S.C. §§ 3604-3606). See generally Robert G. Schwemm, Housing Discrimination: Law and Litigation § 5.3 (1996) (describing changes made by the FHAA to Title VIII).

3 See infra notes 50-55 and accompanying text. The FHAA requires referral of cases filed with HUD to state and local agencies administering fair housing laws that are “substantially equivalent” to the federal law. See 42 U.S.C. § 3610(f)(3)(A); infra note 43 and accompanying text. By 1996, these referrals accounted for well over half of HUD’s caseload. See infra notes 96-99 and accompanying text.

4 See infra notes 80-95 and accompanying text. For a description of the pre-FHAA enforcement system of Title VIII, see Robert G. Schwemm, Private Enforcement and the Fair Housing Act, 6 YALE L. & POL’Y REV. 375 (1988).

5 “Triangular” professional relationships in governmental practice are not unprecedented. See infra note 215 and accompanying text.

6 For a discussion of these issues, see infra Part III.A. Lawyers are required to be loyal to their clients by avoiding conflicts of interest. The American Bar Association’s ("ABA") 1983 Model Rules of Professional Conduct ("Model Rules"), for example, regulate legal representation in the face of conflicts arising from the interests of other present clients, see Model Rules of Professional Conduct Rule 1.7(a) (1996), and former clients, see id. Rule 1.9, the lawyer’s own interests, see id. Rule 1.7(b), and the interests of third persons, see id. Rules 1.7(b), 1.8(f), among others. The ABA’s prior Model Code of Professional Responsibility ("Model Code") provided similar regulation of conflicts of interest. See, e.g., Model Code of Professional Responsibility DR 5-101 (1980) (lawyer’s own interests); id. DR 5-105 (interests of another client); id. DR 5-107 (interest of third persons). Similarly, both codes of legal ethics require lawyers to act with zeal in representing their clients. See id. DR 7-101 (compelling zeal in representation); Model Rules of Professional Conduct Rules 1.1, 1.3 (demanding that lawyers provide competent and diligent representation).
FHAA did not address these issues. The result has been that well into the 1990s, after years of litigation experience under this legislation, a senior Justice Department official was still lamenting that FHAA cases put the DOJ in a situation that "raises a lot of difficult ethical issues." Without any legislative guidance, the resolution of these professional issues has necessarily been left to the lawyers and the agencies that employ them. Given certain practical realities facing these lawyers and their agencies, it is not surprising that the aggrieved persons in such litigation may receive substantially less legal "representation" than they might expect and perhaps than Congress intended. The FHAA, therefore, illustrates the need for more careful legislation by Congress when it chooses to enforce public policy by authorizing governmental litigation on behalf of private parties. Unless Congress provides better statutory guidance to the agencies and the government lawyers charged with pursuing such litigation, the effectiveness of this enforcement tool will necessarily be hampered by the agencies' limitations on the legal assistance provided to private complainants.

This Article explores the ethical issues created by the use of government lawyers to bring actions on behalf of aggrieved individuals under the FHAA. Part I describes the FHAA's enforcement system and the goals that Congress intended to achieve by substituting it for the prior scheme. Part II identifies a number of situations in which government lawyers responsible for prosecuting FHAA cases may find themselves in a conflict between their public and private "clients." Part III examines the treatment of such conflicts in analogous triangular professional relationships, offers thoughts about how government lawyers involved in FHAA litigation should act to minimize their ethical problems, and suggests changes to the law that would help to alleviate the problems.

I. Background: Enforcing Fair Housing

A. Title VIII's Inadequacies

The origins of the FHAA can be traced to the early 1970s when congressional hearings began to call attention to the inadequacies of Title VIII's enforcement scheme. Although Title VIII provided three methods of enforcement (suits by the Attorney General, administrative complaints to HUD, and court actions brought by private plaintiffs), severe limitations

---

7 See infra Part II.B.
9 See infra Part II.C.
12 See id. § 3610.
13 See id. § 3612. A fourth category of litigation generated by Title VIII—private suits against HUD and other federal agencies for violating their affirmative fair housing duties under
on the governmental actions left enforcement of the law largely to private complainants.\textsuperscript{14}

Title VIII authorized the Attorney General to sue only when a defendant engaged in a "pattern or practice" of discrimination or when a group of persons were discriminated against in a way that raised "an issue of general public importance."\textsuperscript{15} These phrases limited the Justice Department to prosecuting cases that had "a measurable public impact."\textsuperscript{16} In addition, several courts limited the Attorney General's authority in these cases to seeking equitable relief, which meant that the Justice Department could not obtain monetary damages and other individualized relief for the victims of discrimination.\textsuperscript{17} In an early Title VIII case, the Supreme Court described the role of the Attorney General in enforcing the statute as "minimal."\textsuperscript{18} Indeed, in the seven years that preceded enactment of the FHAA, the Justice Department brought an average of only ten fair housing cases per year.\textsuperscript{19}

The enforcement powers given to HUD by Title VIII were even more restricted. If HUD received a complaint from an aggrieved person in a state or locality with a fair housing law that was "substantially equivalent" to Title VIII, it was required to refer that complaint to the relevant state or local authorities for processing.\textsuperscript{20} For those cases that were not referred, HUD was given thirty days to investigate the complaint, after which it was authorized to attempt to resolve the dispute only by using "informal methods of conference, conciliation, and persuasion."\textsuperscript{21} If these methods failed, the statute authorized the complainant to bring a private lawsuit for injunctive relief

42 U.S.C. § 3608—was not explicitly authorized by the statute, but could be pursued under the Administrative Procedure Act ("APA"). See, e.g., NAACP v. HUD, 817 F.2d 149, 157 (1st Cir. 1987) (holding that the APA allows federal courts to review claims that the Secretary of HUD is not affirmatively furthering the purposes of Title VIII). See generally Schwegm, supra note 2, § 21.3 (summarizing cases that allowed review of 42 U.S.C. § 3608 actions under the APA). In addition, a separate section of the 1968 Fair Housing Act provided criminal sanctions for fair housing violations that were accompanied by "force or the threat of force." See 42 U.S.C. § 3631 (1982); see, e.g., United States v. Redwine, 715 F.2d 315, 321 (7th Cir. 1983) (upholding convictions under 42 U.S.C. § 3631 for racial intimidation).


\textsuperscript{15} 42 U.S.C. § 3613 (1982).

\textsuperscript{16} United States v. Hunter, 459 F.2d 205, 217 (4th Cir. 1972).


\textsuperscript{18} Trafficante, 409 U.S. at 211.

\textsuperscript{19} Schwegm, supra note 14, at 277.

\textsuperscript{20} 42 U.S.C. § 3610(c). Some 36 states and 79 localities qualified for such referrals by 1988. See Schwegm, supra note 2, app. at C-2.1 to -4.

\textsuperscript{21} 42 U.S.C. § 3610(a). The original version of the bill that became Title VIII included among HUD's powers the authority to issue "cease and desist" orders, but as a result of an amendment sponsored by Senator Dirksen, this authority was eliminated in favor of "informal methods of conference, conciliation, and persuasion." See Schwegm, supra note 2, § 24.2, at 24-3.
in federal court, an option that was already available without the prerequisite of an administrative complaint. These restrictions resulted in an agency procedure that provided no sanctions against recalcitrant defendants and no apparent advantages to complainants. In its first review of this procedure, the Supreme Court observed that “HUD has no power of enforcement.”

Title VIII also authorized persons aggrieved by discrimination to proceed directly to court without first filing a HUD complaint or otherwise pursuing administrative remedies. Aggrieved persons could bring these cases in state or federal court, and the authorized relief included equitable orders, actual damages, punitive damages of up to $1000, and attorney’s fees to prevailing plaintiffs who were financially unable to assume them. Despite these limitations on punitive damages and fee awards, the remedies available in a direct suit were clearly superior to those available in a HUD proceeding.

By the end of the 1970s, the flaws in the Title VIII enforcement scheme were apparent. In testimony delivered in 1979, the Assistant Attorney General for Civil Rights noted that:

[T]he principal impediment to realization of the purposes of the Fair Housing Act has been the lack of adequate enforcement authority. . . . Comparatively few suits have been brought by “aggrieved persons,” in large part because lawsuits may be time-consuming and expensive. Few victims of discrimination actually sue when HUD conciliation efforts fail, and conciliation frequently fails because the Secretary has no authority to institute actions to support positions taken in conciliation efforts.

---

22 See 42 U.S.C. § 3610(d). At least one court held that this provision did not authorize a damage award in suits growing out of HUD complaints. See Brown v. Ballas, 331 F. Supp. 1033, 1036 (N.D. Tex. 1971).

23 See infra note 25 and accompanying text.


26 See 42 U.S.C. § 3612(a), (c).

27 See SCHWEMM, supra note 2, § 24.2, at 24-4. As then-Justice Rehnquist observed in 1979: “Given the advantages to the claimant of proceeding under [the direct lawsuit route of] § 812, it is hard to imagine why anyone would voluntarily proceed [to file a HUD complaint] under § 810 if both routes were equally available.” Gladstone, Realtors, 441 U.S. at 125 (Rehnquist, J., dissenting).

28 Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong. 4 (1979) (testimony of Drew S. Days III, Assistant Attorney General, Civil Rights Division, DOJ). At the same time, HUD Secretary Patricia Roberts Harris noted:

[The Fair Housing Act of 1968] identified the problems but supplied only the most pallid of solutions. It defined and prohibited discriminatory housing practices but failed to include the enforcement tools necessary to prevent such practices and provide relief to victims of discrimination.

It provided HUD no cease and desist authority.

It limited the enforcement authority of the Attorney General to pattern or practice suits and precluded civil actions on behalf of single individuals.

As an inadequate substitute for HUD or Justice Department enforcement au-
Nevertheless, thousands of persons aggrieved by discriminatory housing practices brought their complaints to HUD every year. In 1979, for example, over 2800 administrative complaints were filed, and this figure increased by sixty percent in the next eight years. These figures greatly exceeded the number of direct private lawsuits filed under Title VIII. Thus, despite its vast shortcomings, the simplicity and ease of the administrative complaint procedure apparently appealed to victims of housing discrimination far more than the process of retaining a lawyer and filing a lawsuit. The result was that the administrative process—the weakest of Title VIII’s three enforcement mechanisms—was the one most often used.

B. The Congressional Response

By 1978, bills giving HUD greater enforcement power were the subject of committee hearings in both the House and Senate. For the next ten years, Congress considered a variety of proposals to amend Title VIII, each of which featured a stronger HUD enforcement scheme. During this time, the need to make the administrative process more effective was underscored by the fact that racial discrimination in housing was shown to be continuing at alarming levels.

The Congress that enacted the FHAA felt that Title VIII was unable “to fulfill the promise made to the American people 20 years ago.” According to the House Judiciary Committee’s report on the FHAA:

Existing law has been ineffective because it lacks an effective enforcement mechanism. Private persons and fair housing organizations are burdened with primary enforcement responsibility. Although private enforcement has achieved some success, it is restricted by the limited financial resources of litigants and the bar, and by disincentives in the law itself. The Federal enforcement role is severely limited.

---

29 See Schwemm, supra note 14, at 291.
30 Some 400 private Title VIII lawsuits were reported in the twenty years after enactment of the 1968 Fair Housing Act, for an average of about 20 such suits per year. See Schwemm, supra note 4, at 381.
32 See Schwemm, supra note 2, § 5.3(2), nn.50, 52-55 (citing various bills introduced between 1980 and 1987).
The FHAA was intended to change this by creating "an administrative enforcement mechanism, so the federal government can and will take an active role in enforcing the law."\textsuperscript{36} The same themes were sounded in the Senate. Senator Kennedy, the bill's chief sponsor, stated that the existing law is "a toothless tiger. It recognizes a fundamental right; but it fails to provide a meaningful remedy."\textsuperscript{37} The FHAA, he said, would "put real teeth into the fair housing laws by giving HUD real enforcement authority."\textsuperscript{38} Senator Specter, the principal Republican sponsor, noted that many aggrieved parties could not finance the cost of litigation, so they "simply have no remedy to effectuate that right."\textsuperscript{39} He concluded that Title VIII provided "no effective remedy," but that the "expeditious enforcement proceeding" created by the FHAA would "realistically enshrine the right which was created two decades ago [by] finally bringing to bear an effective remedy."\textsuperscript{40}

The basic goal of the FHAA's new enforcement scheme, therefore, was to provide an effective administrative option for persons aggrieved by housing discrimination who could not or did not want to file their own private lawsuits. This option was intended to combine the more appealing elements of the prior administrative system—the ease, simplicity, and lack of expense involved in filing an administrative complaint—with the enforcement "teeth" of a private lawsuit in which an aggrieved person would be represented by counsel and could obtain damages and other appropriate relief.

C. Enforcement Under the FHAA

The FHAA's administrative procedure provides for the prompt determination of fair housing disputes and for serious sanctions and remedies when a violation is shown. The system is somewhat complicated. Complaints to HUD may be filed by any person who claims to have been aggrieved by a discriminatory housing practice.\textsuperscript{41} HUD is also authorized to file complaints on its own behalf.\textsuperscript{42} In addition, the FHAA incorporated Title VIII's use of state and local agencies: complaints that come from a state or locality with a

\begin{footnotes}
\item[36] \textit{Id.} at 17, reprinted in 1988 U.S.C.C.A.N. 2173, 2178. Congressman Edwards, the FHAA's principal sponsor in the House, noted that victims of housing discrimination are often poor and they cannot afford to be the plaintiff in Federal Court. Under the amendment [that eventually became the FHAA], the HUD Secretary is the plaintiff, and that is how it should be.

As in other civil rights laws, the Government does the enforcing. We do not force the individual to enforce the Federal law.


\item[37] 134 CONG. REC. 19,711 (1988). Senator Dole also remarked that the current law is "without its teeth," because it "relies on voluntary conciliation and persuasion." \textit{Id.} at 19,724.

\item[38] \textit{Id.} at 19,711 (statement of Sen. Kennedy). Senator Specter agreed, remarking that the bill's new administrative remedy "puts teeth in the existing laws." \textit{Id.} at 19,882.

\item[39] \textit{Id.} at 19,882.

\item[40] \textit{Id.} at 19,716 (statement of Sen. Specter).

\item[41] See 42 U.S.C. § 3610(a)(1)(A)(i) (1994). An "aggrieved person" is defined as any person who claims to have been injured by or is about to be injured by a discriminatory housing practice outlawed by the statute. \textit{See id.} § 3602(i).

