

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 9-10, 2010

RECOMMENDATION

RESOLVED, That the American Bar Association urges the United States Department of Justice (the "Department") to:

- (a) continue in its commitment to investigate allegations of professional misconduct on the part of the Department's lawyers;
- (b) release as much information regarding completed individual investigations as possible, consistent with privacy interests and law enforcement confidentiality concerns;
- (c) publish annual reports of completed investigations that inform the public of conduct by government lawyers found to be proper or to constitute a violation of the rules of professional conduct; and
- (d) report any violation of the rules of professional conduct to appropriate disciplinary authorities of the jurisdictions where the involved lawyer is admitted to practice.

REPORT

Any professional misconduct of government lawyers that undermines the fair administration of justice should be identified and sanctioned, as should professional misconduct of lawyers for private parties. Further, the relevant regulatory processes should be reasonably transparent. Transparency is necessary both to give the public confidence that lawyers engaged in serious misconduct are effectively held accountable and to educate the public about the type of complaints that often are made that are unwarranted. This Recommendation addresses an aspect of the regulatory process for government lawyers where greater transparency is needed.

The Recommendation addresses the work of the Office of Professional Responsibility (OPR), the office within the United States Department of Justice (DOJ) that investigates alleged misconduct by federal prosecutors, DOJ civil lawyers and other DOJ lawyers. After investigating accusations made against federal prosecutors and other DOJ lawyers, OPR refers its findings to the Office of the Deputy Attorney General, which decides whether and how to punish wrongdoers.

The Recommendation begins by recognizing the importance of DOJ's continuing commitment to investigate "allegations of professional misconduct on the part of the Department's lawyers." In general, internal regulation by all law firms and law offices plays an important role in promoting lawyers' compliance with professional standards. Effective internal regulation is especially important in government lawyers' offices, to promote the fair and ethical administration of justice and to provide assurance to the public that the offices take compliance with professional standards seriously. Government lawyers in managerial authority must institute effective measures giving reasonable assurance that all lawyers in their offices conform to the professional rules and law.¹ The importance of OPR's work in helping DOJ fulfill its self-regulatory responsibility is worthy of acknowledgment.

In recent years, however, too little public disclosure has been made regarding OPR's investigations and the DOJ disciplinary determinations predicated on them in cases involving alleged professional misconduct. When OPR finds that a prosecutor or other government lawyer engaged in professional misconduct, the public has an interest in learning as much information about the investigation and findings as can be disclosed consistent with privacy interests and law enforcement confidentiality concerns. The remainder of the Recommendation addresses these concerns.

Background

Under a policy it adopted on December 13, 1993,² DOJ disclosed reports of OPR's investigations when it found knowing professional misconduct by DOJ lawyers and in certain other cases unless it determined that the public interest in disclosure was outweighed by the lawyer's privacy interest and countervailing law enforcement interests.

¹ ABA Model Rules of Professional Conduct, Rule 5.1(a); ABA Standing Comm. on Ethics and Prof'l Responsibility, Op. 09-454 (2009).

² Memorandum of Deputy Attorney General Philip B. Heymann re: "Disclosure of the Results of Investigation of Alleged Professional Professional Misconduct by Department Attorneys," dated Dec. 13, 1993.

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The 1993 policy was intended to “promote public accountability and further the fair administration of justice and the law enforcement process.”³ Except in cases where the Attorney General or Deputy Attorney General found that the public interest in disclosure was outweighed by the DOJ lawyer’s privacy interest or a law enforcement interest, the policy required DOJ to disclose the results of OPR findings (a) if DOJ found “intentional knowing professional misconduct”; (b) if the case involved “an allegation of serious professional misconduct” and there was otherwise a demonstrated public interest in the disposition, including a referral by a court or bar association; or (c) if an exonerated DOJ lawyer requested that the results be made public. Before DOJ decided whether to make a report public under its balancing test, the DOJ lawyer in question, his or her supervisor, OPR, and DOJ’s Office of Information and Privacy, which manages DOJ’s compliance with the Freedom of Information Act (FOIA), were all entitled to have input.

Pursuant to the 1993 policy, DOJ released a series of OPR reports that described the allegations, the investigative findings, and the disposition. Some reports described serious disciplinary misconduct resulting in significant sanctions. Some others exonerated DOJ lawyers who had been criticized in judicial opinions or found them to be less culpable than courts had believed. Collectively, the reports enabled readers to form an impression as to whether DOJ adequately policed its lawyers who were not practicing ethically.

Approximately ten years ago, however, the practice at DOJ changed. DOJ stopped publishing reports involving trial lawyers’ misconduct (although it did continue to publish reports involving managerial attorneys’ misconduct in personnel matters). This changed practice continues as of this date, although DOJ has continued to publish “annual reports” that provide statistical and summary information about its work.

The Need to Restore Transparency

The non-public nature of DOJ’s disciplinary determinations deprives the public of information about prosecutors and civil government lawyers who are alleged to have engaged in acts that warrant discipline and about how DOJ responds in such cases. Accordingly, the Recommendation calls upon DOJ to “release as much information regarding completed individual investigations as possible, consistent with privacy interests and law enforcement confidentiality concerns,” whether by reinstating the practices of DOJ pursuant to its 1993 policy or otherwise.

