



U.S. Department of Justice Office of Professional Responsibility Analytical Framework

A. Introduction

In general, after investigating an allegation of misconduct made against a Department of Justice attorney, OPR determines, based on all the facts found, whether the attorney committed professional misconduct in the exercise of his or her authority to investigate, litigate or provide legal advice. If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances.

In making these determinations in the majority of cases, OPR is guided by a general analytical framework described here.¹ Other modes of analysis may be used in investigations of allegations of misconduct by law enforcement personnel that are related to allegations of misconduct by Department attorneys, or in investigations of matters not otherwise within OPR's general jurisdiction that are assigned to this Office by the Attorney General or Deputy Attorney General. Additionally, because allegations of professional misconduct are inherently fact-specific and varied in nature, it is impossible to foresee every possible type of allegation of professional misconduct that may be made against a Department attorney. Thus, alternative modes of analysis may be required in particular cases.

B. Professional Misconduct

1. Definition

A Department attorney engages in professional misconduct when he or she intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy. The elements essential to a conclusion that an attorney committed professional misconduct, then, are that the attorney (1)

¹This document is intended to provide guidance concerning OPR's analytical framework. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, relating to OPR's investigations, its findings and conclusions, or any action taken as a result of them. This document places no limitation on OPR's exercise of its authority and jurisdiction as determined by federal regulation and Attorney General order.

violated or disregarded an applicable obligation or standard (2) with the requisite scienter. A violation or disregard of an obligation or standard does not necessarily constitute professional misconduct if, under the circumstances, it is de minimis.

2. Obligation or Standard

Department attorneys are subject in the performance of their professional duties to obligations and standards imposed by law, by applicable rules of professional conduct, and by Department regulations and policies, the violation or disregard of which could implicate an attorney's professionalism. There are many sources of such obligations and standards, including the Constitution (e.g. the protections afforded by the Fourth, Fifth and Sixth Amendments that a prosecutor must respect), federal statutes (e.g. Jencks Act disclosure requirements), case law (e.g. court opinions interpreting the Due Process Clause as prohibiting vindictive prosecution), court orders (e.g. a District Court's order on a motion in limine), rules of procedure (e.g. requirements in the Federal Rules of Civil Procedure and a District Court's rules governing civil discovery), standards of conduct imposed by an attorney's licensing authority or by the jurisdiction in which the attorney is litigating (e.g. state rules of professional conduct mandating candor to a tribunal), regulations issued by the Department and codified in the Code of Federal Regulations (e.g. the regulation concerning subpoenas to members of the news media), regulations codified in the Code of Federal Regulations and applicable to Department employees as well as other Executive Branch employees (e.g. the prohibition on the use of an employee's public office for private gain), and Department policies contained in the United States Attorney's Manual (e.g. the requirements imposed on prosecutors by the Principles of Federal Prosecution, which are published in the Manual).

In a given situation, then, a Department attorney's conduct may be governed by a number of obligations and standards from a variety of sources. It is the attorney's professional duty to attempt in good faith to ascertain the obligations and standards imposed on him or her and to comply with them. An attorney who fails to do so and who violates or disregards an obligation or standard, with scienter, commits professional misconduct.

3. Intent

An attorney intentionally violates an obligation or standard when he or she (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits, or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard unambiguously prohibits. Intentional professional misconduct, then, includes both conduct that is purposeful and conduct that is knowing. The attorney's conduct includes the actions the attorney takes and fails to take.

Although an attorney may deny intent, either by denying an improper purpose or by denying knowledge of the natural or probable consequences of his or her conduct, OPR's finding whether the conduct was intentional is made using the same preponderance of the evidence standard OPR uses in making other factual findings. Evidence of intent can include, but is not limited to, the circumstances surrounding the attorney's conduct, statements the attorney made,

and other, related conduct in which the attorney engaged. When an attorney denies intent, OPR evaluates and notes in its report, in appropriate circumstances, the attorney's credibility in making the denial, and explains in the report why the attorney was found credible or not in the denial.

4. Reckless Disregard

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows, or should know based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard, (2) the attorney knows, or should know based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or standard, and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation or standard is reckless when, considering the nature and purpose of the attorney's conduct and the facts known to the attorney, it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

An attorney who makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct. Evidence that an attorney made a good faith attempt to ascertain and comply with the obligations and standards imposed can include, but is not limited to, the fact that the attorney reviewed materials that define or discuss one or more potentially applicable obligations and standards, consulted with a supervisor or ethics advisor, notified the tribunal or the attorney representing a party or person with adverse interests of an intended course of conduct, or took affirmative steps the attorney reasonably believed were required to comply with an obligation or standard.

C. Conclusions Other Than Professional Misconduct

If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. If OPR determines that an attorney's conduct was inappropriate, it articulates in its report why the attorney's conduct did not rise to the level of professional misconduct.

The Department has a justifiable expectation that its attorneys will use good judgment in carrying out their professional duties and in exercising the broad discretion the Department has provided them to do so. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. For example, an attorney exercises poor judgment

when, confronted with an obviously problematic set of circumstances, the attorney fails to seek advice or guidance from his or her supervisors even though an attorney exercising good judgment would do so.

When OPR concludes that an attorney demonstrated poor judgment in a matter it has investigated, it refers this conclusion to the responsible management official for consideration. A referral is a notification by OPR that management should consider and take appropriate steps to follow up on a report's conclusion about a particular attorney. After OPR makes a referral, management officials advise OPR of what steps they take to follow up on the report's conclusion. A referral is not made if an attorney engaged in inappropriate conduct not amounting to professional misconduct or poor judgment or simply made a mistake.

A mistake results from excusable human error despite an attorney's exercise of reasonable care under the circumstances. Whether an attorney's error is excusable depends upon factors including: the attorney's opportunity to plan, and to reflect upon the possible and foreseeable consequences of, a course of conduct; the breadth and magnitude of the responsibilities borne by the attorney; the importance of the conduct in light of the attorney's overall responsibilities and actions; and the extent to which the error is representative of the attorney's usual conduct. Examples of mistakes OPR has noted in prior reports include poor choice of words in unplanned remarks, misunderstanding the facts despite a reasonable attempt to inform oneself, and misunderstanding the law despite a reasonable attempt to research, interpret and apply it. Mistake differs from poor judgment in that an attorney makes a mistake as a result of excusable human error despite choosing an appropriate course of action.

When OPR does not conclude an attorney committed professional misconduct, demonstrated poor judgment, or made a mistake, OPR's report specifies whether or not the attorney's conduct was found to be appropriate under all the circumstances. Although a referral is not made, clarifying whether an attorney's conduct was appropriate in a matter identifies potential problems for management and helps to uphold the standards of appropriate conduct all Department attorneys should strive to meet. Potential problems OPR has noted in prior reports as inappropriate conduct that did not, under the circumstances of those particular cases, rise to the level of professional misconduct, demonstrate poor judgment or constitute a mistake include poor communication between attorneys, mismanagement of witnesses and poor organization of files.

In its report on an investigation, OPR can identify for review and consideration by Department officials any issues relating to Department policies, practices and procedures or to possible management deficiencies raised in the investigation. OPR can also identify for review and consideration by an office's managers possible systemic problems found in the office during OPR's investigation.