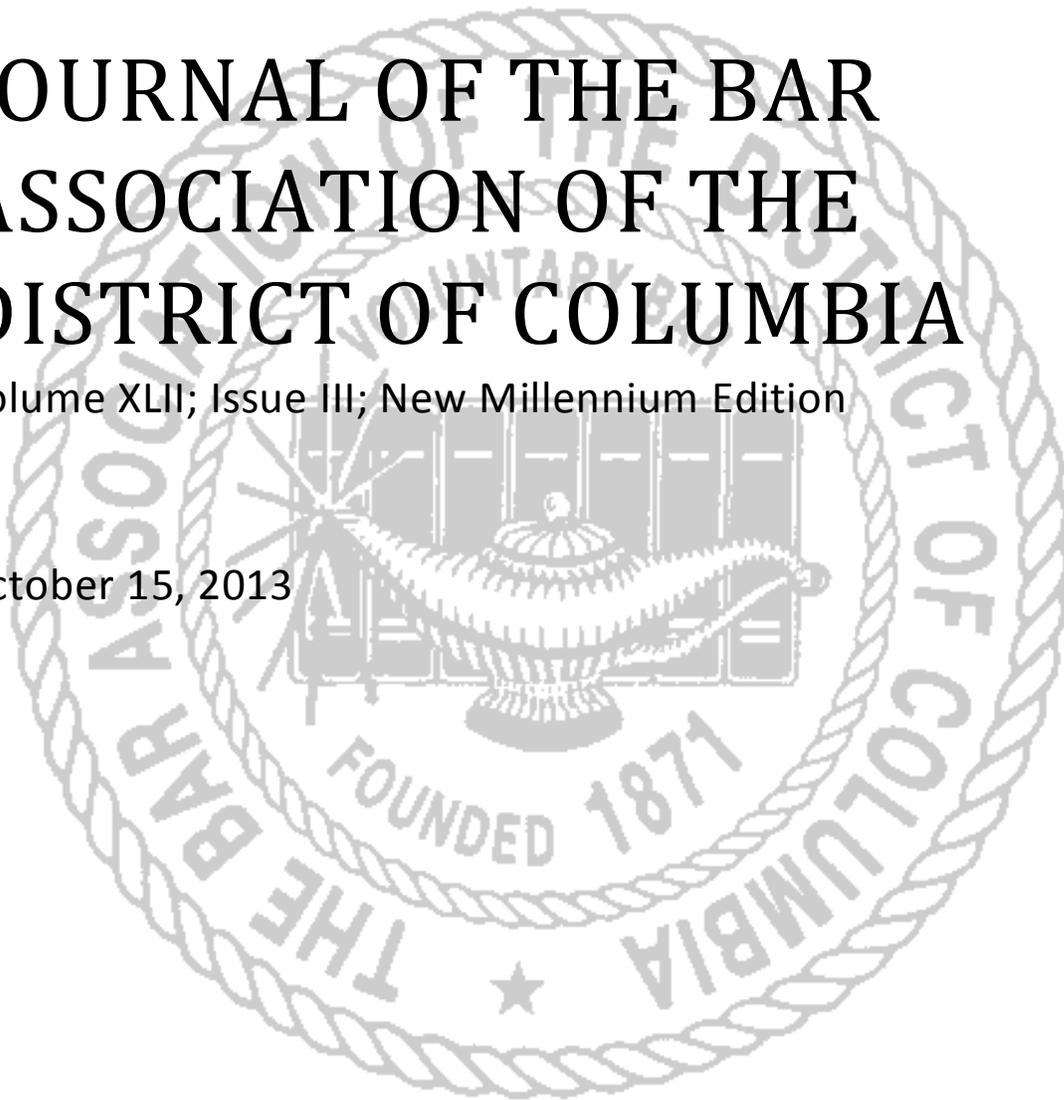


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**The Federal Election Commission calling: the clash over communications with the Department of Justice**  
By William Atkinson

**Introduction**

During summer 2013, a partisan clash erupted over the power of the Federal Election Commission's staff lawyers to communicate and share documents with the Department of Justice. The debate centers on an early stage of the FEC's enforcement process known as the "reason to believe" stage. According to the Republican Commissioners' position, federal regulations prohibit FEC attorneys from sharing information with the Department of Justice without Commission approval during this stage of the enforcement process. The FEC's Office of General Counsel takes a contrary position – tacitly supported by the Democratic Commissioners – that predicts the FEC's relationship with the DOJ will deteriorate should the Republican position prevail. The following paper explores the history that lead up to this debate and offers a humble prediction as to how this debate shall conclude.

**The Federal Election Commission**

In 1971, the 92nd Congress passed the Federal Election Campaign Act (FECA or the Act) in order to consolidate prior efforts to regulate the financing of political campaigns. Before its most significant provisions went into effect, the FECA was amended in 1974 following revelations of campaign abuses during the 1972 presidential campaign and the Watergate scandal.<sup>1</sup>

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<sup>1</sup> The Federal Election Commission, *The FEC and the Federal Campaign Finance Law*, available at <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last updated Jan. 2013).

The 1974 iteration of the FECA forms the four basic elements of modern campaign finance regulation: disclosure; contribution size limits; expenditure limits; and some partial public financing.<sup>2</sup> The 1974 amendments established the Federal Election Commission (FEC) to enforce the FECA, administer the public funding program, and to facilitate disclosure. Subsequent sets of amendments followed in 1976 and 1979.<sup>3</sup> The FEC has exclusive civil jurisdiction over FECA violations.<sup>4</sup> The Department of Justice (DOJ) handles criminal violations, but some knowing and willful violations may be handled by either the FEC or the DOJ.<sup>5</sup>

The FEC has six voting members, who are appointed by the President and confirmed by the Senate.<sup>6</sup> The Commission is bipartisan and only three members, who are known as Commissioners, may be affiliated with the same political party.<sup>7</sup> For one-year terms, one Commissioner affiliated with a political party serves as Chair and a Commissioner affiliated with a separate party serves as Vice Chair.<sup>8</sup>

#### **The FEC Office of General Counsel: Enforcement Division**

The FEC's Office of General Counsel (OGC) is organized into five distinct units: (1) the Deputy General Counsel - Administration; (2) the Deputy General Counsel - Law; (3) the Enforcement Division; (4) the Litigation Division; and (5) the Policy Division.<sup>9</sup> With certain

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<sup>2</sup> Daniel Hays Lowenstein, et al., *Election Law: Cases and Materials* 643 (5th ed. 2012).

<sup>3</sup> *The FEC and the Federal Campaign Finance Law*, *supra* note 1.

<sup>4</sup> 2 U.S.C. § 437c(b)(1).

<sup>5</sup> *See* 2 U.S.C. § 437g(a)(5)(B)-(C); 2 U.S.C. § 437g(d).

<sup>6</sup> 2 U.S.C. § 437c(a)(1).

<sup>7</sup> *Id.*

<sup>8</sup> 2 U.S.C. § 437c(a)(5).

<sup>9</sup> The Federal Election Commission, *Office of the General Counsel*, available at <http://www.fec.gov/about/offices/OGC/OGC.shtml> (last accessed Sept. 28, 2013).

exceptions, the Enforcement Division is charged with responsibility for the Commission's enforcement of the FECA.<sup>10</sup>

The Commission regulations assign OGC's Enforcement Division a variety of duties. These include: making recommendations to the Commission whether there is "reason to believe" (RTB) a violation has occurred or is about to occur;<sup>11</sup> making recommendations whether there is no RTB a violation occurred or whether a case should be dismissed;<sup>12</sup> drafting briefs recommending to the Commission whether or not to make a "probable cause to believe" (PCTB) finding;<sup>13</sup> engaging in efforts to enter conciliation agreements with respondents;<sup>14</sup> and making recommendations to the Commission whether to authorize a civil action.<sup>15</sup>

### **The "Reason to Believe" Stage of the FEC Enforcement Process**

Enforcement processes at the FEC generally begin in one of the four following ways: filing of a complaint by a person or entity; referral from the FEC's Reports Analysis Division or Audit Division; referral from another government agency; or a voluntary submission by parties who believe they potentially committed a campaign finance violation (known as *sua sponte* submissions).<sup>16</sup>

Prior to opening an investigation, the FECA requires that the Commission make an RTB finding that a person has committed or is about to commit a violation of the Act.<sup>17</sup> An

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<sup>10</sup> The Federal Election Commission, *Associate General Counsel for Enforcement*, available at [http://www.fec.gov/about/offices/OGC/AGC\\_enforcement.shtml](http://www.fec.gov/about/offices/OGC/AGC_enforcement.shtml) (last accessed Sept. 28, 2013).

