

# THE UNITED STATES DEPARTMENT OF JUSTICE'S OFFICE OF PROFESSIONAL RESPONSIBILITY

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## I. INTRODUCTION

The United States Department of Justice's Office of Professional Responsibility (OPR) was created in 1975 as one response to the ethical abuses and misconduct committed by Justice Department officials during the Watergate scandal. OPR's mission is to hold accountable Justice Department attorneys, and law enforcement agents who work with those attorneys, who abuse their power as prosecutors or otherwise violate the high ethical standards required of the nation's chief law enforcement agency. OPR's mission is also to exonerate those who have been wrongfully accused of misconduct. OPR is an independent office that reports to the Attorney General and the Deputy Attorney General. It is staffed and led by career Justice Department attorneys.

In this article, I describe the history of OPR. I also discuss major reform legislation enacted in 1978, including the Ethics in Government Act, the Civil Service Reform Act, and the Inspector General Act, directed also at preventing the abuses of power that occurred during Watergate. With respect to the Justice Department particularly, in addition to OPR, there are four other components and offices that focus on ensuring that Department attorneys adhere to the highest ethical standards. They are the Public Integrity Section of the Criminal Division, the Office of the Inspector General, the Professional Responsibility Advisory Office, and the Department's Ethics Office. I discuss the function of each of these offices, as well as the Department's substantial training programme for its attorneys. In addition, I detail the sources of ethical and professional obligations with which Department attorneys must comply. Finally, I describe the organization and function of OPR, the most common kinds of misconduct Department attorneys commit and the types of attorneys who most often engage in misconduct, as well as various kinds of cases handled by OPR.

## II. BRIEF OVERVIEW OF THE FEDERAL SYSTEM OF GOVERNMENT AND THE JUSTICE DEPARTMENT

By way of brief background, there are three components of the federal system of government in the United States. The Legislative Branch, consisting of the Congress, which enacts the laws, including the criminal laws; the Executive Branch, consisting of the President and Executive Agencies and Departments, including the Justice Department, which is primarily responsible for ensuring that the laws are enforced; and the Judicial Branch, including all federal courts, which hear cases involving alleged violations of federal laws, arising in both criminal and civil cases.

All federal prosecutors as well as most of the attorneys who represent the United States in civil litigation are employed by the Justice Department. The Justice Department is headed by an Attorney General who is appointed by the President and confirmed by the U.S. Senate. The Attorney General is a member of the President's cabinet. The current Attorney General is Eric Holder. He previously served as Deputy Attorney General from 1997 – 2001, during President Clinton's administration. There are an additional thirty-seven political appointees who, like the Attorney General, are nominated by the President and confirmed by the Senate, and who head up various offices and divisions within the Justice Department. Most of the prosecutors and other Department attorneys are career civil servants. That is, their employment does not depend on which political party is in power. Indeed, it is unlawful to consider the political affiliation of these employees in any personnel decisions.

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The federal judiciary is a separate and independent branch of government. Prosecutors, the Justice Department and the Executive Branch have no power to tell judges how to handle cases, or to prescribe or enforce rules of conduct or ethics for judges. Congress enacted the Code of Conduct for U.S. Judges but the Judicial Conference of the United States, not the Justice Department, enforces it. However, if a judge engages in criminal conduct such as taking a kickback or a bribe, the Justice Department has authority to investigate and prosecute the criminal conduct as it does with respect to any person who violates the law.

Justice Department attorneys direct criminal investigations and handle prosecutions involving alleged violations of federal laws. Department attorneys also defend the United States government in nearly all civil actions brought against the government and its agencies. In addition, they provide legal advice to investigators, Executive Branch agencies and the White House. There are about 10,000 Department attorneys, and about 110,000 Department employees in all. Criminal investigations are often handled by the Federal Bureau of Investigation (FBI), which is a component of the Justice Department. The FBI employs about 25,000 people, including 10,000 special agents stationed in FBI Field Offices throughout the country. The Justice Department has hundreds of offices throughout the United States, including ninety-four separate U. S. Attorneys' Offices, each located in its own district and each headed by a U.S. Attorney who is nominated by the President and confirmed by the Senate. The U.S. Attorney is the chief law enforcement officer within the district. The attorneys who work in the U.S. Attorneys' Offices are called Assistant U.S. Attorneys. With such a large number of offices and attorneys in the Justice Department, it is very important to have clear ethical rules and policies to govern the exercise of prosecutorial power and the day-to-day actions of prosecutors. It is also essential to ensure that those rules are enforced fairly and administered consistently throughout the country. When similar issues are handled differently by the same or different offices, there is a substantial possibility of creating a perception among the public and within the Justice Department of injustice, unfairness and (possibly) even corruption.

### **III. HISTORY OF THE CREATION OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY**

The creation of the Office of Professional Responsibility dates back to one of the more infamous episodes in modern American history: the events that led to the resignation of then President Richard Nixon and that involved the unprecedented misuse of the Justice Department by the White House for partisan political purposes. On New Year's Day in 1975, a former Attorney General of the United States and head of the Justice Department from 1969 to 1972, John N. Mitchell, along with other former Justice Department officials, was convicted of conspiracy, perjury and obstruction of justice in connection with the break-in and bugging of the Democratic National Committee (DNC) Headquarters located in the Watergate Office Building in Washington, DC, and the subsequent cover-up of those crimes. What became known as the Watergate scandal began in June 1972, when five men were arrested after breaking into the DNC Headquarters at the Watergate. It was later discovered that this was the second of two break-ins at the DNC Headquarters to plant electronic listening devices in its offices to gain intelligence for the Republican presidential campaign. At the time of the arrests, one of the men was carrying an address book containing the name and telephone number of E. Howard Hunt, a White House aide who worked for a high-ranking assistant to President Nixon.

The subsequent investigation into that break-in brought to light an immense pattern of corruption and abuses of government power by President Nixon and his aides, including campaign fraud, political espionage and sabotage, illegal break-ins, improper federal tax audits by the Internal Revenue Service, illegal wiretapping on a massive scale by the FBI, and a secret "slush fund" laundered in Mexico to pay those who conducted these operations. It was a grand scheme to use the power of the government for improper partisan political purposes, that is, to keep the Republican Party and President Nixon in power.

After nearly two years of investigation, the fact that President Nixon had tape recorded conversations in the White House during his years in office came to light, and Archibald Cox, who had been appointed special prosecutor to conduct the Watergate investigation, issued subpoenas for certain of the tapes. A special prosecutor from outside the Justice Department had been named precisely because of concern over actual and perceived conflicts of interest if a Justice Department prosecutor handled the investigation. After a lengthy legal battle involving broad claims of Executive Privilege by the White House, the U.S. Supreme

Court ruled that President Nixon was required to turn over the tapes for use in the special prosecutor's criminal investigation. The incriminating tape recordings were used in subsequent prosecutions of government officials, and cited by the Judiciary Committee of the House of Representatives in its articles of impeachment against President Nixon. Before the full House of Representatives could vote on impeachment, President Nixon resigned and was succeeded by then Vice President Gerald Ford. Shortly after assuming office, Ford pardoned Nixon of "all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in . . .".

