DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation of Allegations of Professional Misconduct Against Former Assistant United States Attorneys Salvador Perricone and Jan Mann, United States Attorney's Office for the Eastern District of Louisiana

DECEMBER 20, 2013

NOTE: THIS REPORT CONTAINS INFORMATION FILED UNDER SEAL IN *UNITED STATES V. BOWEN, ET AL.*, CR. NO. 10-204 (E.D. LA.), AS WELL AS SENSITIVE AND CONFIDENTIAL INFORMATION. DO NOT DISTRIBUTE THE REPORT OR ITS CONTENTS WITHOUT THE PRIOR APPROVAL OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY.

TABLE OF CONTENTS

INTRODUCTION

From at least November 2007 to March 2012, former Assistant U.S. Attorney (AUSA) Salvador Perricone posted on the website nola.com approximately 2,600 anonymous comments on a wide variety of subjects, including comments on cases to which he personally was assigned to prosecute or that were being prosecuted by his colleagues at the U.S. Attorney's Office for the Eastern District of Louisiana (USAO).[1] Many of Perricone's comments disparaged federal and state judges, people under indictment, personnel in the USAO, defense attorneys, and numerous other public and private individuals. For example, Perricone wrote regarding a defendant pending trial, "*I hope you have room in your scrap book for your conviction and mug shot*";[2] declared that a recently-indicted defendant was "*GUILTY!!!*";[3] referred to a suspect under investigation as having "*come[] from a long line of corruptors*";[4] and asserted that a federal judge "*loves killers*"[5] and "*finds ways to let hoodlams and rapists out of jail . . . with the help of her close friend [a defense attorney].*"[6]

From November 2011 to early March 2012, former AUSA Jan Mann, who then served as the USAO's First Assistant U.S. Attorney (FAUSA) and Criminal Division Chief, posted 40 anonymous comments using the pseudonym "eweman" on the nola.com website. She commented on a variety of subjects, and several comments concerned criminal cases being handled by the USAO that Mann supervised. In one comment involving a high-profile federal criminal prosecution, Mann asserted that the court had granted a mistrial "*because [the judge's] best buddy the defense attorney asked for it as a result of the butt whippin' his client was taking on the stand. [The defendant] was committing perjury right and left and was on the ropes going down.*"[7]

On March 14, 2012, former U.S. Attorney James "Jim" Letten notified the Department of Justice (Department) Office of Professional Responsibility (OPR) that Perricone had "expressed

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1 OPR found evidence that Perricone posted comments under the following pseudonyms: "Henry L. Mencken1951" (Mencken), "legacyusa," "campstblue," and "dramatis personae."

2 dramatis personae, Aug. 5, 2011, 3:09 p.m.

3 legacyusa, Feb. 26, 2011, 9:16 a.m.

4 Mencken, Sept. 3, 2011, 10:55 a.m.

5 Mencken, Sept. 18, 2011, 9:36 a.m.

6 campstblue, Sept. 6, 2009, 10:14 a.m. All of Perricone's Internet postings discussed in OPR's report are set forth at Exhibit A.

7 eweman, Jan. 28, 2012, 4:42 p.m. All of Mann's Internet postings discussed in OPR's report are set forth at Exhibit B. Perricone's and Mann's postings contained misspelled words and grammatical errors. In order to avoid a plethora of bracketed corrections or "[sic]" notations, OPR has copied both Perricone's and Mann's postings verbatim, without noting or correcting the errors. In addition, when a posting is quoted, it is placed in italics as a means of highlighting it for the reader. The original postings were not italicized. Apparently as a result of changes to the nola.com website, certain postings discussed in this report may no longer be accessible on the website.

his desire to self-refer to OPR a matter revealed in the local press," which Perricone did on March 15. Letten informed OPR that Perricone had acknowledged using the pseudonym "Henry L. Mencken1951" (Mencken) to post comments on nola.com, a website associated with the *Times-Picayune*, a New Orleans newspaper.[8] Nola.com published *Times-Picayune* articles online and allowed readers to post comments about the articles through usernames that did not reveal the commenters' identities. OPR immediately opened an investigation relating to Perricone's conduct. On November 5, 2012, before OPR concluded its investigation, Letten notified OPR that Jan Mann informed him that she used the pseudonym "eweman" to post comments on nola.com. On that same date, Mann also reported the matter to OPR for the first time. OPR then expanded its investigation to include Mann's conduct.

Allegations that Perricone was posting comments online as Mencken, and Mann as eweman, were first made by attorneys representing Frederick Heebe, the part owner of a landfill company, River Birch, Inc., that was the subject of a criminal investigation. The criminal investigation of River Birch and Heebe (River Birch investigation) had long been a subject of news stories published in the *Times-Picayune*, which generated hundreds of comments by individuals posting on nola.com.

On March 12, 2012, Heebe filed a lawsuit for pre-suit discovery in the Orleans Parish Civil District Court alleging that an anonymous person using the pen name "Henry L. Mencken1951" had posted numerous defamatory comments about Heebe and his family following articles on nola.com. Based in part on the analysis of a forensic linguist who concluded that "Henry L. Mencken1951" was likely one of the prosecutors assigned to a case related to the USAO's River Birch investigation, Heebe sought to depose two prosecutors involved in the case: (b)(6) (b)(7)(C) and Perricone (then-Senior Litigation Counsel).[9] After being informed of the lawsuit, Letten questioned Perricone about his possible involvement in the nola.com postings, and Perricone admitted that he was Mencken. On March 15, 2012, Letten held a press conference during which he publicly acknowledged Perricone's involvement and denied that anyone in the USAO had authorized, "or had knowledge of,"[10] Perricone's online activities. Substantial local and national publicity resulted from the revelation. On March 19, 2012, Perricone resigned from the USAO. Subsequently, the USAO was recused from certain matters about which Perricone had commented.

On November 2, 2012, Heebe filed a lawsuit in the Orleans Parish Civil District Court alleging that Mann, using the pseudonym eweman, had posted two defamatory comments about Heebe on nola.com, and that she had commented on other USAO matters as well. On November

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[8] Henry Louis "H.L." Mencken was a well-known journalist for the *Baltimore Sun* newspaper and literary critic who died in 1956. His comments about popular culture, people, and events are often quoted.

[9] (b)(6) (b)(7)(C)

[10] USAO Press Release, "Statement by United States Attorney Jim Letten and Press Availability Today" (Mar. 15, 2012) (USAO March 15, 2012 Press Release) (attached as part of Exhibit C).

4, 2012, Mann admitted to Letten that she was eweman. On November 5, 2012, Mann stepped down from her supervisory positions as FAUSA and Criminal Division Chief. On November 8, 2012, the USAO issued a public statement acknowledging that Mann had posted anonymous comments on nola.com, resulting in substantial local and national publicity. In mid-December 2012, [redacted] Mann (b)(6), (b)(7)(C) resigned from the USAO.

OPR's investigation has been extensive and is now concluded. In addition to investigating the specific conduct of Perricone and Mann, OPR also investigated what knowledge others in the USAO had concerning the online activities of Perricone and Mann and whether others in the USAO posted comments online relating to matters handled by the USAO or the Department. As described more fully below, during its investigation, OPR conducted approximately 50 interviews (including interviewing some individuals more than once), reviewed reports prepared by others in parallel investigations, reviewed hearing transcripts, reviewed pleadings in criminal and civil cases, gathered and reviewed numerous documents and e-mails for relevant individuals, analyzed online postings of Perricone and Mann and other information in the media, and conducted three surveys of USAO personnel.

Upon completion of its investigation, OPR prepared a draft report tentatively concluding that Perricone and Mann engaged in professional misconduct. OPR provided Perricone and Mann, and Kenneth A. Polite, Jr., the U.S. Attorney for the Eastern District of Louisiana, an opportunity to review and comment on the draft report. Perricone and Mann submitted comments on December 2 and 5, 2013, respectively. Perricone submitted an addendum to his response on December 3, 2013. U.S. Attorney Polite responded and informed OPR that the USAO did not request any changes to OPR's draft report. OPR carefully considered Perricone's and Mann's comments in preparing its final report but did not alter its findings and conclusions. Perricone's response to the draft report and addendum to the response are attached at Exhibit D. Mann's response to the draft report is attached at Exhibit E.

Based on the results of its investigation, OPR reaches the following conclusions regarding Perricone's online postings:

(1) Perricone committed intentional professional misconduct by publicly disseminating extrajudicial statements regarding active investigations and pending cases in violation of his obligations as set forth in Title 28 of the Code of Federal Regulations (C.F.R.) § 50.2, *et seq.*; the U.S. Attorneys' Manual (USAM) § 1-7.000, *et seq.*; the Local Criminal Rules of the U.S. District Court for the Eastern District of Louisiana (Local Rules); and USAO policies; and

(2) Perricone committed professional misconduct in violation of Louisiana Rule of Professional Conduct (LRPC) 8.2 by making statements regarding the integrity or qualifications of judges or candidates for judicial office that he knew were false, or with reckless disregard as to the truth or falsity of the statements.

Based on the results of its investigation, OPR reaches the following conclusions regarding Mann's online postings:

(1) Mann committed intentional professional misconduct by publicly disseminating extrajudicial statements regarding active investigations and pending cases in violation of her obligations as set forth in 28 C.F.R. § 50.2, *et seq.*; USAM § 1-7.000, *et seq.*; the Local Rules; and USAO policies;

(2) Mann committed professional misconduct in violation of LRPC 8.2 by making a statement regarding the integrity of a judge that she knew was false, or with reckless disregard as to the truth or falsity of the statement;

(3) Mann committed intentional professional misconduct in violation of LRPC 1.4(a) and (b) by failing to fully inform Letten, or any other Department official, about her postings on nola.com, so that the Department could make informed decisions about whether and to what extent Mann should be involved in matters relating to Perricone's online postings. OPR did not find credible Mann's allegation that on March 13, 2012, the day she first learned that Perricone (b)(6), (b)(7)(C) had been named in a state court petition for pre-suit discovery, she told Letten that she, too, had posted comments online;

(4) Mann committed intentional professional misconduct in violation of LRPC 1.7(a)(2) by continuing to represent her client, the United States, in matters in which she had a direct, personal conflict of interest without obtaining the written consent of her client. These matters included making decisions regarding whether the USAO should be recused from certain pending cases; responding to motions for recusal of the USAO, new trials, and dismissal of criminal charges; and providing information to OPR and to AUSA Stuart Walz, who was conducting a preliminary criminal inquiry into Perricone's conduct; and

(5) Mann committed intentional professional misconduct in violation of LRPC 8.4(c) when she made misrepresentations to, or intentionally withheld material information from, Judge Kurt D. Engelhardt, Judge Hayden Head, Jr., U.S. Attorney Letten, the Executive Office for United States Attorneys (EOUSA), the Department's Civil Rights Division, and OPR. Mann's dishonest conduct with respect to the courts was prejudicial to the administration of justice in violation of LRPC 8.4(d). Mann's dishonest conduct with respect to the Department impeded OPR's investigation, adversely impacted the Civil Rights Division's prosecutions, and interfered with the administration of justice.

As to both Perricone and Mann, OPR determined that by making inappropriate and offensive comments, Perricone and Mann engaged in conduct that was detrimental to the interests of the Department. In particular, Perricone risked causing significant harm to the Department when he posted comments that could reasonably be interpreted as evidencing racial animus.

Based on the results of its investigation, OPR reaches the following conclusions regarding the knowledge of others in the USAO concerning Perricone's and Mann's online activities and whether others in the USAO posted comments online concerning USAO or Department matters:

(1) The evidence is insufficient to establish by a preponderance of the evidence that Letten, Mann, or (b)(6) (b)(7)(C) was aware contemporaneously of Perricone's anonymous postings;

(2) The evidence is insufficient to establish by a preponderance of the evidence that Letten, (b)(6) (b)(7)(C) or Perricone was aware contemporaneously of Mann's anonymous postings;

(3) The evidence is insufficient to establish by a preponderance of the evidence that AUSAs who may have suspected that Perricone might be engaged in online posting activity intentionally or recklessly violated a clear and unambiguous duty to report that information to USAO supervisors or to the Louisiana Office of the Disciplinary Counsel;

(4) OPR found no evidence establishing that anyone in the USAO knew or suspected that Mann was posting comments online about USAO matters; and

(5) OPR found no evidence establishing that any USAO employee besides Perricone and Mann violated Department, court, or ethical rules prohibiting the posting of online comments concerning active Department investigations or pending cases.

CHAPTER 1

OPR'S INVESTIGATION AND BACKGROUND FACTS

I. OPR's Method of Investigation

In this chapter, OPR provides information about its method of investigation; the USAO's organizational structure; events leading up to and following the discoveries that Perricone and Mann were posting comments online; significant criminal investigations and prosecutions affected by Perricone's and Mann's online posting activity; and the various administrative, criminal, and disciplinary inquiries and investigations into Perricone's and Mann's conduct.

OPR has jurisdiction to investigate allegations of professional misconduct made against Department attorneys when the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice. Upon receipt of allegations of misconduct, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, in which it typically gathers documents and information and obtains written submissions from subjects and components, or a full investigation, in which it also interviews relevant witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation. In all cases in which OPR believes misconduct may have occurred, OPR conducts a full investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). After being provided with warnings concerning the further use of their statements, all Department employees have an obligation to cooperate with OPR investigations. Employees interviewed by OPR must provide information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, up to and including removal from federal service.

OPR often continues and completes investigations relating to the actions of attorneys who resign or retire during the course of the investigation in order to better assess the litigation impact of the alleged misconduct, and to permit the Attorney General and Deputy Attorney General to consider the possible need for changes in Department policies or practices. A completed investigation may also be required in order for the Department to assess whether a referral to an appropriate bar disciplinary authority is appropriate.

In its investigation relating to the conduct of Perricone and Mann, OPR conducted 50 interviews of former and current USAO employees and Department officials, some of whom were interviewed more than once. OPR interviewed Heebe's Washington, D.C., attorneys and his New Orleans counsel regarding Perricone's postings.[11] Although OPR repeatedly requested

[11] (b) (5) [redacted]

to interview Perricone, he declined through his attorney to consent to an OPR interview.[12] OPR reviewed the transcript of Perricone's May 7, 2012 interview conducted by the Louisiana Office of the Disciplinary Counsel, an August 2012 article in *New Orleans Magazine* concerning its interview of Perricone, and the transcript of Perricone's October 10, 2012 testimony in an evidentiary status conference held before U.S. District Court Judge Kurt Engelhardt in *United States v. Bowen, et al.* (Cr. No. 10-204) (Danziger Bridge case).[13] OPR interviewed USAO senior managers Letten, Mann, (b)(6), (b)(7)(C) in August 2012, regarding Perricone's postings, and again in November 2012, after Mann's online posting activity was revealed.

In late July 2012, OPR sent a survey to all USAO attorneys requesting information concerning their knowledge of Perricone's postings. In November 2012, after Mann's postings were discovered, OPR sent a second survey to all USAO attorneys requesting information concerning their knowledge of Mann's postings, and inquiring whether the attorneys themselves had ever posted comments on any Internet website about Department matters. Shortly thereafter, OPR sent a third survey to all USAO non-attorney employees requesting information concerning their knowledge of Perricone's or Mann's postings, and inquiring whether the employees themselves had ever posted comments on any Internet website about Department matters.

OPR reviewed USAO e-mails to and from Perricone, Mann, Letten, (b)(6), (b)(7)(C), the e-mails of other selected AUSAs for certain time periods, and the e-mails of all USAO employees for certain time periods based on key word searches.

Shortly after Perricone admitted posting comments online about Department matters, the Department asked AUSA Stuart Walz from the U.S. Attorney's Office for the District of Utah to conduct a preliminary criminal inquiry into Perricone's conduct. Shortly after Mann admitted posting comments online about Department matters, and in response to an order from Judge Engelhardt, the Department asked AUSA John Horn from the U.S. Attorney's Office for the Northern District of Georgia to conduct inquiries into Perricone's and Mann's conduct. Louisiana Chief Disciplinary Counsel Charles Plattsmier is conducting an investigation into the conduct of both Perricone and Mann. OPR has exchanged documents and information with Walz, Horn, and Plattsmier, including providing Horn and Plattsmier with copies of certain interview transcripts from OPR's interviews.

[12] (b)(6) (b)(7)(C) [redacted]

[13] The Danziger Bridge case was a high-profile criminal civil rights prosecution of New Orleans police officers for their actions following Hurricane Katrina in 2005.

II. The USAO's Organizational Structure

The USAO is led by the U.S. Attorney and the First Assistant U.S. Attorney (FAUSA). The USAO is divided into two divisions, Criminal and Civil. Almost all of the witnesses discussed in this report worked in the Criminal Division, which is subdivided into several units. The Criminal Division is led by a Chief and Deputy Chief. Each Criminal Division Unit is headed by a supervisor, and some have a deputy supervisor as well. The USAO also designates one or more senior AUSAs to act as Senior Litigation Counsel; they provide advice and guidance to other AUSAs and report directly to the appropriate Division Chief. Senior Litigation Counsel do not have supervisory authority.

At the time of the events relevant to this report, Letten was the U.S. Attorney,[14] and Mann was both the FAUSA and Criminal Division Chief.[15] Perricone was a Senior Litigation Counsel and the USAO's training officer.[16] Perricone reported to Mann and was considered by many people OPR interviewed to be part of the USAO's senior management team.

III. Background for Perricone's Postings

A. The River Birch Investigation

The discovery that Perricone and Mann were anonymously posting comments on nola.com was a consequence of the USAO's investigation into allegations of corruption against Jefferson Parish government officials. According to press reports, in 2009 the USAO and the Federal Bureau of Investigation (FBI) initiated an investigation into allegations involving improper health insurance contracts between government entities or government contractors and

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[14] Letten joined the Department in 1982 as a member of the Organized Crime Strike Force. Letten became an AUSA in the USAO in 1990 when the various Strike Forces were merged into the U.S. Attorneys' Offices. He was promoted to the position of FAUSA in 1994. In 2001, Letten became Acting U.S. Attorney, and he was confirmed by the Senate as the presidentially-appointed U.S. Attorney in July 2005. James Letten OPR Interview Transcript at 4-5 (Aug. 8, 2012) (Letten Tr. (Aug. 8, 2012)). Letten resigned from the USAO in December 2012. Letten is a member of the Louisiana State Bar.

[15] Sealed by 11/1/13 order of Judge Engelhardt [redacted]

[16] At the time of his resignation from the USAO on March 19, 2012, Perricone had over 21 years of experience as an AUSA. During his tenure as an AUSA, Perricone held various supervisory positions, including Chief of the Drug Unit and Chief of the Organized Crime and Racketeering Strike Force. (b)(6), (b)(7)(C) [redacted] From 1986 to 1991, Perricone was employed by the Federal Bureau of Investigation. In 1991, he joined the USAO. Perricone is a member of the Louisiana State Bar. Salvador Perricone Resume; Perricone Louisiana Office of the Disciplinary Counsel Interview Transcript at 6-7 (May 7, 2012) (Perricone Tr. (May 7, 2012)).

an insurance company owned by Jefferson Parish Chief Administrative Officer Tim Whitmer. Among the insurance contracts under investigation was one with River Birch, Inc., a privately held landfill company owned by Heebe and his stepfather. Several of the Jefferson Parish officials under scrutiny in the public corruption probe also allegedly had been significantly involved in awarding a controversial $160 million landfill contract to River Birch. The investigation expanded to include the Jefferson Parish–River Birch landfill contract.[17]

In February 2011, a federal grand jury indicted Henry Mouton, a former member of the Louisiana Wildlife and Fisheries Commission, on eight counts of conspiracy, accepting payoffs, and lying to federal agents. The indictment alleged that from 2003 to 2010, "co-conspirator A" paid Mouton over $400,000 to use his influence with the Commission to force the closing of the Old Gentilly Landfill, which competed with River Birch. According to the indictment, Mouton wrote numerous federal officials warning them that extensive environmental damage could result if the Old Gentilly Landfill remained open. In June 2011, Mouton pled guilty to a single conspiracy charge and was reported to be cooperating with prosecutors.

The USAO also developed evidence concerning an alleged embezzlement scheme by Dominick Fazzio, the Chief Financial Officer for River Birch, and his brother-in-law, Mark Titus.[18] Titus pled guilty and became a cooperating witness, and Fazzio was indicted for mail fraud, money laundering, and related charges. The prosecutors assigned to the embezzlement matter were (b)(6) (b)(7)(C), Perricone, and AUSA #1.[19] The case was set before U.S. District Court Judge Helen Berrigan.

The *Fazzio* case generated extensive, acrimonious litigation. On September 19, 2011, Fazzio filed a motion seeking dismissal of the indictment for prosecutorial misconduct. The defense alleged that the prosecutors had violated Fazzio's Fifth and Sixth Amendment rights by interviewing Fazzio outside the presence of his attorney. Defense counsel asserted that the

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[17] The *Times-Picayune* published numerous articles and editorials on the controversial Jefferson Parish–River Birch landfill contract. The contract required Jefferson Parish to close its public landfill and send Jefferson Parish garbage and other waste products to the River Birch landfill for a fee of no less than $6.3 million per year for 25 years. Adding to the controversy was the fact that Heebe's wife, Jennifer Sneed, had been a member of the Jefferson Parish Council, the governmental body that approved the contract. Eight months into her second term of office, Sneed resigned her position, only a month before Jefferson Parish officials began taking action to stop operations at the publicly-owned landfill. In addition to the Jefferson Parish–River Birch landfill contract, the Jefferson Parish corruption investigation included allegations that Whitmer, Jefferson Parish President Aaron Broussard, and Jefferson Parish Attorney Tom Wilkinson engaged in payroll fraud involving Broussard's then-girlfriend, Karen Parker. In 2012, Whitmer, Broussard, Wilkinson, and Parker pled guilty to charges resulting from the payroll scheme.

[18] According to the indictment, Fazzio assisted Titus with embezzling more than $1 million from Garner Services, a construction management firm co-owned and run by Titus.

[19] To protect their privacy interests, OPR refers to line AUSAs, mid-level AUSA supervisors, and non-attorney USAO staff who are not subjects of OPR's investigation by number, and not by name, and also uses male pronouns for these individuals, whether they in fact are male or female.

embezzlement case was "merely a tool being used to threaten and pressure Mr. Fazzio to cooperate in the Government's River Birch investigation."[20]

Shortly thereafter, upon learning that Fazzio's attorneys' fees were being paid by River Birch, the government moved to disqualify Fazzio's attorneys, Stephen London and James Cobb. The government argued that the fee arrangement would prevent the attorneys from engaging in plea negotiations. In December 2011, Judge Berrigan granted the government's motion and disqualified Fazzio's defense counsel. In January 2012, Fazzio retained Arthur Lemann, III, a noted local defense attorney, as his new counsel.

On October 11, 2012, the government filed a superseding indictment charging Fazzio and Titus with additional crimes relating to fraud schemes involving Garner Services, the construction management firm co-owned and run by Titus, and also added new charges against Fazzio concerning a tax fraud scheme involving another Louisiana company.[21]

On March 8, 2013, the government moved to dismiss with prejudice the indictment and first superseding indictment against Fazzio and the second superseding indictment against Fazzio and Titus.[22] The government's one paragraph motion to dismiss stated the motion was "based on evidentiary concerns and in the interests of justice." Also on March 8, 2013, the government informed Heebe's attorneys that Heebe would not be charged in connection with the River Birch investigation. Judge Berrigan granted the motion to dismiss on March 12, 2013.

B. Heebe's First Lawsuit Regarding Anonymous Internet Postings

On March 12, 2012, Heebe filed in the Orleans Parish Civil District Court a Petition for Pre-Suit Discovery. The suit alleged that an anonymous individual using the pen name "Henry L. Mencken1951" had posted 598 comments on nola.com from August 15, 2011, through March 11, 2012. According to the pleading, a significant number of the anonymous comments concerned active USAO cases and, in particular, the River Birch investigation. Heebe claimed that the public online comments concerning him, his family, and his company were false and defamatory. He provided numerous examples of the objectionable postings:

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[20] Memorandum in Support of Defendant's Motion to Dismiss Indictment, *United States v. Fazzio*, Cr. No. 11-157, at 3 (E.D. La., filed Sept. 19, 2011).

[21] Shortly after Perricone's anonymous postings were made public in March 2012, the USAO, after discussions with Department officials in Washington, D.C., recused itself from the River Birch investigation and the *Fazzio* case. The matters were transferred to the Public Integrity Section of the Department's Criminal Division, which filed the second superseding indictment. In August 2012, *Times-Picayune* columnist James Gill reported that Titus had ceased cooperating with federal investigators. James Gill, "Feds botch River Birch case," *Times-Picayune*, Aug. 19, 2012. In September, Titus moved to withdraw his guilty plea, alleging that prosecutors had broken a "secret" plea deal agreed to by Perricone (b)(6), (b)(7)(C) not to forfeit his property, but Titus' motion was denied by the court. On October 10, 2012, Titus was sentenced to five years' incarceration for his role in the embezzlement scheme.

[22] Titus remains convicted and incarcerated for the embezzlement charge to which he pled guilty.

If Heebe had one firing synapse, he would go speak to Letten's posse and purge himself of this sordid episode and let them go after the council and public officials. Why prolong this pain...perhaps Queen Jennifer has something to say about that.[23]

Heebe comes from a long line of corruptors.[24]

Heebe's goose is cooked.[25]

Heebe alleged that evidence "strongly indicates that Mencken is in fact a member of the United States Attorney's Office for the Eastern District of Louisiana."[26] Attached to the pleading was a report authored by James R. Fitzgerald, a forensic linguist and former FBI Criminal Profiler. Fitzgerald conducted a "forensic linguistic/authorial attribution analysis" in which he compared approximately 550 online postings with one legal document that had been filed in the *Fazzio* case. Fitzgerald concluded that the "writing style of the [author of the postings], when compared to the writing style of the author of [the legal document], is **CONSISTENT** to the degree of **Highly Distinctive**."[27] Fitzgerald's report stated:

> While there are noted differences in some of the features and lexical choices utilized by the author of the [postings] and the author of [the legal document], mostly due to the genre differences, they are greatly outweighed by the use of the unusual, uncommon, and idiosyncratic lexical features, stylistic features, literary, and topical and thematic features found therein.[28]

Heebe requested an order authorizing him to depose two of the AUSAs who had signed the *Fazzio* pleading – Perricone(b)(6), (b)(7)(C) – to determine if either had posted comments on nola.com using the Mencken pseudonym.

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[23] Mencken, Dec. 18, 2011, 10:21 a.m.; Heebe's Petition for Pre-Suit Discovery at 3 (Orleans Parish Civ. Dist. Ct., filed Mar. 12, 2012) (Heebe's Petition for Pre-Suit Discovery). Heebe's wife is Jennifer Sneed.

[24] Mencken, Sept. 3, 2011, 10:55 a.m.

[25] Mencken, Sept. 4, 2011, 10:45 a.m.

[26] Heebe's Petition for Pre-Suit Discovery at 2.

[27] James R. Fitzgerald, Forensic Linguistic/Authorial Attribution Report, at 12 (Mar. 12, 2012) (emphasis in original). On the "Distinctiveness Scale" used by Fitzgerald, "highly distinctive" is the second highest out of five possible conclusions: exceptionally distinctive; highly distinctive; distinctive; moderately distinctive; not distinctive.

[28] *Id.* at 12. In his analysis, Fitzgerald considered the use of less common non-legal words, including "redoubt" and "dubiety"; the use of alliteration and metaphor; the consistent comma omission in word series; and the numerous references in the anonymous postings to the River Birch investigation and the USAO.

The original civil action Heebe filed was removed to federal court and voluntarily dismissed by Heebe because of Perricone's admission that he was Mencken. On August 31, 2012, Heebe filed a defamation action against Perricone in Orleans Parish Civil District Court.

C. Perricone Admits Posting as Mencken

On March 13, 2012, after the USAO learned of the Heebe lawsuit, Perricone met with Letten, Mann, (b)(6) (b)(7)(C) and others. At some point in the afternoon, Letten asked Perricone if he was Mencken, and Perricone acknowledged that he was.[29] Letten immediately notified senior Department officials.

On March 14, 2012, Perricone posted a final comment on nola.com. Following an article reporting on Heebe's lawsuit, a commenter noted that Mencken, a "frequent commenter," was "conveniently missing." Perricone, posting as Mencken, responded, "*I'm here. Just watching our rights erode.*"[30]

D. Letten Holds Two USAO Meetings and Comments Publicly about Perricone

On March 15, 2012, Letten held a mandatory meeting for all USAO supervisors, followed immediately by a second meeting for all USAO attorneys and staff, at which he informed them that Perricone had acknowledged posting comments on nola.com as Mencken. Also on March 15, 2012, the USAO issued a press release acknowledging Perricone's admission and announcing that Letten would appear at a press conference that afternoon. A copy of the press release and a transcript of Letten's press conference are attached at Exhibit C. The press release stated:

> On Tuesday, March 13, 2012, following press accounts of a legal filing in Orleans Parish Civil District Court, Assistant United States Attorney Salvador Perricone acknowledged and revealed that he has in fact been the sole user of the Nola.com identifier Henry L. Menken1951 [sic]. It is important to clarify for the record that contrary to speculation in the filings, neither Assistant United States Attorney James R. Mann nor anyone in the United States Attorney's Office authored, participated in or had knowledge of the formulation or posting of the Henry L. Menken1951 [sic] comments. It is also important to note that the course of conduct resulting in the Henry L. Menken1951 [sic] comments by the AUSA was

[29] Accounts regarding the sequence of events vary somewhat, but OPR was told that in the initial discussions among the USAO senior managers about Heebe's lawsuit, Perricone did not acknowledge that he was Mencken. Although Perricone did not explicitly say he was *not* Mencken, he left the impression with some of the managers that he had been unfairly targeted in the lawsuit (b)(6), (b)(7)(C) [redacted]

[30] Mencken, Mar. 14, 2012, 6:15 a.m.

> not known to – or authorized by – myself or this United States Attorney's Office prior to the filing and subsequent acknowledgement on March 13th . . . . The United States Attorney and his staff recognize the absolute duty of all USAO personnel to refrain from publicly commenting on any pending matters before the Department, except in strict accordance with established DOJ and United States Attorney's Office protocols, policies and practices.[31]

At a press conference held shortly after the meeting with all USAO attorneys and staff, Letten repeated the statements contained in the press release. In response to a question, Letten stated, "All of our folks know that commenting on ongoing cases are not things you're supposed to do. . . . [W]e do have a highly structured environment in which we know we're not supposed to comment on ongoing cases."[32] A reporter asked if Letten had heard about "these blogged comments" before Perricone's admission. Letten responded that Perricone's admission was the "first time we knew . . . I can't speculate about what people may have thought or speculated and I'm not going to go into the fine points of that sort of thing. . . . [O]ur statement here is absolutely accurate. . . . I was surprised to find out that this was the case."[33]

E. Events Immediately Following Perricone's Admission

On March 19, 2012, Perricone resigned from the USAO. In a March 23, 2012 letter to Attorney General Eric H. Holder, Jr., Heebe's attorneys alleged, "There is more misconduct to uncover. We are confident that others in the New Orleans office actually knew of Mr. Perricone's blogging. It would be strange, indeed, if others in the office did not know. After all, they are professional investigators."

In the days following Perricone's admission, Letten met with each federal district court judge in the Eastern District of Louisiana to apologize for Perricone's postings and to reiterate that Perricone's comments did not reflect the opinions of personnel in the USAO.

The government's disclosures regarding Perricone's online activities created a firestorm of publicity. The *Times-Picayune* published numerous news articles and editorials, and the national media and blogs also reported and commented on the story.[34] Within days of Letten's announcement, the *Times-Picayune* reported that Perricone also may have posted comments on nola.com using the names "legacyusa," "dramatis personae," and "campstblue." The

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31 USAO March 15, 2012 Press Release.

32 Letten Press Conference Transcript at 8 (Mar. 15, 2012).

33 *Id.* at 10.

34 "Federal prosecutor under fire for anonymously commenting on news website," *Government Executive*, Mar. 19, 2012; "When Anonymous Commenting Goes Real Wrong," *Above the Law*, Mar. 19, 2012; "When a Prosecutor Makes Comments Online About a Case," *Wall Street Journal*, Mar. 16, 2012; "Federal prosecutor taken off cases for web posts about owner at center of investigation," *FoxNews.com*, Mar. 15, 2012.

Times-Picayune noted that the postings made under those names referred to the same subject matter and demonstrated the same "temperament" as those made under the name Mencken. The *Times-Picayune* suggested that campstblue was likely a reference to the New Orleans street where the federal courthouse is located (Camp Street). It also noted that legacyusa had written about a visit to Michigan, and that one of Perricone's sons had attended school in Michigan.[35] As set forth in Chapter 2 of this report, Perricone commented on USAO matters and disparaged suspects, defendants, and others using all four pseudonyms. As noted previously, all of Perricone's postings referenced in this report are set forth at Exhibit A.

IV. Background for Mann's Postings

A. Mann Assumes Primary Responsibility for Addressing the Legal Issues Relating to Perricone's Postings

Over the course of the next several months, Mann assumed primary responsibility for addressing the legal issues arising as a result of the discovery that Perricone had for years been posting anonymous comments about Department matters on nola.com. In particular, Mann: (1) consulted with EOUSA's General Counsel's Office regarding whether the USAO should be recused from several matters to which Perricone had been assigned;[36] (2) wrote letters to federal judges, attended federal court hearings, and wrote and signed pleadings in several federal criminal cases responding to defendants' motions for the USAO's recusal, new trials, and dismissal of charges that were based, at least in part, on Perricone's comments;[37] (3) coordinated, in response to an order from Judge Engelhardt in the Danziger Bridge case, the identification, collection, and production of USAO e-mails and other materials relevant to the issue of whether anyone in the USAO knew or suspected that Perricone was posting anonymous comments about USAO matters; and (4) provided information on behalf of the USAO to OPR and AUSA Walz in the course of their reviews of Perricone's postings.

B. Heebe's Second Lawsuit Regarding Anonymous Internet Postings

On November 2, 2012, Heebe filed a lawsuit in the Orleans Parish Civil District Court alleging that from November 2011 to March 2012, using the pseudonym eweman, Mann had

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[35] "Mystery NOLA.com commenter 'Mencken1951' left a trail of clues," *Times-Picayune*, Mar. 18, 2012.

[36] The USAO and the Department spent substantial time and effort to determine whether and to what extent the USAO should be recused from various investigations and pending cases. Ultimately, the USAO was granted authorization to recuse itself from the River Birch-related matters and the *Fazzio* case. The Department's Public Integrity Section assumed responsibility for the *Fazzio* case and the River Birch investigation.

[37] *See United States v. Broussard*, Cr. No. 11-299; *United States v. Bowen*, Cr. No. 10-204 (Danziger Bridge case).

posted 35-40 comments on nola.com, including two defamatory comments about Heebe.[38] The complaint based its conclusion that Mann was the author of the eweman posts on the following analysis: (1) both Mann's and eweman's writing evidenced a "unique typographic error" – superfluous spacing before punctuation marks; (2) both Mann and eweman used the unusual term "fender lizard" (apparently referring to a woman who "has an affinity for law enforcement officers"); and (3) both Mann and eweman evidenced particular hostility toward two New Orleans criminal defense attorneys.

Heebe's complaint alleged that 63 percent of eweman's comments were in response to nola.com articles on which Perricone, posting as Mencken, had also commented, and noted that several of Perricone's and Mann's comments appeared only minutes apart. Heebe asserted that these facts implied "some degree of coordination between 'Mencken' and 'eweman,'" and contradicted Letten's assertion that no one in the USAO knew of Perricone's postings.

C. Mann Admits Posting as eweman and Resigns

On Friday, November 2, 2012, Mann learned that Heebe had sued her for posting defamatory comments. (b)(6), (b)(7)(C) Also that day, Letten informed the Office of the Deputy Attorney General about Heebe's new allegations. On Sunday, November 4, 2012, (b)(6) (b)(7)(C) met with Letten in his office. Mann acknowledged that she had posted comments on nola.com using the name eweman. (b)(6) (b)(7)(C)

On November 5, 2012, Mann stepped down as FAUSA and Criminal Division Chief. Also on November 5, 2012, Mann self-reported the allegations of Heebe's lawsuit to OPR, which expanded its ongoing investigation of Perricone's postings to include Mann's conduct. On November 8, 2012, the USAO issued a public statement acknowledging that Mann had posted anonymous comments on nola.com. Substantial local and national publicity resulted from the revelation. On December 17, 2012, the USAO publicly confirmed that Jan (b)(6) (b)(7)(C) Mann had resigned from the USAO. As noted previously, all of Mann's postings referenced in this report are set forth at Exhibit B.

V. The Department Conducts Internal Inquiries into Perricone's and Mann's Conduct

In addition to OPR's investigation into Perricone's and Mann's postings and related issues, the Department conducted two additional internal inquiries into Perricone's and Mann's conduct.

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[38] The lawsuit stated that although the nola.com profile for eweman showed 40 comments, Heebe was only able to retrieve 35 comments from the website. OPR was ultimately able to retrieve all 40 of eweman's comments from nola.com.

A. AUSA Stuart Walz's Preliminary Criminal Inquiry Regarding Perricone's Conduct

Shortly after Perricone admitted to posting anonymous comments on nola.com, the Department initiated a preliminary inquiry to determine whether Perricone's postings violated any criminal laws, including the unlawful disclosure of information protected by Federal Rule of Criminal Procedure 6(e) (Rule 6(e)). The Department assigned Stuart Walz, a highly experienced AUSA from the U.S. Attorney's Office for the District of Utah, to conduct that preliminary inquiry. Walz reviewed Perricone's postings on nola.com under the names Mencken, campstblue, legacyusa, and dramatis personae. In a November 30, 2012 report to EOUSA, Walz concluded that the evidence did not support a finding that Perricone violated any criminal law, including Rule 6(e), as a result of his postings. As a result, OPR's investigation did not encompass whether any of Perricone's postings violated Rule 6(e) or any other criminal law.

B. AUSA John Horn's Inquiry Regarding Perricone's and Mann's Conduct

1. The Danziger Bridge Case

In September 2005, six days after Hurricane Katrina struck New Orleans, several New Orleans police officers shot at individuals crossing the Danziger Bridge, killing two and injuring four others. The officers were indicted by the state in 2007, but the charges were dismissed by a state court. Shortly thereafter, the FBI began investigating the incident, and in 2010, several officers pled guilty to federal crimes stemming from the incident. In July 2010, the government indicted six officers for their roles in either the shooting or a cover-up of the shooting. Trial began before Judge Engelhardt for five of the defendants on June 23, 2011, and on August 5, 2011, the jury returned guilty verdicts against all of the defendants.[39] On April 4, 2012, Judge Engelhardt sentenced the defendants to terms of incarceration ranging from 6 to 65 years. The trial of Gerard Dugue, the lone remaining defendant, began in January 2012, but it ended when Judge Engelhardt granted a mistrial after the prosecutor referenced another high-profile civil rights case during the cross-examination of the defendant. After several continuances, the *Dugue* trial remains pending.

Barbara Bernstein, a Deputy Chief in the Criminal Section of the Department's Civil Rights Division, was the lead prosecutor for both cases, and the prosecution team included attorneys and other personnel from the Civil Rights Division and the USAO. Perricone did not work on or supervise the cases. Mann participated in the supervision of the investigation and trials, along with supervisors in the Civil Rights Division. As discussed below in greater detail, Mann took the lead role in responding to several post-conviction motions related in part to Perricone's online posting activity.

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[39] Gerard Dugue was severed from the other defendants due to a statement he provided to the FBI that implicated the other defendants.

2. The Danziger Bridge Defendants' New Trial Motion

On May 18, 2012, one defendant in the Danziger Bridge case moved for a new trial (a motion later joined by all of the defendants). The defendants alleged that the government had engaged in a "secret public relations campaign" against them, as evidenced by Perricone's postings, and also by an alleged "leak" of a plea agreement of a cooperating witness, Michael Lohman (Lohman leak), to the press in an effort to influence public opinion.[40] Judge Engelhardt heard oral argument on the defendants' motion on June 13, 2012. Both Letten and Mann attended the hearing. Letten assured the court that the USAO had not leaked the Lohman plea agreement. Letten then further assured the court:

> [N]either I, nor Jan Mann, nor people in positions in authority in our office, to my knowledge did not have any knowledge of, nor did we authorize, nor did we procure or have any knowledge of Sal Perricone anonymously posting comments about cases or anything like that whatsoever until we learned about it in the filing. That is gospel truth.[41]

On June 13, 2012, Judge Engelhardt ordered the government to submit a report detailing its efforts to determine who was responsible for the Lohman leak. On July 9, 2012, Judge Engelhardt ordered the government to produce internal USAO communications concerning the posting of comments on nola.com. Mann was instrumental in coordinating the prosecution's response to both of Judge Engelhardt's orders.

