MAKE THE HAND FIT THE GLOVE: OPR FINDS PROFESSIONAL MISCONDUCT

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"'If it doesn't fit, you must acquit,' became [Johnny] Cochran's mantra" as he successfully argued that the prosecutor's case against O. J. Simpson was "inconsistent and full of holes."[1] As America and a courtroom filled with spectators watched, the prosecutor[2] asked Simpson to put on the glove.[3] Simpson's hand did not fit. Why didn't O. J.'s hand

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1. *If it doesn't fit, you must acquit*, CNN.COM (Sept. 28, 1995, 12:51 AM), http://articles.cnn.com/1995-09-28/us/OJ_daily_9-27_8pm_1_cap-from-two-blocks-robert-heidstra-johnnie-cochran?_s=PM:US.

2. Christopher Darden and Marsha Clark were co-counsel as Assistant District Attorneys for Los Angeles County, California.

3. In-court demonstrations do not violate the Fifth Amendment right against self-incrimination. *See* Schmerber v. California, 384 U.S. 757, 764 (1966) ("[T]he privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."); *see also* Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (quoting Doe v. United States, 487 U.S. 201, 210 (1988) ("[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself."). For a courtroom demonstration to be admissible as evidence, the proponent of the demonstration, like the proponent of any evidence, must show that the demonstration is relevant. *See* Hinkle v. City of Clarksburg, 81 F.3d 416, 425 (4th Cir. 1996) (A courtroom demonstration that purports to recreate events at issue is relevant if performed under conditions that are "substantially similar to the actual events . . ."); *see also* United States v. Williams, 461

fit the infamous bloody glove, which was supposedly the government's "smoking gun" tying him directly to the murder scene of the double homicide of Nicole Simpson and Ronald Goldman?[4] Did O. J.'s hand miraculously grow a size larger during his several months stay in the Los Angeles County jail or was the glove simply not his? Whatever theory the jury chose to accept as the basis of O. J.'s acquittal, the subtle point that Cochran hammered home during his colorful closing argument was that the government should not engage in attempts to make the evidence fit the suspect,[5] but rather, the suspect should be evident from the facts.[6]

This tailored principle of law, that guilt should be evident from the facts, has been widely accepted by federal prosecutors as they try to mesh complex facts and laws that result in major convictions and, in some instances, not too graceful dismissals.[7] In context, the United States

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F.3d 441, 446 (4th Cir. 2006) ("In a related context, we have stated that [i]f there is substantial similarity, the differences between the [demonstration] and the actual occurrence ordinarily are regarded as affecting the weight of the test evidence rather than its admissibility . . . . On the other hand, the differences between the [demonstration] and the actual occurrences may be such that the trial judge is justified in concluding either that the evidence is totally lacking in probative value as to any material issue, or that the probative value of the evidence is overborne by the danger that introduction of the evidence will tend to confuse the issues, unnecessarily prolong the trial, or create a likelihood of undue prejudice. In such cases, it is proper to exclude the evidence . . . .").

4. Douglas O. Linder, *Chronology of the O.J. Simpson Trials*, FAMOUS AMERICAN TRIALS: THE O.J. SIMPSON TRIAL (1995), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/simpson/simpsonchron.html ("June 12, 1994: Nicole Brown Simpson and Ronald Goldman are stabbed to death. Their bodies found in the front courtyard of . . . Nicole's condominium in Brentwood.").

5. *Police made evidence fit the crime in convicting Kyle Unger: lawyer*, CBC NEWS, (Mar. 11, 2009), http://www.cbc.ca/canada/manitoba/story/2009/03/11/manitoba-kyle-unger-new-trial-murder.html ("'The police formed a theory before they had evidence of it and then made the facts fit into their theory,' said lawyer James Lockyer . . .").

6. *Closing Argument of Johnnie Cochran (Excerpts)*, FAMOUS AMERICAN TRIALS: THE O.J. SIMPSON TRIAL (1995), *available at* http://law2.umkc.edu/faculty/projects/ftrials/Simpson/cochranclose.html.

7. *Judge dismisses case against cyber bully*, UNITED PRESS INT'L (July 2, 2009, 7:03 PM), http://www.upi.com/Top_News/2009/07/02/Judge-dismisses-case-against-cyber-bully/UPI-11731246575823/; *see also* Jacob Parsley, *Judge Dismisses Ruling against Mother in MySpace Suicide Case*, A BLOG FOR THE COLLEGE OF LIBERAL ARTS (Oct. 2, 2009, 10:37 AM), http://blog.lib.umn.edu/cla/discoveries/2009/10/judge_dismisses_ruling_against.html, for a discussion of United States District Court Judge George H. Wu dismissing a cyber bullying case and finding that the prosecution could prosecute against anyone who violates the terms of a service agreement in computer on-line sites and the like. Judge Wu reasoned, "It basically leaves it up to a website owner to determine what is a crime . . . [a]nd therefore it criminalizes what would be a breach of contract." *See also Ted Stevens Charges Dismissed, Federal Judge Orders Criminal Probe of Prosecutors*, WIZBANGBLOG.COM (Apr. 7, 2009, 11:58 AM),

Department of Justice Office of Professional Responsibility ("OPR") ignored this vigorous and widely accepted standard when they investigated and made findings of intentional professional misconduct against an experienced federal prosecutor.[8] The finding of misconduct was based solely on the premise that a police officer and the prosecutor's supervisor were "clients" of the prosecutor in a criminal trial.[9] While the standards for evaluating civil,[10] criminal,[11] or administrative matters[12] differ, the facts nevertheless must be supported by the law and not tailored to support a specific outcome. OPR's finding that a police officer and a supervisor were the clients of a federal prosecutor[13] was an attempt to tailor facts to support a pre-determined outcome, rather than strive for an outcome supported by the law.

OPR's methods and analysis received national attention when they concluded that (Judge) Jay Bybee[14] and (Professor) John Yoo,[15] both former Department of Justice attorneys, engaged in intentional professional misconduct for their roles in drafting the 2002 torture

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http://wizbangblog.com/content/2009/04/07/ted-stevens-charges-dismissed-federal-judge-orders-criminal-probe-of-prosecutors.php (Judge dismisses case and orders probe of federal prosecutors).

8. *See* Memorandum from H. Marshall Jarrett to Guy A. Lewis, Director, Exec. Office for United States Attorneys, Re: Report of Investigation of Misconduct Allegations Against Assistant United States Attorney (Oct. 30, 2003) [hereinafter Jarrett Memorandum] (on file with author). For the purposes of this article, the term "federal prosecutor" means any assistant United States attorney, trial attorney, assistant/associate attorney general or general counsel employed by the United States Department of Justice who functions as an attorney.

9. Jarrett Memorandum, *supra* note 8, at 2.

10. *See* Murel v. Baltimore City Criminal Court, 407 U.S. 355, 360 (1972). Whether clear and convincing and/or preponderance of the evidence standard applies depends on the nature of the case.

11. Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J. dissenting) ("It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and safeguard of due process of law in the historic, procedural context of 'due process.'").

12. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

13. Jarrett Memorandum, *supra* note 8, at 2.

14. The Honorable Jay Bybee is a United States Court of Appeals Judge for the Ninth Circuit. Before being appointed to the federal bench, Judge Bybee was an attorney with the Office of Legal Counsel for the United States Department of Justice. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=2981 (last visited Nov. 23, 2011).

15. John Yoo is a professor at University of California Berkeley and former attorney to the United States Department of Justice—Office of Legal Counsel. *Berkeley Law—Faculty Profiles*, BERKELEY LAW UNIV. OF CAL., http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235 (last visited Nov. 23, 2011).

memo.[16] In a somewhat unexpected reversal of OPR's findings, Associate Deputy Attorney General David Margolis reduced the findings of intentional professional misconduct to "poor judgment" as the final resolution of this moral and political issue.[17] Unlike Judge Bybee and Professor Yoo, the attorney discussed in this article had no high-ranking Justice official to intervene on his behalf to review and hold OPR accountable for its analysis. One may argue that without some type of intervention, OPR's unsupported findings of intentional professional misconduct could have adverse consequences for the Department of Justice attorneys subject to its oversight.

I. INTRODUCTION

A finding of intentional professional misconduct is a lawyer's "death sentence"[18] when upheld by the court or by those who judge whether a lawyer has engaged in unethical behavior.[19] This article explores how the Department of Justice Office of Professional Responsibility (OPR) abandoned well-defined rules of law to make the facts fit an ethical violation, and thereby served as a means to punish rather than fulfill OPR's true purpose, which is to patrol ethics and assure that Department attorneys observe the highest level of professionalism. The potential for this type of unethical conduct in itself speaks to the need for an independent governmental agency or an internal mechanism that provides accountability and meaningful oversight of the process for

16. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340-2340A (2002), *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf. The 2002 Torture Memo addresses the legality, under international law, of interrogation methods used in the war against terrorism, specifically the interrogation methods used on captured al Qaeda operatives.

17. Riya Bhattacharjee, *Dept. of Justice Clears UC Berkeley Professor John Yoo of Misconduct*, THE BERKELEY DAILY PLANET (Feb. 25, 2010, 8:44 AM), http://www.berkeleydailyplanet.com/issue/2010-02-25/article/34705?headline=Dept.-of-Justice-Clears-UC-Berkeley-Professor-John-Yoo-of-Misconduct.

18. *See Duke Lacrosse Prosecutor Disbarred*, CNN.COM (June 17, 2007, 7:25 AM), http://www.cnn.com/2007/LAW/06/16/duke.lacrosse/index.html (the North Carolina State Bar charged Durham County, North Carolina District Attorney Mike Nifong with over a dozen violations of ethics rules following the unsuccessful prosecution of three Duke University Lacrosse players for the alleged rape of an exotic dancer).

19. The authority to remain active in the practice of law "rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." *Ex parte* Secombe, 60 U.S. 9, 13 (1856). Every state bar association in conjunction with the courts has provisions that will permit the termination of a lawyer's privilege to practice the trade of law.

determining whether a Department of Justice attorney has engaged in intentional or professional misconduct.[20]

This article focuses on OPR's finding "intentional professional misconduct" in a specific matter[21] to illustrate how well-defined legal principles can be manipulated to support an ethical violation, rather than the violation being evident from the facts.[22] Because there is no "innocence project"[23] or automatic judicial review of OPR's decisions,[24] it is imperative that findings of misconduct are based on a sound philosophy of integrity, transparency, and resolution, rather than vindication. Hence, OPR's finding that a police officer who was acting in his capacity as a case agent and the prosecutor's supervisor are "clients" of the prosecutor, when the prosecutor does not communicate with either of these two individuals concerning plea negotiations or other matters, presents several inherently complex questions.[25]

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20. *Text of the McDade-Murtha Bill, HR 3396*, The Am. Almanac. http://american_almanac.tripod.com/mcdade.htm (last visited Nov. 23, 2011). The original version of the McDade Bill provided for oversight, independent review, and evaluation of OPR findings.