As a result of the various schemes that were discovered, two Attorneys General were convicted or pled guilty to crimes. As noted, President Nixon's first Attorney General, John Mitchell, was convicted of conspiracy, obstruction of justice and perjury. The tape recordings proved that Mitchell had participated in planning the Watergate break-ins and had repeatedly assisted in trying to cover up the White House's involvement in the scheme after the arrests.

Richard Kleindienst was Deputy Attorney General under John Mitchell. When Mitchell stepped down to run Nixon's campaign for reelection in 1972, Kleindienst was nominated to succeed Mitchell as Attorney General. During his confirmation hearing before the Senate Judiciary Committee, Kleindienst testified in response to questioning that no one in the White House had interfered with his decision making while he was Deputy Attorney General in an antitrust case against International Telephone and Telegraph (ITT). ITT had, at about that time, offered to make a very large contribution to help pay for the Republican National Convention at which President Nixon would be nominated for re-election. Kleindienst had testified to the Committee, "In the discharge of my responsibilities as Acting Attorney General in [the ITT case], I was not interfered with by anybody at the White House. I was not importuned. I was not pressured. I was not directed." *NY Times*, 17 May 1974. During the Watergate investigation, the White House's direct role in Kleindienst's decision came to light and he was forced to resign as Attorney General, and in 1974, Kleindienst pleaded guilty to testifying falsely to Congress. In entering his guilty plea, Kleindienst admitted that President Nixon had telephoned him and ordered him to drop the antitrust case against ITT. In the tape recording of that call, now on the Internet, Nixon ordered Kleindienst to drop the case, not to file a brief due in court the following day, and to "stay the hell out of it."

Kleindienst's successor, Attorney General Elliot Richardson, held office for only a few months. In what became known as the Saturday Night Massacre because the events occurred on a Saturday, Richardson resigned rather than follow President Nixon's order to fire special prosecutor Cox, who was then insisting on being given access to the incriminating White House tape recordings. Richardson's Deputy Attorney General, William Ruckelshaus, also resigned rather than fire the special prosecutor. The official who was third in command of the Justice Department at the time, Solicitor General Robert Bork, ultimately fired Cox. President Nixon then promptly abolished the special prosecutor's office and directed the FBI to seal its records. The public outcry and Constitutional crisis created by the Saturday Night Massacre forced the White House to agree to the appointment of a second special prosecutor, Leon Jaworski, and ultimately led to the resignation of President Nixon.

Upon assuming office, President Ford inherited a Justice Department that was demoralized and widely disrespected. A 1975 law review article (50 N.Y.U. L. Rev. 382 1975) observed: "Except, perhaps, for the Presidency itself, no government institution suffered greater dishonor from Watergate revelations than did the Justice Department. The criminal conduct of incumbent and former Attorneys General, the early mishandling of the Watergate investigation and discrediting testimony before the Watergate Committee - such factors produced a widespread perception that politics and Justice had become intolerably intertwined."

As a first step toward turning the Justice Department around, President Ford appointed Edward Levi to be Attorney General. Levi was a well-respected university president and distinguished legal scholar with no background in politics. He was not a stranger to Washington, however. He had experience working in the Antitrust Division of the Justice Department earlier in his career, and working in Congress as Chief Counsel to the House Committee on Monopolies and with the White House on two White House task forces in the 1960s.

Attorney General Levi was immediately faced with competing proposals, from Congress and elsewhere,

about how the Justice Department should be restructured to prevent Watergate-style abuses of prosecutorial power in the future, and to give the Department a measure of independence from the White House. These proposals included taking the Attorney General out of the President's cabinet and the Justice Department out of the Executive Branch so it would not report to the President. Another would have required the Attorney General, the Deputy Attorney General and the several Assistant Attorneys General (who head up various offices and components within the Department) to belong to a different political party than the President. A third proposal would have split the Department into two parts, one headed by the Attorney General which would serve as legal advisor to the President and the other headed by a Chief Prosecutor responsible for law enforcement. Yet another would have established a permanent Special Prosecutor outside the authority of the Attorney General and the Justice Department.

In his first year in office in 1975, as one response to the Watergate abuses and to these proposals, Attorney General Levi issued an order creating the Office of Professional Responsibility and directed it to "receive and review any information or allegation concerning conduct by a Department employee that may be in violation of law, regulations or orders, or applicable standards of conduct or may constitute mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety." The mission of OPR was "to ensure that Departmental employees continue[d] to perform their duties in accord with the professional standards expected of the nation's principal law enforcement agency." To head the office, Attorney General Levi appointed Michael Shaheen, a career Department of Justice lawyer. Shaheen served as the Counsel for Professional Responsibility and head of OPR for more than 20 years, until retiring from that post at the end of 1997.

The Attorney General also created the Public Integrity Section within the Criminal Division to strengthen the Department's ability to combat corruption through the prosecution of elected and appointed public officials at all levels of government, state and federal, who are involved in actual violations of federal law. The Public Integrity Section also has exclusive jurisdiction over allegations of criminal misconduct by federal judges and monitors the investigation and prosecution of election fraud and conflict-of-interest crimes. Thus, Public Integrity Section attorneys prosecute selected cases against federal, state and local officials, and are available as a source of advice and expertise to other Justice Department prosecutors and investigators throughout the country.

The Public Integrity Section has been highly successful in handling such cases. Most importantly, the creation of a special unit in Washington has had the effect of removing potential conflicts of interest that may exist when local prosecutors investigate local lawyers and officials, and of increasing public trust in the system of justice as it applies to public officials. Because the office consists of career prosecutors who make decisions based on an objective set of standards, the Public Integrity Section can and does make critical decisions without regard to political considerations. It also brings uniformity to the investigation of corruption charges involving federal, state and local officials throughout the country.

With these affirmative steps, Attorney General Levi was able to resist Congressional attempts to split the Justice Department or establish prosecutorial and other law enforcement authority outside of the Executive Branch and the control of the President.

Following the election in 1976, Democratic President Jimmy Carter came into office and he, along with a newly elected Congress, was intent on reforming the federal government to prevent the abuses of Watergate from recurring. Three very important reform measures were enacted in the same month in 1978, and require mention here to put OPR's role in perspective. The first was the Ethics in Government Act of 1978 (Pub. L. No. 95-521, 92 Stat. 1824 (1978)). In addition, Congress passed the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111 (1978)), and the Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101 (1978)). Each of these laws has had a significant impact on preventing the abuse of government power so evident in Watergate, and the Ethics in Government Act and the Civil Service Reform Act provide many of the ethical obligations with which Department attorneys must comply and which OPR enforces.

#### **IV. POST-WATERGATE MAJOR REFORM LEGISLATION**

##### **A. Ethics in Government Act**

The Ethics in Government Act was intended to “increase public confidence in the level of integrity of federal government officials, to deter conflicts of interest from arising, and to stop unethical persons from entering public service.” Through the creation of the Office of Government Ethics (OGE), the Act formalized and institutionalized a consistent, ongoing programme to provide all federal government employees with clear rules of conduct, access to professional ethics advice and procedures to resolve questions of conflict of interest as they arose. The OGE is headed by a Director who is appointed by the President and confirmed by the Senate, and serves a five year term. The fact that his appointment is for a term of years, rather than at the pleasure of the President, confers a measure of independence on the director.