Also in response to the defendants' new trial motion, Judge Engelhardt held two status conferences. During the first, Perricone testified on October 10, 2012, *inter alia*, that no one, including Mann, knew that he had posted online comments, and that he had not known that Mann had posted online comments as eweman. During the second, (b)(6), (b)(7)(C) testified on November 7, 2012, about USAO employees' contemporaneous knowledge of Perricone's postings.[42]

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[40] On February 23, 2010, the *Times-Picayune* and the *Associated Press* reported that, based on information provided by two anonymous sources "familiar with the case," Lohman was cooperating with the federal investigation and was expected to enter a guilty plea the next day. "Danziger Bridge investigation expected to yield guilty plea from former NOPD supervisor," *Times-Picayune*, Feb. 23, 2010; "New Orleans ex-cop expected to plead guilty in Katrina shooting investigation," *Associated Press*, Feb. 23, 2010. (b) (5), (b) (6), (b) (7)(C)

[41] Judge Engelhardt Order at 5 (Nov. 26, 2012) (Judge Engelhardt's November 26, 2012 Order).

[42] The transcripts of Perricone's and (b)(6), (b)(7)(C) testimony were sealed. In a November 26, 2012 order, Judge Engelhardt cited to portions of Perricone's and (b)(6), (b)(7)(C) testimony, and stated that their testimony remained sealed except for the portions discussed in his order. November 26, 2012 Order at 14, n.16; 21, n.24. (b)(6), (b)(7)(C) testified in part because of allegations circulating in the local legal community, and known to one of the Danziger Bridge defense attorneys who represented Heebe, that (b)(6), (b)(7)(C) had told Letten directly about Perricone's anonymous online comments. Following a *Times-Picayune* article posted on nola.com, an anonymous poster using the name "brlawyer" stated, "I usually wouldn't repeat a rumor, however I've now heard from three independent

(Continued . . .)

3. Judge Engelhardt's November 26, 2012 Order

On November 26, 2012, Judge Engelhardt issued a lengthy order in response to the Danziger Bridge defendants' new trial motion. The court did not rule on the merits of the defendants' motion. Rather, the court discussed Mann's involvement in responding to the court's June 13, 2012 and July 9, 2012 orders, as well as Perricone's and Magner's testimony at the status conferences, and ordered the government to review and submit a new response to the court's prior orders.

In his order, Judge Engelhardt noted an exchange of letters he had with Mann in October 2012 regarding what Judge Engelhardt characterized as Mann's "assertion" that federal court employees may have posted comments on nola.com.[43] Judge Engelhardt had written Mann to request that she identify any such employee. Judge Engelhardt noted that on October 19, 2012, Mann responded to his request by saying in part, "Prior to the Perricone incident, I was not a follower of nola.com postings and had no real sense of what was happening there . . . . I did not intend to suggest that anyone else in particular was posting."[44]

Judge Engelhardt noted (b)(6), (b)(7)(C) testified that he told three mid-level AUSA supervisors and several non-supervisory USAO employees about his suspicions that Perricone was posting comments online, but that (b)(6), (b)(7)(C) did not tell Letten or Mann of his suspicions. Judge Engelhardt recounted (b)(6), (b)(7)(C) that (b)(6), (b)(7)(C) believed that Jan (b)(6), (b)(7)(C) Mann must have known that Perricone was posting comments online.[45]

Judge Engelhardt concluded that Perricone testified falsely:

(Continued . . .)

sources that a certain (b)(6), (b)(7)(C) reported Perricone's activities directly to Letten in a face-to-face conversation." Apr. 24, 2012, 11:08 a.m. A second commenter, "muspench," responded, "If that's so, then perhaps that person, seeing Letten fail to respond, tipped Heebe. I've been wondering how Heebe figured it out," followed by another muspench comment, "P.S. Sounds like (b)(6), (b)(7)(C), actually. :)" Apr. 24, 2012, 1:01 p.m., 9:31 p.m. As discussed in Chapter 8, (b)(6), (b)(7)(C) testified that although he informed three mid-level AUSA supervisors about his suspicions that Perricone might be posting comments online, he did not inform Letten.

[43] Judge Engelhardt's November 26, 2012 Order at 17. According to Judge Engelhardt, just prior to the conclusion of the October 10, 2012 status conference, the court expressed its view that it was inappropriate for persons engaged in certain professions, including government employees, to post unprofessional comments under the guise of a pseudonym. During a discussion between the court and counsel, Mann opined that many individuals, possibly including court personnel, posted comments on nola.com. After further consideration of Mann's statement, Judge Engelhardt requested that Mann provide specific information supporting her assertion. Judge Engelhardt's November 26, 2012 Order at 17. There apparently is no transcript for that portion of the October 10, 2012 status conference.

[44] *Id.* at 18.

[45] *Id.* at 21-23.

> [I]t seems clear that Perricone testified falsely in at least some important respects . . . his statement that no one in the office was aware that he was posting surely is false . . . he and former First AUSA Mann worked very closely together, as did his close friend, AUSA Jim Mann . . . no one, especially this Court, could reasonably find it credible that Perricone and former First AUSA Mann, while posting under the same nola.com articles, and responding to and echoing each other's posts, were unaware of the identity of the other.[46]

Judge Engelhardt also doubted Perricone's veracity when Perricone denied knowing who posted as eweman: "[I] find [] it inconceivable that Perricone did not know, at the time he gave sworn testimony, that 'eweman' was seated only two chairs away . . . in the person of former First AUSA Mann."[47] Judge Engelhardt questioned Perricone's truthfulness when Perricone refused to acknowledge being the author of all of the postings under the name campstblue.[48] Finally, Judge Engelhardt doubted Perricone's truthfulness regarding Perricone's testimony about comments Perricone posted concerning a failed real estate development, and a candidate for Superintendent of the New Orleans Police Department (NOPD).[49]

Judge Engelhardt concluded that Mann may have violated LRPC 3.3(a)(1) and 3.4(b) by remaining silent when Letten informed the court that Mann was unaware of Perricone's postings, and by remaining silent when Perricone testified that no one in the USAO was aware of his postings. LRPC 3.3(a)(1) and 3.4(b) require attorneys to correct a false statement of fact made to a tribunal and prohibit attorneys from assisting others to testify falsely. In the course of his discussion about LRPC 3.3(a)(1) and 3.4(b), Judge Engelhardt also referenced Mann's October 19, 2012 letter to the court, discussed above.[50]

Because of Mann's involvement in responding to his June 13, 2012 and July 9, 2012 orders, Judge Engelhardt concluded that the government's reports were "tainted and must be completely redone."[51] Judge Engelhardt found as follows:

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46 *Id.* at 27.

47 *Id.* at 28.

48 *Id.*

49 *Id.* at 28-31.

50 *Id.* at 32. Judge Engelhardt was so troubled by Mann's participation in the Department's response concerning the revelations about Perricone's postings, including exchanging letters with the Court and participating in the status conference during which Perricone testified, that on November 7, 2012, Judge Engelhardt wrote Letten to inform him that Mann would no longer be allowed to represent the United States in any proceeding in Judge Engelhardt's courtroom.

51 *Id.* at 34-35.

> [T]he activities of Perricone and former First AUSA Mann, both those of commission and those of omission, might also constitute prosecutable criminal conduct. Thus, it might well be time for the DOJ to seriously consider appointment of an independent counsel to review the activities of Perricone and AUSA Mann, both with regard to the online postings, as well as subsequent matters before this Court as described herein.[52]

Judge Engelhardt referred his findings to the Louisiana Attorney Disciplinary Board of the Louisiana State Bar Association and the Lawyers Disciplinary Enforcement Committee of the U.S. District Court for the Eastern District of Louisiana for "further investigation" and "if warranted, disciplinary action."[53]

4. The Department Assigns AUSA Horn to Respond to Judge Engelhardt's November 26, 2012 Order

In early December 2012, in response to Judge Engelhardt's November 26, 2012 order, the Department tasked FAUSA John Horn from the U.S. Attorney's Office for the Northern District of Georgia with responding to, and inquiring into issues raised by, the court's order. Horn was assisted by Executive AUSA Charysse Alexander from Horn's office, as well as investigators from the Department's Office of the Inspector General (OIG). Horn prepared new responses to the court's orders of June 13, 2012, and July 9, 2012, replacing the responses that Mann had originally prepared. OPR cooperated fully with Horn's investigation, and pursuant to Horn's requests, OPR provided interview transcripts and other documents to him.

5. Judge Engelhardt Grants the Danziger Bridge Defendants' New Trial Motion

On September 17, 2013, Judge Engelhardt issued an order granting the Danziger Bridge defendants' new trial motion.[54] Relying principally on postings from Perricone about the Danziger Bridge case, Mann's testimony in her OPR interview about what she claimed or speculated that others in the USAO and Department knew about online postings, and the postings of a third Department attorney, Judge Engelhardt concluded that there was evidence of "grotesque" professional misconduct sufficient to merit granting the defendants a new trial.[55]

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52 *Id.* at 33.

53 *Id.* at 49. In Perricone's response to OPR's draft report, he asserted that he had resigned from the federal bar on November 19, 2013, but that he is considering rescinding his resignation. Perricone Resp. at 15 and n.45.

54 *United States v. Bowen*, No. 10-204 (E.D. La. Sept. 17, 2013) (September 17, 2013 order).

55 *Id.* at 7. (b)(6) (b)(7)(C) [redacted]

(Continued . . .)

OPR recounts in Chapter 2 of this report some of Perricone's postings relating to the Danziger Bridge case, and in Chapter 4, concludes that Perricone engaged in professional misconduct.[56] A portion of Judge Engelhardt's order relied on conclusions derived from the testimony of Mann to OPR about what others in the USAO and Department knew concerning online postings. Judge Engelhardt, however, did not have the benefit of Letten's OPR interviews, which in critical respects contradict the testimony of Mann. Resolution of this dispute is important to OPR's assessment of the conduct of Mann and Letten. In Chapter 5, OPR discusses Mann's version of events, Letten's response, and various OPR investigative materials, and concludes that Mann's claims are not credible. In Chapters 4, 5, and 6, OPR concludes that Mann engaged in repeated acts of professional misconduct.

VI. The Louisiana Office of the Disciplinary Counsel Investigations

By letter dated March 26, 2012, Chief Disciplinary Counsel Charles Plattsmier advised OPR that the Louisiana Office of the Disciplinary Counsel had also opened an investigation into the allegations concerning Perricone. The Office of the Disciplinary Counsel is the investigative and prosecutorial arm of the Louisiana State Bar Association's Attorney Disciplinary Board (Board). The Board consists of 14 members appointed by the Louisiana Supreme Court. The Board is responsible for the management of the attorney disciplinary system.[57] Following Judge Engelhardt's November 26, 2012 order, the Office of the Disciplinary Counsel expanded its investigation to include allegations against Mann.

In his communications with OPR, Plattsmier requested access to certain transcripts of OPR interviews, which OPR provided.

(Continued . . .)

(b)(6) (b)(7)(C) (b)(6) (b)(7)(C)

[56] While OPR agrees that Perricone engaged in repeated acts of professional misconduct, OPR takes no position on the merits of the Danziger Bridge defendants' new trial motion, as that issue is outside of OPR's jurisdiction. OPR assesses the conduct of individual Department attorneys to determine whether the attorney fulfilled his or her obligation to comply with applicable standards of conduct. The defendants' new trial motion, and Judge Engelhardt's September 17, 2013 order, centered around a different, albeit related, issue in the Danziger Bridge case: Did the government's misconduct warrant a new trial in the interest of justice under Federal Rule of Criminal Procedure 33.

[57] *See generally* Louisiana State Bar Association, Attorney Disciplinary Board, http://www.ladb.org/about_the_board.asp.

CHAPTER 2

POSTINGS BY PERRICONE AND MANN ON NOLA.COM

In this chapter, OPR sets forth general information about the pseudonyms under which Perricone and Mann posted, as well as the content and frequency of their postings. OPR also sets forth Perricone's and Mann's explanations concerning their postings. As noted previously, nola.com is the Internet website associated with the *Times-Picayune*. Following each article published on the website, nola.com permits posters to add comments, which appear on the web page immediately below the news article about which the posters are commenting. The postings by Perricone and Mann discussed in this report appeared on the nola.com website.

I. Perricone's Postings and Explanations

Perricone admitted posting on nola.com using at least four pseudonyms: campstblue, legacyusa, dramatis personae, and Mencken. The campstblue comments began in November 2007, and the Mencken comments ended on March 14, 2012. During that period, Perricone posted over 2,650 comments using those pseudonyms:[58]

Pseudonym Used	Duration	Number of Postings
campstblue	November 22, 2007 – September 18, 2009	718 postings
legacyusa	April 25, 2009 – July 23, 2011	1,143 postings
dramatis personae	July 26, 2011 – August 14, 2011	193 postings
Mencken	August 15, 2011 – March 14, 2012	599 postings

[58] Some of this statistical information was originally available on nola.com, but may not be currently available. *See also* Defendant Archie Kaufman's Motion for New Trial, Exhibit 19, *United States v. Bowen*, Cr. No. 10-204 (E.D. La., filed May 18, 2012); Gordon Russell, "Ray Nagin reacts to comments by apparent Perricone alter ego 'campstblue,'" *Times-Picayune*, Mar. 20, 2012; Heebe's Petition for Pre-Suit Discovery at 2. Some of the comments under the various names are duplicates.

Perricone stated that he thought he also posted comments using the pseudonym "fed up."[59] As of the date of this report, nola.com lists six postings under the user name fed-up.[60] None of those postings relates to Department matters.[61]

Perricone's postings covered a wide range of topics, including local elections and politicians, Tulane University, traffic cameras, the New Orleans airport, the *Times-Picayune* and its reporters, the NOPD and particular officers and supervisors, and a wide assortment of legal matters and issues. Because the comments followed *Times-Picayune* articles on the nola.com website, they usually related to the topic of the article, which generally pertained to some current event. The comments were generally negative and critical of some individual or entity. Numerous postings were vitriolic, particularly when other commenters disagreed with Perricone's views.[62] Many of Perricone's postings concerned active USAO investigations or pending cases.[63] Perricone also apparently commented as campstblue on Internet websites other than nola.com, including on politico.com, nationaljournal.com, abcnews.go.com, and

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[59] Perricone Tr. at 25 (May 7, 2012). Perricone may have posted comments online using other names as well. Heebe's attorneys told OPR that they believed Perricone may have been posting using several pseudonyms in addition to Mencken, legacyusa, dramatis personae, and campstblue. Heebe's attorneys provided OPR with some specific user names who had posted comments on nola.com about Department matters. OPR's examination of the postings under the user names identified by Heebe's attorneys revealed differences in the writing style, and OPR could not prove that Perricone used those pseudonyms. Online bloggers and opinion writers also engaged in analyses of postings attempting to identify other potential Perricone pseudonyms. *See* Mark Moseley, "Rants under yet another alias sound a lot like Perricone," *The Lens*, Nov. 15, 2012 (suggesting the name "martyfed" based on use of term "pulpit pimps"). Perricone testified in the Danziger Bridge case that he had "no recollection of using any other names" besides Mencken, legacyusa, campstblue, and dramatis personae. Status Conference Transcript, *United States v. Bowen*, Cr. No. 10-204, at 19 (Oct. 10, 2012) (Danziger Bridge Status Conference Tr. (Oct. 10, 2012)). OPR does not know why Perricone mentioned the user name fed-up to the Louisiana Office of the Disciplinary Counsel, but not during his testimony in the Danziger Bridge case.

[60] Although the transcript of Perricone's Louisiana Office of the Disciplinary Counsel interview reflected that Perricone said he posted comments under the user name fed up (without a hyphen), OPR found comments on nola.com by fed-up (with a hyphen), but not by fed up (without a hyphen).

[61] *See* http://connect.nola.com/user/fed-up/comments.html.

[62] In one response, Perricone stated, "*Scarlete you are an total idiot and need to be instutionalized.*" legacyusa, July 17, 2011, 9:34 a.m. When Perricone objected to the portrayal of an Italian ship captain in an editorial cartoon, he responded to the cartoonist, "*I see your name is Kelly. Where you well sodden when you scribbled this cartoon? You are a failure in the human condition and deserve to be draped over the end of a bar, aspirating your own vomit.*" Mencken, Jan. 19, 2012, 7:10 a.m.

[63] In Perricone's response to OPR's draft report, he repeatedly asserted that 99.56 percent of his comments were not work-related. Perricone did not dispute OPR's finding that he posted at least 2,600 comments. If .44 percent of Perricone's comments were work-related, then Perricone is asserting that he posted approximately 13 work-related comments. However, Perricone admitted posting 22 comments about the Danziger Bridge shootings alone. *See* Perricone Resp. at 3 n.2. Moreover, as set forth in Exhibit A and throughout this Report, OPR found that Perricone posted far more than 13 comments about Department matters.

washingtonpost.com.[64] OPR also found evidence that Mencken postings were accessible on mlive.com and masslive.com.[65]

In his postings, Perricone repeatedly discussed active USAO investigations and cases. For many of the cases about which Perricone commented, he was directly involved in the investigation and prosecution. In addition to the prosecution of Dominick Fazzio, to which he

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[64] In response to a January 2008, *Washington Post* article concerning Louisiana U.S. Senator Mary Landrieu, entitled, "Sen. Landrieu defends herself," campstblue posted four comments, several of which contain unusual word choices. For example, campstblue wrote in part:

> *Is it serendipitious that our city is in the dismal shape we find it. It just wasn't Nagin. Gosh! It was years (50) of incompetitent and corrupt politics and practices which has cast us into the depths of social and political dispair. The Landrieus had/have a generous hand in all of it. This fall will be sursum corda!!!!*

campstblue, Jan. 8, 2008, 1:11 p.m.

In response to a January 2010, Politico.com article concerning retired general Wesley Clark, entitled, "Wes Clark considering House Run," legacyusa posted one comment. *See* legacyusa, Jan. 19, 2010, 11:25 a.m.; *see* http://www.politico.com/blogs/bensmith/0110/Wes_Clark_considering_House_run.html.

In response to a June 1, 2008, abcnews.go.com article concerning a sermon delivered at President Obama's former church, entitled, "Rev. Pfleger: 'America is the Greatest Sin Against God'" campstblue posted two comments, which are no longer available on the website, including the following:

> *Why can only whites be racists? I live in a majority black city and I can feel the hate every day. I never owned anybody, nor have my ancestor's. BUt his priest says I am still responsible? Great–I am being accused of a crime my family never committed. These are very dangerous times. Things are being redefined to suit a socialistic agenda...history has seen this before.*

campstblue, June 1, 2008, 11:13 p.m.

In response to a January 2008, article on nationaljournal.com concerning presidential candidate Hillary Clinton, campstblue posted a comment, which is no longer available on that website, writing in part:

> *Obama is a commited socialist. Hillary is just a pure Boleshevik. Who among us think our taxes are too low? If you said "I do." then did you voluntarily offered to pay more taxes the last 8 years? You could have...the IRS is more than willing to accept more than you owe. Ask yourself why you didn't kickin more money to the insatiable beast in D.C.? Who among us believe that the American people should cede their wealth, treasure, minds and industry to the United States Government? They work for us, not us for them!!!Neither Obama or Clinton would make great presidents. Oh, they look nice and we all want change, but at what cost and effect. Think, for Christ's sake, think. For the secularist, think your own sake.*

campstblue, Jan. 5, 2008, 2:37 p.m.

[65] Masslive.com contained information indicating that Mencken had posted 602 comments on the website. However, OPR was unable to access any of those comments. Because the masslive.com, mlive.com, and nola.com websites appear to be run by the same corporate entity, the Mencken comments on nola.com may also have been accessible on masslive.com and mlive.com.

was assigned, Perricone also posted extensively on cases involving members of the Jefferson family, a politically prominent and well-connected New Orleans family. Former U.S. Representative William Jefferson; his brother, Mose Jefferson; and his sister, Betty Jefferson, were all convicted on various public corruption charges. Perricone prosecuted one of Mose Jefferson's cases. Set forth below are examples of Perricone's postings that related to USAO investigations or cases.[66]

A. Comments on a Defendant's Guilt

In numerous postings, Perricone opined that a defendant who was pending trial, or was then in trial, was guilty.

Following nola.com's online posting of the 44-page indictment of Henry Mouton, who was alleged to have received payoffs to use his influence as a member of the Louisiana State Wildlife and Fisheries Commission to close the Old Gentilly Landfill, which competed with River Birch, Perricone commented:

> *I read the indictment...there is no legitimate reason for this type of behavior in such a short period of time and for a limited purpose. GUILTY!!!*[67]

Commenting on an article concerning the indictment of Fazzio, the Chief Financial Officer of River Birch, Perricone wrote:

> *Well, Mr. Fazzio, I hope you have room in your scrap book for your conviction and mug shot. London didn't too well with Archie Kaufman. You're next.*[68]

After Judge Berrigan disqualified Fazzio's attorneys due to a conflict of interest, an article reported that Fazzio had obtained Arthur Lemann as his new attorney. Perricone stated:

> *Looks like Fazzio got a lemon. That book you refer to Mr. Rioux is about all of his losses. The guy is a clown and Fazzio is going down.*[69]

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[66] Because of the volume of Perricone's postings, many other examples could be cited; OPR provides herein examples sufficient to assess whether Perricone violated rules and regulations restricting comments about pending matters. As previously noted, AUSA Walz conducted a separate preliminary inquiry as to whether Perricone's postings violated Rule 6(e), and Walz concluded that they did not. Accordingly, OPR did not investigate that issue.

[67] legacyusa, Feb. 26, 2011, 9:16 a.m.

[68] dramatis personae, Aug. 5, 2011, 3:09 p.m. Stephen London was Fazzio's attorney until December 2011, when he was disqualified by Judge Berrigan. London had also represented former New Orleans Police Detective Archie Kaufman, who was convicted in 2011 for his role in helping to cover up an illegal shooting by fellow officers on the Danziger Bridge following Hurricane Katrina.

[69] Mencken, Jan. 13, 2012, 10:36 p.m. The article mentioned Lemann's memoir, "Hail to the Dragon Slayer."

During the trial of NOPD officers accused of shooting Henry Glover and burning his body in a car (Glover case), Perricone wrote:

> *Let me see if I understand this: The cops, throught their attorneys, admitted that they shot Glover and then burned the body in a car that belonged to another man, who was not arrested for anything...RIGHT??? Guilty!! Now, let's get on to Danzinger.*[70]

During the Danziger Bridge case, the high-profile civil rights trial of NOPD officers who shot and killed individuals crossing the Danziger Bridge after Hurricane Katrina, Perricone posted:

> *[T]he only police force to use deadly force throughout the city was the venerable NOPD. Perhpas we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.*[71]

Commenting on an article about a New Orleans attorney who had been indicted for various crimes associated with his alleged theft of over $30 million from his law firm, Perricone, who was one of the assigned prosecutors, responded to another commenter:

> *MINDS: Go down to Federal Court and read the warrant and complaint. It will tell you from where the " hacking" occurred. This guy is gone! Look at the prosecutors who are handling the case. No light-weights there.*[72]

Following an article about the trial testimony of defendant Mark St. Pierre, who had been charged with paying city officials in exchange for contracts, a commenter asked, "[H]ow many times do the feds have to prove this crook lied?????Just put him on the bus to Levenworth." Perricone responded:

> *Agree. This guy won't be smiling in a couple of days. He should have cut a deal. What kind of lawyer does hie have? Please get this thing over with and I am tired of looking at that pasted-on smile on Mrs St. Pierre...ENOUGH ALREADY!!*[73]

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[70] legacyusa, Nov. 19, 2010, 7:49 a.m. The Glover case was a high profile prosecution of NOPD officers accused of violating Glover's civil rights during Hurricane Katrina, resulting in Glover's death. In December 2010, three NOPD officers were convicted of civil rights crimes relating to the shooting and coverup of Glover's death. The Fifth Circuit Court of Appeals subsequently granted new trials to two of the officers. The retrial of David Warren, the officer who shot Glover, resulted in an acquittal on December 11, 2013.

[71] dramatis personae, Aug. 3, 2011, 7:06 a.m.

[72] campstblue, Oct. 17, 2008, 9:30 a.m.

[73] legacyusa, May 25, 2011, 12:20 p.m.

B. Comments That Heebe or His Attorneys Paid for Favorable Judicial Rulings and to Silence Witnesses

In several postings, Perricone stated or implied that Heebe or his attorneys had paid for favorable judicial rulings and to silence witnesses.

The *Times-Picayune* reported that Heebe made a $250,000 interest-free loan to WWL talk radio host Garland Robinette, allegedly in exchange for Robinette's criticizing the reopening of the Old Gentilly Landfill, which competed with River Birch. Following articles discussing the loan, Perricone suggested that Heebe had paid for Robinette's silence:

> *Looks like he got another 250k to keep his month shut. What a show!! WWL radio is dead!!!*[74]

> *TRANSLATION: Heebe's attorney's won't let me talk, lest I implicate his client. Additionally, I am New Orleans Royalty and I don't have to explain anything to anyone.*[75]

In December 2011, the *Times-Picayune* reported that Jefferson Parish President Aaron Broussard and others had been indicted for payroll fraud. The article also reported that the payroll allegations were part of a wide-ranging investigation into corruption by Jefferson Parish officials that included allegations concerning the Jefferson Parish–River Birch landfill contract. Following the article, Perricone commented:

> *I guess Heebe will be writing more checks this weekend.*[76]

Approximately two weeks later, a *Times-Picayune* columnist criticized Broussard for certain post-indictment legal actions he and his attorneys had taken. The column concluded, "Friends say Broussard is prepared for whatever may befall him. Bravo for him, but God knows, he needs a good lawyer." Perricone responded:

> *He's got the best Heebe can buy.*[77]

A *Times-Picayune* article reported that Judge Berrigan had ruled against St. Bernard Parish in a lawsuit alleging racial discrimination relating to the Parish's housing restrictions. Perricone commented:

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74 Mencken, Sept. 6, 2011, 10:13 a.m.

75 Mencken, Sept. 7, 2011, 7:59 a.m.

76 Mencken, Dec. 2, 2011, 12:50 p.m.

77 Mencken, Dec. 18, 2011, 9:02 a.m.

DA Parish should hire Fred Heebe as their attorney. Then, they would win. Is there another Porteous in the offing?????[78]

Following an article concerning the convictions of several individuals for bribery involving contractors and Jefferson Parish and New Orleans city officials, Perricone wrote:

Letten shouldn't give up on Jefferson Parish. But appears, sadly, that Heebe got the judge in his pocket. Good Luck Feds!!![79]

C. Comments Related to the River Birch Investigation

In addition to the comments set forth above, Perricone repeatedly mentioned Heebe or River Birch in his postings online. Some of these comments are set forth below:

Over, but if the Ford dealership pays a goofy public offical nearly a half-million dollars to have the parish close down his competition, then that is a crime--not marketing. Looks like Heebe had 160 million reasons to pay Mouton.[80]

Now, when Heebe needed to corrupt the airways, he bought you [Robinette]. Don't insult us anymore by telling us it was a loan. It wasn't and we know that. As long as you persist in lying, we will persist in honoring you with our dishonor. CLICK!! That's the sound of me turning off my radio. I hope your adverstisers do the same.[81]

If Heebe had one firing synapse, he would go speak to Letten's posse and purge himself of this sordid episode and let them go after the council and public officials. Why prolong this pain....perhaps Queen Jennifer has something to say about that.[82]

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[78] Mencken, Oct. 19, 2011, 7:06 p.m. "DA Parish" is local slang for St. Bernard Parish. "Porteous" is a reference to the notorious case of U.S. District Judge Thomas Porteous from the Eastern District of Louisiana, who allegedly received illegal gratuities and engaged in other misconduct. Although not charged criminally, in 2010, Judge Porteous was convicted by the United States Senate on four articles of impeachment and removed from office.

[79] Mencken, Oct. 15, 2011, 9:11 a.m. Neither the article, which concerned the conviction of a contractor for bribing New Orleans officials, nor the surrounding comments, sheds light on the judge to whom Perricone was referring. Even without knowing with certainty the identity of the judge, Perricone is clearly insinuating that Heebe had purchased favorable rulings from a judge.

[80] legacyusa, June 8, 2011, 8:32 a.m. Perricone presumably was referring to the $160 million landfill contract between Jefferson Parish and River Birch.

[81] Mencken, Sept. 8, 2011, 8:16 a.m.

[82] Mencken, Dec. 18, 2011, 10:21 a.m. Heebe's wife is Jennifer Sneed.

Garland, if you want to restore what is left of your tattered credibility and image, come clean with us. We know this isn't a loan. We know what the money was for. Heebe comes from a long line of corruptors. Don't be one of his stooges. Get on the mike and let it rip. Tell us the truth. We are waiting.[83]

D. Comments Related to the Danziger Bridge Case

Perricone repeatedly commented on the Danziger Bridge case, before and during the trial. As described above, the Danziger Bridge case was a joint prosecution by the USAO and the Department's Civil Rights Division of police officers who were accused of shooting unarmed civilians on the Danziger Bridge just after Hurricane Katrina and then covering up the shooting. OPR recounts some of Perricone's Danziger Bridge comments below.

Prior to the trial, Perricone posted two comments in response to an article about the anticipated plea of a police officer co-defendant:[84]

Despite defense attorneys protestations to the contrary, It would be prudent for those involve to consider the track record of the US Attorney's Office. Letten's people are not to be trifled with.[85]

Later that same evening, Perricone posted again concerning the same article:

The cover up is always worse than the crime. Archie, your time is up.[86]

Perricone, several months later, commented about another article relating to the plea of a police officer co-defendant:

The Feds never forget.....this officer is doing the right thing....wish the others would, then IT would be over.[87]

Perricone posted a number of comments during the trial. During jury selection, Perricone posted:

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[83] Mencken, Sept. 3, 2011, 10:55 a.m.

[84] As noted, the Danziger Bridge defendants alleged in their new trial motion that the government had improperly leaked the information about the police officer's anticipated guilty plea to the press.

[85] legacyusa, Feb. 23, 2010, 6:17 p.m.

[86] legacyusa, Feb. 23, 2010, 10:44 p.m. "Archie" refers to Archie Kaufman, one of the Danziger Bridge defendants.

[87] legacyusa, May 20, 2010, 10:41 p.m.

NONE of these guys should had have ever been given a badge. We should research how they got on the police department, who trained them, who supervised them and why were they ever been promoted. You put crap in--you get crap out!!![88]

During the trial, Perricone posted:

[T]he only police force to use deadly force throughout the city was the venerable NOPD. Perhpas we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.[89]

Commenting on an article about the testimony of former Police Superintendent Warren Riley, Perricone posted:

He can't remember which deputy chief he instructed to conduct investigations of police shootings???? Thank God he's not chief anymore. Looks like he's reached his capacity for competence at Southern.[90]

Commenting on an article about co-defendant Robert Faulcon's trial testimony, Perricone posted:

Where is Madison's gun? Come on officer, tell us. You shot because you wanted be part of something,you thought, was bigger than you. You let your ego control your emotions. You wanted to be viewed as a big man among the other officers. That's the creed of the NOPD and I hope the jury ignores your lame explanation and renders justice for Mr. Madison. To do less, is to sanction any cop who decides it is in his best interest to put a load of buckshot in the back of a disabled american in broad daylight.[91]

As the jury was deliberating, Perricone posted:

I don't think the jury will leave the dead and wounded on the bridge.[92]

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88 legacyusa, June 22, 2011, 8:19 a.m.

89 dramatis personae, Aug. 3, 2011, 7:06 a.m.

90 dramatis personae, July 25, 2011, 11:32 a.m. ."Southern" refers to Southern University in Baton Rouge, Louisiana.

91 dramatis personae, July 28, 2011, 8:16 a.m.

92 dramatis personae, Aug. 4, 2011, 5:53 p.m.

E. Comments on Cases after Indictment or during Trial

In addition to the Danziger Bridge case, Perricone repeatedly commented on other cases pending trial as well. Perricone posted numerous comments on proceedings in *United States v. Fazzio*, a case pending trial in which he was one of three prosecutors assigned. Following Judge Berrigan's order disqualifying Fazzio's attorneys, Perricone commented:

> *It's the right decision. Judges don't take this action lightly. There must be something going on we don't know about or the TP [Times-Picayune] is too stupid (more likely) to understand. Please get to the bottom of this, PLEASE!!!*[93]

Fazzio's defense attorneys alleged that the prosecutors had committed misconduct by speaking to Fazzio without his attorney present.[94] Following an article reporting on the court's order directing the disclosure of records relating to the misconduct allegations, Perricone posted:

> *As a retired attorney, and thank GOD, I am retired, I don't see the issue here. If Fazzio showed up at the prosecutor's office, what happened then? The story seems to drop off there. What happened next? Did he confess? Am I missing something? Who called the meeting? Why was there a meeting? And if Fazzio's lawyers couldn't represent him, then what damage was done to Fazzio during a meeting he wanted? Damn, I confused and your story doesn't help one bit. I'm going to bed.*[95]

> *"Hell hath no fury like a prosecutor scorned," the ever-combative Cobb said as he left the courtroom." Mr. Rioux, you mean the ever-sodden Cobb, don't you?*[96]

> *Jim Cobb a firebrand??? Only when he's full of firewater.*[97]

In 2008, Mose Jefferson, the brother of U.S. Representative William Jefferson, was indicted for bribery of Ellenese Brooks-Simms, former President of the Orleans Parish School Board. Brooks-Simms pled guilty and testified against Jefferson at his trial, which began in August 2009. During the trial, at which Perricone was one of the prosecutors, Perricone commented:

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93 Mencken, Jan. 5, 2012, 7:36 p.m.

94 Judge Berrigan denied the misconduct motion, ruling that the prosecutors had acted appropriately.

95 Mencken, Jan. 18, 2012, 10:06 p.m.

96 Mencken, Nov. 9, 2011, 7:10 p.m. James Cobb, along with Stephen London, originally represented Fazzio before being disqualified by Judge Berrigan.

97 Mencken, Oct. 26, 2011, 7:40 a.m.

they got the corrupted, now they have to get the corruptor.[98]

Fawer has screwed his client!!!! He revealed exactly what Mose needed on the board to get what Mose wanted. Good job Mike!!!! You're just as arrogant as Ellenese...and the jury knows it.[99]

Mose Jefferson was also charged in a second indictment; that investigation was handled by a different team of prosecutors. Jefferson, his sister Betty Jefferson, and Renee Gill Pratt, a former New Orleans councilwoman and state representative, were indicted for funneling money to nonprofit organizations controlled by the Jeffersons. Following articles discussing the indictment and other court proceedings, Perricone posted:

The sad part of all this is that Bill [Jefferson] is preventing his siblings from pleading guilty and cooperating, thus exposing them to more prison time. Additionally, local defense attorneys are just milking these cases for their own ego gratification and financial enrichment. Something is sick about our system.[100]

Ther real sad part about this, is that they stole from their own people. They hate white people so much, but no white person would have stolen from the poor.[101]

Buddy Lemmon is only interested in making a buck. He could care less about the case because he doesn't have to do the time. The jeffersons are fooooools.[102]

The only wacko in court Friday was Lemann. Oh I forgot, Fawer too. These are two attorneys who have put more of the client's in prison because of the rabid

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98 campstblue, Aug. 16, 2009, 7:41 p.m.

99 campstblue, Aug. 15, 2009, 9:19 p.m. Michael Fawer, Jefferson's attorney, was a particular target of Perricone's critical comments. Perricone also posted, "*Fawer is an idiot*" (campstblue, Apr. 13, 2009, 4:47 p.m.); "*Fawer is just a bag of wind*" (legacyusa, Feb. 9, 2011, 12:20 p.m.); "*Fawer is soooo over rated*" (legacyusa, Nov. 13, 2009, 1:08 p.m.); "*Fawer . . . will never waive his fee...that's all the thinks about is $$$$$$$$$$$$$$$*" (legacyusa, Sept. 15, 2009, 5:50 p.m.); and "*I have NEVER seen a more arrogant, disrespectful a$$ in my life.*" (legacyusa, Aug. 22, 2009, 6:34 a.m.).

100 legacyusa, May 22, 2009, 9:40 p.m. At the time of the posting, William Jefferson was pending trial on corruption charges in federal court in Virginia. Mose Jefferson and Betty Jefferson were pending trial in federal court in Louisiana.

101 campstblue, May 28, 2009, 8:29 a.m.

102 legacyusa, May 28, 2009, 9:28 a.m. Arthur "Buddy" Lemann III represented Mose Jefferson. On several occasions, Perricone used both the legacyusa and campstblue names to comment on the same article.

ego's than any other attorneys in New Orleans. The government shouldn't have it so easy.[103]

Eddie Castaing, like most attorneys, just know how to run their months. They think it generates new clients for them. But it just makes them look foolish, like Castaing needs help. It's the oldest trick in the book--build up your client so you can charge them more and more and more...then you plead them!!! Mose you are being taken for a ride...CUT YOUR LOSSES!!![104]

During Renee Gill Pratt's trial, Perricone commented:

The more Fawer talks, the deeper he sinks his client.[105]

F. Comments on a Civil Matter

In May 2010, the Department's Civil Rights Division publicly announced that it had initiated a civil investigation into allegations of patterns and practices of civil rights violations by the NOPD. Following the Department's announcement in March 2011 that it had concluded that the NOPD had engaged in a pattern of misconduct that violated the Constitution and federal laws, the Department and the City of New Orleans negotiated a settlement that resulted in a consent decree that was approved by the court in January 2013. Perricone played a limited role in the negotiations between the Department and the City.[106] During the investigation and negotiations, Perricone made numerous comments disparaging NOPD managers and lauding the federal investigation of the NOPD:

The NOPD will never change if left to its own devices. It's a corrupt culture which has existed for years. I am opposed to the Federal government residing in our lives, but this is one time I can make an exception.[107]

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103 campstblue, June 6, 2009, 9:23 a.m.

104 legacyusa, Mar. 2, 2010, 8:36 a.m.

105 legacyusa, Feb. 11, 2011, 7:53 a.m. In December 2010, Mose Jefferson's attorney informed the court that Jefferson had been diagnosed with terminal cancer. The court severed the defendants' trials, and Pratt was convicted in July 2011. Mose Jefferson died in prison on May 12, 2011.

106 After the court approved the consent decree, the City of New Orleans moved to vacate it, citing in part Perricone's role in the negotiations and his disparaging public comments about the NOPD. The City, in various pleadings, and the media often described Perricone as the "point person" representing the USAO in the consent decree negotiations. Letten, however, told OPR that he [Letten] was the USAO's "point person" in the negotiations. In litigation concerning the consent decree, the Department described Perricone's role in the negotiations as "de minimus."

107 Mencken, Feb. 5, 2012, 8:25 a.m.

Serpas' success as police superintendent is directly proportionate to how vigorous the court-appointed police monitor will enforce the consent decree. Left to his own devices, the NOPD, under his control, will backslide into the morass it has become over the past 20years.[108]

While these heroes are making promises, where is the Consent Decree they promised? You can't have reform with out the Justice Department in this city. I financially support Mitch, but I beginning to have second thoughts. SHUT UP AND PRODUCE!!!!!![109]

G. Perricone's Explanations Concerning His Postings

Perricone has been questioned three times about his online activities: by the Louisiana Office of the Disciplinary Counsel, by *New Orleans Magazine*, and by attorneys participating in an evidentiary status conference in the Danziger Bridge case before Judge Engelhardt. OPR and AUSA Horn on more than one occasion requested an interview with Perricone as well. Notwithstanding Perricone's reported statement in his *New Orleans Magazine* interview that, "I want to be investigated because I want to get this cleared," Perricone, through counsel, declined OPR's and Horn's repeated requests for an interview.

1. The Louisiana Office of the Disciplinary Counsel Interview

Perricone was interviewed on May 7, 2012, as part of the Louisiana Office of the Disciplinary Counsel's investigation into Perricone's online comments on nola.com and other issues. Perricone acknowledged knowing that prosecutors are not permitted to make extrajudicial statements:

> [A]n attorney is not supposed to make extrajudicial statements. For example, he can't stand on the courthouse step and excoriate your defendant. You can't reveal 6E material, which is grand jury secrecy material. . . . You can't bring any type of opprobrium onto a defendant at all. I mean, you can talk about the case once it's adjudicated, but you know, and . . . really, you've got to watch what you say then. Because there's right – he's still got appellate rights that attach. So I think the rights with DOJ – rights, whatever – regulations are consistent with . . . the canons of ethics.[110]

Perricone also acknowledged that his postings on nola.com were "absolutely inappropriate," but he asserted that "[i]t was . . . never my intent to influence the outcome of any

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[108] Mencken, Sept. 12, 2011, 9:55 p.m.