The Recommendation also acknowledges the importance of OPR’s annual issuance of summary reports concerning its completed investigations, especially with respect to cases in which privacy or confidentiality interests outweigh the public interest in detailed reports. The annual reports serve various interests, including educating government lawyers about their professional conduct and promoting greater public awareness of, and confidence in, DOJ’s internal regulatory process. Accordingly, the Recommendation supports the annual issuance of reports of “completed investigations that inform the public of conduct by government lawyers found to be proper or to constitute a violation of the rules of professional conduct.” Finally, the Recommendation

³ *Id.* at 1.

identifies the importance of reporting to appropriate authorities where the government lawyer is admitted to practice when a government lawyer violated the rules of professional conduct. This will enable the relevant disciplinary agencies to take appropriate investigatory or disciplinary measures.

As Deputy Attorney General Philip D. Heymann observed in justifying the 1993 policy, “serving as an attorney with the Department of Justice carries with it a responsibility to observe high ethical standards,” and the public therefore has a weighty “interest in knowing whether all of our attorneys are consistently satisfying those standards.” Greater transparency would promote the objectives underlying the Administration’s directive calling for a “clear presumption” in favor of disclosing government documents under FOIA and stating that nondisclosure is not justified “merely because public officials might be embarrassed by disclosures.”

Respectfully Submitted,
Charles Joseph Hynes, Chair
Criminal Justice Section
August 2010

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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Charles Joseph Hynes, Chair

1. Summary of Recommendation(s).

This Recommendation urges the United States Department of Justice (the “Department”) to: (a) continue in its commitment to investigate allegations of professional misconduct on the part of the Department’s lawyers; (b) release as much information as possible regarding completed individual investigations, consistent with privacy interests and law enforcement confidentiality concerns; (c) publish annual reports of completed investigations that inform the public of conduct by government lawyers found to be proper or to constitute a violation of the rules of professional conduct; and (d) report any violation of the rules of professional conduct to appropriate authorities where the involved lawyer is admitted to practice.

2. Approval by Submitting Entity.

The recommendation was approved by the Criminal Justice Section Council on February 10, 2010.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

NO.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Criminal Justice Section passed a policy (102 G) at the 2010 Midyear Meeting which is relevant to this proposed policy. It states:

RESOLVED, that the American Bar Association urges the President and the Attorney General to assure that lawyers in the Department of Justice do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests; and

FURTHER RESOLVED, that the American Bar Association urges the leaders of state, local and territorial legal offices to assure that lawyers in their offices do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests.

5. What urgency exists which requires action at this meeting of the House?

The Recommendation supports the annual issuance of reports of “completed investigations that inform the public of conduct by government lawyers found to be proper or to constitute a violation of the rules of professional conduct.” Greater transparency would promote the objectives underlying President Obama’s directive calling for a “clear presumption” in favor of disclosing government documents under FOIA and stating that nondisclosure is not justified “merely because public officials might be embarrassed by disclosures.”

6. Status of Legislation. (If applicable.)

Not applicable

7. Cost to the Association. (Both direct and indirect costs.)

None

8. Disclosure of Interest. (If applicable.)

No known conflict of interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2010 House of Delegates agenda it is being circulated to the following:

Standing Committee on Legal Aid and Indigent Defendants
 Judicial Division
 Litigation Section
 Individual Rights and Responsibilities Section
 Coalition for Justice
 Council on Ethnic and Racial Justice
 Young Lawyers Division
 Government and Public Sector Lawyers Division
 Standing Committee on Ethics and Responsibility
 Standing Committee on Lawyers’ Professional Responsibility
 Standing Committee on Professional Discipline
 State and Local Government Law
 Administrative Law
 National Organization of Bar Counsel

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10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY**A. Summary of Recommendation.**

This Recommendation urges the United States Department of Justice (the “Department”) to: (a) continue in its commitment to investigate allegations of professional misconduct on the part of the Department’s lawyers; (b) release as much information as possible regarding completed individual investigations, consistent with privacy interests and law enforcement confidentiality concerns; (c) publish annual reports of completed investigations that inform the public of conduct by government lawyers found to be proper or to constitute a violation of the rules of professional conduct; and (d) report any violation of the rules of professional conduct to appropriate authorities where the involved lawyer is admitted to practice.

B. Issue Recommendation Addresses.

It addresses an aspect of the regulatory process for Department of Justice lawyers where greater transparency is needed. The Recommendation addresses the work of the Office of Professional Responsibility (OPR), the office within the United States Department of Justice (DOJ) that investigates alleged misconduct by federal prosecutors and other DOJ attorneys. After investigating accusations made against federal prosecutors and other DOJ lawyers, OPR refers its findings to the Deputy Attorney General, who decides whether and how to punish wrongdoers. The Recommendation urges DOJ to make the relevant findings and decisions more transparent in order to promote the public in knowing whether government lawyers are observing ethical standards and in knowing how the government responds when its lawyers do not meet ethical standards.

C. How Proposed Policy Will Address the Issue.

The Recommendation supports the annual issuance of reports of “completed investigations that provide sufficient detail for the public to know the conduct of government lawyers that has been found to be proper or to constitute misconduct.” Greater transparency would promote the objectives underlying President Obama’s directive calling for a “clear presumption” in favor of disclosing government documents under FOIA and stating that nondisclosure is not justified “merely because public officials might be embarrassed by disclosures.”

D. Minority Views or Opposition.

None.