The Ethics in Government Act has several important parts. First, in order to guard against and identify potential conflicts of interest, the law mandates annual public financial disclosure reporting for senior government officials, both political and career. OPR’s Counsel and Deputy Counsel are among those who must file such reports. The annual reports must include the listing of certain gifts, financial holdings, outside income, positions in organizations and debts. The annual reports must also include the sources of a spouse’s income, and certain assets bought, sold or held by a spouse or dependent child of the employee. The reports are reviewed by the employee’s supervisor and by ethics officials in his or her agency to identify potential conflicts of interest with respect to the work each employee performs. These detailed reporting requirements, for example, would quickly disclose to the Justice Department whether an employee was making official decisions that could affect his or her finances or was making investment decisions based on official information concerning a specific individual or entity. In addition, these financial disclosure forms must be available, upon request, to the public and news media. Although intrusive, these reporting obligations are deemed necessary to guard against conflicts of interest by highly-placed officials. The reporting requirement also applies to Members of Congress, federal judges and certain senior staff members of both, although the OGE is not responsible for the contents or enforcement of those reports.

Certain other government employees are required to file annual confidential and more abbreviated disclosure reports. With respect to the Justice Department, a Confidential Financial Disclosure Report must be filed by all non-executive employees whose duties require them to participate personally and substantially through decision or the exercise of significant judgment in a matter which could have an economic impact on a non-federal entity. This includes any employee involved in contracting or administering grants, regulating or auditing any non-Federal entity and, in some cases, investigating or prosecuting a case. All OPR attorneys fall within this category and must file the annual report. The reports are reviewed by the head of their offices to identify possible conflicts of interest with their work assignments. The reports remain confidential, however (5 U.S.C. § 2634.907).

Second, the OGE is responsible for reviewing the financial disclosure forms prepared by persons the President nominates for appointments that require the consent of the Senate, including all cabinet members and the politically appointed executives who report to them. The law requires that nominees to positions that require confirmation by the Senate transmit their financial disclosure reports to OGE. The Director of OGE reviews the forms, advises the nominee if corrective action is necessary and then, as appropriate, certifies to the Senate that reports filed with the OGE are “in compliance with applicable laws and regulations.” This process has become so much a part of the “vetting” of nominees that the Senate confirmation committees normally do not schedule a hearing on the candidate until the Director of OGE certifies that the nominee’s financial disclosure report is in order.

Third, the Ethics in Government Act amended and expanded the legal restrictions on the jobs federal employees may accept after leaving government employment and on their future dealings with the government. Those restrictions generally prevent the employee from “switching sides” after leaving government service. Thus, a former employee is permanently prohibited from representing anyone else before the government on a particular matter involving specific parties in which the employee participated personally and substantially while working for the government. A former employee is prohibited for two years from representing another person before the government on a particular matter involving specific parties that was pending under his or her official responsibility during the employee’s last year of government service,

even if he did not participate in the matter himself. In addition, a senior employee is generally prohibited for one year from representing another person before the agency in which he or she served during his last year of government service.

Finally, the law gives OGE the authority to develop additional standards regarding conflicts of interest and ethics in the Executive Branch. The OGE did so in the form of regulations entitled Standards of Ethical Conduct for Employees of the Executive Branch (Standard of Conduct) which are applicable to all executive branch employees.

Finally, the law provided for the appointment of an Independent Counsel who would, under specified circumstances, investigate allegations of wrongdoing by certain members of the Executive Branch, including the President. That provision, reenacted several times, has since expired.

### **B. The Civil Service Reform Act**

The Civil Service Reform Act (CSRA) was the second piece of major reform legislation enacted in 1978. Among the high crimes and misdemeanours with which President Nixon was charged in the articles of impeachment voted by the House Judiciary Committee in July 1974, was the use of governmental power to harass and intimidate political opponents. The Final Report of the Senate Select Committee on Presidential Campaign Activities addressed abuses in grant and regulatory programmes directed at punishing the “enemies” of the president. Employees were ordered to install illegal wiretaps, to improperly award contracts, and to release grant funds to unqualified recipients. After committee hearings, Congress concluded that there had been extensive violations of civil service laws and procedures.

The Civil Service Reform Act sought to correct that situation by protecting federal employees and restraining the ability of officials to abuse governmental power in the future. First, the Act articulates aspirational “Merit System Principles” intended to condemn abuses of authority for political or other improper purposes. In brief, the principles call for recruitment, selection and advancement in employment based on ability, knowledge and skills, after fair and open competition. They specify fair and equitable treatment of all applicants and employees without regard to political affiliation, race, colour, religion, national origin, sex, marital status, age, or handicapping condition, and with regard for their privacy and constitutional rights. They further provide for protection of employees from arbitrary action, personal favoritism, or coercion for partisan political purposes. They also provide protection for “whistleblowers” who lawfully disclose information pointing to mismanagement, waste or violation of any law, rule or regulation. Finally, they prohibit any government official from using official authority or influence for the purpose of affecting the results of an election.

The law also establishes a list of “Prohibited Personnel Practices,” which form enforceable standards. These principles forbid any official with authority to make or recommend personnel actions to discriminate against an employee or applicant based on race, colour, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. They also prohibit the consideration of employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics. They forbid the coercion of political activity of any person, and prohibit the willful obstruction of anyone from competing for employment and improperly influencing anyone to withdraw from competition. They also prohibit reprisal for whistleblowing. In addition, they prohibit nepotism and discrimination based on personal conduct which is not adverse to on-the-job performance.

### **C. The Inspector General Act of 1978**

The third piece of reform legislation was the Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101 (1978)). In the United States’ system of government, Congress has the authority to appropriate funds for all government agencies and programmes, and the oversight power to ensure that those funds are properly expended. In a series of hearings in 1977, Congress concluded that “fraud, abuse and waste in the operations of federal departments and agencies and in federally-funded programmes are reaching epidemic proportions,” and further that “[t]he federal government has . . . failed to make sufficient and effective efforts to prevent and detect fraud, abuse, waste and mismanagement in federal programmes.” S. Rep. 95-1071, S. Rep. No. 1071, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1978, 1978 U.S.C.C.A.N. 2676, 1978 WL 8639 (Leg. Hist.). The Inspector General Act was enacted to correct these problems. The law created Inspectors General in thirteen executive agencies with the authority to, among other things, conduct, supervise, and co-ordinate

audits and investigations relating to the programmes and operations of the agency; make recommendations to improve the economy and efficiency of programmes and operations administered by the agency; and keep the agency head and Congress “fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programmes and operations, . . . recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action” (5 U.S.C. App. 3, § 4).

The Act gave Inspectors General their own staffs and budgets and a level of independence from the agency head to which he or she reported. Although appointed by the President with the consent of the Senate, Inspectors General may not be removed by the President unless the agency head gives written notice to Congress of the reason for the removal. The Act also limits the authority of the agency head vis-a-vis the Inspector General such that the agency head “shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[er]na during the course of any audit or investigation.” The act also requires all Inspectors General to issue semiannual reports of their activities to the agency head, and the agency head must transmit the Inspector General’s report to Congress within thirty days. The agency head may comment on the Inspector General’s report, but may not change it.

