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Ethics

In This Issue

Department Attorneys' Ex Parte Contact with Represented Persons: The Old Approach v. The New Approach

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Most states have adopted an ethical rule that is similar to the American Bar Association's (ABA) Model Rule 4.2, which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 4.2.

Although each state has adopted some version of the rule, the application varies widely from jurisdiction to jurisdiction. For example, jurisdictions differ about which corporate employees are deemed to be represented by the corporation's lawyer by operation of the rules or law. *Compare, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 4.2 cmt. (when an organization is the represented person, the rule applies to contact with "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization") *with* PA. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (rule applies to "communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter, or who has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability"). Sometimes jurisdictions differ about which communications are deemed to be "authorized by law." *Compare* UTAH RULES OF PROF'L CONDUCT R. 4.2 cmt. 9 (citizen's lawyer is authorized by First Amendment to communicate ex parte with represented government official about policy matter provided he gives prior notice to the attorney representing the government on the matter) *with* State Bar of Wis., Formal Ethics Op. E-95-1 (1998) (citizen is only authorized by the First Amendment right to petition the government for redress of grievances to communicate directly with represented government official; citizen's lawyer may not engage in the ex parte contact).

At some point, most lawyers involved in litigation or prosecution will have to determine whether the ethical prohibition against ex parte communications with a represented person bars communications in which they would like to engage, or communications with employees or agents of their client in which other lawyers propose to engage. State or federal government lawyers handling affirmative civil or criminal law enforcement matters must grapple with these issues on an almost daily basis. In the 1970s and 1980s, it was not entirely clear whether courts intended the ex parte contact rule to apply to prosecutors or their agents engaged in pre-indictment communications with represented witnesses, subjects, or targets. Ultimately, courts began to enforce the contact rule against prosecutors. *See, e.g.*, *United States v. Hammad,* 858 F.2d 834 (2d Cir. 1988). *But see Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 648-49 (2d Cir. 1995) ("It is significant that since *Hammad*, neither this Court nor any reported district court decision . . . has found that the Rule has been violated."); *see also United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) (noting that *Hammad* is unique among courts of appeals decisions); *United States v. Joseph Binder Schweizer Emblem Co.*, 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001) (*Hammad* "stands alone").

In the late 1980s and early 1990s, believing that the rule at times impeded legitimate law enforcement activities and that the variance among jurisdictions undermined consistent enforcement of federal law, the Department of Justice took the position that state rules of professional conduct did not apply to Department attorneys, meaning that the Department should be able to develop a uniform national ex parte contact rule. On June 8, 1989, Attorney General Richard Thornburgh wrote a memorandum to all Department litigators setting forth a new uniform policy on ex parte contacts (the Thornburgh Memorandum). The Memorandum reinforced that, in the exercise of their duties, Department attorneys were bound only by the Constitution and relevant statutes. The Department would only permit state rules of professional conduct to apply to Department attorneys as a matter of policy, not as a requirement of law. The Memorandum then enunciated the Department's policy that: (1) prosecutors are authorized by law to supervise agents communicating ex parte with represented persons pre-indictment or pre-charge; (2) the Supremacy Clause prohibits the application of state contact rules to prosecutors' overt ex parte communication with witnesses; (3) a corporate employee may repudiate an otherwise valid claim of representation advanced by corporate counsel; and (4) prosecutors and their agents may communicate ex parte with corporate employees, despite corporate counsel's blanket claim of representation, so long as the communication is constitutional and otherwise lawful. The Thornburgh Memorandum was widely criticized. *See, e.g.*, *United States v. Lopez*, 765 F. Supp. 1433, 1446-49 (N.D. Cal. 1991), *vacated on other grounds*, 4 F.3d 1455 (9th Cir. 1993).

As a result, on July 30, 1994, Attorney General Janet Reno promulgated 28 C.F.R. §§ 77.6-77.11 (1998), a regulation (the Reno Regulation) specifically addressing ex parte contact with represented persons by Department attorneys and their agents. Pursuant to the regulation, Department attorneys were prohibited from engaging in ex parte contact about the subject of the representation, either directly or indirectly, with a person known to be represented, unless the contact was authorized by law or the representing lawyer consented. Ex parte contacts were permissible in certain situations, including, but not limited to, the following: (1) when the represented person initiated the contact and either waived counsel or a court concluded that there had been an adequate waiver or appointed other counsel; (2) when the statements were post-arrest and *Mirandized*; or (3) when the contact was made to investigate a threat to safety or life. 28 C.F.R. § 77.6 (1998). The objections to the Reno Regulation were equally as negative and as strong. *See, e.g.*, *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1293-95 & n.7 (E.D. Mo. 1997), *aff'd,* 132 F.3d 1252 (8th Cir. 1998).

Ultimately, the disagreements and debates resulted in the passage of 28 U.S.C. § 530B (1998). That statute states, in relevant part, that "an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

In the wake of the enactment of § 530B, the Department turned away from its earlier efforts to establish its own version of a uniform ex parte contact rule. It replaced the Reno Regulation with regulations implementing the new statute. *See* Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273-01 (1999) (codified at 28 C.F.R. pt. 77). Moreover, since 1998, the Department has recognized that its attorneys generally must comply with applicable state rules; however, this does not mean that all pre-indictment or pre-filing ex parte contacts are impermissible. In fact, many jurisdictions recognize that law enforcement communication with represented persons should be deemed permissible when they are pre-filing or pre-indictment contacts. For example, the ABA adopted a new comment to Model Rule 4.2 in 2002 that acknowledges the permissibility of such contacts. The comment provides in relevant part that "communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5. *Accord* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 95-396, Part III (1995).

More important, in most jurisdictions, there are state or federal cases, comments to rules, or bar opinions that expressly permit law enforcement's covert and overt pre-indictment or pre-filing ex parte contacts with represented persons. *See, e.g.*, *United States v. Plumley*, 207 F.3d 1086, 1094-95 (8th Cir. 2000); *United States v. Ford*, 176 F.3d 376, 382 (6th Cir. 1999); *United States v. Balter*, 91 F.3d 427, 435-36 (3d Cir. 1996); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993); *United*

States v. Ryans, 903 F.2d 731, 739-40 (10th Cir. 1990); *United States v. Worthington*, 1990 WL 116618, at 3,4 (4th Cir. 1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *State v. Reavley*, 79 P.3d 270, 279-80 (Mont. 2003); *United States v. Joseph Binder Schweizer Emblem Co.*, 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001); *In re Criminal Investigation of Doe, Inc.*, 194 F.R.D. 375, 378 (D. Mass. 2000); *United States v. Tableman*, No. CRIM. 99-22-B, 1999 WL 1995192, at *2 (D. Me. Sept. 3, 1999) (unpublished); *State v. Bisaccia*, 724 A.2d 836, 847 (N.J. Super. Ct. App. Div. 1999); *State v. Lang*, 702 A.2d 135, 137 (Vt. 1997); *United States v. Gray*, 825 F. Supp. 63, 64-65 (D.Vt. 1993); *In re Disciplinary Proceedings Regarding Doe*, 876 F. Supp. 265, 268-69 (M.D. Fla. 1993); *State v. Mosher*, 755 S.W.2d 464, 469 (Tenn. Crim. App. 1988); *State v. Irving*, 644 P.2d 389, 393-94 (Kan. 1982); *State v. Dorsey*, No. 02CR1519-6 (Super. Ct. of Dougherty Co., Ga. June 1, 2002); Tenn. Bar Assoc., Advisory Ethics Op. No. 2001-A-751 (Sept. 2001); Colo. Bar Assoc., Formal Op. No. 96 (July 15, 1994); Office of the Att'y Gen., Cal., 75 Ops. Cal. Att'y Gen. 223, 1992 WL 469721 (Oct. 8, 1992); Va. State Bar Ethics Counsel, Legal Ethics Op. No. 848 (Oct. 9, 1986) and Legal Ethics Committee Note (undated).

In determining that such pre-indictment or pre-filing ex parte contacts generally are permissible, state and federal authorities have given great weight to the fact that applying the rule to law enforcement personnel during the investigative stage of a matter "would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals." *Balter*, 91 F.3d at 436. Moreover, permitting persons to insulate themselves from certain investigative tools by keeping an "in-house" lawyer on retainer "would simply enable criminal suspects, by retaining counsel, to hamper the government's conduct of legitimate investigations." *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982). It also would unfairly "insulate from undercover investigation any defendant with enough financial resources to permanently obtain private counsel. Such a rule would dramatically impugn the integrity of the judiciary; not to mention the crippling effect it would have on the Government's ability to investigate on-going criminal activity." *United States v. Grass*, 239 F. Supp. 2d 535, 546 (M.D. Pa. 2003).

Despite the fact that the Department has readjusted its approach to the ex parte contact rule, some continue to believe that Department attorneys are relying upon the Thornburgh Memorandum or the Reno Regulation. This simply is not correct. Not only have Department attorneys abandoned reliance on these outdated policies, but reliance is unnecessary because many jurisdictions find ex parte investigative contacts by law enforcement officials to be permissible. In sum, the Department's current approach to issues relating to ex parte contacts with represented persons is consistent with 28 U.S.C. § 530B (1998) and applicable state rules of professional conduct.❖

ABOUT THE AUTHOR

❑. **Jerri Dunston** spent 2 years in private practice as a general litigation associate at the Washington, DC, office of Fried, Frank, Harris, Shriver, and Jacobson and then joined the Department of Justice. From 1991 until 1997, Jerri was a staff attorney in the Housing and Civil Enforcement Section of the Civil Rights Division at Main Justice. As a staff attorney, she handled housing discrimination cases in courts all around the country; she also handled several major sexual harassment cases. After leaving the Housing Section, she became an Assistant United States Attorney for 5 years, first in the United States Attorney's Office for the District of Columbia and later in the United States Attorney's Office for the Eastern District of North Carolina. In October, 2002, Jerri came back to Washington, DC, and the Professional Responsibility Advisory Office (PRAO). At PRAO, Jerri advises and trains other Department attorneys (including prosecutors, civil attorneys, and DOJ agency attorneys) on compliance with their professional responsibilities. In October 2005, Jerri became the Acting Deputy Director of PRAO and in July 2007, became the permanent Director of PRAO. Since Jerri has joined the Department of Justice, she has taught Department attorneys on a variety of topics, including professional responsibility.✠

The Revolving Door: Professional Responsibility Considerations for Attorneys Entering or Leaving the Department of Justice

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I. Introduction

There are a number of professional responsibility issues for attorneys to consider upon entering or leaving the Department of Justice, including the duty of loyalty, which requires that an attorney avoid conflicts of interest, and the duty of confidentiality, which obligates an attorney to maintain the confidences of her current and former clients. This article discusses the ABA Model Rules of Professional Conduct Rule 1.11, which is the primary rule governing an attorney's professional obligations in the revolving door context. The article also examines Model Rules 1.6, 1.7, and 1.9, which address other conflict and confidentiality issues arising in this situation. Finally, the article discusses the Model Rules of Professional Conduct, because most jurisdictions have substantially similar versions of these rules.

II. Professional responsibility issues to consider upon leaving the Department

A. Rule 1.11(a)(2)

Model Rule 1.11(a), commonly referred to as the "side switching rule," prohibits a former government attorney from representing a client in a matter in which the attorney participated in a substantial way for the government, even when the lawyer's subsequent representation would not be adverse to the government. The United States District Court for the District of Columbia has emphasized that, in examining cases involving former government attorneys accused of "side switching," the court "must be especially careful" for two reasons:

> First, because government attorneys may have had access to more kinds of information in connection with the prior representations than private attorneys typically do, there is a greater potential for misuse of information – including information that is not necessarily confidential in nature – . . . in the revolving door context. Second, the public is generally more concerned about government improprieties than about private improprieties. Thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.

United States v. Philip Morris, Inc., 312 F. Supp. 2d 27, 38 (D.D.C. 2004) (citing *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 43 (D.C. 1984) (en banc)); *see also Woods v. Covington County Bank*, 537 F.2d 804, 814 (5th Cir. 1976) ("The purpose most often ascribed to the limitation on former government attorneys is to avoid 'the manifest possibility that (a former government lawyer's) action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.' ") (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 37 (1931)). Rule 1.11(a)(2) (2009) provides:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer

> participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

MODEL RULES OF PROF'L CONDUCT R. 1.11(a)(2) (2009).

There are a number of distinct issues to consider in determining whether past Department employment complies with Model Rule 1.11(a). One issue to consider is whether a former Department attorney would be representing a client at her new job. The fact that a new position is not specified as an attorney position is not dispositive of whether an attorney is "represent[ing] a client" under Model Rule 1.11(a). For example, an attorney acting as a consultant could be deemed to "represent a client" within the meaning of the rule. *See, e.g.*, Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility Op. 94-132 (1994) (former Department attorney was not permitted to act as "legal consultant" for opposing party on a case where she formerly represented the government).

Another issue to consider is whether an attorney's work for the Department constituted work on a "matter." Model Rule 1.11(e) defines "matter," for the purpose of this Rule only, as:

> any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and . . . any other matter covered by the conflict of interest rules of the appropriate government agency.

MODEL RULES OF PROF'L CONDUCT R. 1.11(e) (2009). The phrase "involving a specific party or parties" serves to narrow the definition of "matter" and distinguishes "matter" as used in this Rule from its meaning in other Rules. This Rule is written broadly enough to disqualify government lawyers from participating in a matter even when that matter is not adverse to their former client.

Generally, participating in litigation in any capacity would constitute participation in a matter, while doing regulatory work ordinarily would not be deemed work on a matter. *See, e.g.*, *United States v. Philip Morris, Inc.*, 312 F. Supp. 2d 27, 39-40 (D.D.C. 2004) (court generally recognized that work on a rulemaking would not constitute participation in a matter, but found that an attorney who spent many hours working on a rulemaking that was the subject of a prior litigation was deemed to have participated in a matter under District of Columbia Rule 1.11(a), even though the attorney never entered an appearance in the case); *see In re Sofaer*, 728 A.2d 625, 627 (D.C. 1999) ("The contours of the [Pan Am 103] bombing, the government's investigation, and related responses to it were defined sharply enough to constitute a 'matter' under the Rule."). Each situation will need to be evaluated on a case-by-case basis.

A related issue is whether the former Department attorney's work for the Department would constitute work on the *same* "matter." Comment [10] to Model Rule 1.11 provides some guidance in determining whether two particular matters are the same. " 'A matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. [10] (2009).

In considering whether the work an attorney did for the government would constitute the same matter under Model Rule 1.11, courts also consider whether the former government attorney has confidential information from the former government client that may be useful to the new private client. *See Dugar v. Bd. of Educ.*, No. 92 C 1621, 1992 WL 142302, *4-6 (N.D. Ill. Jun. 18, 1992) (unpublished) (court found that a former Board of Education attorney should be disqualified, even though the matter prompting the disqualification motion had not even arisen at the time she was employed with the Board because she was privy to discussions regarding the Board's position on matters potentially related to the litigation at issue); *see also Sofaer*, 728 A.2d at 627-28 ("Rule 1.11(a) bars participation in overlapping government and private matters where it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second; the actual receipt of . . . information, and hence disclosure of it, is immaterial.") (citations omitted) (emphasis added). In some jurisdictions "matter" is defined to include a "substantially related matter." *See* D.C. RULES OF PROF'L CONDUCT R. 1.11 (2007).

The other component of the rule requires that an attorney has participated "personally and substantially" in the matter. Although the term "substantially" might suggest that an attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates

otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. *See, e.g.*, *United States v. Smith*, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high-level meetings about the case, and signed an immunity agreement for one of the government's witnesses); *Sec. Investor Prot. Corp. v. Vigman*, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and a trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case").

Any analysis concerning whether an attorney participated personally and substantially in a matter under the relevant professional responsibility rules will have to be made on a case-by-case basis. Under Model Rule 1.11(a), if there is a conflict of interest based on prior government representation, the United States may consent to the former Department attorney's participation.

B. Rule 1.11(b)

If a former Department attorney were to join a firm and had a conflict of interest in a particular matter, the rules also would prohibit the attorney's firm from participating in such a matter unless the former Department attorney is screened and is apportioned no fee from the matter and unless the firm notifies the government of the screening measures. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(b) (2009). The screen must be erected promptly. *See Analytica, Inc. v. NPD Research Inc.*, 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed—months after the lawyer had joined the firm."); *see also United States v. Goot*, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed*.") (emphasis added); *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); *Cobb Publ'g, Inc. v. Hearst Corp.*, 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).

C. Rule 1.11(c)

This rule also imposes specific prohibitions on a former government attorney's use of confidential information. Rule 1.11(c) provides:

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

MODEL RULES OF PROF'L CONDUCT R. 1.11(c) (2009). This rule prohibits a former Department attorney from representing a client in a private matter that would be adverse to a person about whom she has confidential government information as a result of her employment with the Department. Based on the proscriptions in this rule, and those discussed below regarding Model Rule 1.9(c), former Department attorneys likely would be precluded from participating in any matters in which confidential government information they learned while a Department attorney would be relevant to the private matter.

D. Rule 1.11(d)(2)(ii)

In addition, Model Rule 1.11(d)(2)(ii) places restrictions on a Department attorney's ability to negotiate for private employment. This rule states in relevant part:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially. . . .

MODEL RULES OF PROF'L CONDUCT R. 1.11 (d)(2)(ii) (2009). Accordingly, to the extent a Department attorney works on the substance of a particular matter, she would be prohibited from negotiating for employment with anyone who is involved in that same matter.

E. Rule 1.6

Former Department attorneys also continue to owe a duty of confidentiality to the United States. Rule 1.6 prohibits a lawyer from revealing any "information relating to the representation of a client." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) 2009. This protection is much broader than the evidentiary privilege given to attorney-client confidentiality. The confidentiality mandated by Rule 1.6 "exists without regard to the nature or source of the information or the fact that others share the knowledge." *Perillo v. Johnson*, 205 F.3d 775, 800 n. 9 (5th Cir. 2000) (quoting ABA MODEL CODE OF PROF'L RESPONSIBILITY, Canon 4, DR 4-101, EC 4-4) (internal quotation marks and alterations omitted). Other precedent provides that information obtained in the course of an attorney-client relationship is required to be "sheltered from use," regardless of who else may know of it, because of the duty of loyalty inherent in that relationship. *See Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (rejecting the idea that an attorney is relieved from his duty to protect confidential information because both parties are privy to it as a result of prior joint representation.).

Finally, the phrase "information relating to the representation" has been interpreted to include a broad spectrum of information, including information that may not itself be protected but reasonably could lead to the discovery of such information by third persons. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [4] (2009); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411 (1998) (noting that, in lawyer-to-lawyer consultations, use of hypotheticals that enable another lawyer to determine identity of one's client may, under some circumstances, violate Rule 1.6); *See, e.g.,* D.C. Bar Op. 297 ("[W]e believe that the inquirer [a former government attorney] must honor his confidentiality obligations to the government . . . as a general matter"). Consequently, even after attorneys leave the Department, they may not reveal the United States' confidential information, absent the United States' consent.

F. Rule 1.9(c)

Model Rule 1.11(a)(i) directs that attorneys leaving government service also are required to follow Model Rule 1.9(c). *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(a)(i) (2009) ("[A] lawyer who has formerly served as a public officer or employee of the government . . . is subject to Rule 1.9(c).") Model Rule 1.9(c) states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2009). In addition to the prohibition against *revealing* confidential government information, an attorney is only permitted to *use* confidential information to the United States' detriment if the United States consents or if the information has become "generally known." This term is not clearly defined in the Model Rules or in legal jurisprudence. Some courts have concluded that information does not become "generally known" simply because it is made public; the manner of its disclosure and subsequent accessibility are the determinative factors. *See, e.g.*, *Steel v. Gen. Motors Corp.*, 912 F. Supp. 724, 739 (D.N.J. 1995) ("The information age has not neglected the legal profession, and step-by-step checklists on litigating a particular type of case can be found in every law library and computerized legal database in the country. The fact that this type of information is publicly available does not make 'information relating to the representation' of GM 'generally known.' "). Other courts subscribe to the view that information is "generally known" when it is a matter of public record. *See Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 9 F. Supp. 2d 572, 580 (W.D.N.C. 1998) (without further discussion, opining that matters of public record are not considered to be confidential). Ultimately, however, even if a Department attorney could use the information covered by this Rule because it is generally known, she could not reveal it, unless the United States consents.