<sup>11</sup> 11 C.F.R. § 111.7(a).

<sup>12</sup> 11 C.F.R. § 111.7(b).

<sup>13</sup> 11 C.F.R. § 111.16(a).

<sup>14</sup> 11 C.F.R. § 111.18.

<sup>15</sup> 11 C.F.R. § 111.19(a).

<sup>16</sup> Federal Election Commission, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* (May 2012) at 5, available at [http://fec.gov/em/respondent\\_guide.pdf](http://fec.gov/em/respondent_guide.pdf).

<sup>17</sup> 2 U.S.C. § 437g(a)(2).

investigation may include field investigations, audits, and other information-gathering methods.<sup>18</sup> An RTB finding is not conclusive and only means the Commission believes a violation may have occurred. The Commission will find RTB where “the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation.”<sup>19</sup>

The OGC recommends to the Commission whether or not there is “reason to believe” a respondent has violated the Act. The six Commissioners “make the final decision by voting for or against” an RTB recommendation.<sup>20</sup> Four affirmative Commissioner votes are required to proceed with an enforcement action.<sup>21</sup> The Commissioners will vote to take one of the four following actions: find RTB; dismiss the matter; dismiss the matter with an admonishment letter; or, find no RTB.<sup>22</sup> If the Commissioners vote to make a no RTB finding or to dismiss the matter, the case is closed. If the Commissioners vote to make an RTB finding, the FEC may either open a full-scale investigation or enter conciliation negotiations with the respondent.<sup>23</sup>

## **OGC Enforcement Manual**

The Commission is currently considering two draft enforcement manuals that would govern the conduct of OGC’s Enforcement Division. One version, promulgated by the Republican Commissioners, restricts the ability of the Enforcement Division to communicate

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<sup>18</sup> 11 C.F.R. § 111.10(b).

<sup>19</sup> Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (March 16, 2007).

<sup>20</sup> Federal Election Commission, *Filing a Complaint: Initial Vote to Proceed (Reason to Believe)* (June 2008), available at [http://www.fec.gov/pages/brochures/complain.shtml#initial\\_vote](http://www.fec.gov/pages/brochures/complain.shtml#initial_vote).

<sup>21</sup> *Id.*; see also 2 U.S.C. § 437g(a)(2).

<sup>22</sup> Statement of Policy, *supra* note 19.

<sup>23</sup> *Guidebook for Complainants and Respondents*, *supra* note 16 at 12-13.

with the Department of Justice (DOJ) during early stages of an enforcement proceeding.<sup>24</sup> The other version, promulgated by the OGC, reflects the Enforcement Division's current practices and allows much greater communication between the OGC and the DOJ.<sup>25</sup> Although the two versions of the Enforcement Manual have been on the FEC's meeting agenda since June 13, 2013, the Commission has yet to officially debate, approve, or adopt either version.<sup>26</sup>

The version of the Enforcement Manual offered by the Republican Commissioners and that offered by the OGC are substantially identical except for a few important distinctions. In particular, a public debate has erupted over the autonomy given to the Enforcement Division to share information, documents, and otherwise communicate with the Department of Justice prior to the Commission making an RTB finding.<sup>27</sup>

On November 3, 2011, the Subcommittee on Elections of the House Committee on Administration held an oversight hearing regarding the Federal Election Commission's policies, processes, and procedures. On May 23, 2013 and in response to requests from Members of the Committee, the Commission released several enforcement documents, including a 1997 Enforcement Manual.<sup>28</sup> During its discussions with the Committee in November 2011, the

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<sup>24</sup> Memorandum from Donald F. McGahn II, Vice Chairman, et al., to The Commission on OGC Enforcement Manual (June 12, 2013), *available at* [http://fec.gov/agenda/2013/mtgdoc\\_13-21-a.pdf](http://fec.gov/agenda/2013/mtgdoc_13-21-a.pdf).

<sup>25</sup> Memorandum from Anthony Herman, General Counsel, to The Commission on OGC Enforcement Manual (June 12, 2013), *available at* [http://fec.gov/agenda/2013/mtgdoc\\_13-21.pdf](http://fec.gov/agenda/2013/mtgdoc_13-21.pdf).

<sup>26</sup> Federal Election Commission, Open Meeting Agenda (June 13, 2013), *available at* <http://fec.gov/agenda/2013/agenda20130613.shtml>.

<sup>27</sup> Editorial Board, *The FEC's wrong-headed proposal to change rules*, Wash. Post, July 14, 2013, *available at* [http://articles.washingtonpost.com/2013-07-14/opinions/40575222\\_1\\_fec-ann-ravel-federal-election-commission](http://articles.washingtonpost.com/2013-07-14/opinions/40575222_1_fec-ann-ravel-federal-election-commission) (last accessed Sept. 29, 2013).

<sup>28</sup> Federal Election Commission, *Enforcement Manual* (November 1997), *available at* [http://www.fec.gov/pdf/1997\\_Enforcement\\_Manual.pdf](http://www.fec.gov/pdf/1997_Enforcement_Manual.pdf).

Republican Members of the Committee stated, “the FEC has committed to producing and releasing an updated Enforcement Manual to replace the existing 1997 manual.”<sup>29</sup>

Vice Chairman Donald McGahn made a strong push to debate the enforcement manual proposals prior to his departure. He resigned from the Commission on September 17, 2013, in order to rejoin the Washington, D.C. office of the law firm Patton Boggs LLP where he previously practiced from 1995-1999. At the September 12, 2013 open FEC meeting, McGahn expressed frustration that the Commission had not engaged in official deliberation on the proposed manuals:

The enforcement manual has taken on -- this issue has taken on a life of its own. I think in many ways that's a good thing because it represents and symbolizes two entirely different worldviews on how the FEC ought to function. But what is clear to me is that this is not going to be considered while I'm still a Commissioner... We all know we don't need six Commissioners to conduct business. We also know that we're not going to do some 3-2 vote to jam a manual down people's throats... In my view, the manual goes to what the statute means. It takes 4 votes to adopt and that could not be clearer under the Act that the Commission construes the Act and when it construes the Act, it takes 4 votes... And for anyone to say with a straight face that we have a functioning process now is absurd. The fact is we don't.<sup>30</sup>

McGahn's mention of a 3-2 vote references the Commissioner makeup at the time. The Republican Commissioners held a 3-2 advantage after Democratic Commissioner Cynthia Bauerly resigned on February 1, 2013.

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<sup>29</sup> Committee on House Administration, *FEC Releases Enforcement Documents* (May 23, 2013), available at <http://cha.house.gov/press-release/fec-releases-enforcement-documents>.

<sup>30</sup> Federal Election Commission, Open Meeting Audio Recording (Sept. 12, 2013) at 2:03-3:43, available at <http://www.fec.gov/audio/2013/2013091200.mp3>.

In rebuttal, Democratic Chair Ellen Weintraub stated the enforcement manuals should not be debated until the two incoming Commissioners began serving their terms:

They're the ones who're going to have to live under any new procedures that the Commission may or may not choose to adopt and they deserve a say in that and they deserve a say in how the agency is going to operate going forward. I'm happy to hear that you believe the enforcement manual would require four votes but you have also shown a willingness to use the fact that there are three of you on that side of the table and fewer on our side of the table to raise procedural motions and to, at least threaten to, try and control the terms of the debate on a three-vote majority.<sup>31</sup>

### **The Republican Commissioners' Position Regarding the Enforcement Division Manual**

The Republican Commissioners hold that information sharing with the Department of Justice constitutes an investigation and therefore may not occur until after the Commissioners have voted to find RTB under 2 U.S.C. § 437g(a)(2).<sup>32</sup> Vice Chairman McGahn wrote:

[S]taff wants a radical change: that they make the decisions regarding the sensitive issue of dealing with other law enforcement, removing the Commissioners from the decision-making process. The statute says otherwise, vests ultimate decision making with the Commission, and precludes the delegation of that power.<sup>33</sup>

The Republican Commissioners believe that by failing to delineate the Enforcement Division's procedural rules, respondents are subjected to an evolving, ad hoc, and unpredictable process that is open to accusations of partisanship and targeting.<sup>34</sup> From their perspective, the disagreement over the Enforcement Division manuals is narrowed down to two issues:

- (1) Who can authorize Commission investigations, and

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<sup>31</sup> Open Meeting Audio Recording (Sept. 12, 2013), *supra* note 30, at 11:59-12:43.