The Inspectors Generals’ relationship with Congress has been a source of controversy since the Act was passed. In 1978, the Justice Department successfully argued that it would be inappropriate to place an Inspector General, a law enforcement official with reporting obligations to the legislative branch, in an executive branch agency whose business is law enforcement, an inherently executive branch function, and whose head, the Attorney General, is the highest ranking law enforcement official in the country. In addition, the Justice Department argued that OPR already existed and had broad authority and responsibility to conduct investigations and “monitor the integrity and professionalism of the Department.”

Nearly a decade later, however, in 1986, Congress again proposed to establish an Inspector General in the Department of Justice along with several other agencies that also had been exempt from the original Act. For similar reasons, the Department opposed the change. In a compromise, the Congress in 1988 created an Inspector General for the Justice Department, but reserved to OPR jurisdiction over certain misconduct (Pub. L. 100-504). Thus, the Act requires the Inspector General to “refer to the Counsel, Office of Professional Responsibility of the Department, for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigator, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct . . .” (5 U.S. C. App. 3, sec. 8E).

Thus, in 1988, the mission of OPR was codified by statute and narrowed to focus on the most serious types of allegations against attorneys and criminal investigators and agents working with those attorneys. In the 1990s, further refinements were made to OPR’s and the Inspector General’s respective jurisdictions. As a result, OPR’s current jurisdiction extends to “allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ-OPR.” In addition, OPR has authority to pursue special investigations as assigned by the Attorney General; allegations of reprisal against any employee for reporting misconduct to OPR; and complaints by FBI employees of retaliation for whistleblowing.

As I will discuss more fully below, many of the obligations imposed by the Ethics in Government and Civil Service Reform Acts provide the basis for misconduct investigations conducted by OPR, the OIG and the Public Integrity Section of the Justice Department.

## **V. ETHICS ENFORCEMENT WITHIN THE DEPARTMENT OF JUSTICE**

As the history of abuses of governmental power that led to the creation of OPR and enactment of the reform legislation detailed above makes clear, ethics enforcement is essential to ensure that Department officials working with career Justice Department attorneys do not abuse for partisan political or other improper purposes, the unique power they exercise as prosecutors, but rather exercise it fairly and

impartially. Ethics enforcement is also important to ensure that Department attorneys conduct themselves in accordance with the myriad other professional obligations governing their day-to-day activities as attorneys. Equally important, ethics enforcement is essential to demonstrate to the public that the Justice Department adheres to the rule of law and not to the will of the officials who happen to hold office when that will contravenes the rule of law. Thus, ethics enforcement is important both to ensure that Justice Department attorneys act ethically in performing their jobs and that the public knows that they do so.

The Justice Department's commitment to the maintenance of high ethical conduct by its attorneys is demonstrated by the fact that it has five separate offices that handle ethics issues, as well as a significant training programme. I have already discussed the creation of the Office of Professional Responsibility, the Public Integrity Section in the Criminal Division, and the Office of the Inspector General. Those offices primarily focus on investigating allegations of ethics violations that have already occurred. The Professional Responsibility Advisory Office (PRAO) and the Department Ethics Office, on the other hand, are focused on providing ethics advice to all Department employees prior to any allegations having arisen. In addition, the Department makes available throughout the year a large array of training courses for attorneys in a variety of settings, and recently adopted a policy of mandatory annual Professionalism Training.

#### **A. Professional Responsibility Advisory Office (PRAO)**

This office of about twenty-five attorneys and support staff was established by the Department in 1999 to ensure the provision of prompt and consistent advice to Department attorneys on issues related to professional responsibility. By law and Department policy, all Department attorneys must be duly licensed and authorized to practice law as an attorney by at least one state bar and they must comply with that state bar's Rules of Professional Conduct as well as the rules of the court before which they appear. PRAO was created to provide Department attorneys with advice concerning compliance with the various state bar rules. For example, most state bar rules prohibit an attorney from contacting a person about a matter regarding which the person is represented by a lawyer unless the lawyer consents or the contact is authorized by law. If a prosecutor is not sure whether it would be considered "authorized by law" under a particular state's rules to allow a law enforcement officer working undercover in an investigation to remain in contact with a criminal suspect who has a lawyer, PRAO is available to advise on whether and how the prosecutor may do so. Each U.S. Attorney's Office and other component within the Department has an attorney who serves as a Professional Responsibility Officer, or PRO, trained by PRAO, who provides advice within the office and acts as a liaison to PRAO.

If a Department attorney seeks advice from PRAO, provides all relevant information pertaining to the issue in question, and follows all the advice given but is later found by a court, or is otherwise alleged to have engaged in misconduct, OPR will not hold that attorney responsible for any wrongdoing. This policy is intended to encourage Justice Department attorneys to seek counsel and advice from PRAO or their PRO to do the right thing before they act, rather than taking a chance and running afoul of the ethics rules.

#### **B. Justice Department Ethics Office**

As noted, the Office of Government Ethics promulgated the Standards of Conduct and provides ethics advice and opinions with regard to those standards. Those standards cover such areas as receipt of gifts and entertainment, travel, conflicts of interest, financial disclosure requirements, outside employment and activities, political activities, procurement integrity, misuse of position and government resources and restrictions on post-government employment.

The standards may be supplemented by agencies with OGE's approval and the Justice Department has adopted several additional standards that specifically relate to attorneys. They include a provision prohibiting an employee from participating in a criminal investigation or prosecution if the employee has a personal or political relationship with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or with any person or organization which the Department attorney knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

An employee who believes that his or her participation might be prohibited by the rule must report the matter to his or her supervisor. If the supervisor agrees, he or she must relieve the employee from further

participation in the matter unless the supervisor determines, and records in writing, that the employee can remain impartial and professional, and that his or her participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

Another pertinent Justice Department standard of conduct prohibits employees from engaging in outside employment that involves the practice of law, without obtaining a waiver from the Department, unless the work is uncompensated and in the nature of community service, or unless it is on behalf of the employee, his or her parents, spouse or children. It also prohibits employees from engaging in any criminal matter, litigation, investigation, grants or other matters in which the Justice Department is or represents a party, witness, or litigant, investigator or grant-maker.

The Justice Department's Ethics Office is also responsible for administering the Department-wide ethics programme and for implementing policies on ethics issues. That office also provides individual advice and periodic training to all Department employees on compliance with the Standards of Conduct and the Department's supplemental standards. Similar to the PRAO structure, each component and office has a Deputy Designated Agency Ethics Official (a DDEO) who is responsible for administering the ethics programme within the component, and who acts as a liaison to the Department's Ethics Office.

### **C. Ethics Training for Department of Justice Attorneys**

As noted, Department attorneys are required to be licensed to practice law by at least one state bar licensing authority. Many state bar licensing authorities have annual continuing legal education (CLE) requirements, such that licensed attorneys in that state must fulfill a certain number of hours of legal training, often including ethics training. The Justice Department has a training center, the National Advocacy Center (NAC), in Columbia, South Carolina, which offers training year round in a variety of subjects, including ethics, many of which provide CLE credit for the attorneys attending.