III. Professional responsibility issues to consider upon starting Department employment

A. Rule 1.11(d)

Under Model Rule 1.11(d), a Department attorney cannot represent the United States in a matter in which she participated personally and substantially while in private practice, unless the United States consents. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(2)(i) (2009) ("[A] lawyer shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment" without the Government's consent). The analysis concerning what constitutes "representation in a matter" and "personal and substantial participation" is the same as the analysis discussed above under Rule 1.11(a)(2).

B. Rule 1.9(a)

Rule 1.11(d) also requires that attorneys entering government service from the private sector comply with Model Rule 1.9, governing duties to former clients. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(1) (2009) ("A lawyer currently serving as public officer or employee . . . is subject to Rule . . . 1.9[.]") Model Rule 1.9 is both broader and narrower than Model Rule 1.11 in its prohibitions regarding conflicts of interest. Model Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R 1.9(a) (2009). The definition of "matter" in Rule 1.9 is broader than the definition of "matter" in Rule 1.11 because a "matter" is not limited to

representation of a party or parties. Therefore, activities such as lobbying or policy making could be considered matters even if no identifiable parties are involved. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.0(h) (defines "matter" to include "lobbying activity"; *see also* D.C. Bar Op. 344 (2008) (definition of matter in Rule 1.6—and thus presumably Rule 1.9—includes lobbying and policy making).

The scope of matter on which an attorney is prohibited from working under Model Rule 1.9(a) also is defined to include a substantially related matter. Comment [3] to Model Rules 1.9 provides:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. [3] (2009). Courts have articulated a number of tests for deciding whether a substantial relationship exists between a current and former representation. One court has summarized the various tests this way:

> There are three primary tests for substantial relationship used throughout the country . . . . The first approach compares the facts of the former and current representations . . . . The second approach, which has not been widely adopted, insists that the issues involved in the two representations be identical or essentially the same . . . . The third approach, developed by the Seventh Circuit Court of Appeals, blends the fact and issue comparisons into a three-step test. . . The Seventh Circuit states: [D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether the information is relevant to the issues raised in the litigation pending against the former client.

Carey v. Danis, 89 S.W.3d 477, 495 (Mo. 2002) (citations omitted). Courts have found that the purpose of the rule is to prevent a former client's confidences from being used against her. *See, e.g., Kaselaan & D'Angelo Assoc., Inc. v. D'Angelo*, 144 F.R.D. 223, 239 (D.N.J. 1993) (citing *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 162 (3d Cir. 1984) ("It is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second the rule is important for the maintenance of public confidence in the integrity of the bar. Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.")

The other issue to consider under Model Rule 1.9(a) is whether the interests of a former client are "materially adverse" to those of the United States, which differs from Rule 1.11(a) that applies even if the subsequent representation is not adverse to the former government client. Opinions discussing former client conflicts most often address situations in which the potentially conflicted attorney is litigating against his former client, which invariably satisfies the adversity requirement. *See, e.g., Paul v. Judicial Watch*, 571 F.Supp. 2d 17, 21 (D.D.C. 2008). A representation also is likely to be adverse when an attorney cross-examines a former client. *See In re Cendant Corp. Sec. Litig.,* 124 F.Supp.2d 235, 241-42 (D.N.J. 2000) *citing* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 92-367; *but see United States v. DeCay*, 406 F. Supp. 2d 679, 686 (E.D. La. 2005) ("[T]he materials submitted in camera do not suggest that DeCay's defense would be buttressed by eliciting any testimony from the former client that could prejudice him, and the attorney's office file on his client does not reveal any information that could be used to the client's disadvantage.").

C. Model Rule 1.9(b)

For lawyers entering the Department from law firms, Rule 1.9(b) establishes the situations in which an attorney could have an imputed conflict due to his or her firm's representation of a current or former client. Rule 1.9(b) provides:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.9(b) (2009). In addition to the requirements of material adversity and substantial relation, discussed above, Rule 1.9(b) also requires that an attorney acquired material confidential information in order for a firm's representation of a current or former client to be imputed to him or her. The definition of "confidential information" is analyzed above in the Rule 1.6 subsection. If the interests of the United States are materially adverse to the interests of the current or former client of the Department attorney's former firm and that attorney acquired any material confidential information relating to her firm's representation of the current or former client, Rule 1.9(b) prohibits the attorney's representation of the United States unless the current or former client consents.

Even if the United States' interests are not materially adverse to the interests of the former client of a Department attorney or the current or former client of the Department attorney's former firm, the confidentiality limitations set forth in Rule 1.9(c), discussed above, still apply to an attorney leaving a firm to work for the Department. Therefore, except in limited circumstances, a Department attorney is prohibited from using or revealing confidential information of a former client or a prior firm's current or former client, unless the current or former client consents. As discussed below, the situation may create a conflict of interest for the Department attorney in representing the United States.

D. Model Rule 1.7

Rule 1.11(d) also requires that attorneys entering government service from the private sector comply with Model Rule 1.7, governing duties to current clients. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(1) (2009) ("A lawyer currently serving as public officer or employee . . . is subject to Rule . . . 1.7[.]"). Because a Department attorney, in most situations, is bound to maintain the confidential information of a former client (and the clients of her former firm), that attorney may face a conflict of interest under Rule 1.7(a)(2) in representing the United States. The Rule states in pertinent part, that: "[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client[.]" MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2009).

Comment [8] to Rule 1.7 defines "materially limited" as whether "there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Because a Department attorney likely will be prohibited from using or revealing a former client's confidential information, her representation of the United States would be materially limited if that confidential information is relevant to the matter she is handling for the Department. The United States may consent to the Department attorney's representation, notwithstanding the conflict of interest. In other words, the United States may consent to the Department attorney's representation with the understanding that she will be bound not to use or disclose any of her former client's confidential information. If, however, the former client does not consent to the use and disclosure of her confidential information, a Department attorney may find it difficult to represent the United States without using or disclosing a former client's confidential information. It may be difficult, if not impossible, for the attorney to distinguish confidential information learned during the prior representation from confidential information learned while representing the United States.

IV. Conclusion

An attorney's fundamental duties of loyalty and confidentiality, which never expire and can be imputed to an attorney from her firm, impose obligations on attorneys entering or leaving the Department. Many of the resulting conflicts of interest can be cured with the consent of the United States and/or the private client; however, when an attorney has confidential information of a former client, subsequent related representation becomes much more difficult. ❖

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This article does not address the Standards of Conduct issues arising when attorneys enter or leave the Department. That topic is addressed in a separate article. PRAO extends its appreciation to Steven Giballa for his assistance with this article.

The Revolving Door Part II: Ethics Issues for Department Attorneys Upon Entering or Leaving Government Service

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I. Introduction

While some attorneys may spend their professional lives exclusively in government or private practice, many attorneys move from one practice setting to another and may even make more than one such transition over the course of a legal career. This movement between public and private employment, popularly known as the revolving door, raises ethics issues for attorneys under the rules of professional responsibility and, for those in federal government service, under the federal ethics laws and regulations applicable to executive branch employees. This article discusses the federal ethics rules that require attention whenever an attorney is entering or leaving government service with the Department of Justice (Department). It focuses primarily on the potential conflicts and recusal obligations of an attorney making such a transition and suggests ways that an attorney can address conflicts and ensure that recusal

obligations are met. The rules of professional responsibility are addressed in a separate article in this issue.

II. Entering government service

Attorneys entering government service in the Department are subject to federal conflict of interest statutes and executive branch standards of conduct as well as Department-specific regulations. Attorneys should consider the requirements of conflict of interest laws as they separate themselves financially from a former employer such as a law firm. Moreover, they will have recusal obligations with respect to a former employer and former clients even if all financial ties with that employer are immediately terminated. In some circumstances, a new Department attorney will need to consider the Department regulation which prohibits the outside practice of law.

A. Separation from private practice

Attorneys joining the Department should consider a number of ethics issues if they are separating from a private practice. If they have worked for a law firm, they may be disengaging themselves from various financial interests and relationships with a former firm. For an attorney coming from a salaried position with a law firm, the process of disengagement may be relatively simple and may be completed upon resignation from the firm. However, for attorneys who are partners in a law firm, the process can be more complicated. The attorney will be receiving a payment from his or her capital account and may also be entitled to various other payments such as a severance payment, undistributed partnership share, or an unpaid bonus. In addition, the attorney may have vested in a law firm retirement plan. Some firms may be able to make these payments in a single lump sum prior to the date of appointment; however, other firms may make a series of payments that could continue until after the attorney has begun service with the Department. In such a case, the attorney will have a financial stake in the receipt of those payments. Under the conflict of interest statute, 18 U.S.C. § 208 (2008), the attorney must be recused from any matter that would affect the ability or willingness of the firm to honor its obligation to make those payments. Generally, there are few particular matters that could have such a significant effect upon a former firm. Moreover, these conflicts are not difficult to monitor and the screening arrangement for avoiding working on any particular matters that might affect the former firm is relatively straightforward. This recusal under § 208 does not usually exceed in duration the recusal under the impartiality standard discussed below because such payments are typically completed within a year of withdrawal from the firm.

A new Department attorney whose former private practice involved contingency fee arrangements should consider the application of 18 U.S.C. § 203 (2008), which prohibits the acceptance of compensation for representational services, even if provided by another, in connection with any matter in which the United States is a party or has a direct and substantial interest. Because an ongoing contingency fee case will continue to involve representation, an incoming attorney must take steps to ensure that he or she does not share in any earnings based on the representations that occurred after the attorney has joined the Department. If the attorney turns a case over to another attorney to handle, the § 203 issue can be resolved by agreeing upon a fixed amount that is not dependent upon the outcome and which represents payment for the work done on the case prior to joining the Department. If a satisfactory arrangement cannot be reached, the attorney may have to forfeit the right to the fee.

A new Department attorney should also consider the application of 18 U.S.C. § 205 (2008), which prohibits the acceptance of a fee award "in consideration of assistance in the prosecution" of a claim against the United States. 18 U.S.C. § 205(a)(1) (2008). For example, § 205 could prohibit an attorney from accepting attorney's fees for work on a case involving a claim against the United States even though that work was completed before the attorney joined the Department. A petition for attorney's fees to be paid by the United States is a claim against the United States where the fee petition is incident to the underlying claim. A new attorney who may be entitled to receive payments arising out of claims against the United States should consult with a Department ethics official to determine whether § 205 would apply to the acceptance of the payment.

The Department's Supplemental Regulation generally prohibits a Department attorney from engaging in the outside practice of law, with certain limited exceptions. 5 C.F.R. § 3801.106 (2009).

Attorneys, therefore, must wind up their affairs with their former firm prior to joining the Department and cannot continue to handle a case or work on a client matter. There is an exception that would allow a waiver where the prohibition on the outside practice of law would unduly "prohibit an employee from completing a professional obligation entered into prior to [g]overnment service." 5 C.F.R. § 3801.106(b)(2) (2009). Thus, in rare and limited circumstances of a very short duration, an attorney may be given permission to complete a professional obligation provided that no compensation is received for this work and that the United States is not a party or does not have a direct and substantial interest.

B. Recusal based on relationship with a former firm and former clients

An attorney entering government service has a so called "covered relationship" with a former law firm or former client under the administrative standards of conduct. 5 C.F.R. § 2635.502(b)(1)(iv) (2009). Under the impartiality standard, a Department attorney is obligated to consider recusal from a specific party matter in which the former firm or former client is a party or represents a party. 5 C.F.R. § 2635.502(a) (2009). This applies only to the clients for which the Department attorney personally provided legal services. It does not extend to all the clients of the firm. However, there is no de minimis amount of service. If the attorney performed any work on a client matter, that person is a personal client. Nevertheless, in such cases, it may be appropriate to waive the disqualification. The recusal obligation is measured for 1 year from the date that the attorney last provided services to that client.

C. Recusal based on relationship with a spouse's firm and clients

A Department attorney also has a covered relationship with a spouse's employer and a spouse's personal clients, 5 C.F.R. § 2635.502(b)(1)(iii), and therefore may not work on a specific party matter in which the spouse's firm or personal client is a party or represents a party. A Department attorney is not recused from a specific party matter that involves a client of the spouse's firm that is not the spouse's personal client, as long as the firm itself is not representing that client in a specific party matter. If the spouse is a partner in a law firm, the conflict of interest statute, 18 U.S.C. § 208 (2008), applies and the scope of the recusal is broader. It covers not only cases with formal parties but also policy making or rulemaking.

A Department attorney who is coming from a law firm needs to provide an appropriate person with a list of the attorney's former clients, including the date that service was last provided, if known, so that the gatekeeper will be able to effectively screen matters that are covered by the recusal. Attorneys will also need to provide a screener with the name of a spouse's employer and a list of the spouse's current clients. The list of a spouse's clients should be updated whenever changes occur.

D. Recusal based on personal or political relationships

A new Department attorney should be aware of the Department regulation that bars participation in a criminal investigation or prosecution if the attorney has a personal or political relationship with a person or organization (1) who is substantially involved in the conduct being investigated or prosecuted, or (2) whom the attorney knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution. 28 C.F.R. § 45.2(a) (1996). A political relationship arises from a close identification with an elected official, candidate, political party, or campaign organization through service as a principal advisor or official. An employee is presumed to have a close personal relationship with a father, mother, brother, sister, child, or spouse. Other relationships, such as friendships, may be personal within the meaning of the regulation where the association is sufficiently close that it would be viewed as creating partiality.

A Department attorney who believes that his or her participation in an assigned matter would be covered by the prohibition must notify a supervisor and provide sufficient facts to enable the supervisor to determine whether the matter should be reassigned. 28 C.F.R. § 45.2(b) (1996). A supervisor may determine in writing that the relationship will not affect the attorney's impartiality and will not create an appearance of a conflict of interest or a loss of integrity of the investigation or prosecution.

III. Leaving government service

A Department attorney who is planning on leaving government service should make consideration of the applicable ethics laws and regulations a key part of this transition. The recusal obligation that comes into play as soon as the attorney begins to seek employment is of immediate concern. Beyond that, the attorney should consider the ethical restrictions that follow him or her after leaving government service. The best time to plan for addressing post-employment restrictions is prior to leaving government service. For example, identifying matters that an employee worked on at the Department is a much easier task if it is completed prior to leaving the Department. Generally speaking, a Department attorney is not barred from seeking and accepting employment with any particular private sector employer unless the attorney served as a procurement official subject to the provisions of the Procurement Integrity Act. 41 U.S.C.A. § 423 (West 2002).

A. Seeking employment

A Department attorney who begins to seek outside employment should consider recusal obligations under both the administrative standards of conduct, 5 C.F.R. § 2635.604(a) (2009), which apply to unilateral contacts, and the criminal conflict of interest statute, 18 U.S.C. § 208 (2008), which applies to employment negotiations. An attorney is disqualified from participating in any particular matter that would affect the financial interests of a prospective employer with whom the attorney is seeking employment.

One way contacts and communications. An attorney's recusal obligation is triggered even before an actual negotiation is underway. The definition of "seeking employment" in the administrative standards of conduct covers not only bilateral negotiations but also certain unilateral contacts or communications by either side. 5 C.F.R. § 2635.603(b) (2009). For example, if a Department attorney submits a resume to a law firm or calls the firm and expresses interest in working for the firm, the attorney has begun to seek employment with that firm and must be recused. However, a communication made solely for the purpose of requesting a job application or inquiring as to whether the firm is hiring would not be considered seeking employment. If the law firm initiates the contact with a Department attorney by asking if the attorney would be interested in employment with the firm, the attorney will have begun seeking employment with the firm if he or she makes any response other than a clear rejection of the unsolicited employment overture. For example, a response that merely postpones or delays an answer would not be a definitive rejection.

Two way employment discussions. The recusal obligation under § 208 applies whenever an attorney has an agreement or arrangement, or is engaged in negotiation, for future employment. A negotiation begins whenever there is a mutual discussion or communication with a person with a view toward reaching an agreement regarding future employment. 5 C.F.R. § 2635.603(b)(1)(i) (2009). A negotiation may require more than an initial expression of interest in working at a law firm and an affirmative response by the firm. Conversely, if the law firm reaches out to recruit a Department attorney and the attorney expresses an interest in employment discussions, a negotiation may not necessarily have begun although the attorney must still be recused under the administrative regulation. However, it is important to note that negotiation is a much broader concept than might commonly be understood and occurs well before a discussion of specific terms and conditions of employment such as compensation. Negotiation occurs whenever there is an expression of mutual interest in reaching an agreement regarding employment.

Matters covered. The recusal obligation under both 18 U.S.C. § 208 (2008) and 5 C.F.R. § 2635.604 (2009) applies to any "particular matter" that will affect the financial interest of the prospective employer. A "particular matter" is any matter that: involves specific parties, such as litigation; covers a judicial or other proceeding; is an application or a request for a ruling or other determination; is a controversy; is a contract, claim, charge, accusation, or arrest; or involves a deliberation, decision, or action focused on the interests of specific persons, or a discrete and identifiable class of persons. 5 C.F.R. § 2635.402(b)(3) (2009). Thus, a "particular matter" includes rulemaking and legislation or policy that is narrowly focused on the interests of an identifiable class of persons. If a

Department attorney is uncertain as to whether a matter is a "particular matter," the attorney should consult an ethics official.

Use of third-party intermediaries. A Department attorney may be considered to be seeking employment even though the communication is made through a personal friend, search firm, or other intermediary. 5 C.F.R. § 2635.603(b)(1)(i) (2009). For example, if either the Department attorney or a law firm uses an employment search firm, the law firm will be considered to be a prospective employer when the law firm is identified. A completely blind search through an intermediary would not be disqualifying. However, as soon as the Department attorney knows the identity of the law firm, that firm is considered a prospective employer and disqualification from matters affecting that firm is required.

When seeking employment ends. Because not all seeking employment efforts lead to actual employment, it is important to know when an attorney is no longer seeking employment. If an attorney has submitted an unsolicited resume or employment proposal and has received no indication of interest from a prospective employer after 2 months, then seeking employment with that employer will have ceased. 5 C.F.R. § 2635.603(b)(2) (2009). Seeking employment also ends when either the attorney or the prospective employer rejects the possibility of employment and all discussions of employment have terminated. Depending on the circumstances, a recusal may continue for some amount of time after seeking employment has ended.

Notification and documentation of recusal. An attorney is not required to notify a supervisor that he or she has begun a job search or even that the attorney has had job discussions with a potential employer. However, an attorney who has been assigned to work on a case that would call for recusal should not work on the matter and should notify the person responsible for the assignment. 5 C.F.R. § 2635.502(e)(1) (2009). Although a written disqualification is not required by regulation, it is a recommended practice in order to document the recusal. 5 C.F.R. § 2635.502(e)(2) (2009).

B. Post-employment restrictions

The federal post-employment restrictions are set forth in 18 U.S.C. § 207 (2008). This section contains six distinct post-employment restrictions which could potentially apply to a former Department attorney, depending on such factors as the kind of matter, the degree of involvement, and the type of position. However, most post-employment questions concern the permanent ban on switching sides in a matter on which the attorney personally worked, the 2-year restriction on matters that were under the former attorney's official responsibility, and the 1-year restriction on contacts with the Department by a former employee who served in a senior position.

Permanent restriction for matters personally worked on. Under 18 U.S.C. § 207(a)(1) (2008), a former Department attorney is barred from representing a private party on a specific party matter in which the attorney participated personally and substantially while working for the Department. This restriction lasts for the life of the specific party matter. A court case with named parties is the clearest example of a specific party matter, but the concept includes any matter that will affect the legal rights of specific individuals. This would include an investigation, charge, accusation, arrest, or enforcement action and also includes contracts, grants, licenses, and approvals involving specific parties.