21. *See* Jarrett Memorandum, *supra* note 8, at 30.

22. *See Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, U.S. DEP'T JUST., OFFICE OF THE DEPUTY ATTORNEY GEN. 68 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf [hereinafter *Memorandum of Decision*] (discussing a lack of scienter—that an allegedly false or misleading statement was made knowingly or with a reckless disregard for the truth); *see also* James Vicini, *U.S. Drops Corruption Case Against ex-Sen. Stevens*, REUTERS.COM (Apr. 1, 2009, 5:22 PM), http://www.reuters.com/article/politicsNews/idUSTRE5302O820090401?pageNumber=2&virtualBrandChannel=0 (dismissing charges against former Senator Stevens after evidence revealed the prosecutor withheld exculpatory evidence). Republican Senator Lisa Murkowski, also of Alaska, welcomed the Justice Department's decision, but said, "I am deeply disturbed that the government can ruin a man's career and then say 'never mind.'" Vicini, *supra.*

23. THE INNOCENCE PROJECT, www.innocenceproject.org (last visited Nov. 23, 2011). "The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice."

24. 5 U.S.C. § 7701 (2002). A Department of Justice lawyer who has been discharged from employment based on conduct may appeal the discharge to the Merit Systems Protection Board. However, in such a situation, there is no effective in-house review beyond the division level.

25. *See* Jarrett Memorandum, *supra* note 8. While this article discusses in part the police officer as a surrogate client, OPR emphasized that the prosecutor's supervisor was the client as a representative of the United States. *Id.* OPR gave little thought to this

Before analyzing the complexity of the legal paradox created by OPR's finding that prosecutors have clients, Part I of this article will define the levels of misconduct, and look at whether OPR's definition of what constitutes intentional misconduct is overly broad. Part I will also discuss the extent to which deference is given to the courts when OPR findings summarily conflict with judicial observations or determinations. Part II will discuss the legal conclusions OPR made in finding intentional professional misconduct in the illustrative case involving an experienced prosecutor, how the conclusions were reached, and the legal authority on which the findings were based. It will also discuss intentional professional misconduct in the context of whether knowing and willful[26] behavior, as defined by OPR, is necessarily the proper requirement to invoke the application of Rule 1.4 of the Rules of Professional Conduct.[27] Finally, Part II will discuss whether such a finding will have a chilling effect on prosecutorial independence.

Part III compares the duties and distinctions afforded the role of federal prosecutors versus those of an ordinary attorney in holding prosecutors accountable for their conduct, and the extent to which those duties and distinctions apply. Part III will also discuss how federal prosecutors will reconcile *Brady*[28] and *Giglio*[29] obligations if police officers are surrogate clients as contemplated by Rule 1.4 of the Rules of Professional Conduct. This article concludes by suggesting that OPR has been permitted to find intentional "professional misconduct by cherry-picking legal arguments to buttress an expansive view of"[30] the attorney-client relationship—a view not accepted in modern jurisprudence.

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analysis considering that the prosecutor himself is a representative of the United States when he appears in court to advocate the government's interest.

26. *See Memorandum of Decision*, *supra* note 22, at 11.

27. Rule 1.4, as stated herein, refers to the Virginia Rules of Professional Conduct, VA. CODE ANN. § 1.4 (2000), as set forth in the OPR investigation. However, every state bar has a provision that specifically addresses the ethical obligation that attorneys must communicate with their clients.

28. Brady v. Maryland, 373 U.S. 83, 88 (1963) (arguing that the prosecutor withholding critical evidence from the defendant is contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution).

29. Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.").

30. Stephanie Woodrow, *Mukasey's 'Qaeda 7' Defense Helps Yoo and Bybee*, MAIN JUST. (Mar. 10, 2010 4:16 PM), http://www.mainjustice.com/2010/03/10/mukasey-turns-al-qaeda-7-defense-to-benefit-of-yoo-and-bybee/. Former Attorney General Michael Mukasey objected to OPR's conclusion that Bybee and Yoo committed intentional professional misconduct in drafting the torture memo. Muskasey's comments are

A. History and Background of OPR

OPR was created in 1975 following the infamous Watergate Scandal.[31] During the Watergate hearings, both the public and Congress subjected the Department of Justice to scrutiny and formal inquiries focusing on ethical abuses and criminal misconduct by Justice officials. These ethical abuses and criminal actions led to several federal indictments[32] and the ultimate resignation of President Richard M. Nixon.[33] It was later discovered that President Nixon was aware of and attempted to cover up the alleged criminal conduct.[34]

OPR was established, in part, to address abuses committed by Justice lawyers and as a means of holding them to the highest ethical standards of conduct and accountability[35] that the public deserves and expects from the nation's top law firm. The United States Attorney General appoints a counsel and deputy counsel to head the Office of Professional Responsibility.

OPR reviews allegations of attorney misconduct involving violations of any standard imposed by law, applicable rules of professional conduct, or Departmental policies. When warranted, OPR conducts full investigations of such allegations, and reports its findings and

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consistent with the notion that OPR picks legal phrases and conclusions to support their finding, rather than those expressly implied in the law.

31. *See The Watergate Story*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/special/watergate/ (last visited Nov. 23, 2011). Watergate, the designation of a major United States political scandal that began with the burglary and wiretapping of the Democratic Party's campaign headquarters, later engulfed President Richard M. Nixon and many of his supporters in a variety of illegal acts, and culminated in the first resignation of a U.S. president.

32. Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988, http://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/mitchobit.htm (A "jury found former White House chief of staff H.R. (Bob) Haldeman, former White House chief domestic adviser John D. Ehrlichman, former assistant attorney general Robert C. Mardian and [John] Mitchell, guilty. The only defendant acquitted was Kenneth W. Parkinson, a Washington lawyer who had been hired by the reelection committee to represent it after the Watergate break-in."). John Mitchell is the only Attorney General ever indicted.

33. *President Nixon's Resignation Speech*, PBS.COM (Aug. 8, 1974), http://www.pbs.org/newshour/character/links/nixon_speech.html.

34. Bob Woodward, Transcript, *The Watergate Legacy, 35 Years Later*, WASH. POST, June 18, 2007, http://www.washingtonpost.com/wp-dyn/content/discussion/2007/06/14/DI2007061400497.html.

35. 28 C.F.R. § 77.1(a) (2010) ("The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.").

conclusions to the Attorney General and other appropriate Departmental officials. The Office also serves as the Department's contact with state bar disciplinary organizations.[36]

Within OPR, staff attorneys serve dual roles as both fact finders and advocates.[37] They not only investigate the underlying factual allegations against Department attorneys, but also make findings of fact and conclusions of law, which are often upheld by division heads.[38]

Many of the attorneys in OPR work exclusively for OPR, while others are temporarily on loan from various United States Attorney offices or other Justice components.[39] The attorneys travel throughout the country investigating complaints filed against Justice attorneys. Complaints are generated from various sources such as judges, private lawyers, defendants, citizens, or from within the Department of Justice itself.[40] In addition, OPR independently reviews appellate decisions, news articles, and the like, searching for conduct not ordinarily reported through regular channels.[41] Moreover, Department of Justice attorneys, as individuals, are required to self-report to their supervisor

> [A]ny "statement by a judge or magistrate indicating a belief that misconduct by a Department employee has occurred..." Whenever a judge or magistrate makes a finding that a DOJ attorney has engaged in misconduct, the attorney must immediately report the finding to the Office of Professional Responsibility "regardless whether the matter is regarded as serious or non-serious."[42]

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36. U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY, http://www.justice.gov/OPR/about-OPR.html (last updated Dec. 2010).

37. Jefferson v. DOJ, 284 F.3d 172, 174 (D.C. Cir. 2002) (requesting OPR to "investigate whether [the prosecutor] violated the law or engaged in professional misconduct" after an assistant United States attorney destroyed files following a FOIA request).

38. U.S. DEPT'T OF JUST., *supra* note 36.

39. *Department of Justice: Agencies*, U.S. DEP'T OF JUST., http://www.justice.gov/agencies/ (last visited Nov. 23, 2011). Within the Department of Justice there are several divisions, both civil and criminal, including Immigration, Drug Enforcement, Federal Bureau of Prison, Civil Rights, Torts Branch, and the Federal Bureau of Investigations.

40. *How to File A Complaint*, U.S. DEP'T OF JUST., http://www.justice.gov/opr/process.htm (last visited Nov. 23, 2011).

41. *United States Department of Justice: Policies and Procedures*, U.S. DEP'T OF JUST., http://www.usdoj.gov/opr/polandproc.htm (last visited Nov. 23, 2011).

42. United States v. Gonzales, 344 F.3d 1036, 1048 n.8 (10th Cir. 2003); *see also* UNITED STATES DEPT. OF JUST., UNITED STATES ATTORNEYS' MANUAL § 1-4.120(A) (2007) [hereinafter U.S. ATTORNEYS' MANUAL].

Facially, the tenure of OPR's counsel appears to be free of political wrangling. Since its inception thirty-five years ago, OPR has had only three counsels appointed.[43] However, the policies and directions of OPR's investigations, recommendations, and findings of misconduct or the lack thereof, are significantly influenced by the philosophy of the Attorney General, his senior staff, and cultural politics. Consequently, even though the leadership in OPR has rarely changed, their findings of misconduct, or a lack thereof, may be reflective of the empowered administration.[44]

The extent to which OPR pursues complaints against attorneys has shifted from administration to administration, and Congress on occasion has taken action to correct some of OPR's shortcomings. For example, during the tenure of Attorney General Richard "Dick" Thornburgh,[45] Congress questioned the Department's rationale for not pursuing disciplinary action against prosecutors in ten specific federal cases.[46] In

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43. *Office of Professional Responsibility (OPR)*, ALLGOV.COM http://www.allgov.com/Agency/Office_of_Professional_Responsibility__OPR_ (last visited Nov. 23, 2011). Mike Shaheen was Chief Council from the creation of OPR until 1997 (twenty-two years). *Id.* He was succeeded by his deputy as acting counsel for five months, and then by H. Marshall Jarrett, who was appointed by Attorney General Janet Reno. *See* Nedra Pickler, *Holder Replaced DOJ Internal Ethics Head*, THE HUFFINGTON POST (Apr. 8, 2009, 8:28 PM), http://www.huffingtonpost.com/2009/04/08/holder-replaces-doj-inter_n_184797.html.