[109] Mencken, Nov. 22, 2011, 11:24 p.m.

[110] Perricone Tr. at 31-32 (May 7, 2012).

case at any time through my anonymous blogging."[111] He stated that he recognized that his postings, even though done anonymously, "implicate [LRPC] 3.8. Absolutely."[112]

When asked to explain his conduct, Perricone stated:

> (b)(6), (b)(7)(C) I thought by doing this, assuming a non de plume, or a pseudonym, that I could express myself freely, anonymously. . . . (b)(6), (b)(7)(C) .[113]
>
> (b)(6), (b)(7)(C) .[114]

Perricone admitted that in addition to Mencken, he also wrote under the names legacyusa and dramatis personae, and stated that he possibly posted comments under the name fed-up. Perricone said that he did not recall using the name campstblue.[115]

2. The *New Orleans Magazine* Interview

In an article published in the August 2012 issue of *New Orleans Magazine*, Perricone admitted that in addition to the Mencken pseudonym, he posted under the names legacyusa and dramatis personae.[116] According to the article, Perricone stated that he "created the personas because he kept forgetting the passwords." Perricone told the reporter, "I don't remember using 'camp street blue.'"

Perricone reiterated in the article that his postings provided a means of relieving stress, because "the constant flow of corruption allegations that came into the U.S. Attorney's Office took a toll." Perricone told the reporter that "he became 'jaded' and 'cynical, sullen and irritable'"; he felt "helpless in trying to help New Orleans. I was burned out." Perricone denied

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111 *Id.* at 33.

112 *Id.* at 34.

113 *Id.* at 26-27. (b)(6) (b)(7)(C) . *See* Perricone Resp. at 2, 10, 29, 33.

114 *Id.* at 37.

115 *Id.* at 25-26.

116 Allen Johnson Jr., "Sal Perricone's Next Chapter: Former prosecutor, aka 'Henry L. Mencken1951,' speaks out," *New Orleans Magazine*, August 1, 2012 (*New Orleans Magazine* interview).

violating the Federal Rules of Criminal Procedure governing grand jury secrecy. In a statement signed by Perricone and published by the *New Orleans Magazine* under the title, "Sal Perricone's Statement to the Citizens," Perricone stated that he believed he "had a First Amendment right to post comments anonymously on Nola.com." He acknowledged, however, that just because "something is legal doesn't mean you should do it." He also stated, "While I didn't steal any money, kill anyone or molest any child, I did make poor choices."

Perricone denied that anyone in the USAO was aware of his online postings: "Jim Letten had no idea of what I was doing . . . . Jan Mann had no idea what I was doing. This is on me. I take 100 percent of the responsibility."

3. Sworn Testimony in the Danziger Bridge Case

On October 10, 2012, Perricone testified under oath at a non-public, evidentiary status conference held in the Danziger Bridge case. Perricone was questioned by defense attorneys, the government, and Judge Engelhardt.

Perricone testified that he posted comments under the names Mencken, legacyusa, and dramatis personae.[117] Sealed. See 11/26/12 order of Judge Engelhardt [redacted] Perricone testified that he did not Sealed. See 11/26/12 order of Judge Engelhardt [redacted] Perricone agreed with a proposition put to him that "Nola.com attributed comments to your screen names that you did not make," saying, "As I sit here today, I believe so."[122] Sealed. See 11/26/12 order of Judge Engelhardt [redacted]

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117 Danziger Bridge Status Conference Tr. at 4 (Oct. 10, 2012).

118 Seal[redacted] Sealed. See 11/26/12 order of Judge Engelhardt [redacted]

119 [redacted]

120 [redacted]

121 [redacted]

122 *Id.* at 11.

123 [redacted]-13; campstblue, June 1, 2009, 8:42 a.m.

Sealed. See 11/26/12 order of Judge Engelhardt

Sealed. See 11/26/12 order of Judge Engelhardt

Perricone's responses to questions concerning postings about a failed real estate development, known as "Algiers Landing" or "Algiers Crossing" (Algiers Landing matter), and Louis Dabdoub, a candidate for Superintendent of the NOPD, caused Judge Engelhardt to question Perricone's truthfulness. During the status conference, defense counsel questioned Perricone on whether he revealed Rule 6(e) or otherwise confidential material in comments he made concerning the Algiers Landing matter.[130] In response, Perricone testified that the comments he posted concerned a New Orleans police practice of downgrading crime reports, and that his reference to the developers involved in the real estate project constituted "a poor choice of words."[131] With respect to a campstblue comment referring to the Algiers Landing matter, Perricone testified, "I don't remember writing that. Like I said, I don't trust this Nola.com at all."[132]

Defense counsel also asked Perricone whether he divulged non-public information when he posted a negative comment about Dabdoub and suggested that the selection committee for the police superintendent position should "speak to the Feds" before considering Dabdoub for the

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124 Sealed. See 11/26/12 order of Judge Engelhardt

130 *Id.* at 35-44. AUSA Walz concluded that Perricone's comments regarding the Algiers Landing matter did not violate Rule 6(e).

131 *Id.* at 41.

132 *Id.* at 42.

position. Sealed. See 11/26/12 order of Judge Engelhardt

II. Mann's Postings and Explanations

Sealed. See 11/1/13 order of Judge Engelhardt.[134] According to nola.com, eweman authored 40 postings from November 4, 2011, to March 2, 2012.[135] Sealed. See 11/1/13 order of Judge Engelhardt

[136] Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt.[137] The majority of Mann's postings were in response to articles about both the federal and state criminal justice systems.

A. Mann's Comments on USAO Matters

OPR identified eight comments by Mann that concerned active investigations or cases pending trial.[138] Mann posted three additional comments after the defendant's sentencing, while the case was on appeal. In response to an article on nola.com about the USAO filing additional charges against Fazzio, Mann posted two very similar comments within a few minutes of each other (which she explained as her early experimentation with the posting process):

> *Like Renee Gill Pratt and Mose Jefferson and Mark St Pierre did, Fazzio is certainly entitled to take his best shot at beating the odds for conviction. The juries in federal court seem to uniformly find that the prosecutors are doing the right thing and proving their cases beyond doubt. Too bad for Fazzio if he is only taking this route because he's afraid of his boss. Does anyone see a pattern here?*

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133 *Id.* at 59-60. OPR did not investigate whether Perricone's testimony regarding Algiers Landing or Dabdoub was false as that issue was within the scope of AUSA Horn's review.

134 Sealed. See 11/1/13 order of Judge Engelhardt

135 *See* http://connect.nola.com/user/eweman/comments.html.

136 Sealed. See 11/1/13 order of

137 Sealed. See 11/1/13

138 With respect to other comments, in some instances although the article on which Mann commented related to a USAO matter, Mann's comment did not.

He used to work for Al Copeland and now he works for Fred Heebe/Jim Ward? Birds of a feather....[139]

Fazzio is certainly entitled to take his chances at trial just as his predecessors Renee Gill Pratt, Mose Jefferson, Mark St. Pierre etc did. Federal jurors seem to always find the prosecutors have done the right thing and proven their cases beyond doubt. It's a pity if Fazzio is taking this route at the urging of his bosses and their minions. Sounds like he could cut his losses. Does anyone see a pattern here? Fazzio worked for Al Copeland and now Heebe/Ward? Birds of a feather...[140]

In response to an article that Fazzio had obtained new counsel, Mann commented:

Luckily Mr. High Profile attorney won't be able to put the fix in in federal court for Fazzio like he did for Cinel in Orleans Parish. Lemann actually referred to himself as a Dragon Slayer in his book - you got to be kidding. This guy looks like Boss Hog and hasn't looked at a law book since he left school. He's better than those last 3 jokers but couldn't you have come up with somebody better on the 2nd try Fazz?[141]

Sealed. See 11/1/13 order of Judge Engelhardt

Mann's comment in the second entry that it "sounds like he [Fazzio] could cut his losses" appears to assert that Fazzio should cooperate with the prosecution. Sealed. See 11/1/13 order of Judge Engelha

,,[144]

In 2011-2012 the *Times-Picayune* published several articles regarding Heebe's $250,000 interest-free loan to WWL talk radio host Garland Robinette, allegedly in exchange for Robinette's criticizing the reopening of the Old Gentilly Landfill, which competed with River Birch. The articles stated that federal authorities had found out about the loan during their investigation of River Birch, and that federal investigators had questioned Robinette. In response to two of those articles about Robinette, Mann posted the following comments:

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139 eweman, Nov. 5, 2011, 11:15 a.m.

140 eweman, Nov. 5, 2011, 10:20 a.m.

141 eweman, Jan. 13, 2012, 6:27 p.m.

142 Sealed. See 11/1/13 order of Judge Engelhardt

143 Sealed. See 11/1/

144 Sealed. See 11/1/

Like the Board at Penn State, whoever runs WWL needs to fire Garlando. His disgrace was selling his opinions to the highest bidder. How can any listener trust his statements on air after that? How do his bosses justify him not disclosing this before he got caught? If hypocrisy is one of the most damning traits, Mr Robinemblind is the poster boy. He is a two bit journalist/artist/ con man who needs to go ASAP. If Penn State didn't feel it was necessary to show JoePa loyalty after 46 years, WWL doesn't owe it to Vincent Van Robinette![145]

$250.000 loan to build a 400 square foot art studio ...are the floors paved with gold? What a crock. I don't know much about construction costs but that must be some helluva 20 X 20 room. B.S. on its' face. Couldn't Garlando have come up with a better story than that? If he has a lot of money in the bank then this story won't hold water in court. Has anyone been to this palatial studio ? Does anyone know if Garland is tap city or flush?[146]

[redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted] [147]

Mann commented three times on articles related to the USAO's prosecution of Jefferson Parish officials. In response to an article about the indictment of Jefferson Parish President Aaron Broussard, Mann commented:

They have been accused of stealing hundreds of thousands of our dollars and are charged with felonies galore. It sounds like a couple of you out there think that won't land em in the pen. Haven't you been paying attention? You take the king down for anything you got him on. Al Capone went to jail for taxes, remember?[148]

Hotsaws –It would be nice if the DA could do some public corruption cases but he'd have to charge his own father in this case who was also a ghost employee – could be a little tough.[149]

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145 eweman, Nov. 12, 2011, 8:15 p.m.

146 eweman, Feb. 4, 2012, 11:59 a.m.

147 Sealed. See 11/1/13 order of Judge Engelhardt

148 eweman, Dec. 2, 2011, 4:37 p.m.

149 eweman, Dec. 2, 2011, 12:07 p.m. "Hotsaws" was the name of another commenter, who questioned why the Jefferson Parish District Attorney had not indicted more public corruption cases. Although the article preceding this post concerned the USAO's indictment of Jefferson Parish officials, Mann's comment arguably did not as she was responding to another commenter's question about a local district attorney. (b)(6) (b)(7)(C) [redacted]

Also related to the *Broussard* case was a comment Mann made in response to an article about an anticipated plea agreement with former Jefferson Parish official Tim Whitmer, in which the author speculated that Whitmer was cooperating in order to obtain a favorable deal:

> *The parish president and parish attorney and the mega Rich contractors are far worse than Whitmer. If the Feds wanted to give him a good deal to get inside scoop on the higher ups lets trust them to get it right. They are all we got standing between justice and total corrupt chaos in JP.*[150]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][151]

In response to an article about Judge Engelhardt declaring a mistrial in the *Dugue* federal civil rights case, Mann commented:

> *This Judge declared a mistrial because his best buddy the defense attorney asked for it as a result of the butt whippin' his client was taking on the stand. Dugue was committing perjury right and left and was on the ropes going down. I would venture to guess that never in the history of the republic has a judge declared a mistrial because a prosecutor said a name "Robair" to her colleague. If the Judge was concerned that the jury heard the name and didn't want it to come out all he had to do was question each juror individually and see if any of them had heard the name and if it meant anything to any of them. Simple procedure used often in trials. I guarantee most of the jurors would have said they hadn't heard it and if any of them did hear they didn't know what she was referring to. the Defense attorney knew he was about to lose and hit the Eject button plain and simple and his friend the Judge gave him a way out . The rest of you commenters are NOPD fender lizards.*[152]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][153]

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150 eweman, Jan. 22, 2012, 11:49 a.m.

151 Sealed. See 11/1/13 order of Judge Engelhardt

152 eweman, Jan. 28, 2012, 4:42 p.m. Gerard Dugue was a New Orleans police officer who was indicted in the Danziger Bridge case. His case was severed from that of his co-defendants, and he was tried separately in January 2012. Judge Engelhardt granted the defendant's request for a mistrial after the prosecutor mentioned, during the cross-examination of Dugue, the name "Robair," who was the victim in another civil rights case that had attracted intense media attention in New Orleans.

153 Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

[redacted][154]

Three of Mann's comments concerned cases that were on appeal. In response to an editorial about the conviction of Renee Gill Pratt, a former state and local official, and in response to an article about Pratt's sentencing, Mann wrote two comments:

> *Pratt's lack of remorse is astounding in the face of the overwhelming evidence of corruption that 23 out of 24 jurors found her guilty of. She claims her only mistake was in picking the wrong boyfriend. If she's so dumb that Mose [Jefferson] bamboozled her, she shouldn't have run for public office in the first place. She wanted the power, the prestige, the free lunches and all of the other perks with being a VIP. For shame that she did it on the backs of those who needed those dollars to make a better life for themselves. Perhaps one of these murder victims would not be laying dead in the street today if the perpetrator had received guidance and a hand up from one of the scam programs she funded.*[155]

> *Do any of you have any common sense at all? Renee not punished for going to trial - punished for lying until the bitter end and not showing any signs of conscience. Is the person that plans the robbery , buys the masks and the guns any less guilty than the ones who go into the bank and hold everyone up? Betty's sentence was too light but she is 20 years older than Renee and not nearly the high level public official that Renee was. The higher up you are the worse your sentence should be when you are corrupt.*[156]

In response to an article about former U.S. Representative William Jefferson's appeal of his conviction, Mann posted:

> *The main thing is Dollar has been ejected from high places for a while now. If his conviction is upheld by the appeals court he will go to jail. Even Edwin Edwards couldn't avoid jail. Of course now the media wants to make him a hero again even though like Dollar, Edwards has never shown one ounce of remorse for his crimes against the citizens. These two are the worst of the worst because even after getting caught and proven guilty at trial they still cannot find any decency in their souls to say they did wrong and regret it. That is unforgivable.*[157]

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154 [redacted]

155 eweman, Nov. 4, 2011, 1:18 p.m.

156 eweman, Nov. 6, 2011, 5:36 p.m.

157 eweman, Dec. 9, 2011, 10:32 a.m. "Dollar" was a derogatory nickname given to Jefferson by a political opponent.

B. Mann's Explanations Concerning Her Postings

Sealed. See 11/1/13 order of Judge Engelhardt In addition, on January 2, 2013, through her attorney, Mann sent nearly identical letters to Louisiana Chief Disciplinary Counsel Plattsmier and to the Chair of the Lawyer Disciplinary Enforcement Committee of the U.S. District Court for the Eastern District of Louisiana, responding to Judge Engelhardt's findings and conclusions regarding Mann's conduct as set forth in the court's November 26, 2012 order.[158]

Sealed. See 11/1/13 order of Judge Engelhardt [160]

Sealed. See 11/1/13 order of Judge Engelhardt [162]

Sealed. See 11/1/13 order of Judge Engelhardt [163] Sealed. See 11/1/13 order of Judge Engelhardt

158 As the two letters are nearly identical, OPR will cite only to Mann's January 2, 2013 letter to Plattsmier (Letter from Mann to Louisiana Chief Disciplinary Counsel Plattsmier).

159 Sealed. See 11/1/13 order of Judge Engelhardt

160 Sealed. See 11/1/13

161 Sealed. See 11/1/13

162 Sealed. See 11/1/13 order. Evidence demonstrates that Mann did look at nola.com comments prior to her first posting on November 4, 2011. For example, Mann sent an e-mail to (b)(6) (b)(7)(C) on September 7, 2011, in which she cut and pasted a nola.com comment in which the commenter alleged that River Birch had helped end an energy project that converted trash to energy. The documentary evidence does not reveal whether Mann reviewed postings more frequently than she asserted.

163 Sealed. See 11/1/13

Sealed. See 11/1/13 order of Judge Engelhardt

[redacted][164] Sealed. See 11/1/13 order of Judge Engelhardt [redacted][163]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][166] Sealed. See 11/1/13 order of Judge Engelhardt [redacted][167] Sealed. See 11/1/13 order of Judge Engelhardt [redacted][169]

In her January 2, 2013 letter to Plattsmier, Mann asserted that she had not violated LRPC 3.8(f) because all of her comments were posted anonymously, none were made in her capacity as a Department attorney, and her comments were among hundreds of other anonymous postings on nola.com.[170] (b) (6), (b) (7)(C) [redacted][171]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][172] Mann did not inform OPR of her own postings at that time.

164 Sealed. See 11/1/13

165 Sealed. See 11/1/13

166 Sealed. See 11/1/13 order

167 Sealed. See 11/1/13

168 Sealed. See 11/1/13 order

169 Sealed. See 11/1/13 order

170 Letter from Mann to Louisiana Chief Disciplinary Counsel Plattsmier at 2-3.

171 *Id.* at 17.

172 Sealed. See 11/1/13 order of Judge Engelhardt

CHAPTER 3

OPR'S ANALYTICAL FRAMEWORK AND APPLICABLE STANDARDS OF CONDUCT

I. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, applicable rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney: (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.

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 is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, made a mistake, or acted appropriately under all the circumstances. 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. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

II. Applicable Standards of Conduct

Department of Justice regulations provide that Department attorneys shall, in all cases, conform to the rules of ethical conduct of the court before which a particular case is pending. 28 C.F.R. § 77. Perricone and Mann are members of the Louisiana State Bar, and to the extent

that they commented on active cases, with one exception, the cases were pending in Louisiana.[173] Therefore, OPR assesses Perricone's and Mann's conduct by the standards set forth in the Louisiana Rules of Professional Conduct (LRPC).

OPR considered whether Perricone and Mann violated the LRPC, federal administrative regulations, Department rules, local rules governing the conduct of attorneys practicing in the U.S. District Court for the Eastern District of Louisiana, and USAO policies. OPR found no Department policy specifically addressing the issue of whether, or to what extent, Department personnel may comment online while using a pseudonym. Nonetheless, numerous administrative regulations, Department policies, local rules, and state bar ethics rules relate to and govern extrajudicial public statements made about Department matters by Department attorneys.

In addition, the LRPC address the extent to which an attorney must keep his or her client informed about the status of the representation, attorney conflicts of interest, the knowing presentation of false statements to a court, and attorney misconduct through dishonest actions.

A. Rules Governing Extrajudicial Statements Regarding Active Investigations or Pending Cases and False Statements about Judges

1. The Code of Federal Regulations

Title 28 of the Code of Federal Regulations (C.F.R.), § 50.2, *et seq.*, restricts extrajudicial statements made by Department personnel relating to criminal and civil proceedings. Section 50.2(b)(2) states:

> At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

Section 50.2(b)(3)(iv) sets forth certain types of information that prosecutors may make public, including background information concerning the defendant, the substance of the charge, and the identity of the investigating agency. However, "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations." *Id.* Furthermore, where the background information or information relating to the circumstances of the investigation "would serve no law enforcement function, such information should not be made public." *Id.*

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[173] Perricone commented on nola.com about a criminal case against William Jefferson that was being prosecuted in the U.S. District Court for the Eastern District of Virginia.

Section 50.2(b)(5) warns of the danger when comments are made in the period occurring immediately prior to or during a trial:

> Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement . . . shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

Sections 50.2(b)(6)(i) and (vi) explicitly prohibit certain statements, including "[o]bservations about a defendant's character" and "[a]ny opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense."

2. Department of Justice Policies

Department policies governing contacts with the media and the disclosure of information relating to Department investigations are contained in the U.S. Attorneys' Manual (USAM) § 1-7.000, *et seq.* Section 1-7.401 states in part:

> A. The use of a press release which conforms to the approval requirements of USAM 1-7.400 is the usual method to release public information to the media by Department of Justice components and investigative agencies . . . .
>
> D. There are also circumstances involving substantial public interest when it may be appropriate to have media contact about matters after indictment or other formal charge but before conviction. In such cases, any communications with press or media representatives should be limited to the information contained in an indictment or other charging instrument, other public pleadings or proceedings, and any other related non-criminal information . . . .
>
> E. Any public communication by any Department component or investigative agency or their employees about pending matters or investigations that may result in a case, or about pending cases or final dispositions, must be approved by the appropriate . . . United States Attorney . . . .
>
> G. All Department personnel must avoid any public oral or written statements or presentations that may violate any Department guideline or regulation, or any legal requirement or prohibitions, including case law and local court rules.
>
> H. Particular care must be taken to avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding . . . .

Section 1-7.500 provides: "At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably

should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

With respect to active investigations, § 1-7.530 provides that "personnel of the Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress . . . ."

Like the C.F.R., § 1-7.550 prohibits Department personnel from making "[o]bservations about a defendant's character" (1-7.550(A)); commenting about the "refusal or failure of the accused to make a statement" (1-7.550(B)); and offering "[a]ny opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged . . . ." (1-7.550(F)).[174]

3. USAO Policy

The USAO prohibits personnel in the office from speaking to the media without authorization from the U.S. Attorney, who is the spokesperson for the office. A November 8, 2007 e-mail from Letten reminded all USAO staff as follows:

> If you are contacted or otherwise queried by anyone outside the Department . . . including any members of the press—do not under any circumstances provide *any information* about any pending or official matters, and *do not confirm or deny the existence of any investigations or subpoenas*. If you find yourself speaking to a reporter, however inadvertently, socially or casually, remember that any casual conversation may lead to an unauthorized disclosure.[175]

Letten told OPR that he had given Mann the "unfettered" authority to make statements to the press, but that Mann was the only person in the USAO to whom he had given that authority.[176]

4. U.S. District Court Local Criminal Rules

The Local Criminal Rules of the U.S. District Court for the Eastern District of Louisiana (Local Rules) restrict attorneys from making extrajudicial statements relating to pending cases or

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[174] The USAM is available online to all AUSAs. In addition, other available online resources include a USABook Media Relations guide that summarizes the applicable restrictions; a 42-minute video presentation that includes presentations from the Department's Office of Public Affairs, EOUSA, and OPR; and a memorandum issued by Deputy Attorney General James Cole setting forth guidance for Department employees regarding electronic communications in criminal cases. The memorandum states, "Prosecution team members should not post case-related or sensitive agency information on a non-agency website or social networking site. Information posted on publically accessible websites or social networking sites may be used to impeach the author." Memorandum, "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases," at 3.C.11 (Mar. 30, 2011).

[175] Emphasis in original.

[176] Letten Tr. at 56 (Aug. 8, 2012).

active investigations. The Local Rules are similar to the Department's and the C.F.R.'s restrictions.

Local Rule 53.1 states:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he or she is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

Local Rule 53.2 states:

> When there is a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, or to warn the public of any dangers, or otherwise to aid in the investigation.

Local Rule 53.3 states:

> From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by means of public communication relating to that matter and concerning: (A) . . . the character or reputation of the accused . . . . (D) The identity, testimony, or credibility of prospective witnesses . . . . (F) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

Local Rule 53.5 states:

> During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

5. The Louisiana Rules of Professional Conduct

a. Public Statements

LRPC 3.6, "Trial Publicity," reads in part:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. . . . (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

LRPC 3.8, "Special Responsibilities of a Prosecutor," reads in part:

> The prosecutor in a criminal case shall: . . . (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . .

b. False Statements about Judges and Judicial Candidates

In addition to the prohibitions on extrajudicial statements, OPR assesses below whether Perricone's and Mann's conduct violated LRPC 8.2, "Judicial and Legal Officials," which prohibits lawyers from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . or of a candidate for election or appointment to judicial or legal office."

B. Additional Louisiana Rules of Professional Conduct Implicated by Mann's Conduct

OPR further assesses whether Mann violated the following LRPC provisions.

1. Communication between Lawyer and Client

LRPC 1.4(a), "Communication," reads in part, "(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules . . . [and] (3) keep the client reasonably informed about the status of the matter."

LRPC 1.4(b) reads in part: "The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Although the wording of LRPC 1.4(b) differs from Rule 1.4(b) of the American Bar Association's Model Rules of Professional Conduct (Model

Rule), the Louisiana State Bar Ethics Committee "intended no major substantive difference from the [Model R]ule."

Comment 7 to Model Rule 1.4 states in part that, "A lawyer may not withhold information to serve the lawyer's own interest or convenience . . . ."

2. Conflicts between Lawyer and Client[177]

LRPC 1.7, "Conflict of Interest," reads in part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if . . . (4) each affected client gives informed consent, confirmed in writing.[178]

LRPC 1.7 is essentially identical to Model Rule 1.7. Comment 10 to Model Rule 1.7 reads in part:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

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[177] LRPC 1.4 and 1.7 require an attorney to provide her "client" with sufficient information to make informed decisions about a matter, and to obtain her "client's" informed consent in writing to waive the attorney's conflict of interest. Some authorities have stated that a government attorney's client is in most cases the agency employing the attorney. Other authorities have concluded that the United States is the client of Department attorneys. No practical difference exists between finding that the Department or the United States was Mann's client in this matter. The Department and the United States can only make decisions through persons authorized by law or policy to do so. Thus, for purposes of assessing Mann's compliance with LRPC 1.4 and 1.7, OPR must determine who was authorized to make decisions about how the USAO would respond to the various issues that arose as a consequence of the revelation that Perricone had posted comments online about Department matters.

The consequences of Perricone's postings required that decisions be made by the Department's leadership offices. OPR concludes that for purposes of Mann's compliance with LRPC 1.4 and 1.7, U.S. Attorney Letten, or those above him in the Department's chain of command, represented the client and had exclusive authority to waive Mann's conflict of interest.

[178] LRPC 1.0(e) defines informed consent: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

One commentator has stated that although attorney conflicts of interest are "usually . . . pecuniary . . . there are times when interests that are not pecuniary – such as . . . [to] forestall a government investigation into [the attorney's] own wrongful conduct – may be found to justify disqualifying counsel."[179]

Federal courts have routinely held that attorneys who have engaged in the same wrongful conduct that is at issue in the representation of their client have a personal conflict of interest. *See, e.g., United States v. Fulton*, 5 F.3d 605, 610 (2d Cir. 1993) ("It is well-settled in this circuit that an actual conflict of interest exists when an attorney engages in wrongful conduct related to the charge for which the client is on trial."); *Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir. 1988) ("[W]hen an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great."). When an attorney has engaged in the same wrongful conduct that is at issue in the representation of his client, a conflict arises because the attorney cannot provide full and effective representation. *See United States v. Jones*, 900 F.2d 512, 519 (2d Cir. 1990) ("In such a situation, the fear of prompting a government investigation into the attorney's own wrongdoing would preclude an attorney from asserting a vigorous defense in behalf of his client."); *Cardoza v. Rock*, 2010 WL 7597717 (S.D.N.Y. 2010) ("[T]he attorney's representation is going to be burdened by the attorney's own interest in self-preservation and the attorney will likely be unable to provide the defendant with unbiased advice . . . .").

3. Rules Relating to Candor and Honesty

LRPC 3.3(a), "Candor Toward the Tribunal," reads in part: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."

The Model Rules state that "[a]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law . . . the lawyer must not allow the tribunal to be misled by false statements of law or fact . . . . Legal argument based on a knowingly false representation of law constitutes dishonesty towards the tribunal." Annotated Model Rules of Professional Conduct at 322 (7th ed. 2011).

4. Dishonest or Misleading Conduct

LRPC 8.4, "Misconduct," reads in part: "It is professional misconduct for a lawyer to . . . (c) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) [e]ngage in conduct that is prejudicial to the administration of justice."

"The concepts of dishonesty, fraud, deceit, and misrepresentation, though closely related, are not the same . . . . The Model Rules do not define dishonesty, deceit, or misrepresentation." Annotated Model Rules of Professional Conduct, at 613 (7th ed. 2011). However, courts have stated that Model Rule 8.4(c) should be broadly construed, and that "dishonesty encompasses

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[179] Richard E. Flam, *Conflicts of Interest*, at http://www.cce mcle.com/tests/ss6013a.htm.

conduct evincing a lack of honesty, probity, or integrity in principle; a lack of straightforwardness." *In re Martin*, 67 A.3d 1032, 1050 (D.C. 2013) (analyzing District of Columbia Rule of Professional Conduct 8.4(c), which mirrors Model Rule 8.4(c)) (quoting *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007) (brackets and internal quotation marks omitted)). "In addition to [Model] Rule 3.3, which directly deals with candor towards tribunals, [Model] Rule 8.4(c) is implicated when a lawyer misleads or lies to a tribunal." Annotated Model Rules of Professional Conduct, at 615 (7th ed. 2011).

Moreover, based on particular states' adoptions of the Rule, courts have held that material omissions in an attorney's communications with clients or third parties may violate Model Rule 8.4(c). *See, e.g.*, *In re Baker*, 294 P.3d 326, 331 (Kan. 2013) (attorney engaged in "dishonesty" in violation of Rule 8.4(c) when he "made material misrepresentations of fact and material omissions of fact"); *In re Waters*, 817 N.W.2d 662 (Minn. 2012) (false statements and material omissions to client violated Rule 8.4(c)); *Attorney Grievance Comm'n v. Floyd*, 929 A.2d 61, 66 (Md. 2007) (sanctioning attorney for Rule 8.4(c) violation; "[r]espondent did not *explicitly* misstate any fact. However, the law recognizes that deceit can be based on concealment of material facts as well as on overt misrepresentations" (emphasis in original)); *In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007) (misstatements and material omissions violate Rule 8.4(c); Rule 8.4(c) violated by "conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness . . . . [W]hat may not be legally characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty"); *In re Mitchell*, 727 A.2d 308, 315 (D.C. 1999) (violation of Rule 8.4(c) for omission of material fact in communication with client; "'[c]oncealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation'").

Misrepresentations to the court also violate Model Rule 8.4(d). "[A] mere misrepresentation to the court . . . constitutes conduct that is prejudicial to the administration of justice." *Henry v. Statewide Grievance Comm.*, 957 A.2d 547, 555 (Conn. App. Ct. 2008) (analyzing Connecticut Rule of Professional Conduct 8.4(4), which mirrors Model Rule 8.4(d)).

C. Duty to Report Misconduct

In Chapter 8, OPR assesses whether USAO personnel who had suspicions that Perricone might be posting anonymous comments breached a duty when they failed to report their suspicions. Any such duty derives from two sources.

USAM § 1-4.100 requires attorneys to report misconduct to their supervisors, OPR, or the Office of the Inspector General (the OIG):

> Department employees shall report to their United States Attorney or Assistant Attorney General, or other appropriate supervisor, any evidence or non-frivolous allegation of misconduct that may be in violation of any law, rule, regulation, order, or applicable professional standard. . . . The supervisor shall evaluate whether the misconduct at issue is serious, and if so shall report the evidence or non-frivolous allegation to the Office of the Inspector General (OIG) or to the

Office of Professional Responsibility (OPR), and to [the Executive Office for United States Attorneys]. . . .

LRPC 8.3(a) requires attorneys to report violations of certain professional conduct rules:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the [Louisiana] Office of Disciplinary Counsel.

CHAPTER 4

PERRICONE AND MANN INTENTIONALLY VIOLATED ADMINISTRATIVE REGULATIONS, DEPARTMENT POLICIES, LOCAL RULES, AND STATE BAR ETHICS RULES BY POSTING COMMENTS ABOUT USAO MATTERS AND FEDERAL AND STATE JUDGES

In this chapter of the report, OPR sets forth its findings and conclusions regarding Perricone's and Mann's conduct in posting comments on nola.com. OPR first concludes that Perricone was responsible for all of the nola.com comments posted under the pseudonyms Mencken, legacyusa, dramatis personae, and campstblue. OPR further concludes that Perricone and Mann intentionally violated administrative regulations, Department policies, and Local Rules concerning extrajudicial statements relating to matters handled by the USAO. OPR then concludes that Perricone and Mann violated state bar ethics rules concerning impermissible statements by bar members concerning the character and integrity of judicial officers. Finally, OPR concludes that comments by Perricone and Mann caused significant harm to the Department's interests, and evidenced exceedingly poor judgment that is unbecoming of Department attorneys.

I. Perricone and Mann Committed Intentional Professional Misconduct by Commenting on Active Investigations and Pending Cases

A. OPR Concludes That Perricone Authored All Postings Attributed to campstblue

Perricone has admitted, and OPR concludes, that Perricone was the author of the postings attributed on nola.com to Mencken, legacyusa, and dramatis personae. In his three interviews, however, Perricone provided varying statements regarding whether he used the pseudonym campstblue. In his interviews with both *New Orleans Magazine* and Louisiana Chief Disciplinary Counsel Plattsmier, Perricone said that he did not recall using the name campstblue to post comments on nola.com. Sealed. See 11/26/12 order by Judge Engelhardt.

Sealed. See 11/26/12 order of Judge Engelhardt

Sealed. See 11/26/12 order of Judge Engelhardt

OPR concludes that, in fact, Perricone posted all of the comments on nola.com attributed to campstblue.

Analysis of the campstblue postings provides strong evidence that Perricone alone posted comments under that name. Heebe's attorneys provided OPR with an analysis of the campstblue postings conducted by forensic linguist, and former FBI Criminal Profiler, James Fitzgerald. According to his March 28, 2012 report, Fitzgerald concluded that the writing style of the author of the campstblue postings was "**CONSISTENT** to the degree of **Exceptionally Distinctive**" to

the writing style of the author of the Mencken postings.[180] Fitzgerald's analysis incorporated "lexical, stylistic, grammatical and other linguistic parameters," which, in other words, is the use of unusual words, word pairings, quotes, alliteration, metaphors, and punctuation, as well as the author's choice of topics. Fitzgerald noted the following consistencies between the 715 campstblue postings and the 550 Mencken postings that he analyzed:

- the use of unusual words, such as "*redoubt*," "*effluvia*," "*Ivy Weed*," and "*caveat lector*";[181]
- alliteration used by campstblue ("'*undereducated, undermotivated, underachievers, undertrainend [sic] and under Riely . . .*'") and Mencken ("'*undereducated, undermotivated, underskilled, undersupervised, underpoliced . . .*'");
- the use of metaphor (campstblue: "'*ripped the scab off an old wound . . .*'"; Mencken: "'*inside the NOPD was the aorta of corruption . . .*'");
- a consistent omission of commas before the "and" or "or" preceding the last word in a series; and
- the common choice of topics on which to comment, including the USAO, AUSAs, and Letten.

Fitzgerald also noted that many biographical references in the campstblue postings were consistent with the known background of Perricone: (b)(6) (b)(7)(C) [redacted]

Similar to Fitzgerald's analysis, OPR also observed the following connections between campstblue postings and postings by Mencken, legacyusa, and dramatis personae:

- strong similarities in word choice: the words "*effluvia*" and "*Ivy Weed*" are used under all four names;
- strong similarities in topic selection and tone: the campstblue postings, like the postings under the other names, are generally negative in tone and highly critical of local and state politicians, national politicians from the Democratic Party, Tulane University, and the NOPD;
- campstblue and legacyusa referred to local black politicians in a similar manner: former New Orleans Mayors Ray Nagin and Marc Morial were described as "*racist*," and black ministers were described as "*pulpit pimps*";

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[180] Fitzgerald, Forensic Linguistic/Authorial Attribution Report (Second Report), at 12 (Mar. 28, 2012) (Forensic Linguistic/Authorial Attribution Report (Second Report)) (emphasis in original). On the "Consistent Outcome – Distinctiveness Scale" used by Fitzgerald, "exceptionally distinctive" is the highest level of consistency and means that "the possibility of this combination of features being shared by other speakers is considered to be remote[.]" *Id.* at 12 n.1.

[181] OPR notes that in his *New Orleans Magazine* interview, Perricone stated, "I had the safe redoubt of my anonymity."

- legacyusa and campstblue both commented in almost identical fashion on an article concerning a hearing before the Louisiana Supreme Court regarding a female judge who had been accused of judicial misconduct: legacyusa stated, "*The Louisiana Supreme Court will do nothing to her. Remember, the Cheif Justice is a woman.*"; seven minutes later, campstblue posted, "*The Louisiana Supreme Court will do nothing. The Chief Justice is a woman and there is significant empathy residing there.*";[182]
- local public corruption cases were a topic of significant interest under all four names; the notable exception to campstblue's continued criticism of local officials was effusive praise for the USAO and the AUSAs who worked in the office; this praise was also expressed in postings under the legacyusa, Mencken, and dramatis personae names;[183]
- campstblue, like the other names, used obscure Latin phrases: "*deus ex machine*" (campstblue and legacyusa); "*Cadit Quaestio*" (dramatis personae); "*damnant quodnon intelligunt*" (Mencken); and
- campstblue, like dramatis personae and Mencken, commented on an obscure historical incident that occurred in New Orleans in 1881 in which 11 Italians were lynched or shot.

OPR concludes that the evidence is sufficient to prove by a preponderance of the evidence that Perricone used the pseudonym campstblue to post comments on nola.com, and that all of the campstblue comments were made by Perricone, not someone else posting comments under that name. The similarities among the campstblue, Mencken, legacyusa, and dramatis personae postings are striking and, as Fitzgerald noted, highly unusual words and phrases like "*redoubt*" and "*Ivy Weed*" appear in postings by campstblue and other pseudonyms known to be associated with Perricone. Perricone failed to offer any evidence to support his claim that nola.com authorized or allowed others to post comments under the campstblue name. OPR concludes that a preponderance of the evidence supports a finding that Perricone wrote all of the comments posted online by campstblue.

B. OPR's Analysis and Conclusions

OPR concludes that Perricone and Mann committed intentional professional misconduct by violating their obligations as set forth in 28 C.F.R. § 50.2, *et seq.*; USAM § 1-7.000, *et seq.*; USAO policy; and Local Rules 53.2, 53.3, and 53.5. The rules regarding when prosecutors may comment on active investigations and pending cases are numerous, clear, and unambiguous. As AUSAs with decades of prosecutorial and managerial experience, Perricone and Mann were aware, or should have been aware, of these rules and that they were required to abide by them.

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[182] legacyusa, Sept. 11, 2009, 8:11 a.m.; campstblue, Sept. 11, 2009, 8:18 a.m. At the time of the posting, the Chief Justice of the Louisiana Supreme Court was Catherine Kimball.

[183] Under the legacyusa pseudonym, Perricone criticized his (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) and occasionally alleged that Letten took credit for the AUSAs' work. Praise for the USAO as a whole, and particularly the AUSAs, remained consistent throughout all of the postings.

1. Perricone and Mann Violated Clear and Unambiguous Rules and Regulations Governing Extrajudicial Statements

OPR finds that the standards governing extrajudicial statements about active investigations and pending cases are clear and unambiguous. C.F.R. § 50.2(b)(3), USAM § 1-7.401(E), Local Rule 53.2, and USAO policy set forth the circumstances in which a prosecutor may make extrajudicial statements. Even though the governing rules and regulations do not specifically address anonymous online postings to a newspaper's website, the clear intent of the rules and regulations is to restrict personnel associated with the prosecution from making statements about active investigations and pending cases.[184]

Equally clear is that Perricone and Mann violated these rules. Perricone and Mann made extrajudicial statements about active investigations and pending cases that served no law enforcement function, were not specifically authorized by C.F.R. § 50.2(b)(3) or the U.S. Attorney, and that were disseminated by means of public communication. Chapter 2 cites numerous examples of Perricone's and Mann's online postings which include extrajudicial statements about active investigations that violate C.F.R. § 50.2(b)(3), USAM § 1-7.401(E), Local Rule 53.2, and USAO policy.[185] For example, commenting on the prosecution of one of his own cases, Perricone responded to another poster:

> *Go down to Federal Court and read the warrant and complaint. It will tell you from where the " hacking" occurred. This guy is gone! Look at the prosecutors who are handling the case. No light-weights there.*[186]

Plainly this was a comment about a pending case, and the posting had no purpose other than for Perricone to comment on the defendant's culpability and to praise himself. Likewise, Mann posted a comment about the USAO filing additional charges against Dominick Fazzio, a case for which Mann had supervisory responsibility:

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[184] In her letter to Louisiana Chief Disciplinary Counsel Plattsmier, Mann referred to a November 26, 2012 training program in which EOUSA's Office of General Counsel advised employees, "There is no DOJ policy on the off-duty personal use of social media. There is no DOJ policy that would govern the off-duty use of an employee's personal equipment, computer, or device (*i.e.*, not issued by DOJ) for social media." Letter from Mann to Louisiana Chief Disciplinary Counsel Plattsmier at 3. The same presentation, however, also made clear that accessing social media in one's personal or professional capacity implicates various ethics rules, including misuse of position. The training advised, "No one ever got in trouble for being too cautious. If in doubt, always confirm whether a particular use of social media is permissible under Government ethics rules." In any event, the Department has promulgated explicit regulations and internal policies restricting extrajudicial statements regarding active investigations and pending cases. The lack of an explicit social media policy does not authorize Department attorneys to willfully ignore those rules.