<sup>32</sup> Memorandum from Donald F. McGahn, Vice Chairman, to The Commission on Background Information Regarding Proposed Enforcement Manual (July 25, 2013) at 2, *available at* [http://fec.gov/agenda/2013/mtgdoc\\_13-21-k.pdf](http://fec.gov/agenda/2013/mtgdoc_13-21-k.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 3.

(2) Who is empowered to refer, report, or otherwise provide information and records regarding enforcement matters to the Department of Justice and other law enforcement authorities.<sup>35</sup>

From the Republican Commissioners' perspective, the OGC version of the enforcement manual permits unlimited searches, in contravention of the Act and regulations, of materials not included in a complaint or respondent's response. In reliance of this proposition, McGahn points to 2 U.S.C. § 437g(a)(2) (emphasis added):

If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, *by an affirmative vote of 4 of its members*, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall *make an investigation* of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

McGahn cites the FECA's legislative history as further evidence bolstering the Republican Commissioners' position. Earlier drafts of the FECA amendments of 1976 expressly allowed pre-RTB investigations but the final version that Congress passed required an RTB finding prior to launching an investigation.<sup>36</sup> It is the Republican Commissioners' position that their proposal "does not in any way preclude OGC from conducting investigations - but a condition predicate to any such investigation is a Commission RTB determination."<sup>37</sup>

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<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 6-7.

<sup>37</sup> *Id.* at 8.

A Memorandum of Understanding (MOU) between the DOJ and FEC states that only the more egregious knowing and willful violations should be referred to the DOJ, according to Republican Commissioners.<sup>38</sup> In addition, 2 U.S.C. § 437g(a)(5)(C) requires the affirmative vote of at least four Commissioners to refer or report matters to the DOJ. These two pieces of evidence, according to the Republican Commissioners, further bolsters their position that pre-RTB communications with the DOJ requires Commission approval.

According to the McGahn, the OGC developed a “secret policy” regarding its interactions with the DOJ.<sup>39</sup> He states this policy was hidden from the Commissioners and the House Administration committee, and was only revealed on June 4, 2013 after the Commissioners questioned OGC’s authority to independently produce documents to the DOJ.<sup>40</sup> McGahn termed OGC’s behavior as “inappropriately hiding the ball.”<sup>41</sup>

McGahn believes even if the OGC were required to seek the Commission’s permission to share information with other federal agencies, the Commission would approve all legitimate requests and the process would not hinder OGC’s efficiency.<sup>42</sup> The Republican Commissioners’ proposal has a stated twofold purpose: (1) to assure the public that OGC operates pursuant to Commission policies and oversight, and does not operate according to an ad hoc procedure; and (2) to ensure that the Commissioners are responsible and accountable for FEC activity.<sup>43</sup>

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<sup>38</sup> Memorandum of Understanding with Department of Justice, 43 Fed. Reg. 5441 (Feb. 8, 1978).

<sup>39</sup> McGahn Memorandum on Background Information, *supra* note 32, at 11-12.

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* at 18.

<sup>43</sup> *Id.*

## The Office of General Counsel's Position Regarding the Enforcement Division's Manual

The OGC's position stands in stark contrast to the Republican proposal both in its view of past Commission history and its interpretation of statutory authority. According to the OGC, the FEC has freely shared information and records with the DOJ for more than 20 years.<sup>44</sup> From the OGC's perspective, information sharing with the DOJ saves time and resources; allows evidence to be obtained more quickly; helps OGC make more accurate recommendations to the Commission; and helps avoid needless DOJ investigations and prosecutions.<sup>45</sup> OGC states that the Republican proposal would increase administrative burden and legal risk due to issues with subpoena responses and would expose the Commission to accusations of political and partisan motivations in its decisions to release information to DOJ.<sup>46</sup>

The OGC states that its policy has been the following: "when, in connection with a criminal investigation, DOJ has requested information on a pending, Commission enforcement matter, OGC has provided that information."<sup>47</sup> From 1987 until 2000, the OGC states its policy was to cooperate with DOJ but to require so-called "friendly" subpoenas, with which the OGC routinely complied.<sup>48</sup> The OGC states that, at the time, General Counsel Larry Noble interpreted the Act's confidentiality provisions as requiring subpoenas. General Counsel Larry Norton, whose term began in 2001, held a differing view and interpreted information sharing with the

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<sup>44</sup> Memorandum from Anthony Herman, General Counsel, and Daniel A. Petalas, Associate General Counsel for Enforcement to The Commission, on Information Sharing with the Department of Justice at 1 (June 17, 2013), *available at* [http://fec.gov/agenda/2013/mtgdoc\\_13-21-d.pdf](http://fec.gov/agenda/2013/mtgdoc_13-21-d.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

DOJ as not “public” and therefore not breaching the Act’s confidentiality rules.<sup>49</sup> Under Norton’s tenure, the OGC ceased requiring friendly subpoenas from the DOJ.

The OGC believes the Commission was previously made aware of its information sharing activities with the DOJ. Former General Counsel Larry Norton states that he informed the Commission, without objection, at an executive session that OGC would no longer require friendly subpoenas.<sup>50</sup> The OGC further states the Commission has been made aware of its information sharing with DOJ by memoranda, emails, and General Counsel Reports that make “unmistakably clear that OGC is regularly cooperating with DOJ.”<sup>51</sup>

According to the OGC, its more open information sharing policy with the DOJ has warmed relations between the two agencies and the DOJ has become more willing to reciprocate and share information with the FEC.<sup>52</sup> The OGC states that information and materials provided by the DOJ has saved the FEC time, money, and helped OGC make more accurate recommendations to the Commission.<sup>53</sup> The OGC states these benefits would likely be lost if DOJ information sharing were to require Commission approval.<sup>54</sup>

In addition to a strong relationship with the DOJ, the OGC cites five other positive impacts of its information sharing policy: (1) an informal process means the FEC obtains information more quickly; (2) with more information and concomitantly more accurate

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 7.

<sup>53</sup> *Id.* at 8.

<sup>54</sup> *Id.* at 11.

recommendations, there are fewer unnecessary criminal investigations and indictments; (3) by sharing information with the DOJ in all cases, the Commission is protected from allegations of partisanship; (4) fewer unnecessary grand juries; and (5) less administrative burden and legal risk if the Commission does not have to abide by a formal subpoena process.<sup>55</sup>

The OGC also notes that its information sharing practice with the DOJ is consistent with the policies of other independent federal agencies. As examples, the OGC favorably compares its practices to the Securities and Exchange Commission, the Federal Trade Commission, the Commodity Futures Trading Commission, the Nuclear Regulatory Commission, the Internal Revenue Service, the Department of Labor, and other agencies.<sup>56</sup>

#### **Confidentiality provisions of the Act and DOJ information sharing**

A central point of contention arising from the debate over the Enforcement Division manual proposals is whether sharing information with the DOJ constitutes making the information “public.” If this information sharing is deemed a public sharing, it violates the pre-RTB confidentiality provisions of the Act. Under 2 U.S.C. § 437g(a)(2), the Commission may open an investigation only after the Commission has made an RTB finding by a vote of four or more affirmative votes. According to 2 U.S.C. § 437g(a)(5)(C), the Commission may only refer knowing and willful violations of the Act after the Commission makes a “probable cause to believe” finding with four or more affirmative votes. The OGC and the Republican Commissioners disagree as to whether sharing information with the DOJ without Commissioner approval constitutes a referral or public disclosure for purposes of the Act.

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<sup>55</sup> *Id.* at 11-12.

<sup>56</sup> *Id.* at 13-17.