In addition to re-assigning Jarrett, the chief of the ethics unit, Holder also announced that Mary Patrice Brown would be the new head of OPR. In the opinion of the author, Attorney General Holder could not have made a better choice. In 1992, while serving as an Assistant Federal Defender, I had the pleasure of litigating a criminal case against then-assistant United States Attorney Mary P. Brown. The case was very factually and intellectually challenging for both sides, and Ms. Brown's efforts to remain an ethical, competent, and vigorous advocate are without criticism in any material respect.

44. *See* Murray Waas, *Bush Blocked Justice Department Investigation*, http://www.informationliberation.com/index.php?id=13436 (last visited Nov. 23, 2011). OPR investigators were denied the necessary security clearance to conduct an investigation of misconduct by White House lawyers relative to the investigation of the firing of seven United States Attorneys. *Id.*

45. *Richard Lewis Thornburgh*, U.S. DEP'T OF JUST., OFFICE OF THE ATTORNEY GEN., http://www.justice.gov/ag/aghistpage.php?id=75 (last visited Nov. 23, 2011). Richard Lewis "Dick" Thornburgh is the former Governor of Pennsylvania. He became the 76th Attorney General of the United States, appointed by President Ronald Regan, and served from 1988 until 1991. *Id.*

46. H.R. REP. NO. 101-986, at 17 (1990). *See also* U.S. v. Lopez, 765 F. Supp. 1433, 1463 n.53 (N.D. Cal. 1991) (listing the ten cases cited by the House Subcommittee on Government Information, Justice, and Agriculture: United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986); United States v. Dougherty, 810 F.2d 763 (8th Cir. 1987); United States v. Skarda, 845 F.2d 1508 (8th Cir. 1988); United States v. Doe, et al., 860 F.2d 488 (1st Cir. 1988); United States v. Eder, 836 F.2d 1145 (8th Cir. 1988); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Pacheco-Ortiz, 889 F.2d

addition to these cases, there was the infamous Thornburgh memo relating to federal prosecutors being exempt from having unauthorized contact with represented parties.[47] Thornburgh, relying on the Supremacy Clause,[48] suggested that federal prosecutors were exempt from state bar regulations that specifically prohibited contact with represented parties.[49] This philosophical position was the subject of a subtle war among the bench and bar[50] and within the ranks of the Department of Justice.[51] Under Attorney General Janet Reno,[52] the practice of contact with represented parties survived but with an independent rationale for its existence.[53] Despite the political and perhaps philosophical differences

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301 (1st Cir. 1989); United States v. Martinez, 894 F.2d 1445 (5th Cir. 1990), *reh'g denied*, 901 F.2d 1110 (5th Cir. 1990); United States v. Shuck, 705 F. Supp. 1177 (N.D.W.Va. 1989), *judgment rev'd*, 895 F.2d 962 (4th Cir. 1990); United States v. Miller, 874 F.2d 1255 (S.D.Fla. 1989)).

47. Memorandum from Dick Thornburgh, Attorney General, United States Dep't of Justice, to All Justice Department Litigators (June 8, 1989) [hereinafter Thornburgh Memo] *reprinted in* Matter of Doe, 801 F. Supp. 478, 489 exh. E (D.N.M. 1992).

48. U.S. CONST. art. VI, § 2.

49. Thornburgh Memo, *supra* note 47, at 489-93.

50. *Matter of Doe*, 801 F. Supp. at 484-85 ("First, John Doe asserts the Supremacy Clause of the United States Constitution precludes states from enforcing varying ethical rules which are inconsistent with a federal prosecutor's duties. Further, he argues federal prosecutors exercise extraordinarily important federal executive functions while investigating and prosecuting violations of law. While a state ethical rule may appropriately be enforced against a state prosecutor, it conflicts with a federal prosecutor's duties. Finally, John Doe concedes the rules of ethics may apply to federal prosecutors in some circumstances, but asserts the Department of Justice ("DOJ") is vested with the authority to determine when and how.").

51. *See* Sapna K. Khatiwala, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 115-17 (2000). Attorney General Richard Thornburgh issued a memo that authorized federal prosecutors to contact persons who were represented by counsel without informing that counsel. *Id.* The memo indicated that federal prosecutors were exempt from Model Rule 4.2 as adopted by the states. *Id.* In 1994, Attorney General Janet Reno issued the regulation based on that memo, in opposition to ABA Model Rule 4.2. *Id. See also* Leslie Hagin, *Justice Department Attacks New Statute Holding Prosecutors to Ethics Rules*, THE CHAMPION (1999), *available at* http://www.criminaljustice.org/public.nsf/championarticles/99mar04?opendocument.

52. *Janet Reno*, WIKIPEDIA, http://en.wikipedia.org/wiki/Janet_Reno (last modified Nov. 13, 2010, 5:44 AM). "Janet Wood Reno (born July 21, 1938) is the former Attorney General of the United States (1993–2001). She was nominated by President Bill Clinton on February 11, 1993, and confirmed on March 11, 1993. She was the first female Attorney General and the second longest serving Attorney General after William Wirt." *Id.*

53. *Written Statement of Tim Evans, on behalf of the Nat'l Ass'n of Criminal Defense Lawyers, before the Judiciary Committee of the U.S. House of Representatives; Subcommittee on Courts and Intellectual Property*, at 3 (Sept. 12, 1996), *available at* http://www.nacdl.org/public.nsf/testimony/1996/$file/Evans091296.pdf ("Section 77.2(a)

between Thornburgh and Reno, contact with represented parties by federal prosecutors continued until Congress specifically addressed the issue by passing the McDade bill.[54]

In 1996, former Congressman Joseph M. McDade, a Republican from Pennsylvania,[55] introduced House Bill 3396, referred to as the "Ethical Standards for Federal Prosecutors Act of 1996."[56] The McDade bill,[57] which was codified into law, mandates that "[a]n 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."[58] The underlying point of the McDade bill is that federal prosecutors are statutorily bound by all state, local, and federal rules that govern attorney conduct. Given the expansive nature of the McDade bill, OPR thereafter assumed it was free to interpret and unilaterally enforce local bar rules with respect to the conduct of federal prosecutors.

In general, OPR is subject to the policies and practices of outside influences when carrying out its responsibility of monitoring and dealing with the conduct of federal prosecutors. These influences can serve to either negatively or positively influence OPR's decisions and practices. Thus, while the practice of law is supposedly a self-regulated industry, OPR is tasked with overseeing the conduct of Department of Justice attorneys, and the question becomes: who is watching OPR? Who is OPR accountable to when their findings are contrary to established lawful practices and policies?

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of part 77 of title 28 of the Code of Federal Regulations ('The Final Rule' or 'Reno Regulations') purports to self-exempt federal prosecutors from all state and local federal court rules governing lawyers' conduct. The Final Rule is the *self-regulatory aggrandizement* of the roundly condemned 'Thornburgh Memorandum' on DOJ unethics, which was first circulated among federal prosecutors in June of 1989. The Thornburgh Memorandum advised DOJ lawyers that any disciplinary rule for the profession that placed a burden on them was invalid under the Supremacy Clause of the U.S. Constitution, and therefore, the rule against contacts with represented parties was unenforceable against federal lawyers.") (citations omitted).

54. *Text of the McDade-Murtha Bill*, *supra* note 20.

55. *Joseph M. McDade*, WIKIPEDIA, http://en.wikipedia.org/wiki/Joseph_M._McDade (last updated June 23, 2011). McDade was a U.S. Congressman for the 10th District of Pennsylvania and served from January 3, 1963 until January 3, 1999. *Id.*

56. H.R. 3396, 104th Cong. (1996), *available at* http://bulk.resource.org/gpo.gov/bills/104/h3386ih.txt.pdf; *see also* 28 C.F.R § 530B (2000).

57. *Text of the McDade-Murtha Bill*, *supra* note 20.

58. H.R. 3396, *supra* note 56.

B. How OPR Makes Findings of Intentional Professional Misconduct

In rendering a decision concerning an attorney's conduct, OPR may find that there was "intentional professional misconduct," "professional misconduct,"[59] "poor judgment," or "a mistake."[60] OPR makes findings of fact and conclusions of law based on the "preponderance of the evidence,"[61] the lowest possible legal standard. In addition, OPR has devised its own analytical framework that it uses as a template in assessing what constitutes misconduct. For example, OPR states that intentional professional misconduct occurs where an attorney violates "an obligation or standard by: (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits."[62] Additionally, OPR provides that "professional misconduct" is based upon a determination:

> (1) that the attorney knew, or should have known, based on his or her experience and the unambiguous nature of the obligation or rule of conduct, of an obligation or rule of conduct; (2) that the attorney knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation or rule of conduct, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation or rule of conduct; and (3) that the

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59. In its 2005 decision, OPR made a finding of reckless professional misconduct. *See* ANNUAL REPORT 2005, U.S. DEP'T OF JUS., OFFICE OF PROF'L RESPONSIBILITY at 7 n.5 (2005), *available at* http://www.justice.gov/opr/annualreport2005.pdf.

60. ANNUAL REPORT 2003, U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY at n.3-6 (2003), *available at* http://www.usdoj.gov/opr/annualreport2003.htm (last visited Nov. 23, 2010).

61. *See* 5 U.S.C. § 770(c)(1)(B) (2010); *see also* U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY REPORT, at 13 (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf; *see also* Miguel Estrada, *Response to the U.S. Department of Justice Office of Professional Responsibility Final Report Dated July 29, 2009*, Submitted on Behalf of Professor John C. Yoo, at 27 n.21 (2009), *available at* http://judiciary.house.gov/hearings/pdf/YooResponse090729.pdf; *see also* Ed Brayton, *The OPR's Track Record and Conclusions on Yoo and Bybee*, SCIENCE BLOGS (Feb. 23, 2010, 12:16 PM), http://scienceblogs.com/dispatches/2010/02/the_oprs_track_record_and_conc.php.

62. *See* ANNUAL REPORT 2003, *supra* note 60, at n.3.

> attorney nevertheless engaged in the conduct, which was objectively unreasonable under all the circumstances.[63]

Moreover, under OPR's analytical framework, an attorney may be found to have exercised "poor judgment" when:

> [F]aced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.[64]

Finally, OPR may find that an attorney has made a "mistake" when "[the] attorney's conduct constitute[s] excusable human error despite the exercise of reasonable care under the circumstances."[65]

On its face, OPR's framework appears neutral and designed to guarantee that matters are investigated in a uniform and evenhanded manner.[66] However, the framework is procedurally flawed in that it has a "catch all" provision that renders OPR's findings unchallengeable, overbroad, and susceptible to philosophical interpretations.[67] This "catch all" provision stresses that the source itself "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, relating to OPR's investigations, its findings and conclusions, or any action taken as a result of them."[68] This clever caveat preempts an aggrieved attorney from seeking departmental recourse if

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63. *See id.* at n.4.

