DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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Notification of Concerns Regarding Lack of Department Policy Requiring Express Authorization for Department Attorneys to Participate in the Criminal or Civil Investigation or Prosecution of Former Clients

INVESTIGATIONS DIVISION

August 24, 2021

Management Advisory Memorandum

To: Lisa Monaco
Deputy Attorney General

From: Michael E. Horowitz
Inspector General

Subject: Notification of Concerns Regarding Lack of Department Policy Requiring Express Authorization for Department Attorneys to Participate in the Criminal or Civil Investigation or Prosecution of Former Clients

The purpose of this memorandum is to advise you of concerns the Department of Justice (DOJ or Department) Office of the Inspector General (OIG) identified during the course of recent OIG investigations involving DOJ attorneys and former clients. Although Department policy tracks federal ethics regulations applicable to Executive Branch employees with respect to conflicts arising from personal or business relationships, and Department attorneys are bound by their state bar rules of professional conduct, these policies and bar rules do not sufficiently address circumstances that can arise in connection with DOJ investigations and prosecutions of former clients. Moreover, the Department does not have a specific policy requiring express authorization for DOJ attorneys to participate in the criminal or civil investigation or prosecution of former clients.

As a recent OIG investigation found, the absence of such a requirement may have contributed to a U.S. Attorney's (USA) failure to disclose to the Executive Office for United States Attorneys (EOUSA) a prior representation while in private practice of a subject of a criminal case in which the USA subsequently participated. The USA's failure to disclose this potential conflict, as well as another potential conflict in the same criminal case, resulted in significant reductions in the sentences of two defendants after post-conviction appeals were filed. Similar issues involving DOJ Trial Attorneys are presented in two ongoing OIG investigations.

Background and Relevant Authorities

The Department of Justice does not have a specific policy requiring express authorization for DOJ attorneys to participate in the criminal or civil investigation or prosecution of former clients. Rather, the only guidelines available to DOJ attorneys in assessing whether a conflict of interest exists that would prevent the DOJ attorney from handling a particular matter are (a) federal government ethics rules that apply to all Executive Branch employees, (b) DOJ guidelines for attorneys, and (c) the attorney's own state bar rules of

professional conduct. Below are the relevant provisions of the three authorities to which DOJ attorneys must refer when weighing whether they have a conflict that requires them to obtain authorization to participate in a matter involving a former client.

Government Ethics Rules Governing All DOJ Employees

Under federal regulations, specifically 28 C.F.R. § 45.1, all DOJ employees are subject to the executive branch-wide Standards of Ethical Conduct. Among these is 28 C.F.R. § 45.2 (Disqualification arising from personal or political relationship), which states:

> (a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:
>
> > (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or
> >
> > (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.
>
> (b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section shall report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he shall relieve the employee from participation unless he determines further, in writing, after full consideration of all the facts and circumstances, that:
>
> > (1) The relationship will not have the effect of rendering the employee's service less than fully impartial and professional; and
> >
> > (2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.
>
> (c) For the purposes of this section:
>
> > (1) Political relationship means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and
> >
> > (2) Personal relationship means a close and substantial connection of the type normally viewed as likely to induce partiality. An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse.

> Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the employee.
>
> (d) This section pertains to agency management and is not intended to create rights enforceable by private individuals or organizations.

Although a representative of DOJ's Ethics Office told the OIG that their office would advise DOJ attorneys prospectively that a "personal relationship" could include a DOJ attorney's relationship with a former client, they pointed out that the definition of "personal relationship" in the regulation (section 45.2(c)(1)) does not specifically address that situation. Moreover, that regulation affords deference to the employee's subjective opinion about whether such a relationship is "personal."

In addition, a separate federal regulation addressing potential conflicts that specifically references former clients of an attorney, 5 C.F.R. § 2635.502, does not adequately address this situation. This regulation states, in relevant part:

> (a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section…
>
> (b) Definitions. For purposes of this section:
>
> (1) An employee has a covered relationship with…
>
> (iv) Any person for whom the employee has, within the last year, served as an . . . attorney.

This provision has the following three shortcomings as it concerns DOJ matters: (1) it defines "covered relationships" to include a relationship between an employee and a former client only when the representation occurred "within the last year;" (2) it does not prohibit the employee's participation in a matter involving an individual with whom the employee has a covered relationship, but rather states only that the employee "*should* not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization" (emphasis added); and (3) it permits the employee to make the initial determination as to whether there is an actual or potential conflict of interest triggering disqualification, rather than requiring that the employee consult with a supervisor, who must then make the determination.

Relevant DOJ Guidance Governing Attorneys and Potential Conflicts

During the relevant times of the completed investigation, the United States Attorneys' Manual (USAM) required United States Attorneys' Offices (USAO) to consult with EOUSA whenever a USAO had a question about a potential conflict of interest. USAM Section 3-2.170 stated in relevant part:

> When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of a personal interest or professional relationship with parties involved in the matter, they must contact General Counsel's Office (GCO), EOUSA. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality.