In 2006, the DOJ viewed the referral provisions in the Act as an exception to the confidentiality protections that prevented the FEC from sharing information with the DOJ before a Commission vote.<sup>57</sup> At the time, the DOJ disagreed with the FEC’s interpretation of the phrase “made public” and believed information was not “made public” for purposes of the Act when the FEC shared information with the DOJ.<sup>58</sup> Rather than wait until the Commissioners voted on the matter, the DOJ proposed requiring the FEC to bring facts suggesting criminal offenses to the Justice Department “in a timely fashion.”<sup>59</sup>

The Republican Commissioners and the OGC differ as to when the interpretation of the Act’s privacy provisions changed. The Republican Commissioners state that as recently as 2006, OGC did not believe it could independently refer matters to the DOJ. McGahn notes that in 2006, the DOJ informed Congress the FEC would not provide information to the DOJ without a grand jury subpoena.<sup>60</sup> As further evidence, McGahn cites to a prior General Counsel’s statement in 2006 where he informed the DOJ that OGC “would be willing to recommend that the

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<sup>57</sup> Letter from William E. Moschella, Assistant Attorney General, DOJ Office of Legislative Affairs, to The Honorable Dennis J. Hastert, Speaker, U.S. House of Representatives at 2 (June 23, 2006), *available at* [http://www.fec.gov/agenda/2013/mtgdoc\\_13-21-i.pdf](http://www.fec.gov/agenda/2013/mtgdoc_13-21-i.pdf) (“FECA’s current structure imposes significant and frequently detrimental obstacles that prevent the FEC from sharing with Federal prosecutors information in the FEC’s possession suggesting that Federal crimes have occurred... The FEC’s position is, that under current law, it can inform the Justice Department of information in the FEC’s possession suggesting that an offense under FECA has occurred only after the FEC (1) has determined that there is “reason to believe” a FECA violation has occurred; (2) has conducted an investigation of the matter; (3) has determined that the investigation indicates that there is “probable cause to believe” a FECA violation has occurred *and* that the violation was “knowing and willful;” and (4) then determines that the matter should be referred to the Department of Justice for prosecutorial evaluation.”).

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> McGahn Memorandum on Background Information, *supra* note 32, at 17.

Commission look anew at its longstanding interpretation that Sections 437g and 437d(a)(9) do not allow referral of FECA violations prior to a finding of a probable cause to believe.”<sup>61</sup>

Conversely, the OGC’s view holds that the FEC abandoned its position that the Act barred pre-RTB information sharing with the DOJ and has freely cooperated with DOJ information requests for more than 20 years.<sup>62</sup> The OGC states that this information sharing policy began during Larry Noble’s term as general counsel. Noble required so-called friendly subpoenas from the DOJ, which were routinely complied with, but that formality was eliminated in 2001 at the start of Larry Norton’s tenure as general counsel.<sup>63</sup>

#### **How the Enforcement Division quagmire will get resolved**

On September 23, 2013, the Senate confirmed President Obama’s appointment of Democrat Ann Ravel and Republican Lee Goodman to the Federal Election Commission.<sup>64</sup> Goodman replaces Chairman McGahn and Ravel replaces the seat vacated by former Democratic Commissioner Cynthia Bauerly.

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<sup>61</sup> Memorandum from Lawrence H. Norton, General Counsel, et al., on the Proposed MOU Between the Commission and DOJ (“Norton Memo”) at 2 (March 3, 2006), *available at* [http://fec.gov/agenda/2013/mtgdoc\\_13-21-j.pdf](http://fec.gov/agenda/2013/mtgdoc_13-21-j.pdf).

<sup>62</sup> Anthony Herman Memorandum (June 17, 2013), *supra* note 44, at 2.

<sup>63</sup> *Id.*

<sup>64</sup> Byran Tau, *Senate confirms Obama's FEC nominees*, Politico, Sept. 23, 2013, *available at* <http://www.politico.com/politico44/2013/09/senate-confirms-obamas-fec-nominees-173305.html>.

Republican Commissioners Matthew Peterson and Caroline Hunter have both voiced support for McGahn's reasoning in proposing a revised Enforcement Division manual.<sup>65</sup> Democratic Chair Weintraub has been reluctant to discuss the Enforcement Manual prior to Goodman and Ravel joining the Commission.<sup>66</sup> On August 22, 2013, both Weintraub and Democratic Commissioner Steven Walther released a Statement of Reasons that publicly supported a more robust exercise of pre-RTB powers by the OGC.<sup>67</sup>

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<sup>65</sup> FEC Open Meeting Audio Recording (Sept. 12, 2013), *supra* note 30, at 31:29-32:03 (Comm. Hunter: "I would like to associate myself with the comments of the Vice Chair... As I mentioned last time, it all started at the House Oversight hearing in November 3rd of 2011 and I believed then, I believe now, that we should have a public enforcement manual that's voted on by the Commission, as the Vice Chair suggested. The idea that we just have part of the manual public and there's other things that are kept secret within this building is completely unacceptable."); *see also* 50:42-52:08 (Comm. Peterson: "The two issues that obviously have generated all the fireworks on this - the pre-RTB stage and the Commission dealings with Department of Justice obviously. Those have been the hot button issues that have gotten all the press, get all the discussion, and as well they should because not only are they issues that deal with what the right policy is, what should be -- how should we craft a procedure in a way that we think gets the right result. Fundamentally, they're about the statute - what does the statute permit the Commission to do and what does the statute prohibit the Commission from doing and that is really at the core of that debate... The statute is very clear about referring and reporting to Department of Justice in terms of requiring four [Commissioner votes].").

<sup>66</sup> Letter from Ellen L. Weintraub, Chair, Federal Election Commission, to The Honorable Candace S. Miller, Chairman et al., Committee on House Administration, U.S. House of Representatives at 2 (July 25, 2013), *available at* [http://www.fec.gov/members/weintraub/ogc\\_docs/fecchairweintraubjuly252013.pdf](http://www.fec.gov/members/weintraub/ogc_docs/fecchairweintraubjuly252013.pdf) ("I am increasingly concerned about the Commission considering significant changes to its longstanding policies in light of President Obama's nomination of two new Commissioners... In my view, it would be highly inappropriate for the Commission to take precipitous action on a matter of this importance without giving our new colleagues the opportunity to participate. I am also concerned about taking such action when the Commission's foundational bipartisan structure is out of balance, but soon to be corrected.").

<sup>67</sup> Chair Ellen L. Weintraub and Commissioner Steven T. Walther, Statement of Reasons, MUR 6540 (Rick Santorum for President, et al.) at 3, Aug. 22, 2013, *available at* <http://eqs.nictusa.com/eqsdocsMUR/13044342453.pdf> ("Underlying our colleagues' rejection of OGC's recommendations is an issue with much broader reach than this specific matter: whether, in preparing RTB recommendations, OGC may include information from the public domain, including information derived from credible newspaper articles, websites, and other publicly available sources. It is absolutely appropriate - indeed, essential - for such information, *either*

With a 2-2 split prior to Ravel and Goodman's arrival, the question remains whether the freshly confirmed Goodman holds views consistent with his Republican colleagues and Ravel with her Democratic colleagues. If Ravel and Goodman fall along the partisan lines regarding the Enforcement Manual proposals, the Commission is left with a 3-3 split and neither manual proposal will receive a four vote majority.

The OGC's policy of pre-RTB information sharing with the DOJ has become a public controversy, with law firms and interest groups lining up to defend each side's position.<sup>68</sup> The debate over OGC's ability to share information with DOJ prior to the Commission making an RTB finding boils down to the interpretations of the OGC's pre-RTB powers under 2 U.S.C. § 437g(a)(2) and the DOJ referral provisions in 2 U.S.C. § 437g(a)(5)(C). Given the Democratic and Republican Commissioners', and the OGC's, demonstrated intractability on this issue, this issue is unlikely to be resolved by a deliberative body split along partisan lines like the Commission.

With the Commission procedurally deadlocked on this issue and no new manual in place, the OGC may continue with its current policy of freely sharing information with the DOJ during the pre-RTB enforcement stage. Such behavior may attract litigation from those who believe the OGC is violating the confidentiality provisions, or other provisions, of the Act or even the Constitution.

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*inculpatory or exculpatory*, to be part of OGC's recommendations if the Commission is to make informed and fair decisions at the pre-RTB stage.”).

<sup>68</sup> See, e.g., comments written in support of the Republican proposal from the law firm Holtzman Vogel Josefiak PLLC and comments in support of OGC's proposal from the campaign finance reform interest groups Americans for Campaign Reform, Campaign Legal Center, and Democracy 21, available at [http://www.fec.gov/members/weintraub/ogc\\_enforcement\\_docs.shtml](http://www.fec.gov/members/weintraub/ogc_enforcement_docs.shtml).

Continuing the status quo may also spur unintended consequences, such as the motion filed in the U.S. District Court for the Eastern District of Louisiana related to statements former Vice Chairman McGahn made to *The Washington Post* questioning the OGC's interactions with the Justice Department. McGahn told the *Post* that the OGC alerted prosecutors to a possible criminal violation before obtaining Commission approval.<sup>69</sup> In response to this public revelation, the respondent, who pleaded guilty in June 2013 to campaign finance violations, filed a motion requesting that his sentencing be delayed for 90 days in order to "obtain any and all information regarding the referral of defendant's matter to Federal prosecutors."<sup>70</sup> Although the court denied the defendant's motion, the case illustrates the myriad of issues that could possibly arise were the Enforcement Manual debate to remain in a holding pattern for an extended period of time.