In addition, in 2008, the Department adopted a new policy on Professionalism Training for its attorneys. In announcing the new policy, the Attorney General noted, "[t]here are few priorities that are more important to the Department's mission than ensuring that we are properly trained so that we may continue to demonstrate the highest levels of ethical conduct and professionalism for which the Department is known." The new policy applies to most Department attorneys and requires them to take at least four hours of professionalism training each calendar year, including at least two hours of Justice Department professional responsibility, one hour of government ethics, and one hour of sexual harassment and non-discrimination or equal employment opportunity training. The Professionalism Policy is a Department requirement and not tied to the requirements of any individual state bar. Department attorneys may satisfy the Professionalism Policy's requirements through training conducted by their component, courses at the NAC, or by watching training videos offered by the Department's Office of Legal Education and available via each attorney's desktop computer. Department attorneys are required to certify at the end of each calendar year to their component's management that they have complied with the Professionalism Policy and its requirements.

In addition, the Department provides training targeted at specific issues as they arise. For example, earlier this year, in a much-publicized decision, Attorney General Holder dismissed the prosecution against former Alaska U.S. Senator Ted Stevens, in which he was charged with making false statements in his financial disclosure report (discussed above). While Senator Stevens had been convicted by a jury of all the charges against him, the Department later learned that, prior to trial, prosecutors apparently had not disclosed to the defence all impeachment evidence, as is required by the Constitution, state bar rules and Department policy. In this case, they did not turn over to defence counsel notes that contradicted testimony from an important government witness. As a result, defence counsel did not have those notes available at trial for their cross-examination of the witness. Under the U.S. system of justice, the question is not whether Senator Stevens was in fact guilty; the question is whether he had been fairly convicted under our Constitution and the rules of criminal procedures. Because these assurances of a fair conviction were lacking since not all impeaching evidence had been disclosed, the Attorney General dismissed the case. Two consequences flowed from the Senator Stevens case for our purposes. First, OPR is conducting an investigation to determine whether the prosecutors committed professional misconduct. That investigation is on-going. Second, the Department has begun a programme of re-training its prosecutors with regard to their discovery obligations under the Constitution, state bar rules, rules of criminal procedure and

Department policy to avoid the recurrence of such a case. In addition, the Department has created working groups to consider new policies to govern criminal and civil discovery.

## **VI. ADDITIONAL SOURCES OF PROFESSIONAL OBLIGATIONS AND STANDARDS**

In addition to the duty not to abuse the unique power of prosecutors for improper purposes, which abuse led to the creation of OPR, attorneys are subject to a myriad of professional obligations that govern their conduct as attorneys. Specifically, Department attorneys are subject to obligations imposed by the U.S. Constitution and case law, federal laws, state bar and court rules of professional conduct, the Standards of Conduct, and Justice Department regulations, policies, and procedures. In our legal system, many of these rules and regulations are designed to ensure that our criminal justice system is fair and that the rights of the accused are protected. In helping to guarantee that Department attorneys respect, and do not abuse, the power they have, making certain that they scrupulously adhere to these rules and regulations is an important part of OPR's mission.

### **A. Obligations Imposed by the Constitution and Case Law**

The Constitution establishes numerous rights for criminal defendants with which Department attorneys must comply. For example, the Fifth Amendment to the Constitution provides that no one may be compelled to testify against himself in a criminal case. That right has been extended by case law to prevent a prosecutor from suggesting during a criminal trial that the defendant should have testified. Thus, if the defendant chooses not to testify, which the defendant has an absolute right to do, a prosecutor may not ask the jury to draw an inference of guilt from the defendant's failure to testify.

The due process clause of the Fifth Amendment as interpreted by the U.S. courts requires prosecutors to provide to the defence all exculpatory evidence they may have gathered during an investigation – for example, police notes, witness statements, scientific tests and other evidence that might raise doubts as to the defendant's guilt. By case law, this right has been extended to include impeaching evidence. The right also applies to certain kinds of pretrial proceedings as well as trials. The remedy for failing to turn over such information can be severe; a judge can reverse a conviction if he or she finds that, had the evidence been disclosed, there is a reasonable probability that the result of the trial would have been different.

In addition, the Fourth Amendment protects a person's reasonable expectation of privacy against government intrusion. Under that right, a prosecutor must first obtain a search warrant issued by an independent judge showing that the government has probable cause before authorizing a search by law enforcement officers.

### **B. Federal Laws**

Federal laws impose a variety of ethical obligations on Department attorneys. For example, in 1957, Congress enacted the Jencks Act, 18 U.S.C. § 3500, which gives a criminal defendant in a federal prosecution the right to discover any witness statement against him which is relevant to the witness's trial testimony and which is in the possession of the government. The law extends to police notes, memos, reports, summaries, letters or verbatim transcripts used by government agents or employees to testify at trial.

Also, in 1968, Congress enacted Title III, prohibiting private citizens from using certain electronic surveillance techniques, but exempting law enforcement agents so long as they complied with explicit directives that controlled the circumstances under which the agent's use of such surveillance would be permitted. Although many of the restrictions were required by the Fourth Amendment, several of Title III's provisions are more restrictive than that Constitutional protection. One of the statute's most restrictive provisions is the requirement that federal agencies must submit requests for the use of certain types of electronic surveillance to the Justice Department for review and approval before applications for such interception may be submitted to a court for an order authorizing the interception.

### **C. Court Rules**

Federal Rules of Criminal and Civil Procedure as well as the Federal Rules of Evidence and local federal court rules also impose obligations on Department attorneys. For example, the Federal Rules of Criminal Procedure require government attorneys well before trial to allow the defendant to inspect any exhibits that the government intends to use at trial. And Rule 6(e) prohibits government attorneys from disclosing

matters occurring before a grand jury. These various rules also set deadlines and rules affecting the pretrial disclosure of evidence. Thus, for example, the Federal Rules of Civil Procedure allow each party to a civil suit, during the discovery phase of a case, to serve upon the opposing party written requests for admissions of fact. Under the rules, if the opponent admits a fact, the party is relieved from having to prove the fact at trial. The Federal Rules specify that answers to such requests must be filed within thirty days.

In addition, courts establish obligations for government attorneys in particular cases. For example, courts frequently adopt a scheduling order governing pre-trial discovery and pleadings. On occasion, courts issue pre-trial rulings regarding the admissibility of evidence or that limiting the purpose for which such evidence may be admitted. Such rulings and orders bind the prosecutor in that case.

#### **D. State Rules of Professional Conduct**

This is a source of rules and obligations that has become more important for Department attorneys in recent years: the professional rules of conduct developed by state bars and adopted by state supreme courts or enacted by state legislatures. Some time ago, there had been uncertainty as to whether Department of Justice attorneys were bound by such rules, because of the constitutional doctrine known as preemption. According to this doctrine, federal authorities are not bound by state rules that interfere with federal laws.