64. *Id.* at n.5.

65. *Id.* at n.6.

66. *See* Devlin Barrett & Pete Yost, *DOJ: No Misconduct for Bush Interrogation Lawyers*, THE WASH. TIMES, Feb. 20, 2010, http://www.washingtontimes.com/news/2010/feb/20/doj-no-misconduct-bush-interrogation-lawyers/.

67. U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY, ANALYTICAL FRAMEWORK, at 1 n.1 (2005), *available at* http://www.usdoj.gov/opr/framework.pdf.

68. *See* ANNUAL REPORT 2003, *supra* note 60, at n.4.

the law or facts do not support OPR's findings.[69] Therefore, in making findings of misconduct, OPR does not have to rely on legal precedent. For instance, OPR has made findings contrary to judicial determinations.[70] Moreover, there is no formal or uniform mechanism for persuading OPR that they are intellectually wrong with respect to their legal findings or conclusions. Thus, while OPR sets out in detail the factors that are to be considered when determining whether an attorney has engaged in professional misconduct,[71] there is no mechanism in place to ensure that OPR adheres to its articulated guidelines. The failure to have such a procedure in place calls into question the value of those factors.

II. OPR FINDS THAT POLICE OFFICERS ARE THE SURROGATE CLIENT OF A PROSECUTOR

In 2005, OPR recommended sanctions against a federal prosecutor following an investigation initiated by a local police officer in 2003,

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69. This assertion seems to be a contradiction because a high-ranking justice official reversed OPR's finding of misconduct as it applied to Yoo and Bybee when they authored the 2002 torture memo. *See Memorandum of Decision*, *supra* note 22, at 65. It seems that in the normal course, the average DOJ attorney is not afforded this luxury of having a forty-five-year veteran of the Department review such findings. In this matter, the DOJ attorney's concerns were addressed with the Executive Office for United States Attorneys (EOUSA), and became final. *Id.* There have been occasions within the Department when the United States Attorney or other ranking officials suggested to OPR that their finding may impact an attorney's career and encouraged them to soften the position taken.

70. *See generally* United States v. Lentz, 524 F.3d 501 (4th Cir. 2008) (noting that when OPR investigated, it made findings of misconduct, and then the court of appeals made contrary findings); *see also* ANNUAL REPORT 2000, U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY, at n.10 (2000), *available at* http://www.justice.gov/opr/annualreport2000.htm (last visited Nov. 23, 2011). ("*Failure to Disclose Brady Material.* A court of appeals reversed a conviction on the ground that a DOJ attorney failed to disclose to the defense three memoranda of interviews of witnesses, in violation of *Brady v. Maryland* [373 U.S. 83 (1963)] . . . The court of appeals also ruled that the attorney violated *Brady* by presenting a government witness as a neutral expert, when the witness had assisted in investigating the government's case. OPR conducted an investigation and concluded that the attorney did not commit professional misconduct. OPR found that the attorney did not violate *Brady* because the information contained in the three memoranda was available to the defense. OPR found further that the attorney did not err in failing to disclose that the government's expert witness had assisted in the investigation because that fact was known to the defendant, who had been interviewed by the witness.")

71. *See* ANNUAL REPORT 2003, *supra* note 60, at n.3.

while the officer was serving on a DEA task force.[72] The police officer learned through a federal probation officer that one of eighteen defendants in a narcotics prosecution, where he served as the case agent, had pleaded guilty to a lesser-included offense—possession of cocaine base[73]—rather than distribution of cocaine base, as charged in the indictment. The officer, upset by the plea agreement, filed a complaint with the prosecutor's supervisor. The officer maintained he was not informed of the prosecutor's decision to accept the guilty plea to the lesser offense, and he did not agree with the disposition of the matter.[74] Counsel for the defendant and the prosecutor negotiated a settlement in the case without the supervisor's approval or the officer's knowledge or input, within days before the matter was to be tried to a jury.[75]

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72. The Drug Enforcement Administration has joint task forces throughout major cities within the United States. The agents act in conjunction with the DEA in conducting criminal investigations. In many cases, these police officers are deputized as federal agents so that their jurisdiction can be expanded outside their respective city limits. *See generally DEA: State & Local Task Forces*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/programs/taskforces.htm (last visited Nov. 23, 2011).

73. In 2007, the Sentencing Commission changed the guidelines for cocaine and crack, making them proportional and thus raising the offense level for possession of cocaine hydrochloride and lowering the offense level for crack. *See* Donna Leinwand, *New Crack Guidelines Could Free 20k Inmates Sooner*, USA TODAY, Dec. 11 2007, http://www.usatoday.com/news/washington/2007-12-11-crack-sentencing_N.htm.

74. In this matter, it was an unwritten office policy to communicate with police. *See U.S. Department of Justice Office of Professional Responsibility Policies and Procedures*, http://www.justice.gov/opr/polandproc.htm (last updated July 25, 2008) (explaining that any non-frivolous complaint is required to be reported to OPR by department officials).

75. *See* ANNUAL REPORT 2005, *supra* note 59, at 12. OPR noted that DOJ attorneys are vested with broad discretionary authority to determine whether and how to pursue criminal investigations and prosecutions. *Id.* Last minute plea deals are not an unusual occurrence within a prosecutor's office. Moreover, OPR made no findings that the use of discretion in the matter was corruptly exercised. *Id.* For comparison, however, see "Example 1—Lack of Diligence; Failure to Obtain Supervisory Approval," where a litigating component reported to OPR that a DOJ attorney consistently failed to prepare cases for trial, resulting in numerous dismissals for want of prosecution. The DOJ attorney also was reported to have failed to obtain supervisory approvals for plea offers and voluntary dismissals. In that instance, OPR concluded that the DOJ attorney acted with a reckless disregard of her obligation to diligently and competently prepare for trial, and that the DOJ attorney engaged in intentional professional misconduct by violating the litigating component's policy requiring supervisory approval for plea offers and voluntary dismissals, and further that her conduct also violated her duty under the applicable state bar rule to communicate and consult with her client. Even though OPR did not reveal which state bar rule requires communication, after a diligent search I could find no instance where a state Bar considered prosecutors to have clients in a criminal context.

The officer's complaint correctly asserted that the defendant would be sentenced as a career offender[76] if found guilty of distributing cocaine base. However, by pleading guilty to possession of cocaine base instead of distribution, the defendant avoided the application of the career criminal guidelines,[77] thereby potentially reducing the time he would spend in custody. The defendant received a 120-month sentence, instead of the 151 months he would have received if had he been successfully prosecuted[78] and sentenced as a career offender.[79] The penalty for either distribution or possession, as charged in the indictment or criminal information, carried a maximum term of twenty years imprisonment.[80]

Even though the defendant would have been sentenced as a "career offender," he was not facing a statutory mandatory minimum sentence.[81] As part of an oral plea agreement, the defendant consented to charges by criminal information for "simple possession of cocaine base." A conviction for simple possession of cocaine base, as charged, carried a mandatory minimum of five years imprisonment and a maximum term of

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76. U.S.S.G. § 4B1.1 (2010) (defining a "career offender" as a defendant that is at least 18 years of age at the time of the offense, where the offense of conviction is a felony crime of violence or a controlled substance offense, and defendant has two prior convictions for crimes of violence or controlled substance offenses).

77. *Id. See also* United States v. Brandon, 247 F.3d 186, 193 (4th Cir. 2001) (holding that possession of cocaine is not a serious drug offense to invoke the career offender provisions).

78. It is highly likely that the defendant would have been convicted based on the skill level of the prosecutor. Because there were serious discovery concerns, the matter would have been ripe for several other challenges that would have been of greater concern to the Department than a failure to communicate with someone who is not a client. It is, however, the prosecutor's responsibility that the case did not move forward with a trial, but given the sentence and the small quantity of drugs, the ultimate sentence was sufficient.

79. In the two years OPR spent drafting its findings, it was obvious it was not sensitive to the changes in the law as it affected the potential sentence in this case. In *Booker*, the Supreme Court concluded that the federal sentencing guidelines were advisory rather than mandatory. U.S. v. Booker, 543 U.S. 220, 245 (2005). This change in the law alone would have substantially affected the outcome of the sentence following a trial or a conventional plea. Faith has it such that the plea agreement, though not authorized, potentially saved this case from a series of collateral attacks. Moreover, *Booker* had no effect on statutory mandatory minimum sentences. *Id.*

80. The indictment specifically charged the defendant with distributing cocaine base on two separate occasions, totaling approximately .035 grams. The potential maximum sentence for the offense is twenty years. *See* 21 U.S.C. § 841(b)(1) (2010).

81. 21 U.S.C.S. § 841(b)(1)(B)(iii) (2010) (carrying a mandatory minimum sentence of five years); United States v. Gales, 603 F.3d 49, 51 (D.C. Cir. 2010). *See generally* 2009 FEDERAL SENTENCING GUIDELINES MANUAL, U.S. SENTENCING COMM'N (2009), *available at* http://www.ussc.gov/Guidelines/2009_guidelines/2009_manual.cfm.

twenty years.[82] The defendant was ultimately sentenced to the terms of the agreement,[83] which was reduced to writing following the investigation.

At the conclusion of its investigation, OPR found that the prosecutor committed "intentional professional misconduct" by failing to communicate with the client (police officer) and the criminal supervisor in violation of Code of Professional Conduct Rule 1.4,[84] an unwritten office policy, and the United States Attorney Manual, Section 9-16.030.[85]

OPR recommended sanctions against the attorney[86] and referred the matter to the state bar for disciplinary action based in part on its findings that the attorney "failed to keep the client reasonably informed of the matter as required by Rule 1.4;[87] the criminal information was defective; and the attorney lacked candor with the district court by misstating the factual bases for the plea and penalties."[88] OPR concluded that these matters constituted intentional and professional misconduct. These

82. 21 U.S.C. § 844 (2010). *See also* United States v. Booze, 108 F.3d 378, 383 (D.C. Cir. 1997).

83. United States v. Gomez, 271 F.3d 779, 781-82 (8th Cir. 2001) (holding that the government is obligated to keep its agreement).

84. There were three other findings made by OPR: (1) a lack of candor; (2) failure to diligently represent the government's interest; and (3) the filing of a defective criminal information. Even though these issues are not discussed in this article, the analysis used to reach the outcome is equally disturbing. For example, OPR was aware that the prosecutor bought the errors to the court's attention upon discovery. The Fourth Circuit described the ethical duty of candor in *United States v. Shaffer Equip. Co.*, "as that duty attendant to the attorney's role as an officer of the Court with a 'continuing duty to inform the court of any development which may conceivably affect the outcome of litigation . . . .Thus, attorneys are expected to bring directly before the Court all those conditions and circumstances which are relevant in a given case.'" United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (1993). *Accord* Bryne v. Nezhat, 216 F.3d 1075, 1117 n.88 (11th Cir. 2001).