The Commission could also be subjected to litigation by public interest, non-profit, and activist groups. Both the Republican Commissioners and the OGC believe their respective manuals rectify concerns regarding the public trust in the integrity of the process due to actual or apparent partisanship or targeting. In light of revelations that the Internal Revenue Service allegedly targeted the 501(c)(3) applications of certain groups on a partisan basis, the conservative voting rights group True the Vote filed suit against the IRS requesting that its tax-

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<sup>69</sup> Matea Gold, *FEC engulfed in power struggle over staff independence*, July 13, 2013, available at [http://articles.washingtonpost.com/2013-07-13/politics/40552461\\_1\\_fec-power-struggle-commissioners](http://articles.washingtonpost.com/2013-07-13/politics/40552461_1_fec-power-struggle-commissioners) (McGahn said "the general counsel's office alerted prosecutors to a possible criminal violation by Arlen Cenac Jr., the owner of a Louisiana truck company who made illegal campaign contributions in the name of others. Such a referral requires commission approval, which the staff did not seek.").

<sup>70</sup> David Courcelle and Kwame Manley, Memorandum in Support of Defendant's Opposed Motion to Continue Sentencing, *U.S. v. Cenac*, No. 13-116, at 2 (E.D. La. filed Aug. 26, 2013), available at <http://www.mainjustice.com/files/2013/09/motion-to-continue.pdf>.

exempt status be granted.<sup>71</sup> If a definitive Enforcement Division manual is not enacted, the Commission is at risk to be a defendant in litigation similar to *True the Vote*. A respondent may challenge the information sharing practices of the FEC and the DOJ that resulted in a conviction or “probable cause” finding on the basis of allegedly unconstitutional targeting. Accordingly, the Commission has a strong incentive from a legal risk perspective to adopt an objective and authoritative Enforcement Division policy regarding pre-RTB information sharing between the DOJ and OGC.

Despite the Commission being strongly incentivized to act promptly regarding the adoption of a new Enforcement Division manual on a bipartisan basis, it is unlikely to happen. As the Commissioners have noted in open meetings, the debate regarding DOJ information sharing strikes at the heart of the Republican and Democratic positions regarding federal campaign finance regulation. As such, the issue is unlikely to be resolved through a bipartisan Commission vote.

With the Commissioners unable to reach a four-vote majority on an approved Enforcement Division manual, a rule-making process may be employed to promulgate new OGC policies and regulations. The rule-making may be initiated by: (1) a Commission vote to initiate a rule-making; or (2) a third-party that files petition to initiate a rule-making pursuant to 11 C.F.R. Part 200.

The Enforcement Division manual issue is not going softly into the night. The Committee on House Administration Chairman Candice Miller wrote that “[t]o maintain its legitimacy and demonstrate a commitment to transparency, the FEC needs to complete and release its revised

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<sup>71</sup> *True the Vote v. United States of America*, No. 1:13-cv-00734-RBW (D.D.C. filed July 22, 2013), available at <http://www.scribd.com/doc/142784144/Amended-Filed-Complaint-True-the-Vote-v-IRS>.

Enforcement Manual.”<sup>72</sup> The chair of the Committee with FEC oversight power’s aggressive questioning of the Commission’s authority due to mishandling of the Enforcement Manual conveys the significance of this matter.

Because the OGC’s pre-RTB sharing of information with the DOJ engenders strong partisan discord, a rule-making process is a positive first step toward formulating definitive policies that govern the Enforcement Division’s activities. The DOJ pre-RTB information sharing debate is an offshoot of the Enforcement Manual drafting process and must be satisfactorily answered prior to the manual’s completion. Both sides raise serious issues that implicate important constitutional and other legal issues. A deliberative rule-making process allows each side, and other interested persons and organizations, to file considered statements in support of or in opposition to the petition. Rather than being swept up in the large overarching process of a comprehensive manual drafting project, the issue of information sharing with the DOJ by the OGC merits a careful and distinct debate through the statutory rule-making procedure.

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<sup>72</sup> Letter from Candice S. Miller, Chairman, U.S. House of Representatives, Committee on House Administration, to Ellen Weintraub, Chair, Federal Election Commission, at 1 (May 10, 2013), *available at* [http://www.fec.gov/members/weintraub/ogc\\_docs/5-10-13letter-fecchairweintraubreenfmanual.pdf](http://www.fec.gov/members/weintraub/ogc_docs/5-10-13letter-fecchairweintraubreenfmanual.pdf).

## **The Unauthorized Practice of Law by Paralegals**

by Kelly Bauer, Grace Lee, Ali Ahsani, and Laura Park

Paralegals and legal assistants make up a group of paraprofessionals who assist the attorneys in effecting the delivery of legal and professional services and are usually delegated tasks that a lawyer would assume; however, attorneys must appropriately train their non-lawyer staff and always supervise the work product. As both attorneys and clients increasingly understand and come to value the role of these legal paraprofessionals, the paralegal becomes increasingly more susceptible to engaging in the unauthorized practice of law. Regardless of whether a paralegal has the ability to do the work independently and successfully, lawyers retain ultimate responsibility for their non-lawyer legal staff's conduct and work performance.

### **The Attorney/Paralegal Relationship**

The District of Columbia's Rules of Professional Conduct ("RPC") Rule 5.3 requires lawyers with managerial or supervisory authority over the work of a non-lawyers to make reasonable efforts in establishing internal policies and procedures to provide reasonable assurance that non-lawyers will act in a way compatible with the RPC. The RPC sets the minimum ethical standards for the practice of law and promulgates a set of rules that govern the professional conduct of all lawyers in the D.C. jurisdiction<sup>73</sup>. Although paralegals are not directly governed by these rules, they are expected to act in accordance with them.

Lawyers must recognize the implications of failure to take such measures. They have to take into account that their non-lawyer paraprofessionals do not have the same legal training and are not subject to the same professional disciplinary actions as those for lawyers. The attorney, not the paralegal, must answer to the Office of Bar Counsel, Board of Professional

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<sup>73</sup> D.C. Rules of Professional Conduct Rule 5.3(a) and (b).

Responsibility, and/or District of Columbia Court of Appeals for their non-lawyer staff's work-related activities and conduct in the work environment<sup>74</sup>.

In the case *In re Toppelberg*, the Court of Appeals suspended an attorney for a year, at which time the Court could readmit him only upon receiving “proof of fitness to practice law.” The attorney had violated RPC Rule 5.3 in his failure to supervise his non-lawyer secretary and to take proper measures, specifically in terms of employee training, to ensure her compliance with the Rules of Professional Conduct<sup>75</sup>. The Hearing Committees of the Board on Professional Responsibility acknowledged that the non-lawyer staff member had committed errors and misjudgments while working on the client’s case, but the Board directly attributed her misconduct to the lawyer’s failure to train his staff regarding the RPC. Here, the lawyer contended that, in finding that he had violated Rule 5.3, the Board was essentially burdening lawyers with the impossible task of “cross-check[ing] every action undertaken by an employee.”<sup>76</sup> The Court, however, dismissed this argument, stating that the Rule requires only the showing of “reasonable effort” in ensuring that an employee’s conduct meets the standards of the RPC. According to the Court, “[a]ppropriate training in the Rules, systems controls, and regular oversight would meet these requirements.”<sup>77</sup>

### **UPL Defined**

The District of Columbia’s Court of Appeals Rule 49 governs the unauthorized practice of law. The D.C. Court of Appeals not only has the “inherent and exclusive authority to define and regulate the practice of law in the District of Columbia” but “also exercises some [but not

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<sup>74</sup> D.C. Rules of Professional Conduct Rule 5.3 Comment [1].

