Various court documents in play

- Settlement agreement
  - Incorporated in order of dismissal
- Stipulated dismissal
  - Conditional stipulation of dismissal w/retained jurisdiction
- **Consent decree**
  - Dual character
    - Agreement of parties
    - Court reviews for fairness and enters as a judgment
- Court-ordered injunction
  - Proposed injunction
Why Consent?

• Creative problem solving
• Broader, more specific relief than court may order
• Avoid time, expense and risk of litigation
• Avoid admissions of wrongdoing
• Greater commitment to implementation
So, what’s the problem?

• Federalism concerns
  – State governors—”Our hands are being tied.”
  – State legislatures—”Get permission.”
  – U.S. Congress—”We hear you.”
    • E.g. Sunshine for Regulatory Decrees and Settlements Act of 2012 (not enacted)
  – U.S. Supreme Court (5 members) – “We hear you, too.”
Notable Supreme Court Decisions

  - Flexible standard
  - *Significant* change in facts
    - “substantially more onerous”
    - “unforeseen obstacles”
    - “detrimental to public interest”
    - defendant has tried to comply
  - *Significant* change in law
    - Must: federal law makes obligation impermissible
    - May: statutory or case law has changed
Notable Supreme Court Decisions

  – Affirmed district court authority to enforce “highly detailed” consent decree

**DICTA:**
  – Return responsibility promptly to state officials
  – Elected officials bring new insights
  – “If State establishes a reason to modify the decree, the court should make the necessary changes...”
Notable Supreme Court Decisions

  – Concern with institutional reform litigation
  – Concern with “dictating” state decision making
  – Perpetual oversight improper absent clear record of ongoing violations
Notable Supreme Court Cases

• *Horne* did not overrule previous cases
  – Burden on party seeking modification
      – Compliance must be well-established, ongoing
  – Standard on appeal: abuse of discretion
Notable Supreme Court Cases

• *Horne* did not overrule previous cases

• But judges matter
  
  

  – *Hawkins v. Comm’r*, 665 F.3d 25 (1st Cir. 2012)
  
Suggested Attorney Behavior:

• DON’T TAKE THE BAIT
  – “We need to be sued”

• NO PUFFING
  – Let complaint speaks for itself

• KNOW WHAT YOU WANT
  – Before complaint is filed

• EXPECT THE HARD PART TO START AFTER ENTRY OF ORDER/DECREE
Considerations for Consent Decrees

• Class actions
  – Fed. R. Civ. P. 23(c)(3)

• State critical facts, considerations, goals

• Specify implementation steps

• Define compliance
  – Where possible, use objective, quantifiable standards
Considerations for Consent Decrees

• Reporting
• Monitoring
  • Attorney fees
• Future court involvement
• Duration and retained jurisdiction
  • Permanent injunction
• Grounds for modification/termination
  • Discovery
Consent Decree Standards

- Grounds for modifying/terminating in decree or
- Fed. R. Civ. P. 60(b)
  - Motion required
  - Standard: “upon terms that are just”
  - Six grounds for relief
Consent Decree Standards

• Fed. R. Civ. P. 60(b)(5)
  – judgment satisfied
  – a judgment on which decree is based has been reversed/vacated
  – *no longer equitable*

• Case-specific review
  – Equitable discretion with trial court
  – Focus on 4 corners of decree & events after decree