The restriction prohibits the former Department attorney from making any communication to, or appearance before, an employee of the United States with the intent to influence that employee on the covered matter. Notably, this statute does not prohibit a former attorney from providing behind the scenes assistance. Former Department attorneys will need to consult applicable bar rules with respect to behind the scenes assistance. Model Rules of Professional Conduct Rule 1.11, for example, requires screening in such cases.

Two-year restriction for matters under official responsibility. Under 18 U.S.C. § 207(a)(2) (2008), a former Department attorney is barred from representing a private party on a specific party matter that was actually pending under the attorney's official responsibility during the attorney's last year in government service. This restriction lasts for 2 years from the date the attorney left government service. A matter is considered to have been actually pending if it was referred to the attorney for assignment or was referred to, or under consideration of, a person the attorney supervised. 5 C.F.R. § 2641.202(j) (2009). The fact that an attorney is disqualified from participating personally in a specific party matter

does not remove that matter from the attorney's official responsibility. A Department ethics official can assist a former Department attorney who is uncertain as to whether a matter was actually pending under the attorney's official responsibility.

One year restriction on contacting former agency. The third major post-employment restriction imposes a 1-year cooling off period on certain senior officials. 18 U.S.C. § 207(c) (2008). This restriction is tied to the amount of pay the officials receive. Persons who are paid under the Executive Schedule, certain members of the Senior Executive Service, certain Administrative Law Judges, and persons whose pay is equal to or greater than 86.5 percent of level II of the Executive Schedule are covered. 18 U.S.C. § 207(c) (2008).

A recent change in the pay structure for Senior Level (SL) and Scientific or Professional (ST) positions, effective on April 12, 2009, means that some persons serving in these positions will be subject to the 1-year restriction. The Senior Professional Performance Act of 2008, Pub. L. No. 110-372, § 2, 122 Stat. 4043 (2008), essentially merged base pay and locality pay for SL and ST positions. There are nearly 100 positions in 14 Department components in the SL series. If a person serving in one of these SL positions is paid at a pay threshold that will trigger the restriction, they will be subject to the 1-year cooling off restriction required under § 207(c). In 2009, the threshold is $153,105. Thus, a person serving in an SL position who is paid at or above $153,105 on the effective date of the new pay system, April 12, 2009, is subject to the 1-year restriction as a senior employee. *Id.*

Former Department attorneys who served in a senior position are barred for 1 year after leaving the senior position from making, with the intent to influence, any communication to or appearance on behalf of another person before their former agency on any matter, without regard to the former senior employee's prior involvement in the matter. The scope of this restriction depends upon the component that the attorney worked in. If the former attorney served in a separate designated component, then the attorney is only barred from communications with that component. A former senior attorney who served in a component that was not designated as separate is barred from communicating with all non-designated components. Former Executive Level employees are barred from communicating with the entire Department. United States Attorneys do not serve in an Executive Level position. A former United States Attorney is barred for 1 year from making covered communications with the office in which the former United States Attorney served, as well as with the Executive Office for United States Attorneys. Former United States Attorneys are not barred by 18 U.S.C. § 207(c) (2008) from communications with other U.S. Attorney's offices which are each designated separate components.

Other post-employment restrictions under § 207. Three other provisions of the post-employment law arise less frequently, either because they concern specialized subject matter or apply only to a small class of former attorneys. Nevertheless, attorneys should be aware of these other restrictions that could apply, depending upon the kind of matters they worked on and the position in which they served. For example, 18 U.S.C. § 207(b) (2008) prohibits all former Department attorneys from providing even behind-the-scenes assistance concerning an ongoing trade or treaty negotiation that the attorney worked on during the last year of government service. Another post-employment restriction, 18 U.S.C. § 207(f) (2008), applies only to senior and very senior officials and prohibits them from representing, aiding, or advising a foreign government or foreign political party back before the government. Finally, under 18 U.S.C. § 207(d) (2008), a former very senior official is prohibited from contacting an executive branch official serving in an Executive Level position. For the Department, the only very senior position is the Attorney General.

Restriction on sharing in fees. Former Department attorneys are prohibited by 18 U.S.C. § 203 (2008) from receiving or sharing in compensation for representational services, even when provided by another, in connection with a matter in which the United States is a party or has a direct and substantial interest, if the representation occurred during the time when the former attorney was working for the Department. For example, an attorney who joined a law firm as a partner would not be able to share in fees for representations that occurred during the time that the attorney was employed by the Department. Section 203 also makes it a violation of the statute for the payer of such compensation. This potential conflict is generally resolved in one of two ways. The firm may have an accounting system that allows it to segregate the fees it earned from representations before the government and to ensure that the former Department attorney's share of partnership profits does not include any such fees, or the firm may arrange

to pay the former Department attorney a fixed salary for a period of time until those billings have worked their way through the system, and the attorney may then begin sharing in firm profits.

Post-employment advice. The post-employment laws can present a host of highly technical questions. When is a matter the same specific party matter that a former attorney worked on while with the Department? When is a communication made with the intent to influence? When is a communication intended to be attributed to a former Department attorney? When is public commentary considered a prohibited communication or appearance? These questions involve the application of highly technical criminal statutes to complex facts. Federal ethics regulations expressly provide that an attorney who has left the Department may continue to request and receive advice from Department ethics officials regarding their obligations under the post-employment laws. 5 C.F.R. § 2641.105 (2009). A former Department attorney will not be deemed to be acting on behalf of another person by contacting a Department ethics official regarding the meaning of 18 U.S.C. § 207 (2008) or its application to the attorney's activities. A Department ethics official can assist a former Department attorney in interpreting and applying this statute. A Department ethics official can also assist a former Department attorney in determining whether a matter was pending under the attorney's official responsibility or whether a case is the same specific party matter as a case that the attorney worked on while employed by the Department.

IV. Rules applicable to political appointees under the Executive Order

Political appointees to full-time, non-career positions are subject to additional revolving door restrictions under Executive Order 13490 of January 21, 2009. 74 Fed. Reg. 4673 (Jan. 26, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf. Appointees are required to sign an Ethics Pledge which extends time periods and expands the scope of recusal obligations upon entering government service beyond those established under the administrative standards of conduct. Moreover, upon leaving government service, appointees in senior positions are subject to an extended ban on contacting their former agency. Finally, there are special lobbying related restrictions that apply to political appointees upon entering and leaving government service.

A. Restrictions upon entering government service

Paragraph 2 of the Ethics Pledge bars an appointee for a period of 2 years from the date of appointment from participating in any specific party matter that is directly and substantially related to a former employer or a former client. *Id.* A former employer is any person whom the appointee has served as an employee, officer, director, trustee, or general partner during the 2 years prior to appointment. *Id.* at 4674. A former client includes only those persons whom the appointee has served personally as an attorney, agent, or consultant during the 2 years prior to appointment. *Id.* For example, the restriction applies only to an appointee's former personal clients and not other clients of an appointee's former law firm for whom the appointee did not personally provide services. *Id.* at 4674-75.

The Ethics Pledge expands the definition of specific party matter under 5 C.F.R. § 2641.201(h) (2009) to include any meeting or communication with a former employer or former client that relates to an appointee's official duties. *Id.* at 4674. The practical effect of this expanded definition is to virtually preclude any communication with a former employer or former client that involves the official business of the Department. The only exception to this ban is for a meeting or other event that is open to all interested parties and that deals with a particular matter of general applicability, such as general policy or legislation. An appointee may participate in such an event even though a former employer or client is in attendance.

The Office of Government Ethics (OGE) has provided guidance as to when an event is considered open to all interested parties. The event need not be open to all comers but will be considered open if at least five distinct stakeholders are in attendance. Thus, there is an exception to the ban on communications with a former employer or client for a five stakeholder event that deals with general policy. OGE has also advised that an appointee is not precluded from consulting with experts at educational institutions and think tanks on general policy matters provided that the organization does not have a financial interest, as opposed to an academic or ideological interest.

Paragraph 3 of the Ethics Pledge bars an appointee who was a registered lobbyist during the 2 years prior to appointment from participating in any particular matter that the employee lobbied on during that 2-year period or in any specific issue area in which that particular matter falls. *Id.* This restriction applies for 2 years from the date of appointment. In addition, a former registered lobbyist may not seek or accept employment with any executive agency that the appointee lobbied during the 2 years prior to appointment. *Id.*

B. Restrictions upon leaving government service

Paragraph 4 of the Ethics Pledge applies to any appointee who is subject to the 1-year cooling off period under 18 U.S.C. § 207(c) (2008) at the time of the appointee's departure from government service. It extends that 1-year period to 2 years from the end of the appointment. *Id.* This restriction only extends the duration of the § 207(c) restriction and does not otherwise alter its substance. So, for example, the component designations that limit the scope of section 207(c) for some Department senior officials are applicable, except for the restriction on lobbying contained in Paragraph 5.

Paragraph 5 of the Ethics Pledge adds an additional restriction on lobbying for appointees who are subject to Paragraph 4. *Id.* It bars the former appointee from lobbying "any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration." *Id.* Lobbying means to act as a registered lobbyist under the Lobbying Disclosure Act. *Id.* at 4674.

V. Conclusion

This article is intended to alert attorneys to the ethical considerations involved in making this career transition. Current Department attorneys are encouraged to contact an ethics official whenever they have questions regarding these or other ethics rules. Former Department attorneys may continue to contact a Department ethics official after they have left government service regarding their obligations under the post-employment law. A clear understanding of applicable ethical requirements is key to making such career transitions smoothly and successfully.❖

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Not Your Problem? Not So Fast: Opposing Counsel Conflicts and Your Professional Responsibilities

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I. Introduction

There are a number of contexts in which a Department of Justice attorney may learn during the course of a criminal or civil proceeding that opposing counsel has a conflict of interest in representing his or her client. In some cases, opposing counsel may not be aware of the conflict, such as when the government is investigating opposing counsel for criminal conduct. In most situations, however, the attorney's prior or impending employment, former or current representation of another client, or conduct in a particular case, may create a conflict that is apparent to all parties involved. This article explores a variety of situations in which conflicts of opposing counsel may arise. For purposes of this article, analysis of these issues will reference the ABA Model Rules of Professional Conduct, which forms the basis for almost every state's rules of professional conduct.

II. General discussion of opposing counsel conflicts of interest

A. Rules relating to opposing counsel conflicts of interest

> ABA Model Rule 1.7, the general rule regarding current conflicts of interest, provides:
>
> 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: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009). One way of considering whether a conflict of interest exists in a particular situation under ABA Model Rule 1.7(a)(2) is to ask whether the lawyer must pull his or her punches in representing a client because of other obligations to current or former clients under the rules of professional conduct; another is to ask whether the lawyer would likely do so because of some personal interest. Some of these obligations to other current and former clients, including duties of loyalty and confidentiality, are set forth in other ABA Model Rules, such as ABA Model Rules 1.6 (Confidentiality of Information), 1.9 (Duties to Former Clients), 1.10 (Imputation of Conflicts of Interest: General Rule), and 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees). These rules will be discussed in context below, but for now it is sufficient to say that these obligations may hinder an attorney's representation of a client where, for example, sharing another client's confidential information with a current client would be helpful to the current client, but the lawyer is constrained from doing so by the rules.

Even if opposing counsel has a conflict of interest, his or her client may, in some circumstances, consent to representation by that attorney. ABA Model Rule 1.7(b) sets forth the criteria for consent as follows:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009). All four criteria must be met for a client to be able to consent to representation by counsel notwithstanding a conflict of interest. Although the question of when representation may be prohibited by law is a substantive legal question, that question nonetheless informs whether counsel may represent a party consistent with the rules of professional conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (2009). Not all conflicts may be resolved with consent. *See United States v. Schwarz*, 283 F.3d 76, 95 (2d Cir. 2002) ("An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation."). The question of whether an attorney may represent a co-defendant or witness in addition to a defendant is certainly one that needs to be addressed under ABA Model Rule 1.7(b)(3). Sometimes, in order to ensure that a party's consent is "informed," as required by ABA Model Rule 1.7(b)(4), it may be necessary to make a record of such consent in court rather than simply relying upon the assurances of opposing counsel that consent has been given.

B. Reasons for raising opposing counsel conflicts

The rules of professional conduct provide that attorneys have a duty to represent their clients competently and diligently. ABA Model Rule 1.1 (Competence) states, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rule 1.3 (Diligence) states, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Department attorneys must represent their client, the United States, in a competent and diligent manner. The responsibility to protect the integrity and finality of a proceeding is embedded in the duties of competence and diligence. If opposing counsel in one of your cases is laboring under a conflict of interest, the proceeding later may be subject to attack.

In criminal cases, it may be necessary to raise conflict of interest concerns pertaining to defense counsel with the court. "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' U.S. CONST. amend. VI. This right to counsel includes a 'correlative right to representation that is free from conflicts of interest.' " *United States v. Williams*, 372 F.3d 96, 102 (2d Cir. 2004) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). *See also Wheat v. United States*, 486 U.S. 153, 161 (1988) ("[T]he trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment."); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) ("Although a defendant who raises an ineffective assistance of counsel claim is ordinarily required to show prejudice, prejudice is presumed if the alleged violation is based on an actual conflict of interest." (internal citations omitted)). Sixth Amendment case law recognizes that a defendant is not entitled to counsel of choice if that counsel is encumbered by a conflict of interest which would undermine a defendant's constitutional rights. Accordingly, a duty to represent the United States competently and diligently by addressing opposing counsel's conflicts of interest is particularly important in criminal proceedings, where there is a risk that a criminal defendant may later raise an ineffective assistance of counsel claim based on defense counsel's conflict of interest. It should be noted, however, that even where an attorney's conflict would not rise to the level of a Sixth Amendment violation, it may still create a conflict under the rules of professional conduct.

A conflict of interest also may arise in a civil proceeding. The government also has an interest in the integrity and finality of civil proceedings, considering the expenditure of resources during the litigation process and any relief that may be at stake. A few courts notably have overturned judgments because counsel had a conflict of interest. *See Ames v. Miller*, 184 F. Supp. 2d 566, 577 (N.D. Tex. 2002) (granting plaintiffs relief from summary judgment in favor of defendants, after judgment was affirmed on

appeal, on the grounds that plaintiffs were not adequately represented by counsel who were laboring under a conflict of interest and relief was necessary "to accomplish substantial justice"); *Marderosian v. Shamshak*, 170 F.R.D. 335 (D. Mass. 1997) (granting relief from judgment where defense counsel's conflict of interest had been unaddressed prior to judgment). Accordingly, it may be important to discuss such a conflict with opposing counsel and determine whether, in certain circumstances, reporting the conflict to the court would be appropriate.

C. Standing to raise opposing counsel conflicts

A number of cases discuss the issue of whether a party—here, the United States—has standing to raise the issue of opposing counsel's conflict of interest with the court. Citing different justifications, courts consistently have held that a criminal prosecutor has standing to raise the issue of defense counsel's conflict of interest with the court and to seek disqualification of the conflicted attorney. These justifications include the "overriding" interest of a prosecutor to "seek justice" and the ethical duties imposed upon lawyers as officers of the court. *See United States v. Lara Alvarez*, 96 Fed. Appx. 166, 170 (4th Cir. 2004) (where defense counsel for a drug dealer represented a drug purchaser in an unrelated case, and the drug purchaser allegedly paid an attorney to represent the drug dealer, "the government had a duty to bring to the district court's attention the potential conflict of interest," which it did) (citing *United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991)). Courts also are mindful of practical considerations: "Convictions are placed in jeopardy and scarce judicial resources are wasted when possible conflicts are not addressed as early as possible." *United States v. Stantini*, 85 F.3d 9, 13 (2d Cir. 1996). Whatever rationale is invoked, prosecutors are routinely exhorted to advise the court of any conflicts at the earliest possible stage of the proceedings and as circumstances warrant. *See, e.g.*, *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir. 1995) (government should inform court of potential conflicts "at the earliest possible moment"); *United States v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994) (when case was reassigned to new judge, and the government had raised the conflict with the original judge, the government should have informed the new judge as well); *Mannhalt v. Reed*, 847 F.2d 576, 583-84 (9th Cir. 1988) ("We trust that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.").

Case law is less consistent with respect to whether a party has standing to raise opposing counsel's conflict with the court in civil cases. Courts have recognized that the need to protect a case from future challenges based on a conflict of interest, as well as a general duty to protect the integrity of a proceeding, justifies one party raising the conflict of another party in a civil case. *See Adams v. Village of Keesville*, Civ. No. 8:07-CV-452 (LEK/RFT), 2008 WL 3413867, at *10 (N.D.N.Y. Aug. 8, 2008) ("Given the court's oversight obligation, a motion to disqualify an attorney, even if brought by an unaffected party, is an appropriate means by which to bring the conflict issue to the court's attention."); *Jamieson v. Slater*, No. CV 06-1524-PHX-SMM, 2006 WL 3421788, at *5 (D. Ariz. Nov. 27, 2006) (holding that it was appropriate to raise defense counsel's conflict in part because an ethical breach by opposing counsel (here, operating with a conflict of interest) "would likely have a negative impact on [plaintiff's] interest in obtaining a just and lawful determination of the claims at issue"). One Ninth Circuit case even discussed "the government's failure to move to disqualify" opposing counsel when it had reason to know that a potential conflict of interest existed as "the government's failure to act." *United States v. Associated Convalescent Enters., Inc.*, 766 F.2d 1342, 1347 (9th Cir. 1985).

A number of district courts have followed the standard announced in *Colyer v. Smith*, 50 F. Supp. 2d 966 (C.D. Cal. 1999), which held that third parties did not have standing to raise opposing conflicts except that "in a case where the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims, she may have the constitutional standing needed to bring a motion to disqualify based on a third-party conflict of interest or other ethical violation." *Id.* at 971-72. *See, e.g.*, *Simonca v. Mukasey*, No. CIV S-08-1453 FCD GGH, 2008 WL 5113757 (E.D. Cal. Nov. 25, 2008); *Moreno v. Autozone, Inc.*, No. C05-04432 MJJ, 2007 WL 4287517 (N.D. Cal. Dec. 6, 2007); *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153 (W.D. Wash. 2006). Even those civil cases holding that the moving party did not have standing to raise opposing counsel's conflict nonetheless acknowledge that standing may exist where the conflict in question is

"manifest and glaring" or "open and obvious and confront[s] the court with a plain duty to act." *In re Yarn Processing Patent Validity Litig*., 530 F.2d 83, 89 (5th Cir. 1976).

III. Four red flag scenarios

Although conflicts arise in myriad circumstances, here are four situations in which opposing counsel conflicts may exist.

A. Where counsel's former or current representation of another client creates a conflict of interest

If an attorney is representing two co-defendants, or even a defendant and a witness, in a criminal case, the situation may implicate ABA Model Rule 1.7(a)(1) if the two clients have or develop directly adverse positions (which may be especially difficult to reconcile if the attorney has to cross-examine one or both individuals). However, a lawyer's representation of a current client also may be materially limited under ABA Model Rule 1.7(a)(2) by duties to another current or former client. This is because the lawyer would not be able to use confidential information obtained from that other client in representing his current client, even if such information would be helpful to the current client's case (as it is unlikely that the other client would consent to the attorney's disclosure of the other client's confidential information).

A lawyer's duty of confidentiality is set forth in ABA Model Rule 1.6 (Confidentiality of Information), which states, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." Such confidential client information is not limited to information protected by the attorney-client privilege; rather it includes "all information relating to the representation, whatever its source." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2009). An attorney's confidentiality duties apply forever. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2009) ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2009) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.").

ABA Model Rule 1.9 (Duties to Former Clients) explicitly defines a lawyer's duty to former clients. ABA Model Rule 1.9(a) prohibits an attorney who formerly represented a client from representing another person with materially adverse interests in the same or a substantially related matter absent consent from the former client. ABA Model Rule 1.9(b) similarly prohibits an attorney from representing a client where an attorney's firm formerly represented another client with materially adverse interests in the same or substantially related matter, absent consent from the firm's former client, where the lawyer had acquired confidential information material to the matter. ABA Model Rule 1.9(c) explicitly defines restrictions on an attorney's ability to reveal and use a former client's confidential information:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2009).