[185] Perricone's Internet postings cited in this report are set forth at Exhibit A. Mann's Internet postings cited in this report are set forth at Exhibit B.

[186] campstblue, Oct. 17, 2008, 9:30 a.m.

Like Renee Gill Pratt and Mose Jefferson and Mark St Pierre did, Fazzio is certainly entitled to take his best shot at beating the odds for conviction. The juries in federal court seem to uniformly find that the prosecutors are doing the right thing and proving their cases beyond doubt. Too bad for Fazzio if he is only taking this route because he's afraid of his boss. Does anyone see a pattern here? He used to work for Al Copeland and now he works for Fred Heebe/Jim Ward? Birds of a feather....[187]

Not only did Perricone and Mann make unauthorized extrajudicial statements about active investigations and pending cases that served no law enforcement function, but Perricone did so in the period approaching or during trial that were not "absolutely demand[ed]" by circumstances, in violation of C.F.R. § 50.2(b)(5) and Local Rule 53.5. During the trial in the Glover case, involving NOPD officers accused of shooting Henry Glover and burning his body in a car, Perricone wrote:

Let me see if I understand this: The cops, throught their attorneys, admitted that they shot Glover and then burned the body in a car that belonged to another man, who was not arrested for anything...RIGHT??? Guilty!! Now, let's get on to Danzinger.[188]

During the Danziger Bridge case, the high-profile civil rights trial of NOPD officers who shot and killed individuals crossing the Danziger Bridge after Hurricane Katrina, Perricone posted:

[T]he only police force to use deadly force throughout the city was the venerable NOPD. Perhpas we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.[189]

Perhaps most egregiously, and as demonstrated above, Perricone and Mann offered prohibited opinions and made statements regarding the accused's or the defendant's guilt, in violation of C.F.R. § 50.2(6)(vi), USAM § 1-7.550(F), and Local Rule 53.3(F); and about a "defendant's character," in violation of C.F.R. § 50.2(6)(i), USAM § 1-7.550(A), and Local Rule 53.3(A). As reflected more fully in Chapter 2, these statements by Perricone were repeated and unrelenting. Following nola.com's online posting of the indictment of Henry Mouton, for example, Perricone posted, "*I read the indictment...there is no legitimate reason for this type of behavior in such a short period of time and for a limited purpose. GUILTY!!!*"[190] Commenting

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187 eweman, Nov. 5, 2011, 11:15 a.m.

188 legacyusa, Nov. 19, 2010, 7:49 a.m.

189 dramatis personae, Aug. 3, 2011, 7:06 a.m.

190 legacyusa, Feb. 26, 2011, 9:16 a.m.

on an article concerning the indictment of Fazzio, Perricone wrote, "*Well, Mr. Fazzio, I hope you have room in your scrap book for your conviction and mug shot. London didn't too well with Archie Kaufman. You're next.*"[191] After Judge Berrigan disqualified Fazzio's attorneys due to a conflict of interest, an article reported that Fazzio had obtained Arthur "Buddy" Lemann as his new attorney. Perricone commented:

> *Looks like Fazzio got a lemon. That book you refer to Mr. Rioux is about all of his losses. The guy is a clown and Fazzio is going down.*[192]

Mann likewise commented on the character and guilt of defendants in pending cases. In response to an article about the USAO filing additional charges against Fazzio, Mann wrote:

> *Like Renee Gill Pratt and Mose Jefferson and Mark St Pierre did, Fazzio is certainly entitled to take his best shot at beating the odds for conviction. The juries in federal court seem to uniformly find that the prosecutors are doing the right thing and proving their cases beyond doubt. Too bad for Fazzio if he is only taking this route because he's afraid of his boss. Does anyone see a pattern here? He used to work for Al Copeland and now he works for Fred Heebe/Jim Ward? Birds of a feather....*[193]

In response to an article about Judge Engelhardt declaring a mistrial in the *Dugue* case, a prosecution related to the Danziger Bridge incident, Mann accused the defendant of perjury.[194] Nothing about the circumstances justified such a communication, and it plainly violated the prohibitions of USAM §§ 1-7.401(E) and 1-7.550(F), as well as C.F.R. § 50.2(b)(6)(i) and (iv).

2. Perricone and Mann Committed Intentional Professional Misconduct

The rules and regulations restricting a prosecutor's right to comment about cases are not directed solely at comments likely to influence the outcome of a case. They are also designed to protect defendants from extrajudicial statements that may present a danger of creating prejudice, even if that is not the intent of the commenter; to protect the privacy of persons who have not been and may never be charged with a criminal offense; and to protect against the possibility of disclosing sensitive or confidential information, among other purposes.[195]

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191 dramatis personae, Aug. 5, 2011, 3:09 p.m.

192 Mencken, Jan. 13, 2012, 10:36 p.m.

193 eweman, Nov. 5, 2011, 11:15 a.m.

194 eweman, Jan. 28, 2012, 4:42 p.m.

195 Generally, online comments are made hurriedly as an immediate reaction to an article or other comment. Sealed. See 11/1/13 order of Judge Engelhardt (b)(6), (b)(7)(C) . Accordingly, a very real risk exists that a Department employee will disclose (Continued . . .)

Even if Perricone [redacted] did not intend to "influence the outcome of a case," they "engaged in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits."[196] Perricone and Mann intentionally posted comments online for the purpose of: (1) discussing active investigations and pending cases; (2) disparaging the character of defendants, and subjects and targets of grand jury investigations; and (3) offering opinions regarding the guilt of defendants. Perricone admitted that he was aware that "an attorney is not supposed to make extrajudicial statements" and "[y]ou can't bring any type of opprobrium onto a defendant at all."[197] He also acknowledged that he understood that posting anonymously implicates LRPC 3.8.[198] Sealed. See 11/1/13 order of Judge Engelhardt [redacted][202] *See In re Discipline of Russell*, 797 N.W.2d 77, 89 (S.D. 2011) (attorney failed to conduct research about propriety of actions).

OPR finds by a preponderance of the evidence that when posting their comments online, Perricone and Mann acted with the purpose of obtaining a result – making extrajudicial statements about active investigations and pending cases – that the applicable rules and regulations unambiguously prohibit. Accordingly, OPR concludes that Perricone and Mann committed intentional professional misconduct.

(Continued . . .)

confidential information, perhaps inadvertently, because little or no reflection is given before making these types of online comments.

196 *See* OPR Analytical Framework, Chapter 3. In his interviews with *New Orleans Magazine* and the Louisiana Office of the Disciplinary Counsel, Perricone stated generally that his purpose in posting comments was to relieve stress, and not to influence the outcome of any case. Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

197 Perricone Tr. at 31-32 (May 7, 2012).

198 *Id.* at 34.

199 Sealed. See 11/1/13 order of Judge Engelhardt

200 Sealed. See 11/1/13 order [redacted]

201 Sealed. See 11/1/13 order [redacted]

202 Sealed. See 11/1/13 order [redacted]

3. First Amendment Rights of Government Employees

Perricone and Mann defended their conduct in part by asserting that they were acting within their rights under the First Amendment when they commented anonymously about matters of public interest. Legal analysis concerning the extent of free speech rights of public employees has changed significantly in the past 50 years. While the U.S. Supreme Court initially gave the government broad authority to restrict employees' speech on the ground that individuals did not have a right to government employment,[203] courts now recognize that the government's interest in restricting its employees' speech must be balanced against the employees' First Amendment rights. This balancing test was initially articulated by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in which the Court established a test that balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[204] *Id.* at 568 (upholding right of public school teacher to write letter to newspaper criticizing the school board's funding decisions).

In applying the *Pickering* balancing test, courts first consider whether the speech at issue relates to a matter of "public concern." Work-related speech that relates only to matters of personal concern to the employee is not afforded constitutional protection. *Connick v. Myers*, 461 U.S. 138 (1983). If the speech does relate to a matter of public concern, the employer may still restrict the speech if it disrupts the institutional efficiency of the organization. *Id.* at 149; *see also* Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. Rev. 2117 (summarizing state of the law). "Justifications may include such considerations as maintaining efficiency, discipline, and integrity, preventing disruption of operations, and avoiding having the judgment and professionalism of the agency brought into serious disrepute." *Piscottano v. Murphy*, 511 F.3d 247, 271 (2d Cir. 2007).

The *Pickering* balancing test also applies to the non-work-related speech of government employees. In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Supreme Court considered a rule prohibiting employees from accepting honoraria for writings and speeches that were unrelated to their work. Although the speech was outside the context of the employees' official duties, the Court applied the *Pickering* balancing test to determine whether the government's limitation on employee speech outweighed the employees' right to

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[203] *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952) (upholding ban on New York public school employees from engaging in "subversive" speech and joining "subversive" organizations because employees had no constitutional right to work for the school system).

[204] This test is reflected in Department policy: "As a matter of law, DOJ will not restrict an employee's freedom of speech in the Federal workplace except where the employee's interest in the speech is outweighed by the Government's interest in the efficient provision of public services or where the speech intrudes upon the legitimate rights of other employees." United States Attorneys' Procedures, Official and Personal Use of the Internet and Intranets, § 1-4.320.001.7 (2008).

expressive activity.[205] *Id.* at 470-72 (ban on honoraria not sufficiently tailored to protect government's interests). Likewise, in *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008), the court applied the *Pickering* test in evaluating a police department's policies that affected its employees' off-duty conduct (upholding termination of police officer for selling sexually explicit photographs of himself and his wife because off-duty activity brought embarrassment and disrepute upon the police department).

Several cases have dealt with government restrictions imposed on the speech of prosecutors or law enforcement officers. In *Connick v. Myers*, the Supreme Court upheld the discipline of an assistant district attorney for distributing a survey to her colleagues concerning office policies and morale. The Court held that most of the survey did not deal with matters of public concern. With respect to the one issue that did deal with a matter of public concern, the Court determined that the employee's speech disrupted the office by undermining the relationship between prosecutors and their supervisors. *Connick*, 461 U.S. at 151-53. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court upheld the discipline of a prosecutor who had written a memorandum criticizing the accuracy of an affidavit in a search warrant. The Court held that the memorandum was written because the prosecutor was complaining as an employee, not as a "citizen," and therefore was not afforded constitutional protection. Moreover, as noted, in *Dible*, the U.S. Court of Appeals for the Ninth Circuit upheld the discharge of a police officer for off-duty conduct even though the officer had taken "some pains" to keep his official status separate from his sexually-explicit photography business. 515 F.3d at 925. *See also Locurto v. Guiliani*, 447 F.3d 159 (2d Cir. 2006) (police officer's off-duty participation in parade float mocking African-Americans justified termination of plaintiff's employment based on potential disruption to police department).

Perricone's postings contain a mix of comments relating to matters of personal and public concern and a mix of work-related and non-work-related issues. Most of Perricone's postings concern topics about which the government has little interest (*e.g.*, Perricone's opinions regarding such things as Mardi Gras), or would likely constitute protected First Amendment speech (*e.g.*, Perricone's opinions regarding President Obama). The great majority of Mann's postings related to the state and federal criminal justice systems.

With respect to Perricone's and Mann's comments relating to USAO matters that OPR finds violated administrative regulations and Department and court rules, the government's interests outweigh Perricone's and Mann's interest in free speech. The rules prohibiting prosecutors from making extrajudicial statements exist to protect the important due process rights of persons facing criminal prosecution and the privacy rights of persons who may never be charged with a criminal violation. Furthermore, Perricone's and Mann's actions caused severe

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[205] In many cases, the line between private conduct and work-related conduct can become blurred. Off-duty speech may be work-related. In *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), the Supreme Court affirmed the termination of a police officer who created sexually-explicit videos of himself in a police uniform. The Court concluded that the speech was work-related because the officer had intentionally linked his videos to his police work by dressing in a police uniform.

disruption in the USAO, requiring its recusal from certain active investigations and pending cases, and resulting in substantial unnecessary litigation in several matters. The *Pickering* balancing test weighs heavily in favor of the government's interests in restricting this type of extrajudicial speech. As a court stated in one recent case upholding the discharge of a child protective services caseworker for comments she posted on her Facebook page, legitimate government interests include "promoting efficiency and integrity in the discharge of official duties . . . . [T]he government may show that an employee's statement 'interferes with the regular operation of the enterprise.'" *Shepherd v. McGee*, 2013 WL 5963076, at *5 (D. Or. Nov. 7, 2013) (upholding discharge of caseworker for discussing and criticizing clients on caseworker's Facebook page).

OPR concludes that Perricone's and Mann's speech that violated the restrictions governing extrajudicial statements about active investigations and pending cases was not protected by the First Amendment.[206]

4. Posting Anonymously Is Not an Exception to the Rules and Regulations Prohibiting Extrajudicial Statements

The Supreme Court has recognized the importance of anonymous speech. "Under our Constitution, anonymous [expression] is . . . an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Nonetheless, anonymity does not afford the speaker absolute protection from employer policies or laws restricting speech, such as prohibitions against slander and libel.[207]

Perricone's and Mann's use of pseudonyms does not exempt their conduct from the rules and regulations restricting public comments by prosecutors on active investigations and pending cases. As the Ninth Circuit stated in *Dible*, "Many a rule breaker does so clandestinely in the

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[206] In *Ranck v. Rundle*, No. 08-22235, 2009 WL 1684645 (S.D. Fla. June 16, 2009), the court found that a prosecutor's public distribution of a critical memorandum he wrote after being removed from a case when he questioned the propriety of a police shooting was protected First Amendment speech. The court found that the prosecutor was speaking on a matter of public concern and that the employer's interest in restricting the speech was not sufficiently significant to justify the 30-day suspension imposed on the prosecutor. The facts of the case are distinguishable, because the court in *Ranck* found no evidence that the ability of the state prosecutor's office to conduct business had been impeded in any "material sense." Furthermore, the court found that the employee's speech touched on an area of significant public concern, that is, a type of "whistleblowing" that concerned issues of good governance. In this matter, however, neither Perricone nor Mann exposed governmental misconduct; they disparaged individuals (or the attorneys who represented them) who were under investigation or had been charged by the USAO.

[207] In his response to the OPR draft report, Perricone repeatedly claimed that his comments were protected by the First Amendment because he made them anonymously. Perricone Resp. at 10, 18-28. The substance of anonymous speech is protected only to the same extent that speech made overtly would be entitled to First Amendment protection. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Speech does not gain First Amendment protection because it is made anonymously. As courts resolving defamation and other claims have often pointed out, the "right to speak, whether anonymously or otherwise, is not unlimited." *Id.*

hope that his violations will not come to light and have untoward consequences. When that hope is dashed, the results and consequences for him are the same as they would have been if he had broken the rules overtly." 515 F.3d at 925-26. Similarly, in *Pappas v. Guiliani*, 290 F.3d 143 (2d Cir. 2002), the court upheld the termination of a police officer who mailed racially bigoted materials to charitable organizations even though he did so anonymously. As the court stated, "Although [the officer] tried to conceal his identity as speaker, he took the risk that the effort would fail." *Id.* at 148.[208] The rules and regulations do not state that they are to be applied only when the prosecutor is identified and speaks in his or her governmental capacity. Allowing a prosecutor to do anonymously what he or she is prohibited from doing overtly would create a significant exception to the rules and regulations. Such an exception, however, should not be presumed in the absence of explicit language creating it.

In addition, Perricone and Mann had no reasonable basis for concluding that their use of pseudonyms would necessarily protect their identities. The nola.com User Agreement and Privacy Policy set forth on the website makes clear that nola.com does not guarantee privacy to the website's anonymous posters: "We reserve the right to identify you from your Registration Information and/or to merge or co-mingle anonymous or non-personally identifiable data about you . . . for any lawful business purpose." The User Agreement and Privacy Policy also states, "We may also provide access to our database in order to cooperate with official investigations or legal proceedings initiated by governmental and/or law enforcement officials, as well as private parties, including, for example, in response to subpoenas, search warrants, . . . court orders, or other legal process."[209]

Furthermore, many anonymous bloggers and commenters have been the subject of lawsuits seeking to unveil their identities, several of which have been successful. *See* Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 Minn. L. Rev. 1478 (2010) (and cases cited therein); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008) (denying motion of anonymous posters seeking to quash subpoena to Internet service provider for identification information regarding individuals who posted sexually-harassing comments about female law students); *In re: Indiana Newspapers Inc.*, 963 N.E.2d 534 (Ind. App. 2012) (former president of organization sued newspaper for release of identity of commenter who implied that former president had embezzled money); "N.C. judge orders blog to disclose anonymous commenters," Cristina Abello, July 1, 2010, www.rcfp.org/node/98020; "Illinois Newspaper Forced To Disclose Names of Anonymous Commenters," July 23, 2012, www.huffingtonpost.com/2010/06/03/illinois-newspaper-forced_n_599722.html. One news organization unilaterally unmasked a poster simply because of the news value of the poster's identity. *See* "Plain Dealer sparks ethical debate by unmasking anonymous Cleveland.com

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[208] The American Bar Association's first ethics code, published in 1908, warned against attorneys resorting to anonymous public comments regarding cases: "'If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously.'" American Bar Association Canons of Professional Ethics, Canon 20 (1908) (quoted in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1066 (1991)).

[209] nola.com User Agreement and Privacy Policy at 16 (rev. Nov. 1, 2011).

poster," Henry J. Gomez, March 26, 2010, http://blog.cleveland.com/metro/print.html (poster commenting on cases had e-mail address associated with local judge).

The evidence developed by OPR demonstrates that Perricone and Mann were well aware of the possibility that their anonymity could one day end and their identities be revealed. Using the legacyusa name, Perricone commented on articles concerning a lawsuit filed by Jefferson Parish President Steve Theriot seeking the identities behind 11 nola.com user accounts. Sealed. See 11/1/13 order of Judge Engelhardt

[redacted] Sealed. See 11/1/13 order of Judge Engelhardt

Perricone and Mann knew or should have known that their identities as federal prosecutors might one day be revealed. In any event, their initial anonymity did not permit them to post comments online that they knew they could not make in their official capacities.

5. Application of LRPC 3.6(a) and 3.8(f)

Both LRPC 3.6(a) and 3.8(f) limit a prosecutor's ability to comment on cases pending trial. LRPC 3.6(a) limits an attorney who has participated, or is participating, in an investigation from making extrajudicial statements that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." LRPC 3.8(f) likewise limits a prosecutor from making extrajudicial statements "that have a substantial likelihood of heightening public condemnation of the accused . . . ."[212]

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210 Sealed. See 11/1/13 order of Judge Engelhardt

211 The term "Luddite" is sometimes used to describe persons opposed to computers and other forms of modern technology.

212 Model Rule 3.8(f) restricts its application to those extrajudicial statements made by "the prosecutor" in a criminal case. In contrast, LRPC 3.6(d) explicitly expands the scope of Model Rule 3.6(a) to include government attorneys "associated with" attorneys who investigated or litigated a matter. LRPC 3.8, however, contains no provision similar to LRPC 3.6(d), and therefore appears to apply only to those attorneys actually prosecuting the matter at issue, and not to government attorneys merely "associated with" the prosecutors.

The rising prevalence of attorneys' use of social media has required state bar disciplinary counsel throughout the country to apply ethics rules to novel situations. Although disciplinary counsel have routinely assessed allegations regarding improper extrajudicial statements, they have usually done so in contexts vastly different from that presented in this matter – extrajudicial comments originally made anonymously as part of an online forum consisting of numerous similar comments, where the author's identity is only later revealed. Because OPR found no disciplinary cases involving these unique facts interpreting LRPC 3.6(a) or 3.8(f), or similar ethics rules in other jurisdictions, and for the other reasons set forth in the following discussion, OPR defers to the Louisiana Office of the Disciplinary Counsel to review and analyze this case of first impression to determine whether Perricone and Mann violated LRPC 3.6(a) and 3.8(f).[213]

The restrictions imposed by LRPC 3.6(a), which is virtually identical to Model Rule 3.6(a), are aimed primarily at two potential problems: (1) comments that are likely to influence the outcome of a trial; and (2) comments that are likely to prejudice the jury venire by increasing the difficulty of assembling an unbiased jury. *Gentile*, 501 U.S. at 1075. Prejudice may occur because "attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. . . . [C]omments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public." *Attorney Grievance Comm'n of Md. v. Gansler*, 835 A.2d 548, 559 (Md. 2003). Not all extrajudicial comments, however, necessarily violate Model Rule 3.6(a). "Only the occasional case presents a danger of prejudice from pretrial publicity." *Gentile*, 501 U.S. at 1046 (Kennedy, J., dissenting). Thus, evaluation of the attorney's conduct "requires an assessment of proximity and degree of harm." *Id.* at 1037.

LRPC 3.8(f), like Model Rule 3.8(f), prohibits a prosecutor in a criminal case from making extrajudicial statements "that have a substantial likelihood of heightening public condemnation of the accused . . . ." The comment to Model Rule 3.8(f) indicates that it is intended to "supplement" Model Rule 3.6(a) by prohibiting speech that has a substantial likelihood of increasing public opprobrium of the accused, as well as speech that has a substantial likelihood of materially prejudicing an adjudicative proceeding. OPR found no case addressing whether the anonymous, or once-anonymous, speech of a prosecutor violates rules similar or identical to Rules 3.6(a) or 3.8(f).

The disclosure of confidential information might constitute grounds for concluding that a prosecutor's speech had a significant likelihood of prejudicing an adjudicative proceeding as

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[213] 28 C.F.R. § 50.2(b)(2), USAM §§ 1-7.000.H and 1-7.500, and Local Rule 53.1 are similar to LRPC 3.6(a). Although each of these rules has a slightly different formulation, they are designed to achieve a common purpose: to prohibit attorneys from making extrajudicial statements that could reasonably be expected to materially prejudice the outcome of a pending or future adjudication. For the same reasons that OPR defers to the Louisiana Office of the Disciplinary Counsel on the issue of whether Perricone's and Mann's online posting activity violated LRPC 3.6(a) and 3.8(f), and because of the other professional misconduct findings contained in this report that apply specifically to the extrajudicial statements made by Perricone and Mann, in the context of this matter, OPR need not decide whether Perricone and Mann violated the provisions in the Department's regulations and policies that are similar to LRPC 3.6(a).

such a disclosure might inform potential jurors about information that would not otherwise be available to them. *See Gansler*, 835 A.2d at 559 (details of confession disclosed prior to trial). In this matter, OPR could not establish that either Perricone or Mann disclosed confidential information in their postings. As discussed previously, AUSA Walz found that none of Perricone's postings contained information protected by Rule 6(e), and OPR is aware of no evidence that Perricone's postings contained confidential USAO material. OPR found that none of Mann's postings contained information protected by Rule 6(e) or confidential USAO material. In his investigation, AUSA Horn likewise determined that none of Perricone's or Mann's postings related to the Danziger Bridge case violated Rule 6(e). Although Perricone and Mann commented on articles that discussed USAO cases, OPR is unaware of evidence that their comments, at least prior to the revelation of their identities, increased the publicity associated with those cases. *See United States v. Bingham*, 769 F. Supp. 1039 (N.D. Ill. 1991) (defense counsel "personally contribut[ed]" to case's media exposure by submitting to television interviews on the evening prior to jury selection). Nor does it appear that either Perricone's or Mann's postings were distinguishable from those of other commenters (prior to the time when their identities became known). Neither Perricone's nor Mann's comments were noticeably more negative or colorful than other commenters.[214] Finally, at the time they were posting comments online, Perricone and Mann were not identified as attorneys associated with the cases, or as prosecutors, so their extrajudicial comments at that time could not have carried the imprimatur of the Department.

Of course, Perricone and Mann were both eventually identified as senior prosecutors, and their comments might thereafter have garnered added significance in the public's opinion. In other words, after Perricone's and Mann's identities were revealed, their comments received substantial attention, which might have increased the likelihood that their comments could prejudice the outcome of pending or future proceedings or heightened the public's condemnation of defendants. That does not appear to have happened here, however. In fact, public discussion

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[214] For example, regarding nola.com's February 3, 2012, article about Heebe's loan to Garland Robinette, upon which both Perricone and Mann commented, other commenters wrote: "*Garland is just another piece of garbage.*" (comment by "oneemperor"); "*I turned off WWL until the fire that self serving idiot, Garland Robinette.*" (comment by "bayoubud"); "*Robinette was PAID, repeat PAID, repeat PAID to rant on the gentilly landfill, period. Cut out all the B.S. about a loan and tell it like it is. [His attorney] Ciolino should be disbarred for lying.*" (comment by "isthatupa"); "*Robinette is a fraud and probably should have been indicted along with the others involved in the scheme*". (comment by "screamingyellowzonker"); "*Why hasn't WWL radio fired Robinette yet? The guy is obviously a lying crook who used his radio show to defend Heebe who will occupy the cell next to Aaron Broussard in the near future. Fire him and be done with it!*" (comment by "craig911"); and "*Garland Robinette is a pig.*" (comment by "Understanding").

As another example, regarding nola.com's December 2, 2011, article about Aaron Broussard's indictment, upon which both Perricone and Mann commented, other commenters wrote: "*Pure greed. Each parish should have a cage in it's parish seat location in which the scumbags who violate public trust would be placed on display for several hours a day to face the people they screwed.*" (comment by "errorcorrector"); "*Some have speculated that Broussard has Mafia ties, don't know, but I do know he totally defrauded the people of Jefferson Parish as its President. He is an absolute hoodlum. Has ZERO character.*" (comment by "bobbycoxe1"); and "*Broussard, Broussard Parker, Wilkison, Whitmer are all crooks. I want them all nailed.*" (comment by "crooksrus").

and media reports following the revelations concerning Perricone's and Mann's online activities were uniformly highly negative about the *prosecutors*; those they attacked in their postings were not publicly condemned. Further complicating the analysis is that by the time Perricone's and Mann's identities were revealed, most of the cases upon which they had commented were resolved, and therefore their identities as prosecutors could not have affected the proceedings that were concluded.

OPR found no disciplinary cases in Louisiana or elsewhere addressing the issue of the impact on pending cases, or the public's perception of defendants, from anonymous speech – or once-anonymous speech – by prosecutors. Disciplinary cases concerning violations of ethics rules similar or identical to LRPC 3.6(a) or 3.8(f) invariably arose from more formal settings, such as press conferences or media interviews. In those cases, the identity of the commenter was readily apparent; the particular comments were highlighted, not buried amongst tens or hundreds of other comments; and the policy concerns underlying the applicable ethics rules came immediately into play.

As the foregoing analysis makes clear, the application of LRPC 3.6(a) and 3.8(f) to Perricone's and Mann's extrajudicial speech is factually complex and legally novel. In addition, and perhaps most important, the question of whether a prosecutor's extrajudicial speech has or may affect a pending or future trial, or has or may increase public condemnation of the accused, are fact-based determinations that depend on a factual analysis of how people in a given geographic area (here, the Eastern District of Louisiana) may be affected by the extrajudicial speech at issue.

Without question, the postings by Perricone and Mann were inappropriate at best, and offensive, and even outrageous, at worst. The postings plainly constituted professional misconduct, as discussed throughout this report. Extrajudicial speech of the type in which Perricone and Mann engaged is never appropriate or acceptable for Department prosecutors. Whether Perricone's and Mann's conduct also specifically violated LRPC 3.6(a) and 3.8(f) is a question best addressed by the Louisiana Office of the Disciplinary Counsel, which is currently investigating Perricone's and Mann's conduct.

II. Perricone and Mann Intentionally Violated LRPC 8.2 by Commenting about the Judiciary

In his comments posted on nola.com, Perricone repeatedly criticized state and federal judges and candidates nominated for federal judgeships or campaigning for elected state judicial office. Mann authored one comment criticizing Judge Engelhardt. OPR concludes that these comments violated LRPC 8.2 and constitute intentional professional misconduct.

A. Comments Made by Perricone

1. Comments That Judges Were Appointed Based on Political Influence Rather than Merit

Perricone repeatedly commented that judges in the Eastern District of Louisiana, and other judges, were appointed to the bench because of their relationships with politicians rather than their qualifications:

> *Vance should ask Jones to appoint a special judge to hear all corruption cases arising in this area. After all, every judge on the New Orleans bench as some political connection to someone. How do you think they got their jobs????*[215]

> *Landrieu . . . has chose three lady lawyers with little or NO federal jury trial experience to be a Federal judge. With the paucity of experience evident, one must ask why? We all know that Federal judges are NOT selected for their erudition, but for their relationship with politicians . . . .*[216]

> *No one should be surprised at this behavior. Afterall, it human nature to lord over someone when you are cognizant of your own shotcomings and conceal them with conceit. Federal judges are NOT selected for their erudition, but for their relationships with politicians. Hence, we get a product short on wisdom, long on solipsism, shallow in humanism, deep in activism and all bangled in a life time appointment. They forget they're wearing a robe, not a crown, and the last thing on their minds is service to the public.*[217]

> *You lose a case and get a promotion??? This clearly demonstrates that it's not qualifications that get you a judgship -- it's politics and only politics. SAD!!!*[218]

> *She graduated in 1992 and feels she's qualifed to be a judge??? From Mayberry to the big leagues on one single bound. Man, she's got to know somebody. Who says politics is absent from the Federal Bench???? Sad.*[219]

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[215] Mencken, Dec. 3, 2011, 10:19 a.m. "Vance" is Chief Judge Sarah Vance of the U.S. District Court for the Eastern District of Louisiana; "Jones" is Judge Edith Jones, former Chief Judge of the U.S. Court of Appeals for the Fifth Circuit.

[216] Mencken, Nov. 5, 2011, 3:44 p.m.

[217] Mencken, Oct. 9, 2011, 8:24 a.m.

[218] legacyusa, Mar. 27, 2011, 8:54 a.m.

[219] legacyusa, Mar. 16, 2011, 8:19 p.m.

2. Judge Helen Berrigan

Perricone repeatedly criticized Judge Berrigan, who was overseeing the *Fazzio* case. He implied that Judge Berrigan's favorable rulings were the result of being paid off by Heebe or her "love" for criminals:

> *DA Parish should hire Fred Heebe as their attorney. Then, they would win. Is there another Porteous in the offing?????*[220]
>
> *After he graduates, and Tulane will graduate him, he should seek employment with Ginger Berrigan. She loves killers.*[221]
>
> *Berrigan would do ANYTHING to overturn a death penalty. She loves criminals. She coddles them and reveres them. . . . My sincere condolences to the* [redacted] *for have your loved one killed then justice killed by a ideologue judge . . . . Shameful. This is why Presidential election are so important. You get judges who love criminals and feel sorry for them instead of victims.*[222]
>
> *We will probably get a Boleshevek in the White House who will appoint Boleshevik federal judges,like Ginger Berrigan. (She loves Wilber Redoux)*[223]
>
> *Berrigan finds ways to let hoodlams and rapists out of jail and now she does it with the help of her close friend. We can only hope the court of appeals sees through ths mendacity!!!!*[224]

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[220] Mencken, Oct. 19, 2011, 7:06 p.m. "Porteous" is a reference to the notorious case of U.S. District Court Judge Thomas Porteous from the Eastern District of Louisiana, who allegedly received illegal gratuities and engaged in other misconduct. Although not charged criminally, Judge Porteous was convicted in 2010 by the United States Senate on four articles of impeachment and removed from office.

[221] Mencken, Sept. 18, 2011, 9:36 a.m. "Ginger" Berrigan is the name by which Judge Berrigan is commonly known. The article generating the comment concerned a student at Tulane University Law School, who previously had been convicted of murder.

[222] legacyusa, May 21, 2010, 8:07 a.m. Judge Berrigan reversed, on the grounds of prosecutorial misconduct, the death sentence of John Johnson, who had been convicted of killing bank guard and off-duty Deputy Sheriff Sidney Zaffuto.

[223] campstblue, Feb. 24, 2008, 6:38 p.m. Wilbert Rideau was released from state prison in 2005 after serving 44 years for murder. His conviction was overturned on appeal three times, and his last retrial resulted in a manslaughter conviction. Following his original conviction and death sentence in 1961, Rideau's case generated substantial controversy and was racially divisive. Judge Berrigan represented Rideau prior to her appointment to the federal bench.

[224] campstblue, Sept. 6, 2009, 10:14 a.m. The article on which Perricone was commenting concerned Judge Berrigan's ruling in a state *habeas corpus* action that the defendant's attorney had been ineffective by failing to inform the defendant of a plea offer. The article described the attorney as an "old friend" of Judge Berrigan's.

3. State Judges

Perricone criticized numerous state judges, particularly the judges on the Louisiana Supreme Court, commenting:

> *This is a disgrace for the Looooooooziana Supreme Court. How do they expect the public of have ANY confidence in ANY judgment they render if they let a convicted felon become a lawyer???? Incredible!!! Disgusting! Unbelievable and typical of this haven for criminals.*[225]

> *AGREE!!! And the voters, at least the ones who made the effort to vote, just elected a well-sodden member of the bar to be a judge at Tulane and Broad. It will not get any better, lamentably.*[226]

Following an article concerning pay raises for state judges, Perricone commented at length:

> *Here are my reasons [for objecting to the pay raise]: . . .*
>
> *1. We can't afford lavish raises on people who DO NOT WORK a full day. Ask any attorney . . . and all wil tell you that nearly ALL judges are home by noon if they go to work at all. . . .*
>
> *2. Most are incompetent lawyers to begin with. The only way to get elected is to have the right friends in the right places . . . .*
>
> *5. They are generally stupid. Very stupid--besides being lazy. One just has to pull any law book which reports decided cases and one will realize that nearly all the cases are reverrsed because of STUPID decisions of the judges.*[227]

Referring to a hearing regarding allegations of judicial misconduct involving a female state judge, Perricone posted comments as both legacyusa and campstblue:

> *The Louisiana Supreme Court will do nothing to her. Remember, the Cheif Justice is a woman.*[228]

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225 Mencken, Jan. 20, 2012, 9:48 p.m.

226 Mencken, Oct. 23, 2011, 9:43 a.m.

227 Mencken, Dec. 19, 2011, 8:57 a.m.

228 legacyusa, Sept. 11, 2009, 8:11 a.m.

The Louisiana Supreme Court will do nothing. The Chief Justice is a woman and there is significant empathy residing there.[229]

4. U.S. Supreme Court Justices and Nominees

During the hearings on the nomination of Elena Kagan to the U.S. Supreme Court, Perricone criticized Kagan and Justice Sonia Sotomayor:

Look at what has been put on the US Supreme Court and what has been nominated? Sotomayor LIED during her hearings, and Kagin is doing the same damn thing.[230]

Kagin is woefully unqualified to be a traffic court judge.[231]

B. Comment Made by Mann

In response to an article about Judge Engelhardt declaring a mistrial in the *Dugue* case because of a statement made by the prosecutor, Mann wrote:

This Judge declared a mistrial because his best buddy the defense attorney asked for it as a result of the butt whippin' his client was taking on the stand. Dugue was committing perjury right and left and was on the ropes going down. I would venture to guess that never in the history of the republic has a judge declared a mistrial because a prosecutor said a name "Robair" to her colleague. If the Judge was concerned that the jury heard the name and didn't want it to come out all he had to do was question each juror individually and see if any of them had heard the name and if it meant anything to any of them. Simple procedure used often in trials. I guarantee most of the jurors would have said they hadn't heard it and if any of them did hear they didn't know what she was referring to. the Defense attorney knew he was about to lose and hit the Eject button plain and simple and his friend the Judge gave him a way out . The rest of you commenters are NOPD fender lizards.[232]

C. OPR's Analysis and Conclusions

OPR concludes that Perricone and Mann violated LRPC 8.2 by making comments that "the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the

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229 campstblue, Sept. 11, 2009, 8:18 a.m.

230 legacyusa, July 28, 2010, 7:39 a.m.

231 legacyusa, May 23, 2010, 9:25 a.m.

232 eweman, Jan. 28, 2012, 4:42 p.m.

qualifications or integrity of a judge . . . or of a candidate for election or appointment to judicial or legal office." Not all criticism of the judiciary is prohibited. "[L]awyers are free to criticize the state of the law. . . . Such criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges." *In re Sawyer*, 360 U.S. 622, 631-32 (1959). "To say that 'the law is an ass, a[n] idiot' is not to impugn the character of those who must administer it." *Id.* at 634. The "attribution of honest error to the judiciary is not cause for professional discipline." *In re Westfall*, 808 S.W.2d 829, 833 (Mo. 1991). Attorneys have "a right to engage in speech involving 'governmental affairs' and 'the manner in which government is operated or should be operated, and all such matters relating to political processes.'" *Berry v. Schmitt*, 688 F.3d 290, 302 (6th Cir. 2012).

Nonetheless, courts have upheld discipline imposed on lawyers for violations of LRPC 8.2, or similar ethics rules, despite First Amendment challenges. "Even protected speech may be regulated. Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's exercise of personal rights guaranteed by the Constitution." *Westfall*, 808 S.W.2d at 835. In *Westfall*, the Missouri Supreme Court stated:

> It is clear that the state has a substantial interest in maintaining public confidence in the administration of justice. The interest is not only the litigant's but also the public's. The interest is in the administration of justice by a fair and impartial judiciary. . . . Lawyers are an integral part of and essential to the administration of justice. . . . Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public. Statements by a lawyer impugning the integrity and qualifications of a judge, made with knowledge of the statements' falsity or in reckless disregard of their truth or falsity, can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice.

Id. at 836.

Although some courts have held that ethics rules may utilize a less restrictive standard than that required for defamation, LRPC 8.2 requires proof that an attorney acted with "knowledge of the statements' falsity or in reckless disregard of their truth or falsity." The Louisiana Supreme Court has held that LRPC 8.2 comports with the First Amendment's guarantee of free speech because it only prohibits statements known to be false or in reckless disregard of the truth. *See In re Simon*, 913 So.2d 816 (La. 2005) (upholding discipline of attorney who accused a judge of "'embark[ing] upon a campaign of misrepresenting the truth'" and of violating the principles of "honesty and fundamental fairness").

Courts have also rejected claims that an attorney was only expressing an "opinion" rather than stating a fact. In *Westfall*, the Missouri Supreme Court upheld the discipline of an attorney for stating that a judge "had made up his mind before he wrote the decision," and that the court's ruling was "a little bit less than honest," despite the attorney's claim that his statements were only "subjective opinion." Using the analysis set forth by the U.S. Supreme Court in a

defamation action, the court rejected an "'artificial dichotomy' between opinion and fact." The court held that statements that are subject to being proven true or false are statements of fact, and statements that "imply an assertion of objective fact" are construed as factual statements as well. *Westfall*, 808 S.W.2d at 833. "[T]he statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'" *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

In analyzing whether attorneys within its jurisdiction have violated LRPC 8.2, the Louisiana Supreme Court applies an objective standard:

> [I]t is not the genuineness of an attorney's belief in the truth of his allegations, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR 8-102(B).

La. State Bar Ass'n v. Karst, 428 So.2d 406, 409 (La. 1983) (upholding discipline under prior version of LRPC 8.2 of attorney who wrote letters to a newspaper accusing a judge of fraud, corruption, and bribery in connection with litigation); *Simon*, 913 So.2d at 824.

OPR concludes that Perricone made false statements about judges in his postings. In his interviews with *New Orleans Magazine* and Louisiana Chief Disciplinary Counsel Plattsmier, as well as in his testimony in the Danziger Bridge status conference, Perricone was not asked about, and therefore did not offer, a factual basis for his criticism of the state and federal bench. OPR is unaware of any facts that would support a blanket statement that every federal judge in the Eastern District of Louisiana was unqualified for his or her position and was appointed only because of political relationships, or that the entire federal bench in the Eastern District of Louisiana should be recused from political corruption cases because of their political connections. No reasonable attorney would have construed the possible political associations of the judges of the Eastern District of Louisiana as proof that those judges were either unqualified for office or unable to fairly preside over any public corruption matters. "Judges generally have political backgrounds to one degree or another but must be presumed, absent more, to be impartial." *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998) (upholding discipline of plaintiff's attorneys for implying that the court acted as a result of racial and political bias).