In 1998, Congress clarified this issue by enacting the Citizens Protection Act, 28 U.S.C. § 530B, that explicitly requires federal prosecutors to abide by the rules of the court before which they appear. The Citizens Protection Act was a response to a concern by certain Congressmen that Justice Department prosecutors had to be reined in and made subject to the same professional standards applicable to private attorneys. Most federal courts have their own local rules which incorporate the rules of professional conduct of the state bars in which they are located. This law then clearly requires federal prosecutors to comply with the rules of professional conduct of the states in which they appear in court. These state provisions are a significant source of the rules that bind Department attorneys. Typically, such rules include provisions requiring reasonable diligence and promptness in representing a client, providing objective and independent legal advice, guarding the confidentiality of information received from a client, and compliance with the client's lawful instructions. Such rules also normally require candor to the court and opposing counsel as well as correction of testimony later discovered to be false. They also normally prohibit prosecutors from communicating with parties they know are represented by an attorney unless the party's attorney consents, and from communicating with the court unless the opposing lawyer is present (*ex parte* communications).

#### **E. Department of Justice Regulations and Policies**

The Department has its own extensive regulations and policies that impose professional obligations on Department attorneys. For example, because of the sensitive Constitutional rights at issue, there are regulations that require prior approval by the head of the Criminal Division before a Department attorney may issue a grand jury subpoena to a reporter [First Amendment] or a lawyer [Sixth Amendment]. There are also rules requiring certain types of plea agreements to be approved by a supervisor who stands in the shoes of the client for this purpose. The Department also has extensive regulations governing the kinds of information that can be provided to the news media while a case is pending, in order to protect the defendant's right to a fair trial.

In some cases, the Department imposes rules that are stricter than those imposed by state bars or courts and the Constitution. For example, the Department recently adopted provisions governing the disclosure of exculpatory information before a criminal trial that are considerably more expansive - - that is, they require more information to be disclosed - - than the Constitution requires. In addition, while state bar rules typically prohibit prosecutors from prosecuting a criminal case if they know the charges are not supported by probable cause, the Department's Principles of Federal Prosecution prohibit a prosecutor from indicting a defendant unless a stricter standard is met - namely, that he believes that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

The Department's regulations limit the exercise of a prosecutor's discretion in other ways as well. Thus, in determining whether to commence prosecution, or take other action against a person, Department regulations provide that the prosecutor should not be influenced by a person's race, religion, sex or national origin, or political association, activities or belief, the attorney's own personal feelings concerning the person, his associations or the victim; or the possible effect of the decision on the attorney's professional or personal circumstances.

## VII. HOW OPR CONDUCTS INVESTIGATIONS AND DISPOSES OF THEM

### A. OPR's Jurisdiction

As noted, when it was created in 1975, OPR had jurisdiction over all Department employees and all allegations of misconduct as well as fraud, waste and abuse. The office effectively served as both OPR and the Inspector General at the time. The office consisted of only a few attorneys and conducted relatively few investigations itself; rather, it oversaw investigations conducted by the internal affairs offices of the various components and agencies within the Justice Department such as the FBI and Drug Enforcement Administration (DEA). From time to time, an allegation of abuse of prosecutorial or investigative power by Department officials at the direction of the White House arose, necessitating OPR's direct involvement in the investigation, sometimes with the assistance of the FBI, such instances were not the norm, however. For the most part, OPR served in an oversight capacity on behalf of the Department's leadership.

After an Inspector General was established for the Department in 1988, OPR's jurisdiction became more focused on the conduct of attorneys acting as attorneys and on law enforcement agents assisting them. Thus, since 1994, OPR has had jurisdiction to investigate allegations that Department of Justice attorneys engaged in misconduct in the exercise of their authority to investigate, litigate, or render legal advice. OPR's jurisdiction includes attorneys assigned to the various components of the Justice Department, including the FBI, DEA, Bureau of Alcohol, Tobacco & Firearms, Bureau of Prisons, and the U.S. Marshals Service. OPR also investigates allegations of professional misconduct made against Department attorneys who serve as immigration judges and enforce the Immigration and Nationality Act. Further, OPR investigates misconduct allegations against Department of Justice law enforcement agents when Department attorneys are involved in the alleged misconduct. Other allegations of misconduct against attorney and law enforcement agents are investigated by the Office of the Inspector General – example, for off-duty misconduct, voucher fraud, and the like.

OPR is an independent office, not within any of the Divisions or components of the Justice Department, and reports directly to the Attorney General and Deputy Attorney General. As noted, the office is headed by a Counsel for Professional Responsibility and a Deputy Counsel. Throughout the decade of the 1990s, and at the direction of then Attorney General Janet Reno, OPR grew in size from seven to twenty-four attorneys along with additional support staff. Its attorneys also began to conduct many more investigations themselves and the investigations focused largely on compliance by Department attorneys with their numerous professional obligations. Currently, there are four Associate Counsel who oversee the work of twenty-two Assistant Counsel and eight support staff members. Five of the Assistant Counsel are Assistant U.S. Attorneys on detail to OPR from U.S. Attorneys' Offices across the country. Most of the permanent OPR attorneys have prior experience as Assistant U.S. Attorneys or as Department of Justice litigators. Within the Justice Department, OPR's investigations are uniformly regarded as fair and thorough. However, the office continues to be understaffed and as a result is not able to complete the investigations it conducts in as timely a manner as the attorneys who are subjects of the investigations, the Department, and the public deserve.

### B. Sources of Complaints

Department employees have a duty to report to an appropriate supervisor, any evidence or non-frivolous allegations of misconduct concerning themselves or their colleagues. The supervisor must evaluate whether the misconduct allegation at issue, if true, is serious. If so, the supervisor must report the matter to OPR. Any statement by a judge indicating a belief that a Department attorney has engaged in misconduct must be reported to a supervisor and he must report it to OPR if he determines it to be a non-frivolous allegation of serious misconduct. The duty to report is not limited to instances where the court uses the term "misconduct" because courts do not always use that term when an attorney fails to abide by his professional responsibilities. In cases where a judge *finds* that a Department attorney committed misconduct or requests an inquiry into possible misconduct, the attorney or his supervisor must immediately report the matter to OPR, even if the reporting attorney considers the judge's action to be frivolous. Such matters are usually tracked for full and often expedited investigations.

As a result of that reporting requirement, about half of all allegations of misconduct against Department attorneys are brought to OPR's attention by Department sources. These include self-referrals and referrals

of complaints by officials in U.S. Attorneys' Offices and Department litigating divisions. The remaining complaints received by OPR come from a variety of sources, including private attorneys, defendants, inmates and civil litigants, other federal agencies, state or local government officials, congressional referrals, and media reports.

In addition, OPR regularly searches the Westlaw (legal) database for cases involving judicial criticism and findings of misconduct, and reviews such matters that have not already been referred to OPR to determine whether an investigation is warranted.

### **C. Miscellaneous Matters and Inquiries**

OPR receives about 1,100 letters, emails and other forms of communication each year, asking for assistance. Many complaints are frivolous on their face, vague and unsupported by any evidence, or not within OPR's jurisdiction. For example, a prisoner might complain about jail conditions, or about the public defender who represented him, or the judge who presided over his case. Such complaints are referred to the appropriate component within the Department or the complainant is directed to an office or agency outside the Department for assistance.