\item[42] \textit{See id.} § 3610(a)(1)(A)(i).
\end{footnotes}
fair housing law that is "substantially equivalent" to the FHAA must be referred to the appropriate state or local agency for handling.43

Complaints that are not referred to state or local agencies remain the responsibility of HUD, which has 100 days to conduct an investigation and to determine whether "reasonable cause" exists to believe that a discriminatory housing practice occurred or is about to occur.44 Also during this one-hundred-day period, HUD must engage in conciliation efforts with the respondent and the complainant "to the extent feasible."45 In addition, if HUD determines that a particular case requires prompt judicial action, HUD may refer that case to the Justice Department, which is then required to file a lawsuit seeking appropriate temporary or preliminary relief.46 Furthermore, if the case involves a challenge to a local land-use law, it must be referred to the Justice Department for prosecution.47

If the case is not conciliated and if HUD determines that reasonable cause exists to believe that a discriminatory housing practice occurred or is about to occur, the FHAA directs HUD to "immediately issue a charge on behalf of the aggrieved person."48 At this stage, either the complainant or the respondent may elect to have the case decided in a federal district court.49 If either party makes an election, the Justice Department is required within thirty days of the election to "commence and maintain[] a civil action on behalf of the aggrieved person,"50 which may result in the same types of relief that are available in privately initiated lawsuits (equitable orders and actual and punitive damages to the person aggrieved by the discriminatory housing practice).51 In such a case, the statute authorizes any aggrieved person to

43 See id. § 3610(f). In order to qualify for such referrals, a state or local agency must be administering a fair housing law that is substantially equivalent to the FHAA in four respects: (1) the substantive rights covered; (2) the procedures followed; (3) the remedies available; and (4) the availability of judicial review. See id. §§ 3610(3)(A); SCHWEMM, supra note 2, § 24.5(2). By continuing Title VIII's practice of referring HUD complaints to states and localities with substantially equivalent fair housing laws, Congress "recognize[d] the valuable role state and local agencies play in the enforcement process." H.R. REP. No. 100-711, at 35 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2176.
44 42 U.S.C. § 3610(g)(l). HUD must complete its investigation within this 100-day time limit "unless it is impracticable to do so." Id. § 3610(a)(l)(B)(iv).
45 Id. § 3610(b)(l).
46 See id. § 3610(e)(l). Unlike the other litigation that may result from a HUD complaint pursuant to §§ 3610-3612, a "prompt judicial action" maintained by the Justice Department under § 3610(e)(l) is not explicitly brought "on behalf of" the aggrieved person. Cf. id. § 3610(g)(2)(A) (authorizing Secretary upon reasonable cause determination to issue a charge for further proceedings "on behalf of aggrieved person"); id. § 3610(o)(l) (authorizing Attorney General to bring a civil action "on behalf of aggrieved person").
47 See id. § 3610(g)(2)(C).
48 Id. § 3610(g)(2)(A).
49 See id. § 3612(a), (o). This election procedure was inserted late in the legislative process in order to protect the parties' constitutional right to trial by jury. See infra notes 170-173 and accompanying text.
51 See id. § 3612(o)(3). The relief in both elected and nonelected cases may include an award of attorney's fees and costs to the prevailing party, other than the United States. See id. § 3612(p).
intervene "as of right," although such intervention is not required for the aggrieved person to obtain relief.

If the case is not elected to court, it will be prosecuted by HUD lawyers and will be tried before a HUD-appointed administrative law judge ("ALJ") not later than 120 days after the charge was filed. The ALJ is required to decide the case within sixty days after the hearing and may award actual damages to the aggrieved person, civil penalties of up to $50,000 to the government, injunctive relief, and attorney's fees. These ALJ decisions are subject to review by the Secretary of HUD and ultimately by the courts of appeal. The statute also authorizes any aggrieved person to intervene as a party in the HUD proceeding, although such intervention is not required for that person to obtain relief.

The FHAA, like the original FHA, gives private complainants the option of by-passing this entire administrative procedure and going directly to court, where they may be awarded equitable relief, actual and punitive damages, and attorney's fees. Indeed, the FHAA makes this option more attractive and easier to use by extending the statute of limitations for private litigants from 180 days to two years and by eliminating the $1000 cap on punitive damages and the "financial inability" limitation on attorney's fees awards.

The FHAA also authorizes the Justice Department to intervene in private cases if the Attorney General certifies that the case is "of general public importance." Conversely, an aggrieved person may intervene in a "pattern
or practice” suit brought by the Justice Department and may obtain any relief in that suit that would be available in a private case. Even without such intervention, the Justice Department is authorized by the FHAA to seek monetary damages for aggrieved persons and civil penalties of up to $100,000 for the government in “pattern or practice” cases, in addition to the equitable relief that Title VIII has always authorized in such cases.

The ultimate effect of the FHAA was to considerably expand the government’s role in the enforcement of fair housing. Not only is the government now expected to pursue cases of public significance as it was under the prior law, but it is also directed to prosecute claims of housing discrimination on behalf of private individuals.

In establishing this enforcement scheme, Congress provided two primary settings in which federal government lawyers must pursue the interests of private complainants alleging harm from housing discrimination: (1) HUD lawyers must prosecute private complaints in proceedings before administrative law judges within that agency; and (2) Justice Department lawyers must take over these cases when they are “elected” to court. Through the FHAA, Congress placed much of the burden of private fair housing enforcement squarely on the shoulders of these federal government lawyers. At the same time, however, Congress created some troubling professional issues for these lawyers.

These issues arise because of the “triangular” professional relationship presented by HUD-charged cases. The three vertices of that triangle consist of the government lawyer providing the representation, the lawyer’s usual governmental client, and the private complainant on whose behalf the case

65 A “pattern or practice” case requires the government to prove that the defendant discriminated on a regular basis as opposed to in an “isolated or accidental or peculiar” way. United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) (internal quotation marks and citations omitted); see Schwemm, supra note 2, § 26.2(2).


67 See id. § 3614(d)(1); cf. id. § 3613 (1982). The top civil penalty is $50,000 for respondents who have not committed a prior violation; the $100,000 penalty is available for subsequent violations. See id. § 3614(d)(1)(C) (1994).

68 See supra note 46 and accompanying text (discussing the Justice Department’s role in “prompt judicial actions” that grow out of HUD administrative complaints). In addition, in “pattern or practice” cases, Justice Department lawyers are authorized to seek monetary relief on behalf of aggrieved persons. See supra note 67 and accompanying text. These cases may also raise some of the same types of professionalism issues for DOJ lawyers that occur in HUD-charged cases, but because “pattern or practice” cases are not brought “on behalf of” aggrieved persons, see supra note 46, and because they are relatively few in number, see infra note 93, they are not the focus of this Article.

69 Lawyers representing state and local fair housing agencies have similar responsibilities under the FHAA because complaints filed with HUD must be referred to state and local agencies that have laws “substantially equivalent” to the FHAA. See supra note 43 and accompanying text. In order to be certified as “substantially equivalent” to the FHAA, a state or local law would need to provide governmental legal representation to private individuals aggrieved by housing discrimination. See supra note 43. Although this Article focuses primarily on the professional issues confronted by HUD and DOJ lawyers in pursuing the claims of aggrieved individuals under the FHAA, government lawyers providing similar services under state and local laws face the same issues.

70 The identification of the actual “client” of a government lawyer is itself a rather troub-
is brought. These professional relationships necessarily generate pressures on the lawyers' loyalty, zeal, and control of litigation. These are the pressures that have caused the government lawyers acting under the FHAA to feel uncertain about their role.\textsuperscript{71}

The FHAA's system of having the government maintain actions "on behalf of" private complainants is not unprecedented, although it does feature certain unique elements. A number of other federal statutes, including some dealing with civil rights enforcement, authorize government suits based on complaints from private individuals.\textsuperscript{72} On rare occasions, these statutes, like the FHAA, specifically provide that the suits are to be brought "on behalf of" these private persons.\textsuperscript{73} In the employment discrimination field—the area most often analogized to fair housing—\textsuperscript{74} the Equal Employment Opportunity Commission ("EEOC") is authorized to bring cases prompted by private complaints under Title VII of the Civil Rights Act ("Title VII").\textsuperscript{75} In contrast to the government's role under the FHAA, however, the EEOC has discretion over whether to file such suits, and these suits are not specified as being brought "on behalf of" the complaining individuals.\textsuperscript{76}

The FHAA, therefore, is unique among federal statutes in mandating that a complainant's suit be brought by the government automatically upon a finding of reasonable cause\textsuperscript{77} and in authorizing government suits for sub-

\begin{footnotesize}
\item[71] See supra text accompanying note 8; infra notes 101-105 and accompanying text.
\item[72] For examples of such federal civil rights statutes, see 20 U.S.C. § 1706 (1994) (authorizing the Attorney General to file suit on behalf of individuals who are denied equal educational opportunities); 42 U.S.C. § 2000b(a) (1994) (authorizing the Attorney General to file suit to desegregate public facilities if the complainant is unable to maintain a private suit); \textit{id.} § 2000c-6 (authorizing the Attorney General to file suit to desegregate schools when the complainant is unable to maintain a private suit); \textit{id.} § 2000e-5(f)(1) (authorizing the Equal Employment Opportunity Commission or the Attorney General to file suit based on a charge of unlawful employment practice brought by a private individual).

For examples of federal statutes outside of the civil rights arena, see 29 U.S.C. § 2617(b)(2) (1994) (authorizing the Secretary of Labor to bring suit on behalf of employees to recover damages resulting from employer violations of the Family and Medical Leave Act); \textit{id.} § 482(b) (authorizing the Secretary of Labor to bring suit to set aside invalid election upon a finding of probable cause after the investigation of a union member's complaint); \textit{id.} § 660(c)(2) (authorizing the Secretary of Labor to file suit when the investigation of an employee's complaint shows that the employer has discharged or discriminated against the employee for exercising rights under the Occupational Safety and Health Act, with available relief to include restraining orders and "all appropriate relief including rehiring or reinstatement . . . with back pay").

\item[73] See, e.g., 20 U.S.C. § 1706 (authorizing civil suits for individuals denied equal educational opportunities and providing that the Attorney General "for or in the name of the United States, may also institute such a civil action on behalf of such an individual").

The similar goals and substantive language of the federal employment discrimination and fair housing laws have led courts to rely regularly on precedents from employment discrimination law in interpreting the FHA. See Schwemm, supra note 2, § 7.2(3), at 7-5 to 7-7.


\item[75] See \textit{id.; see also General Tel. Co. v. EEOC}, 446 U.S. 318, 326 & n.8 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

\item[76] See supra notes 48, 50-51 and accompanying text.
\end{footnotesize}
stantial money damages "on behalf of" private individuals. In short, the FHAA pushed the concept of governmental enforcement of private rights to a new level.

D. Experience with the FHAA

The FHAA has had a significant impact on the enforcement of fair housing law. The new system has generated a much higher number of fair housing complaints than occurred under Title VIII. This higher complaint load has produced a substantial number of HUD-charged cases, in which government lawyers face the dilemma of having to act on behalf of the complainant while still pursuing the interests of their agency-employer.

In the 1980s, before the FHAA became effective, the number of Title VIII complaints received by HUD was generally in the range of 4000 to 5000 per year. This number rose dramatically after enactment of the FHAA. In 1989, a then record number of 7174 administrative complaints was filed under the FHA, an increase of sixty-two percent over the 1988 figure. In 1990, this figure rose to 7675, and in 1991 it jumped to 9320. Thereafter,

---

78 See supra notes 48, 50-51, 56 and accompanying text. By way of contrast, the Title VII suits that the EEOC is authorized to bring may seek only monetary awards for back pay and other equitable remedies. See 42 U.S.C. § 2000e-5(f)(1), (g)(1).

79 In a few situations (generally involving criminal defense work), Congress provides that attorneys employed by the government are to represent private individuals. See, e.g., 10 U.S.C. § 827 (requiring judge advocates of the Army, Navy, Air Force, and Marine Corps and law specialists of the Coast Guard to be detailed to serve as defense counsel); 18 U.S.C. § 3006A(g)(2)(A) (authorizing attorneys employed by the Federal Public Defender Organization to represent criminal defendants).

80 See infra notes 81-95 and accompanying text. Some, but not all, of this increase in complaint levels is due to the fact that the FHAA added two new categories—familial status and handicap—to Title VIII's list of prohibited bases of discrimination. See supra note 2. For example, in 1990 (the first full year of FHAA enforcement), 2056 complaints to HUD alleged familial status discrimination, and 1088 complaints alleged handicap discrimination. The total number of complaints in the other five categories was 6957, an increase of about 57% over the figure for 1988 (the last full year before the FHAA became effective). See Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., The State of Fair Housing 1990: Report to the Congress Pursuant to Section 808(e)(2) of the Fair Housing Act 5-6 (1991) [hereinafter 1990 HUD Report].


The complaint levels described here and throughout this textual paragraph refer to the total number of complaints filed with HUD under the FHA, which includes complaints referred to state and local fair housing agencies as well as those retained by HUD. For a break-down of these total complaint figures into categories of complaints that were referred to state and local agencies and those that were retained by HUD, see infra notes 82-87 and accompanying text.

82 See 1989 HUD Report, supra note 81, at 13. About 95% of these complaints were filed after the FHAA became effective on March 12, 1989. See id. Of the 7174 complaints filed in 1989, 3952 fell within HUD's jurisdiction, and 3222 fell within the jurisdiction of state and local agencies. See id. The comparable figures for 1988 were 1255 complaints falling within HUD's jurisdiction and 3167 within the jurisdiction of state and local agencies. See id.

83 See 1990 HUD Report, supra note 80, at 6. Of the 7675 complaints filed in 1990, 4457 fell within HUD's jurisdiction, and 3218 fell within the jurisdiction of state and local agencies.
the numbers leveled off somewhat to 9461 complaints filed in 1992,\textsuperscript{85} 10,184 in 1993,\textsuperscript{86} and 9670 in 1994,\textsuperscript{87} the last year for which official statistics are available.

This growth in the HUD complaint load was eventually reflected in a substantial number of "reasonable cause" determinations\textsuperscript{88} and charges on behalf of aggrieved persons. By the end of 1994, HUD issued cause determinations in a total of 947 cases, with the yearly figures—19 in 1989; 81 in 1990; 157 in 1991; 154 in 1992; 211 in 1993; and 325 in 1994—showing a clear pattern of growth.\textsuperscript{89} Although these cause determinations represent only a small percentage of the overall HUD complaint load,\textsuperscript{90} their overall numbers have
eventually come to be quite substantial and to constitute a huge caseload for government lawyers.\textsuperscript{91}

Well over half of these HUD-charged cases have been “elected” to court,\textsuperscript{92} thus making their prosecution the responsibility of Justice Department lawyers.\textsuperscript{93} By the end of 1994, elections occurred in a total of 608 cases, with yearly figures as follows: 4 in 1989; 62 in 1990; 97 in 1991; 93 in 1992; 132 in 1993; and 220 in 1994.\textsuperscript{94} Thus, over sixty percent of the cases in which HUD issued a charge were elected, and this rate has remained fairly constant throughout the history of the FHAA.\textsuperscript{95}

State and local fair housing agencies have come to play an increasingly important role in handling FHAA complaints. The statute requires that HUD complaints be referred to such agencies if they have a fair housing law that is “substantially equivalent” to the FHAA.\textsuperscript{96} In the six-year period from

Unlike zoning and land-use cases, however, a prompt judicial action referral does not remove the case from HUD’s jurisdiction; instead, the administrative process and the prompt judicial action proceed simultaneously. See supra note 46 and accompanying text; see, e.g., HUD v. Blackwell, 908 F.2d 864, 867 (11th Cir. 1990). Through December 6, 1993, HUD had referred a total of 35 prompt judicial action cases to Justice, the majority of which were settled by consent order or conciliation prior to a hearing. See \textit{Commission Report}, supra, at 208-09.


92 See supra note 49 and accompanying text.

93 See supra notes 49-51 and accompanying text. Once a case has been elected, the FHAA requires the Justice Department to file suit on behalf of the aggrieved person in federal court within 30 days of the election. See 42 U.S.C. § 3612(o). Virtually all elected cases have resulted in a lawsuit or a presuit settlement at this stage. On rare occasions, however, Justice has determined that newly discovered information or other circumstances would make a suit inappropriate, and it has returned these cases to HUD for further consideration. See \textit{Commission Report}, supra note 90, at 185-88, 213-14. As of December 6, 1993, the Justice Department had filed a total of 293 election cases. See \textit{id}. at 212. The number of election lawsuits has far exceeded the number of “pattern or practice” and other DOJ litigation under the FHAA. See, e.g., 1993 HUD \textit{Report}, supra note 83, at 30 (reporting that DOJ’s civil enforcement activity under the FHAA in 1993 included filing 91 election cases, 20 “pattern or practice” cases, 1 zoning case, and 8 prompt judicial action cases, and that the comparable figures for 1992 were 58, 16, 5, and 4, respectively).