<sup>75</sup> *In re Toppelberg*, 966 A.2d 852 (D.C. 2009).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

exclusive] authority over the unauthorized practice of law by nonlawyers.”<sup>78</sup> As such, the Court establishes that “[n]o person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the D.C. unless enrolled as an active member of the D.C. Bar, except as otherwise permitted.”<sup>79</sup> Rule 49 also outlines the function of the Committee on Unauthorized Practice of Law which, “[s]ubject to the approval of the court, [...] shall adopt such rules and regulations as it deems necessary to carry out the provisions of this rule.”<sup>80</sup>

Rule 5.5 under the D.C. Rules of Professional Conduct further addresses the issue of UPL, stating that a lawyer shall not “[a]ssist a person who is not a member of the bar [such as a paralegal] in the performance of activity that constitutes the unauthorized practice of law.”<sup>81</sup> However, it clarifies that this does not prohibit a lawyer from effectively utilizing paralegals and delegating certain tasks to them, “so long as the lawyer supervises the delegated work and retains responsibility for their work.”<sup>82</sup>

### **Reciprocal Discipline**

In contrast to many other jurisdictions, applicants are allowed to apply for membership to the D.C. Bar by motion and do not have to wait a specific number of years before requesting admission. As a result, a large number of members of the D.C. Bar hold more than one license. Attorneys holding multiple licenses can be held responsible for unauthorized practice of law by non-lawyer employees and be subject to disciplinary measures imposed by the D.C. Court of

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<sup>78</sup> In re Banks, 805 A.2d 990 (D.C. 2002) (quoting *Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125 (D.C. 1988), and citing D.C. Code § 11-2501 (2001)).

<sup>79</sup> D.C. R. 49(a).

<sup>80</sup> D.C. R. 49(d).

<sup>81</sup> D.C. Rules of Professional Conduct Rule 5.5(b).

<sup>82</sup> D.C. Rules of Professional Conduct Rule 5.5 Comment [2].

Appeals for misconduct occurring outside of the District of Columbia. Reciprocal discipline is more commonly instituted in the D.C. and “account[s] for a significant percentage of disciplinary actions in the District of Columbia.”<sup>83</sup>

Pursuant to D.C. Bar Rule XI, §2(b)(2) and §11, reciprocal discipline may be imposed by the D.C. Court of Appeals when an attorney has been disbarred, suspended, or placed on probation by another disciplining court.<sup>84</sup> Even if the discipline does not include suspension or disbarment, the Court will order publication of the fact that the discipline occurred.<sup>85</sup>

Additionally, the Court has adopted a more rigid standard in cases regarding attorney discipline. There is a presumption for the Court to impose identical reciprocal discipline unless an attorney can establish with clear and convincing evidence that one or more exemptions set forth in D.C. Bar R. XI § 11(c) exist.<sup>86</sup>

*In re Kline*, the Board on Professional Responsibility considered what type of reciprocal discipline to impose on conduct that occurred in another jurisdiction.<sup>87</sup> Maryland Bar disbarred one of its members for allowing one of his employees to be sworn in before a court, and falsely testifying under oath, thereby violating several provisions of the Maryland Rules of Professional Conduct including rules pertaining to responsibilities regarding non-lawyer assistants. The Court

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<sup>83</sup> *In re Zdravkovich*, 831 A.2d 964, 968 (D.C. 2003).

<sup>84</sup> D.C. Bar R. XI, §2(b)(2) and §11

<sup>85</sup> *Id.*

<sup>86</sup> The five exemptions under D.C. Bar R. XI, § (c) are as follows:

(1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or (3) The imposition of the same discipline by the Court would result in grave injustice; or (4) The misconduct established warrants substantially different discipline in the District of Columbia; or (5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

<sup>87</sup> *In re Kline*, 955 A.2d 155 (D.C. 2008).

directed the Board on Professional Responsibility to investigate and recommend “whether identical, greater, or lesser discipline should be imposed as reciprocal discipline or whether it should proceed de novo.” Upon receiving the Board’s recommendation, the D.C. Court of Appeals imposed identical discipline and disbarred the Respondent from the practice of law, which was consistent with discipline imposed for similar misconduct in other cases.

Additionally, D.C. Bar members who do not practice in D.C. and remain on “inactive status” are also subject to reciprocal discipline imposed by the D.C. Court of Appeals. *In re Aimar*, Respondent, a member of the Nevada and California Bar and an inactive member of the D.C. Bar, was suspended from the practice of law by the Supreme Court of Nevada for violating several Nevada Supreme Court Rules (“SCR”) including provisions pertaining to responsibility regarding non-lawyer assistants and the unauthorized practice of law.<sup>88</sup> Although, the Respondent had remained on inactive status, the D.C. Court of Appeals found that his conduct also violated the D.C. Rules of Professional Conduct and imposed identical reciprocal discipline in the instant case.

### **Exceptions to UPL**

Paralegals particularly are among those who are not authorized to practice law in the District of Columbia under D.C. Court of Appeals Rule 49. This rule contains, however, exceptions, especially where activities do not constitute the unauthorized practice of law. Not only are these areas where non-lawyers may assist in the delivery of legal services but, also, in special circumstances are permitted to independently perform certain types of law-related services.

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<sup>88</sup> *In re Aimar*, 926 A.2d 167 (D.C. 2007)

## Paralegals and Alternative Dispute Resolution

One of these exceptions extends to practice of mediation and other Alternative Dispute Resolution (“ADR”) services. This new exception under Rule 49 “furthers the strong public policy favoring the efficient and expeditious resolution of disputes outside the judicial process, to the extent consistent with the broader public interest.”<sup>89</sup> Although this exception applies specifically to lawyers who represent clients in ADR proceedings, it is important to note that Rule 49 distinguishes ADR services from the ordinary practice of law and recognizes that lawyers who serve as third-party neutrals in ADR proceedings are not engaging in the practice of law.<sup>90</sup>

The “practice of law,” according to Rule 49, refers to the provision of professional legal advice or services where there is a client relationship of trust or reliance.<sup>91</sup> This rule highlights these two essential components that, together, define and constitute the “practice of law”: (1) the “provision of legal advice or services,” and (2) “a client relationship of trust or reliance.” The Committee on Unauthorized Practice of Law’s commentary on Rule 49, which is to be considered when interpreting this definition of the “practice of law” as adopted by the rule, provides that paralegals and other non-lawyers are not engaging in the unauthorized practice of law where they are not legally advising clients or otherwise purporting to have the authority to practice law and specifies that Rule 49 is “not intended to cover conduct which lacks the essential features of an attorney-client relationship [of trust or reliance].”<sup>92</sup> No such relationship exists in the context of ADR services. Furthermore, the Rule commonly requires that third-party neutrals take special measures to explicitly inform the parties to the proceeding that they are not

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<sup>89</sup> D.C. Rule Commentary 49(c)(12)

<sup>90</sup> *Id.*

<sup>91</sup> D.C. R. 49(b)(2).

<sup>92</sup> D.C. R. Commentary to 49(b)(2).

legal counselors and that they do not have the authority to furnish any legal advice or services.<sup>93</sup> Rule 2.4 of the D.C. Rules of Professional Conduct also differentiates the role of a third-party neutral from the role of a client representative and expresses the absolute need to disclose this difference, especially when a lawyer, whose primary role is to represent clients, serves as a third-party neutral. The subsequent comment to the Rule further acknowledges that the role of a third-party neutral is not exclusive to lawyers, although there are certain types of matters that only a lawyer may direct.<sup>94</sup>

The Multi-Door Dispute Resolution Division of the D.C. Superior Court assists parties in settling disputes and reaching agreements through mediation and other ADR techniques. Multi-Door's objective, through the administration of ADR programs, is to create more efficient options for the potential settlement of disputes. Before Multi-Door, there was only litigation. However, "people can now come to the courthouse to litigate or to mediate or to arbitrate or to be referred to community programs that offer a variety of alternative dispute resolution services."<sup>95</sup> Multi-Door directly trains its mediators and dispute resolution specialists and prepares them for a range of cases covering different areas of the law. Mediation is the most popular form of dispute resolution among the programs offered and the one most closely concerned with paralegals and other non-lawyers. All mediation, as it occurs within D.C. Superior Court, must go through Multi-Door, and mediators in the courts must be staff or volunteers of Multi-Door's Mediation Program. There are different qualifications for different types of mediators. Some mediator positions, such as that for small claims, require basic qualifications including the completion of an orientation and a certain number of hours of

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<sup>93</sup> *Id.*

<sup>94</sup> D.C. Rules of Professional Conduct R. 2.4 Comments [2] and [3].

<sup>95</sup> *Impressive Ceremony Marks Opening of Multi-Door Dispute Resolution Program*, *The Afro American*, Apr. 13, 1985, at 16.

training as well as actual performance alongside mentors. Other positions, such as that of a civil court mediator, entail the additional qualification of being a licensed attorney. However, the mediator, both lawyer and non-lawyer alike, neither represents a client nor expends legal advice. Therefore, paralegals who volunteer as third-party neutrals and become mediators in an appropriate program that permits non-lawyer participation are not engaging in the unauthorized practice of law but rather lawfully and necessarily aiding in dispute resolution.