When a lawyer has obligations under ABA Model Rule 1.6 and/or ABA Model Rule 1.9, those duties may materially limit a lawyer in representing a current client because confidential information of the former or other client that is beneficial to the current client cannot be shared or used unless the former or other client consents. Even if counsel withdraws from representing one of two current clients, the lawyer may not be able to continue representing the remaining client because of Rule 1.6 and Rule 1.9 obligations to the first client.

Remember that not every conflict can be resolved through consent. Although a current client may consent to the representation notwithstanding a conflict created by duties under ABA Model Rules 1.6

and 1.9 to another current or former client, it is important to determine whether the criteria set forth in ABA Model Rule 1.7(b) can be and have been met. These criteria include requirements that the representation not be prohibited by law and that the client provides informed consent. Case law acknowledges that, as a substantive matter, the representation may not be permitted by law in certain circumstances in criminal cases because of Sixth Amendment and other concerns. *See United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (court concluded that defense counsel had an unwaiveable conflict of interest where counsel's firm had a multi-million dollar retainer agreement with an organization whose interests conflicted with the defendant); *United States v. Williams*, 81 F.3d 1321, 1324-25 (4th Cir. 1996) (well within district court's discretion to disqualify defense counsel "who had represented a significant potential witness for the government with respect to the same crime"); *United States v. Moscony*, 927 F.2d 742, 749-50 (3d Cir. 1991) (court properly disqualified defense counsel who had previously represented prospective government witnesses).

Finally, former and other client conflicts are not limited to criminal cases. Attorneys in civil cases also have duties of confidentiality to their clients and operate under the restrictions set forth in ABA Model Rules 1.6 and 1.9 with respect to taking positions against their current or former clients, or sharing confidential client information of their current or former clients. An attorney who represents a corporation and specific employees of that corporation may risk operating under a conflict of interest depending on the circumstances involved, such as when the employees and the corporation have opposing interests.

B. Where counsel's former or future employment creates a conflict of interest

An attorney's former or future employment may create a conflict of interest for an attorney in a given case. For example, if opposing counsel has worked for the Department, or is leaving his or her current employment to begin working for the Department, the attorney may have a conflict of interest in representing his or her current client against the Department.

The analysis is more straightforward if opposing counsel is seeking or has obtained employment with the Department. Again, pursuant to ABA Model Rule 1.7(a)(2), one would assess whether, because of opposing counsel's impending employment by the Department, "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Here, the concern is that the lawyer's personal interest in obtaining a job with the Department, or currying favor with his or her new employer, would cause the attorney to represent the client less vigorously than he or she otherwise might. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-400 (1996) (discussing job negotiations, stating that one should consider the nature of the lawyer's representation of a client and the extent to which the attorney's interest in a firm is concrete and has been communicated and reciprocated in order to determine if a conflict exists).

Additional considerations apply if an attorney formerly worked for the Department. Here, the attorney's representation of the current client is limited by the attorney's obligations to the United States. ABA Model Rule 1.11(a) (Special Conflicts of Interest for Former an Current Government Officers and Employees) states that a former government employee cannot represent a client, even if the client were to consent, where that lawyer previously participated in the matter personally and substantially, absent the government's consent. ABA Model Rule 1.11(b) clarifies that absent timely screening of that lawyer and written notice to the government agency, no other lawyer in that firm may undertake the representation either. Finally, ABA Model Rule 1.11(c) states that a lawyer who acquires confidential government information while employed by the government "may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person."

A number of cases discuss situations in which former government attorneys were outright prohibited from working on related matters. *See United States v. Phillip Morris Inc.,* 312 F. Supp. 2d 27 (D.D.C. 2004) (former Department attorney who had worked on tobacco litigation cases disqualified from representing company in related privilege litigation even though he denied working on tobacco cases and only admitted to working on rulemaking and even though he had not been counsel of record; matters substantially related because confidential information obtained in government representation could be used in representation of company); *see also In re Sofaer*, 728 A.2d 625 (D.C. 1999) (former State

Department attorney sanctioned for representing Libya in Pan Am bombing civil and criminal cases; the court found that participation in briefings on Pan Am investigation, among other things, constituted personal and substantial participation in the same or a substantially related matter).

Even where the prohibitions set forth in ABA Model Rule 1.11 would not apply, a former government lawyer may be limited by obligations to keep the confidences of his or her former client pursuant to ABA Model Rules 1.6 and 1.9 as discussed in the previous section. There may be situations where the Department may seek to disqualify a former Department attorney, and possibly his or her firm, if the representation would violate Rules 1.11, 1.6, or 1.9(c).

C. Where counsel is under investigation or being prosecuted by the government

When opposing counsel is under investigation, consider whether the attorney being investigated is aware that he or she is under investigation for criminal conduct, whether the conduct being investigated is related to a client's matter, and whether the entity conducting the investigation (for example, a United States Attorney's office) is the same entity investigating or prosecuting a particular client. The answers to these questions bear on an analysis under ABA Model Rule 1.7(a)(2) of whether the attorney would be materially limited in representing a client because of a personal interest in a favorable outcome with respect to the investigation of the attorney. If the attorney is aware of the investigation and/or it is related to conduct of the attorney's client, it may be particularly important to consider raising the conflict with the court not only for an assessment of whether the client has provided informed consent but also to determine whether consent can be given as a matter of substantive law. *See United States v. Williams*, 372 F.3d 96, 105 (2d Cir. 2004) (actual conflict of interest existed where defendant's pretrial attorney engaged in criminal activity with the defendant of the same type as that being prosecuted); *United States v. Register*, 182 F.3d 820, 828-34 (11th Cir. 1999) (upholding district court's disqualification of defense counsel who was being investigated for involvement in his client's criminal activity and rejecting defendant's attempted waiver of conflict and argument that the government's efforts to disqualify counsel were simply "strategic maneuvering" by the prosecutors to get rid of a formidable opponent). *But see United States. v. Novaton*, 271 F.3d 968, 1010-12 & n.12 (11th Cir. 2001) (declining to reverse conviction on grounds that defense counsel was implicated in an investigation by the same United States Attorney's office in connection with a different case where there was no evidence that representation was actually affected, but noting that both defense attorney and prosecutors should have notified defendant and court about circumstances surrounding the potential conflict).

D. Where counsel's conduct or advice is at issue in the case

When defense counsel indicates that his or her client may rely on the advice of counsel defense, and/or counsel's conduct in a particular case is at issue, counsel may have a personal conflict of interest under ABA Model Rule 1.7(a)(2). The lawyer's personal interest may be his or her own reputation or trying to avoid any liability in connection with his or her own actions. Comment [10] to ABA Model Rule 1.7 in part clarifies that, stating "[a] 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." Note that in some cases, the court has held that an attorney in this situation should be disqualified. *See, e.g.*, *Lease v. Rubacky*, 987 F. Supp. 406, 407-08 (E.D. Pa. 1997) (court granted defendant's motion to disqualify plaintiff's attorney where lawyer represented himself and his law firm, along with the firm's client, in a breach of contract claim against a doctor, and where the client of the firm has a potential malpractice claim against the lawyer and his firm in relation to the facts giving rise to the suit; holding generally that where client's potential claims against a lawyer render her interests directly adverse to a lawyer representing himself, disqualification is appropriate because it is unreasonable to assume that the lawyer can adequately represent himself and his client).

Another consideration is whether other lawyers at a law firm—not just the lawyer whose conduct is at issue or against whom the advice of counsel defense is applied—have a conflict based on imputation principles. ABA Model Rule 1.10(a) (Imputation of Conflicts of Interest: General Rule) states, in relevant part, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client

when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm[.]" When a lawyer has a personal interest conflict because his or her advice is at issue, the issue is whether the lawyer's conflict would present a significant risk of materially limiting the representation of the client by other lawyers in the firm. An argument can be made that lawyers at the law firm may be significantly limited by their own interest in taking the side of the lawyer over that of the client because of their financial and business relationship with the lawyer, out of loyalty to the lawyer, and because any finding against the lawyer may impact the reputation or financial health of the law firm. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. [3] (2009) ("[I]f an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.").

However, with respect to both the lawyer at issue and the lawyer's firm, the ultimate question is whether the client may consent to representation notwithstanding a conflict. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.10(c) (2009) ("A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."). In both situations, ABA Model Rule 1.7(b) will determine whether consent may be given appropriately. *See Brennan v. Independence Blue Cross*, 949 F. Supp. 305, 309-10 (E.D. Pa. 1996) (disqualifying attorney and law firm, despite consent of the client, in part because attorney would be a necessary witness, on the ground that a client's choice of lawyer "must yield . . . to considerations of ethics which run to the very integrity of our judicial process" (internal citation and quotation omitted)).

Finally, this situation may also raise issues under ABA Model Rule 3.7 (Lawyer as Witness) that are beyond the scope of this article.

IV. Conclusion

Opposing counsel conflicts may affect the integrity and finality of a case a Department attorney litigates on behalf of the United States. Therefore, it is important to identify opposing counsel conflicts, discuss said conflicts with opposing counsel when appropriate, and determine whether reporting opposing counsel's conflict to the court would be appropriate or even necessary on a case by case basis.❖

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Who's on First? Lawyer Discipline Jurisdiction Under Federalism

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I. Introduction

Our system of federalism presents conceptual challenges when it comes to lawyer regulation. From state to state, things are relatively clear, in no small part because the states are physically separated. By contrast, a lawyer who is physically present in a state might be there for the sole purpose of conducting business in the federal courts located within the state. When a lawyer is physically present in a state, but jurisdictionally present in a federal court in that same state, things can get confusing.

Historically, lawyer regulation in the United States has mostly been within the sphere of state court activity, although not to the exclusion of the federal courts. Federal courts have traditionally looked to state courts in the first instance to determine basic qualifications for bar membership. And they have refrained from creating the administrative infrastructure to comprehensively regulate the lawyers who appear before them, relying to a large extent on the states to police the practicing bar, many of whose members also practice in federal court. In this environment, comity, communication, and coordination should be the watchwords.

II. Admission to practice in federal courts

Subject to rarely exercised supervision by the Supreme Court, the authority to decide who may practice in federal court belongs to the federal courts in which individuals seek permission to practice. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). Federal district courts could theoretically admit whoever they want to practice before them without regard to whether they have legal training or state-issued law licenses. This is a moot point, however, since by custom and practice, federal courts require, at a minimum, that applicants for admission be members of at least one underlying state bar. *See* Federal Rules of Appellate Procedure 46(B)(1)(a).

There is no national bar to which a lawyer may obtain admission in order to practice in all federal courts. Lawyers must qualify for admission on a court by court basis. Federal courts have diverse bar admission standards. Some allow admission to any lawyer with a license in good standing in any state. Others are not so generous and require admission to the bar of the state in which the federal court sits. The District of Puerto Rico goes a step further, requiring successful completion (with some exceptions) of a district bar examination. L. Cv. R. 83.1(a) (D.P.R. 2009), *available at* http://www.prd.uscourts.gov/CourtWeb/docs/rule_83_1.pdf.

Regardless of their state of bar admission, Department of Justice lawyers may practice in all federal courts (and state courts, for that matter) for purposes of representing the interests of the United States. 28 U.S.C. § 517 (1966). All federal courts admit lawyers on a temporary, case by case basis (known as *pro hac vice*). Once admitted to a federal court, the Supremacy Clause and the preemption doctrine preclude states from taking action that substantially interferes with a lawyer's authority to exercise that federally-granted license. *Sperry v. Florida*, 373 U.S. 379, 385 (1963).

III. Lawyer discipline under federalism

Federal courts have inherent authority to discipline and supervise the conduct of the lawyers they admit, albeit subject to appellate review. *In re Snyder*, 472 U.S. 634, 643 (1985). Once admitted to

practice in federal court, that admission stands independent of the state court license that initially supported federal court admission. Suspension or disbarment by the state does not result in automatic suspension or disbarment in federal court. *Theard v. U.S.*, 354 U.S. 278, 282 (1957); *Selling v. Radford*, 243 U.S. 46, 48-49 (1917).

When a federally admitted lawyer is suspended or disbarred in a state, the state's decision is entitled to "high respect, [b]ut it is not conclusively binding on the federal courts." *Theard*, 354 U.S. at 282. Most federal courts have demonstrated this respect by creating rules that defer to state court orders of discipline subject to the lawyer's right to show otherwise. Federal courts should impose reciprocal discipline unless "an intrinsic consideration of the record" reveals (1) a want of due process, (2) an infirmity of proof resulting in a clear conviction that the decision cannot be accepted as final, or (3) other grave reasons consistent with principles of right and justice. *Selling*, 243 U.S. at 51 (1917).

IV. Broad state disciplinary authority

Most states follow the ABA model rule on disciplinary jurisdiction:

> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ABA MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2009).

This authority is quite sweeping. Under this rule, a state has the authority to address the conduct of one of its bar members wherever it occurs. If the conduct occurs in another state or a federal court where the lawyer is also licensed, another state of licensure may address the conduct as a matter of regulatory power, but for prudential reasons may choose to defer to the regulation regime in the jurisdiction where the conduct occurred in the first instance.

If the conduct takes place in another jurisdiction where the lawyer is not admitted and the conduct is not law-practice related, if it is to be dealt with at all, it must be handled by a state of licensure. If an Indiana lawyer is arrested and convicted of a crime in New Orleans, it will be of no interest to the Louisiana lawyer regulators, but it may be of interest to those in Indiana, depending on the crime.

If the conduct occurs in another jurisdiction where the lawyer is not admitted, but the conduct is law practice related, the authority of the jurisdiction where the conduct occurred to address it will turn on the applicable jurisdictional rule. In jurisdictions that follow ABA Model Rule 8.5(a) or something similar, the jurisdiction where the law practice related conduct occurs has authority to address it, but may as a prudential matter refer it to the lawyer regulation system in a state where the lawyer is formally licensed to practice law.

If the jurisdiction where the law-practice related conduct occurred does not have a jurisdictional basis to exercise disciplinary authority over the out-of-state lawyer, it will have no choice but to refer the matter to the lawyer's state of licensure. This is what happened in the seminal case of G. Paul Howes, where an Assistant U.S. Attorney, licensed only in New Mexico, engaged in misconduct while prosecuting a case in the Superior Court of the District of Columbia. A District of Columbia bar rule excluded lawyers who practiced law in the D.C. courts, without having been formally admitted there, from its oversight. The D.C. bar counsel referred the matter to disciplinary counsel in New Mexico, where, after much litigation, Howes was eventually disciplined for his conduct in the District of Columbia. *Matter of Howes*, 123 N.M. 311 (1997); *In re Doe*, 801 F.Supp. 478 (D.N.M. 1992) (state disciplinary action not removable to federal court); *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), *aff'd* 54 F.3d 825 (App. D.C. 1995) (DOJ suit dismissed for lack of personal jurisdiction over New Mexico discipline authorities).

If a jurisdiction has authority to address the conduct of a lawyer who is temporarily present in that jurisdiction, with or without the formalities of *pro hac vice* admission, the choice to handle the matter or refer it to a jurisdiction where the lawyer is regularly admitted to practice law will often turn on prudential considerations, such as whether the conduct at issue offends important policy interests of the state where it occurred and whether that state's citizens were affected by the lawyer's misconduct.

V. Federal disciplinary authority

Some federal courts have directly adopted the ABA Model Rules of Professional Conduct to govern the members of their bars. In doing so, they will have adopted the ABA Model Rule 8.5(a) approach to disciplinary jurisdiction. Other federal courts have adopted the Rules of Professional Conduct of the highest court of the state in which the court is located. Whether those federal courts accept the Model Rule 8.5(a) approach to disciplinary jurisdiction will turn on whether the state has adopted that rule or something like it. Any federal court that has adopted ABA Model Rule 8.5(a), either directly or by incorporating it into a state rule, will have disciplinary jurisdiction over any lawyer it has admitted, without regard to where the conduct in question occurred.

As a practical matter, there are few federal courts with the disciplinary infrastructure or the institutional interest to extend lawyer regulation to the full limits of Model Rule 8.5(a). Instead, federal courts are inclined to allow states or other federal courts to take initiative for discipline, and then act on a reciprocal basis. Even when alleged lawyer misconduct occurs in connection with a federal action, rather than using its own lawyer discipline mechanism, the federal court may still, as a prudential matter, choose to refer the matter to the state where the lawyer is fully licensed, especially if that state is the one in which the federal court sits. The federal court might even refer a lawyer who is not admitted in that state to the state in which the federal court sits. If that state has adopted Model Rule 8.5(a), a conceptual question arises around whether the lawyer is even "in" that state for purposes of exercising disciplinary jurisdiction.

This presents a key federalism question: Can a state exercise disciplinary authority over a foreign lawyer whose presence was for the sole purpose of handling a matter in a federal court in that state? In practice, this question will rarely be posed. The full extent of the state's authority will tend not to be tested because the state will be disinclined to exercise disciplinary jurisdiction under those circumstances. Practically speaking, the state has a tenuous stake in the matter at best. The conduct occurred in a federal court. The lawyer in question was never licensed to practice law by the state's supreme court. The lawyer may not even have been representing a citizen of the state. If one takes the position that the lawyer in federal court is also "in" the state for jurisdictional purposes, the outer reaches of Model Rule 8.5(a) could perhaps be interpreted to suggest that the state has the power to act, but it will rarely choose to do so. This is especially true when the matter can be handled by the disciplinary system of either the federal court where the alleged misconduct took place or the state where the lawyer is regularly admitted to practice law.

VI. Disciplinary comity

Lawyer discipline under federalism has much in common with discipline in other multi-jurisdictional settings, such as when a lawyer is admitted to practice law in more than one state. For the most part, the system of deference to the discipline orders of other jurisdictions works rather smoothly. But the unique character of federalism raises interesting questions at the margins.

Discipline under federalism should balance jurisdictional power and authority against coordination with and respect for the work of lawyer regulation that occurs at both state and federal levels. It should in practice be marked by the same concerns for comity that are found in other legal doctrines that address the interplay between federal and state jurisdiction. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971).

VII. Reciprocal discipline

Whether in a state to state, state to federal, or federal to state setting, mechanisms exist for jurisdictions to coordinate action using streamlined procedures when an admitted lawyer is disciplined elsewhere. Known as "reciprocal discipline," a jurisdiction where a lawyer is licensed will generally order the same discipline as was ordered against the lawyer in another jurisdiction, without permitting the lawyer to re-litigate the merits of the case. This is normally accomplished through a "show cause" type proceeding.

The American Bar Association's model rule on reciprocal discipline provides the dominant template and defaults to full recognition of foreign discipline unless: "(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or (3) The discipline imposed would result in grave injustice or be offensive to the public policy of the jurisdiction. . . ." ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22(D) (2002). Most state and federal courts have adopted rules that include these or similar considerations. In the absence of an adequate showing to the contrary, the foreign order of discipline is determinative in the reciprocating jurisdiction. *Id.* R. 22(E).

Procedurally, the reciprocating jurisdiction gives the target lawyer notice of intent to give full force and effect to the order of foreign discipline, subject to the lawyer's proof on the record from the originating jurisdiction why it would be unwarranted. *Id.* R. 22(B). In August of 2002, by substituting the word "jurisdiction" for the word "state," the ABA amended its reciprocal discipline rule to clarify that it applies equally to reciprocal discipline between the state and federal courts.