85. Jarrett Memorandum, *supra* note 8, at 15, 16, 18. *See also* U.S. ATTORNEYS' MANUAL, *supra* note 42, § 9-16.030.

86. Sanctions were imposed in 2005, but the referral to the state bar did not occur until 2007.

87. *See* VA. RULES OF PROF'L CONDUCT, R. 1.4 (2010), *available at* http://www.vsb.org/docs/2008-09_rules-pc.pdf (last visited Nov. 23, 2011) ("(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.").

88. The state bar rejected all of the claims of misconduct alleged by OPR. It is important to note that OPR made no finding that the misstatement of the underlying facts or penalty was intended to deceive the court or to mislead it in accepting the guilty plea.

findings were then referred to the attorney's state bar for further action of a disciplinary nature.

One may conclude that the examination of the facts and the law surrounding OPR's findings suggests that OPR's role was to guarantee a recommendation that would result in punishment, rather than patrolling ethics by assuring that the attorney adhered to the highest professional standard.[89]

A. Who Are The Prosecutor's Clients?

The question at the heart of OPR's findings is: who are the clients of federal prosecutors? By all accounts, they have none, and to suggest otherwise is misguided and a form of "intellectual dishonesty"[90] that squarely fits the notion that OPR can "make the hand fit the glove." As stated earlier, OPR may make findings of misconduct when they determine that an attorney violates an obligation or standard by: "(1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits."[91]

OPR is mandated with the responsibility of reviewing and investigating "allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy."[92] However, OPR's unprecedented decision that police officers and supervisors are the clients of federal prosecutors fits neither a standard imposed by law, an applicable rule of professional conduct, nor Department of Justice policy.[93] To give credence or any legal recognition to the proposition that federal prosecutors have clients would require a statute or judicial opinion holding that a police officer or a federal prosecutor's supervisor enjoys a fiduciary relationship with the

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89. *See supra* note 86 and accompanying text.

90. Edward Lazarus, *George Will, Miguel Estrada, and the Cloture Vote: How Will's Flip-Flop of Positions Illustrates the Increasing Collapse of the Politics/Law Distinction*, FINDLAW (Mar. 6, 2003), http://writ.news.findlaw.com/lazarus/2003/030 ("Intellectual dishonesty is pure poison to the enterprise of the law . . . . [O]ur society had become so divided, with each side so bent on perpetuating itself in power, that government and the world around it imposed a sustained and terrible pressure on good people to make a choice. They could either leave that world or, far worse, give up the search for truth, in exchange for the search for victory.").

91. *See* ANNUAL REPORT 2003, *supra* note 60, at n.3.

92. U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY, http://www.usdoj.gov/opr/about-opr.html (last visited Nov. 23, 2011).

93. A prosecutor represents a powerful sovereignty and not an ordinary party in a controversy. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

prosecutor, and thus forms an attorney-client relationship. Moreover, by implication, the respective bar for which a Justice attorney holds a license to practice law would treat police officers and supervisors as "clients" of the prosecutor in its rules of professional conduct. At a minimum, there would be legal precedent to support the proposition and put prosecutors on notice of the relationship at the inception of employment. To date, however, this position is far from a legal reality.

Former United States Deputy Attorney General James B. Comey,[94] a well-respected legal scholar, said, "[a prosecutor's] client is justice," as he discussed the important and unique role of the federal prosecutor.[95] Comey further emphasized that "[t]he most important thing . . . [prosecutors] can do is make sure the right thing is done . . . whether that involves clearing someone who has been accused, or severely punishing someone who has been accused and is guilty . . . ."[96] Mr. Comey's comments are consistent with the idea that prosecutors owe a duty to the public and criminal defendants to be fair and to use good judgment in resolving cases, regardless of the outcome. Prosecutors must not foster or engage in any conduct that would give the appearance that they are supporting or endorsing any conduct consistent with having a personal stake in the outcome.[97] In that, prosecutors should not make charging decisions for the satisfaction of witnesses or constituents.[98]

So, who are the clients for the purposes of Rule 1.4[99] as it relates to the federal prosecutor?[100] The short answer is no one. The term "client,"

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94. James B. Comey served as the United States Deputy Attorney General from 2003 until 2005 under Attorney General John Ashcroft. *See James B. Comey*, WIKIPEDIA, http://en.wikipedia.org/wiki/James_B_Comey (last updated Aug. 22, 2011). Before becoming Deputy Attorney General, Comey served as United States Attorney, Southern District of New York, and Managing ASUA for the Eastern District of Virginia. *Id.*

95. Richard Foster, *Part II: One of the Good Guys*, STYLE WEEKLY (Jan. 1 1980), http://www.styleweekly.com/gyrobase/part-ii/Content?oid=1387317.

96. *Id.*

97. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 n.17 (2005) (citing Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984)) ("If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obligated, to be deeply interested in urging that view by any fair means.").

98. A point of contention with the police and the prosecutor was that the police officer's desire was to secure a conviction of the defendant as a career criminal. Inherent in every hand-to-hand delivery of a controlled substance is the element of possession.

99. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004):

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

as used in the context of a criminal prosecution, is merely symbolic when describing the position or interest the government is protecting or advancing in a criminal matter. Yet, OPR makes reference to the term "client" as though a real person or entity's interest is at stake.[101] Numerous scholars have discussed the importance and the significance of prosecutors not having individual clients[102] because of the inherent responsibility of "seeking justice"[103] and the freedom of client control.[104]

While the American Bar Association (ABA) Rules of Professional Conduct and those similarly adopted by the various states use the term "client" frequently, there is no "black letter law" beyond the term explaining or endorsing a fiduciary relationship enjoyed between prosecutors (and their subordinates or superiors) and police officers that supports OPR's finding that one or more of these individuals are "clients." In some respects, the position that OPR has taken is not a novel issue entirely, but rather a surprising deviation based on the intellectual reputation of the collective Department of Justice. Throughout an investigation, police officers often seek permission from prosecutors before they submit to interviews by defense attorneys[105] because police officers often feel or mistakenly believe the prosecutor is their attorney, not only to marshal their case through the court system, but also to advise

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(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

100. Gershman, *supra* note 97, at 563. ("A prosecutor's 'clients' are the people who live in the prosecutor's jurisdiction, including police, witnesses, crime victims, and even the accused.").

101. Jarrett Memorandum, *supra* note 8, at 2.

102. Gershman, *supra* note 97, at 559.

103. *See* Bruce A. Green, *Prosecutors' Professional Independence: Reflections on* Garcetti v. Ceballos, 22 CRIM. JUST. 4, 6 (2007) ("[T]he ABA standards do not define the duty to 'seek justice'" . . . . Rather, they "call upon prosecutors" "to exercise sound discretion in the performance of his or her functions.").

104. *Cf.* Foothills Dev. Co. v. Clark Cnty, Bd. of Cnty. Comm'rs, 730 P.2d 1369, 1373 (Wash. Ct. App. 1986) (holding that an attorney must follow his client's specific instructions).

105. Prosecutors are prohibited from instructing witnesses against speaking with defense counsel. United States v. Simmons, 670 F.2d 365, 371 (D.C. Cir. 1982). Witnesses can be informed of their rights to speak with whomever they desire to communicate. *Id.*

the officer individually on case-related matters. However, the courts have admonished prosecutors for encouraging government witnesses, such as police officers, not to speak with defense lawyers about pending criminal matters.[106] In 2000, the North Dakota Bar addressed an ethical question relating to prosecutors instructing defense counsel not to speak with police officers before preliminary hearings[107] in the context that such contact was a violation of "contact with a represented party."[108] These instructions, as given by a prosecutor, arguably suggest there is an erroneous belief by some prosecutors that an attorney-client relationship exists between police officers and prosecutors and that the police officers are represented parties. While the North Dakota Bar did not specifically address the relationship of the prosecutor and the police in the attorney-client context, it made clear that "[p]olice officers are witnesses in a criminal case and not a persons [sic] represented by counsel."[109] Similarly, the Arizona Bar Ethics Committee addressed "whether a prosecutor may reveal the substance of discussions with law enforcement witnesses, or whether that information may not be disclosed as a client confidence."[110] In explaining its position that prosecutors do not have clients, the Arizona Bar, in quoting Wolfram's *Modern Legal Ethics* section 13.10.1, said:

> The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies. The police are an important constituency, although for most purposes individual police officers with whom the prosecutor holds confidential meetings are not the lawyer's client. Victims of crime are also clearly not clients . . . The emotionally satisfying statement is that the client of every prosecutor is the public. A less emotive but more realistic conceptualization is that prosecutors in a position to make policy decisions should regard the public as their client, while prosecutors in subordinate roles should regard their superiors in the office as the effective client

106. United States v. Peter Kiewit Sons' Co., 655 F. Supp. 73, 77 (D.Colo. 1986) ("Generally, witnesses do not 'belong' to either side in a criminal case. Absent compelling circumstances, both the government and the defense have a right to interview witnesses prior to trial."). *See also* United States v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1989), *rev'd on other grounds* U.S. v. Dave, 314 Fed. Appx. 40 (9th Cir. 2008).

107. St. Bar Ass'n of N.D. Ethics Comm. Op. 00-05 (2000), *available at* http://www.sband.org/data/ethics/00-05.pdf.

108. MODEL RULES OF PROFESSIONAL CONDUCT R. 4.2 (2004).

109. *See* St. Bar Ass'n of N.D. Ethics Comm., *supra* note 107.

110. St. Bar of Ariz. Ethics Op. 01-13 (2001), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=281,

> for matters on which office policy has been set or specific directions given, unless a superior directs a subordinate lawyer to violate the law or the professional rules.[111]

Therefore, OPR's finding that the prosecutor's failure to converse with the police officer or his supervisor concerning the final disposition of a criminal matter constituted intentional professional misconduct is inconsistent with the tenets of the rules of professional responsibility as they relate to clients.[112] Because of the unique position of the prosecutor, he represents the interest of the people collectively, and not as individuals.[113] The prosecutor also does not represent political entities or the personal agendas of law enforcement personnel and other parties.[114] By representing the interest of the people collectively, the prosecutor represents the interest of the defendant[115] so that his rights are not violated;[116] the interest of the police to ensure that their criminal cases

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111. *Id.* (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1 (West 1986)).

112. For a jurisdiction that has specific rules of conduct for prosecutors, *see, e.g.*, 27 N.C. ADMIN. CODE 2.3 (West 2001).