OPR is aware of no factual support for Perricone's comments that Judge Berrigan's rulings were the result of Heebe's alleged improper influence, that she has a "love" for killers, that her rulings are designed to let hoodlums and rapists out of jail, or that she was ever a member of the Marxist Russian Social Democratic Labour Party (*i.e.*, that she was a Bolshevik) or has communist leanings or sympathies. Perricone's comments comparing Judge Berrigan to former U.S. District Court Judge Thomas Porteous, the latter being a notorious example of judicial corruption, and implying that her rulings were the result of Heebe's financial influence,

are particularly egregious. Nothing "undermine[s] public confidence in the administration and integrity of the judiciary, [and] in the fair and impartial administration of justice" more than a belief that judges can be bought. Attorneys must be particularly careful about making unsupported corruption allegations.[233]

Perricone's subjective beliefs or personal opinions concerning the judges about whom he commented have no bearing on this analysis. Even were Perricone to assert, for example, that he personally believed that Judge Berrigan "loves killers," OPR concludes nevertheless that no reasonable attorney would have believed the truth of such an allegation. *See Karst,* 428 So.2d at 409 (attorney "knowingly" made false statements despite attorney's subjective belief in truth of statements); *Fla. Bar v. Conway,* SC08-326 (October 29, 2008) and Report of Referee (attorney reprimanded for characterizing a judge as "Evil Unfair Witch," "seemingly mentally ill," and "clearly unfit for her position" on legal blog); *In re Peshek,* No. 09 CH 89 (Ill. Disc. Comm. August 25, 2009) (attorney engaged in misconduct by referring to court as "total [***]hole" and "Judge Clueless"); *Russell,* 797 N.W.2d at 84 (attorney disciplined for implying that the court was responsible for delay in setting trial date in criminal case).

Perricone's other allegations about judges were equally offensive and irresponsible. OPR is aware of no evidence that Justice Sotomayor or Justice Kagan lied during confirmation hearings, as Perricone alleged. In addition, Perricone's implication that then-Louisiana Supreme Court Chief Justice Kimball favored female litigants because of her "empathy" for the litigants' gender appears to have no more factual basis than an attorney's suggestion that a judge may have acted from a "Jewish bias," a statement that resulted in a summary disbarment by a federal district court. *See In re Evans,* 801 F.2d 703 (4th Cir. 1986).

Mann's comment concerning Judge Engelhardt likewise is not supported by a factual basis. Indeed, as with Perricone's comments about judges, it is offensive and highly inappropriate. OPR knows of no evidence to support Mann's contention that Judge Engelhardt declared a mistrial in the *Dugue* case because of an alleged friendship with the defendant's counsel. Sealed. See 11/1/13 order of Judge Engelhardt [redacted] That explanation is dubious at best and hardly justifies an irresponsible attack on a judge's integrity. Mann knew that there was no factual basis for her posting and likewise knew that such a posting would unfairly tarnish the reputation of a sitting judge in a matter that the USAO was then litigating.

Accordingly, OPR concludes that Perricone and Mann violated LRPC 8.2 by making online comments that denigrated the integrity and qualifications of judges and judicial candidates, knowing that the statements were false or with a reckless disregard for their falsity.

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[233] One indication that Perricone's criticisms of Judge Berrigan had less to do with his concern about her integrity, and more to do with whether Perricone liked particular rulings, is shown by the fact that Perricone's postings about Judge Berrigan were favorable when he approved of her actions: "*Berrigan is doing the right thing.*" legacyusa, Jan. 27, 2011, 7:29 a.m.

III. Perricone's and Mann's Online Activities Were Detrimental to the Interests of the Department

Because prosecutors play a special role in the criminal justice system, they are held to an appropriately high standard of professionalism. As explained by U.S. Supreme Court Justice George Sutherland nearly 80 years ago:

> [A federal prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[234]

Particularly in light of this special role, the Department expects federal prosecutors always to treat victims, witnesses, judges, defendants, and opposing counsel justly, fairly, and respectfully. The Department requires federal prosecutors to conduct themselves in a manner consistent with the highest professional standards when they represent the United States. Perricone and Mann failed to uphold these standards.

As described above, Perricone and Mann, through their online conduct, repeatedly belittled defendants and defense attorneys and made disparaging, and untrue, comments about judges. They discussed pending cases and investigations, including commenting pretrial on the culpability of defendants, such that their objectivity and sound judgment understandably have been called into question. By making inappropriate and offensive comments, both Perricone and Mann engaged in conduct that not only was unacceptable for an AUSA, but that proved detrimental to the interests of the Department.

Perricone's and Mann's improper online activities had a significant detrimental impact on the Department and adversely affected its efficiency. Not only did Perricone and Mann have to be recused from handling certain cases, but the entire USAO had to be recused from handling several cases about which Perricone had commented. As a direct consequence of Perricone's and Mann's misconduct, the Department was forced to expend valuable time and resources to deal with the resulting aftermath, including conducting three internal reviews by AUSA Walz, AUSA Horn, and OPR. The convictions in the Danziger Bridge case have been jeopardized. Because of Perricone's and Mann's improper conduct, the USAO has lost some of the respect, trust, and good will it earned over many years of honorable service from the bench, defense attorneys, and the community. Perricone and Mann thus damaged the interests and efficiency of the Department by failing to comport themselves in a professional manner consistent with the highest standards of fairness and justice.

Perricone and Mann were fully aware of the probable consequences of their conduct. Perricone was a federal prosecutor with decades of experience who had served as one of the USAO's Senior Litigation Counsel. Mann not only had decades of experience as an AUSA, but

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234 *Berger v. United States*, 295 U.S. 78, 88 (1935).

had served as the USAO's FAUSA and Criminal Division Chief, as well as the U.S. Attorney's most trusted advisor. In these positions, Perricone and Mann were acutely aware of the need to comport themselves with the utmost professionalism. Indeed, they were expected to set an example of good leadership for the entire USAO, a duty they failed to carry out.

Perricone's and Mann's attempt to hide under a cloak of anonymity was rash and fraught with peril. Perricone and Mann were aware that, in the past, the careless and inappropriate use of social media had caused substantial problems in the prosecution of cases. They also knew or should have known that anonymous posters of comments online could be unmasked at any moment. Attempting to do anonymously that which they were absolutely prohibited from doing openly as AUSAs demonstrated not only exceedingly poor judgment, but exhibited deceptive behavior the Department does not tolerate in federal prosecutors.

As set forth immediately below, numerous additional postings by Perricone raise even more disturbing concerns about his fitness to serve as an AUSA, his conduct, and his judgment. Perricone's postings were so offensive, and his actions in posting them – anonymously or otherwise – demonstrated such exceedingly bad judgment, that had Perricone remained in the Department and not resigned, the Department would have been justified in considering taking significant management action against him to address the matter.[235]

Some of Perricone's postings can reasonably be interpreted as evidencing racial bias against African-Americans. In a posting that purported to instruct attendees how to behave at the Essence Music Festival, a celebration of African-American music and culture, Perricone wrote:

Time for the hotels to replenish their hotel supplies. Thanks for the write off.

Please no cooking in the bathtubs.

Leave your micro waves at home.

Learn to tip properly.....

Please learn how to multiply percentages . . . .

Canal Street will be full of RIBS AND RIMS.[236]

Perricone's postings that can be interpreted as evidencing racial bias were primarily, but not exclusively, found in the campstblue comments (from which Perricone tried to distance himself during his interviews and testimony):

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[235] *See Locurto*, 447 F.3d 159 (upholding termination of police officer and firefighters for participating in parade float mocking African-Americans).

[236] campstblue, July 3, 2008, 9:52 a.m. (capitalization in original)

Today we have more blacks killing blacks than white killing blacks. The latter simply doesn't exist. Black politicians run New Orleans and have runned it into the ground.[237]

Didn't Katrina demonstrate what 30 years of black rule can do to a city?[238]

Blacks have done more damage to their own poeple than whites have could ever imagine. But, yet blacks won't blame their own for their own problems--it's easier to blame the white man. Consider this Harvey: Blacks kill blacks with greater frequency than whites kill whites or whites kill blacks. But still the white man gets the blame. Blacks steal from blacks more. Blacks sell drugs to blacks more. Blacks deny blacks a good education. The Orleans School board is a great example of how black adults victimize their own children. Now whites are stepping in to see that young blacks get educated. Blacks have run this city for over 30 years. Enough said.[239]

Following an article regarding corporal punishment at a predominately African-American school, Perricone wrote:

One of our founding fathers said it best(do your own research) The Negro is not given to reflection, but to sensation. How true, if they truely embrace this form of discipline and what it putatively promises.[240]

Following an article concerning white residents' opposition to a low-income housing development, Perricone compared it to the opposition by blacks to a merger of an historical black college with a majority white institution:

Blacks hide behind "historical black institutions" to perpetuate poor college educational standards.[241]

Following an article about Mose and Betty Jefferson and their co-defendants entering guilty pleas, Perricone posted:

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237 campstblue, Sept. 7, 2009, 12:15 p.m.

238 campstblue, July 16, 2008, 5:59 p.m.

239 legacyusa, May 23, 2009, 12:07 p.m.

240 legacyusa, June 19, 2011, 11:10 a.m.

241 legacyusa, June 12, 2011, 10:22 a.m.

Ther real sad part about this, is that they stole from their own people. They hate white people so much, but no white person would have stolen from the poor.[242]

In addition, one controversial and inappropriate posting that was highlighted in press coverage of Perricone's comments concerned former New Orleans Mayor Ray Nagin:

For all of you who have a penchant for firearms and how they work, Ray Nagin lives on Park Island.[243]

Prosecutors should avoid conduct that gives the appearance that their actions are in any way dictated by racial animus, or that they support the use of violence against others. Federal prosecutors wield significant power and must always act justly and without prejudice toward the citizens they serve. The public must have confidence that charging decisions are made in a fair manner without regard to race or other prohibited factors.[244] Perricone's postings, once his identity was revealed, could have caused the public to suspect that he might have conducted his professional duties as an AUSA in a racially-biased manner.[245] *See Locurto*, 447 F.3d at 179 (government may consider public's perception of employee's actions in determining whether disciplinary action for expressive activity is warranted).

OPR concludes that Perricone's and Mann's conduct with respect to their postings as described in this report fell woefully below the Department's expectations for federal prosecutors, and that their online activities were detrimental to the Department's interests and efficiency.[246] Perricone and Mann engaged in conduct that was improper, unacceptable, and that

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[242] campstblue, May 28, 2009, 8:29 a.m.

[243] campstblue, June 1, 2009, 8:42 a.m.

[244] *See In re Advisory Letter No. 3-11*, 73 A.3d 1244 (N.J. 2013) (prohibiting municipal judge from maintaining parallel career as actor and comedian when part of his routine disparaged ethnic groups and religions).

[245] In his response to OPR, Perricone strongly objected to OPR's discussion regarding these posts that can be interpreted as showing racial animus. Although Perricone acknowledged that the posts could be interpreted "to be racial," Perricone asserted that he was "NOT racist." Perricone Resp. at 11 (emphasis in original). Perricone contended that his writings were "simple parody and satire." *Id.* Furthermore, Perricone emphasized that in his 40 years in law enforcement, he had never conducted himself in a racially biased or discriminatory manner. *Id.* at n.33 and 23. Perricone, however, misses the point. Had he not resigned, and had the USAO been faced with the issue of determining whether Perricone should be subject to management action as a result of his posts that could be interpreted as evidencing racial animus, the relevant inquiry would not have been whether Perricone in fact harbored racial animus, an issue OPR does not address. Rather, the issue in part would have been the effect Perricone's speech had on the community he was hired to serve. Regardless of his intent, Perricone's speech set forth in this section could have eroded the community's trust in his actions and the decisions of the USAO. *See Pappas*, 290 F.3d at 146-47 (upholding termination of police officer for anonymously mailing racially bigoted materials to charitable organizations: "If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, . . . respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.").

[246] OPR also notes that Perricone's final Mencken posting on March 14, 2012, represents yet another example of his extraordinarily poor judgment. Fewer than 24 hours after acknowledging to Letten his serious error

(Continued . . .)

detracted from the Department's reputation for upholding the highest standards of fairness and justice.

(Continued . . .)

in engaging in online posting activity and apologizing to his supervisors and colleagues, Perricone posted another caustic comment online: *"I'm here. Just watching our rights erode."*

CHAPTER 5

MANN'S FAILURE TO KEEP HER CLIENT INFORMED AND HER PERSONAL CONFLICT OF INTEREST

In this chapter, OPR discusses Mann's failure to keep her client informed and her personal conflict of interest. Mann violated LRPC 1.4(a) and (b) when she failed to inform her client, through either Letten or senior Department officials, about her online posting activity. LRPC 1.4(a) and (b) require an attorney to keep her client reasonably informed about a matter and to provide her client with sufficient information to enable the client to make intelligent decisions about the objectives of the attorney's representation and how those objectives are to be pursued.[247] Comment 7 to Model Rule 1.4 states that an attorney cannot withhold information from a client to serve the attorney's self-interest. Mann's client was the Department of Justice or the United States, and in the aftermath of the revelation of Perricone's online posting activity, either U.S. Attorney Letten or others above Letten in the chain of command had the authority to speak for Mann's client for purposes of determining Mann's compliance with LRPC 1.4 and 1.7.

LRPC 1.7 prohibits an attorney from representing a client if the representation creates a concurrent conflict of interest, which exists if "there is a significant risk" that the representation will be "materially limited by . . . a personal interest of the lawyer." Even in the face of a personal conflict of interest, an attorney may represent the client, provided the client is fully informed of the conflict and the attorney obtains a written waiver. OPR concludes that Mann's representation of the United States was materially limited by her personal conflict of interest, she did not inform her client about this conflict (or at a minimum did not fully inform her client about the conflict), and she did not obtain in writing the client's informed consent to her continued representation. Accordingly, Mann violated LRPC 1.7.

I. Mann Intentionally Violated LRPC 1.4(a) and (b) When She Failed to Inform Her Client That She Was Posting Comments Online about Active Investigations and Pending Cases

A. Mann's Contention That She Informed Letten

Sealed. See 11/1/13 order of Judge Engelhardt

[redacted] [248]

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247 This chapter of the report addresses only Mann's violation of LRPC 1.4(a) and (b), given Mann's failure to inform her client of her online posting activity once it was plain that such activity had, or could have had, a substantial detrimental impact on her client. OPR notes that the Louisiana Office of the Disciplinary Counsel may choose to address the issue of whether Perricone also violated LRPC 1.4(a) and (b) by failing to keep his client reasonably informed about his postings concerning Department and USAO matters.

248 Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

Sometime during the morning of March 13, 2012, a reporter called Letten's secretary seeking the USAO's reaction to Heebe's lawsuit. Because the secretary had not seen a copy of the lawsuit, and apparently because she understood that Heebe sought to depose Perricone and "Mann," the secretary initially believed that Heebe had sought to depose Jan Mann, not Jim Mann. The secretary therefore called Jan Mann on the telephone, told her about the reporter's inquiry, and told Mann that she (Mann) and Perricone had been sued by Heebe for posting comments online. The secretary then asked Mann to come to Letten's office.[249]

Sealed. See 11/1/13 order of Judge Engelhardt

[250] Sealed. See 11/1/13 order of Judge Engelhardt

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Sealed. See 11/1/13 order of Judge Engelhardt

.[252] Sealed. See 11/1/13 order of Judge Engelhardt

.[253] Sealed. See 11/1/13 order of Judge Engelhardt

[254] Sealed. See 11/1/13 order of Judge Engelhardt .[255]

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249 Sealed. See 11/1/13 order of Judge Letten OPR Interview Transcript at 2-3 (Nov. 15, 2012) (Letten Tr. (Nov. 15, 2012)). Though the secretary had a very limited recollection of these events, she recalled that she initially understood that Mann (b)(6) (b)(7)(C) had been sued by Heebe.

250 Sealed. See 11/1/13 order of Judge Engelhardt

251 Sealed. See 11/1/13 o

252 Sealed. See 11/1/13 o

253 Sealed. See 11/1/13 order of J

254 Sealed. See 11/1/13 o

255 Sealed In her January 2, 2013 letter to Louisiana Chief Disciplinary Counsel Plattsmier, Mann Sealed. See 11/1/13 order o assert that on March 13, 2012, she told Letten that she had posted "innocuous" comments online about Heebe "on a few occasions." Mann stated that "over the subsequent months," she mentioned to Letten "on several other occasions" about "having posted comments on nola.com." Letter from Mann to Louisiana Chief Disciplinary

(Continued . . .)

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

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Sealed. See 11/1/13 order of Judge Engelhardt

B. Letten's Response to Mann's Contention

Letten told OPR that he did not recall having any conversations with Mann on March 13, 2012, or in the months thereafter. Sealed. See 11/1/13 order of Judge Engelhardt. Letten said that he and Mann discussed Perricone's posting activities many times, but that during those conversations Mann never said, "Remember, I told you that I had done it, too."[260] Letten told OPR:

> At no time did Jan Mann or anyone else ever convey to me that she had posted anything like [Perricone] had, any comments relating to the work of this office. If I heard anything of that nature that indicated that to me, I would have stopped. I would have asked for a full explanation. . . . [A]t no time did Jan [Mann] or

(Continued . . .)

Counsel Plattsmier at 4. Mann provided no details in her letter about those conversations; Sealed. See 11/1/13 order of Judge Engelhardt

256 Sealed. See 11/1/13 order of Judge Engelhardt

257 Sealed. See 11/1/13 o

258 Sealed. See 11/1/13 o

259 Sealed. See 11/1/13 order of J

260 Letten OPR Interview Tr. at 39 (Nov. 14, 2012) (Letten Tr. (Nov. 14, 2012)).

anyone ever accurately or clearly ever signal to me in any way that she had done what Sal [Perricone] had done.[261]

Letten said that if Mann had told him on March 13, 2012, that she had posted comments online about Heebe, "I would have wanted to go back to [that] before I did anything else."[262] Letten told OPR that if Mann had said to him during their discussions about Perricone, "I'm a coward," he would have asked Mann what she was talking about.[263] Letten said, "[E]verything that [Mann] did [after she allegedly told Letten about her postings] is inconsistent, completely inconsistent, with [Mann] being clear to me that she blogged anonymously about cases . . . ."[264]

Letten told OPR that it was on November 6, 2012 when he first learned of Mann's claim that she had told him on March 13, 2012, about her online posting activity. It was on November 6 that Letten held a USAO supervisors meeting to announce that Mann had admitted posting comments online as eweman. Letten said that many of the supervisors felt betrayed and expressed their views that Mann could not continue to work in the office.[265] Letten said that after the meeting, he went to Mann's office and told her that her supervisory colleagues were upset and believed that Mann should not remain in the office. Letten said that Mann appeared visibly shaken and upset, and then, for the first time, said that she had told him on March 13, 2012, that she had posted some "innocuous" comments. Letten said that Mann also said that she was going to "tell this to OPR." Letten said that he responded by telling Mann he had no recollection of such a discussion, and he asked Mann if she had provided any specifics to him. Mann responded, "'No, because you didn't ask anything after that.'"[266]

Letten told OPR that had Mann told him she had posted comments online about Heebe, he would have made vastly different decisions about Mann's role in responding to the revelations about Perricone's postings, and handling the repercussions resulting therefrom. In particular, Letten said that if on March 13, 2012, Mann had told him that she had posted comments online about Heebe, Letten would have: (1) immediately consulted with the Office of the Deputy Attorney General or EOUSA regarding whether to remove Mann as FAUSA and Criminal Division Chief; (2) not allowed Mann to work on recusal issues with EOUSA; (3) not allowed Mann to work with the Department on its preliminary criminal investigation into Perricone's postings; (4) not allowed Mann to respond on behalf of the Department to defense motions for

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261 *Id.* at 81-82.

262 Letten Tr. at 5 (Nov. 15, 2012).

263 *Id.* at 7.

264 *Id.* at 16.

265 Letten Tr. at 63-67 (Nov. 14, 2012). On November 5, 2012, Letten reported Mann's conduct to OPR.

266 *Id.* at 69-72.

recusal, new trials, and dismissal of charges; (5) not allowed Mann to appear before or communicate with Judge Engelhardt regarding Perricone; and (6) not allowed Mann to gather USAO internal communications about Perricone's online activities, and produce them to the court.[267]

Letten also pointed to his conversation with Mann on November 4, 2012, when Mann admitted that she was eweman, as further support for his contention that Mann did not inform him in March 2012 about her online activities. According to Letten, after Mann acknowledged her online posting activity as eweman, Letten asked Mann, "[S]hould I have known that you were doing this[?]," and Mann replied, "No."[268] Letten viewed his question as pertaining to any point in time prior to Mann's admission to him on November 4, 2012, and Mann's negative response was evidence that she had never informed Letten about her postings prior to that date. Sealed. See 11/1/13 order of Judge Engelhardt

[269] Sealed. See 11/1/13 order of Judge Engelhardt

C. Mann's Contention Is Not Credible

OPR concludes that Mann's assertion that she informed Letten on March 13, 2012, about her online posting activity is not supported by the evidence. Sealed. See 11/1/13 order of Judge Engelhardt

If Mann had previously acknowledged her postings to Letten – her supervisor – Mann had little reason not to advise OPR, or at least her husband, of her online activities as well. Yet, she did not.

Letten told OPR that Mann said nothing about her purported prior admission during other discussions Mann had with Letten on November 4 and 5, 2012, about her postings.[271] Sealed. See 11/1/13 order of Judge Engelhardt.

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267 Letten OPR Interview Transcript (Apr. 12, 2013) (Letten Tr. (Apr. 12, 2013)).

268 Letten Tr. at 21 (Nov. 14, 2012).

269 Sealed. See 11/1/13 order of Judge Engelhardt

270 Sealed. See 11/1/13 o

271 Letten Tr. at 25, 56-63 (Nov. 14, 2012).

Sealed. See 11/1/13 order of Judge Engelhardt.[272] OPR credits Letten's very clear recollection that Mann "reminded" Letten on November 6, 2012, about her purported March 2012 discussion with him. OPR finds it significant that Mann did not remind Letten during discussions she had with him on November 2, 4, or 5, 2012, that she had previously told him about her postings, because it would have been in Mann's interest to do so. OPR also observed that Mann's "reminder" to Letten came during the course of a conversation in which Letten informed Mann about the USAO supervisors meeting that he had just left, during which Mann's supervisory colleagues expressed anger toward Mann when they learned that Mann had been posting comments online as eweman. Sealed. See 11/1/13 order of Judge Engelhardt. Mann's delay in advising anyone of her purported conversation with Letten and the circumstances leading to her November 6, 2012, conversation with Letten support OPR's conclusion that Mann's account lacks credibility.

(b)(6), (b)(7)(C) told OPR that Mann also did not inform [redacted] about her purported conversation with Letten until on or after November 6, 2012. According to (b)(6), (b)(7)(C) Mann told [redacted] that Letten had informed Mann after the supervisors meeting that her colleagues were upset with her:

> [Letten] was saying some things that [were] hurtful to Jan. . . . [S]he thought [Letten] was being a little unnecessarily rough with her and making her feel bad. And she said, "Well, since . . . we're in the truth-telling mode right here . . . I just have to remind you . . . I did tell you" . . . . [T]his is what she told me.[273]

(b)(6), (b)(7)(C) said that in Mann's account to [redacted] of her purported conversation with Letten on March 13, 2012, Letten did not ask Mann any questions when she told him that she had been commenting.[274] OPR finds (b)(6), (b)(7)(C) account notable because: (1) despite acknowledging her online posting activity (b)(6), (b)(7)(C) on November 2, 2012, Mann did not also inform [redacted] of her alleged March 13, 2012 conversation with Letten until sometime on or shortly after November 6, 2012, even though Mann would have had little reason not to inform (b)(6), (b)(7)(C) that their mutual supervisor had allegedly known about her conduct for months; and (2) when Mann did inform (b)(6), (b)(7)(C), Mann's description of her March 13, 2012 conversation with Letten differed from the description Sealed. See 11/1/13 order of Judge Engelhardt

OPR also considered significant the fact that Letten took no action in response to Mann's purported admission, including notifying Department officials. OPR finds that Letten's inaction supports his assertion that he was unaware of Mann's postings, because Letten's lack of action after purportedly being told by Mann of her posting activities was in such marked contrast to Letten's actions after Perricone's posting activities became known. Within a few hours of learning of Heebe's lawsuit against Perricone (b)(6) (b)(7)(C) about Perricone's admission, Letten informed the Office of the Deputy Attorney General and EOUSA of those events.

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272 Sealed. See 11/1/13 order of Judge Engelhardt

273 (b)(6) (b)(7)(C) [redacted].

274 *Id.* at 46-47.

However, Letten informed no one in any Department office about Mann's alleged admission to him on March 13, 2012. The contrast in Letten's response is highly relevant because both Perricone's and Mann's admissions allegedly occurred on the same day. The fact that Letten told no one about Mann's purported admission, when compared to Letten's actions concerning Perricone's admission, as well as Letten's routine past practice of immediately reporting significant issues to Department leadership offices, raises serious doubt about whether Mann's March 2012 admission to Letten actually occurred.[275]

Perhaps even more significant is the fact that in the months following Mann's purported admission, Letten authorized or allowed Mann to represent the Department and the USAO in myriad matters that arose as a result of the revelation of Perricone's postings. In contrast, Letten promptly recused Perricone from any case about which he had posted comments. Letten told OPR that had he known that Mann had also posted comments online about Department matters, he would never have authorized or allowed Mann to represent the Department or the USAO in any of the Perricone-related matters on which she worked. OPR finds Letten credible. OPR also finds Letten's representations regarding how he would have responded to an admission by Mann to be supported by and consistent with the evidence, especially the facts concerning how Letten responded to Perricone's admission. OPR concludes that Letten initially treated Mann and Perricone differently because Perricone acknowledged his postings to Letten in March 2012, and Mann did not.

Sealed. See 11/1/13 order of Judge Engelhardt

When Perricone admitted to Letten that he had been posting online comments, Letten did not Sealed. See 11/1/13 order of Judge Engelhardt ignore the legal ramifications of Perricone's online posting activity; rather, Letten took immediate action to address the issues relating to Perricone's conduct. Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

As detailed in Chapter 6 below, OPR found that although Mann had numerous opportunities to inform those with whom she was working on the repercussions of Perricone's online activities that she had engaged in similar conduct, she intentionally failed to do so. Mann's duty of candor to Letten was the same as her duty of candor to others representing the Department's interests, Sealed. See 11/1/13 order of Judge Engelhardt Sealed. See 11/1/13 order of Judge Engelhardt In addition, in weighing the credibility of Letten and Mann, OPR considered that, as discussed extensively in Chapter 6, Mann purposefully was not candid and forthright to OPR and others about her online activity. Mann's lack of candor is relevant to any assessment of

[275] Thomas Anderson OPR Interview Transcript at 8 (Dec. 20, 2012) (Anderson Tr. (Dec. 20, 2012)) (Letten's practice was to keep EOUSA informed and seek advice).

her credibility with respect to her claim that she informed Letten about her online comments on March 13, 2012.

Finally, Sealed. See 11/1/13 order of Judge Engelhardt After her postings were discovered, Mann must have known that she would be scrutinized for ethical violations, including her failure to inform her client about her actions and continuing to work on matters concerning which she had a personal conflict of interest. Sealed. See 11/1/13 order of Judge Engelhardt

For all of these reasons, OPR does not find credible Mann's claim that she told Letten on March 13, 2012, about her postings.

D. Even If Mann Told Letten about Her Postings on March 13, 2012, Her Disclosure Did Not Satisfy Her Obligation under LRPC 1.4

LRPC 1.4(a) required Mann to keep Letten "reasonably informed" about her postings, and LRPC 1.4(b) required Mann to provide Letten with "sufficient information" to participate intelligently in decisions regarding her representation of the Department. Comment 7 to Model Rule 1.4 states that an attorney may not withhold information to suit the attorney's self interest. Even if OPR assumes *arguendo* the accuracy of Mann's version of the events of March 13, 2012 and thereafter, Mann nevertheless did not keep Letten "reasonably informed" or provide him with "sufficient information" necessary for him to make appropriate decisions regarding how to deal with the repercussions from Perricone's postings.

Sealed. See 11/1/13 order of Judge Engelhardt

OPR concludes that Mann's alleged admission regarding her postings would not in any event have constituted sufficient information to keep her client "reasonably informed." Sealed. Sealed. See 11/1/13 order of Judge Engelhardt During the week of March 13, 2012, Heebe initiated a lawsuit involving (b)(6), (b)(7)(C) Perricone; Perricone had been demoted from his position as Senior Litigation Counsel and recused from cases; the Department was actively analyzing recusal issues concerning the entire USAO; and Letten had convened multiple staff meetings, issued a press release, and held a press conference, all in response to Perricone's postings. Sealed. See 11/1/13 order of Judge Engelhardt . Mann knew or should have known, however, that it was the substance of Perricone's comments, Sealed. See 11/1/13 order of Judge Engelhardt that created the legal issues requiring the USAO's and the Department's attention. Furthermore,

Mann also should have known that the issues raised by Perricone's postings were broader than the question of disclosure of confidential information. In any case, the question of whether Mann disclosed confidential information was not a question to be resolved by Mann herself. Sealed. See 11/1/13 order of Judge Engelhardt, Mann failed to promptly and timely investigate her postings and correct her statements to Letten. Accordingly, OPR finds that Sealed. See 11/1/13 order of Judge Engelhardt the statements would constitute misrepresentations of fact to the person who spoke for Mann's client, the United States, in violation of LRPC 1.4(a).

Mann violated Rule 1.4 for other reasons as well. Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

If necessary, Mann should have printed out her postings and given them to Letten, e-mailed Letten copies of her postings, read her postings to Letten, or described for Letten what she had done in consultation with other USAO managers so that Letten fully understood the nature of Mann's online activities.[276]

The evidence demonstrates that Mann failed to take any of these steps. She failed to keep her client "reasonably informed," Sealed. See 11/1/13 order of Judge Englehardt. In doing so, Mann placed her own interests above the interests of her client.

OPR concludes that Sealed. See 11/1/13 order of Judge Engelhardt Mann failed to provide Letten with sufficient information to keep him reasonably informed about events crucial to his being able to determine whether Mann could continue to represent the Department on various matters related to Perricone. Mann therefore committed intentional professional misconduct in violation of LRPC 1.4(a) and (b).

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[276] For example, (b)(6) (b)(7)(C) and AUSA #2 were consulted about issues concerning Perricone. Indeed, both were present in Letten's office when Perricone acknowledged that he was Mencken. (b)(6) (b)(7)(C) told OPR that having information about Mann's own postings would have been "very instructive" with respect to resolving the question concerning whether Heebe's state court suit against Perricone (b)(6) (b)(7)(C) should be removed to federal court, and whether the USAO should be involved in the removal. (b)(6) (b)(7)(C) OPR Interview Transcript at 25-26 (Nov. 14, 2012).

II. Mann Violated LRPC 1.7 When She Failed to Obtain Her Client's Informed Consent in Writing

As noted, LRPC 1.7 prohibits an attorney from representing a client if the representation creates a concurrent conflict of interest, which exists if "there is a significant risk" that the representation will be "materially limited by . . . a personal interest of the lawyer." A client may consent to the attorney's representation notwithstanding such a conflict, if the consent is "informed" and "in writing." Comment 10 to Model Rule 1.7, which is identical to LRPC 1.7, states that an attorney may have a personal conflict of interest when the probity of the attorney's own conduct is in question in the transaction at issue, because the attorney may not be able to provide objective advice. OPR concludes that Mann violated LRPC 1.7.

A. Mann Had a Personal Conflict of Interest in Any Context in Which Perricone's Postings Were at Issue

Perricone posted anonymous comments on nola.com about Department matters. When his identity was unmasked, Perricone became the subject of internal Department reviews and intense public scrutiny, including by defense counsel in cases about which Perricone had commented. The purpose of those internal and external reviews was to determine whether Perricone had violated any law, rule, regulation, or policy by posting comments online, and to determine if any case or defendants' rights had been adversely affected.

Mann had engaged in similar conduct to Perricone's, albeit on a much smaller scale: she had posted anonymous comments on nola.com about Department matters. Mann knew, or should have known, that if and when her anonymity became known, her conduct would be subject to the same internal and external reviews as Perricone's. Mann, therefore, had a classic and clear personal conflict of interest in any matter in which Perricone's conduct was to be assessed and judged. The conflict of interest presented a significant risk that Mann could not independently and fairly assess any claim that Perricone's conduct violated any law, rule, regulation, or policy, because it was in her self-interest to conclude that Perricone's conduct was appropriate. Every time Mann had to discuss, describe, defend, or investigate Perricone's conduct, her self-interest might cause her to downplay or dismiss entirely the seriousness of that conduct. Whether Mann acted pursuant to her own self-interest or in fact exercised independent judgment is beside the point with regard to this analysis. A waiver of the conflict of interest can only be made by the client after being fully apprised of all facts creating the conflict.

Because of the significant risk that Mann could not provide her client with objective, unbiased advice, Mann had a clear personal conflict of interest in any matter related to Perricone's postings. Pursuant to LRPC 1.7, Mann was therefore prohibited from continuing to represent the Department in matters related to Perricone unless she obtained the Department's informed consent in writing to her continued representation. Mann did not inform her client of her conflict of interest and did not obtain the client's informed consent to continue to represent it. Instead, Mann worked on numerous matters involving assessments of Perricone's conduct, as set forth in the following discussion.

B. Mann Worked on Numerous Matters in Which She Had a Personal Conflict of Interest

Mann was heavily involved with almost every matter relating to Perricone's nola.com postings, including recusal decisions, internal administrative and criminal investigations, and responding to motions in pending litigation.

1. Recusal Decisions

As soon as it became known that Perricone was posting comments online, the Department addressed the issue of whether the USAO should be recused from further work on matters about which Perricone had commented. Thomas Anderson, EOUSA's Deputy General Counsel, coordinated the recusal decisions. Anderson told OPR that EOUSA was involved in deciding whether the USAO should be recused from cases about which Perricone had commented, and that Mann was Anderson's primary point of contact in the USAO.[277] Anderson said that during his discussions with Mann about recusal issues, Mann never told Anderson that she also had posted comments on nola.com.[278]

Anderson recalled that Mann never affirmatively represented to him that she had not posted comments online, but stated that Mann should have informed him that she had posted comments. Anderson pointed to the *Broussard* case as a clear example of how Mann's failure to inform the Department about her online comments almost certainly affected the Department's decision not to require the USAO to recuse itself from the prosecution. On May 1, 2012, Mann informed Anderson that attorneys for defendants Broussard and Wilkinson intended to send a letter asking the Department to recuse the USAO from further involvement in the case, which was set for trial in October 2012.[279] Through many subsequent e-mails, Mann informed Anderson of the facts of the *Broussard* case and explained the USAO's position that it should not be recused from prosecuting the matter.[280] One of the factors Mann cited was Perricone's lack of involvement in the charging decisions or indictment of *Broussard*.[281] Mann did not disclose to Anderson that she herself had posted three comments on nola.com in response to articles about the *Broussard* case.[282]

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277 Anderson Tr. at 9-10 (Dec. 20, 2012).

278 *Id.* at 11.

279 E-mail from Mann to Anderson (May 1, 2012, 3:59 p.m.).

280 *E.g.*, e-mail from Mann to Anderson (May 4, 2012, 4:43 p.m.); e-mail from Mann to Anderson (May 8, 2012, 4:32 p.m.)

281 E-mail from Mann to Anderson (May 8, 2012, 4:32 p.m.).

282 As previously noted, Mann posted: *"They have been accused of stealing hundreds of thousands of our dollars and are charged with felonies galore. It sounds like a couple of you out there think that won't land em in*

(Continued . . .)

Anderson consulted extensively with Mann when drafting an e-mail to the Office of the Deputy Attorney General (ODAG) analyzing whether the USAO should be recused from the *Broussard* prosecution. In a May 18, 2012 e-mail, Anderson explained why the General Counsel's Office had concluded that the USAO did not have a "disqualifying conflict of interest" in the *Broussard* case. One of the primary factors Anderson cited in the recommendation not to recuse the USAO was that Perricone "had a very limited role in the case pre-indictment;" Perricone had not signed the indictment nor had he discussed charging decisions or strategy with the AUSAs assigned to the matter.[283] Anderson also stated that "[i]f Perricone had played [a] greater role in the [*Broussard*] investigation and indictment or if his comments had been more fact specific, then . . . the earlier recusals [in other USAO matters relating to the River Birch investigation] would compel recusal in this case."[284]

Anderson told OPR that he struggled over whether to recommend recusal in the *Broussard* matter because "[i]t was a pretty close question."[285] Anderson said that if he had known that Mann had posted online comments about the *Broussard* case, his recommendation to ODAG would have been to recuse the USAO.[286] Anderson explained that Perricone's lack of involvement in the prosecution was one of the "big factors" influencing the decision against recusal.[287] Anderson further explained that, "The fact that [Mann] had commented on [*Broussard*], the fact that she would have been in sort of the supervisory chain of these AUSAs would have been a big factor in, in making the determination of whether they ought to be recused."[288]

(Continued . . .)

the pen. Haven't you been paying attention? You take the king down for anything you got him on. Al Capone went to jail for taxes, remember?" eweman, Dec. 2, 2011, 4:37 p.m.

"Hotsaws –It would be nice if the DA could do some public corruption cases but he'd have to charge his own father in this case who was also a ghost employee – could be a little tough." eweman, Dec. 2, 2011, 12:07 p.m.

"The parish president and parish attorney and the mega Rich contractors are far worse than Whitmer. If the Feds wanted to give him a good deal to get inside scoop on the higher ups lets trust them to get it right. They are all we got standing between justice and total corrupt chaos in JP." eweman, Jan. 22, 2012, 11:49 a.m.

283 E-mail from Anderson to ODAG (May 18, 2012, 7:49 a.m.).

284 *Id.*

285 Anderson Tr. at 41 (December 20, 2012).

286 *Id.* at 42.

287 *Id.*

288 *Id.* at 43.

Anderson told OPR that had Mann disclosed the fact that she, too, had posted comments online, it would have "colored the way I viewed everything . . . [and] she wouldn't have been my point of contact."[289] Anderson said that even if no one asked Mann directly whether she had posted comments online, Mann should have disclosed her comments, an action that Mann should have known she needed to take: "[I]t would be so self-evident in the, the numerous conversations we had about this that it didn't need to be asked in my view. That should have been information she should have . . . told me about and said . . . I shouldn't be working with you on this."[290]

Mann's conflict of interest in participating in discussions about the USAO's recusal from matters about which Perricone posted comments online is demonstrated by an e-mail Mann sent Anderson on April 12, 2012, in which Mann wrote: "I do think the misconduct aspect of Perricone's comments has been blown way out of proportion. Terrible judgment, yes. If he had stood on the courthouse steps and said the same things about Fazzio would it be getting this same degree of attention – not sure." It was crucial that Mann's client (in this instance being spoken for by Anderson) be aware that Mann had engaged in the same conduct as Perricone. It is almost certain that had Anderson known that Mann also had posted comments online about Department matters, Mann would not have been Anderson's point of contact in the USAO, or involved in any decisions regarding Perricone and his postings. If Mann remained involved, her own conduct needed to be disclosed to the client so that it could consider that important information when determining to what extent it should rely on Mann's analysis of Perricone's conduct. Anderson undoubtedly would not have accorded Mann's input the same value had he known that Mann had engaged in the same conduct as Perricone.

[redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted] Anderson said he did not recall Mann ever making such a comment to him, but if she had, it would not have alerted Anderson to Mann's conduct.[291] LRPC 1.7 requires that attorneys dealing with conflict of interest issues handle them openly, directly, and clearly; sending ambiguous messages and hoping that the true facts are somehow understood is not sufficient to alert one's client of a possible conflict of interest. Even if OPR assumes for the sake of argument [redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted]. Significantly, Mann took not a single step to ensure that Anderson understood that she, too, had posted comments online.

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289 *Id.* at 29-30. An April 11-12, 2012 e-mail exchange between Anderson and Mann clearly demonstrates that Anderson was relying on Mann to provide him with accurate, unbiased information about recusal issues. Anderson wrote, "You around today? I may need some assistance putting Perricone's comments about Fazzio in context."

290 *Id.* at 35.

291 *Id.* at 15.