95 See \textit{Commission Report}, supra note 90, at 211 (reporting that as of October 1993, HUD had issued charges in 619 cases, of which 369 (60%) were elected). Most elections have been made by respondents, although complainants have also elected in a number of cases; on occasion, both parties have filed an election. See \textit{id}. (reporting that of the 369 cases elected as of October 1993, elections were made by respondents in 268 of these cases, complainants in 77 cases, and both in 24 cases). The rate of election has not been significantly different for the various types of discrimination. See \textit{id}. at 56. The election rate has remained at about 60% through 1996. Interview with Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Dep’t of Justice, Washington, D.C. (Oct. 4, 1996).

96 See supra note 43 and accompanying text.
1989 through 1994, HUD referred approximately 22,000 fair housing complaints to state and local agencies, a figure that represented about forty percent of HUD's overall complaint load.\(^\text{97}\)

During this six-year period, a sufficient number of states and localities adopted fair housing laws that were substantially equivalent to the FHAA so that by 1994, almost half of the HUD complaint load was referred to agencies in those jurisdictions.\(^\text{98}\) By 1996, California (the largest HUD-complaint state) had been added to the substantially equivalent list, which included some thirty states and forty-four localities that now handle well over half of all FHAA complaints filed with HUD.\(^\text{99}\)

Assuming that this complaint load yields anywhere near the same degree of cause determinations as occurs in HUD-retained cases,\(^\text{100}\) the result will likely be that hundreds of FHAA charges will now be filed every year by state and local agencies. Accordingly, lawyers working for these agencies, along with the lawyers who prosecute the cases that are "elected" to court out of these agencies, will regularly have to face the same sorts of professional issues that HUD and DOJ lawyers face under the FHAA.

One other noteworthy development occurred during the early years of the FHAA: both HUD and DOJ lawyers adopted the practice of sending a form letter to the aggrieved persons on whose behalf they were acting in

\(^{97}\) The yearly figures were as follows: 3222 referrals to state and local agencies out of a total HUD complaint load of 7174 in 1989; 3218 referrals out of a total of 7675 in 1990; 3663 referrals out of a total of 9320 in 1991; 3109 out of a total of 9461 in 1992; 4053 referrals out of a total of 10,184 in 1993; and 4786 out of a total of 9670 in 1994. See supra notes 82-87. Adding these yearly figures together produces a combined six-year total of 22,051 referrals out of a total HUD complaint load of 53,484 for a referral rate of 41.2%. It should be noted that the addition of these yearly figures does not produce a precisely accurate set of total six-year figures because this process involves adding together figures for years that were sometimes reported on a calendar year basis and sometimes on a fiscal year basis. See supra note 83. Nevertheless, the general order of magnitude of the six-year totals and the basic points made here—that thousands of referrals occurred during this period and that these referrals made up a major portion of HUD's complaint load—are not significantly affected by this change in HUD's data reporting system.

\(^{98}\) See 1994 HUD Report, supra note 87, at 16 (reporting that state and local agencies received 4786 (49.5%) of the total of 9670 HUD complaints in 1994). None of these states or localities had laws equivalent to the FHAA when it first became effective, but a significant number of referrals were still made at that time based on an FHAA provision authorizing up to a 48-month "grace period" during which previously certified states and localities were allowed to continue to receive referrals. See 42 U.S.C. § 3610(f)(4); SCHWEMM, supra note 2, § 24.5(3). Indeed, during this 48-month period, about 40% of the HUD complaint load was referred to these previously certified state and local agencies. See figures cited for the years 1989, 1990, 1991, and 1992 supra notes 82-85. By the time the 48-month grace period expired in 1992, a sufficient number of states and localities had enacted laws substantially equivalent to the FHAA that referrals accounted for over 30% of the HUD complaint load in 1992 and almost 40% in 1993. See figures cited for the years 1992 and 1993 supra notes 85, 86.

\(^{99}\) See SCHWEMM, supra note 2, § 24.5(2). For a list of these states and localities, see id. at app. C.

\(^{100}\) Some evidence exists that a somewhat smaller percentage of cases result in cause determinations by state and local agencies than for HUD-processed complaints. In 1994, for example, HUD found cause in 21% of all cases in which a cause or no cause determination was made, whereas this rate for state and local referral agencies was 15%. See 1994 HUD Report, supra note 87, at 17. Even with this lower rate, however, these agencies found cause in 161 of the referred cases in 1994. See id.
order to clarify the nature of the professional relationship early on. The HUD letter, sent soon after a charge is filed, explains the administrative process, states that HUD will “represent” the complainant in this process, notes the possibility that the complainant’s interests may ultimately diverge from the government’s, and points out the right of the complainant to hire his or her own attorney and to intervene in the case.101

The Justice Department form letter is sent to the aggrieved person soon after an election occurs and before suit is filed. This letter explains that the United States will bring suit on behalf of this person without cost; notes that “we are available to assist you and act on your behalf” at all stages of the case and that “we will consult carefully with you” in determining the appropriate amount of monetary relief to seek; and points out that, although the interests of the complainant and the United States are expected to be the same, “the possibility does exist that at some point our respective interests may differ” and that the complainant has the right to retain his or her own attorney and to intervene in the case.102

Eventually, the Justice Department lawyers responsible for FHAA election cases became so concerned with their proper relationship to aggrieved persons in these cases that they asked for a formal opinion on this matter from the DOJ’s Office of Legal Counsel (“OLC”). This opinion, issued in January 1995, concluded that “the Department attorney does not enter into an attorney-client relationship with the complainant” in an election case,103 but that “in view of the potential confusion on behalf of complainants regarding the nature of the relationship, it would seem prudent to advise them that the government attorney is not their attorney.”104 The OLC’s opinion concluded that the form letters currently being sent to aggrieved persons by Justice and HUD were sufficient to achieve this purpose, because they made clear “that the possibility exists that the government’s interests may diverge from the complainant’s, and that the complainant is entitled to retain his or her own attorney.”105

To summarize, the FHAA has generated a considerable quantity of cases in which government lawyers at HUD, the Justice Department, and state and local agencies have been called upon to act on behalf of private complainants. In this respect, the FHAA has accomplished one of Con-

101 A copy of this letter [hereinafter HUD Letter] is on file with the authors. See also supra note 91; infra note 105 (discussing the meaning of the word “represent” in this letter).
102 A copy of this letter [hereinafter DOJ Letter] is on file with the authors.
103 Office of Legal Counsel, U.S. Dep’t of Justice, Memorandum from Assistant Attorney General Walter Dellinger to Assistant Attorney General Deval L. Patrick regarding “The Relationship Between Department Attorneys and Persons on Whose Behalf the United States Initiates Cases Under the Fair Housing Act” 2 [hereinafter DOJ Opinion] (Jan. 20, 1995) (copy on file with the authors). This opinion also concluded that DOJ attorneys do not have any fiduciary duties or other litigation-related obligations to complainants in election cases. See id. at 5-6. The opinion did note, however, that communications between DOJ lawyers and complainants could be protected from disclosure under the “common interest/joint defense” privilege. See id. at 6-7.
104 Id. at 6.
105 Id. The OLC opinion did note, however, that the use of the word “represent” in HUD’s letter, see supra text accompanying note 101, “may create confusion by overstating the nature of the relationship.” DOJ Opinion, supra note 103, at 6.
gress's principal goals in amending Title VIII's enforcement scheme. The system created by the FHAA, however, also created the potential for some major problems for these government lawyers, including divided loyalties and other ethical issues, which have become quite real in a number of FHAA cases. The next section will demonstrate the substance of these problems that, in some cases, have led to a less than satisfactory form of representation for the aggrieved persons on whose behalf the legislation was enacted.

II. "Triangular" Professional Relationships and the FHAA

As noted above, when Congress assigned to HUD and DOJ lawyers the task of bringing actions on behalf of private complainants, it created triangular professional relationships in FHAA cases. Such relationships are not unusual in either the private or governmental practice of law, but they are always professionally problematic. In fact, the various bodies of legal ethics rules devote considerable effort to the problems created by such relationships. Triangular professional relationships spawn issues of loyalty, zeal, and control over litigation for the lawyers engaged in them, and the situations created for HUD and DOJ lawyers under the FHAA proved to be no different.

A. Some Illustrative Cases

Actual experience under the FHAA has shown that the professional problems are quite real. Four HUD-charged cases under the FHAA provide a sample of the professional issues facing government lawyers litigating on behalf of private parties who allege housing discrimination.

I. United States v. Presidio Investments, Ltd.

In United States v. Presidio Investments, Ltd., a tenant filed a Title VIII complaint with HUD alleging sexual harassment by the manager of her apartment complex. The alleged harassment occurred in 1987, before the FHAA was passed. By the time HUD completed its investigation, however, the FHAA was in effect, and HUD processed the case under that law's

---

106 See supra notes 68-71 and accompanying text.
107 See infra Part III.A.
108 For example, Model Rule 1.7(a) and DR 5-105 regulate the triangular situation presented by a lawyer simultaneously representing two clients with adverse interests. See Model Code of Professional Responsibility DR 5-105 (1980); Model Rules of Professional Conduct Rule 1.7(a) (1996). Similarly, Model Rule 1.8(g) and DR 5-106 control settlements on behalf of multiple clients in the same setting. See Model Code of Professional Responsibility DR 5-105; Model Rules of Professional Conduct Rule 1.8(g). Model Rule 1.8(f) and DR 5-107(A) pertain to the triangular scenario of a lawyer being paid by one other than the client. See Model Code of Professional Responsibility DR 5-107(A); Model Rules of Professional Conduct Rule 1.8(f). Model Rule 1.13(d) expressly governs the troublesome triangular relationship of a lawyer representing an organizational client while dealing with the various third-party constituents of the organization, such as directors, officers, and shareholders. See Model Rules of Professional Conduct Rule 1.13(d).
109 4 F.3d 805 (9th Cir. 1993).
110 See id. at 806.
111 See id. at 807.
new administrative procedures. The George Washington Law Review

HUD determined that reasonable cause existed to believe that illegal sex discrimination occurred, and it issued a charge against the apartment complex and its manager.

The manager elected to have the case tried in federal court, and the Justice Department filed suit on behalf of the complainant. Believing that the FHAA should not be applied retroactively, however, the district court granted the defendants' motion for summary judgment and dismissed the case.

It was at this point that problems arose between the private complainant and her government lawyers. The complainant wanted to challenge the district court's adverse ruling on the retroactive application of the FHAA, but the Justice Department was hesitant. By pro se motion, the complainant sought to intervene at the district court level, but her motion was denied. The Justice Department then filed a notice of appeal on the complainant’s behalf, but subsequently “reversed its field and sought to withdraw its notice of appeal,” prompting the complainant to file another pro se intervention motion with the district court and, two days later, with the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”). The Ninth Circuit eventually granted the complainant’s motion to intervene, substituted her for the United States in the appeal, and held that the district court incorrectly denied retroactive application of the FHAA.

The Justice Department may have had legitimate reasons, as counsel for the United States, to support the positions it took in Presidio. One cannot read the case, however, without sensing that the complainant was abandoned by her government lawyers and that she was not served with the loyalty and the zeal that she likely expected to receive from lawyers who brought an action on her behalf.

---

112 That is, HUD decided that the FHAA’s new procedures should be applied retroactively to Title VIII cases that were pending when the FHAA took effect. See id. at 809 (citing 24 C.F.R. ch. 1, subch. A, app. I, subpt. A, § 103.1 (1990); Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3259 (1989)).
113 See id. at 807.
114 See id.
115 See id. at 806.
116 See id. at 807.
117 See id.
118 See id.
119 See id. at 808, 810; see also United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416 (9th Cir. 1994) (permitting the plaintiff to intervene and substitute for the United States on appeal and citing Presidio).
120 At the time, there was an “apparent tension” based on “seemingly contradictory statements” in the Supreme Court’s recent opinions dealing with the retroactive application of newly amended statutes. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1496 (1994). This tension was not resolved until 1994, when the Court in Landgraf adopted a general presumption against retroactivity and applied this presumption to deny retroactive application of certain remedial amendments to the federal employment discrimination law. See id. at 1508. This ruling, in retrospect, makes the DOJ’s position in Presidio seem more than justified.
2. Baumgardner v. HUD

A similar scenario arose in another FHAA appeal, *Baumgardner v. HUD*. In this case, a male complainant named Holley alleged that Baumgardner had a house for rent that he denied to Holley and his male friends because of their gender. HUD found reasonable cause and issued a charge. When neither party filed an election, HUD lawyers represented Holley in the subsequent administrative proceeding. This proceeding culminated in a HUD ALJ decision that awarded the complainant a total of $5000 in actual damages, of which $2500 was for loss of civil rights, and that also assessed a $4000 civil penalty and injunctive relief against Baumgardner.

Baumgardner filed an appeal, and the Justice Department undertook to "defend" the ALJ's decision in the court of appeals, arguing that it should be upheld in all particulars except one. The exception was the $2500 "civil rights" element of Holley's damage award, which Justice felt could not be justified because of an adverse Supreme Court precedent on such damages in another civil rights field. The point was an arguable one, and Holley was forced to obtain his own lawyer to defend the ALJ's decision.

Ultimately, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") agreed with the Justice Department and set aside the ALJ's award for loss of civil rights. It is possible, however, that this award might have received more sympathetic treatment from the court of appeals if the Justice Department had vigorously defended Holley's position. Furthermore, even though HUD lawyers prosecuted the case before the ALJ, and then different DOJ lawyers handled the appeal, Baumgardner again raises

---

121 960 F.2d 572 (6th Cir. 1992).
122 See id. at 574-75.
123 See id. at 575.
124 See id. at 575, 581. These actual damages also included $2000 for inconvenience and other economic losses and $500 for emotional distress. See id. at 580-81.
125 See id. at 575.
126 See COMMISSION REPORT, supra note 90, at 181-83. Pursuant to Part VI, para. 2 of the "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988" entered into on December 7, 1990, the Justice Department is responsible for all appellate court litigation arising from HUD proceedings. See id. at 180-81. A copy of this Memorandum is on file with the authors.
127 See Baumgardner, 960 F.2d at 581-82 (discussing Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986)); COMMISSION REPORT, supra note 90, at 182 (same). Justice argued, unsuccessfully, that the $2500 award should be upheld as "compensation for actual injury, not for the abstract value of civil rights." Baumgardner, 960 F.2d at 581.
128 See Baumgardner, 960 F.2d at 585-87 (Jones, J., concurring); COMMISSION REPORT, supra note 90, at 182-83; SCHWEMM, supra note 2, § 25.3(2)(b).
129 See Baumgardner, 960 F.2d at 574.
130 See id. at 583. The Sixth Circuit also reduced the award for economic losses and inconvenience from $2000 to $1000, upheld the $500 emotional distress award, reduced the civil penalty from $4000 to $1500, and adjusted the injunctive relief. See id. at 580-81, 583-84. Although it was critical of HUD's precharge handling of the case, the Sixth Circuit felt that the HUD mistakes were not so prejudicial to Baumgardner to require reversal of the ALJ's decision on liability, which the court of appeals upheld. See id. at 575-79.
questions about the overall duty of loyalty of government lawyers to FHAA complainants.