113. IND. CODE ANN. § 31-25-4-13.1(e)(f) (West 2008 & Supp. 2011) ("(e) A prosecuting attorney or private attorney entering into an agreement or a contract with the bureau under this section enters into an attorney-client relationship with the state to represent the interests of the state in the effective administration of the plan and not the interests of any other person. An attorney-client relationship is not created with any other person by reason of an agreement or contract with the bureau. (f) At the time that an application for child support services is made, the applicant must be informed that: (1) an attorney who provides services for the child support bureau is the attorney for the state and is not providing legal representation to the applicant; and (2) communications made by the applicant to the attorney and the advice given by the attorney to the applicant are not confidential communications protected by the privilege provided under IC 34-46-3-1.").

114. *See* Roland Acevedo, Note, *Is A Ban On Plea Bargaining An Ethical Abuse Of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1005, n.153 (1995) ("The prosecutor simultaneously represents the often conflicting interests of the community, victim, defendant, and the state.").

115. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.").

116. United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974) ("The Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel and, if the perjury may be material, also the grand jury in order that appropriate action may be taken.").

move forward when appropriate; and the interest of the victims.[117] Because the prosecutor is always facing conflicting interests,[118] at least one of his or her constituents will undoubtedly be dissatisfied with the outcome, [119] and there will be an assumption by the party that he has been let down.

Furthermore, OPR's de facto findings that attorney-client relationships exist within the Department of Justice are also inconsistent with other rules and policies within the Department. For example, the United States Attorneys' Manual states:

> [p]ersonal representation of government employees is necessary only when they are sued in an individual capacity for damages. When a government employee is sued in an official capacity, the real defendant is the United States. Should relief be awarded, it would be against the resources of the United States. The Department of Justice represents federal officials sued in their official capacities for declaratory, injunctive or other forms of relief....
>
> When an employee (present or former) is sued in his or her individual capacity, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from the personal assets of the employee as opposed to the assets of the United States. Additionally, it is noted that in most instances a federal employee providing testimony (i.e. deposition), and who is not a party to the action, does not need personal representation and Department of Justice representation will not be authorized.[120]

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117. *See generally* NAT'L CRIME VICTIM LAW INST., *South Carolina Victims' Rights Laws*, http://www.scvan.org/legal/SouthCarolinalaw.pdf (last visited Nov. 23, 2011) (listing requirements for prosecutors and other law enforcement officials in order to properly serve victims).

118. Henry K. Lee, *Federal Agent Charged in Case Where Colleagues Made up Story*, S.F. CHRON. (Nov. 30, 2004), http://articles.sfgate.com/keyword/federal-police ("A federal police official has been charged with covering for two colleagues in San Francisco who invented a story about a motorist trying to run them down to explain why one of them shot at the man's car.").

119. *New Directions From The Field: Victims' Rights and Services For The 21st Century*, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST. (1998), *available at* http://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf ("There are . . . times when the prosecutor can neither accept the victim's wishes nor explain the reason for a contemplated plea agreement, such as when the defendant is cooperating with an ongoing investigation or working undercover.").

120. U.S. ATTORNEYS' MANUAL, *supra* note 42, § 4-5.412.

In the criminal context, the Manual states that "[a]lthough United States Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power should be exercised only after appropriate consultation with the federal investigative agency involved."[121] The Manual continues by stating that, "in addition, the *Attorney General Guidelines for Victim and Witness Assistance 2000* provides that United States Attorneys should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations."[122] These provisions make clear that the United States Department of Justice does not have "real people as clients" in the context of criminal matters, but that the attorney should be considerate of an individual or an entity's interest in the outcome of a matter.

Interestingly, in 1995, Assistant Attorney General Deval Patrick,[123] Civil Rights Division, specifically sought clarification regarding "the legal relationship between Department of Justice attorneys and individuals on whose behalf the United States institutes civil actions pursuant to the Fair Housing Act, as amended (42 U.S.C. §§ 3604-3616a)."[124] Justice attorneys responded to the inquiry unequivocally that "[w]hen the Department of Justice undertakes a civil action 'on behalf of' a complainant," alleging a discriminatory housing practice under the Fair Housing Act, Department attorneys handling the action do not "enter into an attorney-client relationship with the complainant, nor do they undertake a fiduciary obligation to the complainant."[125] Similarly, when a police officer or federal agent files a criminal complaint alleging criminal conduct of a defendant, the officer is no more of a client than is a victim of housing discrimination. Given that a victim of housing discrimination is not considered a client even though that person may have a personal stake in the outcome of the litigation, it is highly unlikely that a police officer, who has no inherent interest in the outcome of the case, would be considered a client.

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121. *Id.* § 9-16.030.

122. *Id.*

123. *Governor Deval Patrick*, OFFICIAL WEBSITE OF THE GOVERNOR OF MASSACHUSETTS, http://www.mass.gov/?pageID=gov3utilities&sid=Agov3&U=Agov3_Deval_Patrick_welcome_msg (last visited Nov. 23, 2011).

124. *See* Memorandum from Walter Dellinger, Assistant Att'y Gen. for U.S. Dep't of Just., Civ. Rts. Div., to Deval Patrick, Assistant Att'y Gen. for U.S. Dep't of Just., Civ. Rts. Div. (Jan. 20, 1995) [hereinafter Dellinger Memo], *available at* http://www.usdoj.gov/olc/civrts2mem.htm (asserting no attorney-client relationship formed when Department represent individuals in housing discrimination cases).

125. *Id.*

Thus, OPR's finding of a prosecutor's failure to communicate with a police officer and supervisor as a client as set forth in Rule 1.4, and its reliance on any part of section 9-16.030 of the United States Attorneys' Manual as the basis for its determination that an implied attorney-client relationship exists, is intellectually troublesome.

III. ANALYZING *BRADY* AND *GIGLIO*

OPR has determined that a prosecutor's failure to inform a police officer or his supervisor of an impending plea is a violation of Rule 1.4, communication with a client.[126] Department of Justice attorneys are required to report "non-frivolous"[127] complaints of attorney misconduct.[128] Certainly, if a recognized attorney-client relationship existed between a prosecutor and his supervisor or the police, the reporting of this matter to OPR would have been a legitimate reason to initiate an investigation. However, OPR's reliance on the faulty legal assumption that prosecutors have clients produced a disjointed, unsubstantiated, hodgepodge analysis that resulted in an injustice[129] and an exercise in "poor judgment."[130]

OPR's assessment that an attorney-client relationship existed between the prosecutor and the police officer or his supervisor must be supported by statutory or legal precedent that puts into context how the attorney-client relationship was formed. This is especially true in light of the historical significance of *Berger v. United States*[131] and the

126. Jarrett Memorandum, *supra* note 8, at 15. Since this matter originated in the Commonwealth of Virginia, OPR cited the Virginia provision of the Code of Professional Responsibility. *See* Virginia Rules of Professional Conduct, VA. CODE ANN. § 1.4 (2000).

127. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2004).

128. Rule 8.3—Reporting Professional Misconduct, commonly known as the "snitch rule," states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority." D.C. RULES OF PROF'L CONDUCT R. 8.3 (2007).

129. This analysis does not suggest that from a managerial perspective the prosecutor's missteps should have been subject to some kind of action.

130. Finding that DOJ officials who authored the torture memo exercised poor judgment in reaching a conclusion that is not supported by the law. *See OPR Report on the Torture Memos*, ALLIANCE FOR JUST, http://www.afj.org/connect-with-the-issues/accountability-for-torture/opr-report-on-the-torture-memos.html (last visited Nov. 23, 2011) ("Poor judgment . . . does not rise to the level of professional misconduct and does not automatically trigger a DOJ referral to the attorneys' state bar associations for potential disciplinary action.").

131. 295 U.S. 78 (1935), *rev'd on other grounds by* U.S. v. Hughes, 505 F.3d 578 (6th Cir. 2007).

Department of Justice's position in housing discrimination cases where it is clear that an aggrieved individual is not a client.[132]

The formation of an attorney-client relationship is the first step in determining whether there is a legal duty to communicate.[133] The law is clear that an attorney-client relationship varies depending upon the circumstances, but the test is:

> '[W]hether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client.'
>
> An 'essential element as to whether an attorney-client relationship has been formed is the determination that the relationship invoked such trust and confidence in the attorney that the communication became privileged and, thus, the information exchanged was so confidential as to invoke an attorney-client privilege.'[134]

Confidentiality is an attribute and responsibility essential to formulating the attorney-client relationship, which survives beyond litigation.[135] However, beyond the mere elements of the relationship, the client must have selected the attorney, the attorney must have been appointed by the court, or the relationship must have been formed simply by default.[136] "The existence of that attorney-client relationship creates a confidential relationship that provides an evidentiary[137] and ethical protection surrounding any confidences or secrets disclosed during that relationship."[138]

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132. *See* Dellinger Memo, *supra* note 124.

133. Thompson v. Karr, No. 98-3544, 1999 WL 519297, at *5 (6th Cir. July 15, 1999).

134. *Id.* (citations omitted).

135. Miss. St. Bar Ethics Comm., Formal Op. 119 (1986), *available at* http://www.msbar.org/ethic_opinions.php?id=377 (last visited Nov. 23, 2011) (stating that "[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment," and further providing "'for the protection of the confidences and the secrets of his following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement.' Accordingly, it is the opinion of the committee that a deceased client should be afforded all the duty of confidentiality owed to a living client.").

136. *See generally* Ingrid A. Minott, Note, *The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269 (2009).

137. FED. R. EVID. 501.

138. United States v. Hustwit, 33 M.J. 608, 612 (N-M.C.M.R. 1991) (citing J. WIGMORE, EVIDENCE § 2292 (1961); C. WOLFRAM, MODERN LEGAL ETHICS, 147 (1987)).

When a police officer brings a criminal matter to a prosecutor, the officer is generally a witness to a crime or is the case agent presenting facts that may or may not constitute a criminal offense.[139] In the same context, when a supervisor assigns a case to a prosecutor in his office, that assignment or its literal outcome should be of no personal value or consequence to the supervisor. The relationship between the prosecutor and law enforcement officer is best described as "quasi," which, as defined in most dictionaries, means "seemingly, but not really."[140] In context, a prosecutor in the traditional sense does not conform to the boundaries of the regular relationship between an attorney and client because of the level of confidentiality enjoyed in a true attorney-client relationship. The relationship between a police officer and a prosecutor starts with the proposition that the officer is either the case agent or a witness whose "secrets and confidences" are guided by other rules of law such as the Federal Rules of Criminal Procedure, which do not encompass a fiduciary relationship or a personal confidential obligation.[141]

The Department of Justice's own *Brady* policy[142] contradicts the notion that prosecutors have clients, since compliance may mandate revealing the secrets of the individuals whom OPR has characterized as a client. A police officer's secrets, which are often confidential and personal in nature, may be a significant piece of impeachment evidence that the prosecution is required to disclose to the defendant in a criminal trial.