2. Internal Department Investigations and Inquiries

Mann worked with AUSA Walz, who was conducting a preliminary review to determine whether Perricone's postings violated any criminal laws. On August 23–24, 2012, Walz exchanged e-mails with Mann, regarding Walz's upcoming trip to the USAO to gather information for his review, in which Mann told Walz that she would gather and provide Walz with the necessary documents and files. In his report, Walz stated that he relied on Mann for information regarding USAO matters: "In carrying out this assignment, I talked . . . primarily [to] former First Assistant Jan Mann and [AUSA #1] . . . . I relied on Ms. Mann for information about cases assigned or not assigned to Mr. Perricone and for the history of many of the cases and matters on which Mr. Perricone commented . . . ."[292] Mann did not tell Walz that she had also posted comments on nola.com about Department matters.[293]

Although Mann was not affirmatively tasked with assisting OPR with its investigation, Mann did provide OPR with information and opinions about Perricone's conduct. [redacted] The next day, Mann sent an e-mail to OPR in which she discussed whether Perricone's comments violated any rules or regulations, Sealed. See 11/1/13 order of Judge Engelhardt. Mann wrote:

> The answer to that question is something I have thought about at length . . . and I still don't know the answer. It doesn't seem to be settled in the law either . . . . What Perricone did, unlike a Brady or Giglio violation, is a gray area for me although I definitely think it was foolish and imprudent. Certainly had I known I would have consulted with [EOUSA's] GCO [Office of General Counsel] about the proper course of action including whether an OPR referral was appropriate or whether some type of disciplinary action [was] warranted but I am really torn on whether it would have been in my power to tell Perricone he could not post comments anonymously. I struggle with this as a manager based on what I believe is uncharted territory. I hope that one of the things that will result from your investigation is guidance on what managers can constitutionally police concerning internet and social media.

Although she had ample opportunity, Mann never informed OPR that she had engaged in behavior similar to Perricone's. Had OPR known that Mann had also posted comments online about Department matters, OPR would have read Mann's e-mail in an entirely different light. Without that knowledge, Mann's e-mail to OPR appeared to be simply a statement by the USAO's second-in-command that Mann was unsure whether Perricone had violated any strictures against extrajudicial statements by prosecutors. When read in the light of Mann's own conduct, however, Mann's e-mail appears to be a self-serving attempt to protect her own interests. Moreover, when read with the knowledge that Mann herself posted comments online,

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292 Stuart Walz Report to EOUSA at 2-3 (Nov. 30, 2012).

293 Communication from Walz to OPR (Nov. 19, 2012); Mann Tr. at 203 (Nov. 15, 2012).

her statement to OPR that had she known about Perricone's posting activities, she would have consulted with EOUSA to determine if an OPR referral or disciplinary action were warranted, is arguably false, or at best purposely misleading. Although she clearly assured OPR that she would have consulted with EOUSA regarding Perricone's conduct to determine whether an OPR referral needed to be made or disciplinary action taken, she neither informed OPR, nor consulted with EOUSA, about her own similar conduct. Rather, her assurances regarding what course of action she would have taken had she known about Perricone's conduct were apparently given to send the explicit message that Perricone's conduct was so unusual and unique (*i.e.*, no others in the office were engaging in the same conduct) that she would have consulted EOUSA's General Counsel's Office to determine how to handle it from a management point of view, and the implicit message that she herself had never posted comments online.

3. Responding to Defense Motions and Court Orders

Mann assumed a central role in responding to various defense motions for recusal, new trials, or dismissal of charges that cited as their basis Perricone's postings about the defendants or their attorneys in those cases.

a. The *Broussard* Case

In May 2012, the defendants in the *Broussard* case, which was being heard by Judge Hayden Head, filed motions to recuse the USAO, in part because of Perricone's nola.com comments about the defendants and in part because of alleged leaks of confidential material to the media.[294] The government opposed the motions in a pleading authored by several AUSAs. Mann did not participate in writing the pleading. On June 27, 2012, Judge Head ordered the government to file under seal an *in camera* report concerning the government's internal inquiry into the alleged leaks of confidential information. Mann took primary responsibility for responding to Judge Head's June 27, 2012 order, even though Mann – unbeknownst to others in the USAO – had posted three comments on nola.com following articles concerning the *Broussard* case, and had supervisory authority over the *Broussard* case.

On July 2, 2012, Mann wrote a letter to Judge Head, in part to discuss the USAO's leak investigation, and in part to discuss "the events surrounding the resignation of [Perricone]." Mann wrote:

> [Perricone] admitted to [Letten] and me that he had posted comments under the 'Mencken' name including some comments about news stories on our office's cases . . . . [Letten] and I immediately . . . contacted [the Office of the Deputy

[294] Judge Head is a Senior U.S. District Court Judge for the Southern District of Texas. He was appointed by the Chief Judge of the U.S. Court of Appeals for the Fifth Circuit to preside over the *Broussard* case after all of the judges in the Eastern District of Louisiana were recused. The recusal arose because defendant Tom Wilkinson is the brother of Joseph Wilkinson, Jr., a U.S. Magistrate Court Judge for the Eastern District of Louisiana.

> Attorney General and EOUSA's Office of General Counsel] requesting an investigation. On the following day, we reported the Perricone matter to [OPR].

Mann wrote further, "In the aftermath of the revelation about Perricone having been an anonymous commenter on-line, [Letten] and I consulted at great length with OGC about the appropriateness of District recusal in any pending matters or cases." Mann concluded:

> As scrupulously as we considered and sought advice on cases where recusal might be appropriate, we also followed the same protocol in determining where we should not be recused. The Broussard/Wilkinson case fits this latter category. First, the case did not involve Heebe as a witness or subject. Second, Perricone had neither been assigned to handle the case before or after the indictment was returned and had played no decision making role in it.[295]

b. The Danziger Bridge Case

In May 2012, the Danziger Bridge defendants moved for a new trial, in part because of Perricone's postings. In response to the motion, Judge Engelhardt held several court proceedings, heard testimony from Perricone, and requested that the USAO provide the court with information about, *inter alia*, internal USAO communications regarding the issue of online posting activity by AUSAs. Notwithstanding that she had engaged in similar conduct, Mann: participated in a June 13, 2012 proceeding before Judge Engelhardt; exchanged correspondence with Judge Engelhardt concerning Perricone; represented the USAO at the hearing at which Perricone gave testimony on October 10, 2012, during which Mann spoke to the court and objected to certain questions; collected internal USAO communications about online postings by AUSAs and produced them to the court; and drafted and filed two pleadings objecting to Judge Engelhardt's intention to provide those internal USAO communications to the Danziger Bridge defendants.

In response to Judge Engelhardt's focus on Perricone's postings, Mann worked closely with Barbara Bernstein, a Deputy Chief of the Civil Rights Division Criminal Section, who was the lead prosecutor in the Danziger Bridge case. Mann did not inform Bernstein that Mann had engaged in conduct similar to Perricone's. In Bernstein's view, Mann should not have been involved in the production to Judge Engelhardt of USAO materials regarding Perricone. Bernstein told OPR that if Mann had informed her about Mann's own postings, Bernstein would have made sure that Mann did not represent the USAO in post-trial litigation.[296]

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[295] Judge Head subsequently denied the defendants' motion for recusal. Judge Head Order (July 26, 2012) (Judge Head's July 26, 2012 Order).

[296] Barbara Bernstein OPR Interview Transcript at 32-33 (Dec. 20, 2012) (Bernstein Tr. (Dec. 20, 2012)).

C. Mann Intentionally Violated LRPC 1.7

Because Perricone and Mann engaged in similar conduct, Mann had a personal conflict of interest when representing the Department in any matter related to Perricone's postings. LRPC 1.7(a)(2) and (b) prohibited Mann from any such representation unless Mann obtained in writing the informed consent of the Department. As discussed previously in relation to Mann's violation of LRPC 1.4(a) and (b), Mann never fully or adequately informed her client about her conflict of interest. Mann therefore violated LRPC 1.7, because she never obtained her client's informed consent for continued representation.

[redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

[redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted][297]

Mann's defense of her conduct is without merit. LRPC 1.7 does not exempt attorneys who view themselves as irreplaceable. [redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted] LRPC 1.7 prohibits an attorney from representing a client if a "significant risk" exists that the representation would be affected by the attorney's personal conflict of interest. Whether Mann actually provided her client with biased advice tailored to protect her own personal interests at the expense of her client is immaterial when analyzing whether Mann violated LRPC 1.7. Mann's client, not Mann, was entitled to make the decision of whether to accept the risk that Mann would put her own interests ahead of its interests.

Because Mann intentionally represented her client in numerous matters in which Mann had a personal conflict of interest, without obtaining the informed consent of her client in writing,[298] Mann committed intentional professional misconduct in violation of LRPC 1.7.

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[297] Mann Tr. at 175-76 (Nov. 15, 2012).

[298] Even were OPR to credit Mann's version of events, [redacted] Sealed. See 11/1/13 order of Judge Englehardt. [redacted], Mann nevertheless violated LRPC 1.7 because she never obtained her client's consent in writing to her continued representation as required by LRPC 1.7(b). Letten confirmed to OPR that Mann never asked him to sign any kind of acknowledgement that the Department agreed to Mann's continued representation despite her personal conflict of interest. Letten Tr. (Apr. 12, 2013). [redacted] Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

CHAPTER 6

MANN LACKED CANDOR TOWARD THE JUDICIARY AND DEPARTMENT OFFICIALS

In this chapter, OPR discusses Mann's lack of candor toward the judiciary and Department officials. Mann's communications with the courts and Department officials following Perricone's admission violated LRPC 8.4(c) and (d). LRPC 8.4(c) states that an attorney commits misconduct by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. LRPC 8.4(d) prohibits conduct that is prejudicial to the administration of justice. OPR found no evidence that Mann directly lied to anyone regarding whether she had posted comments on nola.com. Courts have held, however, that an attorney's material omissions in communications with her client can constitute "dishonesty" or a "misrepresentation," in violation of Rule 8.4(c). *Waters*, 817 N.W.2d 662; *Mitchell*, 727 A.2d at 315. OPR found substantial evidence that Mann exhibited "a lack of honesty, probity, or integrity in principle; a lack of straightforwardness," when she failed to inform those persons in the Department with whom she was communicating about issues related to Perricone, that she had engaged in the same conduct as Perricone. *In re Scanio*, 919 A.2d at 1137. Mann's conduct was deceptive, she was not straightforward, and she made misrepresentations or omitted material information when dealing with Judge Head, Judge Engelhardt, Letten, Civil Rights Division Criminal Section Deputy Chief Barbara Bernstein, EOUSA Deputy General Counsel Thomas Anderson, and OPR. By dealing dishonestly with Judge Head and Judge Engelhardt, Mann also violated Rule 8.4(d).

I. Mann's Dishonest Conduct toward the Judiciary

A. Judge Head

Mann posted three comments on nola.com following articles concerning the *Broussard* case, over which Mann had supervisory authority. Notwithstanding her extrajudicial comments on the *Broussard* case, Mann participated in preparing the government's response to the defendants' recusal motions, which were based in part on Perricone's nola.com comments about the case.

As previously discussed, the defendants in the *Broussard* case filed motions to recuse the USAO from the prosecution of the case or, in the alternative, to recuse the prosecutors then assigned to the case, as well as their supervisors, including Mann.[299] The motions for recusal were based in part on Perricone's postings disparaging the defendants.

The government filed a responsive pleading, signed by AUSA #3, arguing in part that the motions should be denied because Perricone "did not have an active role" in the *Broussard* case

[299] Tom Wilkinson's Motion to Disqualify the United States Attorney's Office at 1, 13 n.12 (filed May 23, 2012); Aaron Broussard's Motion to Recuse (filed May 10, 2012). Defendant Broussard's motion also requested that the court order the government to show cause why it should not be held in contempt for alleged leaks of grand jury information.

because Perricone had not been assigned to the case; did not prepare, sign, or review the indictment or superseding indictment; and did not appear in any court proceedings related to the case.[300] The government also repeatedly asserted that Perricone's retirement had "eliminated any potential conflict that may have existed."[301] Responding to defendant Broussard's allegations regarding the disclosure to the news media of information about target letters sent to the defendants and the defendants' imminent indictment, the government submitted an affidavit signed by Letten denying that the government was responsible for any such disclosures. Letten stated that the government had conducted an inquiry consisting of interviews of prosecutors and federal law enforcement agents who had participated in the investigation and indictment of the defendants.

On June 27, 2012, Judge Head granted defendant Broussard's request for an *in camera* review of the government's inquiry into the leak allegations. In a July 2, 2012 letter to Judge Head, Mann detailed the actions taken by the government in response to the leak allegations. In addition, Mann discussed Perricone's online posting activity and the Department's decision not to recuse the USAO. Mann represented that she and Letten had consulted "at great length" with Department officials and "scrupulously" sought advice about cases on which the USAO should be recused. Mann also noted that one of the reasons the USAO had not been recused in the *Broussard* case was because Perricone "had played no decision making role in it." Mann also placed herself in the role of witness by asserting that she had spoken to Perricone and that "Perricone represented, what I believe to be accurate based on my personal recollection, that he was not made aware of the timing of the target letters or the precise indictment date."[302]

In a July 26, 2012 order, Judge Head denied the defendants' requests for recusal of the USAO or any other AUSAs:

> The "generally accepted remedy" is disqualification of specific individual Assistant United States Attorneys, and not the entire office. . . . On public revelation of his professional indiscretions, Mr. Perricone has resigned from the United States Attorney's Office for the Eastern District of Louisiana. Mr. Perricone was not and obviously cannot be the prosecutor in this case. *Other Assistant United States Attorneys have not made such similar public comments as Mr. Perricone's or otherwise indicated personal bias in this case.* Whatever involvement Mr. Perricone had in this case, it is so tangential that it is insignificant.[303]

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[300] United States Response in Opposition to [Wilkinson's and Broussard's] Motions to Recuse at 3, 10 (filed June 1, 2012).

[301] *Id.* at 3, 10-11.

[302] Letter from Mann to Judge Head at 6 (July 2, 2012). Mann's letter was originally filed under seal, but the court subsequently ordered it to be filed publicly. Judge Head Order (Dec. 3, 2012).

[303] Judge Head's July 26, 2012 Order at 1-2 (emphasis added).

On August 25, 2012, defendants Broussard and Wilkinson pled guilty to various crimes associated with the alleged fraudulent payroll scheme.[304]

OPR concludes that Mann violated LRPC 8.4(c) and (d) by failing to inform the court of facts that were material to its decision whether to recuse the USAO or particular AUSAs, including Mann, whom defendant Wilkinson had specifically named as an individual who should be recused. Mann permitted the government to file a responsive pleading containing inaccurate representations, or at the very least failed to correct those inaccurate representations; drafted and signed a letter to the court that contained misleading representations; and failed to correct the court's factual statement that no AUSA besides Perricone had posted online comments, despite the fact that she had personal knowledge that the statement was inaccurate, thereby allowing the Court to render a legal ruling based in part on misinformation.

Mann was actively involved in discussing the recusal issue with the prosecutors. AUSA #3 told OPR that while he did not have a specific recollection of Mann reviewing the government's response to the recusal motions, Mann typically would have done so, and AUSA #3 recalled that Mann reviewed other motions in the high-profile case.[305] A May 31, 2012 e-mail shows that AUSA #3 sent a draft of the government's response to Mann and Letten requesting that they advise AUSA #3 of "any thoughts either of you may have." AUSA #3 said that after Judge Head's June 27, 2012 order, Mann assumed responsibility for responding to the court's requests for information, and AUSA #3 did not see Mann's July 2, 2012 letter to Judge Head until after it had been submitted to the court.[306]

Given the high-profile nature of the *Broussard* case, Mann's known involvement in it, the unusual nature of the defendants' recusal allegations, and the e-mail from AUSA #3 forwarding to Mann and Letten a draft of the government's response to the allegations, OPR concludes that Mann almost certainly reviewed the government's response and knew that the government was representing that any potential conflict of interest had been "eliminated" by Perricone's resignation, a statement that Mann knew was inaccurate given her own online posting activity.[307]

Mann also knew that she had not informed the Department of her own comments about the *Broussard* case and that, therefore, she had not "scrupulously" sought advice from

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304 On November 20, 2012, after Mann's postings were revealed, Letten wrote a letter to Judge Head, informing him that the sentence in Judge Head's July 26, 2012 order stating that no other AUSA had engaged in conduct similar to Perricone's was incorrect in light of Mann's postings. Letten also informed Judge Head that Mann had posted at least one comment online about the *Broussard* case. Defendant Broussard filed a motion requesting an evidentiary hearing about the government's purported misconduct. The court denied the motion primarily on the ground that defendant Broussard's guilty plea, which Broussard had not moved to withdraw, waived any claim of government misconduct. Judge Head Order (Jan. 23, 2012).

305 AUSA #3 OPR Interview (June 19, 2013) (recorded).

306 *Id.* at 30:13.

307 In any event, at the very latest Mann became aware of the misinformation when Judge Head issued his order, and she took no action to correct the record or Judge Head's understanding.

Department officials regarding recusal issues. Accordingly, Mann's statement to the court that the Department had permitted the USAO to remain on the *Broussard* case after full consideration of all material information was false and misleading.

That Mann's own postings were relevant to the issues before Judge Head should have been readily apparent. AUSA #3, a prosecutor with far less experience than Mann, told OPR that if he had known at the time of the recusal motions that Mann had also posted comments online about the *Broussard* case, he would have "talked to somebody" because, in his view, it was "inappropriate" for Mann to send communications under seal to the court about someone else's postings when Mann had done the same thing.[308] AUSA #3 believed that EOUSA likely would have recused the USAO, or at least Mann, if EOUSA had known about Mann's postings.[309] AUSA #1 told OPR that Judge Head considered the information relevant because after Letten advised Judge Head in November 2012 about Mann's online activities, Judge Head held a telephone conference call with the parties in the *Broussard* case, during which Judge Head expressed his anger with the government and indicated that he would consider permitting the defendants to withdraw their guilty pleas.

In addition, because Mann was not forthcoming with Judge Head about her online activities, the court reached an inaccurate factual conclusion that "[o]ther Assistant United States Attorneys have not made such similar public comments as Mr. Perricone's or otherwise indicated personal bias in this case." Pursuant to her general duty of candor, Mann was obligated to inform the court that its understanding regarding material facts – that only Perricone had engaged in online posting activity and indicated personal bias in the case – was incorrect. Mann made no effort to correct the record; instead, as discussed in the following section, Mann used Judge Head's inaccurate factual conclusion to improperly bolster the government's argument before Judge Engelhardt.

Accordingly, OPR concludes that Mann intentionally violated LRPC 8.4(c) and (d) by knowingly failing to disclose facts material to the court's decision whether to grant the defendants' recusal motions in the *Broussard* case, permitting the government to make misleading representations in its response to the recusal motions, and misrepresenting the nature of the Department's consideration of the recusal issue.

B. Judge Engelhardt

OPR concludes that Mann engaged in dishonest conduct when she made misrepresentations and misleading statements in two written communications to Judge Engelhardt. In both communications, Mann misled the court by making statements suggesting that Perricone was the only AUSA who posted comments online about USAO matters and that she herself was not a follower of comments on nola.com.

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308 *Id.* at 29:19-30:52.

309 *Id.* at 31:19-33:12.

1. Mann's First Misleading Communication with Judge Engelhardt

Mann's first misleading representation to Judge Engelhardt was made in a sealed pleading she drafted and then filed on August 17, 2012, entitled, "Government's Relevance Objections To Court's Order of August 13, 2012 Filed Under Seal" (in a November 1, 2013 Order, Judge Engelhardt unsealed this and other previously sealed materials in the Danziger Bridge case). In the pleading, Mann quoted from a portion of the July 26, 2012 order issued by Judge Head in the *Broussard* case. Although Mann modified the quote in the pleading, she was aware that the full and original quote was false.

As previously discussed, Judge Head issued an order in the *Broussard* case denying the defendants' motions to recuse the USAO, stating in part, "Mr. Perricone was not and obviously cannot be the prosecutor in this case. *Other Assistant United States Attorneys have not made such similar public comments as Mr. Perricone's or otherwise indicated personal bias in this case.*"[310] Notwithstanding the factual inaccuracy of Judge Head's statement, Mann, knowing of this inaccuracy, quoted a portion of Judge Head's conclusion in a submission to Judge Engelhardt.

On July 9, 2012, in response to the Danziger Bridge defendants' new trial motion, Judge Engelhardt ordered the prosecution to obtain and provide him with information about internal USAO communications concerning online posting activity. Mann coordinated that process and produced responsive materials to Judge Engelhardt *in camera*. On August 13, 2012, after reviewing the government's submission, Judge Engelhardt ordered the disclosure of the materials to the Danziger Bridge defendants. In response to that order, Mann drafted and filed two sealed pleadings: in the first, the government objected to providing the materials to the Danziger Bridge defendants because the internal USAO communications contained privileged material; and in the second, the government argued that the materials were not relevant to the Danziger Bridge defendants' new trial motion.

Mann drafted the pleading setting forth the government's objections as to relevance on or about August 16, 2012. That day, Mann attached a draft of the pleading to an e-mail she sent to Barbara Bernstein, the Civil Rights Division attorney assigned to the Danziger Bridge case, seeking Bernstein's comments. In the draft pleading, Mann included the following statement:

> In an opinion denying a defense motion to disqualify [the USAO] in United States v. Broussard, 11-299 "HH", the district court recently found that while Perricone should not be the prosecutor in the case based on his public comments, there was nothing supporting the suggestion that other AUSAs had made "similar public comments . . . or otherwise indicated personal bias in this case."

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[310] Judge Head's July 26, 2012 Order at 2 (emphasis added).

On August 16, 2012, at 11:19 p.m., Bernstein e-mailed Mann an edited version of the draft pleading that Mann had sent to Bernstein earlier that day. In her revision, Bernstein reworded Mann's citation to Judge Head's July 26, 2012 order as follows:

> In a recent opinion denying a defense motion to disqualify [the USAO] from a prosecution, the district court noted that Perricone's postings about that pending case did not support a suggestion that other AUSAs, aside from Perricone, had "indicated personal bias" in the case. **(Is this accurate?)** United States v. Broussard, 11-299 "HH."[311]

In Bernstein's revision of Mann's draft pleading, Bernstein deleted Mann's quote from Judge Head's July 26, 2012 order that no other AUSA had made "similar public comments." Mann, however, reinserted the quote into the final pleading that she submitted to Judge Engelhardt under seal on August 17, 2012. In the final pleading that Mann drafted, filed with the court, and served on the Danziger Bridge defendants, Mann wrote:

> In a recent opinion denying a defense motion to disqualify [the USAO], the district court noted that Perricone's posting did not support the suggestion that other AUSAs had made "similar public comments . . . or otherwise indicated personal bias in this case." United States v. Broussard, 11-299 "HH".[312]

In the final version of this pleading, therefore, Mann cited, paraphrased, and quoted from a portion of Judge Head's July 26, 2012 order that she knew to be inaccurate. Only Mann could have informed Judge Engelhardt, Judge Head, and defense counsel, that the quote taken from a statement in Judge Head's July 26, 2012 order was factually inaccurate – because only Mann knew at that point that she herself had made "similar public comments." As the record demonstrates, however, Mann did not inform anyone that Judge Head's reasonable assumption was in fact wrong. Indeed, she took affirmative steps to further spread the inaccurate view of the situation.

OPR concludes that when Mann drafted, signed, and filed a pleading citing to a portion of a judicial finding that she knew to be factually false, Mann intentionally violated LRPC 8.4(c) and (d). These rules prohibit conduct involving dishonesty, fraud, deceit, or misrepresentation as well as conduct that is prejudicial to the administration of justice. Although the final pleading filed by Mann paraphrased the statement in Judge Head's July 26, 2012 order, rather than incorporating the complete inaccurate statement, the final pleading filed in Judge Engelhardt's court nevertheless perpetuated the notion that Perricone was the only AUSA posting comments online regarding USAO matters. At a minimum, Mann intentionally invited Judge Engelhardt to rely on and give credence to the order issued by Judge Head, knowing it contained an inaccurate statement. Mann knew, or should have known, that Judge Engelhardt or the Danziger Bridge

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311 Emphasis in original.

312 Government's Relevance Objections To Court's Order of August 13, 2012 Filed Under Seal at 6 (E.D. La, filed Aug. 17, 2012).

defendants might review Judge Head's July 26, 2012 order in conjunction with the government's pleading referring to it, and be misled into believing that the government was asserting that no other AUSA had posted comments online similar to Perricone's. OPR concludes that Mann's conduct was intentionally deceitful and that her misrepresentations to Judge Engelhardt were prejudicial to the administration of justice.

2. Mann's Second Misleading Communication with Judge Engelhardt

OPR concludes that Mann engaged in dishonest conduct with respect to a second written communication with Judge Engelhardt. Mann communicated with Judge Engelhardt regarding the claim she previously made in court that court employees may also have been posting comments online. In an October 19, 2012 letter responding to Judge Engelhardt's request that she identify the individuals engaged in such conduct, Mann wrote: "Prior to the Perricone incident, I was not a follower of nola.com postings and had no real sense of what was happening there . . . . I did not intend to suggest that anyone else in particular was posting."[313] In his November 26, 2012 order, Judge Engelhardt expressed his view that Mann's statement in her October 19, 2012 letter may have violated Mann's duty of candor to the court.[314] OPR agrees that Mann's statement that she "was not a follower of nola.com postings and had no real sense of what was happening there" was misleading. Mann not only read articles and at least some postings on nola.com, but she had posted at least 40 comments on the nola.com website over four months. Accordingly, Mann violated LRPC 8.4(c) because her attempt to suggest to Judge Engelhardt that she had little or no involvement with or understanding of nola.com was dishonest and demonstrated a lack of integrity and straightforwardness.

In her January 2, 2013 letter to Louisiana Chief Disciplinary Counsel Plattsmier, Mann claimed that her October 19, 2012 letter to Judge Engelhardt was "poorly written" because she intended the phrase "follower of nola.com postings" to be construed as a "term of art."[315] Mann said that after the revelation in March 2012 about Perricone's online comments, she was informed that nola.com readers could take affirmative steps to "follow" particular commenters, like Perricone (presumably, when a reader "follows" a particular commenter, the reader is notified when those they "follow" write new comments). Mann said that during the time she was posting comments, she did not "follow" any other commenters in that sense nor did she notice whether anyone "followed" her. In her letter to Chief Disciplinary Counsel Plattsmier, Mann stated that "in hindsight and upon reflection," she realized that her reference to "follower" had not been defined in her October 19, 2012 letter to Judge Engelhardt, and the reference could have been misconstrued to mean that she had not posted comments on nola.com.[316]

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313 Judge Engelhardt's November 26, 2012 Order at 18.

314 *Id.* at 32.

315 Letter from Mann to Louisiana Chief Disciplinary Counsel Plattsmier at 11-12.

316 *Id.* at 12.

Mann's explanation is unpersuasive. First, Mann's phrasing in her October 19, 2012 letter – "I was not a follower of nola.com postings and had no real sense of what was happening there" – belies Mann's explanation that she was using "follower of nola.com postings" as a "term of art." Rather, the phrasing indicates Mann's intent to distance herself from the nola.com postings, even as a reader of them. Furthermore, under Mann's interpretation of the term "follower," one is a "follower" of a particular commenter, not of nola.com postings in general. Even if OPR accepts Mann's contention that at the time of her October 19, 2012 letter, she intended to use the phrase "follower of nola.com postings" in a narrow, technical sense, Mann knew, or should have known, that Judge Engelhardt was highly likely to construe "follower of nola.com postings" as meaning that Mann did not read or have any involvement with the nola.com postings. As an experienced attorney, Mann well knows that words and phrases are construed in light of their ordinary meaning unless otherwise specifically defined. Therefore, OPR concludes that Mann's statement in her October 19, 2012 letter to Judge Engelhardt distancing herself from the nola.com postings was intentionally misleading.

In his November 26, 2012 order in the Danziger Bridge case, Judge Engelhardt expressed concerns that Mann violated LRPC 3.3(a)(1) and 3.4(b) because of: (1) Mann's silence when Letten told the court in June 2012 that Mann did not know Perricone had been posting comments online; (2) Mann's silence when Perricone testified that no one knew that he had been posting comments online; and (3) Mann's statement in her October 19, 2012 letter to the court.[317] As explained more fully below, OPR finds the evidence insufficient to prove by a preponderance of the evidence that Mann knew that Perricone was posting comments online. OPR therefore could not conclude that the evidence established that Mann violated LRPC 3.3(a)(1) and 3.4(b) when she remained silent during Letten's and Perricone's statements to the court. OPR concludes that the statement in Mann's letter to Judge Engelhardt is more appropriately considered in the context of LRPC 8.4(c).[318]

In some media accounts of the June 2012 hearing before Judge Engelhardt, Mann was alleged to have improperly remained silent when Letten asserted that no one other than Perricone

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[317] Judge Engelhardt's November 26, 2012 Order at 32. LRPC 3.3(a)(1) prohibits an attorney from making a false statement of fact or law. LRPC 3.4(b) prohibits an attorney from counseling or assisting a witness to testify falsely.

[318] Because both of Mann's misleading statements to Judge Engelhardt fall squarely within the ambit of LRPC 8.4(c), OPR finds it unnecessary to reach the question of whether those same statements also violate the similar, but narrower, prohibition of LRPC 3.3(a)(1) against making a knowing "false statement of fact or law" to a court. Mann's August 17, 2012 pleading misled the court by citing the factually-erroneous statement in Judge Head's July 26, 2012 order, and Mann's October 19, 2012 letter to Judge Engelhardt misleadingly stated that Mann did not follow nola.com postings. Under these circumstances, LRPC 8.4(c) plainly encompasses these misleading statements. The weight of authority suggests that Rules 3.3(a)(1) and 8.4(c) substantially overlap, and that "a lawyer who deliberately misleads a tribunal [also] violates [Rule] 3.3(a)(1) . . . ." Richard R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 27-37 (2002) (discussing Model Rule 3.3(a)(1)). OPR concludes that Mann intentionally violated LRPC 8.4(c). OPR notes that the Louisiana Office of the Disciplinary Counsel may choose to address whether these statements also violated Mann's duty under the narrower prohibition found in LRPC 3.3(a)(1).

had posted comments online.[319] The record demonstrates, however, that Letten's comments were narrowly focused only on whether USAO senior managers were aware of *Perricone's* postings. Letten never stated publicly that no one other than Perricone had posted comments online. Although, as discussed, Mann was dishonest in her dealings with Judge Engelhardt, in this particular instance, OPR did not find that Mann had an obligation to correct Letten's statement to the court.

II. Mann's Dishonest Conduct toward Department Officials

A. Mann's Dishonest Conduct toward Letten

As the U.S. Attorney, Letten was appointed by the President and confirmed by the Senate. He was Mann's direct supervisor, and he made USAO decisions on behalf of the client, either the Department or the United States. After Perricone's online posting activity was revealed, Mann misled Letten and omitted material information during her communications with him.

Sealed. See 11/1/13 order of Judge Engelhardt

As previously discussed, however, Letten adamantly disputed Mann's account of their March 13, 2012 conversation and denied that Mann gave him any indication that she had posted comments online about pending cases. OPR finds that Mann Sealed. See 11/1/13 order of Judge Engelhardt intentionally withheld material information from her client for the purpose of protecting her self-interest.

Letten also described conversations he had with Mann in which Mann misled him by implying that she disapproved of Perricone's conduct. Letten told OPR that after Perricone's online posting activity was revealed, Letten and Mann on numerous occasions lamented, "[H]ow stupid was that for him [Perricone] to just do that? What could have caused his lapse in judgment to do that?"[320] Letten said that he and Mann discussed "scores of times" the question of what would make a highly intelligent man like Perricone comment anonymously online about office matters.[321] Letten said that during these conversations, Mann never mentioned her own

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[319] John Simerman, "Jim Letten demotes second-in-command, tries to quietly weather scandal," *Times-Picayune*, Nov. 8, 2012 (Letten portrayed Perricone as "lone online wolf").

[320] Letten Tr. at 33 (Nov. 14, 2012).

[321] *Id.* at 33.

posting activities. Although Letten told OPR that "this is hard for me to say," he said that Mann was "not forthright" with him when she failed to inform him of her own postings.[322]

B. Mann's Dishonest Conduct toward Barbara Bernstein and Thomas Anderson

Following the revelation of Perricone's online posting activity, Mann worked closely with Bernstein on the Danziger Bridge case, and EOUSA Deputy General Counsel Anderson on recusal issues. Each was representing Mann's client – the Department – on important issues related to Perricone's postings. Mann omitted material information during her communications with both Bernstein and Anderson when she failed to tell them about her own online posting activity. Mann's conduct was perhaps most egregious in her dealings with Bernstein and the Civil Rights Division concerning the Danziger Bridge case. Mann's involvement ultimately adversely affected the government's ability to defend the jury's guilty verdicts against the Danziger Bridge defendants' attacks.

Bernstein told OPR that she and Mann discussed Perricone's actions on many occasions. Bernstein's "clear impression" as a result of those conversations was that Mann "thought that [Perricone] was an absolute idiot for having done what he did."[323] Bernstein recalled Mann saying either that Perricone's actions raised an issue of whether his postings were protected by the First Amendment, or that Mann agreed with the statement that Perricone's postings were protected by the First Amendment.[324] Bernstein said that although Mann may not have affirmatively lied to her, "I absolutely felt misled, not necessarily because of anything she said but because of what she chose not to say . . . . [W]hen I found out that [Mann] had been posting as well, I very much felt misled but I can't pinpoint anything specifically that she said."[325] Bernstein thought Mann told her that she did not follow postings on nola.com, a recollection that Bernstein said was reinforced when Judge Engelhardt in his November 26, 2012 order quoted Mann's October 19, 2012 letter to him in which Mann stated that she did not follow nola.com postings.[326] Bernstein told OPR that the revelation that Mann had posted comments online about Department matters negatively "affected the credibility of representations that the government has made during the [Danziger Bridge] post-trial litigation."[327]

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322 *Id.* at 37-38.

323 Bernstein Tr. at 18 (Dec. 20, 2012).

324 *Id.* at 18-19.

325 *Id.* at 19-20.

326 *Id.* at 20-22.

327 *Id.* at 24.

In addition, as described more fully above, Mann worked closely with Anderson to assist the Department in deciding whether the USAO should be recused from cases about which Perricone had posted comments online. Mann never told Anderson that she also had posted comments online, including comments about the *Broussard* case, which was one of the matters under review for possible USAO recusal.

C. Mann's Dishonest Conduct toward OPR

In late July, 2012, OPR sent all USAO attorneys, including Mann, a survey regarding Perricone's postings to determine, among other things, whether and to what extent those attorneys knew or suspected that Perricone had been commenting online. Mann submitted her survey response to OPR almost immediately after receiving it. Shortly after receiving USAO attorney survey responses, OPR began conducting in-person interviews, including interviews of USAO senior managers. Sealed. See 11/1/13 order of Judge Engelhardt

Mann did not inform OPR of her postings, either in her survey response Sealed. See 11/1/13 order of Judge Engelhardt [redacted] 328

The survey concluded with the very broad question: "Do you have other information, not covered by this survey, that you believe would be relevant to OPR's investigation?" Respondents were asked to explain their response. Sealed. See 11/1/13 order of Judge Engelhardt [redacted] These questions were designed to elicit any relevant information that may not have been captured through a direct question. Mann did not provide OPR Sealed. See 11/1/13 order of Judge Engelhardt, with the material information that Mann herself had engaged in the same conduct as Perricone by posting anonymous comments on nola.com about ongoing Department matters.

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328 Sealed. See 11/1/13 order of Judge Engelhardt At the time when OPR disseminated its first survey Sealed. See 11/1/13 order of Judge Engelhardt OPR was aware of no evidence or allegation that any AUSA other than Perricone was posting comments online about Department matters. In fact, even Heebe's attorneys explicitly stated that they had no such evidence. In their March 23, 2012 letter to Attorney General Holder, Heebe's attorneys asserted that others in the USAO likely were aware of Perricone's postings, but they did not suggest that others in the USAO had engaged in similar activities, and OPR uncovered no such evidence until Mann was unmasked. When interviewed by OPR in July 2012, Heebe's attorneys stated that they had no information indicating that anyone other than Perricone had posted comments online. After that interview, Heebe's attorneys provided OPR with a list of pseudonymous nola.com postings that they suggested might have been authored by USAO employees because of the subject matter of the postings; none of eweman's postings, however, were included in the list. Given the lack of any evidence indicating that other AUSAs were engaged in the same online posting activity, OPR followed its standard policy of investigating only non-frivolous misconduct allegations; in this case, those relating to Perricone. Indeed, as described in this subsection, Mann misled OPR about whether she or anyone else also was commenting online. After Mann's admission that she was eweman, OPR believed it had sufficient evidence of a broader problem to warrant asking every USAO employee whether they had ever made statements online about Department matters or federal or state judicial officials.

Sealed. See 11/1/13 order of Judge Engelhardt

[329] Sealed. See 11/1/13 order of Judge Engelhardt

[331]

On March 15, 2012, two days after Perricone admitted that he had posted comments online about Department matters, Letten held two USAO meetings, one for supervisors followed by one for all USAO employees. Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

Immediately after the meetings, Letten was scheduled to issue a press release and hold a press conference to address Perricone's postings. Witnesses told OPR that Letten said something to the effect of, "Before I go and announce that no one knew what Perricone was doing, please come and talk to me if you have information to the contrary." This is consistent with the press release Letten had drafted and intended to issue, which stated that no one "had knowledge of" Perricone's actions. Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

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329 Sealed. See 11/1/13 order of Judge Engelhardt

330 Sealed. See 11/1/13 order of Judge Engelhardt

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Sealed. See 11/1/13 order of Judge Engelhardt [redacted][334]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][335]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted] These affirmative statements by Mann misled OPR by Sealed. See 11/1/13 order of Judge Engelhardt [redacted] Mann, and only Mann, knew that implication was false.

Sealed. See 11/1/13 order of Judge Engelhardt [redacted][336]

Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

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333 [redacted] As OPR discusses more fully in Chapter 6, AUSA #4 informed Letten at the supervisors meeting that prior to the public revelation about Perricone's online comments, AUSA #4 had heard about a rumor that Perricone had posted online comments under the name legacyusa. According to AUSA #4, he did not raise the possibility of other bloggers, only that Perricone may have posted comments under more than one name.

334 [redacted]

335 [redacted]

336 Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

Sealed. See 11/1/13 order of Judge Englehardt.

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt, as discussed previously. Sealed. See 11/1/13 order of Judge Engelhardt Mann sent OPR an e-mail containing her thoughts as to whether Perricone had done anything wrong when he posted comments anonymously online. In her e-mail, Mann told OPR that had she known about Perricone's postings, she would have consulted with EOUSA regarding whether disciplinary action or an OPR referral were warranted. Mann's statement in her e-mail clearly implied that Mann believed Perricone's online postings were wrong and that she would have requested an independent assessment of whether or how Perricone should be punished for his conduct – an assessment Mann never requested for her own postings.

By failing to advise OPR of her postings, Mann omitted information that was material to OPR's investigation. Sealed. See 11/1/13 order of Judge Englehardt.
Sealed. See 11/1/13 order of Judge Engelhardt
Mann's failure to be forthcoming falls far short of the Department's expectations for its attorneys, particularly a senior manager as experienced as Mann. Mann was obligated by Department policies, as well as ethics rules, to be forthright and proactive, and to do more than simply wait for what she deemed a sufficiently explicit question concerning her own conduct. Sealed. See 11/1/13 order of Judge Engelhardt
Sealed. See 11/1/13 order of Judge Engelhardt
. OPR concludes that Mann intentionally engaged in a course of dishonest and misleading conduct in violation of LRPC 8.4(c).

Sealed. See 11/1/13 order of Judge Englehardt.

[339] Mann's explanation is unreasonable and incredible. Having failed to inform OPR or

337 Sealed. See 11/1/13 o

338 Sealed. See 11/1/13 o

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the Department about her online posting activity, Mann Sealed. See 11/1/13 order of Judge Englehardt. . Furthermore, Sealed. See 11/1/13 order of Judge Engelhardt , Mann's online posting activity would nonetheless be relevant to that investigation. OPR considers managers' views regarding the actions of subordinates under investigation in determining whether misconduct has occurred. Information that a manager has engaged in the very same conduct as the employee would be a significant factor for OPR to consider when evaluating the manager's opinions concerning the reasonableness of the subordinate's conduct. It also would shed light on the office's culture regarding the conduct at issue. A reasonable manager would have immediately understood that the fact that she engaged in conduct identical to that of her subordinate being investigated required prompt reporting. Sealed. See 11/1/13 order of Judge Engelhardt [340]

Accordingly, by failing to inform OPR about her online postings, Mann demonstrated a "lack of honesty" and "straightforwardness" and thereby intentionally engaged in conduct constituting dishonesty, fraud, deceit, or misrepresentation in violation of LRPC 8.4(c).

III. Mann Intentionally Violated LRPC 8.4(c) and (d)

OPR found no evidence that Mann affirmatively lied to anyone about whether she had posted comments on nola.com. However, as detailed above, Mann made both misrepresentations and material omissions in her communications with almost everyone with whom she dealt after Perricone's online posting activity was revealed, including federal judges and Department attorneys who spoke for Mann's client.