VIII. Reciprocity problem cases

Reciprocal discipline usually works smoothly, in part because most professional standards and disciplinary sanctions are similar from jurisdiction to jurisdiction, and procedural due process is bountiful in all discipline systems. But difficult issues can arise:

- What if conduct in the originating jurisdiction is not a violation of the substantive rules in the reciprocating jurisdiction? Recently, an Ohio lawyer was disciplined there for failing to comply with Ohio's malpractice insurance disclosure rule. *Cincinnati Bar Ass'n v. Trainor*, 851 N.E.2d 505 (Ohio 2006). Kentucky, where Trainor was also admitted, sought reciprocal discipline even though Kentucky did not have a malpractice insurance disclosure rule. The Kentucky Supreme Court held that Trainor should nonetheless be disciplined in Kentucky. While Kentucky did not have a similar rule, it did have a rule prohibiting lawyers from disobeying an obligation to a tribunal. *Kentucky Bar Ass'n v. Trainor*, 277 S.W.3d 604 (Ky. 2009). A harder case would be presented if there were no alternate rule in the reciprocating state that incorporated the lawyer's conduct in the originating state.
- What if the sanction options in the reciprocating jurisdiction do not encompass the sanction ordered in the originating jurisdiction? Normally, the reciprocating jurisdiction will attempt to craft a sanction that is the closest counterpart to the sanction in the originating jurisdiction. *See, e.g.*, *Office of Disciplinary Counsel v. Webster*, 789 N.E.2d 191 (Ohio 2003) (disbarment with possibility of reinstatement in Rhode Island converted to corresponding period of suspension, not permanent disbarment, as is the case in Ohio). *But see Re Krouner*, 748 A.2d 924 (D.C. 2000) (30-day suspension in District of Columbia rather than censure called for by New York).
- What if the sanction in the originating jurisdiction cannot be translated directly into a meaningful sanction in a reciprocating jurisdiction? This can happen when the lawyer was admitted *pro hac vice* in the originating jurisdiction and the sanction is tailored to meet those circumstances, such as by prohibiting the respondent from seeking *pro hac vice* admissions in the future. *See, e.g.*, *Matter of Fieger*, 887 N.E.2d 87 (Ind. 2008).
- What if there are fundamental differences in sanctioning philosophy between the two jurisdictions? A recent case from the Maryland Court of Appeals, *Maryland Attorney Grievance Comm'n v. Whitehead*, 890 A.2d 751 (Md. 2006), illustrates different and conflicting

philosophical approaches to reciprocal discipline sanctions. The majority thought that it should assess the appropriateness of the sanction consistent with the state's own disciplinary precedent in order to promote intrastate consistency in sanctions for similar misconduct. The dissenters believed that, except in unusual cases, the same sanction should be imposed in order to promote comity as the primary value underlying reciprocal discipline.

- Increasingly, lawyer discipline is accompanied by varying periods of probationary practice. How does a reciprocating jurisdiction address the fact that the originating jurisdiction has stayed some or all of a period of suspension in favor of a period of probation? Should the reciprocating jurisdiction defer to the originating jurisdiction's probationary supervision or impose its own?
- Where both the originating and reciprocating jurisdictions suspend a lawyer subject to reinstatement only upon petition and proof of fitness, may a lawyer choose to reinstate in the reciprocating jurisdiction without first having been reinstated in the originating jurisdiction?
- Standards of proof may differ from jurisdiction to jurisdiction. Some require a mere preponderance while others require something similar to clear and convincing evidence. Will a reciprocating jurisdiction that uses the higher standard give reciprocal effect to an order of an originating court based on a lower standard? Normally, yes, unless the lower standard is found to have been fundamentally unfair to the point of violating due process. *In re Barach*, 540 F.3d 82 (1st Cir. 2008).
- Will a reciprocating jurisdiction that issues discipline by court order give reciprocal effect to a discipline order of another jurisdiction that is rendered by an administrative body, not a court? The District of Columbia Court of Appeals declined to give reciprocal effect to public reprimands from Maryland and Massachusetts because its reciprocal discipline rule operates only on discipline orders from courts or agencies with authority to disbar or suspend lawyers. The boards that issued the public reprimands in Maryland and Massachusetts had authority to reprimand, but not to suspend or disbar. *In re Greenspan*, 910 A.2d 324 (D.C. 2006).

Addressing these questions is often a matter of making necessary adjustments so that an appropriate order of reciprocal discipline can be entered. Even though factors exist that create a fundamental barrier to reciprocal discipline, the reciprocating jurisdiction can always initiate its own independent disciplinary action based on the same conduct that resulted in discipline elsewhere.

IX. A partial solution

In my home state of Indiana, the Supreme Court is gravitating toward an approach to reciprocal discipline that resolves several of the problems outlined above. Recent Indiana reciprocal discipline orders have been marked by several features:

- Once suspended on a reciprocal basis, the lawyer remains suspended from practice in the reciprocating jurisdiction until it is demonstrated that the lawyer has been reinstated in the originating jurisdiction.
- The lawyer's suspension in the reciprocating jurisdiction is to be no shorter than the period of suspension in the originating jurisdiction. So, for example, if there is a delay in the reciprocating jurisdiction learning of discipline in the originating jurisdiction, even though the lawyer may have been already been reinstated in the originating jurisdiction, he or she will remain suspended for an equivalent period.
- Reinstatement in the reciprocating jurisdiction is on simple motion demonstrating that the above two elements are satisfied, rather than by the more rigorous reinstatement process that applies to other lawyers who are suspended subject to proof of fitness before reinstatement.
- When a lawyer is suspended, but allowed to practice under probation in the originating jurisdiction, the lawyer's license in the reciprocating jurisdiction is suspended but stayed subject to continued compliance with the terms of probation in the originating jurisdiction. Changes in probationary status in the originating jurisdiction must be reported to the reciprocating jurisdiction, and the lawyer is fully reinstated in the reciprocating jurisdiction when the lawyer

reports by motion that his or her license has been unconditionally restored in the originating jurisdiction.

See, e.g., Matter of Ucherek, 904 N.E.2d 212 (Ind. 2009); *Matter of Buehner*, 904 N.E.2d 661 (Ind. 2009).

X. Getting practical about discipline

Comity in lawyer regulation under federalism depends on effective communication of information and coordination between regulators. If a lawyer is disciplined in a federal court and that information does not find its way to other licensing jurisdictions, the lawyer regulation system cannot take full account of the lawyer's disciplinary experience elsewhere.

There are three effective ways to communicate important information about lawyer discipline to other interested jurisdictions. They are intentionally redundant so that if one method fails, perhaps another will succeed.

First, the governing rules of all regulatory systems should require lawyers to self-report disciplinary action from another jurisdiction. Rule 22(A) of the ABA Model Rules of Disciplinary Enforcement requires this. Many states and federal courts require this as well.

Second, disciplinary counsel should directly notify other jurisdictions when they discipline a lawyer who is admitted elsewhere. The National Organization of Bar Counsel, with membership comprised of disciplinary counsel offices in all states and the District of Columbia, helps facilitate inter-state cooperation by bar counsel. But, this cannot happen if disciplinary counsel in the originating jurisdiction does not know where else a respondent is admitted. The best solution is to require lawyers to report all other jurisdictions of admission, including federal courts and agencies, on their annual registration statements. *See, e.g.*, MASSACHUSETTS SUPREME JUDICIAL COURT R. 4:02 (2009). Failing that, disciplinary counsel should discover all other respondent bar admissions in the course of every discipline case, or as Wisconsin does, require that every disciplined lawyer file an affidavit disclosing, "all jurisdictions, including state, federal and administrative bodies, before which the attorney is admitted to practice." WISCONSIN SUPREME COURT R. 22.26(e)(ii) (2006).

Third, federal and state discipline entities should report orders of discipline to the American Bar Association's National Lawyer Regulatory Data Bank in a timely manner. The Regulatory Data Bank is a central repository of information concerning public disciplinary sanctions imposed against lawyers throughout the United States. All 50 states, the District of Columbia, and many federal courts report disciplinary information to the Data Bank. *See* National Lawyer Regulatory Data Bank, American Bar Association, http://www.abanet.org/cpr/regulation/databank.html. Records of discipline reported to the Data Bank by authorized reporters are sent to discipline contacts in other jurisdictions where the disciplined lawyer is identified as also being licensed. Moreover, discipline counsel can compare their rolls of attorneys to the Data Base to flag lawyers who have been disciplined elsewhere.

While the flow of information among the states works well, the flow sometimes works less efficiently between the states and the federal courts. When a lawyer who is disciplined in federal court is licensed in another state or in other federal courts, the information may not be reported as effectively. Likewise, states routinely report final discipline orders to their own federal courts, but they may miss other federal courts where a disciplined lawyer is also admitted to practice. One practical solution to this problem would be to develop a national database of federal court admissions so that there would be a single source for identifying the federal courts that should be notified when a lawyer is disciplined.

The second aspect of making discipline work effectively in a federal system is interjurisdictional coordination—usually between federal judges or federal court discipline committees and the bar counsel in the states where those federal courts sit. As shown above, the jurisdictional rules leave open the possibility that a lawyer may be subject to discipline in several jurisdictions arising out of a single set of facts. With effective reciprocal discipline rules in place, there will rarely be a good reason for more than

one regulator to initiate disciplinary action. Coordination between regulators will identify the jurisdiction that has the closest nexus with the conduct in question and determine which should act first. To the extent confidentiality rules that still prevail in many lawyer discipline systems stand in the way of this coordination, they frustrate efficiency in addressing lawyer misconduct that is of concern to multiple jurisdictions and should be amended.

XI. Comity gone wrong—a case study

A particularly knotty federalism problem arises when there is a misfit between federal and state disciplinary sanctions, especially when the federal sanction is shorter. This presents the anomaly of a lawyer who is admitted to practice law in federal court with no active state court license—a situation that could never happen at the federal bar admission stage.

This is what happened in Pennsylvania. The Pennsylvania Supreme Court suspended the law license of Robert Surrick, who was admitted to practice in both Pennsylvania and the United States District Court for the Eastern District of Pennsylvania but nowhere else. In 2000, Surrick's Pennsylvania law license was suspended for 5 years. *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441 (Pa. 2000). The Eastern District of Pennsylvania took reciprocal action but only suspended Surrick for 30 months. *In re Surrick*, 2001 WL 1823945 (E.D. Pa. June 21, 2001), *aff'd*, 338 F.3d 224 (3d Cir. 2003).

Acting under the authority of a local rule allowing reinstatement without regard to a lawyer's continued suspension in state court, the federal court reinstated Surrick after his 30-month suspension, leaving approximately 30 months in which Surrick was licensed to practice in federal court with no state law license. Surrick sued the Pennsylvania disciplinary authorities in federal court seeking a declaration that he was free to maintain a Pennsylvania law office dedicated to his practice in federal court. Pennsylvania had recently held otherwise. *Office of Disciplinary Counsel v. Marcone*, 855 A.2d 654 (Pa. 2004). Curiously, Surrick's plan was to represent clients in diversity matters.

The Third Circuit affirmed the district court order allowing Surrick to open a law office subject to certain conditions, including prohibiting him from providing "legal advice or consultation on state law matters" but authorizing him "to represent clients on all matters within the jurisdiction" of the Eastern District of Pennsylvania. Affirming the district court's decision, the Third Circuit opined that maintaining a law office was sufficiently essential to Surrick's ability to enjoy the benefits of his federally-granted license to practice law that Pennsylvania's threat to prohibit it was preempted by federal law. The Third Circuit extended its preemption analysis by rejecting Pennsylvania disciplinary counsel's argument that it should be able to prohibit Surrick from giving advice on matters of Pennsylvania law. The Third Circuit believed that so long as Surrick intended to litigate those Pennsylvania law questions within the diversity jurisdiction of the federal court, its preemption analysis prevented Pennsylvania from interfering.

The Third Circuit recognized that it was treading on thin federalism ice. After noting that it was not overruling and could not overrule *Marcone*, the court stated:

> It is difficult to conceive of a matter that appears to jeopardize concepts of comity more than the case presently before us . . . . Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required, nor expected, to yield to the other.

Surrick v. Killion, 449 F.3d 520, 534-35 (3d Cir. 2006). The denouement was the Third Circuit's recognition that the Eastern District had promulgated a rule requiring federal reinstatement to be held in abeyance until reinstatement to state practice has been decided. *Id.* at 535. *Surrick* is an unfortunate example of what can go awry when there is inadequate coordination between federal and state discipline systems. It need not be so, as the district court's amended local rule illustrates.

XII. Choice of law

Whenever a lawyer engages in conduct that touches on multiple jurisdictions of licensure or law practice, choice of law questions inevitably arise. Jurisdictions that have adopted an analogue to ABA Model Rule of Professional Conduct 8.5(b) have a choice of law rule that states:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

In the *Howes* case discussed earlier, Howes's conduct occurred in the District of Columbia, where he was not licensed. His discipline case was in New Mexico, his state of licensure. New Mexico, which did not and still does not have a choice of law rule, disciplined Howes for violating the New Mexico, not the District of Columbia, rules that govern direct contact with represented criminal defendants. Perhaps the outcome of the case would have been the same had New Mexico applied the District of Columbia rule. *Matter of Doe*, 801 F.Supp. 478, 480-81 (D.N.M. 1992). But it raises the possibility that lawyers practicing in different jurisdictions could be subject to irreconcilably conflicting professional duties.

A contrary example is from Wisconsin, which does have a choice of law rule. It has applied the Michigan Rules of Professional Conduct to discipline a Wisconsin lawyer for conduct that took place, in part, before a Michigan tribunal. *Disciplinary Proceedings Against Marks*, 665 N.W.2d 836 (Wis. 2003). Presumably, Wisconsin would have applied the federal forum's rule had Marks's conduct taken place there. Under federal law enacted after *Howes* was decided, Department of Justice lawyers are subject to the substantive ethical standards of the jurisdiction where they practice.

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B (2008). This does not solve the potential problem of an irreconcilable conflict between the rules of the jurisdiction where the federal lawyer practices and the rules of the state where that lawyer is licensed. Department of Justice regulations attempt to give guidance for resolving those conflicts when they arise. 28 C.F.R. 77.4 (2009).

The rationale for the choice of law rule is that lawyers should not be placed in the trick bag of being accountable to conflicting and irreconcilable professional duties. ABA MODEL R. 8.5, COMMENTS 2-6. Professional conduct standards are largely consistent from state to state and the choice of law question will usually be a moot point. With the blossoming of multi-jurisdictional law practice, this is one reason why the states and the federal courts should strive for consistency in their professional conduct rules. Experience with implementing the ABA Ethics 2000 amendments to the Model Rules of Professional Conduct belies a serious commitment to uniformity. *See also* CHARTS COMPARING INDIVIDUAL PROFESSIONAL CONDUCT RULES BY STATES TO ABA MODEL RULES, AMERICAN BAR ASSOCIATION, http://www.abanet.org/cpr/jclr/rule_charts.html.

XIII. Conclusion

Lawyer discipline under federalism can be complicated if regulators choose to make it so, but the tools exist, including good communication and cooperation, to make comity more than an empty idea.❖

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The views expressed in this article do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.

An Overview of the Office of Professional Responsibility

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I. Introduction

On New Year's Day, 1975, the former Attorney General of the United States, John N. Mitchell, a former Assistant Attorney General, Robert C. Mardian, and others were convicted of conspiracy, perjury, and obstruction of justice in connection with the cover-up of the break-in and the bugging of the Democratic National Committee Headquarters in the Watergate Office Building in Washington, D.C. Mitchell is the only attorney general ever to serve a prison sentence.

The Office of Professional Responsibility (OPR) was created by the Department of Justice (DOJ or the Department) in 1975 as one response to the revelations of these and other ethical abuses uncovered by Department officials in the investigation of the Watergate scandal.

OPR investigates allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. OPR also investigates allegations against Department law enforcement personnel when they are related to allegations of professional misconduct against Department attorneys. Other types of misconduct by attorneys and agents may be investigated by the Office of the Inspector General (OIG).

II. Structure of the office

OPR reports directly to the Attorney General and Deputy Attorney General. 28 C.F.R. § 0.39 (2006). The office is headed by a Counsel and Deputy Counsel. Currently, there are 4 Associate Counsels who oversee the work of 22 Assistant Counsels and 8 support staff. Five of the Assistant Counsels are Assistant U.S. Attorneys (AUSAs) on detail from U.S. Attorneys' offices across the country. In addition, most of the permanent OPR attorneys have prior experience as AUSAs or as Department litigators, including service as Criminal Chief, First Assistant, and interim U.S. Attorney.

III. OPR policies and procedures

Department employees are required to report serious judicial criticism or judicial findings of misconduct as well as non-frivolous allegations of misconduct to OPR. The obligation to report judicial findings or allegations of misconduct is set forth at USAM 1-4.100 and 1-4.120. The duty to make a report is not limited to instances where the court uses the term "misconduct" because courts do not always use that term when an attorney fails to abide by his professional responsibilities. Reports may be made to OPR directly or to an office supervisor. If the supervisor is involved in the alleged misconduct, he or she must bring it to the attention of a higher-ranking official. OPR has a duty attorney system and encourages Department attorneys to consult with the office if they have any doubt about whether a particular matter should be reported to OPR.

If a judge or magistrate orally states a belief that a Department attorney has committed misconduct, or takes such a claim under advisement, the matter must be reported to a supervisor. Any evidence or non-frivolous allegation of serious misconduct must be reported to OPR by the supervisor. If a judge or magistrate makes a finding of misconduct or requests an inquiry into possible misconduct, the matter must be immediately reported to OPR, even if the reporting attorney considers the judge's action frivolous.

OPR receives complaints from many sources, including self-referrals, officials in USAOs and other DOJ components, private attorneys, Congress, and the media. OPR also conducts searches of legal databases to identify opinions containing serious judicial criticism or findings of misconduct.

A Department attorney who is asked by OPR to submit a written response to the allegations will also be asked to provide information regarding his or her professional background and experience. In order to determine which rules of professional responsibility apply to the attorney's conduct, the attorney will be asked to list each jurisdiction in which he or she maintains bar membership and to indicate the membership category. OPR also seeks copies of any media reports relating to the allegations. This assists OPR in determining the extent of the public interest in the matter. The attorney need not wait for OPR to request a written response but may provide a complete written response at the time of the self-referral.

All Department employees have a duty to cooperate with an OPR investigation. Employees who do not cooperate may be subject to formal discipline, including termination of their employment with the Department. *See* 28 C.F.R. § 45.13 (2006). Nearly all OPR investigations are administrative in nature; however, if the allegations of misconduct are criminal in nature, the subject DOJ attorney is so advised. In such instances, the subject attorney is not required to participate in the investigation unless the attorney is informed that his or her statements will not be used to incriminate him or her in any criminal proceeding.

A subject attorney will usually be allowed to have privately retained counsel present at his or her OPR interview as long as the subject's counsel does not interfere with the questioning. Counsel must be formally retained before he or she will be allowed to attend the interview. The subject attorney's counsel must sign a confidentiality agreement before being given access to a transcript of the interview. In addition, the attorney and his or her counsel must agree not to make copies of the transcript and to return to OPR the original copy, along with any additional information they wish OPR to consider in connection with its investigation. Co-workers of the subject attorney are not allowed to attend the interview.

The subject attorney does not have a right to review the entire OPR report of investigation unless discipline is proposed based on the report. Nevertheless, the subject may be permitted to review the report in the absence of a misconduct finding if he or she has a convincing need to do so. Such a determination is made on a case-by-case basis. With regard to OPR's referral of its misconduct findings to the subject's state bar, OPR is authorized to provide investigative information to bar authorities for their use in state disciplinary proceedings pursuant to the Privacy Act. *See* 63 Fed. Reg. 68299 (Dec. 10, 1998).

At the conclusion of the OPR investigation, the Department may consider disclosing OPR's findings to the public. The Attorney General or the Deputy Attorney General must find that the public interest in disclosure outweighs relevant privacy and law enforcement interests. Other disclosures may be made in accordance with other "routine uses," such as disclosures to other government agencies or officials for law enforcement purposes; disclosures to individuals or agencies in order to elicit information relevant to the investigation or other pending proceedings; disclosures in judicial, regulatory,

or administrative proceedings; and disclosures to other federal agencies in connection with the hiring or retention of an employee or the issuance of a security clearance.