3. Soules v. HUD

Perhaps the most dramatic example of government lawyers switching sides in an FHAA case is *Soules v. HUD*,\(^\text{131}\) which was a nonelected case in which the complainants were initially represented by HUD attorneys. The complainants alleged that a rental agent named Downs refused to rent an apartment on familial status grounds.\(^\text{132}\) The principal complainant was a woman named Sherry Soules, who sought to rent the unit for herself, her mother, and her minor daughter.\(^\text{133}\) At their initial meeting, Downs asked Soules how old her daughter was and noted that she could not rent the unit to noisy tenants because an elderly person lived downstairs.\(^\text{134}\) There was other evidence suggesting familial status discrimination, but the ALJ ruled in favor of Downs, concluding that her treatment of and statements to Soules and other prospects with children could be explained by nondiscriminatory reasons.\(^\text{135}\)

At this point, Soules wanted to appeal, but her HUD lawyers felt they could not challenge an FHAA administrative decision beyond the confines of the Department.\(^\text{136}\) Soules, therefore, obtained her own attorney, who prosecuted an appeal to the United States Court of Appeals for the Second Circuit ("Second Circuit").\(^\text{137}\) In this appeal, the adverse ALJ decision was defended not only by Downs's attorney, but by the Justice Department as well.\(^\text{138}\) Thus, within the same FHAA matter, Sherry Soules was represented by government lawyers from HUD, abandoned by those same lawyers, and directly opposed in her appeal by other government lawyers from the DOJ.

The Second Circuit upheld the ALJ's decision against Soules, but a fair reading of its opinion indicates that the court had difficulty resolving the legality of the oral statements made by Downs.\(^\text{139}\) The court of appeals noted that a rental agent's oral statements and questions are more difficult to evaluate than written statements and advertisements,\(^\text{140}\) and questions about familial status might be allowed although questions about other prohibited types

\(^{131}\) 967 F.2d 817 (2d Cir. 1992).
\(^{132}\) See id. at 821.
\(^{133}\) See id. at 819.
\(^{134}\) See id. at 820.
\(^{136}\) See COMMISSION REPORT, supra note 90, at 180. "As HUD's lawyer, OGC may not appeal to Federal court any adverse administrative decisions that become the final order of the agency." Id. (footnote omitted).
\(^{137}\) Compare Downs, Fair Housing-Fair Lending (P-H) ¶ 25,011 (indicating HUD attorneys on behalf of Soules), with Soules, 967 F.2d at 819 (indicating separate private counsel for Soules).
\(^{138}\) See Soules, 967 F.2d at 819; supra note 126 (regarding DOJ's responsibility for representing HUD in appellate cases arising from HUD proceedings).
\(^{139}\) See Soules, 967 F.2d at 824-26.
\(^{140}\) See id. at 824-25 (contrasting the review accorded written advertisements, which can be viewed by the court, with oral statements taken out of context, which preclude review).
of discrimination would not.\footnote{141} Indeed, the opinion actually quoted the Justice Department’s brief on this latter point, noting that “whereas ‘[t]here is simply no legitimate reason for considering an applicant’s race . . . there are situations in which it is legitimate to inquire about the number of individuals interested in occupying an apartment and their ages.’”\footnote{142} Thus, Soules ultimately lost her appeal and must have had serious doubts about the “representation” she received from government lawyers.\footnote{143}

4. United States v. Country Club Garden Owners Ass’n

A fourth illustrative case, \textit{United States v. Country Club Garden Owners Ass’n},\footnote{144} provides additional evidence that when conflicts arise, Justice Department lawyers view their real client in FHAA election cases as the government and not the complainant. The complainant in \textit{Country Club Garden} was a handicapped woman named Josephine Palasciano who suffered from osteoarthritis and other conditions that severely restricted her ability to walk.\footnote{145} Shortly after the FHAA became effective, she and her husband requested that the owners of the cooperative building where they lived assign them a parking space near their unit.\footnote{146} They also asked the owners to permit them to add a gate and steps to the terrace behind their unit to allow Mrs. Palasciano immediate access to the parking space.\footnote{147}

When the owners denied these requests, Mrs. Palasciano filed a HUD complaint in late 1989, which eventually led to a determination of reasonable cause and a charge some three years later.\footnote{148} The defendants then filed an election, and the Justice Department brought suit in October 1992, alleging that the defendants’ refusal to grant the Palascianos’ requests violated the “reasonable modifications” and “reasonable accommodations” provisions of

\footnote{141}{See id. at 824 (noting that questions regarding children are permissible if concerned, for example, with whether the neighborhood is suited for children; however, questions regarding race are never permitted).}

\footnote{142}{Id. at 824.}

\footnote{143}{It is interesting to speculate about what the case’s posture might have been if Soules had won her appeal. Presumably, the court of appeals would have remanded the case back to the ALJ for further proceedings, either to take a new look at the liability issue or, if the appellate court had decided liability, to determine the appropriate relief. \textit{See} 42 U.S.C. § 3612(k)(1)(B) (1994) (authorizing appeals court to “affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings”); \textit{see also} Kelly v. HUD, 3 F.3d 951, 957-58 (6th Cir. 1993) (remanding for conciliation or further ALJ proceedings). At this stage, one intriguing set of questions would arise as to whether the same HUD lawyers who had abandoned Soules and left her opposed by the Justice Department’s appellate lawyers would now be expected to take up her case again. If so, with what degree of enthusiasm would they or she have approached this new relationship? On the other hand, if HUD lawyers refused to represent her, would a complainant like Soules effectively be “penalized” for prosecuting a successful appeal by having to participate in the second ALJ proceeding without the help of government attorneys?

\footnote{144}{159 F.R.D. 400 (E.D.N.Y. 1995).}

\footnote{145}{See id. at 401.}

\footnote{146}{See id.}

\footnote{147}{See id.}

\footnote{148}{See id.}
the FHAA.\textsuperscript{149} The DOJ complaint sought declaratory and injunctive relief and compensatory and punitive damages but did not demand a jury trial.\textsuperscript{150} 

In mid-1993, the Palascianos decided to try to intervene in this case because of their concern that the Justice Department was not sufficiently aggressive in pursuing their claim for damages.\textsuperscript{151} They hired a private lawyer who waited until January 1994 to file a motion to intervene and then failed to comply with the local rules regarding service of this motion, which led to its denial.\textsuperscript{152} The Palascianos then retained a new lawyer, who properly filed the motion and attached a copy of their complaint, which was in all material respects identical to the Justice Department's complaint except that it demanded a jury trial.\textsuperscript{153} 

The defendants objected to the intervention motion on the ground that it occurred some two years after the filing of the initial complaint and therefore was not "timely" as required by Rule 24(a) of the Federal Rules of Civil Procedure.\textsuperscript{154} In a 1995 opinion, the district court granted the Palascianos' motion, noting that they had an unconditional right to intervene under the FHAA\textsuperscript{155} and that the defendants failed to show that they would be prejudiced by the delay in the Palascianos' intervention.\textsuperscript{156} The court also concluded that the Palascianos would be prejudiced if they were prohibited from participating as parties "because they would be precluded from effectively putting the issue of liability and punitive damages before a jury."\textsuperscript{157} 

The court based this latter conclusion on its belief that the Palascianos and the United States were pursuing "divergent interests" in this case.\textsuperscript{158} Indeed, the Justice Department's principal trial attorney supported this view by filing an affidavit stating that "the government did not demand a jury trial in this case because it is interested in obtaining a favorable ruling on issues of first impression that are raised in the complaint, and that such a ruling is

\textsuperscript{149} Id. at 402. The FHAA's "reasonable modifications" and "reasonable accommodations" provisions, respectively, make it unlawful (1) to refuse to permit, "at the expense of the handicapped person, reasonable modifications of existing premises occupied . . . by such person, if such modifications may be necessary to afford such person full enjoyment of the premises" and (2) to refuse "to make reasonable accommodations to rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." See 42 U.S.C. § 3604(f)(3)(A), (B) (1994).

\textsuperscript{150} See \textit{Country Club Garden}, 159 F.R.D. at 402.

\textsuperscript{151} See \textit{id.} at 403-04. Although the Palascianos claimed that they retained a private lawyer to help them intervene "upon being apprised of their right to intervene," there was in fact a gap of some eight months between the Justice Department's filing of a complaint on their behalf (and presumably informing them of their right to intervene, see \textsuperscript{supra} note 102 and accompanying text) and the Palascianos' retention of private counsel. See \textit{Country Club Garden}, 159 F.R.D. at 403. The reason for this delay was not explained in the case.

\textsuperscript{152} See \textit{Country Club Garden}, 159 F.R.D. at 402.

\textsuperscript{153} See \textit{id.}

\textsuperscript{154} See \textit{id.} at 403. Rule 24(a), which governs interventions of right in the federal district courts, provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Fed. R. Civ. P. 24(a).

\textsuperscript{155} See \textit{supra} note 52 and accompanying text.

\textsuperscript{156} See \textit{Country Club Garden}, 159 F.R.D. at 402, 404.

\textsuperscript{157} \textit{Id.} at 404.

\textsuperscript{158} See \textit{id.} at 403-04.
more likely to come from a district judge rather than a jury."159 In contrast, the Palascianos argued that presentation of their case to a jury was important to them, especially in terms of obtaining an award of punitive damages.160 Given the Justice Department's admission that its interests were not the same as those of the Palascianos, the district court concluded that the Palascianos had "a significant interest in being present during the trial of this case";161 it granted their motion to intervene and went on to uphold their jury trial demand as well.162

The Country Club Garden case presents a less dramatic example of "divergent interests" between the complainant and the government than occurred in Presidio, Baumgardner, and Soules, but it nevertheless reinforces the notion that HUD and DOJ lawyers see their client as the government, and that these lawyers may pursue a different set of priorities in the litigation than the complainant would want. Indeed, the ultimate resolution of this case showed that these potentially divergent interest were in fact quite real. Just a few months after the court allowed the Palascianos to intervene, the parties reached a settlement agreement. The defendants agreed not only to assign the Palascianos a special parking space and to provide for construction of steps from the Palascianos' unit to this space, but also to pay an additional $90,000 to Josephine Palasciano, an amount that currently stands as one of the largest financial settlement ever obtained in an FHAA election case.163 It seems highly unlikely that such monetary relief would have been obtained for the Palascianos if they relied exclusively on DOJ attorneys to represent them.

5. Summary of Cases

These four cases illustrate some of the complications that may confront government lawyers, their agencies, and the private claimants on whose behalf they litigate in HUD-charged cases under the FHAA. The cases demonstrate that the interests of the government and the private parties might diverge in FHAA litigation in a number of different ways, resulting in ethical issues for the government lawyers as to loyalty, zeal, and control over the litigation. The Country Club Garden case shows that the complainant's interest in maximizing the monetary portion of an award or settlement might conflict with the government's preference for creating favorable precedents or for structural injunctive relief aimed at insuring nondiscrimination in the future. The Presidio and Baumgardner cases demonstrate that the government may have views on certain important legal issues that differ from those favorable to the aggrieved person.164 Presidio and Soules show that the gov-

159 Id. at 403.
160 See id.
161 Id. at 404.
162 See id. at 404, 406.
164 See COMMISSION REPORT, supra note 90, at 186-87, 195-96 (discussing, respectively, DOJ's refusal to bring FHAA cases against other federal agencies and its history of occasional
The George Washington Law Review

The government may be more hesitant than a complainant to appeal an adverse decision.\textsuperscript{165}

Other conflicts may arise as well. For example, the government generally disfavors confidentiality provisions in settlement agreements, while aggrieved persons may prefer not to see a favorable monetary settlement lost over such an issue.\textsuperscript{166} The government may also find itself acting on behalf of a complainant whose monetary demands it finds excessive\textsuperscript{167} or who is unappealing in some other respect.\textsuperscript{168}

All of these complications arise from the triangular relationship that Congress created when it assigned government lawyers the task of bringing actions on behalf of private complainants under the FHAA. Such triangular relationships always create some uncertainty as to the identity of the client and the consideration to be given to the interests of the other party. In resolving these complications, it would be natural for HUD and DOJ lawyers to look for guidance from Congress as to how it intended the relationships to be structured.

B. Lack of Congressional Guidance

Congress has provided precious little guidance on how government lawyers in HUD-charged FHAA cases should behave within the triangular rela-

\textsuperscript{165} See also United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1415-16 (9th Cir. 1994) (stating that the complainant, pro se, requested an extension to file an appeal after the government did not appeal on her behalf).

\textsuperscript{166} Interview with Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Dept of Justice, Washington, D.C. (Sept. 15, 1995). In the analogous area of precharge conciliations, the FHAA provides that conciliation agreements "shall be made public unless the complainant and respondent otherwise agree and the Secretary [of HUD] determines that disclosure is not required to further the purposes of this subchapter." 42 U.S.C. § 3610(b)(4) (1994). HUD regulations provide that a conciliation agreement executed by the complainant and the respondent is subject to approval by HUD and that HUD will approve such an agreement only if it will "adequately vindicate the public interest." 24 C.F.R. § 103.310(b)(1) (1996). HUD's concern for vindicating the public interest in conciliation agreements, which commonly takes the form of seeking affirmative action and reporting requirements from the respondent in addition to whatever monetary relief is obtained for the complainant, also surfaces in settlement negotiations conducted by HUD and DOJ lawyers in charged cases.

\textsuperscript{167} See, e.g., Reply Brief for the United States Re Duty of Representation Under the Fair Housing Act at 8, United States v. Kingswood Village Property Owners Ass'n, Civil No. S-94-0927 DFL/JFM (E.D. Cal. June 6, 1996) (stating that, among other things, complainant's non-negotiable demand for $25,000 in monetary relief "made it increasingly difficult for the United States to reach a fair and equitable settlement").

\textsuperscript{168} See, e.g., United States v. Weiss, 847 F. Supp. 819, 821, 824 (D. Nev. 1994) (election case in which the Justice Department sought leave to file an amended "pattern or practice" complaint after depositions of the complainants revealed perjury, substance abuse, and a criminal record, making them "unsuitab[le] both as tenants and as plaintiffs"); see also United States v. Woodlake Realty Co., Fair Housing—Fair Lending (Aspen Law & Bus.) ¶ 16,044 (N.D. Ga. Jan. 3, 1996) (order denying complainants' request for extension of time and additional discovery in election case where Justice Department had agreed to equitable consent decree with defendants without resolving complainants' claims for monetary damages after complainants accused the DOJ attorneys who were prosecuting the case of "racial bias, moral turpitude, judicial corruption, personal dishonesty, conflict of interest and violation of an individual's constitutional rights").
tionship that includes their agencies and the persons aggrieved on whose behalf they are directed to act. The statute’s “on behalf of” language and its goal of helping private complainants enforce the FHAA by providing government lawyers to prosecute their claims give only minor and uncertain clues about what the government attorneys should do when a complainant’s interests diverge from those of the government. In addition, the FHAA’s legislative history is virtually devoid of any discussion of these matters, suggesting that Congress never even considered, much less tried to resolve, the difficulties of the triangular relationship created by the FHAA.

This lack of congressional guidance may stem from the fact that the precise nature of the FHAA’s scheme for using HUD and DOJ lawyers to act on behalf of private complainants was established late in the legislative process with little attention paid to its rationale. The original bills that were the subject of House and Senate hearings (H.R. 1158 and S. 558) and the amended version of the House bill that was reported by the House Judiciary Committee on June 17, 1988, provided for neither the election-to-court option nor any role for the Justice Department in the administrative process. Rather, the administrative cases were to be handled entirely within HUD and prosecuted only by HUD lawyers.

The election-to-court option resulted from an amendment offered early in the House floor debates by Congressman Fish, the ranking Republican member of the Judiciary Committee. The purpose of this amendment was to relieve the concerns of some House members that the Seventh Amendment right to jury trial would be compromised by a procedure that allowed ALJs to award damages for fair housing violations. The election-to-court option provided a way of allowing a party who desired a jury trial to have the case resolved in a federal court where a jury would be available.