Mann knew that Perricone's anonymous postings had caused serious damage to the Department, both generally, as a result of negative media coverage, and in individual cases in the Eastern District of Louisiana, in which defense counsel had filed motions based at least in part on Perricone's online posting activity. By failing to immediately and voluntarily admit that she also had posted comments online about Department matters, Mann assumed the risk that her conduct would nevertheless be discovered, which predictably would (and did) greatly increase the damage already done to the Department. Mann compounded the damage done to the Department when she accepted the responsibility for acting as the USAO's point person dealing with the repercussions resulting from the disclosure of Perricone's online posting activity, while knowing that the secret of her own posting activities might be revealed at any moment. Mann gambled with the Department's credibility and the good will it enjoyed with the judiciary, defense counsel, and the public, at great cost to herself and, more important, to the Department.

340 Sealed. See 11/1/13 order of Judge Engelhardt

Mann's misstatements, misrepresentations, and omissions of material facts in her dealings with Judge Head, Judge Engelhardt, Letten, Bernstein, Anderson, and OPR were purposeful and intentional. OPR therefore concludes that Mann intentionally violated LRPC 8.4(c) and (d).

CHAPTER 7

OPR FOUND INSUFFICIENT EVIDENCE TO CONCLUDE THAT USAO SENIOR MANAGERS WERE AWARE OF PERRICONE'S AND MANN'S POSTINGS

In their March 23, 2012 letter to Attorney General Holder and July 2012 interview with OPR, Heebe's attorneys alleged that others in the USAO, specifically Letten, Mann, [redacted] were contemporaneously aware that Perricone was posting comments online about Department matters. Heebe's attorneys advised OPR that their allegations were based on several factors. First, they stated that they had obtained information that [redacted] had informed Letten that Perricone was posting comments about cases on nola.com. Second, Heebe's attorneys claimed that the defense bar and others were aware of Perricone's online activities. Third, a close friendship existed between the Manns and Perricone, which made it likely that the Manns would know about Perricone's online activities.[341] And fourth, they said that an office-wide e-mail was apparently distributed sometime after [redacted] purported complaint to Letten cautioning USAO employees not to comment online regarding cases. After Mann's online posting activity was revealed, Judge Engelhardt and Heebe's attorneys concluded that Perricone and Mann were contemporaneously aware of each other's online posting activity because of the substance of Perricone's and Mann's postings, and the fact that Perricone and Mann posted comments on some of the same articles at approximately the same time.

For the reasons set forth in the following discussion, OPR concludes that the evidence is insufficient to support a conclusion by a preponderance of the evidence that Letten, Mann, [redacted] was aware of Perricone's postings prior to March 13, 2012. Likewise, the evidence is insufficient to support a finding by a preponderance of the evidence that Letten, [redacted] or Perricone was aware of Mann's postings prior to November 2, 2012.

I. Perricone's and Mann's Overlapping Postings

Prior to the revelation concerning Mann's own postings, Heebe's attorneys alleged that Mann likely was aware of Perricone's online posting activity. When Mann's postings also became an issue, many, including Judge Engelhardt and Heebe's attorneys, cited the fact that Perricone and Mann posted comments on some of the same articles, sometimes within minutes of each other, as significant evidence consistent with the conclusion that each was aware of the other's online posting activity. Mann posted comments online in response to 35 news articles (she commented twice on 5 articles). Perricone, posting as Mencken, posted comments online in response to 18 of the same articles as Mann. Heebe's attorneys asserted that this overlap evidenced coordination between Perricone and Mann.

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341 [redacted]

Heebe's complaint against Mann, filed in Orleans Parish Civil District Court, alleged that 63 percent of eweman's comments were in response to nola.com articles on which Perricone, posting as Mencken, had also commented, and noted that several of Perricone's and Mann's comments appeared only minutes apart. Heebe asserted that these facts implied "some degree of coordination between 'Mencken' and 'eweman,'" and contradicted Letten's assertion that no one in the USAO was aware of Perricone's postings.[342]

Judge Engelhardt reached the same conclusion as Heebe's attorneys:

> Quite simply, no one, especially this Court, could reasonably find it credible that Perricone and former First AUSA Mann, while posting under the same nola.com articles, and responding to and echoing each other's posts, were unaware of the identity of the other. Any assertion to the contrary belies the fact that both Perricone and then-First AUSA Mann are highly intelligent, experienced investigators and very capable prosecutors; and it is truly hard to believe that such seasoned, savvy and keenly insightful individuals, charged with unraveling the most complex white collar crimes in this District, would completely and totally overlook such an obvious thing, especially considering the information set forth in the posts of each. To even think as much strains credulity well beyond the breaking point. Surely, the particular posts of "eweman" and "legacyusa", et al., stood out quite dramatically amongst the quotidian posts of many others . . . . The undersigned finds it inconceivable that Perricone did not know, at the time he gave sworn testimony, that "eweman" was seated only two chairs away, on the other side of prosecutor Bernstein, in the person of former First AUSA Mann.[343]

As a consequence of his conclusion that Perricone and Mann were contemporaneously aware of each other's postings, Judge Engelhardt found that Perricone likely perjured himself when he testified that Mann did not know about Perricone's postings, and that Mann may have violated LRPC 3.3 and 3.4 when she failed to correct Perricone's false testimony:

> As it stands now, it seems clear that Perricone testified falsely in at least some important respects: first of all, his statement that no one in the office was aware that he was posting surely is false . . . . In that regard, Perricone was specifically asked whether he knew the identity of the person posting under "eweman", he stated unequivocally, "No." . . . Indeed, he [Perricone] made a point of stating: "Jan Mann had no idea what I was doing. This is on me. I take 100 per cent of

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[342] Heebe's Complaint at ¶ 16 (Orleans Parish Civ. Dist. Ct., filed Nov. 12, 2012). Heebe's 63 percent calculation was derived from his determination that 22 of the 35 eweman comments of which he was then aware were posted to the same "comment boards on which 'Mencken' also posted." However, Heebe's percentage calculation includes articles upon which Mann commented more than once, in essence "double counting" 4 comments. A more accurate description is that Perricone posted comments online on about half of the articles on which Mann also posted comments: 18 of 35 articles, or 51 percent.

[343] Judge Engelhardt's November 26, 2012 Order at 27-28.

the responsibility." We now know that this assertion, which was repeated in substance in his sworn testimony, is very likely false . . . . [S]he [Mann] sat through the sworn testimony of Perricone knowing full well the infirmities of his assertions and untruths which he told, as described hereinabove, and the Court's misgivings regarding his conduct . . . . The Court's concern relative to former First AUSA Mann begins with possible violations of Rules 3.3(a)(1) and 3.4(b) of the Rules of Professional Conduct . . . ."[344]

II. OPR's Analysis and Conclusions

The existence and timing of Perricone's and Mann's postings on the same articles raise a reasonable suspicion that the two were aware of each other's postings. These two factors alone, however, do not prove actual knowledge. Based upon its analysis of the substance and timing of Perricone's and Mann's postings, as well as other documentary and testimonial evidence, OPR concludes that the evidence is insufficient to support a finding by preponderant evidence that Perricone was contemporaneously aware that Mann was posting comments online, or that Mann was aware of Perricone's online activities.

A. Statistical Evidence

Mann posted 40 comments on 35 nola.com articles over a period of about 4 months. OPR's review of the comments following those articles found that Perricone posted comments on 18 of the same articles as did Mann. Perricone, a prolific commenter, posted comments on approximately half of the articles on which Mann posted a comment. This, however, is not the only relevant statistic. Perricone posted more than 2,600 comments online over a period of about 4.5 years on literally hundreds of articles. Thus, while Perricone may have posted comments on more than half of the articles on which Mann also posted comments, Mann commented on only an exceedingly small number of articles on which Perricone commented. A review of Perricone's postings reveals that Perricone often posted multiple comments on the same article, sometimes responding to comments by other posters. Even if OPR conservatively assigns four comments per article, Perricone commented on 650 articles. Mann commented on 18 of those 650 articles, or 2.8 percent. Moreover, during the period when Mann was posting comments – November 4, 2011 to March 6, 2012 – Perricone commented on approximately 190 different nola.com articles (posting multiple times on some of those articles). Mann commented on 18 of those articles, or 9.5 percent. In other words, assuming *arguendo* that Mann knew Perricone was also posting comments, Mann did not respond to 9 out of 10 of Perricone's postings on nola.com articles during the time that Mann was also posting comments online.

As a matter of statistical analysis, the frequency of Perricone's and Mann's overlapping postings does not appear to be particularly significant. If Perricone and Mann were actively coordinating their comments on nola.com articles, for either innocent or nefarious purposes, they likely would have decided that joint postings on more than 10 percent of articles over a four-

[344] *Id.* at 28, 32.

month period would have a greater impact on persons reading the comments on nola.com articles. If Perricone and Mann had coordinated their postings, Mann's postings likely would have begun years earlier, and she probably would have commented on more than three percent of the articles on which Perricone posted comments.

As part of its analysis into the evidentiary significance of Perricone's and Mann's overlapping postings, OPR also examined the postings of other commenters. For some articles on which Perricone posted comments, including one on which Mann also commented, there were as many as 100 different comments, or more. Many articles were commented upon by the same posters. During the period January 13, 2012, to March 11, 2012, for example, Perricone commented on 102 articles; Mann commented on 9 of the same articles. During that same period, at least 11 other commenters posted on as many or more of the articles on which Perricone had commented as did Mann. For example, "Muspench" commented on 24 of the articles on which Perricone had commented; "Ctjames" commented on 19 articles; "Emersoncrazynewman" also commented on 19 articles; "Graft" commented on 15 articles; and "Toulousegoos5" commented on 14 articles. Yet there is no evidence to suggest Perricone was coordinating with – or aware of the identities of – those commenters. The fact that many commenters overlapped on more articles with Perricone than did Mann is evidence that Perricone's and Mann's overlapping postings were more likely the result of coincidence stemming from Perricone's prolific online posting activity and Perricone's and Mann's mutual interest in certain articles, rather than evidence of planned joint activity.

In sum, OPR finds that the statistical evidence regarding Perricone's and Mann's overlapping postings does not prove by a preponderance of the evidence that each was contemporaneously aware of the other's online posting activity.

B. The Timing and Substance of Perricone's and Mann's Overlapping Postings

Perricone and Mann each posted comments on 18 nola.com articles on which the other also commented. OPR attaches little significance to the fact that most of Perricone's and Mann's comments were posted within a few hours of each other. The "shelf-life" of an active article on nola.com is measured in minutes and hours, not days or weeks.[345] Nola.com adds new articles to its website throughout each day. Unless the article is unusual in some way, people stop posting comments on the article after a short period of time, and turn their attention elsewhere. In OPR's view, the substance, as opposed to the timing, of Perricone's and Mann's postings is more important to an assessment of their alleged mutual knowledge or collaboration.

OPR examined Perricone's and Mann's comments on the 18 articles on which they both responded. OPR found no direct evidence of collaboration or mutual awareness of the other's postings. The fact that Perricone and Mann commented on some of the same articles provided little support for the allegation of mutual awareness. Both Perricone and Mann were interested

[345] OPR observed that articles of significant public interest would occasionally receive comments for two or three days, but such articles were infrequent.

in the criminal justice system in general and USAO matters in particular. Almost all of Mann's postings were in response to articles that in some way related to the federal or state criminal justice system. Perricone also commented on articles related to the criminal justice system, which, given his background as a former police officer, federal investigator, and federal prosecutor, is not surprising. Therefore, the fact that Perricone and Mann posted comments on some of the same articles adds little to the analysis because OPR would expect to find that Perricone and Mann posted comments on articles relating to their mutual interests, even if Perricone and Mann were acting independently of each other.

An examination of the substance and timing of Perricone's and Mann's postings that appear in response to the same nola.com articles reveals little, if any, evidence that supports the allegation that Perricone and Mann were contemporaneously aware of each other's postings. In Exhibit F, OPR sets forth and analyzes the content and timing of Perricone's and Mann's postings on the 18 nola.com articles on which they both commented. Although the timing of their postings indicates that Mann may have read some portion of Mencken's postings and Perricone may have viewed eweman's comments on those articles, the evidence is insufficient to support a conclusion that Mann knew that Perricone was the author of the Mencken postings or that Perricone knew that Mann was posting comments as eweman. These specific postings do not disclose information that would necessarily reveal the authors' identities, even to persons who were friends and associates in the same office.[346]

In their overlapping postings on these 18 articles, Mann never directly responded to any of Perricone's postings, nor did Perricone directly respond to any of Mann's postings. In contrast, during the time period that Perricone was posting comments online as both campstblue and legacyusa, he occasionally used one of the pseudonyms to highlight and applaud his posting under the other pseudonym. One would expect that if Perricone and Mann were engaged in coordinated activity, they would have been unlikely to have missed the opportunity to compliment, or at least bring readers' attention to, the other's postings. In addition, most of Perricone's and Mann's postings are separated by other commenters, sometimes numerous commenters. In the few instances in which Perricone's and Mann's postings were adjacent or close to each other in the list of commenters, the postings do not reveal any give-and-take or reference to each other's postings. *See* Exhibit F.

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[346] Letten told OPR that in the November 5, 2012 meeting in which Mann acknowledged that she posted comments online as eweman, Mann insisted that she and Perricone did not know of each other's online activities. Letten said that Mann pointed out that in one of her postings, Mann defended Letten in the face of criticism that had been written (unbeknownst to her) by Perricone under the name Mencken. According to Letten, Mann told him that if she had known Perricone had written the critical posting, Mann would not "have responded to him with a post; she would have gone down to the end of the hall and smacked the hell out of him." Letten Tr. at 31 (Nov. 14, 2012). OPR finds it plausible that given Mann's close friendship with Letten, Mann would not have permitted Perricone to publicly criticize Letten if she had known of it; furthermore, it is highly unlikely that Perricone would have written the critical postings if Perricone knew Mann was aware of his identity. Therefore, the substance of these two postings provides at least some evidence supporting Perricone's and Mann's independent assertions that they were unaware of the other's online activities.

C. USAO Senior Managers Denied Knowing That Perricone or Mann Were Posting Comments Online

Letten (b)(6) (b)(7)(C) denied knowing that Perricone or Mann had been posting comments on nola.com.[347] Sealed. See 11/1/13 order of Judge Engelhardt [348] Perricone denied knowing that Mann had been posting comments on nola.com.[349] Perricone [redacted] denied under oath that anyone in the USAO, or even their own families, knew contemporaneously that they were commenting on nola.com.[350]

1. James Letten

As previously discussed, Letten denied having any contemporaneous knowledge that Mann was posting comments online:

> I will tell you unequivocally . . . there is nothing, nothing that Jan [Mann] said to me ever that clearly – that signaled to me, that conveyed to me, there was nothing I heard from her or saw from her, that told me that she had been engaging in fundamentally the same sort of anonymous online commenting about matters in which this office were involved as Sal [Perricone] was. Absolutely nothing.[351]

Letten also emphatically denied authorizing or having any knowledge of Perricone's postings prior to March 13, 2012. He described Perricone's actions as "a complete betrayal and was the stupidest thing I've ever seen in my life."[352] Letten said that he reads the newspaper in paper form and does not look at online postings following articles on nola.com unless someone specifically draws his attention to them. Letten told OPR that he thinks people who post comments anonymously online are "cowards," and so Letten does not care to read their comments.[353] Letten said he does not follow the comments on nola.com and has no familiarity with the names that commenters use.

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347 Letten Tr. at 18-19, 32 (Nov. 14, 2012); Letten Tr. at 5-6 (Aug. 8, 2012); (b)(6) (b)(7)(C) [redacted]

348 Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

349 (b)(6) (b)(7)(C) [redacted] Danziger Bridge Status Conference Tr. at 19 (Oct. 10, 2012) (Perricone testified that he did not know identity of eweman).

350 Sealed. See 11/1/13 order of Judge Engelhardt; Danziger Bridge Status Conference Tr. at 19 (Oct. 10, 2012).

351 Letten Tr. at 38 (Nov. 14, 2012).

352 Letten Tr. at 29 (Aug. 8, 2012).

353 *Id.* at 29.

Letten said that, even looking back on events, he did not believe there was any "clue" that should have alerted him to Perricone's posting activities. Letten said, "I don't believe anybody – I certainly never did and I don't believe any of us ever even thought it possible that someone from this office would be doing that, much less Sal Perricone."[354] Letten added, "The idea that Sal Perricone was posting . . . was non-existent and was still hard for me to get my arms around when this thing came to light."[355] Letten said that he had chosen Perricone to give lectures to agents, attorneys, and police officers about the pitfalls in the new electronic discovery age and the dangers of creating electronic communications that could affect a case. Letten said that Perricone was the "last guy" he thought would be posting comments online about these topics, stating, "Were there any indicators that Sal was doing this? Absolutely not."[356] Letten said that his dim view of people who posted comments anonymously online was no secret, and that Perricone was aware of Letten's views on the subject.

Letten said that on March 13, 2012, after Perricone acknowledged his online activities, Letten called various individuals at the Department, including the Deputy Attorney General, to alert them to Perricone's admission, and referred the matter to OPR because he recognized that Perricone's online posting activity was "misconduct on its face." Letten told OPR that while he was making these calls, Perricone mainly sat on Letten's couch with his head in his hands. According to Letten, Perricone stated (b) (6), (b) (7)(C) and Perricone made it clear that no one else knew either, (b)(6), (b)(7)(C) Letten recalled that Perricone stated, "I really valued that anonymity."[357]

2. (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) told OPR that he learned about Perricone's online posting activity on March 13, 2012. According (b)(6) (b)(7)(C) he was preparing witnesses for a hearing when he (b)(6), (b)(7)(C) (b)(6) (b)(7)(C) went to Letten's office, where he was told about the allegations regarding the Mencken postings. (b)(6), (b)(7)(C) (b)(6), (b) said that Perricone was distraught, which, at the time, (b)(6) (b)(7)(C) believed was because Perricone's picture was on nola.com in connection with an article about Heebe's lawsuit (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) said he left Letten's office after 10 to 15 minutes to finish preparing his witnesses.

(b) (5), (b) (6), (b) (7)(C)

354 *Id.* at 8, 30.

355 *Id.* at 30.

356 *Id.* at 31.

357 *Id.* at 9.

358 (b)(6) (b)(7)(C)

(b) (5), (b) (6), (b) (7)(C) (b)(6) (b)(7)(C) said that Perricone did not respond, (b)(6) (b)(7)(C) and Perricone returned to Letten's office. Letten asked Perricone about Heebe's allegations and told Perricone that while Perricone did not have to answer, if he did, Perricone should tell the truth. Letten asked Perricone if "he did this," and Perricone said, "I'm the blogger." (b)(6) (b)(7)(C) said that he could not believe it, and everyone in the room was stunned. According to (b)(6), (b)(7)(C), Perricone said:

> I got to tell you that it was me because (b)(6), (b)(7)(C)
> (b)(6), (b)(7)(C)
> . . . I'm the only one that did this. . . . [N]obody else knew. . . . [I]t was all me. . . . (b)(6) (b)(7)(C) doesn't even know.[359]

(b)(6) (b)(7)(C) said Perricone apologized for putting Letten in a bad position and for embarrassing the office. (b)(6) (b)(7)(C) said he spoke to Perricone later after the meeting. Perricone told (b)(6) (b)(7)(C) that he did not have a hobby and that he "just had fun doing it."

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

359 (b)(6) (b)(7)(C)

360 (b)(5) (b)(6) (b)(7)(C)

361 (b)(5) (b)(6) (b)(7)(C) g.

362 (b)(5) (b)(6) (b)(7)(C)

(b)(5) (b)(6) (b)(7)(C)

3. Jan Mann

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

In her January 2, 2013 letter to Louisiana Chief Disciplinary Counsel Plattsmier, Mann "unequivocally affirm[ed]" that she did not know Perricone was posting comments online.[367] Mann also stated that she believed Perricone was unaware of her postings because Mann did not tell Perricone about her online activities. Mann said that it was a "mere coincidence based on

363 (b)(5) (b)(6) (b)(7)(C)

364 (b)(5) (b)(6) (b)(7)(C)

365 Sealed. See 11/1/13 order of Judge Engelhardt

366 Sealed. See 11/1/13 order of Judge Engelhardt

367 Letter from Mann to Louisiana Chief Disciplinary Counsel Plattsmier at 10.

mutual interest in certain subject matters" that resulted in Mann commenting on some of the same articles as Perricone.[368]

4. Salvador Perricone

Perricone has repeatedly denied telling anyone in the USAO that he was posting comments online. Although Perricone has never been asked under oath or in an interview whether he was aware of Mann's postings, Perricone testified during proceedings in the Danziger Bridge case that he did not know the identity of eweman.[369]

5. OPR's Assessment of the USAO Senior Managers' Denials

Each of the USAO senior managers vehemently denied that they were contemporaneously aware that Perricone or Mann had been posting comments online. OPR recognizes that such denials are often self-serving, as each manager has a strong motive to prevaricate or at least to minimize his or her responsibility for the misconduct of other managers.

In its investigation, OPR carefully scrutinized other evidence that might support or contradict the USAO senior managers' claims, including e-mails, witness interviews, and other circumstantial evidence. As the following discussion demonstrates, OPR found little evidence inconsistent with the managers' collective denials, and found insufficient credible evidence to establish by a preponderance of the evidence that, other than Perricone's and Mann's knowledge of their own posting activities, any of the managers knew that either Perricone or Mann was posting comments online.

Although OPR could not accord Perricone's and Mann's statements substantial weight because of the misconduct detailed in this report, OPR did not discount entirely their sworn denials. Perricone had some motivation to reveal Mann's postings if he knew of them, as Mann's similar conduct would have supported his claim that he did not believe his conduct violated any rules, regulations, or policies. While, as previously discussed, OPR does not credit some of Mann's claims with respect to her conduct, OPR's analysis of the circumstantial evidence supports Mann's contention that she was unaware of Perricone's online postings until March 13, 2012.

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[368] *Id.*

[369] Danziger Bridge Status Conference Tr. at 19 (Oct. 10, 2012). All of Perricone's public statements were made prior to the public revelation regarding Mann's postings. (b)(6) (b)(7)(C) [redacted] In Perricone's response to OPR's draft report, Perricone reiterated that he was unaware of Mann's online comments. Furthermore, Perricone asserted that had he known of Mann's online activity, he would not have resigned in March 2012 unless Mann did so as well. Perricone Resp. at 7.

D. Absence of Documentary Evidence

OPR searched thousands of e-mails to and from Letten, (b) (6), (b) (7)(C) Mann, and Perricone from 2007 to 2012. OPR also conducted key word searches on the e-mails of all USAO employees for certain time periods, such as those following the legacyusa and Mencken comments criticizing (b)(6) (b)(7)(C) on nola.com. OPR also searched USAO e-mails during the period between March 13, 2012 (the date of Perricone's admission) and March 19, 2012 (the date of Perricone's resignation), the period during which one of the USAO senior managers or Perricone would have been more likely to allude to prior conversations about the postings, if such conversations occurred. With the one exception discussed below, the results of these searches revealed no evidence to contradict the managers' claims that they were unaware of Perricone's or Mann's online activities.

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

Heebe's attorneys informed OPR that they had heard a "rumor" that the USAO had distributed an office-wide e-mail reminding employees not to comment about cases online. Heebe's attorneys indicated that the e-mail allegedly was distributed in the fall or winter of 2011 as a response to (b)(6) (b)(7)(C) alleged complaint to Letten about Perricone's online posting activity. As detailed below in this chapter of the report, (b)(6) (b)(7)(C) told OPR that he did not inform Letten about his suspicions regarding Perricone. Nevertheless, OPR carefully reviewed USAO e-mails

370 (b)(5) (b)(6) (b)(7)(C)

371 (b)(5) (b)(6) (b)(7)(C)

in an attempt to find an office-wide e-mail similar to what Heebe's attorneys described. OPR found no e-mail instructing employees not to comment about cases online.[372]

E. Whether Perricone's and Mann's Identities Were Obvious

Judge Engelhardt concluded that Perricone and Mann must have been contemporaneously aware of each other's postings in part because Perricone and Mann were "highly intelligent, experienced investigators" and "keenly insightful individuals" who would not "overlook such an obvious thing," and because Perricone's and Mann's postings "stood out quite dramatically amongst the quotidian postings of many others."[373]

OPR does not find by a preponderance of the evidence that Perricone's and Mann's postings stood out in any substantive way from the hundreds of surrounding comments online.[374] Although, as OPR discusses subsequently, several USAO employees speculated that Perricone might have authored the campstblue, legacyusa, or Mencken comments, OPR did not learn of a single USAO employee who speculated that Mann authored the eweman comments. The identity of eweman was not obvious, even to trained investigators, and the tone and substance in Mann's comments as eweman was similar to that of other posters. Moreover, until the issue surfaced, there was little reason for anyone in the USAO to wonder whether Mann was posting comments anonymously online. OPR therefore concludes that the evidence is insufficient to support a finding that Letten, (b)(6) (b)(7)(C) or Perricone must have contemporaneously known that Mann was posting comments on nola.com based on the substance of Mann's comments.

In contrast to Mann's postings, several USAO employees harbored contemporaneous suspicions that Perricone might be posting comments on nola.com. As discussed in Chapter 8, these employees' suspicions were based on the language Perricone used (unusual vocabulary words), Perricone's criticisms of (b)(6), (b)(7)(C) [redacted] or other indications. Perricone's postings, therefore, contained information that led

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372 Sealed. See 11/1/13 order of Judge Engelhardt [redacted]

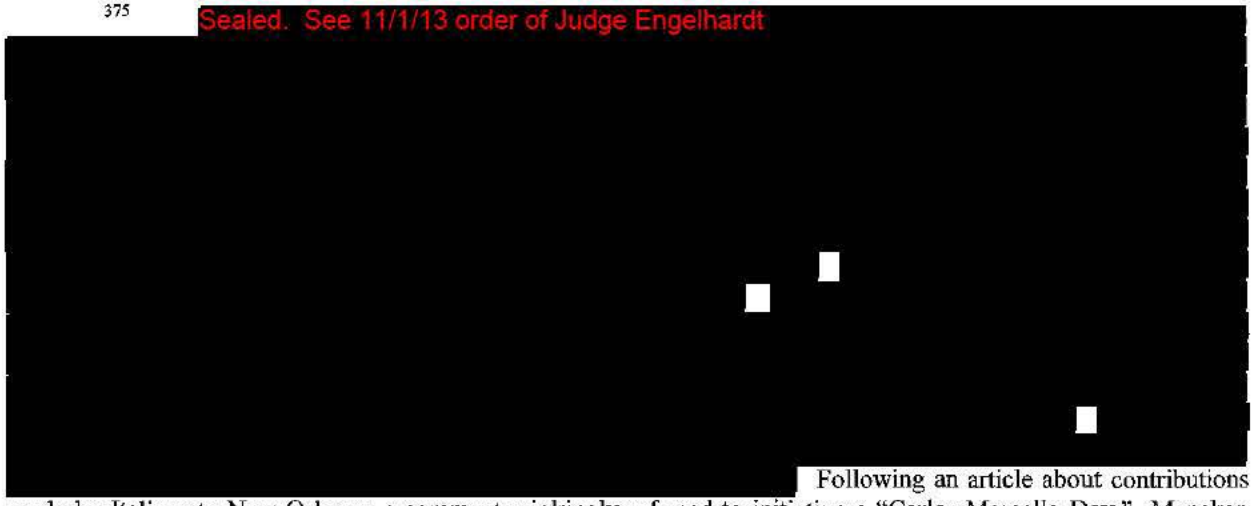
373 Judge Engelhardt's November 26, 2012 Order at 27.

374 As it turned out, Mann's 40 postings were different from other commenters' postings because of obscure typographical errors. As Mann typed, she had a habit of leaving a space between the last character of a sentence and the final punctuation mark. OPR believes that only a trained specialist, who was intentionally trying to discover the identity of eweman, would have noticed this typographical tic. The only substantive oddity OPR found in Mann's postings was Mann's one-time use of the unusual phrase "fender lizard." OPR concludes that Mann's one-time use of a two-word phrase is insufficient evidence upon which to base a finding that Perricone or other USAO managers knew that Mann was posting anonymous comments online.

these employees to speculate, correctly, that Perricone wrote them. Judge Engelhardt was correct that *if someone were looking*, was very familiar with Perricone, and possessed the necessary investigative skills and time to examine hundreds of postings, Perricone's postings contained clues to his identity.[375] Nonetheless, the evidence does not establish that because some of Perricone's myriad anonymous postings contained some identifiable information, it necessarily follows that Letten, (b)(6) (b)(7)(C), or Mann must have known that Perricone was the author. The fact that Mann posted a total of 40 comments over 4 months (an average of 2.5 comments a week) does not support a finding by a preponderance of the evidence that Mann must have been a close observer of *all* nola.com comments authored by Perricone, either during that time, or during the time Perricone was posting comments online.[376]

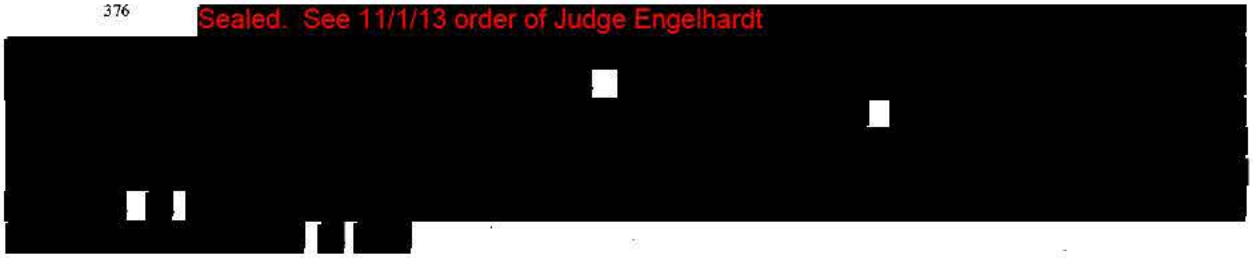
Second, even if Mann did read Perricone's nola.com comments, the evidence does not establish that she did so *for the purpose of* divining the identity of hundreds of authors of the voluminous comments, which would have made it much more likely that Mann would recognize the clues to Perricone's identity. OPR also notes that Perricone's postings were among dozens, sometimes hundreds, of comments following an article.[377] Without more direct evidence

375 Sealed. See 11/1/13 order of Judge Engelhardt



Following an article about contributions made by Italians to New Orleans, a commenter jokingly referred to initiating a "Carlos Marcello Day." Mencken responded, "He was born in Tunis, Tunesia." Oct. 12, 2011, 10:26 a.m. OPR concludes that the one posting concerning Marcello's birthplace does not constitute such an obvious clue that Mann should have recognized that the posting was written by Perricone.

376 Sealed. See 11/1/13 order of Judge Engelhardt



377 As examples of postings that typically followed a nola.com article, OPR attaches at Exhibit G the postings relating to two articles on which Perricone and Mann both posted comments online: one including 12 total postings, and one including 81 total postings.

indicating that she did so, OPR cannot reasonably assume that Mann read or focused on Perricone's comments to the extent required to ascertain his identity. Even were OPR to assume that Mann read the Mencken comments that followed the articles on which Mann also posted comments, those Mencken postings did not contain the significant clues that raised the suspicions of other USAO employees regarding Perricone's posting activities.

OPR also notes that even (b)(6) (b)(7)(C) whom Perricone criticized by name while commenting as legacyusa and Mencken, and who therefore had the most reason to attempt to determine the identity of the author of those postings, did not immediately suspect Perricone simply from reading the comments. Rather, (b)(6) (b)(7)(C) was alerted to the possibility that legacyusa was Perricone by a colleague ((b)(6) (b)(7)(C) suspicions are discussed in Chapter 8). In addition, several USAO employees who had not otherwise heard the rumors about Perricone told OPR that, for various reasons, they focused on some of the legacyusa postings, but did not suspect that the author was Perricone. Therefore, although many employees engaged in speculation about Perricone, that fact does not establish that it was easy to divine Perricone's identity merely from occasionally reading the anonymous online comments following some nola.com articles.

Like Mann, Letten and (b)(6) (b)(7)(C) also denied reading the comments that followed articles on nola.com. OPR found little reason to expect that busy managers would necessarily read the postings, even those that followed articles relating to USAO matters. Having reviewed hundreds of postings by numerous authors attached to nola.com articles, OPR notes that the comments for the most part appear to be without factual basis and of no relevance to the business of the USAO.

OPR concludes that while some of Perricone's comments contained clues to his identity, the preponderance of the evidence does not establish that Letten, (b)(6) (b)(7)(C), or Mann reviewed Perricone's postings and either knew or must have known that Perricone was posting comments online about Department matters.

F. Allegation That Former (b)(6) (b)(7)(C) [redacted] Informed Letten about Perricone's Postings

Heebe's attorneys informed OPR that they had received information indicating that (b)(6) (b)(7)(C) had informed Letten that Perricone was posting anonymous comments on nola.com. Heebe's attorneys acknowledged that they had not spoken to (b)(6) (b)(7)(C) personally about the matter, however.

1. Perricone's Anonymous Online Criticisms of (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C) had the most incentive of any USAO employee to raise his suspicions of Perricone's postings with senior managers, as (b)(6) (b)(7)(C) was the only line AUSA whom Perricone criticized by name in his online comments. Posting as Mencken and legacyusa, Perricone harshly criticized (b)(6) (b)(7)(C) prosecutorial skills. The first comment OPR found that was specifically directed at (b)(6) (b)(7)(C) appeared in 2009, approximately one a week after the *Times-Picayune* published a favorable article about (b)(6) (b)(7)(C) In a December 8, 2009 legacyusa posting directed at the article's author, Drew Broach, Perricone commented:

I can only assert my complete and utter disgust in the shameless self-serving pablum you and (b)(6) (b)(7)(C) *thrusted upon the readers of this august newspaper. It was total effluvia. . . . Thank God there are other prosecutors in that office who, in the past, have bailed his chestnuts out the fire.*

A year later, Perricone again criticized (b)(6) (b)(7)(C) in an anonymous online comment. During the trial of (b)(6) (b)(7)(C) [redacted],[378] Perricone discussed in two postings (b)(6) (b)(7)(C) cross-examination of (b)(6) (b)(7)(C)

Three hours of Cross Examination???? Too long. Sounds like the prosecutor was wandering through a forest looking for an acorn. Perhaps it was standing behind the podium. Mr. Prosecutor, you just let (b)(6) (b)(7)(C) *sell himself at your expense – idiot!!!*[379]

This prosecutor apparently doesn't understand Euclidian geometry. . . . Juros don't need a FBI agent parading through a courtroom with a tape meassure at the behast of a headline-grabbing prosecutor, to demonstrate a metaphiscal and obvious point. My point is simple: the ego of the prosecutor over rode his judgment . . . .[380]

In September 2011, Perricone, posting as Mencken, continued the criticism, calling (b)(6) (b)(7)(C) a "*flop*" who had to "*have his hand held.*"[381] Following a *Times-Picayune* article that stated, "Indeed, (b)(6) (b)(7)(C) would go on to prosecute and win convictions of the 14 defendants in the case . . . .," Perricone wrote, "*Oh Really??? All by himself???? Damn!!! I thought John Wayne was dead!!!!*"[382]

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378 (b)(6), (b)(7)(C) [redacted]

379 legacyusa, Nov. 24, 2010, 7:29 a.m.

380 legacyusa, Nov. 24, 2010, 10:16 a.m. (b)(6), (b)(7)(C) [redacted]

381 Mencken, Sept. 4, 2011, 10:45 a.m.

382 Mencken, Dec. 11, 2011, 10:52 a.m.

2. (b)(6), (b)(7)(C) Never Informed Letten about Perricone's Postings

OPR interviewed (b)(6) (b)(7)(C),[383] who also testified at a status conference in the Danziger Bridge case. Both OPR and defense attorneys questioned (b)(6) (b)(7)(C) about whether (b)(6) (b)(7)(C) informed Letten about his suspicions that Perricone might be posting comments online.

(b)(6), (b)(7)(C)

.[384] Regarding the claim that USAO senior managers knew about but did not stop Perricone's online postings, (b)(6) (b)(7)(C) told OPR that he did not tell Letten, Mann, (b)(6) (b)(7)(C) that Perricone was posting comments on nola.com. Similarly, when (b)(6) (b)(7)(C) was asked during the November 7, 2012 status conference in the Danziger Bridge case whether (b)(6) (b)(7)(C) ever informed Letten about Perricone's online comments, (b)(6) (b)(7)(C) testified that he never told Letten "Sealed. See 11/1/13 order of Judge Engelhardt"[385]

(b)(6) (b)(7)(C) told OPR about a time when he informed Letten about one of the anonymous comments criticizing (b)(6) (b)(7)(C) performance, but without mentioning Perricone. (b)(6) (b)(7)(C) recalled that on the Friday after Thanksgiving in 2010, Letten walked down the hallway past (b)(6) (b)(7)(C) office just as (b)(6) (b)(7)(C) was reading the legacyusa comment of November 24, 2010, which referred to (b)(6) (b)(7)(C) deficient grasp of Euclidian geometry. (b)(6) (b)(7)(C) said that he was not sure, but he may have shown Letten the comment. (b)(6) (b)(7)(C) recalled saying to Letten, "Who is legacyusa; what is this all about? Why is he saying all these things about me?" (b)(6) (b)(7)(C) recalled Letten responding, "It's just a very bitter person." (b)(6) (b)(7)(C) told OPR that although he suspected Letten knew who legacyusa was, (b)(6) (b)(7)(C) had no evidence that Letten actually did. Sealed. See 11/26/12 order of Judge Engelhardt

[387]

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383 (b) (5), (b) (6), (b) (7)(C)

384 (b)(6), (b)(7)(C)

385 Sealed. See 11/26/12 order of Judge Engelhardt

386 Sealed. See 11/26/12 order

387 Sealed. See 11/26/12

OPR questioned Letten about [redacted] recollection that in November 2010, [redacted] spoke to Letten about legacyusa's comments critical of [redacted] Letten said that he had no memory of the incident.[388]

[redacted] also described an unrelated incident in which, in [redacted] view, Letten had not pursued [redacted] complaint about Perricone's conduct. [redacted] told OPR that based on these two incidents, he did not think his suspicions about Perricone's online posting activity would be well received, and he believed that USAO management would not take any action against Perricone.

AUSA #6 also refuted the allegation that [redacted] told Letten about Perricone's online activities. AUSA #6 told OPR that on [redacted], or shortly before, [redacted] stopped in AUSA #6's office [redacted] According to AUSA #6, [redacted] told him that he had decided not to tell anyone in USAO management about his suspicions concerning Perricone's online activities, a topic that [redacted] and AUSA #6 had previously discussed. According to AUSA #6, [redacted] said that he did not want to leave the office on bad terms. OPR asked [redacted] about his recollection of this conversation. [redacted] said he did not tell AUSA #6 that he had chosen not to tell management that he strongly suspected that Perricone was posting comments online. [redacted] thought AUSA #6 may have misunderstood what [redacted] had said to him in that conversation.[389]

Based on [redacted] statements to OPR [redacted] OPR concludes that the allegation that [redacted] told Letten that Perricone was posting comments online is not supported by the evidence.

G. Allegation That Mann Said Perricone's Postings Were Just "Sal Being Sal"

[redacted]:

[redacted].[390]

OPR interviewed AUSA #7 [redacted]. AUSA #7 said that the following occurred immediately before a supervisors meeting:

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388 Letten Tr. at 38-39, 41 (Aug. 8, 2012).

389 [redacted]

390 [redacted]

[T]hey were talking about -- it was some -- some story in the Picayune or something. And in the end, I think Jan said something like, sounds like Sal or something like that . . . I didn't remember how it came up. But it sounds like Sal. And at that point . . . I didn't know what they were talking about. It was like an inside joke or whatever. And it was like sounds like Sal, whatever. And that's really the only statement that I ever heard them ever make about Sal that had anything to do with him doing anything . . . And I don't remember what the event was that they were talking about. But it was something funny, silly. And they said, it sounds like Sal or something like that. And I don't -- I can't tell you for the life of me that they were talking about blogging.[391]

AUSA Horn and another AUSA from his office, along with an OIG investigator, also Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt [392]

Sealed. See 11/1/13 order of Judge Engelhardt [393]

OPR concludes that evidence that AUSA #7 possibly heard Mann say words to the effect of "that's just Sal being Sal," is insufficient to support a finding that Mann was contemporaneously aware of Perricone's online postings.