IV. Inquiries and investigations

OPR receives approximately 1,000 complaints a year. Many complaints are frivolous on their face, vague and unsupported by any evidence, or not within OPR's jurisdiction. About 25 percent are determined to be serious enough to initiate an inquiry into the allegations. Typically, OPR asks the subject attorney to provide a written response, which is reviewed along with any relevant files and documents. About 85 percent of these inquiries are closed based on this preliminary review, with a finding of no misconduct. If, in the course of an inquiry, OPR concludes that further investigation is needed, the matter is converted to an investigation. In addition, some matters are opened as investigations *ab initio* due to the seriousness of the allegations. For example, any finding of misconduct or serious criticism of a Department attorney by a court merits initiation of a full investigation. When a matter is handled as an investigation, two OPR attorneys are assigned to the matter. Each witness with information about the allegations is interviewed, and the interviews are recorded with a digital tape recorder. The subject of the allegations is interviewed on the record, under oath, with a court reporter transcribing the interview. The subject is provided with a transcript of the interview and given an opportunity to make corrections and provide additional relevant information. OPR may also review e-mail and other computer records, which are obtained from the component to which the subject attorney is assigned. The lead Assistant Counsel reviews the results of the investigation and drafts a report, which is reviewed by the second-chair attorney, an Associate Counsel, the Deputy Counsel, and the Counsel. Once any revisions are complete, the Counsel issues the investigative report. In appropriate cases, including those where OPR seeks to make a report public, a draft final report is provided to the subject and the component head for review and comment prior to the preparation of a final report. In a typical year, OPR completes between 75 and 100 investigations.

Department attorneys are subject to obligations imposed by law, rules of professional conduct, and Department regulations and policies. OPR examines whether the alleged misconduct violated a clear and unambiguous rule and, if so, whether the conduct was intentional or reckless. If the conduct was neither intentional nor reckless, OPR determines whether the subject attorney exercised poor judgment or made an excusable mistake. Alternatively, OPR may find that the attorney acted appropriately under all the circumstances. If OPR's investigation discloses issues that reflect a need for improved performance or management, the report will also contain those findings. For subject AUSAs, the findings are ordinarily reported to the Director of the Executive Office for United States Attorneys. For other Department attorneys, the report is provided to the subject attorney's component head. In all cases, a copy is provided to the Office of the Deputy Attorney General. In high-profile cases and in those matters involving high-level Department officials, the report is provided directly to the Attorney General, Deputy Attorney General, or both.

V. Dissemination of OPR's findings

After any DOJ disciplinary proceedings are complete, pursuant to Department policy, findings of professional misconduct (either intentional or reckless) that implicate an applicable state bar rule are referred to the appropriate state disciplinary authority, which is usually the state bar of the jurisdiction in which the attorney is licensed.

OPR also reports summaries of its findings in Annual Reports to the Attorney General and posts those reports and other information on its Web site.

VI. Who gets referred to OPR?

Attorneys who fail to comply with their professional responsibilities generally do so because they are overzealous, not zealous enough, or uninformed about the rules governing their conduct.

Overzealous attorneys are reported most often for trying too hard to win their cases. Examples of misconduct by overzealous Department attorneys include making improper remarks to a grand or petit jury; being less than candid with a court about a material fact; making misrepresentations or misstatements regarding the evidence; introducing inadmissible evidence; conducting improper cross-examination; impugning opposing counsel in the presence of the jury; leaking information to the press; breaching a plea agreement; and failing to disclose favorable information to the defense in violation of law (*e.g., Brady*) or Department policy. (All litigating attorneys should give special attention to the provisions of USAM 9-5.001 and 9-5.100, regarding the Department's newly expanded policy on turning over exculpatory information or information that could lead to impeachment.)

In contrast, attorneys that are not zealous enough are reported most often for not moving their cases or for taking shortcuts to dispose of their cases. Examples of misconduct by this type of Department attorney include allowing statutes of limitations or Speedy Trial Act deadlines to run; failing to meet discovery deadlines; failing to file motions or other pleadings in a timely manner; violating office policies concerning charging decisions and plea agreements; and failing to comply with the Ashcroft Memorandum's requirement to pursue "readily provable" offenses and sentencing enhancements.

Uninformed Department attorneys are reported most often for not being adequately versed in the rules and caselaw governing the matters to which they are assigned. Some of these attorneys fail to keep abreast of new statutes or appellate court decisions. Others have not mastered the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, applicable Department regulations, or state rules of professional conduct.

VII. Statistics

Between January 2001 and June 2009, OPR found professional misconduct in 24 percent of the investigations it completed during these 8 years, and found poor judgment in 11 percent. OPR made no negative findings in 65 percent of the investigations it closed during this same time period.

OPR records show that between January 2001 and June 2009, the three most common allegations of misconduct by Department attorneys were that an attorney made misrepresentations to the court or opposing counsel (213 instances); failed to perform (155 instances); or committed discovery violations (154 instances). Attorneys were also alleged to have made improper remarks to a grand jury or a petit jury (111 instances); made unauthorized disclosures (85 instances); failed to comply with Department rules and regulations (98 instances); and missed deadlines, violated the Speedy Trial Act, or failed to perform some other obligation in a timely manner (76 instances).

As to actual findings of professional misconduct (intentional or reckless) during this same period, allegations of failure to perform resulted in the most findings of misconduct (54 instances), followed by allegations of making misrepresentations to the court or opposing counsel (47 instances). OPR also made findings of misconduct for failure to comply with Department rules or regulations (36 instances), for making unauthorized disclosures (22 instances), for tardiness in dealings with the court (22 instances), for making improper remarks to a jury (18 instances), and for discovery violations (17 instances).

VIII. Referrals of non-DOJ attorneys and judges to state bar authorities

Department policy requires that allegations of misconduct by non-Department attorneys and by judges must be reported to OPR for a determination of whether to report the attorney or judge to disciplinary authorities. Any Department attorney who receives information about alleged misconduct by a non-Department attorney or judge must consult with his or her component head or U.S. Attorney. He or she may also consult with the Professional Responsibility Advisory Office, which can assist in determining if the non-Department attorney or judge has violated an applicable professional rule or judicial code of conduct. If the component head or U.S. Attorney determines that a referral should be made, he or she must send a recommendation and supporting documentation to OPR. OPR will then decide whether a referral should be made.❖

ABOUT THE AUTHORS

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DOJ's Regulation and Discipline of Immigration Attorneys

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I. Introduction

The Executive Office for Immigration Review (EOIR) of the Department of Justice (Department) primarily adjudicates cases in which the Department of Homeland Security (DHS) seeks the removal of aliens from the United States. Aliens in removal proceedings are entitled to be "represented (at no expense to the Government) by such counsel, *authorized to practice* in such proceedings, as he shall choose." 8 U.S.C. § 1362 (2006) (emphasis added). Approximately 50 years ago, the Department promulgated regulations establishing qualifications for private immigration practitioners appearing before the Board of Immigration Appeals (Board) and the former Immigration and Naturalization Service (INS), rules of professional conduct for those practitioners, and a disciplinary process by which the Department could prohibit practitioners from practice before the Board and INS. *See* 23 *Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 230-31 (7th Cir. 1977). In 2000 and 2008, the Department significantly reformed and expanded these regulations. *See* 73 Fed. Reg. 76,914, 76,915 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292).

Although Congress transferred the functions of the former INS to DHS, *see* 6 U.S.C.A.§ 251 (2006), the Department and DHS maintain a unified process for adjudicating allegations of immigration practitioner misconduct. The disciplinary counsels for either EOIR or DHS may initiate disciplinary proceedings with the Board, and any final order prohibiting a practitioner from practice before one agency may be made applicable to the other. *See* 8 C.F.R. §§ 292.3(e), 1003.101(a), 1003.105 (2009).

The purpose of this article is to summarize the Department's professional conduct rules and

disciplinary process for private immigration practitioners and to explain the circumstances under which Assistant United States Attorneys (AUSAs) interact with EOIR's Practitioner Disciplinary Program. Because the Department's and DHS's disciplinary regulations are nearly identical except for some recent amendments to the Department's regulations, all references and citations in this article will be to the Department and the Department's regulations.

II. Individuals authorized to practice before EOIR

The Department permits both attorneys and non-attorney representatives to practice before EOIR. 8 C.F.R. § 1292.1 (2009). Collectively, attorneys and representatives are called "practitioners." *Id*. at §1003.101(b).

Attorneys comprise the only category of practitioner who may practice before EOIR as a matter of right and without restriction as to whom they may represent. An "attorney" is someone who is in good standing and eligible to practice law before the highest court of a state or territory of the United States or the District of Columbia, and "is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law." 8 C.F.R § 1001.1(f) (2009). If a practitioner no longer meets the definition of "attorney" due to an order of suspension or disbarment in another jurisdiction, EOIR must provide that practitioner with due process before denying the practitioner "the right to further practice before the agency." *See Bogart v. Carter*, 445 F.2d 321, 322 (9th Cir. 1971); *Matter of Bogart*, 15 I&N Dec. 552, 556-61 (BIA 1975, AG 1976); 8 C.F.R. § 1003.103 (2009).

The Department's regulations also permit certain non-attorneys to practice before EOIR, with varying degrees of restrictions. EOIR may accredit non-attorneys to serve as representatives if the non-attorneys work for non-profit organizations recognized by EOIR, the organizations sponsor the non-attorneys, and the non-attorneys have experience in and knowledge of immigration and naturalization law. *See* 8 C.F.R. § 1292.2 (2009). Accredited representatives must be re-accredited every 3 years and continue to be employed by the sponsoring organization in order to practice before EOIR. Accredited representatives may only accept compensation from their employing organization and cannot charge aliens a fee for representational services. *See* 8 C.F.R. § 1003.102(a)(2). EOIR maintains a list of recognized organizations and accredited representatives at http://www.usdoj.gov/eoir/statspub/raroster.htm.

In addition to accredited representatives, other non-attorneys may qualify to practice before EOIR. Law students and law graduates of accredited American law schools may represent aliens; however, the law students or graduates must work under the supervision of a faculty member, a licensed attorney, or an accredited representative; must not accept fees from aliens for the representation; and must receive EOIR's permission before undertaking the representation. *See* 8 C.F.R.§ 1292.1(a)(2) (2009). Further, a non-attorney who is a "reputable individual" may represent an alien. However, he or she may not accept a fee, may only appear in a single case, must have a pre-existing relationship with the alien (e.g., relative, neighbor, clergy), and must receive EOIR's permission to represent the alien. *See id*. § 1292.1(a)(3).

III. The rules of professional conduct for practitioners

The Department's regulations enumerate professional conduct rules with which practitioners must comply. *See* 8 C.F.R. § 1003.102 (2009); 73 Fed. Reg. 76,923 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292). In promulgating these rules, the Department created uniform nationwide rules applicable to practice before Immigration Judges and the Board. *See Gadda v. Ashcroft*, 377 F.3d 934, 944-47 (9th Cir. 2004). By creating these rules, the Department did not seek to preempt state authority over licensed attorneys, nor did it intend to "denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law." *Id*.; 8 C.F.R. § 1003.102 (2009). Because attorneys have to comply with both state bar ethics rules and the Department's rules, the Department based many of its rules on the American Bar Association's Model Rules of Professional Conduct. 73 Fed. Reg. 76,915 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292).

The Department's rules of professional conduct include prohibitions on: charging or receiving

grossly excessive fees; making false statements of material fact or law in a case; improper solicitation; failing to act competently, diligently, and promptly while representing a client; failing to communicate with or comply with the decisions of a client; engaging in conduct that is prejudicial to the administration of justice; engaging in frivolous behavior; assisting an individual, other than a practitioner, to engage in the practice of immigration law; failing to inform an adjudicator of controlling legal authority known to the practitioner but not disclosed by opposing counsel; engaging in contumelious or otherwise obnoxious conduct that would constitute contempt of court in a judicial proceeding; repeatedly failing to appear at scheduled hearings or case-related meetings in a timely manner; failing to properly enter an appearance when a practitioner substantively works on a case; and filing briefs that use "boilerplate" language with little application of the law to the facts in a case. Further, the Department may institute summary disciplinary proceedings when practitioners have been found guilty of or pleaded guilty or *nolo contendere* to a serious crime or have been prohibited from practice before or resigned with a disciplinary investigation or proceeding pending from a state or federal court or an executive branch agency. 8 C.F.R. § 1003.102 (2009); 73 Fed. Reg. 76,914, 76,923 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292).

IV. Disciplinary proceedings and sanctions

EOIR may impose a variety of sanctions on practitioners when it is in the public interest to do so. 8 C.F.R. § 1003.101(a) (2009). It is in the public interest to discipline practitioners who have violated the enumerated rules of professional conduct; however, the professional conduct rules are not the exclusive grounds for imposing disciplinary sanctions. *Id.* § 1003.102.

A. Complaints, investigations, and informal discipline

Any individual may file a complaint against a practitioner with the EOIR Disciplinary Counsel. The EOIR Disciplinary Counsel, the chief prosecutor for disciplinary cases, conducts preliminary inquiries into all complaints and determines whether they have merit. If a complaint lacks merit, it is dismissed. If a complaint has merit, the EOIR Disciplinary Counsel may informally resolve the matter by issuing a written admonition or a warning letter, or by entering into an agreement with the practitioner in lieu of discipline. The EOIR Disciplinary Counsel may also initiate formal disciplinary proceedings. *See* 8 C.F.R. §§ 1003.104-105 (2009).

B. Formal disciplinary proceedings

When the EOIR Disciplinary Counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct, she will file with the Board and serve on the practitioner a Notice of Intent to Discipline (Notice). The Notice contains a statement of the charge(s), a proposed sanction, and a copy of the preliminary inquiry report. The practitioner must file a timely answer to the Notice or the Board will enter a default order. 8 C.F.R § 1003.105 (2009). If a practitioner files an answer to the Notice, then EOIR will appoint an adjudicating official from a specially trained corps of Immigration Judges and Administrative Law Judges to hear and decide the case. 8 C.F.R. § 1003.106 (2009).

The adjudicating official conducts an adversarial proceeding in which both parties have the right to submit and object to evidence, and to examine and cross-examine witnesses. Although the parties are free to voluntarily exchange information and make stipulations before the hearing, there is no right to formal discovery. The standard of proof is clear and convincing evidence. 8 C.F.R. § 1003.106 (2009); 73 Fed. Reg. 76,914, 76,925-926 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292). If, at the conclusion of proceedings, the adjudicating official sustains any of the charges in the Notice, then the adjudicating official must impose one of the following disciplinary sanctions: expulsion from practice before EOIR and DHS, which is presumptively permanent; suspension from practice before EOIR and DHS; public or private censure; or another appropriate sanction. 8 C.F.R. § 1003.101(a) (2009). Either party to a disciplinary case may appeal an adjudicating official's decision to the Board, which reviews findings of fact and credibility determinations under the clearly erroneous standard and reviews issues of

law and discretion *de novo*. 73 Fed. Reg. 76,914, 76,926 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292).

C. Summary disciplinary proceedings

When the highest court of a state or a federal jurisdiction suspends or disbars a practitioner, or when a practitioner resigns from the bar of one of those courts while a disciplinary investigation or proceeding is pending, the practitioner is subject to summary disciplinary proceedings. Further, practitioners who are found guilty of or plead guilty or *nolo contendere* to a serious crime are also subject to summary disciplinary proceedings. *See* 8 C.F.R. § 1003.103 (2009).

When a practitioner is subject to summary disciplinary proceedings, the EOIR Disciplinary Counsel must file a petition with the Board to immediately suspend the practitioner until summary disciplinary proceedings have been completed. Upon receipt of the petition and a certified copy of the order evidencing the basis for summary disciplinary proceedings, the Board will issue an order immediately suspending the practitioner. The Board may set aside the immediate suspension order only for good cause shown and if it is in the interest of justice to do so. *Id.* It is good cause and in the interests of justice to set aside an immediate suspension order when the court order on which the immediate suspension is based has been vacated. *See* 73 Fed. Reg. 76,914, 76,920 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001, 1003, 1292). However, a practitioner's argument that he was able to maintain good standing with one state bar despite being suspended or disbarred by another court does not show good cause. Further, the Board will not set aside an immediate suspension order if it appears that the practitioner is not likely to prevail in summary disciplinary proceedings. *Matter of Rosenberg*, 24 I&N Dec. 744, 746 (BIA 2009).

During summary disciplinary proceedings, a practitioner may contest the imposition of discipline but will not be given the opportunity to re-litigate every issue raised in a previous criminal or disciplinary case. *Bogart*, 15 I&N Dec. at 561. If a practitioner fails to show in his or her answer that there is a material issue of fact in dispute, then the Board may summarily adjudicate the case without referring it to an adjudicating official. A certified copy of a court record concerning a criminal conviction is conclusive proof that the practitioner committed the specified crime. A certified copy of a final order of suspension or disbarment creates a rebuttable presumption that the practitioner engaged in professional misconduct. If the practitioner disputes this presumption, he or she has the burden of proving by clear and convincing evidence that: the underlying disciplinary proceeding was so lacking in notice and opportunity to be heard that it constitutes a deprivation of due process; the disciplinary decision was based on such an infirmity of proof so as to give rise to a clear conviction that the underlying disciplinary decision cannot be accepted; or a grave injustice would result from imposing discipline. 8 C.F.R. § 1003.103(b) (2009). However, as long as minimal due process was given to the practitioner in the initial disciplinary matter and the findings of fact are not patently erroneous, EOIR may accept the disciplinary decision of the other jurisdiction. *Bogart*, 15 I&N Dec. at 562.

D. Public notice of disciplinary sanctions

When EOIR issues a final order imposing expulsion, suspension, or public censure on a practitioner, EOIR provides notice to the public of this discipline. The EOIR Disciplinary Counsel will report the disciplinary order to all jurisdictions in which the practitioner is licensed to practice and to the American Bar Association's National Lawyer Regulatory Data Bank. 8 C.F.R. § 1003.106(d) (2009). Further, the Immigration Courts and the offices of the immigration agencies of DHS post a list of currently disciplined practitioners, *see* 8 C.F.R. § 1003.106(c) (2009), and EOIR posts this list on its internet Web site at http://www.usdoj.gov/eoir/profcond/chart.htm.

E. Reinstatement to practice

Suspended or expelled practitioners may seek reinstatement to practice before EOIR and DHS. When a suspended practitioner completes the term of suspension specified in the final disciplinary order,

the Board will only reinstate the practitioner if the practitioner meets the regulatory definition of either an attorney or representative. 8 C.F.R. § 1003.107(a) (2009).

If a practitioner under a suspension completes half of the term of the suspension or 1 year of a suspension, whichever is longer, the practitioner may seek early reinstatement. Further, if a practitioner has been expelled for at least a year, he or she may also petition for reinstatement. A condition precedent for seeking reinstatement is that the practitioner meet the regulatory definition of either an attorney or representative. The practitioner also has the burden of proving by clear and convincing evidence that he or she possesses the moral and professional qualifications to be a practitioner and that reinstatement will not be detrimental to the administration of justice. *See* 8 C.F.R. §1003.107(b) (2009). Reinstatement after expulsion is especially difficult because expulsion is presumptively permanent. 8 C.F.R. § 1003.101(a)(1) (2009). Even when an expelled practitioner can meet the definition of an attorney, shows remorse, and has been expelled for nearly 5 years, the Board may still deny reinstatement because of the serious nature of the offense that led to the expulsion (e.g., conviction of immigration related fraud). *See Matter of Krivonos*, 24 I&N Dec. 292, 293 (BIA 2007).

V. Assistant United States Attorneys and EOIR's Practitioner Disciplinary Program

AUSAs will interact with EOIR concerning practitioner discipline in a variety of circumstances that arise in both the civil and criminal context.