Congressman Fish’s proposal, which was ultimately adopted by a 401-0 vote on June 23, 1988, generated little substantive discussion, apart from the members’ apparent relief at finding a mechanism that appeared to eliminate the Seventh Amendment issue. Adoption of the Fish amendment was the key compromise that led to overwhelming bipartisan support for H.R. 1158 in the House, which passed the amended bill three days later by a vote of 376-23.

Both the original bills and the House-passed version provided that HUD lawyers would prosecute all cases that began with a HUD complaint, regardless of whether the case remained within HUD or was elected to court. In the month or so before the Senate floor debates began on August 1, however, certain “modest modifications” to the House-passed bill were agreed to by Senators Kennedy, Specter, and Hatch. One of these modifications pro-

---

173 See id. at 16,511.
174 See id. at 19,711.
vided that the Justice Department, rather than HUD, would handle all court litigation resulting from administrative complaints (i.e., prompt judicial actions and elected cases). 175

A memorandum explaining these changes in the House-passed bill was sent to the full Senate by Senators Kennedy and Specter on August 1, 1988. 176 This memorandum, which provides the only legislative rationale for giving the responsibility for prompt judicial actions and elected cases to Justice, simply described this change as “consolidat[ing] in the Justice Department the authority to represent the federal government in each of the enforcement actions contemplated under the Act.” 177 Thus, the sole articulated reason for moving FHAA cases from HUD to Justice was to ensure that a single agency, the Justice Department, would handle all government court litigation—“pattern or practice” cases and cases arising from the administrative process.

This Senate “substitute” was endorsed by the Reagan Administration, with HUD Secretary Pierce describing the new role of the DOJ in administrative cases as “centraliz[ing] fair housing litigation at the Department of Justice.” 178 The Senate passed this version of the bill by a vote of 94-3 on August 2, after a few hours of floor debate and two more minor amendments. 179 On August 8, after a brief floor discussion, the House concurred in the Senate version 180 and on September 13, 1988, President Reagan signed this bill into law. 181

Thus, the legislative history reveals that both the election-to-court option and the shifting to Justice of the responsibility for all court cases arising out of the administrative process resulted from last-minute changes in the legislation. These changes were not accompanied by any guidance from Congress about the nature of the legal representation that the government would provide for private aggrieved parties; 182 nor did Congress provide insight into

175 See id. at 19,712.
176 See id. at 19,712-13.
177 Id. at 19,712.
178 See id. at 19,714.
179 See id. at 19,902.
180 See id. at 20,920. During this brief floor discussion, Congressman Edwards, the chief sponsor of the bill in the House, did express some concern over the Senate’s decision to have the Justice Department, rather than HUD, prosecute court cases arising from the administrative process. He noted that:

Transferring litigation authority to the Justice Department may create distinctions in Federal agency responsibilities between HUD and the Justice Department in fair housing cases. . . . This divide[d] responsibility for handling these often routine cases . . . may defeat consistency and hamper the development of an effective body of expertise within HUD. . . . [T]he possibility exists that individual cases of housing discrimination may not receive the focus needed [at Justice] to address the national problem of housing discrimination.

Id. at 20,916.
181 See id. at 23,711.
182 As if to compound the confusion of the FHAA’s original legislative history, Congress in 1995 and 1996 very nearly enacted legislation that would have transferred the entire administrative apparatus of the FHAA from HUD to Justice, again without providing any explanation for the rationale for this major change in the government’s fair housing enforcement program. See infra notes 284-289 and accompanying text.
the representation that HUD lawyers would provide to aggrieved persons in administrative proceedings within HUD. In the absence of such guidance, the resolution of the professional issues presented by the triangular relationship created by the FHAA was left to the parties involved.

C. Practical Realities and Government Lawyers

Lacking any congressional guidance on the nature of their triangular relationship in HUD-charged cases under the FHAA, government lawyers in each of the four illustrative cases discussed above pursued their agencies' position rather than that of the private complainant when a conflict arose.\textsuperscript{183} This fact sheds considerable light on the views of agencies and government lawyers as to the resolution of the professional issues presented by the FHAA representations. The lawyers perceive the interests of the private complainant as subordinate to the interests of their governmental agency. Considering certain realities regarding these triangular professional scenarios, this result is not surprising.

Government lawyers are employed by and regularly represent their governmental client,\textsuperscript{184} and they are experienced in and accustomed to asserting its interests. Private complainants, on the other hand, present professional relationships and interests for government lawyers that are more transitory. Given the ongoing nature of the professional relationship between the lawyers and the government, it would be difficult to expect them to owe their primary allegiance to the private parties,\textsuperscript{185} at least in the absence of precise direction by Congress to do so.\textsuperscript{186}

Furthermore, on certain legal issues, government lawyers must advocate a consistent, specified legal policy adopted by their agency. This is especially true in the area of civil rights, in which law and policy are closely intertwined. For example, consider the position taken by the Justice Department on the retroactivity of the FHAA's enforcement provisions in \textit{Presidio}.\textsuperscript{187} Given the Justice Department's position on this issue, it would have been remarkable if the DOJ attorneys had taken a contrary position merely because the government brought the matter on behalf of a private party under the FHAA.\textsuperscript{188}
Additionally, FHAA cases, although substantial in total number, constitute only a fraction of the caseload of Justice Department lawyers. It is unlikely that these government lawyers would assume an entirely novel relationship with their employer and usual client within the narrow context of the FHAA representation of a private complainant. Such an approach would be remarkable in the absence of specific direction from Congress.

This natural tendency of government lawyers to favor the interests of their usual governmental client over those of private complainants under the FHAA is now reflected in the official policy of the DOJ. A 1995 opinion from the DOJ's OLC declares that no lawyer-client relationship exists between government lawyers and aggrieved persons in FHAA litigation and even concludes that these lawyers owe no fiduciary duties to the private complainants in these cases. This position certainly makes the resolution of the professional issues considerably easier for the government lawyers involved. Whether it accurately reflects Congress's vision of entrusting government lawyers with private enforcement of the fair housing law, however, is a much harder question.

Is this the only way to view the relationship between the government lawyers and private complainants seeking enforcement of the FHAA? Is it possible, even given these practical realities, to accommodate both of these competing interests? The answer may lie in analogous situations involving triangular professional relationships.

III. Solving the Problems of the FHAA's Triangular Relationships

Triangular professional relationships are not unusual in the practice of law. In representing a client, lawyers often must deal with professional pressures created by the presence of other clients or nonclient third parties in a representation. Rules of ethics provide standards by which lawyers must judge the propriety of potentially conflicting representations and to which lawyers must look for guidance on structuring these relationships.

---

189 For example, the Model Rules address problems of simultaneous representation of two adverse interests, see Model Rules of Professional Conduct Rule 1.7 (1996), conflicts created by the lawyer's own personal or financial interests, see id. Rules 1.7(b), 1.8(a),(c)-(e), pressures resulting from fee payments made by nonclient third parties, see id. Rule 1.8(f), and complications inherent in family relationships between opposing counsel, see id. Rule 1.8(i). The prior ABA treatment of legal ethics, the Model Code, dealt with similar issues. See, e.g., Model Code, § 7.3, at 355 (1986).
Lawyers facing these triangular situations generally confront two issues. First, the lawyer must determine which of the other two entities will be viewed as a "client," to whom the lawyer will owe the most exacting of ethical duties.\textsuperscript{191} Second, in order to decide whether to proceed with the representation, the lawyer must make an assessment of the effect that the interests of the other entity will have on the legal representation of the client.\textsuperscript{192} These determinations are critical to the lawyer's compliance with the various ethical rules governing conflicts of interest.

The enactment of the FHAA left the government lawyers who bring actions on behalf of private complainants unsure of how to resolve these issues and of how to proceed in the face of the conflicting interests presented by the triangular relationships that the legislation created.\textsuperscript{193} Because Congress gave no hint as to how to answer these two prerequisite questions, the lawyers from HUD and Justice have been left to wonder about their professional responsibilities.\textsuperscript{194}

\begin{quote}
\textsc{Code of Professional Responsibility DR 5-101 (1980) (lawyer's personal interests); id. DR 5-104 (lawyer's business relations with clients); id. DR 5-105 (representing multiple clients); id. DR 5-107 (interests of third parties).

Despite the presently dominant position of the \textit{Model Rules} among the states, DOJ lawyers are expected to comply with the earlier \textit{Model Code}, the ABA's prior codification of ethical rules. This obligation is provided by a federal regulation promulgated prior to the ABA's 1983 adoption of the \textit{Model Rules}. \textsc{See} 28 C.F.R. § 45.735-1(b) (1996) ("[A]ttorneys employed by the Department [of Justice] should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association."). Given the predominant position of the \textit{Model Rules} nationally, however, in discussing the application of ethical rules to the governmental representation of private complainants under the FHAA, this Article discusses the \textit{Model Rules} in addition to the \textit{Model Code}. It might be noted that even the Justice Department takes guidance from both the \textit{Model Rules} and the \textit{Model Code} despite the federal regulation's reference to the \textit{Model Code}. \textsc{See}, e.g., \textit{DOJ Opinion}, supra note 103, at 4 (referring to Model Rules 1.2 and 1.7 and DR 5-105(A) as sources of guidance for DOJ attorneys); 28 C.F.R. § 77.1 (referring to Model Rule 4.2's rules regarding communications with parties represented by counsel as a source of guidance for DOJ attorneys); \textit{id.} § 77.12 (similarly referring to Model Rule 4.2 and DR 7-104(A)(1)).

\textsuperscript{191} It is to the "client" that the lawyer owes the duties, for example, of competence under Model Rule 1.1 and the \textit{Model Code}'s DR 6-101, diligence under Model Rule 1.3 and the \textit{Model Code}'s DR 6-101, confidentiality under Model Rule 1.6 and the \textit{Model Code}'s DR 4-101, and loyalty under Model Rule 1.7 and the \textit{Model Code}'s DR 5-105. \textsc{See Model Code of Professional Responsibility DR 6-101, 4-101, 5-105 (1980); Model Rules of Professional Conduct Rules 1.1, 1.3, 1.6, 1.7 (1996).}

\textsuperscript{192} For example, under Model Rule 1.7(b), the lawyer must determine whether the interests of other clients, third parties, or the lawyer will materially limit the representation of a client. \textsc{See Model Rules of Professional Conduct Rule 1.7(b) (1996).} Similarly, under the \textit{Model Code}'s DR 5-105(A), a lawyer must "decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment." \textsc{Model Code of Professional Responsibility DR 5-105(A) (1980).}

\textsuperscript{193} For further discussion of the lack of congressional guidance offered when the FHAA was enacted, \textsc{see supra Part II.B.}

\textsuperscript{194} \textsc{See, e.g., supra note 8 and accompanying text.}
A. Models of Triangular Professional Relationships

To resolve the problems faced by government lawyers who bring actions on behalf of private complainants under the FHAA, an examination of other triangular professional relationships offers helpful insights. Although these relationships generally arise in private legal representations, some of the models resemble other situations in which government lawyers have been assigned the task of representing private interests.

1. The Two-Client Model

One way to view the professional relationship created by Congress under the FHAA is simply as an instance of simultaneous representation of two clients. That is, the lawyers in these proceedings could be viewed as representing both their usual governmental client and the private complainant as well.

195 Conceivably there could be even more than two clients, because a HUD or DOJ lawyer may well be required to pursue the claims of more than one private complainant in the same FHAA case. For example, in the Soules case, two private complainants—Sherry Soules and a fair housing organization named Housing Opportunities Made Equal, Inc. of Buffalo—had individual claims and interests that were quite distinct from one another. See HUD v. Downs, Fair Housing—Fair Lending (P-H) ¶ 25,011, at 25,171-72 (Dep't of Hous. & Urban Dev. Sept. 20, 1991), aff'd sub nom. Soules v. HUD, 967 F.2d 817 (2d Cir. 1992).

196 Even in traditional government practice, the precise identity of a government lawyer's "client" may be a difficult issue. Professor Wolfram notes that conflict of interest problems for government lawyers are particularly troublesome "because of the frequent absence of any single client who can unequivocally direct the lawyer on the substantive position to be taken in a matter and, if necessary, discuss and possibly consent to conflicts in representations." WOLFRAM, supra note 188, § 8.9.1, at 448. He goes on to list several possible solutions: Various candidates [as the government lawyer's "client"] are offered, such as the "government;" the lawyer's "agency;" the "head" of the agency; the lawyer's "immediate superior;" whoever has the power to hire and fire; or the "people." Another, related approach is to abandon the "who is the client" inquiry and to posit that the role of the government lawyer is to serve "good government in and of itself," the "public interest," "justice," or a similar abstraction that is not tied to a particular entity. Id. § 13.9.2, at 756-57 (footnotes omitted). An excellent discussion of the complexity of the client identity issue is provided by Robert P. Lawry, Confidences and the Government Lawyer, 57 N.C. L. Rev. 625, 631-38 (1979).

The ethical rules are not very helpful in resolving a government attorney's client identity problem. For example, the Comment to Model Rule 1.13 entitled "Organization as Client" addresses the issue by noting: Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 6 (1996) (emphasis added). The earlier Model Code is even less helpful. In Ethical Consideration 5-18, the drafters note that: A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980). Although certainly the government lawyer represents an "entity" as a client, the Model Code offers no guidance on the
Simultaneous representation of multiple clients occurs frequently in the private practice of law.\textsuperscript{197} For example, criminal defense lawyers sometimes represent two or more defendants in the same trial.\textsuperscript{198} On occasion, personal injury lawyers represent multiple plaintiffs injured in the same event.\textsuperscript{199} Similarly, a domestic relations lawyer will at times be approached by a married couple seeking joint representation in the amicable dissolution of their marriage.\textsuperscript{200}

When the interests of these multiple clients are consistent, the joint representation may offer the clients the dual advantages of presenting a consistent, unified front in the matter and a reduction in the total cost of legal services.\textsuperscript{201} Such representations, therefore, are often attractive to clients.\textsuperscript{202}

The ethical rules provide standards for judging the propriety of simultaneous multiple representations. Under the American Bar Association’s \textit{Model Rules of Professional Conduct} ("\textit{Model Rules}")\textsuperscript{203}, such a representation is generally prohibited if one client’s interests are “directly adverse”\textsuperscript{200} to another client’s, or if the representation of one client would be “materially limited”\textsuperscript{204} by the lawyer’s representation of the other client. In either situation, the \textit{Model Rules} contemplate that a lawyer will proceed with the representation only if the lawyer reasonably believes that the representation of one client will not adversely affect the relationship with the other and if both

---

\textsuperscript{197} Although lawyers represent multiple clients in transactional matters such as business deals and estate planning, the examples cited here all involve litigation because that is the process involved in FHAA enforcement efforts.

\textsuperscript{198} Such multiple representations present a number of potential conflicts of interest. See WOLFRAM, \textit{supra} note 188, § 8.2.2, at 412. They create problems under the law of legal ethics and under constitutional doctrine pertaining to effective representation of counsel. See \textit{id.} § 8.2.1.

\textsuperscript{199} See \textit{id.} § 7.3.3 (describing the potential for conflicts of interest between coplaintiffs).

\textsuperscript{200} This practice was facilitated by the wide-scale enactment of no-fault divorce statutes, obviating the need for allegations and proof of marital misconduct. See L\textit{aws. Man. on Prof. Conduct} (ABA/BNA) 51:308-09 (1995).

\textsuperscript{201} WOLFRAM, \textit{supra} note 188, § 7.3.1, at 349.

\textsuperscript{202} Professor Wolfram sees the permissibility of such joint representations as essentially furthering client autonomy. \textit{See id.}

\textsuperscript{203} Model \textit{Rules of Professional Conduct} Rule 1.7(a) (1996).