> Potential impeachment information, . . . has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in

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139. *See* St. Bar Ass'n of N.D. Ethics Comm., *supra* note 107.

140. *Quasi*, DICTIONARY.COM, http://dictionary.reference.com/browse/quasi (last visited Nov. 23, 2011).

141. *See* St. Bar of Ariz. Ethics Op. 01-13, *supra* note 110.

142. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial); *see also* U.S. ATTORNEYS' MANUAL, *supra* note 42, § 9-5.001.

> the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.[143]

Secrets and confidential communications are the heart of the attorney-client relationship,[144] and in the most generic sense an attorney may not disclose his client's secrets and communications,[145] except in rare and well-defined instances.[146] If a federal prosecutor becomes aware of a crime committed by a law enforcement agent during the course of a criminal prosecution and the crime is of substantial federal interest,[147] such as perjury, public corruption, or deprivation of rights under color of law,[148] that attorney has the authority and obligation to expose the conduct to the court and to prosecute the law enforcement official.[149] OPR's finding that police officers are clients creates yet another contradictory analysis when considered in the context of a civil action for deprivation of rights under 42 U.S.C. § 1983. For example "[a] police officer who withholds exculpatory information from [a] prosecutor can be liable under both section 1983 and the state common law."[150] In such a case, the principal witness for the aggrieved party could be the prosecutor from whom the police officer withheld the exculpatory evidence. The prosecutor's testimony would likely reveal the conversations held with the officer, the very individual OPR concluded to be the prosecutor's client. If OPR's position that police officers are the clients of prosecutors is correct, then the prosecutor would be ethically prohibited from revealing the

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143. *See* U.S. ATTORNEYS' MANUAL § 9-5.001, *supra* note 42.

144. *See generally* United States v. Deloitte LLP, 610 F.3d 129, 140 (D.C. Cir. 2010).

145. *See* McClure v. Thompson, 323 F.3d 1233, 1250 (9th Cir. 2003) (Ferguson, J., dissenting) (explaining that a "lawyer had an obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences").

146. *In re* Grand Jury Proceedings, 604 F.2d 798, 802-03 (3d Cir. 1979) (addressing the attorney-client privilege existing when criminal conduct is anticipated as opposed to when the criminal conduct occurs after the client consults the attorney).

147. The prosecutor's obligation extends to notifying local authorities as well.

148. Jack Leonard, *U.S. investigates LAPD officers accused of perjury*, L.A. TIMES, Feb. 2, 2009, http://articles.latimes.com/2009/feb/02/local/me-civilrights2 (explaining that the Civil Rights Division of Justice investigates perjury charge against LA police officers).

149. *See* United States v. Nickels, 502 F.3d 1178 (7th Cir. 1974) (convicting defendant-police officer in the United States District Court of committing perjury before a grand jury); *cf.* United States v. Regan, 103 F.3d 1072, 1075 (2d Cir. 1997) (affirming a perjury prosecution that stemmed from defendant police officer's testimony before grand jury investigating anticrime unit).

150. Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989), *rev'd on other grounds by* Jean v. Collins, 155 F.3d 701 (4th Cir. 1998), *vacated* 526 U.S. 1142 (1999).

"confidential communication" which formed the basis of the § 1983 action. Moreover, OPR's conclusion is inconsistent with the findings of the Arizona bar on the question regarding discussions between the prosecution and police witnesses.[151]

There are a few, very specific, statutes where Congress authorizes an attorney hired by the government to represent individuals as part of his job as a lawyer for the government. These positions include judge advocates for the Army, Navy, Air Force, Marine Corps, and United States Coast Guard,[152] and attorneys employed by Federal Public Defender Organizations.[153]

While neither a Federal Public Defender nor a Military Judge Advocate Officer, both federal employees, are obligated to act when a client admits the commission of a crime[154] or when a client has impeaching skeletons in his closet, the same is not true for prosecutors.[155] It is difficult to envision that the Department of Justice would advocate a position that an assistant United States attorney breached his ethical responsibilities because he failed to inform someone who is not his client of an impending court matter, or to notify him of a decision that is exclusively within the scope of the attorney's responsibility. These actions are akin to punishing the prosecutor rather than being premised on either a violation of the law, a standard imposed by law, an applicable rule of professional conduct, or Departmental policy.[156] A failure to communicate with supervision as an alternative basis to support the ethical violation is equally problematic from an ethical perspective. While it is well within the purview of management to seek reprisal for failure to follow directions, OPR should not be free to manufacture a rationale to justify a reprisal.

OPR's findings of misconduct that center on the prosecutor's failure to communicate with a police officer and a supervisor pursuant to an unwritten office policy[157] and the United States Attorneys' Manual

151. *See* St. Bar of Ariz, Ethics Op. 01-13, *supra* note 110.

152. 10 U.S.C. § 827 (2006).

153. 18 U.S.C. § 3006A(g)(2)(A) (2006).

154. *See* ST. BAR OF ARIZ. RULES OF PROF'L CONDUCT, R. 1.6 (2011), *available at* http://www.myazbar.org/Ethics/ruleview.cfm?id=26. This situation is distinguished from when an attorney knows that his client intends to commit a criminal act and seeks the attorney's advice on how to commit it. Under these circumstances the attorney has a duty to report the defendant. *Id.*

155. *See* 28 C.F.R. § 45.11 (2011).

156. *See* U.S. DEP'T OF JUST., OFFICE OF PROF'L RESP., *supra* note 92.

157. The criminal supervisor for one of three field offices for the United States Attorney insisted that agents be notified relative to the disposition of cases in which they are involved. This was not a division-wide policy or one specifically mandated by the United States Attorney.

section 9-16.030 presupposed that a duty existed to consult with an investigative agency before finalizing a plea arrangement. However, an examination of the text of the U.S. Attorneys' Manual section 9-16.030 shows conclusively that OPR's interpretation and conclusions regarding this particular portion of the manual are flawed. U.S. Attorneys' Manual section 9-16.030 in its entirety states:

> Although United States Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power *should* be exercised only after appropriate consultation with the federal investigative agency involved. . . . In addition, the *Attorney General Guidelines for Victim and Witness Assistance 2000* provides that United States Attorneys should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations.[158]

Here, U.S. Attorneys' Manual section 9-16.030 unambiguously states that an assistant United States Attorney, in exercising discretion, "should" consult with the investigative agency before negotiating guilty pleas.[159] It is also clear that the authors deliberately chose "should," connoting an expectation or recommendation, rather than "shall," connoting an imperative.[160] Accordingly, the plain language indicates that consultation with an investigating agency *is preferred* but not mandatory. Moreover, nowhere does the policy state that the attorney must base his other decision on the input of the agency. It is a *notice* recommendation only. Therefore, applying a strict and "unambiguous" reading of the plain language of the policy, no violation occurred; thus, there was no ethical violation.

OPR gave far too much credence to the effect of an unwritten office policy to support its case. An unwritten policy should have little or no weight in reaching a decision concerning whether there was a violation of a policy or rule because of the very nature of spoken words. Moreover, manner, tone, or inflection leaves the listener to question the meaning when facing extenuating circumstances.[161] In any event, OPR has recognized the difficulty of policies, written or otherwise, that are less than clear and unambiguous. For example,

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158. U.S. ATTORNEYS' MANUAL, *supra* note 42, § 9-16.030 (emphasis added).

159. *Id.*

160. 82 C.J.S. *Statutes* § 498 (2010) ("Construction of 'may' and 'shall'").

161. *Memorandum of Decision*, *supra* note 22 (noting that an allegedly false or misleading statement was made knowingly or with a reckless disregard for the truth).

> OPR received an allegation that a DOJ attorney failed to follow the established procedure of his office when he agreed to permit a defendant to remain free on bail overnight and report for incarceration the next morning, following his conviction at trial on a drug offense with a mandatory five-year sentence, rather than being taken into custody immediately. Thereafter, the defendant failed to report, and eventually was found in a hospital in another state under treatment for a drug overdose.
>
> OPR conducted an investigation and found that, although there was a statutory requirement that the defendant be incarcerated immediately after conviction for this offense, the judges in the district did not always adhere strictly to that requirement. Moreover, OPR found that the policy of the litigating component with respect to whether prosecutors could agree to the defendant's release in such situations had not been clearly established at the time of this incident. Accordingly, OPR concluded that the DOJ attorney did not commit professional misconduct because he did not violate a clear and unambiguous obligation, but that he exercised poor judgment by agreeing to the defendant's release without seeking the approval of any supervisor and without taking into account the potential consequences if the defendant did not appear for incarceration as promised.[162]

The findings in the example above beg the question, when there was a clear violation of a criminal statute[163] and an unclear or unenforced office policy, why the outcome merited "poor judgment"[164] rather than "intentional professional misconduct."[165] This is particularly noteworthy considering that the prosecutor who is the subject of this article was found to have engaged in intentional professional misconduct by not adhering to an unwritten office policy, and by violating a rule of professional conduct[166] that is strictly applicable to an attorney-client relationship that does not exist.[167] OPR's dissimilar treatment of these similar incidents raises the prospect that OPR's decisions are influenced by favoritism, political climate, and/or intimidation tactics.

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162. ANNUAL REPORT 2003, *supra* note 60, at n.4.
163. 18 U.S.C. § 3143 (2006).
164. ANNUAL REPORT 2003, *supra* note 60, at n.4.
165. *Id.*
166. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004).
167. Jarrett Memorandum, *supra* note 8, at 15.

OPR is required to find "intentional professional misconduct" when the attorney violates "an obligation or standard by (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits."[168] "[T]he crucial discretionary decision a prosecutor makes in the judicial system is whether to charge" and what charges should be lodged.[169] OPR's finding that a police officer or the prosecutor's supervisor is a prosecutor's client significantly changes the legal playing field. This notion suggests that police have a legal right to dictate charging decisions and approval of pleas.[170] Moreover, while charging decisions and plea approval are an inherent responsibility vested in the prosecutor and prosecutorial supervision, a failure to discuss these matters does not support a finding of an attorney-client relationship, let alone a breach of it. As suggested earlier, prosecutors must be free of client control[171] because interests and ethical standards often conflict. Rule 1.2 of the Rules of Professional Conduct, for example, provides that a lawyer must "follow a client's decisions concerning the objectives of representation, mandates that an attorney consult with the client as to means, and requires that the attorney heed a client's decision whether to accept an offer of settlement."[172] Even with clear policies in place, the dynamics of a criminal case can change instantly and prosecutors must make instantaneous decisions without minute-by-minute consultations and approvals.[173] Here, OPR is playing the role of a "Monday morning quarterback"[174] without consideration of the outcome, let alone the true dynamic of the case as it evolves.[175] Charles Wolfram makes an interesting point when he suggests that:

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168. ANNUAL REPORT 2005, *supra* note 59, at n.3.