### **Paralegals in the Government and Administrative Agencies**

D.C. Court of Appeals Rule 49 provides for a second exception to the exclusive practice of law provisions for attorneys unlicensed in DC and employees of government and federal agencies. The District of Columbia has an exception to this status because of its location as the headquarters of the federal government. Rule 49 includes an exception for the practice before federal departments and agencies that allow persons not admitted to the D.C. Bar to practice before them.<sup>96</sup> Rule 49 states that “no person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia bar,” unless they fall under an exception. This Rule specifically applies to lawyers and not paralegals because they need a license to practice law in specific jurisdictions. Individuals must disclose that they are not admitted in the District of Columbia, but their practice is limited pursuant to Rule 49.

### **Paralegals in the Armed Services**

The United States Armed Forces has important bases located in the District of Columbia. Within these bases, cadet life is governed by the Uniform Code of Military Justice, a part of the Code of Federal Regulations. The services recruit and train of a large number of military and

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<sup>96</sup> D.C. R. 49(c)(B).

civilian lawyers and paralegals that help enforce this section of administrative law.<sup>97</sup> Legal professionals in the nation's capital should therefore pay close attention to this important cadre. Also, a snapshot of work in the U.S. Army is representative of the larger picture of legal professionals in the other services, such as the Navy and Air Force.

Army paralegals in the nation's capital are regulated by three codes: the Army's 1987 *Rules of Professional Conduct* that replaced the American Bar Association ("ABA") Rules which the Army had used for decades, the *Soldier's Training Manual-Paralegal Specialist 27D*, and Rules of the District of Columbia Court of Appeals. These three regulatory sources, together with the ABA Rules, govern the work of Army legal professionals.

As mentioned above, under the exceptions that accompany Rule 49 of the D.C. Court of Appeals Rules, legal professionals may represent clients in a "special court, department or agency of the United States."<sup>98</sup> The exceptions also stipulate that the agency concerned should set the parameters of legal representation, having "adopted a rule expressly permitting and regulating such practice" In other words, D.C. law grants the Army considerable leeway regulating legal practice.

For decades, the Army had regulated legal practice using the ABA's Rules of Professional Conduct. In 1987, it developed its own rules that were more suited to military necessity. However, a look at Rule 5.3, as well as with the commentary that accompanies it, shows a verbatim borrowing from the ABA Model Rules. The adaptations of the ABA Rules to military life is not apparent in its language. Instead, *Soldier's Training Manual-Paralegal Specialist-27 D* designates tasks to and defines the responsibilities of paralegals. The Army's

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<sup>97</sup> *Soldier's Training Manual-Paralegal Specialist 27 D*, The Judge Advocate General's Legal Center and School, Charlottesville, VA, 15 April 2011, at 5.

<sup>98</sup> DC Cir. R. 49(c)2.

unique and, for civilians, somewhat puzzling ways are best captured in the following interpretation of the widely used Rule 5.3:

Supervisors must make reasonable efforts to ensure subordinates comply with the Rules (Army Rule 5.1), including non-lawyers under their supervision (Army Rule 5.3). A supervisor assumes imputed responsibility for acts of subordinates if the lawyer orders or ratifies a subordinate's violation, or the lawyer knows of and fails to take remedial action to avoid or mitigate the consequences of a violation. Thus, when a lawyer or attorney is referred to hereafter that includes you, the paralegal.

The manual defines imputed responsibility as vicarious responsibility. Hence, the code, while drawing on the language of the ABA, sees the paralegal as a lawyer. The rest of the training manual will show that given the nature of combat situations, where everyone pitches in, a strict separation between lawyers and paralegals is not practically feasible, as it is in the civilian world. As such, paralegal supervision in the army manual reflects the hierarchical command structure of military ranks and not a qualitative difference between lawyers and non-lawyers as seen in the civilian world. The section entitled *Comply with the Rules of Professional Responsibility* explicitly establishes the tasks and duties of army lawyers. In short, a paralegal is expected to follow a lawyer. While military personnel view paralegals as doing the same kind of work as lawyers, they have lower in the rank structure. This manual defines in great detail the specifically legal work of an army paralegal.

The section entitled "Comply with the Law of War" highlights the significantly greater role of the paralegal in the administration of army justice. The section starts off with possible scenarios that an Army paralegal might face.

Conditions: You are a Paralegal working in a Brigade Operational Law team. You must be able to identify, understand and comply with the Law of War, to include prohibitions on targets and weapons; humane treatment of prisoners of war, wounded and sick, and civilians; rights and obligations of prisoners of war, and responsibility to disobey criminal orders. You have access to

provisions of Customary Law of War, Geneva and Hague Conventions, the Operational Law Handbook and FM 27-10.

As the paralegal is also a combat soldier, he or she participates in warfare, the main function of the army. And since an important part of army law consists of international conventions regulating warfare, the army paralegal should be well versed in this body of international law. Thus, in today's conduct of warfare, the army paralegal acts like a lawyer.

In contrast, paralegals in the civilian world do not share comparable responsibilities with lawyers and do not share in the firm's profits. These kinds of distinctions are important to note, for those in the civilian legal professionals who interact with military counterparts. Legal professionals from the civilian should understand that their army colleagues shoulder greater responsibilities. This will help reduce misunderstandings and thereby facilitate communication.

### **Conclusion**

Lawyers bear the ultimate responsibility for their non-lawyer legal staff's conduct and work performance. Under the District of Columbia's Rules of Professional Conduct Rule 5.3, Rule 5.5, and the District of Columbia's Court of Appeals Rule 49, lawyers are punished if they do not properly supervise and train their non-lawyer staff. Paraprofessionals are not subject to the same discipline as lawyers, and therefore, they must be cognizant of the Rules and act in accordance with them.

AUTHOR'S PHOTO'S

First Line : Kelly Bauer, Grace Lee, Ali Ahsani; Second Line: Laura Park



## BOOK REVIEW OF ALLISON LEOTTA'S "SPEAK OF THE DEVIL"

by the Editor in Chief of the Journal, Christopher A. Zampogna

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And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

(see Sir Thomas More in *A Man for all Seasons*.)

Anna Curtis, an AUSA in Washington DC, must face off against a real life Devil or *Diablo* a leader of the infamous MS-13 gang and the villain in "Speak of the Devil," and give him the benefit of the law, no matter what. She must follow the famous adage despite the peril to herself and others, and, at times, reservations whether she chooses the proper path in her personal and professional life. After you have read this entertaining and well written book, you be the judge.

Allison Leotta, the author, and former sex crimes prosecutor, catches the reader from the first chapter and drives them at formula one pace with suspense, plot twists, and darkness of the MS-13 gang. Her writing style approximates the randomness and unexpected nature of a court room experience. You will never guess the surprise ending.

Even if you have not read Allison Leotta's other two books, you will be able to pick this one up and get hooked. It embodies a modern legal thriller with a very authentic style. Those

lawyers, who do not go to court, will be able to understand and enjoy why trial attorneys clamor for it. You can feel the excitement of the court and all that leads up to it. For instance, during the investigation, a favorite quote of mine related to one of the police officers, McGee, “The man was lying, but McGee was used to being lied to” squarely nails the process of investigation.

While being a prosecutor is more exciting than watching TV show approximations of it, this book comes close to the real thing. It is not a PG version, but a real drama with R rated for reality. It has certain grit, putting to shame a show like *The Wire* or other pay for movie channel legal/police dramas. Any reader will enjoy the character development, and the reader will be perplexed at and will flip back and forth trying to determine who really is right or wrong. And, learn, as any good prosecutor must, that you have to gather all the facts as a reader before judging the actions of any of the characters.

The book begins with Anna Curtis deciding to get engaged to Jack a co-worker and Chief of the Homicide Bureau of the DC office. And, adding to any DC lover, the question is popped at a famous local bar/restaurant, “The Tabard Inn.” And, she writes about other local DC places in the scenes from the book, like Rock Creek Park, Langley Park, Cakelove, and even the “Days Inn” on New York Avenue, NE, described as “squat motel long past its prime of life.” I think all DC residents have driven by it and thought the same thing. And, all the while during this joyous moment in Anna’s life, a gruesome scene develops in a DC neighborhood where the reader is introduced to Diablo, a horror character out of a comic book. The first chapter, rips the reader from a very joyous moment to a hideous scene, and demonstrating how within a small distance in a city, a tale of two cities is made modern.