In February 2018, this provision was modified and replaced by Justice Manual Section 3-1.140 (United States Attorney Recusals), which states in relevant part:

> When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of an actual or apparent conflict of interest, they must contact EOUSA's General Counsel's Office (GCO). United States Attorneys cannot recuse themselves or their offices from cases or matters. They must be recused by the designated Associate Deputy Attorney General. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a loss of impartiality.
>
> A United States Attorney who becomes aware of circumstances that might necessitate his or her recusal or that of the entire office should promptly notify GCO to discuss whether a recusal is required. If recusal is appropriate, GCO will coordinate the recusal action, obtain necessary approvals for the recusal, and arrange for a transfer of responsibility to another office.

The USAM and corresponding Justice Manual sections are consistent with the guidance in the federal ethics regulations, *see* 5 C.F.R. § 2635.502 (Personal and business relationships), which require every employee to act in an impartial manner.

The drawback with the Justice Manual provision is that while it requires U.S. Attorneys or their offices to bring potential conflicts to the attention of EOUSA's GCO, it does not obligate individual Department attorneys to raise potential conflicts with their respective offices, so the office can seek guidance from GCO.

State Rules of Professional Conduct

DOJ attorneys are bound by the rules of professional conduct in their respective states and the District of Columbia, which set forth their own restrictions on a DOJ attorney's ability to participate in a case involving a former client. Although state bar rules vary, the following Model Rule of Professional Conduct sets forth standards, which require all DOJ attorneys to be mindful of the hazards of participating in any case involving a former client.

> Model Rule 1.9 (Duties to Former Clients)
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> Client-Lawyer Relationship

> (a) 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.

Although state bar rules protect a former client from a DOJ attorney's potential conflict, they fail to adequately address the Department's own equities. Specifically, state bar rules generally permit individual Department attorneys to resolve potential conflicts by themselves without requiring the attorney to consult or notify a supervisor. This could result in situations where a DOJ attorney's former client is willing to waive a conflict that the Department views as problematic even with a waiver. For example, the Department might determine that the appearance of a conflict would cause the public to question whether the former client received preferential treatment in exchange for agreeing to waive the conflict. State bar rules focus primarily on preventing harm to a former client rather than the public's separate interest in the integrity of the process and accountability to the public. The Department should be able to independently evaluate a DOJ attorney's potential conflict.

The Issue

During our investigation of conflicts of interest involving a former USA (*see* Investigative Summary, posted on the OIG website on July 14, 2020: https://oig.justice.gov/sites/default/files/reports/20-083_0.pdf), the OIG found that the USA failed to (1) disclose to EOUSA and the relevant personnel of the USAO that the USA had previously represented in private practice the subject of a criminal case being investigated and prosecuted by the USAO; and (2) fully recuse from the matter. Post-conviction appeals filed by two defendants affected by the USA's conflict resulted in significant reductions in their sentences, in part because of the undisclosed conflict.

The USA likely violated the relevant state bar's rules of professional conduct, which required that the USA seek a waiver from the USA's former client before participating in the USAO investigation. However, those bar rules did not require the lawyer to consult with the current employer (DOJ) and DOJ policy did not require the USA to obtain explicit Department authorization allowing participation in the case. Consequently, the undisclosed potential conflict resulted in numerous post-conviction legal challenges and referrals to DOJ's Office of Professional Responsibility, and contributed to two defendants receiving significantly reduced sentences when the potential conflicts were ultimately disclosed. The mishandling by the USA also caused damage to the public's perception of the Department's integrity in its pursuit of the case, which is the type of harm the relevant federal ethics regulations seek to avoid.

While Office of Government Ethics (OGE) rules require some DOJ attorneys to fill out either a Public Financial Disclosure Report (OGE Form 278) or a Confidential Financial Disclosure Report (OGE Form 450), these forms capture only a limited amount of information and are therefore inadequate to address the concern we have raised.[1]

[1] For example, while OGE Form 278 requires new entrants to disclose the names of clients who have given them at least $5,000 per year during the two years prior to the new DOJ attorney joining the Department, its scope is limited to that amount and time period. The OGE Form 450 is limited to one year.

The OIG has identified similar issues in two other investigations, which are not described further because the investigations remain ongoing.

Conclusion

The OIG has found that the absence of a requirement that DOJ attorneys receive express authorization to participate in a matter involving a former client has negatively impacted the outcome of criminal prosecutions. The Department should take appropriate action to address this issue.

Recommendations

The OIG recommends the following:

1. The Department should modify existing policy concerning a DOJ attorney's participation in a criminal or civil investigation or prosecution in which a former client is a witness, subject, target, defendant, or party, to ensure that any such participation does not cause a reasonable person to question that attorney's impartiality.

2. The Department should consider what requirements, guidance, and/or training should be provided to any incoming Department attorneys entering service regarding their handling of potential conflicts arising from their representation of clients prior to joining DOJ.

Please advise us within 60 days of the date of this memorandum on what actions the Department has taken or intends to take with regard to these issues. If you have any questions or would like to discuss the information in this memorandum, please contact Sarah E. Lake, Assistant Inspector General for Investigations, at (202) 616-4730.

cc: Bradley Weinsheimer
Associate Deputy Attorney General

Monty Wilkinson, Director
Executive Office for United States Attorneys