About twenty-five percent or 250 of the complaints are determined to be serious enough to require OPR to open inquiries into the allegations. Typically in such cases, OPR asks the subject attorney to provide a written response to the allegations, one that is written by him and not edited by anyone in his office or the Department, along with relevant documents. A large majority of these inquiries are closed with a finding of no misconduct based on a review of these materials and the individual bringing the matter to our attention is advised by letter that his complaint did not warrant further investigation. However, if in the course of an inquiry, OPR determines that further investigation is needed, the matter is converted to an investigation, the conduct of which is described below. In addition, we open some matters as investigations from the outset due to the serious nature of the allegations. For example, a finding of misconduct or serious judicial criticism of a Department attorney by a court is normally opened as a full investigation.

### **D. Investigations**

In a typical year, we initiate between 80 and 100 full investigations. When a matter is handled as an investigation, two OPR attorneys are assigned to the matter. Normally the case file is reviewed and each witness with information about the allegations is interviewed. The interviews are recorded with a digital tape recorder. If the matter is an administrative investigation, and nearly all OPR investigations are administrative in nature, the subject of the allegations is required to sit for an interview on the record under oath with a court reporter transcribing the interview. The subject attorney is later given an opportunity to review the transcript and provide additional information in writing regarding the allegations. All Department attorneys have a duty to co-operate with an OPR investigation. Employees who do not co-operate may be formally disciplined, including termination of their employment with the Department (28 CFR § 45.13 (2006)). In administrative investigations, OPR will normally permit the subject to have privately retained counsel present at his or her interview as long as the counsel does not interfere with the questioning. OPR administrative investigations are occasionally hampered by the fact that we cannot compel non-Department witnesses to participate in OPR administrative investigations and some refuse to do so. Because the investigation is not criminal, OPR cannot conduct a grand jury investigation and serve grand jury subpoenas to compel participation.

If the allegations are criminal in nature and OPR is deemed the appropriate office to investigate, the subject attorney is notified of that fact and is not required to participate in the investigation. Thus, if a decision is reached to try to interview him because it would advance the investigation, he or she is told that he or she is not required to submit to an interview and that, if he or she does, his or her statements may be used against him or her in a subsequent criminal trial. Under these circumstances, the subject attorney has a right to be represented by counsel. A Department attorney cannot be fired for refusing to participate in a criminal investigation, but if the investigation is conducted administratively and he or she is compelled to testify, he or she can be disciplined administratively for what he or she admits to.

At the conclusion of an investigation, the assigned OPR Assistant Counsel prepares a report outlining the results of the investigation and findings and conclusions as to whether the subject attorney committed professional misconduct, exercised poor judgment, made a mistake or acted appropriately under the circumstances.

**E. Overview of Disposition of Investigations, 2001 to 2009**

**1. OPR Findings and Conclusions**

In analyzing whether a Department attorney committed professional misconduct, OPR first determines whether the attorney violated the obligation or duty at issue. For example, if an attorney is alleged to have violated his duty of candor toward the court by making a false statement or failing to correct a statement he subsequently learned was false, OPR first determines whether the attorney in fact breached his duty. OPR then determines whether that conduct constituted professional misconduct, poor judgment, mistake, or was appropriate under the circumstances.

OPR finds that an attorney committed intentional professional misconduct if it finds that the attorney acted with the purpose of violating his or her obligation, or knowing that the natural and probable consequences of his or her action will be to violate the obligation.

OPR finds that an attorney committed misconduct in reckless disregard of the attorney’s professional obligation when the attorney knows, or should know, of the obligation and that his or her conduct involves a substantial likelihood that he or she will violate the obligation, and the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances.

Even if an attorney did not breach an obligation, OPR may find that he or she exercised poor judgment when, faced with alternative courses of action, the attorney chose a course of action that is in marked contrast to the action the Department may reasonably expect an attorney exercising good judgment to take. Alternatively, OPR may find that the attorney made an excusable human error, or a mistake, despite his or her exercise of reasonable care under the circumstances.

**2. Different Roles for OPR and the Courts**

Between January 2001 and June 2009, OPR found professional misconduct in twenty-four percent of the investigations it completed during these eight years, and found poor judgment in eleven percent. OPR made no negative findings in sixty-five percent of the investigations it closed in the last eight years. Among the sixty-five percent are many involving serious criticism or findings of misconduct by the courts. It is noteworthy that OPR disagrees with courts frequently. It does so for several reasons, including the fact that the roles of OPR and the courts in addressing possible misconduct by Justice Department attorneys are significantly different. The courts’ interests are in protecting the rights of defendants, enforcing the court’s orders and maintaining decorum, and imposing sanctions for rule violations. In fashioning an appropriate course of action, a court is limited to the record in the case before it, and often does not permit the individual prosecutor to address his or her individual culpability.

OPR, on the other hand, focuses on the individual attorney’s personal responsibility to uphold the standards of professionalism established by the Constitution, statutes, court and bar rules, and Department regulations and policies. In so doing, OPR takes a more in-depth look at what led to the court’s criticism, and delves into the entire background of the case and the scienter level of the attorney. Thus, in making an assessment of the attorney’s culpability in handling the matter, we look at such factors as the attorney’s communications with the client agency, investigators, and supervisors, what the attorney knew or should have known based on his or her level of experience and the obvious applicability of the rule to the situation, and his or her options for dealing with unexpected problems. In addition, courts use varying definitions of what constitutes “professional misconduct” and often criticize attorneys without using that term at all. For example, a court may use the term “professional misconduct” to describe conduct that OPR refers to as “poor judgment” or a “mistake.” Or, conversely, a court may describe as an “error” conduct that we determine constituted reckless misconduct.

**3. Most Frequent Allegations and Findings of Misconduct**

As noted, much of the day-to-day work of OPR involves ensuring that Justice Department attorneys adhere to the highest standards of professionalism and do not allow anything, including a zeal to convict, to compromise those standards. Between January 2001 and June 2009, the most common allegations of misconduct by Department attorneys were that an attorney made misrepresentations to the court or opposing counsel, and that an attorney failed to act diligently in performing performed his or her duties as a Department attorney, including neglecting assigned cases or committing discovery violations.

Attorneys were also alleged to have made improper remarks to a grand jury or a petit jury, made unauthorized disclosures of client secrets or confidences or of non-public information, failed to comply with Department rules and regulations, missed court deadlines, or failed to perform some other obligation in a timely manner.

As to findings of professional misconduct during the same period, allegations of failure to diligently perform duties resulted in the most findings of misconduct, followed by allegations of making misrepresentations to the court or opposing counsel. OPR also made findings of misconduct for failure to comply with Department rules or regulations, for making unauthorized disclosures, for making improper remarks to a jury, and for discovery violations.

#### 4. Investigations Involving Allegations of Misuse of Power

From time to time, OPR is called upon to investigate allegations of misuse of prosecutorial power by Department officials and line attorneys. As noted, such investigations have been part of OPR's mission since the office's creation in the aftermath of Watergate. Since the early 1990s, OPR has investigated and where appropriate found misconduct in cases involving allegations that criminal prosecutions were started, or terminated, for partisan political purposes, and the FBI's investigative powers were misused to benefit the incumbent administration.