H. Allegation That (b)(6) (b)(7)(C) Knew about Perricone's Postings

AUSA #8 told OPR that, in a supervisors meeting, (b)(6) (b)(7)(C) indicated that he had been informed of Perricone's online postings prior to the public revelation of them. AUSA #8 told OPR that he attended Letten's supervisors meeting on March 15, 2012, during which Letten informed the supervisors about Perricone's admission that he was Mencken. AUSA #8 said that during the meeting, (b)(6), (b)(7)(C) AUSA #8 told OPR that (b)(6) (b)(7)(C) then said words to the effect that someone had previously brought up to him the possibility

391 AUSA #7 OPR Interview Transcript at 18-19 (Aug. 7, 2012).

392 Sealed. See 11/1/13 order of Judge

393 Seal

that Perricone was posting comments online, but (b)(6) (b)(7)(C) had dismissed it or did not want to pursue it. AUSA #8 said that supervisors were coming in and out of the meeting and that various people were talking at the same time. AUSA #8 told OPR that the comments by (b)(6) (b)(7)(C) were made to the supervisors as a group, not just to AUSA #8.

(b)(6) (b)(7)(C) told OPR that he had no prior knowledge of Perricone's online activities and denied making any comment indicating that he had.[394] (b)(6) (b)(7)(C) said he probably did tell the assembled supervisors at the March 15, 2012 meeting (b)(6), (b)(7)(C) [redacted].[395] (b)(6) (b)(7)(C) denied saying that he had received information prior to March 13, 2012, that Perricone was posting anonymous comments on nola.com. (b)(6) (b)(7)(C) told OPR that what he likely said at the supervisors meeting was that he did not follow the postings on nola.com because other AUSAs would point out certain postings to him. (b)(6) (b)(7)(C) said he did not recall ever receiving any information that anyone suspected Perricone of posting comments on nola.com.[396]

(b)(6) (b)(7)(C) recalled an exchange he had with AUSA #4 at the supervisors meeting. [redacted] said that Letten told the supervisors what Letten intended to say to the press and asked for input from the supervisors. AUSA #4 responded by telling Letten that there were "other blogs by other people," and AUSA #4 referred to other user names like legacyusa. (b)(6) (b)(7)(C) told OPR that AUSA #4 said the commenters had "insulted all kind[s] of other people," including AUSA #4's family.[397] (b)(6) (b)(7)(C) said that AUSA #4 did not connect these other postings with Perricone, but rather implied that other people in the USAO were participating in posting comments online. (b)(6) (b)(7)(C) said he inferred that AUSA #4 meant that he, (b)(6) (b)(7)(C), was involved in the postings, and (b)(6) (b)(7)(C) therefore got upset. (b)(6) (b)(7)(C) explained that he told AUSA #4 that he had no knowledge about Perricone posting comments online and that Perricone had told the senior managers that even (b)(6) (b)(7)(C) [redacted]. (b)(6) (b)(7)(C) said that Letten and Mann asked AUSA #4 how he knew about the other user names. (b)(6) (b)(7)(C) said that AUSA #4 was vague and would not say where he got the information.[398] [redacted] told OPR that he apologized to AUSA #4 the next day for taking AUSA #4's comments at the supervisors meeting personally.

OPR questioned numerous USAO supervisors who attended the March 15, 2012 meeting during which AUSA #8 alleged that (b)(6) (b)(7)(C) said that he, (b)(6) (b)(7)(C), was aware of Perricone's online postings, including the Chief of Criminal Appeals, the then-Criminal Division Deputy Chief, the then-Civil Division Chief, the then-Civil Division Deputy Chief, and other

394 (b)(5) (b)(6) (b)(7)(C) [redacted]

395 [redacted]

396 [redacted]

397 [redacted]

398 [redacted]

supervisors. None of the supervisors interviewed recalled any statement by (b)(6) (b)(7)(C) indicating that he had any type of prior knowledge, even through rumor, that Perricone had been posting comments online about Department matters. Numerous supervisors recalled (b)(6) (b)(7)(C) specifically denying having any such knowledge.

Letten told OPR that at the March 15, 2012 supervisors meeting, Letten informed the assembled supervisors that he intended to tell the press that no one knew about Perricone's online posting activity, and that if anyone knew differently to speak up. Letten recalled that AUSA #4 said he suspected that Perricone might have been posting comments online. Letten said that Mann asked AUSA #4 if he knew it was Perricone, and AUSA #4 responded, "[N]o," but there was some "chatter."[399]

Sealed. See 11/1/13 order of Judge Engelhardt

[400] Sealed. See 11/1/13 order of Judge Engelhardt

[401] Sealed. See 11/1/13 order of Judge Engelhardt

[402]

OPR questioned AUSA #4 about his comments at the March 15, 2012 supervisors meeting. According to AUSA #4, at the meeting, Letten told the supervisors that he was going to issue a press release acknowledging that Perricone was Mencken. AUSA #4 said that if Letten went in front of the cameras, AUSA #4 thought Letten should know about a rumor that Perricone was using other names in addition to Mencken to post comments online. AUSA #4 said he therefore told Letten that AUSA #4 had a memory of someone telling him about Perricone using the name legacyusa, and AUSA #4 said that Letten might want to investigate the rumor.[403] AUSA #4 said he did not mention the name campstblue because AUSA #4 did not learn about that name until later. AUSA #4 recalled being asked how he knew about legacyusa, and AUSA #4 responded that someone had mentioned it to him. AUSA #4 said he recalled that other supervisors may have said they heard the rumor regarding Perricone as well, but AUSA #4

399 Letten Tr. at 18-19 (Aug. 8, 2012).

400 Sealed. See 11/1/13 order of Judge Engelhardt

401 Sealed. See 11/1/13 order of Judge Engelhardt

402 Sealed. See 11/1/13 order of Judge Engelhardt

403 AUSA #4 OPR Interview Transcript at 5, 11-12 (Aug. 16, 2012) (AUSA #4 Tr. (Aug. 16, 2012)).

could not recall any supervisors in particular. AUSA #4 told OPR that various people were making comments and talking during the meeting. AUSA #4 also told OPR that [redacted] told the supervisors as a group that he did not know about Perricone's posting activities. AUSA #4 said that after he made his comment about legacyusa, [redacted] became angry because [redacted] thought AUSA #4 was accusing him of lying.[404]

AUSA #4 told OPR that his comment to Letten at the supervisors meeting was based on an incident when someone mentioned to AUSA #4 in passing that Perricone had posted a comment online about a member of AUSA #4's family under the name legacyusa. AUSA #4 said that he was not sure, but he thought that [redacted] may have been the individual who mentioned the posting. AUSA #4 did not recall any details of the conversation, but he remembered that the person, perhaps [redacted] made some association that "Sal might be the person who is legacyusa."[405] AUSA #4 did not ask any questions of the person who gave him the information because the fact that someone in the office might be critical of AUSA #4's family member was not important to AUSA #4. AUSA #4 did not pay any attention to the posting because, as AUSA #4 explained, "[I]f it is Sal, so what." AUSA #4 said that the person who told him about the posting did not seem certain that the poster was Perricone, nor did the person give AUSA #4 any information about why he thought legacyusa might be Perricone.[406]

Although AUSA #8 told OPR that, at a supervisors meeting, [redacted] indicated he had prior knowledge of Perricone's online postings, others who attended the meeting did not hear this statement. Notably, at the March 15, 2012 supervisors meeting where this statement by [redacted] was allegedly made, AUSA #4 made statements highly similar to the comments AUSA #8 attributed to [redacted] Furthermore, others at the meeting heard [redacted] deny having any prior knowledge of Perricone's posting activities. AUSA #8 could have misheard or misunderstood [redacted] statement or, most likely, mistakenly recalled [redacted] as the speaker when the statement was actually made by AUSA #4. OPR concludes that AUSA #8's uncorroborated recollection of [redacted] statement does not support a conclusion that [redacted] was aware of Perricone's online postings.

In addition to AUSA #8's recollection of [redacted] statement, others, such as [redacted] (b) (6), (b) (7)(C) [redacted][407] While it might reasonably be expected that Perricone would tell his close friend [redacted] about his online activities, OPR found no evidence that Perricone did so. Indeed, Perricone asserted that he had not even told [redacted] about his online posting activity. That Perricone kept his friends in the dark about his online activities is

404 *Id.* at 17.

405 *Id.* at 7.

406 *Id.* at 6-10.

407 Judge Engelhardt's November 26, 2012 Order at 23-24.

supported by AUSA #9, who told OPR that he, too, was unaware of Perricone's online activities even though AUSA #9 and Perricone had been close friends for many years.[408] OPR also notes that if Perricone suspected that the USAO would not approve of his posting activities, Perricone would have reason not to tell anyone in the USAO, particularly Perricone's close friends who were senior managers, what he was doing. As Perricone himself said, he enjoyed his anonymity.

While the fact that Perricone, Mann, and (b)(6) (b)(7)(C) were friends, or that Perricone and (b) (6), (b) (7)(C) led to speculation, it is insufficient evidence upon which to base a finding that (b)(6) (b)(7)(C) was aware of Perricone's online postings.

I. Other Evidence

As OPR discusses later in this report, although several AUSAs suspected that Perricone might be commenting online, none reported their suspicions to Letten, Mann, (b)(6) (b)(7)(C). OPR also questioned witnesses about whether they had any information, either through personal knowledge or hearsay, indicating that any of the USAO senior managers (Letten, Mann, (b)(6) (b)(7)(C) (b)(6) (b)(7)(C) knew prior to March 13, 2012, that Perricone was posting comments online, or that prior to November 2, 2012, Letten, (b)(6) (b)(7)(C), or Perricone knew that Mann was posting comments online. None of the AUSAs reported knowing or hearing of any such information, other than the previously discussed comments allegedly made by (b)(6) (b)(7)(C) at the March 15, 2012 supervisors meeting.

The results of OPR's office-wide surveys did not reveal any information indicating that Letten, Mann, (b)(6) (b)(7)(C) was contemporaneously aware of Perricone's online activities, or that Letten, (b)(6) (b)(7)(C) or Perricone was contemporaneously aware of Mann's online activities.

Heebe's attorneys alleged that Letten and the other USAO senior managers must have known that Perricone was posting comments online because: (1) other individuals, such as defense attorneys and reporters, suspected Perricone; (2) Perricone was a senior manager; and (3) Perricone, Letten, Mann, and (b)(6) (b)(7)(C) were close friends. However, OPR is aware of no evidence that, prior to Heebe's lawsuit against Perricone and (b)(6) (b)(7)(C), any defense attorney or reporter had raised any suspicion directly with Perricone or with USAO senior managers.

Viewing all of the evidence as a whole, OPR is unable to conclude by a preponderance of the evidence that USAO senior managers were aware of Perricone's and Mann's postings, or that Perricone and Mann were aware of each other's postings. The limited circumstantial evidence that Perricone and Mann might have been aware of each other's postings does not survive closer scrutiny and cannot overcome the credible direct and circumstantial evidence that strongly suggests that Perricone and Mann were unaware of each other's online posting activity.

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408 AUSA #9 OPR Interview (Aug. 7, 2012).

CHAPTER 8

SUSPICIONS OF OTHERS IN THE USAO ABOUT PERRICONE'S ONLINE ACTIVITIES

As a result of searching USAO e-mails, reviewing responses to OPR surveys, and conducting numerous witness interviews, OPR learned that some USAO employees contemporaneously suspected, to varying degrees, that Perricone might be posting comments anonymously on nola.com, or had heard about such suspicions from those who held them. OPR conducted interviews of all of these USAO employees. In addition, (b)(6) (b)(7)(C) told OPR, (b)(6) (b)(7)(C) that he had suspected Perricone was posting comments online about (b)(6) (b)(7)(C) conduct in USAO cases. As previously discussed, OPR received no information from any source that any USAO employee contemporaneously suspected that Mann had been posting comments anonymously online.

The defendants in the Danziger Bridge case alleged that the government had engaged in a "government sponsored media campaign intended to pressure targets into pleading guilty and testifying falsely."[409] The Danziger Bridge defendants alleged that Perricone's postings were a part of the "media campaign," and they sought an evidentiary hearing to discover the "extent of the government's misconduct and the identities of the individuals who have engaged in it."[410] Similarly, defendant Broussard alleged that Perricone's and Mann's postings, and "possibly other [sic] in the U.S. Attorney's Office who have yet to be unmasked, . . . illustrates an obvious, deliberate, and years long conspiracy to scheme and employ by all means possible to destroy the public image of defendant as both a man and an elected official."[411] Although OPR found evidence establishing that a few AUSAs suspected to varying degrees that Perricone might be posting comments on nola.com, and that others had heard about those suspicions, OPR found no evidence that those AUSAs were involved in any "campaign" to disparage defendants, destroy defendants' public images, pressure targets into pleading guilty, or undermine defendants' rights to fair trials.

As a result of OPR's surveys and interviews, OPR learned that several mid-level supervisors, line AUSAs, and two support staff members suspected or were aware of others' suspicions that Perricone might be posting comments online using the pseudonyms Mencken, legacyusa, or campstblue.[412] A small number of AUSAs began to suspect that Perricone was

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409 Kaufman's Reply Memorandum in Support of Motion for New Trial Based on Prosecutorial Misconduct at 5 (filed June 12, 2012).

410 *Id.*

411 Broussard's Memorandum in Support of His Motion for an Evidentiary Hearing to Determine the Extent of the Government's Prosecutorial Misconduct at 11 (filed Dec. 17, 2012).

412 One AUSA indicated in his survey response that he had heard that Perricone was posting comments online as "dramatis." This AUSA was the only witness who told OPR in survey responses or interviews that he or she suspected Perricone was posting comments online as dramatis [personae].

posting comments online because of legacyusa's criticisms of (b)(6) (b)(7)(C) or the unusual words used in the postings. These AUSAs' suspicions were communicated over time to a somewhat larger group within the USAO, usually during lunchtime or other casual conversations.

All USAO employees who suspected, or heard suspicions, that Perricone might be posting comments online denied "knowing" or being certain that Perricone was posting comments. All of these USAO employees stated that they never saw any postings that they suspected might be Perricone's that revealed Rule 6(e) protected material or any other information that they believed was privileged or confidential. All of these employees stated that they never saw any postings that they suspected might be Perricone's that they believed violated any ethics rule or Department policies. None of these employees said that they informed the USAO senior managers (Letten, Mann, (b)(6) (b)(7)(C) about their suspicions or the suspicions of others.

In this chapter, OPR discusses (b)(6) (b)(7)(C) contention that he reported his suspicions to USAO supervisors and whether those supervisors had an obligation to take further action. It certainly would have been preferable had (b)(6) (b)(7)(C) or anyone else, reported suspicions about Perricone to senior management. However, OPR uncovered no evidence to establish that anyone in the USAO was aware of the full nature or extent of Perricone's online posting activity, or even believed that the postings they suspected were Perricone's had violated ethics rules or Department policies. The factual record OPR developed in this investigation did not establish by a preponderance of the evidence that any USAO employee was sufficiently aware of Perricone's online posting activity to trigger a clear and unambiguous duty to report their suspicions to supervisors, OPR, or the OIG.

I. (b)(6) (b)(7)(C)

According to (b)(6) (b)(7)(C) he first learned about anonymous online comments criticizing his prosecutorial performance during his prosecution of (b) (6), (b) (7)(C).[413] (b)(6) (b)(7)(C) told OPR that he initially did not connect the comments to Perricone, "maybe because I didn't want to believe it." Indeed, (b)(6) (b)(7)(C) told OPR that he was never certain that the anonymous poster who criticized (b)(6) (b)(7)(C) was Perricone. While (b)(6) (b)(7)(C) did discuss his suspicions about Perricone with others in the USAO, (b)(6) (b)(7)(C) told OPR that he and his colleagues concluded that they did not have an obligation to report their suspicions, largely because they could not be certain that Perricone was authoring the postings and because they never saw any privileged or confidential information revealed in the postings that they read.

(b) (6), (b) (7)(C) g the reason he did not report his suspicions about Perricone to USAO senior managers:

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[413] (b)(6) (b)(7)(C) recollection is inconsistent with AUSA #5's recollection; AUSA #5 told OPR that he told (b)(6) (b)(7)(C) about his suspicions that Perricone was posting comments online several months before the trial in the (b)(6) (b)(7)(C)

I didn't think anything would happen if I did. I thought I would be rebuffed. To some degree, I feared some retaliation if I did, professionally . . . I didn't like Sal Perricone, he didn't like me . . . so my perception was that if I had come forward with my suspicions . . . they would not have been well taken.[414]

Sealed. See 11/26/12 order of Judge Engelhardt

II. (b)(6) (b)(7)(C) Alleged That He Told Three Mid-Level AUSA Supervisors about His Suspicions Regarding Perricone

(b)(6) (b)(7)(C) told OPR, and (b) (6), (b) (7)(C) that (b)(6) (b)(7)(C) had discussed (b)(6) (b)(7)(C) suspicions that Perricone might be posting comments online with three USAO supervisors: AUSA #1, who was (b)(6) (b)(7)(C) direct supervisor, AUSA #8, and AUSA #4.[417] (b)(6) (b)(7)(C) testified that (b)(6) did not think that AUSA #1 "ever read the posts . . . [H]e didn't want to become enmeshed in it."[418] (b)(6) (b)(7)(C) said (b)(6) recalled little about (b)(6) conversation with AUSA #1, and (b)(6) (b)(7)(C) did not recall AUSA #1 having much of a response regarding (b)(6) (b)(7)(C) suspicions. (b)(6) (b)(7)(C) said (b)(6) told AUSA #8 that "we should do something about [Perricone's comments] . . . that I thought that this would ultimately blow up . . . I don't remember his [AUSA #8's] exact words, but his sentiments were that he just wasn't willing to take that risk."[419] (b)(6) (b)(7)(C) said (b)(6) (b)(7) mentioned Perricone's postings to AUSA #4 because "I thought Perricone had made a number of very critical remarks about his family that I thought he

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414 Sealed. See 11/26/12 order of Judge Engelhardt

415 Sealed by 11/26/12

416 Sealed by 11/26/12

417 *Id.* at 10-14. (b)(6) (b)(7)(C) also told OPR that someone had informed him that following the public revelation concerning Perricone's online posting activity, (b)(6), (b)(7)(C) had raised the issue at a meeting of whether Perricone also posted comments online under another name, possibly campstblue. (b)(6) (b)(7)(C) did not recall from whom (b)(6), (b)(7)(C) had received the information. When informed that OPR had heard that AUSA #4, not (b)(6), (b)(7)(C) was reported by others to have made such a comment at the March 15, 2012 supervisors meeting, (b)(6) (b)(7)(C) agreed that the information he received may have become altered as it passed through various sources, which (b)(6) (b)(7)(C) likened to the children's game of "Telephone." (b)(6) (b)(7)(C) OPR Interview (June 10, 2013).

418 Sealed. See 11/26/12 order of Judge Engelhardt

419 Sealed by 11/26/12

[redacted]"[420] In response to questions from Judge Engelhardt, [redacted] was not able to provide the court with a definite time frame for these conversations.

AUSA #1 told OPR that sometime after May 2011, [redacted] made a "passing comment" about Perricone:

> I remember [redacted] making a comment to the effect, hey, you know -- I don't remember the exact content of what he said, but something to the effect that Sal's blogging or Sal's writing things on the Internet. And that was pretty much the extent of it. . . . [H]e did not tell me anything regarding [the] content of what Sal was doing. He did not tell me [the] subject matter of what Sal was writing about . . . . So I attached no significance whatsoever at all because I figured it was just more Sal [redacted] basically, you know, those guys not getting along, something going on between them. And that was the extent of it. There was nothing further. There was no discussion.[421]

AUSA #1 said he had never heard anyone else express suspicions about Perricone, and he never told anyone in the USAO about his conversation with [redacted] "because there was no necessity."[422]

AUSA #8 strongly disputed [redacted] recollection that [redacted] had discussed with AUSA #8 whether they should report Perricone:

> Absolutely not. He never did such a thing . . . [redacted] didn't, one it didn't happen, two [redacted] would never come to me. . . . He was [redacted], you know, he was not at the time, but . . . [h]e was way ahead of me in the pecking order so he doesn't come to me to ask me if we should move up the chain.[423]

[redacted] told OPR that AUSA #8 and another AUSA teased him about Perricone's postings criticizing [redacted] AUSA #8 denied that he ever engaged in such behavior, and the other AUSA said that he did not recall it.[424]

AUSA #4 told OPR that he thought that [redacted] said something to him about legacyusa making critical comments about AUSA #4's family, but was not certain it was [redacted] "I'm not a hundred percent sure who it was, cause it was mentioned in passing, but my – if I had to guess,

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420 [redacted]

421 AUSA #1 OPR Interview Tr. at 12-14 (Nov. 28, 2012).

422 *Id.* at 19-21.

423 AUSA #8 OPR Interview Transcript at 28-29 (Aug. 7, 2012).

424 *Id.* at 29.

it was probably (b)(6) (b)(7)(C) . . . I think it was him, but I wouldn't bet my life on it."[425] AUSA #4 said he did not discuss the allegation that Perricone was posting comments online with anyone else in the USAO.[426] AUSA #4 said it did not concern him if Perricone had made critical comments about his family.[427]

III. OPR's Analysis and Conclusions

A. USAO Employees Who Suspected That Perricone Might be Posting Comments Online Lacked Sufficient Information to Trigger the Duty to Report Misconduct Pursuant to USAM § 1-4.100

OPR concludes that the AUSAs and other USAO employees who suspected that Perricone might be posting comments online about Department matters, or who heard others voice such suspicions, did not intentionally or recklessly violate a clear and unambiguous obligation to report misconduct because the evidence is insufficient to establish that any of these employees suspected misconduct or knew that specific postings that they suspected might have been posted by Perricone violated the LRPC, C.F.R., Local Rules, or the USAM. While a few AUSAs, such as (b)(6) (b)(7)(C) became over time increasingly confident that Perricone may have been posting online, others heard little more than vague rumors about some of Perricone's online postings. All of these employees had either insufficient information to conclude that Perricone was responsible for the postings or did not determine that the postings of which they were aware violated an applicable standard of conduct sufficient to trigger a duty to report pursuant to USAM § 1-4.100. These employees were not aware of any Rule 6(e) or other confidential or privileged information being disclosed in any of the postings they read, and did not conclude that any of the postings violated any ethics rule or Department policies. OPR found insufficient information to conclude that these attorneys engaged in professional misconduct.

Nor is OPR able to conclude that the mid-level supervisors to whom (b)(6) (b)(7)(C) claimed to have reported his suspicions about Perricone's postings had sufficient information to take further action. (b)(6) (b)(7)(C) reported to OPR that he mentioned Perricone's postings to AUSA #1, AUSA #8, and AUSA #4. (b)(6) (b)(7)(C) recalled little about his conversation with AUSA #1, a supervisor, and (b)(6) (b)(7)(C) did not recall AUSA #1 having much of a response to (b)(6) (b)(7)(C) suspicions about Perricone. AUSA #1 reported that the conversation with (b)(6) (b)(7)(C) was very brief and lacked specifics about Perricone's postings. Indeed, according to AUSA #1, (b)(6) (b)(7)(C) only mentioned that Perricone was posting comments on the Internet, but (b)(6) (b)(7)(C) provided no description of Perricone's alleged postings. AUSA #1 was aware of the animosity between Perricone and (b)(6) (b)(7)(C) which may have led AUSA #1 to further downplay the significance of (b)(6) (b)(7)(C) comments.

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425 AUSA #4 Tr. at 6 (Aug. 16, 2012).

426 *Id.* at 10.

427 *Id.* at 6-9.

AUSA #8, another supervisor, strongly disputed [redacted] recollection that he had discussed with AUSA #8 whether they should report Perricone. [redacted] was unable to provide any details about his conversation with AUSA #8, nor did he assert that he provided AUSA #8 with specific information as to either the content of Perricone's postings or why [redacted] believed that Perricone authored the postings. AUSA #8 was adamant that no such conversation had taken place.

AUSA #4, a third USAO mid-level supervisor, told OPR that he thought [redacted] had said something to him about legacyusa making critical comments online about AUSA #4's family. AUSA #4 did not understand [redacted] to be reporting misconduct on the part of Perricone; rather, AUSA #4 thought [redacted] was simply relaying information AUSA #4 [redacted] Sealed. See 11/26/12 order of Judge Engelhardt [redacted][428]

OPR credits the recollections of these mid-level supervisors concerning their conversations with [redacted] and is unable to conclude that the supervisors had sufficient information that obligated them to take action concerning the information as they understood it. [redacted] had only a vague recollection of his conversations with these supervisory AUSAs, and he never provided any specific information, either about the content of Perricone's postings or why he suspected that Perricone was the author of the postings, that would have compelled the supervisors to take further action.

B. USAO Employees Who Suspected That Perricone Might be Posting Comments Online Lacked Sufficient Information to Trigger the Duty to Report Misconduct Pursuant to LRPC 8.3

OPR concludes that there is insufficient evidence to establish that the AUSAs who suspected that Perricone possibly was posting comments online violated LRPC 8.3. LRPC 8.3 requires an attorney to report attorney misconduct when he or she "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer . . . ." The LRPC define "knows" as having "actual knowledge of the fact in question." LRPC 1.0(f). OPR concludes that the AUSAs who suspected that Perricone might be posting comments online, or who heard about others' suspicions, did not violate LRPC 8.3 by not reporting their suspicions. None of the employees had actual knowledge that Perricone had violated the LRPC, and none believed that Perricone had committed a violation of the LRPC "that raise[d] a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." None of the AUSAs believed Perricone's postings contained Rule 6(e) material or other non-public information. Accordingly, OPR concludes that none of them violated LRPC 8.3.

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428 Sealed. See 11/26/12 order of Judge Engelhardt

CHAPTER 9

THE USAO'S MARCH 13, 2012 PRESS RELEASE WAS NOT INTENTIONALLY MISLEADING

Given the fact that some AUSAs had suspicions that Perricone might be posting comments online, and other AUSAs had heard rumors to that effect, OPR considered whether the press release issued by the USAO on March 15, 2012, was materially erroneous, and if so, who was responsible for any errors contained therein. The press release stated in part, "It is important to clarify for the record that contrary to speculation in the filings [in which Heebe's counsel had alleged that (b)(6) (b)(7)(C) may have authored the Mencken comments], neither (b)(6) (b)(7)(C) anyone in the United States Attorney's Office authored, participated in *or had knowledge of* the formulation or posting of the Henry L. Menken1951 comments." (Emphasis added.) Letten had sent a draft of the press release, which contained the "or had knowledge of" language to the Office of the Deputy Attorney General, EOUSA, the Office of Public Affairs, and OPR earlier that day.[429] At Letten's press conference on March 15, 2012, he read from the press statement and repeated the assertion that no one in the USAO "had knowledge of the formulation or posting" of the Mencken comments.[430]

As discussed previously, several USAO employees contemporaneously suspected that Perricone might be posting comments on nola.com. In addition, during the supervisors meeting held shortly before the release of the press statement, AUSA #4 informed Letten that he was aware of a rumor that Perricone might have been posting under names other than Mencken. Therefore, OPR assessed whether the press release statement that no one in the USAO "had knowledge of" Perricone's online activities was false or misleading.

OPR asked Letten whether, given AUSA #4's comment about having heard a rumor about Perricone posting comments online and Letten's subsequent knowledge that other persons in the office suspected Perricone, the statement Letten made to the press was inaccurate. Letten noted that at the press conference, he told the reporters that he was not going to discuss what USAO employees might have "speculated" about Perricone.[431]

In addition, Letten told OPR that he believed the statement in the press release was accurate:

> [E]ven as we continued to learn things, I was confident that nobody -- I was still confident that no one had knowledge, knew for sure, that there was just simply speculation. . . . [T]o me, knowledge would have been a confirmation, confidence

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429 *See* e-mail from Letten to the Office of the Deputy Attorney General, EOUSA, Office of Public Affairs, and OPR (March. 15, 2012).

430 An unofficial transcript of Letten's press conference is attached at Exhibit C.

431 Letten Press Conference, WWLTV.com at 22:13 (Mar. 15, 2012).

. . . maybe an admission by Sal, not just oh, this looks like someone, this may be someone, whatever. . . . To this day I still believe that's accurate. . . .

[S]peculation and knowledge are two completely different animals. . . . Knowledge is . . . some cognizance that in fact Sal is doing this. . . . I still believe that there wasn't knowledge by anyone out here other than Sal that in fact Sal was blogging. . . .

I thought it was important that we -- let me tell you this came as a surprise to us. This had not been sanctioned. We didn't know about it. And this was something that I was absolutely confident was something that Sal had kept to himself, that despite what speculation there might have been out there, that I thought it was appropriate and safe to say that. . . . I believed that if anybody knew Sal was doing this they would have said something to us, especially since I actually said does anybody know, does anybody have any information on this or whatever. And people just didn't come forward.[432]

Sealed. See 11/1/13 order of Judge Engelhardt

[433]

Sealed. See 11/1/13 order of Judge Engelhardt

Sealed. See 11/1/13 order of Judge Engelhardt

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[432] Letten Tr. at 25-27 (Aug. 8, 2012). OPR received various reports about Letten's comments at the USAO staff meeting. AUSAs recalled Letten asking people to come forward if they "knew" that Perricone had been blogging; others recalled Letten asking if anyone had "information" about Perricone's blogging; and some recalled Letten asking for any information that would contradict the press release. Accordingly, OPR cannot evaluate whether Letten was justified in relying on the minimal response to his questions as a basis for concluding that no one in the office "had knowledge of" Perricone's online activities. Heebe's attorneys reported that they understood that Letten had told the USAO attorneys and staff that "the managers did not know about Perricone and no one in the office knew," more akin to a directive or script that Letten expected the employees to follow. OPR did not find support for this interpretation of Letten's comments. The AUSAs did not interpret Letten's comments, however they were phrased, as a directive to falsely deny any knowledge of Perricone's online activities.

[433] Sealed. See 11/1/13 order of Judge Engelhardt

[434] Sealed. See 11/1/13

Sealed. See 11/1/13 order of Judge Engelhardt

[redacted]

OPR was informed that some of the managers at the supervisors meeting on March 15 advocated against having a press conference and recommended that the office not provide any information other than acknowledging that Perricone was posting as Mencken and that the matter had been referred to OPR. Nonetheless, because Letten wanted to dispel the rumors quickly, he made the decision to proceed with the press conference.

OPR concludes that the statement in the press release that no one in the USAO "had knowledge of" Perricone's online activities was overbroad and subjected the USAO to further criticism that it had not provided accurate information. Letten and Mann interpreted "had knowledge of" to mean that no one in the office was confident that Perricone was posting comments. But, especially in the context of a media press release, "had knowledge of" can also be interpreted to mean something less than proof positive. The statement in the press release that no one in the office "had knowledge of" Perricone's posting activities could be construed as being misleading, in light of the fact that several attorneys suspected that Perricone might be posting comments online. Even though AUSA #4 advised Letten regarding rumors about Perricone, and some managers advocated for a more limited public announcement, Letten nonetheless opted to proceed with the press release as drafted. As a highly experienced U.S. Attorney and FAUSA, Letten and Mann should have known that they were not in a position to state unequivocally that no one in the USAO "had knowledge of" Perricone's postings, even if no one had come forward in response to Letten's inquiries, because no investigation had as yet been conducted. Indeed, Letten made that point himself in his press conference when he referred to the ongoing investigation when declining to answer certain questions from the media.

Nonetheless, under the circumstances, OPR does not conclude that any particular manager committed misconduct in the drafting or dissemination of the press release. OPR found no evidence that the managers intended to mislead the public. Rather, the primary goal was to refute allegations that senior managers had authorized Perricone to post comments online. The precise meaning of "had knowledge of" as used in the press release is not entirely clear. The press statement was based on the limited information Letten and his management team possessed at the time. Furthermore, the USAO made clear that the matter had been referred for an investigation, and the public therefore could readily infer that the facts in the press release were based upon limited information.

In sum, when engaging the media on a matter under investigation and on which managers have limited factual information, managers should be exceedingly cautious when making public statements. Generally, factual statements that relate to the issue under investigation should be avoided, given that any hastily made pronouncement may well be contradicted by subsequent

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435 *Id.* at 72.

information coming to light. Although the USAO's March 15, 2012 press release made a claim that was overbroad and arguably misleading, OPR concludes that it does not constitute a basis for a finding of professional misconduct against those who drafted or approved it.

CHAPTER 10

OPR FOUND NO EVIDENCE ESTABLISHING THAT USAO EMPLOYEES OTHER THAN PERRICONE AND MANN VIOLATED RULES PROHIBITING ONLINE COMMENTS CONCERNING ACTIVE INVESTIGATIONS OR PENDING CASES

Both OPR and AUSA Horn undertook to determine whether any other USAO employees besides Perricone and Mann had posted comments online about Department matters.

I. OPR's Surveys and Responses

On July 27, 2012, OPR sent a survey to all USAO attorneys asking about their knowledge of Perricone's online activities. On November 20, 2012, OPR sent a second survey to all USAO attorneys asking about their knowledge of Mann's online activities. On December 4, 2012, OPR sent a third survey to all USAO non-attorney employees asking them about their knowledge of Perricone's and Mann's online activities. In the November 20 and December 4 surveys, OPR asked several questions, including the following:[436]

> Have you posted comments relating to any matter handled by the USAO or Department of Justice, including, but not limited to, the matter itself, the defendant or the accused, the opposing attorneys handling the matter, or any witnesses involved in the matter? If yes, identify to the extent possible the (1) website; (2) user name; (3) date; and (4) subject matter of each posted comment.
>
> Have you posted comments relating to any state or federal court judge? If yes, identify to the extent possible the (1) website; (2) user name; (3) date; and (4) subject matter of each posted comment.
>
> Have you received information from any source that any employee in the USAO (other than former AUSA Salvador Perricone and AUSA Jan Mann) has posted, or may have posted, comments relating to a state or federal judge or to matters handled by the USAO or the Department of Justice, including, but not limited to, the matter itself, the defendant or the accused, the opposing attorneys handling the matter, or any witnesses involved in the matter. If yes, identify the (1) employee; (2) source of your information; and (3) subject matter of each posted comment.

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[436] The instructions for the surveys read in part as follows:

> Your answers to the following questions should include any posted comments made by you since you have been employed by the United States Attorney's Office for the Eastern District of Louisiana (USAO), whether under your own name or a pseudonym, on (1) Nola.com or any other Internet website; (2) social media websites such as Facebook and Twitter; and (3) blogs maintained by you or anyone else. By "posted comments," we include any and all forms of electronic communication on a topic, whether or not the communication is specifically designated as a "comment" on the website or social media.

All USAO employees answered the surveys. OPR previously discussed in this report those persons who stated that they suspected or had heard rumors that Perricone was posting comments online. No USAO employee stated that he or she suspected or heard that Mann was posting comments online.

(b) (5), (b) (6), (b) (7)(C)

(b) (5), (b) (6), (b) (7)(C)

II. AUSA John Horn's Inquiry

Sealed. See 11/1/13 order of Judge Engelhardt

437 Sealed. See 11/1/13 order of Judge Engelhardt

438 Sealed. See 11/1/13 order of Judge Engelhardt

439 Sealed. See 11/1/13

440 Sealed. See 11/1/13 order

Sealed. See 11/1/13 order of Judge Engelhardt

[redacted]

[redacted][441]

III. OPR's Analysis and Conclusions

Without access to information protected by nola.com, OPR cannot state with absolute certainty that no USAO employee other than Perricone and Mann made online extrajudicial statements about active Department investigations or pending cases. Nonetheless, neither OPR nor AUSA Horn, using available investigative techniques and resources, found evidence establishing that other USAO employees made extrajudicial statements about active Department investigations or pending cases through online postings.

441 [redacted]

CONCLUSION

From approximately November 2007 to March 2012, former AUSA Salvador Perricone posted on the website nola.com approximately 2,600 anonymous comments on a wide variety of subjects, including comments concerning cases to which he personally was assigned to prosecute or that were being prosecuted by others in the United States Attorney's Office for the Eastern District of Louisiana (USAO). Many of Perricone's postings were highly inappropriate and unprofessional; and many disparaged federal and state judges, defendants in pending cases, personnel in the USAO, defense attorneys, and numerous other public and private individuals. Significantly, Perricone inappropriately commented on pending cases.

From November 2011 to early March 2012, former AUSA Jan Mann, while serving as the First Assistant U.S. Attorney and Criminal Division Chief, posted on nola.com inappropriate and unprofessional anonymous comments about criminal cases she supervised that were being prosecuted by the USAO.

Perricone's and Mann's inappropriate online posting activity caused significant damage to the good will and reputation of the USAO and the Department of Justice. They failed to uphold the high standards of justice, fairness, and professionalism expected of federal prosecutors.

Based on the results of its investigation, the Office of Professional Responsibility (OPR) reaches the following conclusions regarding Perricone's online postings:

(1) Perricone committed intentional professional misconduct by publicly disseminating extrajudicial statements regarding active investigations and pending cases in violation of his obligations as set forth in various provisions of 28 C.F.R. § 50.2, *et seq.*; the United States Attorneys' Manual (USAM) § 1-7.000, *et seq.*; the Local Criminal Rules of the District Court for the Eastern District of Louisiana (Local Rules); and USAO policies; and

(2) Perricone committed professional misconduct in violation of Louisiana Rule of Professional Conduct (LRPC) 8.2 by making statements regarding the integrity or qualifications of judges or candidates for judicial office that he knew were false, or with reckless disregard as to the truth or falsity of the statements.

Based on the results of its investigation, OPR reaches the following conclusions regarding Mann's online postings:

(1) Mann committed intentional professional misconduct by publicly disseminating extrajudicial statements regarding active investigations and pending cases in violation of her obligations as set forth in various provisions of 28 C.F.R. § 50.2, *et seq.*; USAM § 1-7.000, *et seq.*; the Local Rules; and USAO policies;

(2) Mann committed professional misconduct in violation of LRPC 8.2 by making a statement regarding the integrity of a judge that she knew was false, or with reckless disregard as to the truth or falsity of the statement;

(3) Mann committed intentional professional misconduct in violation of LRPC 1.4(a) and (b) by failing to fully inform former U.S. Attorney James Letten, or any other Department official, about her postings on nola.com, so that the Department could make informed decisions about whether and to what extent Mann should be involved in matters relating to Perricone's online postings. OPR did not find credible Mann's allegation that on March 13, 2012, the day she first learned that Perricone (b)(6) (b)(7)(C) , had been named in a state court petition for pre-suit discovery, she told Letten that she, too, had posted comments online;

(4) Mann committed intentional professional misconduct in violation of LRPC 1.7(a)(2) by continuing to represent her client, the United States, in matters in which she had a direct, personal conflict of interest without obtaining the written consent of her client. These matters included making decisions regarding whether the USAO should be recused from certain pending cases; responding to motions for recusal of the USAO, new trials, and dismissal of criminal charges; and providing information to OPR and to AUSA Stuart Walz, who was conducting a preliminary criminal inquiry into Perricone's conduct; and

(5) Mann committed intentional professional misconduct in violation of LRPC 8.4(c), when she made misrepresentations to, or intentionally withheld material information from, Judge Kurt D. Engelhardt, Judge Hayden Head, Jr., former U.S. Attorney Letten, the Executive Office for United States Attorneys, the Department's Civil Rights Division, and OPR. Mann's dishonest conduct with respect to the courts was prejudicial to the administration of justice in violation of LRPC 8.4(d). Mann's dishonest conduct with respect to the Department impeded OPR's investigation, adversely impacted the Civil Rights Division's prosecutions, and interfered with the administration of justice.

As to both Perricone and Mann, OPR determined that by making inappropriate and offensive comments, Perricone and Mann engaged in conduct that was detrimental to the interests of the Department. In particular, Perricone risked causing significant harm to the Department when he posted comments that could reasonably be interpreted as evidencing racial animus.

Based on the results of its investigation, OPR reaches the following conclusions regarding the knowledge of others in the USAO concerning Perricone's and Mann's online activities and whether others in the USAO posted comments online concerning USAO or Department matters:

(1) The evidence is insufficient to establish by a preponderance of the evidence that former U.S. Attorney Letten, Mann, (b)(6) (b)(7)(C) was aware contemporaneously of Perricone's anonymous postings;

(2) The evidence is insufficient to establish by a preponderance of the evidence that former U.S. Attorney Letten, (b)(6) (b)(7)(C), or Perricone was aware contemporaneously of Jan Mann's anonymous postings;

(3) The evidence is insufficient to establish by a preponderance of the evidence that AUSAs who may have suspected that Perricone might be engaged in online posting activity

intentionally or recklessly violated a clear and unambiguous duty to report that information to USAO supervisors or to the Louisiana Office of the Disciplinary Counsel.

(4) OPR found no evidence establishing that anyone in the USAO knew or suspected that Mann was posting comments online about USAO matters; and

(5) OPR found no evidence establishing that any USAO employee besides Perricone and Mann violated Department, court, or ethical rules prohibiting the posting of online comments concerning active Department investigations or pending cases.