\textsuperscript{204} \textit{Id.} Rule 1.7(b).
clients consent after full disclosure. Additionally, settlements offered during such representations cannot be accepted without the consent of all the clients.

Even if appropriate when initiated, multiple representations can become inappropriate if the clients' interests later diverge. In these instances, the lawyer must refrain from representing either client without the consent of the other. In most situations, this means that each client will seek new, separate counsel.

The multiple-client scenario provides an appealing analogue for the government lawyer's role in the triangular relationship created by the FHAA. In most instances, the interests of the private complainant will align with those of the government client. This apparent confluence of interests undoubtedly explains why Congress turned to HUD and DOJ lawyers to bring actions on behalf of persons aggrieved by housing discrimination. In these typical cases, the government lawyer would have no difficulty providing equally loyal, zealous, and effective representation to the governmental and private clients.

As applied to the FHAA situation, however, the model has some flaws. The risk of conflicts developing in these cases still exists, as demonstrated by the illustrative cases discussed above. Most important, the lawyer's preex-

---

205 See id. Rule 1.7. By comparison, the ABA's earlier Model Code generally prohibits simultaneous representation of more than one client when their interests are likely to be differing, but permits such a representation if the lawyer has the informed consent of the clients and "it is obvious that [the lawyer] can adequately represent the interest of each" client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A)-(C) (1980).

206 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1996).

207 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 2 (1996) ("If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation."). The Model Code provides that lawyers not only "shall decline proffered employment," MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1980), but also that they "shall not continue multiple employment," id. DR 5-105(B), when conflicts are apparent.

208 Under the Model Rules, this requirement is explicit. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 2 (1996) ("Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9."); id. Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same . . . matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."). If a lawyer attempts to continue the representation of one client in the same matter after the representation of multiple clients becomes inappropriate, the lawyer needs the consent of the former clients whom he or she is no longer representing. See id. Rule 1.9(a).

The ABA's earlier Model Code had no express rule governing subsequent representations by lawyers against former clients. See WOLFRAM, supra note 188, § 7.4.2, at 363-64. Because such representations usually implicate confidential information provided to the lawyer by the former client, however, the rules governing confidential client communications generally require client consent. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B), (C) (1980). Thus, when a multiple representation is terminated under the Model Code, the lawyer cannot continue to represent one of the clients without the consent of the other terminated client. For further discussion of the relationship between subsequent representations and problems of confidentiality, see WOLFRAM, supra note 188, § 7.4.2, at 359-61.

209 See supra Part II.A.
isting, naturally dominant relationship with the government client makes it quite unlikely that unbiased joint representation can continue if conflicts do eventuate. Furthermore, a government lawyer facing such a conflict will be incapable of withdrawing from the representation of both clients, as contemplated by the Model Rules. In the event of conflicts, therefore, the lawyer continues to represent the governmental client without the consent of the private complainant who must obtain legal counsel elsewhere. This scenario may lead to feelings of betrayal on the part of the private complainant and to legitimate concerns about whether the representation provided by the government lawyers was the representation contemplated by Congress in enacting the FHAA.

The multiple-client model has several shortcomings in its application to FHAA cases. Although it seems apposite to the typical FHAA situation, its initial appeal obscures the difficulties it presents when conflicts arise. In fact, government lawyers may actually have this model in mind when they approach these cases and then complain of difficult professional issues in FHAA representations. Other models may offer more comfort both to the government lawyers and the private complainants.

210 See supra note 208 and accompanying text. One writer has argued to the contrary, maintaining that the Justice Department should be expected to withdraw from any "cases in which a shift in political power compels the government to switch sides in a lawsuit." Clifford Freed, Comment, Ethical Considerations for the Justice Department when It Switches Sides During Litigation, 7 U. Puget Sound L. Rev. 405, 406 (1984) (discussing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), a case involving a mandatory busing program intended to reduce racial imbalance in public schools). For a view expressing similar concerns based on misuse of confidential information by government lawyers when the government switches sides, see Note, Professional Ethics in Government Side-Switching, 96 Harv. L. Rev. 1914 (1983) (discussing Washington).

211 This arrangement violates the standards suggested by the Model Code and the Model Rules. See supra note 208.

212 In addition to the loyalty concerns of the private complainant in such a situation, there are additional concerns about confidentiality. It is possible and even likely that the complainant has provided the government lawyer with information relating to the representation during the time that the lawyer provided legal services jointly to that individual and the government. When the lawyer withdraws from the representation of the complainant but continues the representation of the government in the matter now in a manner adverse to the complainant, concerns about the misuse of that information may be quite real. For an argument that government lawyers possessing such information should be disqualified from such matters, see Note, supra note 210.

213 One commentator has argued that the practice of side-switching by the Justice Department undermines public confidence in the law. The argument proceeds:

The "images and appearances" of Watergate are visions of a few government figures infusing politics into the justice system.

That is precisely the same image that is conveyed to the public when the government switches sides in the middle of a lawsuit, deserting its coparty and zealously advocating in one court exactly the opposite of what it advocated in another. The image perceived by the public is that of a "hired gun"—the lawyer working at the whim of a political administration, advocating without conviction whatever is the prevailing sentiment of the prevailing administration. Whether confidences are in fact betrayed, the appearance of betrayal breeds public distrust of the legal profession and of government ethics in particular.

Freed, supra note 210, at 421-22 (footnotes omitted).
2. The One Client, Third-Party Payor Model

Another model of a triangular professional relationship that may offer guidance occurs when a lawyer represents a client while a third party pays the lawyer's fee.\textsuperscript{214} In private practice, this relationship arises, for example, when a lawyer represents one family member while another family member pays, or when a lawyer provides legal services to clients under a group legal plan. The model is common in the governmental arena as well. Publicly funded civil legal aid is an example. A public defender representing an indigent criminal defendant is another.\textsuperscript{215}

The ethics rules clarify the propriety of such relationships. They are permissible only if the client consents to the arrangement and the lawyer ignores any efforts by the third-party payor to direct or interfere with the lawyer's exercise of professional judgment on behalf of the client.\textsuperscript{216} The rules thus contemplate that the lawyer will provide loyal and zealous representation to the client while disregarding the third-party payor's influence and interests. Any conflicts between the client and the third party must be resolved in favor of the client.\textsuperscript{217} Indeed, if interference from the third party becomes too stringent and impairs representation of the client, the lawyer may have to end the representation.\textsuperscript{218}

Although the model works well in describing the governmental lawyer serving as public defender or legal aid advocate for indigent clients, it does not fit the FHAA scenario. Certainly the HUD and DOJ lawyers are employed and paid by their governmental agencies. Unlike the public defenders or publicly funded legal aid lawyers, however, HUD and DOJ lawyers are not employed in settings specifically structured to provide legal assistance to private parties. In fact, these lawyers regularly represent the government itself in related matters. Given the interest of the government agencies in the

\textsuperscript{214} See Wolfram, supra note 188, § 8.8.2.
\textsuperscript{215} Professor Wolfram explores the peculiar tensions created by a system that funds both the prosecution and defense of those accused of crimes. See id. at 445-46.
\textsuperscript{216} See Model Code of Professional Responsibility DR 5-107(A), (B) (1980) (permitting a third party payor relationship only when the lawyer does not permit the payor to "direct or regulate" his or her professional judgment in rendering legal services to the client); see also Model Rules of Professional Conduct Rule 1.8(f) (1996) (permitting such a relationship only when the client consents, there is no interference with the independence of professional judgment or with the client-lawyer relationship, and information relating to the representation is kept confidential); id. Rule 5.4(c) (prohibiting a lawyer from allowing "a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services").
\textsuperscript{217} Professor Wolfram puts the matter succinctly: "[I]n normal cases a lawyer who represents a client with a third person paying the fee must devote his or her entire loyalty to the pursuit of the client's interests. Pursuing the interests of the fee-paying party adverse to the interests of the client is plainly impermissible." Wolfram, supra note 188, § 8.8.2, at 444-45 (footnote omitted).
\textsuperscript{218} The representation under these circumstances would violate the rules discussed supra in note 216. Under both the Model Rules and the earlier Model Code, if the representation cannot be continued without the violation of an ethical rule, it must be terminated. See Model Code of Professional Responsibility DR 2-110(B)(2) (1980); Model Rules of Professional Conduct Rule 1.16(a)(1) (1996).
cases litigated, the lawyers cannot easily treat those agencies as merely third-party payors for the lawyers’ services.

With a clear expression of congressional intent, however, it would seem that this approach could work in the FHAA context. Congress could have chosen to provide free legal representation to private parties alleging housing discrimination with a funding mechanism for paying for these legal services. These services, however, would undoubtedly have to be rendered by nongovernmental lawyers. The government, therefore, could act as a third-party payor for the lawyers’ representation of the private clients.

Instead, Congress directed HUD and DOJ lawyers to litigate on the behalf of those parties. In the absence of specific congressional guidance and in the light of practical reality, those lawyers cannot be expected to view the private complainants as their clients to the exclusion of their usual governmental client. The above cases illustrate that when conflicts arise, government lawyers side with their usual governmental client. Under the circumstances, the single client, third-party payor approach is not a realistic model for viewing the FHAA’s triangular relationships.

3. The One Client, Third-Party Beneficiary Model

The one client, third-party beneficiary model of triangular professional relationships arises when the lawyer’s representation of a client foreseeably benefits a nonclient third party. The increasing frequency of legal malpractice suits by such third parties demonstrates that such relationships are common. Estate planning is a good example. Lawyers drafting wills and trusts for clients must consider the interests of third persons intended to be the beneficiaries of their work.

Ethical rules also speak to this form of triangular representation. Those rules contemplate that the lawyer will provide loyal and zealous representation for the client and will further the interests of the third party looking to benefit from the lawyer’s services only to the extent that the client’s interests permit. Thus, when conflicts arise, the client’s interests must predominate over those of the third party.

219 See supra note 48 and accompanying text.
220 See supra Part II.B-C.
222 See WOLFRAM, supra note 188, § 5.6.4, at 224-26 (discussing the shift away from the requirement of privity in legal malpractice actions, especially in the area of estate planning).
223 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107 (1980) (prohibiting lawyers from giving in to any interest that might affect his or her independent professional judgment); id. EC 5-21 (providing that “[t]he obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment”); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1996) (prohibiting a lawyer from representing a client if the representation may be materially limited by a lawyer’s responsibilities to a third person unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation).
224 This is one reason why identifying the “client” is so important. See supra note 191 and accompanying text.
The single client, third-party beneficiary model has some relevance to
the FHAA situation.225 It most closely fits "pattern or practice" cases in
which government lawyers bring discrimination suits of public importance on
behalf of the government, but in which they also may seek remedies for pri-
vate aggrieved persons as well.226 In these cases, the lawyers may represent
their traditional governmental clients loyally and zealously while knowingly
benefiting nonclient private third parties at the same time.

Certainly we could employ this model to evaluate HUD-charged cases
brought on behalf of private complainants, even though those cases are not
based upon allegations of a pattern or practice of discrimination. Under this
model, HUD and DOJ lawyers can simply represent their governmental cli-
ents with the knowledge that the private complainants will benefit from the
representation as well. The illustrative cases discussed above suggest that
HUD and DOJ lawyers may do just that. They certainly view the private
complainants as something less than "clients" when any conflicts arise, choos-
ing to subordinate the complainants' interests to those of their traditional
governmental clients. In this way, this model seems consistent with the natu-
ral and practical tendencies of these governmental lawyers.

The application of the model to the HUD-charged case, however, is
more troublesome than when it is applied to pattern or practice cases. Even
if the model seems to approximate the manner in which the government law-
yers currently approach FHAA cases on behalf of private complainants, it
appears to fall short of the likely expectations of those seeking legal assist-
ance to enforce their fair housing rights. Also, the question remains whether
this is the form of representation that Congress intended when it assigned
these cases to government lawyers. Congress may have envisioned some-
thing more closely approaching "legal representation" when it directed HUD
and DOJ lawyers to bring actions "on behalf of" private complainants. If so,
this model offers those parties too little actual representation.

4. The Shifting Model

A final model of triangular professional relationships that could be used
to analyze the government lawyer's role in representing private complainants
under the FHAA might be called the "shifting model." Under this approach,
the representation begins according to the multiple client approach discussed
above.227 Normally, the lawyer can continue the representation to conclusion
in this form. If conflicts develop between the clients under this approach,
however, rather than terminating the representation of both clients,228 the

225 Courts generally have the most difficulty finding lawyer liability to nonclient third par-
The model of the single client and third-party beneficiary, however, provides instruction for
assessing the relationship between the government lawyer and the private complainant in
FHAA cases.
226 See supra note 67 and accompanying text.
227 See supra notes 195-206 and accompanying text.
228 Such withdrawal would be required as to both clients under the two-client model dis-
cussed above. See supra notes 207-208 and accompanying text.
lawyer shifts the representation to another model that provides full representation to one client but something less to the other.

This scenario arises in the private practice of law when a lawyer represents the insured and insurer in an insurance defense matter. Although the ethical rules do not expressly endorse the "shifting model" and it is somewhat controversial even within the field of insurance law, a number of courts have utilized this model in insurance cases and some scholars have

229 The term "shifting model" is used by the authors to describe one response to the triangular relationship in the insurance defense context. The Model Rules mention this recurring ethical problem only in the comments, where the drafters recognize that "when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence." Model Rules of Professional Conduct Rule 1.7 cmt. 10 (1996). Similarly, the Model Code refers to the situation only in its Ethical Considerations, rather than its Disciplinary Rules, and merely identifies the scenario of lawyers representing both the insurer and the insured as a "[t]ypically recurring situation[] involving potentially differing interests." Model Code of Professional Responsibility EC 5-17 (1980). For these situations, the Model Code offers only the following guidance:

Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

Id. In Professor Wolfram's view, "[n]either set of rules gives more than general guidance, although it is reasonably clear from both that the insurance lawyer's allegiance, if slanted in either direction, must be aligned with the insured." Wolfram, supra note 188, § 8.4.1, at 429 (footnote omitted).

230 See generally Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583 (1994) (exploring the controversy of whom the lawyer represents in the insurance defense context). The dispute as to the proper way to view the lawyer's relationship with the insurer and the insured is usually couched in terms of the "one client" approach versus the "two client" approach. A helpful discussion of the two approaches is found in William H. Fortune et al., Modern Litigation and Professional Responsibility Handbook § 15.3, at 502-06 (1996). Professor Silver advocates the two client model in which the lawyer represents both the insured and the insurer. See Silver, supra, at 1606. The strongest advocate for the "one client" approach has been Professor John K. Morris. See John K. Morris, Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution, 1981 Utah L. Rev. 457. The one client model has also been adopted by the new Restatement of the Law Governing Lawyers, which states:

A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The lawyer represents the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer.


231 While not using the "shifting model" label, several courts have approached the triangular relationship presented by insurance defense matters in a similar fashion. That is, they see the lawyer representing both the insurer and insured as clients at the outset, but when conflicts arise they see the lawyer as having the option of continuing the representation of one of the clients, thus changing the relationship with the other. In Parsons v. Continental National American Group, 550 P.2d 94 (Ariz. 1976) (in banc), for example, a lawyer hired by the insurer to represent an insured learned facts that suggested a lack of coverage. See id. at 96. The court concluded that the lawyer should have notified the insurer that it no longer represented it, while continuing to represent the insured as a client. See id. at 98. In the usual multiple representa-
endorsed it as well. The model contemplates that the insured and the insurer will normally share a common interest in minimizing liability to the

tion, the lawyer would be expected to withdraw from the representation of both clients. See supra notes 207-208 and accompanying text. Special treatment of the insurance defense context was also recognized in American Mutual Liability Insurance Co. v. Superior Court, 113 Cal. Rptr. 561 ( Ct. App. 1974), where the court noted that the relationship begins as a joint representation of two clients, id. at 571, but can change:

The tranquility of this coalition is disturbed however, where, as here, disagreement arises between the members. Dissatisfaction flowering into litigation may disrupt the harmony of the arrangement. The attorney who formerly represented both clients in a special and unique relationship now must choose among alternative courses of action. He may totally withdraw from the entire relationship. He may continue to represent the insured as to third parties on pending matters, continuing at the same time to represent the insurer. Other avenues may be open to the attorney ....