169. Harrington v. Almy, 977 F.2d 37, 40 (1st Cir. 1992).

170. *Cf. Foothills Dev. Co.*,730 P.2d at 1373 (holding that an attorney must follow client's specific instructions).

171. This is not to suggest that prosecutors should not have supervisors, but rather they are not clients in the context of abiding by their wishes as contemplated by the Rules of Professional Conduct.

172. MODEL RULES OF PROF'L CONDUCT, R. 1.2 (2000); *see* Dellinger Memo, *supra* note 124.

173. *See* U.S. ATTORNEYS' MANUAL, *supra* note 42, § 9-16.030 (explaining that prosecutors are vested with broad discretion).

174. Harris v. Reed, 894 F.2d 871, 877 (7th Cir. 1990).

175. *Cf.* U.S. v. Hill, 398 Fed. App'x 611 (D.C. Cir. 2010).

> [P]rosecutors in a position to make policy decisions should regard the public as their client, while prosecutors in subordinate roles should regard their superiors in the office as the effective client for matters on which office policy has been set or specific directions given, unless a superior directs a subordinate lawyer to violate the law or the professional rules.[176]

While this hypothesis seemingly supports OPR's position that the criminal supervisor was the client, Wolfram is careful when suggesting that a superior is a client when he says, "prosecutors in subordinate roles *should* regard their superiors in the office as the effective client for matters on which office policy has been set or specific directions given."[177] The word "should" carries with it the notion that it is suggested rather than a directive or an imperative.

Wolfram suggests that a supervisor in a prosecutor's office is the "effective client."[178] Accordingly, there would be multiple levels of attorney-client relationships existing within the Department of Justice. For example, the United States Attorney[179] would be the client of his supervisors, and these supervisors are clients of the Attorney General. One of the major problems with this hypothesis is that there is no legal authority that fosters this surrogate attorney-client relationship. For example, when Congress started investigating why Justice officials fired eight sitting United States Attorneys,[180] no Department of Justice subordinate to the Attorney General sought to rely on the attorney-client privilege to preclude their respective testimony or to avoid answering questions by the Office of the Inspector General (OIG) or congressional investigators.[181] This would have been the perfect opportunity to assert the attorney-client privilege, which would have legally barred compelled testimony or the requirement to answer questions.[182] Certainly, former

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176. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1 (West 1986).

177. *Id.* (emphasis added).

178. *Id.*

179. There are 94 United States Attorneys throughout the United States. *Executive Offices for U.S. Attorneys*, OFFICES OF THE U.S. ATTY'S, http://www.justice.gov/usao/eousa/ (last visited Nov. 23, 2011).

180. Those eight U.S. Attorneys were David Iglesias, John McKay, Margaret Chiara, Daniel Bogden, Paul Charlton, H.E. "Bud" Cummins III, Kevin Ryan, and Carol Lam. *List of 8 Dismissed U.S. Prosecutors*, B. GLOBE (Mar. 6, 2007), http://www.boston.com/news/nation/washington/articles/2007/03/06/list_of_8_dismissed_us_prosecutors/.

181. *See* U.S. DEP'T OF JUST., OFFICE OF THE INSPECTOR GEN. AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), *available at* http://www.justice.gov/oig/special/s0809a/final.pdf.

182. FED. R. EVID. 501; *see also* Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

Deputy Attorney General Paul J. McNulty,[183] McNaulty's former Chief of Staff Michael Elston,[184] or Chief of Staff to Attorney General Alberto Gonzales, Chuck Rosenberg,[185] could have asserted the attorney-client privilege if the attorney-client relationship exists while being a subordinate of the Attorney General.

Aside from a statutory mandate that Department of Justice employees are required by law to cooperate during an OPR or OIG investigation,[186] the Code of Federal Regulations does not supersede the inherent responsibility that an attorney owes his client: the confidentiality of communications. If there is no confidentiality, then, for the same reason, there is no attorney-client relationship.

In order for OPR to find that the attorney engaged in intentional professional misconduct "by a preponderance of the evidence" for his failure to communicate with his client as stated earlier, there must be a legally recognized attorney-client relationship.[187] When failing to communicate with a supervisor or a police officer, the inherent question becomes, can there be a legitimate finding of an attorney-client relationship that invokes the application of the rule? Truly, this inquiry by OPR was an attempt to find misconduct when it did not exist in this vein.

It is both frivolous and disingenuous to suggest that OPR be eliminated from the Department of Justice. OPR serves a legitimate and often necessary function. However, the subtle point that needs to be addressed with OPR is its ability to focus on seeking the facts instead of "Monday morning quarterbacking" in determining whether the conduct

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183. Paul J. McNulty served as Deputy Attorney General from 2005-2007. *See* Dan Eggen, *Justice Dept.'s No. 2 to Resign*, WASH. POST. (May 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051401071.html.

184. *See* U.S. DEP'T OF JUST., OFFICE OF THE INSPECTOR GEN, *supra* note 181, at 61. Mr. Elston told investigators from OIG that, "McNulty was concerned that the U.S. Attorneys might be worried about what the Attorney General was going to say about them in his testimony at the January 18 hearing. *Id.* Elston said the concern was that they might publicly announce that the Department had sought their resignations, in anticipation that the Attorney General would say they had been removed. *Id.* Elston said that on January 17 McNulty asked him to call McKay, Charlton, and Ryan to let them know that the Attorney General was not going to testify about who had been removed or about the basis for the removal." *Id.* In essence he was repeating his conversations with Mr. McNulty.

185. *Chuck Rosenberg Named Interim Chief of Staff*, U.S. DEP'T OF JUST. (Mar. 16, 2007), http://www.justice.gov/opa/pr/2007/March/07/_ag_158.html. Mr. Rosenberg served as Chief of Staff and U.S. Attorney simultaneously. *Id.*

186. 28 C.F.R. § 0.29(c) (1998) (amended 2001).

187. *See* U.S. DEP'T OF JUST., OFFICE OF PROF'L RESPONSIBILITY REP., *supra* note 67, at 13.

was an ethical violation in itself. OPR made legal judgments in this case that a police officer and the prosecutor's supervisors were clients without an examination of the problem in context. As such, OPR's approach would have been short-circuited by a more stringent analysis of the facts and law. For example, the prosecutor's supervisor's complaint suggests that there was a breach of the attorney-client relationship. This purported problem is not supported by the facts.

House Bill 3396, introduced by former congressional representative McDade, contained a significant provision that would have potentially eliminated the outcome of this case and perhaps others—an independent agency to review Justice complaints.[188] The significance of an independent agency is that it would have accomplished what Associate Deputy Attorney David Margolis did in Woo and Bybee's case—a complete and thorough analysis of facts and the law apart from the Office of Professional Responsibility.[189] "Fortunately for Yoo and Bybee, cooler and wiser heads prevailed" and OPR's misguided efforts were rejected both factually and intellectually, despite seeming political pressure.[190]

It would be naïve to suggest that every matter that OPR investigates receives the attention and the thoroughness that the Bybee and Woo matter did.[191] Do all lawyers in the Department of Justice deserve the same treatment? Yes! Will it happen? Probably not. Based on Margolis' reputation within the Department of Justice, it is not likely that his findings were politically motivated. Nevertheless, OPR remains free to act with unfettered discretion when investigating allegations of attorney misconduct. Thus the question is, who watches OPR on a daily basis? Will it take national attention to get a legal consensus to say that OPR was wrong and has been wrong in past assessments and their decisions have been generally unchecked?

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188. *See Text of the McDade-Murtha Bill, HR 3396, supra* note 20.

189. *See Memorandum of Decision, supra* note 22, at 68.

190. Andrew Ramonas, *Sen. Sessions' Prepared Statement on OPR Report*, MAIN JUST. (Feb. 26, 2010), http://www.mainjustice.com/2010/02/26/sessionss-prepared-statement-on-opr-report/.

191. *Id.* U.S. Senator Jeff Sessions suggested that Mr. Margolis "has conducted the final review of every discipline matter of this sort in the last 17 years." *Id.* If this statement is true, political favoritism may be at the root of most decisions. However, Jim Comey and other attorneys general believe that Margolis is morally and ethically above board contradicts any suggestion of favoritism. *Id.* On the other hand, did Margolis review this matter and endorse such an erroneous and poorly supported rational? Perhaps Senator Sessions' comments would have been more accurate if he said, "Mr. Margolis conducts the final review of every disciplinary matter that is drawn to the attention of Congress."

Margolis' decision to reverse OPR's findings is not popular among those who sought retribution or harshly criticized the ultimate actions that followed.[192] Moreover, whether Yoo or Bybee's legal analysis was fundamentally flawed will forever be an academic debate. The point is that OPR was permitted to scrutinize their legal analysis under the guise of patrolling ethics. While the system ultimately worked for Yoo and Bybee to the extent that the Department of Justice endorsement averted the necessity for further scrutiny from the Bar Association, it has not worked for the ordinary rank and file Justice attorney.

OPR would be more accountable and less subject to outside influences and personal ideologies if it were required to submit its findings to an independent agency. An independent agency's first assessment ideally would have been to determine whether the attorney's action was in fact an ethical violation, or a product of error, or administrative dysfunction. This distinction is important since the issues concerning the attorney who is the subject of this article were administrative in nature rather than ethical. The true intent of Congress's demand that Department of Justice lawyers abide by the highest ethical standards goes beyond the rigid boundaries of ideology, but must embrace the notion that they should be able to do their jobs without being subjected to unfair and artificial standards of conduct to justify reprisal or some other underlying objective.

IV. CONCLUSION

Every violation of or deviation from a rule or policy does not reflect intentional professional misconduct, nor does it represent poor judgment. Prosecutors do not have "ichor in their veins"[193] and mistakes can and will be made. OPR, when conducting investigations of alleged attorney misconduct, should refrain from "Monday morning quarterbacking"[194] or manipulating facts to justify violations that would otherwise not exist. Prosecutors do not have clients but must operate within legal standards that foster fundamental fairness and meeting the goals of protecting society—even when it applies to them. That delicate balance demands the highest ethical standard for those who are judging as well as those serving as judge. Those standards must embrace a notion of fundamental, fair, careful scrutiny, and consciousness of the purpose of the law. OPR's

192. *David Margolis—The Institutionalist*, MAIN JUST. (Apr. 19, 2010), http://www.mainjustice.com/tag/david-margolis/.

193. Gen. Dynamics Corp. v. U.S., 139 F.3d 1280, 1286 (9th Cir. 1998).

194. *Id.* at 152.

goals must be equally balanced to afford exoneration and condemnation when appropriate.