More recently, OPR along with the Department's Inspector General, jointly investigated allegations that seven U.S. Attorneys were simultaneously removed from their positions, and two others were removed a short time before, for improper partisan political purposes. We focused on the reasons for the U.S. Attorney removals and whether the U.S. Attorneys were removed by the Department's leadership, in conjunction with the White House, to influence an investigation or prosecution or to retaliate for their actions in any specific investigation or prosecution for partisan political purposes. We found substantial evidence that partisan political considerations played a part in the removal of several of the U.S. Attorneys. Because several White House officials and former Department officials refused to be interviewed by us and the White House refused to provide internal White House documents related to the removals of the U.S. Attorneys, we recommended that a counsel specially appointed by the Attorney General conduct further investigation, with a grand jury and subpoena power, to determine whether the evidence demonstrates that any criminal offense was committed with regard to the removal of any U.S. Attorney.

We also found evidence that several other U.S. Attorneys were viewed as mediocre performers and were removed because they also lacked political support of their home state Senators, while other mediocre performing U.S. Attorneys were not removed because they had such support and removal would have resulted in a fight between the White House and the Senators. We noted that while U.S. Attorneys are Presidential appointees who may be dismissed for any lawful reason or for no reason, they may not be dismissed for an illegal or improper reason. U.S. Attorneys should make their prosecutorial decisions based on the Department's and the Administration's priorities and the law and the facts of each case, not on a fear of being removed if they lose political support. If a U.S. Attorney must maintain the confidence of home state political officials to avoid removal, regardless of the merits of the U.S. Attorney's prosecutive decisions, respect for the Justice Department's independence and integrity will be severely damaged and every U.S. Attorney's prosecutive decisions will be suspect. The longstanding tradition of integrity and independent judgments by Department prosecutors will be undermined, and confidence that the Justice Department decides who to prosecute based solely on the evidence and the law, without regard to political factors, will disappear.

The Attorney General accepted our recommendation, and appointed a counsel to conduct an investigation which is on-going. OPR and the OIG also examined allegations of politicized hiring at the Justice Department by several officials in the Office of then Attorney General Alberto Gonzalez and concluded that such officials in fact considered political and ideological affiliations of candidates for career attorney positions and for other personnel actions concerning Department attorneys in violation of the Civil Service Reform Act and Department policy. Again, the danger of such misuse of power is that the Department will be perceived as staffed by prosecutors with an ideological or political perspective that will influence the prosecutive decisions they make rather than the facts and the law.

In addition, OPR has been conducting an investigation into whether the attorneys who drafted memoranda approving the CIA enhanced interrogation techniques complied with their obligation to provide objective and

independent legal advice or instead provided the advice they knew their client wanted. OPR also conducted investigations into allegations that certain investigations and prosecutions were initiated selectively against political opponents while public officials of the President's party who engaged in similar conduct were not prosecuted. Such allegations undermine the American government's promise of a fair, unbiased, and politically blind criminal justice system and, obviously, require prompt and thorough investigations.

#### **F. Who Gets in Trouble with OPR**

The types of lawyers who tend to get in trouble with OPR are, it appears, the kinds of lawyers who tend to get in trouble wherever they work. These are some common categories that such lawyers seem to fall into: the over eager, the under eager and the uninformed Department attorney. For the over-eager attorney, or "the Zealot," winning is everything. This can be the result of believing that the outcome of a particular case is so important that corners may be cut to gain a conviction. This attorney is so aggressive that he improperly tries to gain advantage by failing to disclose information that by law must be provided to the defendant pursuant to Federal Rule of Criminal Procedure 16, the *Brady v. Maryland*, 373 U.S. 83 (1963), Department regulations and the Federal Rules of Civil Procedure. Or he violates his duty of candor to the court by failing to disclose material information that is adverse to a position advanced by the Department attorney. Or he misstates the evidence, impugns opposing counsel, makes improper remarks to the jury or breaches plea agreements.

The under-eager attorney, or the "minimalist," does not appreciate and respect the importance of representing the United States as his client. He may fail to charge a case timely or meet discovery or other disclosure obligations because he failed to review all of the files in a timely manner. Or he may fail to obey a court order because he did not prepare the memorandum or pleading timely. In essence, he does not diligently represent his client, the United States.

There are also, unfortunately, some Department attorneys who do not know the rules and, "blissfully ignorant," fail to master the Rules of Professional Responsibility, Evidence, or Criminal or Civil Procedure in the manner required to carry out their important function. These attorneys fail to keep up with new laws or court decisions, fail to review slip opinions, and do not bother to read new Department policies such as the one dealing with disclosure of exculpatory evidence. As noted, OPR considers an attorney's experience level in evaluating misconduct allegations, but knowledge of the rules is expected and required even for attorneys lacking significant experience.

### **VIII. CONSEQUENCES OF A PROFESSIONAL MISCONDUCT FINDING BY OPR**

In cases where OPR concludes that a Department attorney committed professional misconduct, a report is sent to the head of the office or division where the attorney works with a recommendation of a range of discipline for the component head to consider in proposing discipline. OPR is otherwise not involved in the discipline process. Discipline can range from a written reprimand, suspension without pay, up to termination of employment. At the conclusion of the discipline process, pursuant to Department policy, OPR notifies the relevant state bar of which the subject attorney is a member of its finding of misconduct. We share with the bar a copy of OPR's report upon request.

OPR is charged with providing advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures which become evident during the course of OPR's investigations. OPR moreover, tracks misconduct findings in order to detect developing trends, and recommends remedial training for individual attorneys and changes in institutional training programmes to address patterns of violations. OPR also recommends changes in Department policies and procedures.

OPR reports are usually not made public. Even within the Department, they are shared on a need-to-know basis. This is because they contain sensitive information about the subject attorney and other witnesses referred to in the report who are protected by the Privacy Act. 5 U.S.C. § 552a. (The Privacy Act establishes special requirements for the Executive Branch with regard to disclosure of information on individuals it has collected pursuant to its mission.) In addition, the report may contain other sensitive law enforcement information, classified information, or information prohibited from disclosure by Federal Rule of Criminal Procedure 6 (e) which, as noted, prohibits the government from disclosing matters occurring

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before a grand jury.

Occasionally, however, the subjects of a report are high-ranking public officials and the subject matter is of such importance to the public that the public's interest in disclosure outweighs the privacy interests of the subjects. Thus, the joint OIG/OPR reports I referred to regarding the U.S. Attorney removals and the Department's hiring practices were deemed to be so important in terms of restoring public confidence in the Department and the morale of its employees, that the reports were made public.

Lastly, OPR may share information with other government agencies and officials for law enforcement purposes; with individuals and agencies in order to elicit information relevant to the investigation or another pending proceeding, in a court, grand jury, regulatory or administrative proceedings; with other federal agencies when requested in connection with hiring or retention of an employee, the issuance of a security clearance, or the reporting of an investigation of an employee; with complainants to the extent necessary to inform them of the progress or results of OPR's review of their complaints; and to the subject of an OPR investigation or inquiry to further the investigation or inquiry or to give notice of the status or outcome of the matter.