She even takes one of the characters who we should not have much sympathy for, and provides an insight into his life and reasons for joining the gang. She adds an element of spirituality when he sees a figurine of a skeleton carrying a scythe and set of scales, La Santa Muerte, who influences the character, “The Mexican Spirit of Good Death,” and weaves this story line through the novel, to bring some sort of order to the chaos. Redemption enters the novel, adding a dimension not predicted at the beginning. And, even Anna makes some very deep statements, “Evil is a result of choices people make.”

As a former Assistant DA from New York, it was impossible for me not to inhale the details Allison placed into each part of the fact gathering, lying witnesses, police roadblocks, frustrations, and then vindication many prosecutor’s face. Details, like, eating out almost all the time, being ready to drop everything to take up the next case. Learning which defense attorneys had reputations for certain types of strengths and weaknesses.

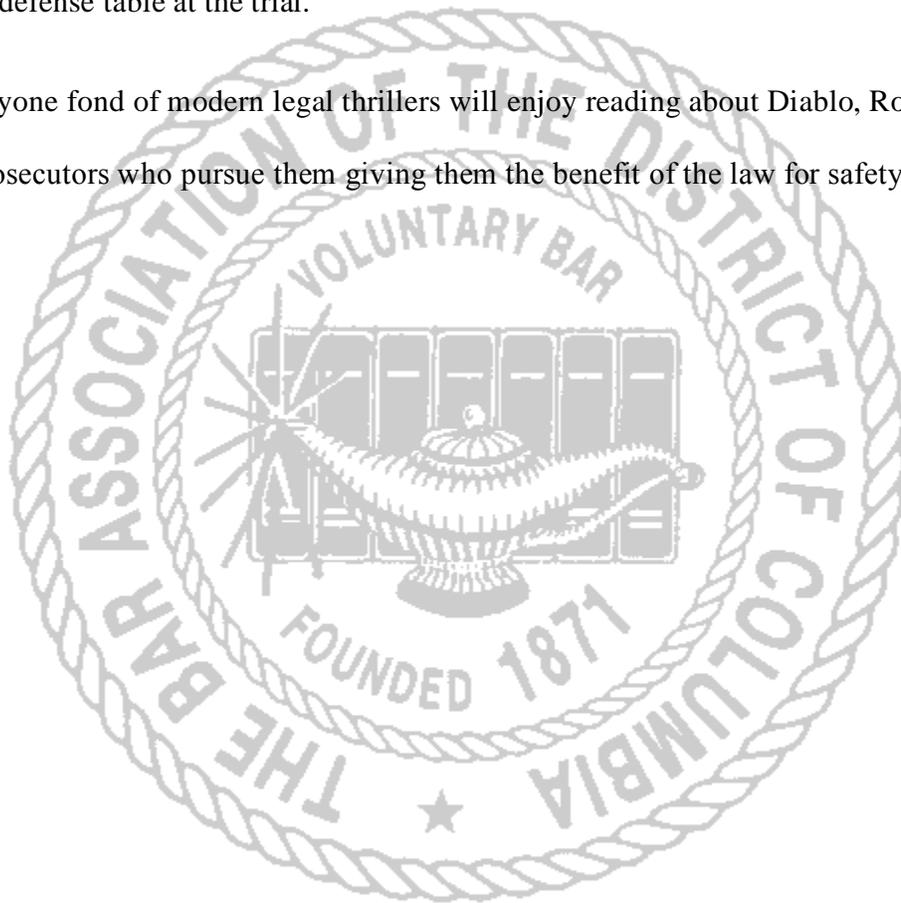
It’s the book’s view that the best defense attorneys are in the Public Defender’s office, a view not shared by all in the defense bar. Those in private practice, who were former public defenders and prosecutors, combine the skill of the court room with the tactics of using the influence of policy and relationships to influence for the better the case for their client.

Also, regarding the historical arraignment court room in DC Superior court, today’s new arraignment court room on C-10 level, has lost the history described in the book, because it is now a modern marvel of close circuit TV’s, bi-lingual announcements, touch screen computers and new everything which makes it one of the best looking court rooms in Superior Court.

Overall, the novel has excellent details of criminal practice by combining the excitement of prosecutions and uses a modern writing style by adding “text” messages and even online

music, Spotify, to the repertoire of the reader. The trial scene, which takes place at the DC Federal Court house, a court home to many high profile cases, is rich with drama and unpredictability. Each part of the case from the opening to closing arguments, places you in Anna's mind, and provides insight into all the crazy and unpredictable elements of a prosecution. You, by reading the book, will understand the truly remarkable job done by those at the AUSA's office and defense table at the trial.

Anyone fond of modern legal thrillers will enjoy reading about Diablo, Rooster, Psycho and the prosecutors who pursue them giving them the benefit of the law for safety's sake.<sup>1</sup>



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<sup>1</sup> You may read more about this book and the author's other works at <http://allisonleotta.com/books/>.

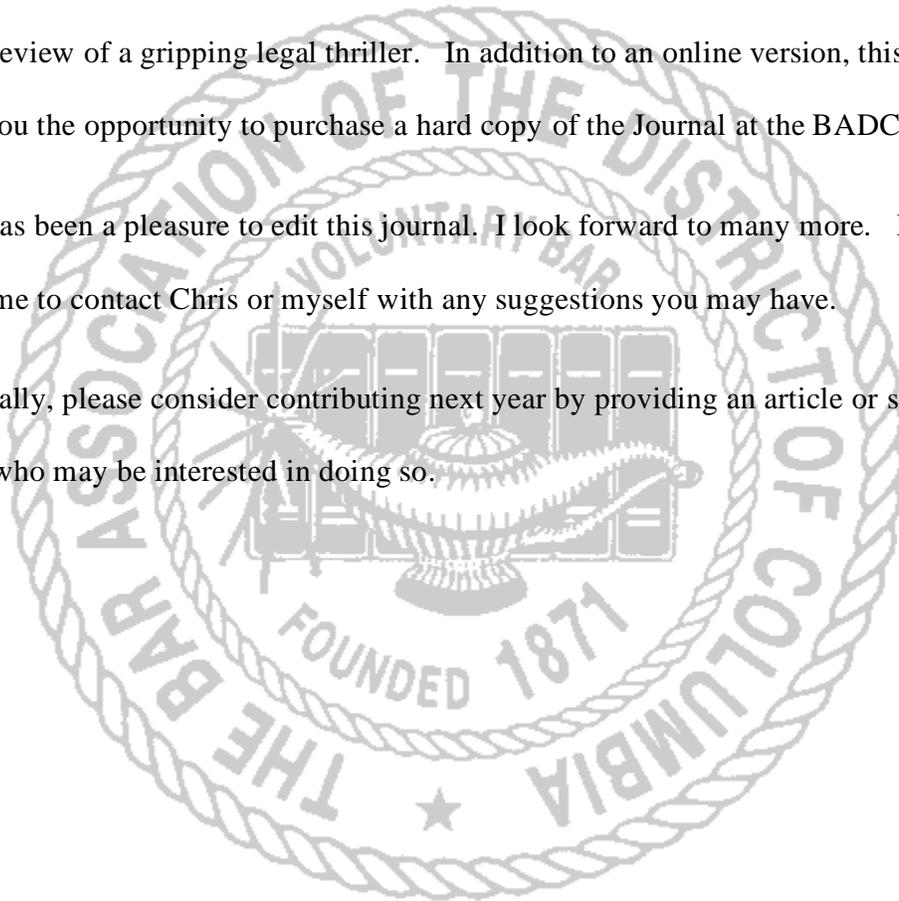
## REMARKS

by the Senior-editor – Steven J. Schwarz

Thank you for reading the second new millennium edition of the Journal of the Bar Association of the District of Columbia. In this edition, we have an informative and timely article on election law – just in time for the fall election. We also have a practice article, as well as a book review of a gripping legal thriller. In addition to an online version, this year we have provided you the opportunity to purchase a hard copy of the Journal at the BADC headquarters.

It has been a pleasure to edit this journal. I look forward to many more. Please take a moment time to contact Chris or myself with any suggestions you may have.

Finally, please consider contributing next year by providing an article or suggesting a colleague who may be interested in doing so.



## ACKNOWLEDGMENTS and COPYRIGHT INFORMATION

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