A. Defense of EOIR's disciplinary orders in federal court

Practitioners may seek judicial review of EOIR's final disciplinary orders in federal district court under 28 U.S.C. § 1331 (1980). *See Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 232 (7th Cir. 1977). However, AUSAs have defended every type of decision that EOIR makes during practitioner disciplinary cases, including the Board's immediate suspension order based on an attorney's resignation from a federal court after admitting misconduct in a disciplinary proceeding, *Guajardo v. Mukasey*, No. C-08-1929 PJH, 2008 WL 1734517 (N.D. Cal. Apr. 11, 2008); the Board's immediate suspension order based on an interim suspension by a state bar, *Gadda v. Ashcroft*, No. C-01-3885 PJH, 2001 WL 1602693 (N.D. Cal. Dec. 07, 2001); the Board's final order of reciprocal discipline based on a state supreme court's disbarment order, *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004); the Board's denial of a request for reconsideration of a final order of expulsion, *Ramos v. U.S. Dep't of Justice*, 538 F.Supp.2d 4 (D.D.C. 2008), *recons. denied,* 588 F.Supp.2d 38 (D.D.C. 2008); the Board's decision to publish a decision as precedent; the Board's denial of a petition for reinstatement; the EOIR Disciplinary Counsel's issuance of an informal admonition; and the INS's decision to prohibit a practitioner from practice based on his failure to meet the definition of an attorney, *Bogart v. Carter*, 445 F.2d 321 (9th Cir. 1971).

B. Referral of criminal convictions to the EOIR Disciplinary Counsel

AUSAs who successfully prosecute immigration practitioners and obtain findings of guilt, guilty pleas, or pleas of *nolo contendere* to a "serious" crime should report these practitioners to the EOIR Disciplinary Counsel. Serious crimes include felonies and lesser crimes involving the following: interference with the administration of justice; false swearing; misrepresentation; fraud; willful failure to file income tax returns; deceit; dishonesty; bribery; extortion; misappropriation; theft; or an attempt, conspiracy, or solicitation of another to commit a serious crime. 8 C.F.R. § 1003.102(h) (2009). For purposes of disciplinary proceedings, a guilty verdict or a plea of guilt or *nolo contendere* is deemed to be a conviction. *Id.* Therefore, AUSAs should immediately refer practitioners because the Board may impose an immediate suspension before sentencing has been completed. *See id.* § 1003.103(a).

C. Referral of practitioner misconduct to the EOIR Disciplinary Counsel

AUSAs may observe or encounter immigration practitioners who commit misconduct in immigration-related litigation or who have been suspended or disbarred by a state bar or federal court.

AUSAs should refer these practitioners to the EOIR Disciplinary Counsel. Further, if an AUSA determines that an immigration practitioner has committed misconduct in an immigration-related matter and believes that the immigration practitioner should be referred for state bar discipline, the AUSA may forward the matter to the EOIR Disciplinary Counsel to consider such a referral. The Department's regulations permit EOIR to refer private immigration practitioner complaints to appropriate licensing authorities. 8 C.F.R. § 1003.106(d) (2009); 28 C.F.R. § 0.39(a)(9) (2006).

D. EOIR Disciplinary Counsel's referral of potential criminal conduct to United States Attorneys

If the EOIR Disciplinary Counsel receives credible information or allegations that a practitioner has engaged in criminal conduct, the EOIR Disciplinary Counsel refers the matter to the appropriate United States Attorney or other appropriate law enforcement agency. In such cases, before pursuing disciplinary sanctions against the practitioner, the EOIR Disciplinary Counsel will coordinate with relevant investigative and prosecutorial authorities in the Department to ensure that neither the disciplinary process nor any criminal prosecution is jeopardized. 73 Fed. Reg. 76,914, 76, 925 (Dec. 18, 2008) (to be codified at 8 C.F.R. pt. 1001,1003, 1292).❖

ABOUT THE AUTHOR

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This article is not intended to provide advice to Department attorneys regarding any obligations they may have under applicable state bar rules of professional conduct.

An Overview of the New Policy on Professionalism Training for Department Attorneys

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I. Introduction

On July 18, 2008, Attorney General Michael Mukasey enacted the New Policy on Professionalism Training for Department Attorneys (Professionalism Policy or Policy). As the Policy states:

> Public service is a public trust, and it is important for the Department to maintain the highest standards for all of its employees . . . . There are few priorities that are more important to the Department's mission than ensuring that we are properly trained so that we may continue to demonstrate the highest levels of ethical conduct and professionalism for which the Department is known.

Professionalism Policy (July 18, 2008), *available at* http://10.173.2.12/usao/eousa/ole /08_ogc _ professionalism_policy.pdf. The Professionalism Policy thus is intended to ensure that Department attorneys continue to be properly trained and perform to the high professional and ethical standards expected of them.

This article will provide an overview of the Professionalism Policy. In addition to focusing on the Policy's specific requirements, the article will address the process leading up to the Policy's enactment, certification and compliance issues and the steps being taken to provide Department attorneys with more opportunities to satisfy the requirements of the Policy in the future.

II. Background and enactment of the Policy

As the Policy states: "It is important for the Department to maintain the highest standards for all of its employees. These high standards include those relating to the continuing legal education and professional responsibility training of our attorneys." In addition to ensuring that Department attorneys meet the highest ethical standards, the Policy provides guidance to Department attorneys in areas involving conduct which could lead to a referral to the Department's Office of Professional Responsibility (OPR) or a state bar association.

The Professionalism Policy originated in the Executive Office for United States Attorneys (EOUSA). Rather than being a response to a particular case or controversy, the Policy emanated from a growing consensus in the Department over a period of several years that it would be beneficial to establish basic training requirements in order to ensure highly ethical conduct by Department attorneys.

Prior to the enactment of the Professionalism Policy, there was no Department-wide professional responsibility training requirement. Instead, the general rule was that Department attorneys were simply required to comply with the professional responsibility training requirements of their individual state bars. If an attorney's state bar required 1 hour of professional responsibility training each year, for example, then that was the training requirement for that attorney.

A number of state bars have no professional responsibility training requirements, however, and some states and territories (such as the District of Columbia) have no continuing legal education (CLE) requirements at all. Prior to enactment of the Policy, attorneys licensed in those states simply were not required to take professional responsibility training. Further, Department attorneys in states with no CLE requirements conceivably could avoid taking any type of continuing legal education training, including professional responsibility training, throughout their entire careers. The Professionalism Policy is intended to address these issues by imposing a basic level of training that all Department attorneys are required to take.

EOUSA sought the opinions of a number of other Department components, including the United States Attorneys' offices, as it drafted the Professionalism Policy. It also worked closely with the Attorney General's Advisory Committee, the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General. The Policy was enacted on July 18, 2008.

III. The applicability and requirements of the Policy

A. Applicability

The Policy currently applies to all attorneys in the following Department components and offices: the Antitrust Division; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Civil Division; the Civil Rights Division; the Criminal Division; the Environment and Natural Resources Division; the Executive Office for Immigration Review; the Executive Office for United States Attorneys (including

the United States Attorneys' offices); the National Security Division; the Office of Attorney Recruitment and Management; the Office of Professional Responsibility; the Office of the Associate Attorney General; the Office of the Attorney General; the Office of the Deputy Attorney General; the Professional Responsibility Advisory Office; and the Tax Division. It is anticipated that the Policy will apply to even more components, if not to the entire Department, in the coming years.

The Policy applies to all attorneys in the Department components listed above regardless of the level of their position or the nature of the work required by their position. It applies to both career and non-career attorney positions, as well as to compensated Special Assistant United States Attorneys (SAUSAs) and term Assistant United States Attorneys (AUSAs). The Policy does not apply, however, to uncompensated SAUSAs, who typically are employed by an entity outside of the Department of Justice. Of course, offices are free to offer the Policy's training to their uncompensated SAUSAs, and many offices have made it their practice to do so.

B. Requirements of the Policy

The Policy requires Department attorneys in the participating components to take at least 4 hours of professionalism training each year, including at least 2 hours of Department of Justice professional responsibility training, 1 hour of government ethics training, and 1 hour of sexual harassment and non-discrimination or equal employment opportunity training.

For a number of Department components, at least some of these training requirements are not new. For example, attorneys in the EOUSA and the United States Attorneys' offices have long been required to complete at least 1 hour of government ethics training and 30 minutes of sexual harassment training each year. As a result, for attorneys in these components, the Policy simply consolidates some training requirements that previously existed.

The most significant change brought about by the Professionalism Policy is the requirement that Department attorneys take at least 2 hours of Department of Justice professional responsibility training each year. As stated previously, prior to enactment of the Policy, Department attorneys were simply required to comply with the professional responsibility training requirements of their individual state bars. The Professionalism Policy imposes a basic level of professional responsibility and other training upon all Department attorneys.

The Professionalism Policy is a Department requirement and is not tied to the requirements of any individual state bar. As a result, only Department training courses will satisfy the requirements of the Policy. Department professionalism training courses taken pursuant to the Policy may be used to fulfill state bar CLE requirements, provided that the relevant state bar will accept a given Department course for CLE credit. Department attorneys wishing to obtain credit from their state bars for Department professionalism training received may send requests directly to their state bars.

The requirements of the Professionalism Policy are designed to allow Department attorneys to satisfy them in a variety of ways. For example, any Department course or training that an attorney takes or teaches in one of the Policy's required subjects, either in their component or at the National Advocacy Center (NAC) in Columbia, South Carolina, will count towards the requirements of the Professionalism Policy. This may include training conducted by a component's Professional Responsibility Officer on professional responsibility issues or by a component's Ethics Advisor on government ethics issues.

The Policy is designed to be both time and cost efficient. Department attorneys may satisfy the requirements of the Policy without traveling outside of their designated duty station—thus saving time and travel costs. For example, Department courses or training in the Policy's required subject areas that are available through the video-on-demand or distance learning services offered by EOUSA's Office of Legal Education will count towards the requirements of the Professionalism Policy. As a result, in addition to courses at the NAC, Department attorneys could satisfy the Policy's requirements through training conducted by their own component, or by sitting at their desks and watching taped or live training videos.

Department attorneys may not carry over or transfer the Professionalism Policy's training hours that they have received in excess of the required 2 hours of professional responsibility, 1 hour of government ethics, and 1 hour of sexual harassment and non-discrimination training to the next calendar

year. These requirements are annual requirements, and Department attorneys must satisfy them under the Policy each calendar year, no matter how many hours of additional training they have accumulated in a year.

IV. Certification and compliance issues

The Professionalism Policy provides that Department attorneys must self-certify to the management of their component that they have complied with the Policy and its training requirements. The process is similar to the certification process for bar membership that occurs each year.

A. Attorney certifications to component management

To this end, Department attorneys should complete the designated certification form (Office of Attorney Recruitment and Management (OARM) Form 13, Professionalism Policy Training Certification) and submit it to their component's management by February 1st of the year following that for which certification is being provided (e.g., 2009 certifications are due February 1, 2010). Attorneys entering on duty with less than 90 days remaining in the calendar year are currently exempt from the Policy's training requirements until the following year.

B. Component certifications to OARM

By April 1st of the year following that for which certification is being provided, the head of each Department component must certify to the Director of OARM that he or she has received Professionalism Policy certifications from all component attorneys. The component's Professionalism Policy certification to OARM should state the number of attorneys employed by the component and the number of individual attorney certifications received by the component. If the numbers do not match, indicating that there are attorneys who have not completed the Policy's training requirements for the year, the component should provide a brief explanation of the reason(s) for the discrepancy. Common instances where an attorney may not have been able to complete the Professionalism Policy training for the year include instances where an attorney was on active military duty overseas or on extended maternity or sick leave.

V. The Professionalism Policy into the future

In February 2009, the Attorney General's Professionalism Policy Working Group (Working Group) was created to address a variety of issues relating to the Professionalism Policy. Among the issues upon which it is focusing is development of further guidance and criteria for determining whether a specific training course satisfies the requirements of the Professionalism Policy, as well as development of new training materials intended to count towards the requirements of the Policy. One of the main goals of the Working Group is to provide Department attorneys with more opportunities to satisfy the requirements of the Policy in the future. Members of the Working Group include representatives from the General Counsel's Office of EOUSA, EOUSA's Office of Legal Education (OLE), and Professional Responsibility Officers and Ethics Advisors from a number of United States Attorneys' offices.

Thus far, the Working Group has agreed on several issues regarding the Professionalism Policy and its continued implementation. A summary of these items is provided below.

A. Guidance provided to Professional Responsibility Officers on available training materials

At the suggestion of the Working Group, additional guidance has been provided recently to all Professional Responsibility Officers in the United States Attorneys' offices regarding what materials are available to assist them in conducting in-house training designed to satisfy the requirements of the Professionalism Policy. Professional Responsibility Officers from across the country have agreed that

there are significant benefits to conducting live, interactive, in-house professional responsibility training in the Districts, as opposed to having AUSAs merely sit before their computer screens to receive training, with no opportunity to ask questions or engage in discussion. Consequently, Professional Responsibility Officers have stated that they would benefit from knowing the universe of available training materials that would satisfy the requirements of the Policy.

As a result, additional guidance has been provided recently to all Professional Responsibility Officers in the United States Attorneys' offices regarding available training materials, including OLE's video-on-demand and Justice Television Network (JTN) programming, taped training modules, and Professional Responsibility Advisory Office (PRAO) training videos which are taped monthly and distributed by OLE.

B. Professional responsibility component to be added to most NAC and OLE courses

The Working Group also has agreed that it would be beneficial to have a professional responsibility or ethics component incorporated into as many NAC and OLE courses as possible. Once this step is completed, Department attorneys will be able to receive at least some credit toward the requirements of the Professionalism Policy from virtually any NAC or OLE course that they take. Some existing courses already contain such a component, and in the future similar components will be added to most NAC and OLE courses. These designated segments will be marked clearly in the syllabus for each course, as well as in the NAC and OLE course catalogs. As a result, it will be clear to all Department attorneys which NAC and OLE courses count toward the requirements of the Professionalism Policy and how many credits towards the Policy they can expect to receive.

C. Creation of annual year in review professional responsibility training materials

Finally, at the suggestion of the Working Group, an annual year-in-review set of training materials will be produced which will address significant professional responsibility and ethics issues which have arisen during the year involving Department attorneys. Since one of the primary purposes of the Professionalism Policy is to help prevent Department attorneys from being referred to OPR and to their state bar associations, Working Group members agreed that it would be beneficial to create and distribute a set of training materials which would provide an overview of the most significant referrals of Department attorneys to OPR for the year. The General Counsel's Office of EOUSA is currently working with OPR to produce this set of training materials, which will be distributed to all United States Attorneys' offices.

VI. Conclusion

The Professionalism Policy seeks to reinforce the fact that public service is a public trust, and that few priorities are more important to the Department's overall mission than ensuring its attorneys continue to demonstrate the highest levels of professionalism and ethical standards for which the Department is known. By establishing annual training requirements in professional responsibility, ethics, and other areas, the Policy will assist Department attorneys in understanding and meeting their professional and ethical obligations, and will continue to reinforce the fact that the Department's high expectations for its employees include the highest levels of professionalism by its attorneys.

If you have further questions regarding the Professionalism Policy, feel free to contact the General Counsel's Office of EOUSA, EOUSA's Office of Legal Education, or your component's Professional Responsibility Officer or Training Officer.❖

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Under Attack: The "Document Dump"

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I. Introduction

In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Supreme Court wrote: "[T]he individual prosecutor has a duty to learn of any favorable evidence . . . [gathered in the investigation, and to disclose to the defendant any] rising to a material level of importance. . . ."

Within this language may lie an emerging *Brady* frontier, for many defense counsel are now asserting that the Court's coupling of duty to "learn" with a duty to disclose makes clear that prosecutors' responsibilities exceed mere disclosure and include affirmatively identifying exculpatory and impeaching evidence in the government's possession. Thus, they claim, *Kyles* rejects the proposition that *Brady* can be satisfied by any practice such as what they scornfully refer to as the "document dump," a term apparently coined 30 years ago in *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

The term encompasses the common practice of providing the defendant unlimited and essentially unguided access to the evidence (except for witness interviews) accumulated during the investigation. Such access exceeds that formally required by recognized principles of law, including both *Brady* and the discovery mandate of the Federal Rules of Criminal Procedure Rule 16 (which only requires disclosure of evidence intended for use at trial, obtained from the defendant, or material for preparing the defense). There are at least three reasons why providing such broad access is desirable from the prosecutor's perspective, particularly in cases involving complex and voluminous evidence: it minimizes his or her active role in the discovery process and conforms to the standard allocation of responsibility over the custody and security of evidence to the case agent; it allows discovery to proceed without requiring the prosecutor to prepare for trial first, and thus saves enormous resources that would otherwise be expended for trial preparation in the vast majority of cases subsequently resolved by guilty pleas; and it avoids reliance on judgment calls in granting access, calls which are pregnant with the possibility of later controversy when second guessed by an adversary professionally quick to find fault. But to defense counsel, the document dump practice is anathema for two reasons: it places the full responsibility for diligent assessment of the evidence squarely on his or her shoulders, and it restricts a source for gleaning the adversary's thought process (manna from heaven to any attorney) which might otherwise flow bountifully.

As is often the case in the adversary system, defense counsels' claims that *Kyles* rejects the document dump and requires affirmative identification of exculpatory material is a huge leap from the Court's actual holding in that case, or for that matter from any other significant authority within *Brady* jurisprudence. Nonetheless, for two reasons it may be a substantial threat to our current practice: First,

because resort to methods they would condemn is often a key element in our efforts to satisfy *Brady*, and second, because institutional mistrust of prosecutors seems currently to be ascendant in the aftermath of the ignominious collapse of the Stevens prosecution, generating pressure for additional protections for the accused. For an example of such mistrust, *see United States v. Shaygan*, 2009 WL 980289 (S.D. Fla. Apr.14, 2009). In that case, the central issue was a poorly justified and mishandled witness tampering investigation of defense counsel commenced on the eve of trial, which was disclosed unprompted and with shocking affect by a witness during trial testimony. After the defendant's acquittal, the court concluded that aspects of the tampering investigation generated *Brady* information, granted a Hyde Act judgment of over $600,000, excoriated the prosecutors in unusually blunt terms, and referred the matter to the appropriate disciplinary boards. Accordingly, an understanding of the pertinent case law is important because it well supports a prosecutor confronted by an expansive application of *Kyles* in objecting to a document dump.

That defense counsel may chafe at a document dump is not new; what is new is the gloss buffed over *Kyles v. Whitley* in order to attack the practice. As will be discussed herein, sound understanding and application of *Brady* jurisprudence should suffice to refute the attack in any but the most difficult forum. Nonetheless, as will also be discussed, extreme circumstances may require special caution. The prosecutor, of course, should never be less than committed in good faith to the fairness of trial and may need to provide practical accommodations to achieve that reality.

This article does not address whether a prosecutor's duty to disclose under the *Brady/Giglio* line of cases is coextensive with the requirements of Rule 3.8(d), Special Responsibilities of a Prosecutor, of the American Bar Association's Rules of Professional Conduct. That rule provides that a prosecutor shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

II. Discussion

Brady, *Kyles*, and the other significant cases making up the body of *Brady* jurisprudence, deal with "suppression" of exculpatory or impeaching evidence. For example, *Brady v. Maryland*, 373 U.S. 83 (1963), was a felony-murder prosecution resulting in the imposition of a death sentence. The holding that the prosecution had caused a denial of due process was triggered by the state's failure to disclose in response to the petitioner's request for use in the penalty phase of trial that the co-defendant was the actual killer. The holding in *Giglio v. Illinois*, 405 U.S. 150, 154 (1972), was that suppression of a witness's previous plea agreement denied the defendant the opportunity for basic cross-examination regarding this potential source of bias and thus denied a fair trial. The holding in *United States v. Bagley*, 473 U.S. 667 (1985), was that suppression of an agreement to work as an informant, entered into during the investigation with a witness who testified at trial, similarly denied a fair trial, although only as to the charges for which the agreement was material evidence. Finally, *Kyles* involved suppression of a variety of information generated during the investigation by New Orleans police that would have supported the defendant's claim he was framed by the real killer and misidentified by eyewitnesses, which cumulatively arose to the "touchstone of materiality . . . [i.e.] a reasonable probability of a different result . . . [which is] shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial[.]' " *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 678).