Id. at 572. Similarly, in Lieberman v. Employers Insurance, 419 A.2d 417 (N.J. 1980), the court saw the lawyer as representing both the insured and the insurer at the outset of the relationship. See id. at 424. When a dispute arose as to the settlement of the matter, however, the court declared that the lawyer should have withdrawn from the representation entirely (the course of action generally contemplated when multiple representation becomes inappropriate) or should have withdrawn from representing either the insured or the insurer. See id. at 425.

While the term "shifting model" has not been used by other writers, some utilize an approach that is similar. For example, our colleague Professor Richard H. Underwood has argued that the insurance defense lawyer represents both the insured and the insurer as clients. See Richard H. Underwood, The Doctor and His Lawyer: Conflicts of Interest, 30 Kan. L. Rev. 385, 387-88 (1982). If the lawyer gains confidential information from the insured regarding a possible lack of policy coverage, however, Professor Underwood argues that the lawyer should continue to represent the insured but not disclose the information to the insurer. See id. at 399. This approach appears to convert the initial multiple representation of both the insured and the insurer as clients into a different arrangement, with the lawyer representing only the insured as a client.

Professor Underwood was later joined in this approach by his coauthors Professors William H. Fortune (another of our colleagues) and Edward J. Imwinkelried in their book, Modern Litigation and Professional Responsibility Handbook. In applying the two-client model to the problem of the insurance defense lawyer's acquisition of confidential information pertaining to coverage defenses, they argue that the lawyer cannot continue to represent the insured as client and that the representation of the insured can continue only if she is recognized as the sole client, an apparent shifting of the relationship. See Fortune et al., supra note 230, § 15.7.1, at 518-24.

In making his strong case for the one-client model, Professor Morris also endorses an approach akin to the authors' "shifting model" at least as it applies to confidential information. While maintaining that the insurance defense counsel represents only the insured as a client, he recognizes that the lawyer may ordinarily freely share information pertaining to the representation with the insurer. See Morris, supra note 230, at 478-79. This sharing of information would permit the lawyer to inform and advise the insurer on matters of potential liability exposure, settlement, and so on, even if the lawyer does not represent the insurer as a client. When the lawyer acquires information that suggests a lack of coverage, however, Professor Morris maintains that the lawyer should not disclose the information to the insurer because the insured is the sole client. See id. at 482-83. Although the approach taken by Professor Morris does not recognize the initial arrangement to be the joint representation of both the insured and the insurer, it does contemplate that the lawyer's relationship with the insurer to be something less than what it was at the beginning.

That the insurance defense lawyer's relationship with the insured and insurer is a hybrid one that can change from a joint representation to one favoring the insured is reflected in the common assertion that the insured is the primary client. The notion that one client in a joint representation should be favored is inconsistent with the usual notion of ethical multiple
plaintiff. Joint representation typically furthers these common interests.

The lawyer in this situation can look upon both the insured and the insurer as clients and serve both loyally and zealously.

At times, however, the interests of the insured and insurer conflict. This occurs, for example, when the lawyer learns facts that may indicate that there is no coverage under the policy or that liability in excess of the policy coverage makes settlement more attractive to the insured than the insurer. When this happens, the representation of both parties equally as clients cannot continue. Under the usual approach in the two-client model, the lawyer must withdraw from the representation of both clients. In the insurance scenario, however, the insured has paid for the right to a defense against claims. Abandonment by the lawyer may conflict with this contractual expectation. As a result, one resolution has been to recognize a shift to a representation somewhat akin to the one client, third-party beneficiary model. The lawyer continues to represent the insured, and the insurer may benefit from that representation. Under this shifting model, the original lawyer must now subordinate the interests of the insurer, as a nonclient third party, to those of the insured, who remains a client. To the extent that the insurer feels that its own interests warrant representation, however, it is expected to obtain its own legal counsel.

This shifting model has some appeal as an analogue for FHAA cases. The HUD or DOJ lawyer who represents a private complainant can ordina-

representations. See Silver, supra note 230, at 1587-88. Professor Wolfram notes that the hybrid relationship favors the insured. See WOLFRAM, supra note 188, § 8.4.1, at 428.

See Silver, supra note 230, at 1608-69.

See id.

For a concise discussion of potential conflicts of interest between the insured and insurer, see WOLFRAM, supra note 188, § 8.4.

Under the Model Rules, because the interests of the clients would be directly adverse, the representation of each client would be adversely affected by the relationship with the other. See Model Rules of Professional Conduct Rule 1.7 (1996). Using the Model Code approach, the lawyer would be representing clients with differing interests, and it would not be "obvious" that the lawyer could adequately represent the interests of each client. See Model Code of Professional Responsibility DR 5-105 (B), (C) (1980).

See supra notes 207-208 and accompanying text.

In the insurance context, by providing loyal and zealous representation to the insured, the lawyer presumably also serves the common interest of the insurer in avoiding or minimizing liability. One author, however, has suggested an opposite application of this approach. See John W. Dondanville, Defense Counsel Beware: The Perils of Conflicts of Interest, 18 Forum 62 (1982). Mr. Dondanville argues that when conflicts arise, the lawyer should withdraw from the representation of the insured while continuing in some form the representation of the insurer. See id. at 68. Mr. Dondanville does recognize, however, that the attorney-client privilege may "prevent[] the attorney from revealing anything he was told during the course of the relationship." Id.

Professor Wolfram describes the remaining relationship between the lawyer, the insured, and insurer as something of a hybrid. "The accommodation that the law in most jurisdictions seems to require involves compromises with the extreme models suggested by a single-valued pursuit of either of the opposing impulses, although with a decided tilt in favor of the insured." WOLFRAM, supra note 188, § 8.4.1, at 428.

This is the result contemplated by the court's approach in Parsons v. Continental National American Group, 550 P.2d 94, 98-99 (Ariz. 1976) (in banc). See supra note 231. It is also the result favored by Professor Underwood and Professor Morris. See supra note 232.
rily treat both that party and the government as clients because their interests usually are consistent. If a conflict develops, however, the lawyer cannot continue the two-client model of representation.\textsuperscript{241} Given the preexisting employment arrangement with the government agency, the lawyer could not be expected to abandon the government client in favor of the private complainant.\textsuperscript{242} Thus, the representation logically and practically must evolve into one in which the lawyer represents the government as the sole client. To the extent that the complainant's interests are served by this new form of representation, that person becomes a beneficiary of the lawyer's services on behalf of the government. The complainant also may secure separate legal counsel if necessary to advocate interests distinct from those of the government.

This shifting model offers the most promise as an approach to the professional problems that may arise in FHAA cases. It utilizes the multiple representation approach for the usual situation in which the interests of the government and the private complainant nicely coalesce. It also recognizes that the interests of the complainant and the government may diverge and accommodates the practical realities of the government lawyer when these conflicts arise. The model may also most closely accomplish the likely intent of Congress in assigning these cases to HUD and DOJ lawyers. Even so, structuring such a triangular relationship requires some care, especially if the relationship will at least minimally satisfy the expectations of the private party recipients of the government's legal representation.

\textbf{B. Structuring the Relationship}

Under the rules of legal ethics, a lawyer must approach any professional relationship presenting potential conflicts of interest with caution.\textsuperscript{243} Even when the rules allow a potentially conflicting relationship, the lawyer may enter and continue the relationship only with the client's fully informed consent.\textsuperscript{244} The "shifting model" of triangular relationships, which arguably pro-

\textsuperscript{241} See supra notes 207-208 and accompanying text.
\textsuperscript{242} It is inconceivable that this could be accomplished without the lawyer terminating his or her employment relationship with the government, which is too extraordinary to suggest.
\textsuperscript{243} The ABA urged this caution in the \textit{Model Code}, where lawyers were warned as follows: If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.
\textit{Model Code of Professional Responsibility EC 5-15} (1980). In the ABA's \textit{Model Rules}, this caution is embodied in the advice to lawyers to "adopt reasonable procedures . . . to determine whether there are actual or potential conflicts of interest" in the matters they handle. \textit{Model Rules of Professional Conduct} Rule 1.7 cmt. 1 (1996).

\textsuperscript{244} See \textit{Model Code of Professional Responsibility} DR 5-105(A), (B), (C) (1980) (client consent is similarly required when a lawyer is involved in a representation that will "be likely to involve him in representing differing interests"); \textit{id.} DR 5-107(A)(1) (prohibiting a lawyer from accepting payment for legal services from a source other than the client without that client's consent); \textit{see also Model Rules of Professional Conduct} Rule 1.7(a)(2), (b)(2) (1996) (stating that a lawyer cannot represent a client with interests directly adverse to another client or when the representation would be materially limited by the lawyer's responsibilities to
vides the most promise as an analogue for FHAA cases, demands particular care.

As described above, the model starts with the lawyer representing two clients in the same matter. In any simultaneous representation of multiple clients, the lawyer must understand that the interests of the clients may diverge as the matter progresses. Because this potential is not always apparent to the clients, the lawyer must carefully describe the situation to them so that they may give meaningful consent to the arrangement.

Given the nature of the shifting model, clients must also understand from the beginning that the lawyer will continue to represent only one of the clients if conflicts later arise. This notice ameliorates the loyalty and confidentiality concerns regarding the abandoned client, who otherwise might insist that the lawyer refrain from representing the other client as well. Of course, in some circumstances, these early disclosures may make the joint

another client, a third party, or the lawyer's personal interests, without the informed consent of the client); id. Rule 1.8(f)(1) (a lawyer cannot accept compensation from one other than the client without such consent).

See supra notes 193-206 and accompanying text.

The representation of multiple clients in litigation is generally viewed as the most likely situation for conflicts to materialize. The drafters of the Model Code noted this in discouraging such joint representations:

A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

Model Code of Professional Responsibility EC 5-15 (1980). Professor Wolfram also recognizes the need for a higher state of alert to conflicts of interest in the litigation setting when he notes that "[c]ourts demonstrate a somewhat more benign attitude as the scene of a conflict of interest moves away from litigation and into contract and other private-ordering transactions. Lawyers here, as a general matter, have more latitude to represent clients with arguably differing interests." Wolfram, supra note 188, § 7.3.4, at 356 (footnote omitted).

The Model Code's Ethical Considerations emphasize the need for disclosure:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all clients of those circumstances.

Model Code of Professional Responsibility EC 5-16 (1980).

This factor might cause a potential client to question the undivided loyalty of the lawyer. The drafters of the Model Code noted the importance of disclosure of any information that pertains to such doubts:

A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

Id. EC 5-19.
representation so unappealing at the outset that the clients may prefer to have separate counsel throughout the matter.

Government lawyers' representation of private complainants in FHAA actions can be structured in this way. Given the government's familiarity with these multiple representations, the disclosure concerns center on the complainants. In order to obtain informed consent to the representation, HUD and DOJ lawyers should inform complainants of the precise nature of the professional relationship resulting from the FHAA enforcement scheme. This disclosure should advise them of the potential for future conflicts and of the change in representation that may occur in the event those conflicts materialize.

HUD and DOJ structure the professional relationships created by FHAA actions by mailing form letters to the complainants.249 The HUD letter informs the complainant that the agency lawyer will “be responsible for representing the interests of the government and yourself” in pursuing the discrimination claim before the agency ALJ.250 It goes on to assure the complainant that HUD lawyers will “represent fully your interests and the government’s interests, unless they conflict with each other.”251 The letter advises the complainant of the right to intervene as a party in the proceeding and points out that the complainant may wish to do so “to enable you to assert your interests in the event of such a conflict,”252 but it also notes that the complainant is not required to intervene or to secure separate legal counsel.253

The HUD letter sets up a professional relationship with the complainant that is generally consistent with the shifting model of triangular relationships discussed above. Although the letter may fail to describe fully the range of ways in which conflicts might arise in such an arrangement, it does approach the sort of disclosure that is necessary for the creation of such a relationship.

The Justice Department's letter in FHAA election cases takes a different approach. When an FHAA case has been elected to court, the DOJ letter informs the aggrieved person that a lawsuit will be filed “in the name of the United States on your behalf”254 but avoids stating that the Justice Department “represents” that person. It notes that “[a]lthough we expect that your interest and that of the United States will be the same as we proceed to litigate this case, the possibility does exist that at some point our respective interests may differ,”255 and warns that “if you wish to have your own attorney to represent you, you have the right to retain one.”256 The letter also advises the complainant of the right to intervene as a party in the matter by a timely motion.257

249 See supra notes 101-102 and accompanying text.
250 HUD Letter, supra note 101, at 1.
251 Id.
252 Id.
253 See id. at 2.
254 DOJ Letter, supra note 102, at 1.
255 Id.
256 Id.
257 See id.
Unlike the HUD letter, DOJ's letter takes an approach more akin to the "one client, third-party beneficiary model" discussed above,\textsuperscript{258} with its careful avoidance of any claim of "representation" of the complainant. The Justice approach is supported by an opinion of the department's OLC,\textsuperscript{259} which concludes that DOJ has no lawyer-client relationship with complainants under the FHAA\textsuperscript{260} and undertakes no fiduciary duties toward these complainants in fair housing enforcement actions.\textsuperscript{261} As discussed above, one might question whether this approach provides the sort of representation to complainants that Congress intended.\textsuperscript{262} Although it is restrictive in the representation it offers complainants, the DOJ approach provides a plausible resolution of the triangular relationship presented by election cases. Furthermore, the letter used by Justice does a reasonable job of informing complainants of the nature of this relationship.

Regardless of the approach taken to the initiation of the triangular relationship, additional precautions must be taken if conflicts later develop. When the government's position diverges from that of an aggrieved person, the technique used by HUD and DOJ lawyers has been to make clear to the aggrieved person that they represent only the government and to encourage that person to hire his or her own lawyer and to intervene in the case.\textsuperscript{263} Successful intervention by an aggrieved person represented by private counsel frees the government lawyer from any continuing duty to the complainant and allows that lawyer to focus exclusively on representing the government without any concern that this "abandonment" of the complainant will jeopardize his or her interests thereafter.

This structuring of the triangular relationship under the FHAA is workable—that is, it provides sufficient protection for the complainant's interests—as long as three conditions are met: (1) the complainant must be promptly and effectively informed of the conflict of interest; (2) he or she must be able to intervene in the case at this stage; and (3) his or her interests must not have been prejudiced by the delay in achieving full party status.

The first of these conditions requires that the government lawyer effectively communicate the need for retention of private counsel and intervention to the aggrieved person. This is an on-going duty, not one that can be satisfied simply by an initial cautionary letter, particularly because the exact nature of the divergence of interests may not be clear until it actually occurs well into the case.\textsuperscript{264} In addition, this communication must be effective—that is, it must succeed in conveying to the aggrieved person the specific nature of

\textsuperscript{258} See supra Part III.A.3.
\textsuperscript{259} For a discussion of this opinion, see supra notes 103-105 and accompanying text.
\textsuperscript{260} See DOJ Opinion, supra note 103, at 2.
\textsuperscript{261} See id. at 5.
\textsuperscript{262} See supra Part III.A.3.
\textsuperscript{263} See DOJ Letter, supra note 102, at 1; HUD Letter, supra note 101, at 1.
\textsuperscript{264} See, e.g., United States v. Presidio Investments, Ltd., 4 F.3d 805, 807 (9th Cir. 1993) (noting that the complainant moved to intervene after the government attempted to withdraw its notice of appeal); Baumgardner v. HUD, 960 F.2d 572, 581 (6th Cir. 1992) (government theory of the case diverging from complainant's at the appellate stage of litigation); Soules v. HUD, 967 F.2d 817 (2d Cir. 1992) (complainant filing appeal without government's assistance and eventually with government opposition).
the conflict of interest problem and the steps required for its solution. Therefore, some method for insuring that the complainant has understood this message should be included in the communication efforts undertaken by the government lawyer.265

The second element needed to insure that an aggrieved person's interests are adequately protected is that the court must allow that person to intervene. At first glance, this condition seems easily satisfied because the FHAA specifically provides that an aggrieved person "may intervene" in both ALJ proceedings and elected cases,266 but in fact this provision does not guarantee that intervention will always be allowed. Although the statute gives complainants an unconditional right to intervene,267 an application to intervene may still be denied if it is not made in a "timely" fashion.

Both the Federal Rules of Civil Procedure, which govern intervention motions in the federal district courts where election cases are heard, and HUD's FHAA regulations, which govern intervention motions in ALJ proceedings, allow for intervention only "[u]pon timely application."268 The HUD regulation states that an intervention motion is timely if it is submitted "within 30 days after the filing of the charge."269 The Federal Rules do not specify what constitutes a timely application, but the case law has identified certain factors—in addition to chronology—that are relevant to this issue, which is ultimately left to the sound discretion of the trial court.270

This timeliness requirement can pose a significant problem in FHAA cases because the divergence of the government's and the complainant's interests may not occur until the latter stages of a case.271 Indeed, it seems

265 The legislative history of the FHAA shows that Congress viewed complainants as generally tending to be people of modest means without a great deal of legal sophistication, see, e.g., supra notes 29-30, 36, 39 and accompanying text, which suggests that in order to be effective, communications directed to complainants by government lawyers must avoid legal jargon and be easy for a lay person to understand.

266 See supra notes 52, 58 and accompanying text.

267 In elected cases, the statute explicitly provides for "of right" intervention. See supra note 52 and accompanying text; see also United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416 (9th Cir. 1994); Presidio, 4 F.3d at 808 n.1; United States v. Country Club Garden Owners Ass'n, 159 F.R.D. 400, 402-03 (E.D.N.Y. 1995). The statute does not specifically authorize intervention in HUD proceedings, but the HUD regulations governing these cases do provide for such intervention. See infra notes 268-269 and accompanying text.

268 FED. R. CIV. P. 24(a); 24 C.F.R. § 104.430 (1996).

269 24 C.F.R. § 104.430.

270 See Country Club Garden, 159 F.R.D. at 403 (citing cases). According to a recent Second Circuit decision:

Timeliness defies precise definition, although it certainly is not confined strictly to chronology. Among the circumstances generally considered are: (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.


271 For example, in Soules, Presidio, and Baumgardner, the divergence of interests arose only after the trial court or ALJ had issued a final judgment. See supra note 264. The timeliness problem can also arise when the divergence of interests occurs at a late pretrial stage. See, e.g.,
inherent in the system that the most likely time for a significant divergence of interests to occur will not be at the early stages of a case, when the government lawyer’s principal task is to draft and file the complaint, but rather well along in the proceeding after that lawyer has had occasion to make some major strategic decisions about how to prosecute the case.

Although virtually all of the intervention motions based on conflicts of interest in FHAA cases have occurred late in the proceedings, every one of them has eventually been allowed. Indeed, this conflict of interests situation may present such a compelling claim for intervention that a court or ALJ should never reject it on tardiness grounds, at least if the complainant’s motion occurs reasonably soon after he or she learns of the government’s conflicting interests.

This argument could be extended to assert that the FHAA was intended to override any timeliness requirement for a complainant’s intervention in an ALJ or elected case, based on the fact that the statute explicitly requires a “timely application” for other types of intervention but omits this requirement in ALJ and elected cases. Congress certainly has the power to override the requirements of an otherwise generally applicable procedural rule when it sets up a remedial system in a civil rights statute. Nevertheless, the

---

272 It is possible for a divergence of interests to occur even at these early stages over such matters as who should be named as defendants, what relief to seek, and whether to demand a jury trial in an election case.

273 In at least two of these cases, however, the decision allowing intervention came only as a result of an appeal from an adverse trial court or ALJ decision. See *Presidio*, 4 F.3d at 807-08; *HUD v. Holiday Manor Estates Club*, Fair Housing—Fair Lending (P-H) ¶ 25,027, at 25,297-98 (Dep’t of Hous. & Urban Dev. Mar. 23, 1992) (appeal to the HUD Secretary); see also *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1415-16 (9th Cir. 1994) (reversing an “effective” denial of a motion to intervene). Furthermore, intervention in HUD proceedings such as *Holiday Manor* and *Soules* was allowed despite the fact that the complainants’ motions in those cases occurred more than 30 days after the filing of the HUD charge and therefore were beyond the period defined as timely by HUD’s own regulation. See *Holiday Manor Estates Club*, Fair Housing—Fair Lending (P-H) ¶ 25,027, at 25,297-98 (allowing intervention to prevent prejudice to complainant when HUD unexpectedly abandoned one of complainant’s “major contentions”); *HUD v. Downs*, Fair Housing—Fair Lending (P-H) ¶ 25,017, at 25,235 (Dep’t of Hous. & Urban Dev. Nov. 22, 1991) (expanding the 30 day period by authority of another regulation that permits ALJ enlargement of time periods “where necessary to avoid prejudicing the public interest or the rights of the parties” (citing 24 C.F.R. § 104.30(b))), aff’d *sub nom.* *Soules v. HUD*, 967 F.2d 817 (2d Cir. 1992).

274 For an example of judicial forgiveness of a rather substantial delay in a complainant’s intervention motion after the conflict-of-interests problem became known, see *Country Club Garden*, 159 F.R.D. at 401-04.

275 See 42 U.S.C. § 3613(e) (1994) (stating that the Attorney General is authorized to intervene in a private action “upon timely application”); id. § 3614(e) (stating that aggrieved persons are authorized to intervene in “pattern or practice” and certain other actions brought by the Attorney General “upon timely application”).

276 See id. § 3612(c), (o)(2). This argument was made in *Country Club Garden* but the court, finding the intervention motion to be timely, did not have to address it. See *Country Club Garden*, 159 F.R.D. at 403-04.

277 See *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980). In *General Telephone*, the Supreme Court held that the 1972 amendments to Title VII authorizing the EEOC to bring “class” suits on behalf of persons aggrieved by illegal employment discrimination were not subject to the
FHAA is not at all clear on this matter, and the fact that the HUD regulations do impose a timeliness requirement on intervention in ALJ cases suggests that such a requirement is not inconsistent with the statute.\textsuperscript{278} At the very least, therefore, the timeliness requirement of Rule 24 and the HUD regulations pose a potential problem for complainants who seek to protect their interests by attempting to intervene at a late stage of an FHAA case.

Furthermore, even if an aggrieved person is always allowed to intervene, the delay between the time when that person's interests diverge from those of the government and the moment when intervention is achieved may undercut a complainant's ability to protect his or her interests. The danger of this type of prejudice to the complainant's interests would occur in every situation in which the assertion of a right or interest—such as the jury trial demand in the \textit{Country Club Garden} case—depends on meeting a time deadline.\textsuperscript{279} It might also arise in cases in which the failure to take early action—such as deposing an about-to-be-unavailable witness who is crucial to the complainant's claim for damages—cannot be fully remedied at a later stage of the case. And it would occur in virtually every case in which the divergence of interests arises after a judgment is rendered by the trial court or ALJ—as in \textit{Presidio}, \textit{Soules}, and \textit{Baumgardner}—because at that point, the ability of a complainant to pursue or participate effectively in an appeal will likely be compromised unless he or she has already become a party to the case in the proceedings below.

Protection against this kind of prejudice to the complainant is a necessary third element of a workable triangular relationship under the FHAA. The complainant must obtain party status early enough in the case so that assertion of the complainant's particular interests may be made in an effective manner. Because it is impossible to predict in advance what these interests will be and how they might eventually diverge from those of the government, the only way to guarantee that the complainant's interests will

\textsuperscript{277} HUD's regulations interpreting the FHAA are entitled to deference as long as they are based on a permissible construction of the statute. See \textit{Presidio}, 4 F.3d at 809; NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 300-01 (7th Cir. 1992). See generally \textit{Chevron}, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (stating that courts should defer to agency interpretations of ambiguous statutes). Given the ambiguity in the FHAA concerning whether intervention in ALJ proceedings and election cases must be timely, HUD's regulation on this point would likely be determinative that such a timeliness requirement does, in fact, attach to these intervention motions.

\textsuperscript{278} For example, trial by jury in a federal civil case is waived unless a demand therefor is made within 10 days after service of the last pleading directed to an issue that is triable of right by a jury. See \textit{Fed. R. Crv. P.} 38(b).
The solution, therefore, is for Congress to amend the FHAA to provide for automatic intervention on behalf of aggrieved persons after the charge is filed in HUD proceedings and after the complaint is filed in elected cases. Automatic intervention at the initial stage of a HUD proceeding or elected case would not change the basic relationship between an aggrieved person and the government lawyer working on his behalf; it would merely reflect adoption of the shifting model of representation discussed above. As in the past, most cases would continue to be prosecuted solely by government lawyers for the benefit of both the government and the private complainant. This would only change when and if conflicts arose and the complainant chose to retain private counsel. The only difference occasioned by automatic intervention would be that when a divergence of interests between the aggrieved person and the government does occur, that problem could be solved quickly and without the possible prejudice to the complainant from delay. Without automatic intervention, however, the risk that an aggrieved person’s interests will be inadequately protected by his or her government lawyer will continue to exist in every HUD-charged case under the FHAA.

C. Congressional Choice

The ultimate responsibility for structuring the relationship between government lawyers and the aggrieved persons for whom they act under the FHAA lies with Congress—the only entity with the power to establish and adjust this relationship in virtually any way it chooses. Thus far, however, the congressional guidance on this subject has been quite limited, consisting only of what may be inferred from the statutory language that was adopted in 1988 to establish the HUD enforcement scheme. This language simply calls for HUD and DOJ lawyers to act “on behalf of” aggrieved persons in HUD proceedings and elected cases and also allows such persons to intervene in these cases. In the absence of a more explicit directive calling for government lawyers to “represent” private complainants in a full-fledged lawyer-client relationship, it was perhaps inevitable that HUD and DOJ lawyers would come to view their only real “client” in these cases as the government. To the extent that this system has led to situations in which aggrieved persons have received less satisfactory representation than the 1988 Congress intended, the only solution is for a subsequent Congress to indicate more explicitly how it wants this relationship to be adjusted.

Congress has, in fact, considered a number of proposals to amend the FHAA in recent years, but none has directly addressed the issue of repre-

\[280\] A less dramatic amendment would be for Congress to declare that intervention in these cases need not be “timely,” see supra notes 275-278 and accompanying text, but this would not solve the problem of potential prejudice from a delayed intervention as well as automatic intervention would.

\[281\] See supra notes 72-76, 79, 186 and accompanying text (discussing various statutory models adopted by Congress for providing lawyers for particular groups in the society).

\[282\] See supra notes 48-54, 59 and accompanying text.

\[283\] These proposals have included: (1) easing the qualification requirements for the “hous-
sentation. The most important proposal relating to the FHAA’s enforcement scheme, appearing as a little-debated provision of the 1996 appropriations bills for HUD and certain other agencies, called for all of HUD’s fair-housing activities to be transferred to the Justice Department.\textsuperscript{284} No Congressional hearings were held on this transfer proposal, which was opposed by both HUD and Justice.\textsuperscript{285} The only rationale offered for the proposal—to achieve consistency in federal civil rights enforcement policy—appeared in a small section of the conference report that accompanied the overall appropriations bill.\textsuperscript{286} The House and Senate passed this bill in late 1995,\textsuperscript{287} but President Clinton vetoed it on grounds unrelated to its fair housing provisions.\textsuperscript{288} A few months later, a similar transfer provision was included in both the House- and Senate-passed versions of a new omnibus appropriations bill. Under pressure from the White House and in response to opposition from civil rights and business groups, however, the House and Senate conferees eventually dropped this provision from the bill that ultimately became law.\textsuperscript{289}
This performance of the 1995-1996 Congress is not encouraging to those who seek additional congressional guidance on the problems discussed in this Article. The 104th Congress came very close to making a major change in the FHAA's enforcement system. It did this without holding hearings on or providing any detailed rationale for this change, much less supplying any new guidance on the issue of what relationship government lawyers and aggrieved persons should have under the FHAA.

This unfortunate legislative experience, however, may eventually produce a positive result. If the concerns underlying the 1995-1996 transfer proposal exist in a future Congress, those concerns might manifest themselves in public hearings that could result in a deliberative examination of the FHAA enforcement scheme. Such hearings might, in turn, address the proper relationship between government lawyers and their private "clients," and in particular, the need to provide automatic intervention or another appropriate mechanism to ensure the proper representation of aggrieved persons in FHAA cases.

Conclusion

In the FHAA, Congress added "teeth" to the federal fair housing law by creating a new enforcement system for administrative complaints that calls for government lawyers to prosecute cases on behalf of private individuals aggrieved by discriminatory housing practices. This system has had the desired effect of producing a substantially elevated complaint load, which has led to the filing of hundreds of charged cases. These cases are then tried either by HUD lawyers before HUD ALJs, by Justice Department lawyers in federal court, or by lawyers employed by state and local governments in the agencies or courts of those jurisdictions.

In virtually every one of these cases, the potential exists that the interests of the private complainant may diverge from those of the government agency that employs the prosecuting attorney. This situation raises serious professional issues for the government lawyers involved. Although many of these cases have been concluded satisfactorily without any conflicts developing, a number produced serious divergence-of-interest problems. In the cases in which the divergence problem became real, HUD and Justice Department lawyers have invariably responded by identifying their sole "client" as the government and abandoning the private complainant on whose behalf they have been working, albeit with an effort to alert the complainant of the need to secure private counsel and to intervene in the case to protect his or her interests.

The basic problem in all of these cases is that Congress created a system of triangular representation in the FHAA without providing sufficient guidance to the government lawyers as to how they should resolve conflicts of interest between their agency-employers and the private individuals on

---

290 The principal proponents of the 1995-1996 transfer proposal were Congressman Jerry Lewis (R-Cal.) and Senator Christopher S. Bond (R-Mo.), the respective chairs of the House and Senate appropriations subcommittees dealing with HUD during 1995-1996. They serve in those same capacities in the 1997-1998 Congress.
whose behalf they are directed to act. Although Congress was concerned with the plight of aggrieved persons whose inability to secure private counsel was undercutting enforcement of the FHA, and although the FHAA, by providing government lawyers to pursue private interests, went further than any other comparable civil enforcement scheme, Congress stopped short of directing HUD and DOJ lawyers to "represent" private complainants to the point of ignoring the interests of their agency-employers. Under these circumstances, it was inevitable that government lawyers would view their primary responsibility as representing the government and would therefore provide less in the way of representation for private complainants than these individuals or Congress might reasonably have expected.

The result is a less than satisfactory system for using government lawyers to help private complainants enforce the FHA. Congress could remedy this problem by providing more explicit directions to the lawyers involved as to how the problems created by the FHAA's triangular representation system should be resolved. If this asks too much of a legislative process whose recent history suggests that focused, rational attention to this problem is unlikely to occur, then Congress should at least amend the FHAA to provide for automatic intervention by aggrieved persons at the beginning of all HUD-charged cases.