The Court's comment in *Kyles,* that "[t]he individual prosecutor has a duty to learn of any favorable evidence" was in response to the argument by the state on appeal that there was no *Brady* violation resulting from the admitted failure to disclose the suppressed evidence in that case because it was not personally known to the prosecutor, to whom it evidently had never been communicated by the police. The Court did not tarry long over that bit of sophistry, rightly recognizing that prosecutors and investigators are not independent factotums, but mutually interdependent members of a team pursuing a common goal; thus, what is known by one is deemed to be known by the other. Accordingly, the prosecutor's actual ignorance is irrelevant to the scope of his duty to avoid suppression of material, exculpatory evidence. Indeed, that holding was fully foreshadowed in the earlier holding in *Giglio,* that

the trial attorney's ignorance of the actions of his departed predecessor did not excuse the former's failure to know of and disclose the witness's plea agreement.

No argument at all was raised in *Kyles*, or any other of the major *Brady* cases, that adequate disclosure of the exculpatory information at issue had actually been supplied nor could it have been on the facts presented. The fundamental holding of all the cases is that suppression by the prosecution (defined to include investigators) of material, exculpatory information is a denial of due process. No dispute over the adequacy of a particular type of disclosure has ever been before the Court. The suggestion, therefore, that the reference in *Kyles* to a duty to learn implies that a document dump is an inadequate disclosure—that is, that the practice legally constitutes suppression of any favorable evidence included—is plainly based merely on dictum, and actually constitutes an effort to achieve a broad expansion of *Brady* jurisprudence.

This is well reflected in a plethora of opinions of Federal Circuit Courts of Appeal. While the *Kyles* dictum that "the individual prosecutor has a duty to learn of any favorable evidence" is commonly quoted in the opinions, to this writer's knowledge, no Court of Appeals has ever extrapolated from it the conclusion that the true emphasis for *Brady* compliance is on duty to learn rather than duty to disclose. To the contrary, Courts of Appeal routinely characterize *Brady* jurisprudence in a manner fully congruent with the discussion herein; e.g. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) ("To establish a *Brady* violation the defendant must prove that the prosecution suppressed evidence . . . .") For a handful of the many additional recent opinions reciting the same proposition, *see United States v. Collins*, 551 F.3d 914, 923 (9th Cir. 2009); *United States v. Aleman*, 548 F.3d 1158, 1164 (8th Cir. 2008); *United States v. Kuehne*, 547 F.3d 667, 698 (6th Cir. 2008); *United States v. Reyeros*, 537 F.3d 270, 281 (3d Cir. 2008); and *United States v. Douglas*, 525 F.3d 225, 244 (2d Cir. 2008).

In addition, the Courts of Appeal frequently elaborate further, as in *Erickson*, by placing the ultimate emphasis on what is actually available to the defendant. Thus, the court there rejected the claim that a *Brady* violation occurred when the government failed to disclose a document to which the defendant had independent access. "[A] defendant is not deprived of due process by the government's failure to disclose information if the defendant has obtained the information through other means." *Erickson,* 561 F.3d at 1165. The court also stated that *"no Brady violation is possible* when [the] defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information' " *id.* at 1163 (quoting *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) and citing numerous cases to like effect) (emphasis added). One case to like effect, but not cited in *Erickson*, is *United States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005) (relying on "the well-established principle that 'the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.' " (citing *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984)).

If the emphasis in *Brady* jurisprudence were properly placed on the duty of prosecutors "to learn," consistent with the substantial expansion currently championed by defense counsel, rather than as suggested herein on whether any actual suppression has occurred, the analysis in *Erickson*, *Pelullo,* and myriad other cases could not fail to be wrong. But no reported opinion of a Court of Appeals has ever so understood the law.

Furthermore, the notion has been authoritatively rejected that the responsibility to "learn" recognized in *Kyles* somehow implies that provision to the defendant of unlimited, timely, but unguided access to the body of investigative data, i.e., the so called document dump, is legally insufficient to satisfy the prosecution's duty of disclosure under *Brady* of material, exculpatory evidence. As held in *United States v. Pelullo,* 399 F.3d 197, 212 (3d Cir. 2005) (emphasis added), "*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and *impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information* from materials that are so disclosed."

In *Pelullo*, the defendant operated a welter of business ventures among which he habitually transferred funds at whim, sometimes (as alleged in the indictment at issue, filed in the District of New Jersey) in connection with schemes including diversion of funds from employee benefit plans. His activities brought him to investigators' attention in several judicial districts and a search of a warehouse where he maintained the bulk of his business records was conducted in the Middle District of Florida. Investigators from New Jersey reviewed the seized materials, identified six boxes which appeared

relevant to the alleged diversions, and concluded that the remaining 160 boxes were not. The latter boxes remained in Florida, and the New Jersey federal prosecutor informed the court and the defendant of their supposed irrelevance to the pending indictment.

Nonetheless, the defendant insisted the documents remaining in Florida were relevant and obtained continuances of trial needed to inspect them. The necessary access to do so was made fully available. However, the defendant never followed up, eventually went to trial, and was convicted. Thereafter, he finally identified specific documents within the 160 boxes containing material, exculpatory evidence which he argued had been suppressed by the government in violation of his rights. The District Court granted a new trial, but the Court of Appeals reversed. It noted that the government did not have actual knowledge of the exculpatory character of the documents and that the defendant had full access to them. The fault was his. *Pelullo, id.* at 212-13 (emphasis added):

> As in [*United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) and *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996)] the government in this case made the warehouse documents available to the defense, without specifying any particular documents that were helpful to the defense, *something Brady does not obligate it to do.* In such circumstances, the burden is on the defendant to exercise reasonable diligence.

See also United States v. Runyan, 290 F.3d 223, 245-46 (5th Cir. 2002) (provision of access to computer hard drive was sufficient; government not obliged to identify data helpful to defendant); *United States v. Morris*, 80 F.3d 1151, 1168-69 (7th Cir. 1996) (The lower "court emphasized that there were literally hundreds of boxes of documents potentially relevant to this case and that the government had provided defendants and their counsel free and open access to all of those documents. To the extent defendants were alleging that certain documents had not been specifically identified by the government as exculpatory, the court believed that the government also had been unaware of the existence of those documents. The court emphasized, moreover, that defendants had been given the same opportunity as the government to discover the identified documents." Thus, the government did not suppress the evidence, and denial of a new trial was proper.)

Nor does the previously mentioned early Northern District of Georgia case which criticized what it characterized as a document dump offer an interpretation of *Brady* including any duty for prosecutors to identify exculpatory information to the defendant, let alone exalt any such perceived duty over the true *Brady* linchpin, i.e., the duty to disclose. Like *Brady* jurisprudence in general, *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975), actually dealt with a classic suppression of exculpatory evidence, accomplished there by delivery *in camera* to the trial judge, evidently in an attempt by the prosecutor to avoid the responsibility for disclosure by purporting to transfer it to the court.

The case involved a grisly homicide, in which the prosecution's case was built entirely on the hypnotically "enhanced" recollection of an immunized, drug addled, self-proclaimed co-conspirator named Kidd, which progressively, during a series of interviews and hypnosis sessions, achieved increasing conformity with physical evidence from the crime scene. In response to the complete omission to make available to the defense all of the vast impeachment information that was generated during the multiple interviews, the District Court found that, "as the prosecutor's theory of this case ripened with the 'restoration' of Kidd's memory, there was a *decision made in the Office of the Cobb County District Attorney to suppress* all evidence of Kidd's prior inconsistent statements." *Id.* at 1042 (emphasis added). The court continued to describe the implementation of that decision as follows:

> The prosecution, though it knew full well the exculpatory and devastating nature of the documents it possessed, did not divulge their existence or contents to either petitioner. It instead turned its files [of which the extensive and voluminous prior inconsistent statements were but a part] over to the trial judge without giving him a hint or clue as to their existence or significance. This, like the prosecution's ploy of padding its witness list with 500 names, was an act calculated to obfuscate rather than clarify, and it is not surprising that the trial judge failed to select the crucial documents for defense perusal.
>
> In this Court's opinion, the prosecutorial duty to produce exculpatory evidence imposed by *Brady* may not be discharged by "dumping" (even in good faith) a voluminous mass of files, tapes and documentary evidence on a trial judge. . . . [T]he prosecutor retains the constitutional

obligation of initially screening the materials before him and handing over to the defense those items to which the defense is unquestionably entitled under *Brady*.

Id. at 1042-43. The opinion in *Emmett v. Ricketts* is devoid of any implication that actual delivery by the prosecutor to the defense of the voluminous data, including the inconsistent statements, rather than indulgence in a contrivance to prevent such delivery by dumping the data on the state trial judge, would have failed, in the District Court's view, to satisfy *Brady*.

While one District Court has specifically opined that providing the defendant unlimited and essentially unguided access to the evidence possessed by the government is inadequate to meet the prosecutor's *Brady* obligation, the court's comment is dicta and unsupported by analysis or authority. *United States v. Hsia*, 24 F.Supp 2d 14, 29 (D.D.C. 1998) ("The government cannot meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack.") While the opinion considers a defendant's pre-trial motions in a factual context only thinly sketched, the court's true focus in applying *Brady* appears, in essence, similar to that in *Ricketts*. The actual holding to resolve the issue presented deals with the obligation to disclose information known to be exculpatory rather than the propriety of a document dump. Thus the court reasoned that "to the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to Ms. Hsia," *id.* at 29-30. In any event, to the extent that *Hsia* may be cited as criticism of the document dump practice, it is not persuasive in the face of the contrary authority.

Proponents of the current effort to exalt the purported duty to learn, crafted from a gloss on *Kyles* to an unwarranted status as the new litmus test of *Brady* compliance, may claim their expansive theory conforms to the consistent choice of the Supreme Court in its *Brady* jurisprudence to impose the fundamental responsibility for ensuring disclosure of exculpatory information on the prosecutor. But viewing the Court's choice in context, the apparent conformity of the theory is illusory, for the gloss blithely mixes mismatched parts of the jurisprudence like apples with oranges.

The starting point needs to be recognition that although due process forbids convictions achieved through suppression of material exculpatory evidence, it is firmly settled also that due process does not require a right of discovery for the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Concerns that broad discovery could compromise ongoing investigations, jeopardize witness safety, and cause unproductive complication of pre-trial proceedings with concomitant delay in the administration of justice are deemed sufficient to justify restricting routine criminal discovery to that allowed by Federal Rules of Criminal Procedure Rule 16 and the Jencks Act. *Brady* thus supplies a sort of safety valve in an otherwise normally adequate system, by choosing to assign to prosecutors the aforesaid fundamental responsibility for ensuring disclosure, so that access to material, exculpatory evidence will not be denied to the defendant by routine enforcement of the ordinary rules of discovery. The assignment to prosecutors of the safety valve responsibility for protection of defendants clearly has its roots in the institutional limits on access to evidence, which might prevent awareness of exculpatory information if rigidly applied.

But, there is no element contained in this assignment, made "in derogation of the ordinary allocation of responsibilities under the adversary system," *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001), to suggest that it is an actual assessment by the prosecutor of the potential exculpatory character of information that is the ultimate goal being sought. Rather, the goal is clearly disclosure to the defendant supplemental to ordinary discovery. Where that disclosure occurs, there is no reason to conclude that due process turns on the prosecutor's assessment or any lack thereof.

The ardent hopes of the defense bar notwithstanding, as a practical matter, expanding *Brady* principles to the point of requiring the prosecutor at his or her peril affirmatively to identify for the defendant exculpatory information acquired in an investigation, without regard to whether disclosure has actually been made, would be profoundly difficult to justify.

First, while exculpatory information may sometimes be obvious, that is not always the case. Oftentimes, particularly in complex cases, evidence will prove a population of facts of ambiguous significance. Such individual facts can arguably be used to support opposing inferences, depending on the context supplied by choosing other facts. Furthermore, systematic criminal activity may involve deceitful practices, including creation of disinformation and fragmentary retention of real information. Assessment of the potential value as proof of information subject to flaws of this sort, capable of exploitation by an

adversary, requires that it be considered in light of a specific theory that can be supported by anticipated testimony. For all these reasons, whether discrete facts can be cobbled into a chain of circumstances supporting an inference favorable to one side or the other, and how much weight such an inference is capable of bearing in the harsh light of litigation, is the very substance of the art of advocacy.

It is unwarranted to assume that prosecutors can effectively make the judgments central to this art on behalf of the defendant. There are at least two profound barriers to any such assumption: the differences in training and perception unique to each of the prosecution and defense functions, and the plain fact that the prosecutor is barred by the Fifth Amendment and attorney-client privilege from information critical to assessing fully the potential exculpatory value of investigative information. It is a simple but inescapable prediction that prosecutors charged with the broad responsibility of fully identifying all material, exculpatory information in an investigation will be plagued by some significant degree of error in the attempt. No matter what actions the prosecutor may take in this regard, those actions will be better done by the defense attorney with access to the data.

Second, as noted previously, wholesale disclosure of evidence via a so-called document dump saves substantial prosecution resources. If, instead of continuing to recognize this practice as adequate satisfaction of the *Brady* prohibition against suppression of exculpatory evidence, an expansive requirement for prosecutors affirmatively to identify exculpatory information were adopted, there would be a substantial societal cost in the form of a significant reduction of the number of prosecutions that could be initiated. Complex fraud and drug prosecutions would likely be reduced in frequency to the point that law enforcement would become largely ineffective against these significant forms of criminal activity.

Of course, to overcome such a reduction of productivity, a solution would be to hire more prosecutors in order to meet the expanded responsibility to identify exculpatory information for defendants. But, how sensible would it be to hire more prosecutors to help defendants? True, the document dump practice is burdensome to a defense attorney compared to being spoon fed exculpatory information, but, since identification of such information requires an expenditure of effort, it obviously makes more sense to provide funds for additional defense resources to support the effort, for example, by appointment of supplemental counsel if defense resources may otherwise be inadequate in a particular case.

III. Caution

There are a few recent cases specifically discussing the so-called document dump practice. The cases do not support any argument that it cannot satisfy the prosecution's *Brady* obligations. The cases echo the analysis in *Emmett v. Ricketts*, *supra*, insofar as they evince concern for the possibility that the practice might be subject to abuse from a prosecutor looking for a means to frustrate effective disclosure by hiding exculpatory evidence in plain sight, overwhelming the defendant with a flood of data. Clearly, this concern manifests the cardinal principle that a fair trial presupposes fair play by the prosecution. *See e.g., Banks v. Dretke*, 540 U.S. 668, 675-76 (2004) ("When police or prosecutors conceal significant exculpatory or impeachment material in the State's possession, it is ordinarily incumbent on the State to set the record straight.") Hiding in plain sight is, of course, a theme invoked by defense counsel in criticizing the document dump practice, and to that extent these cases may offer some slight support for their arguments. However, the better view of the cases is that they contain no real criticism of the practice so long as the defendant has effective access available to potential *Brady* material, or the playing field is at least level, and the prosecutor is not actually contriving to hide material exculpatory or impeachment information.

The most prominent and carefully reasoned of these cases arises from the Enron scandal, *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009). Multimillions of documents had been collected by the government in its investigation of accounting fraud, allegedly concocted by the defendant and others to misrepresent the company's true business activity and thus inflate the market value of its securities. The government provided full access to the documents in electronic form. The defendant argued that the "[U]se of an open file failed to satisfy . . . [*Brady*, because it] 'resulted in the effective concealment of a huge quantity of exculpatory evidence.' " *Id.* at 576. In response to the case law that "[a]s a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of

disclosed evidence," and "when evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation," the defendant contended that no reasonable amount of diligence would ever be sufficient to find everything materially exculpatory, i.e., "[t]hat the voluminosity of the government's open file prevented him from effectively reviewing the government's disclosure . . . . [and accordingly] the government's production of the voluminous open file, as a matter of law, suppressed exculpatory evidence." *Id*. (citations omitted).

The Court of Appeals declined to resolve the issue as a matter of law, but instead considered the extent to which the prosecution was sensitive to its *Brady* responsibilities and afforded a level playing field:

> In the present case, the government did much more than drop several hundred million pages on Skilling's doorstep. The open file was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to Skilling's defense. The government created indices to these and other documents. The government also provided Skilling with access to various databases concerning prior Enron litigation. Skilling contends that the government should have scoured the open file in search of exculpatory information to provide to him. Yet the government was in no better position to locate any potentially exculpatory evidence than was Skilling.
>
> Additionally, there is no evidence that the government found something exculpatory but hid it in the open file with the hope that Skilling would never find it. Skilling simply makes an unsupported assertion of improper conduct on the part of the government, but he fails to provide sufficient evidence to even hint at such deceit. . . .
>
> We do not hold that the use of a voluminous open file can never violate *Brady*. For instance, evidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*. . . . [In the circumstances presented, however,] we hold that the government's use of the open file did not violate *Brady*.

Id. at 577.

To like effect is the decision in *United States v. Ferguson*, 478 F.Supp 3d 220, 241-42 (D. Conn. 2007), where in response to the argument that a voluminous production characterized as a document dump violated *Brady*, the court held:

> [I]n this case there are no allegations of gross misconduct by the government: at arraignment, the government provided the defendants with its 'hot docs', and the government will also make its final *Brady* and *Giglio* disclosures far in advance of trial. Given these efforts by the government, coupled with the searchable electronic format of its entire Rule 16 production, the defendants' motion for identification of the *Brady* and *Giglio* material already disclosed is denied.

IV. Conclusion

Our practice of complying with Rule 16 and *Brady* by providing the defendant unlimited and essentially unguided access to the physical and documentary evidence accumulated during the investigation is well supported by case law, and broad objections to its utilization should fail. While some defendants may cite the insubstantial criticism of a document dump in *United States v. Hsia*, *supra*, the clear, prevailing view is that "the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence," *United States v. Skilling*, 554 F.3d at 529, and if full access is provided to the evidence, "the burden is on the defendant to exercise reasonable diligence" to find what may be exculpatory. *United States v. Pelullo*, 399 F.3d at 197.

The opinion in *Skilling* is especially instructive. While it contains no hint of criticism for the document dump practice in principle, it also represents the high water mark of well considered judicial reservations over the practice that may arise under extreme circumstances. Objections schooled by considerations cited by the court in *Skilling* could be problematic in some cases. To limit this risk, defendants should be provided access to the evidence by means adequate for effective review in the exercise of reasonable diligence. In extreme circumstances, steps to facilitate the review should be taken by the prosecutor, including utilization of searchable, electronic data, rather than paper documents, when sheer volume poses a significant difficulty. Further care should be taken to avoid placing unnecessary hurdles in the path of the defendant's review and any factor implying a purpose to impair its effectiveness must be avoided. *Skilling* and other opinions make abundantly clear that the prudent prosecutor will always be careful to disclose any information actually known to be helpful for exculpation or impeachment. In sum, prosecutors must be sensitive to *Brady* obligations and avoid any appearance of indifference. In the case of a challenge, the prosecutor should always be able to demonstrate good faith and a level playing field.

To the extent feasible, it is a good practice to minimize potential disputes over *Brady* compliance for the prosecutor personally to undertake a review of the accumulated evidence (even if only a partial review), while also granting full access to the defendant. Even in a case with voluminous evidence where the prosecutor cannot, as a practical matter, fully review everything and needs to rely on provision of full access as a means of compliance with *Brady*, disclosure of key documents and of any *Brady* material actually known will be a strong demonstration of the good faith that will help overcome objections.

Of course, there may be circumstances in which it is not desirable to grant the defendant unlimited, full access to evidence collected in an investigation. Certainly the prosecutor has the option of disclosing instead only specifically identified exculpatory and impeachment information, plus whatever must be provided as Rule 16 discovery, when the circumstances dictate. In that event, however, the prosecutor will need to be careful to meet the applicable standards gleaned from the *Brady* jurisprudence. Furthermore, such disclosure should be generous, in conformity with good judgement and Department of Justice policy, *see* USAM 9-5.001(c), which requires disclosure of helpful information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime."❖

ABOUT THE AUTHOR

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