



May 27, 2016

**VIA OVERNIGHT DELIVERY SERVICE**

Robin C. Ashton  
Counsel  
U.S. Department of Justice  
Office of Professional Responsibility  
950 Pennsylvania Avenue, NW, Suite 3529  
Washington, DC 20530-0001

*RE: Accountability for DOJ Attorneys*

Dear Ms. Ashton:

By way of introduction, the American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties and the rule of law at home and abroad. ACLJ attorneys have argued in a number of significant cases before the Supreme Court of the United States and lower federal courts and have argued and filed amicus briefs both in support of and in opposition to the United States government.<sup>1</sup>

In the case that is the subject of this correspondence, *Texas v. United States*, the ACLJ filed amicus briefs in the District Court and the Fifth Circuit Court of Appeals representing numerous Members of Congress, and filed an amicus brief at the United States Supreme Court on behalf of over 337,000 of our members.

The ACLJ possesses tremendous and sincere respect for the United States Department of Justice (DOJ) and the role it plays in promoting the rule of law in our Nation. And, as an organization that regularly litigates with the DOJ (sometimes alongside and other times in opposition to), the ACLJ understands how critically important it is for DOJ attorneys to adhere to the highest standards of conduct governing litigation practices. The ACLJ submits this

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<sup>1</sup>See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

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correspondence on behalf thousands of its members including individuals from all fifty States who seek accountability for the DOJ.

The purpose of this correspondence is twofold. First, we call to your attention a United States District Court's disturbing findings of misconduct by DOJ attorneys. Second, we respectfully urge you, as Counsel for the DOJ Office of Professional Responsibility, to do all in your power to hold the offending attorneys accountable and restore confidence in the Nation's attorneys.

## **I. The United States District Court's Findings of Misconduct by DOJ Attorneys**

In its Memorandum Opinion and Order entered May 19, 2016, the United States District Court for the Southern District of Texas, Brownsville Division (the "Court"), squarely addressed the "unseemly and unprofessional conduct"<sup>2</sup> of multiple DOJ attorneys with six specific sanctions. The sanctioned behavior centered on "the series of misrepresentations made by the attorneys from the Justice Department to the Plaintiff States and to this Court" wherein the DOJ attorneys "misled the Plaintiff States into foregoing a request for a temporary restraining order or an earlier injunction hearing" and "misdirected the Court as to the timeline involved in the implementation of the 2014 DHS Directive."<sup>3</sup>

According to the Court, the Government's "admissions make one conclusion indisputably clear: the Justice Department lawyers knew the true facts and misrepresented those facts to the citizens of the 26 Plaintiff States, their lawyers and this Court on multiple occasions."<sup>4</sup>

*Because the "Court and opposing counsel were misled by misrepresentations both in writing and in open court on multiple occasions"<sup>5</sup> as to when the Government commenced deferred action and because DOJ attorneys have now admitted that it knew the facts and declined to truthfully and candidly disclose them in a timely fashion, the Court is persuaded that DOJ attorneys have engaged in indefensible and unethical conduct.*

According to the Court:

The United States Department of Justice . . . has now admitted making statements that clearly did not match the facts. It has admitted that the lawyers who made these statements had knowledge of the truth when they made these misstatements. The DOJ's only explanation has been that its lawyers either "lost focus" or that the "fact[s] receded in memory or awareness." These misrepresentations were made on multiple occasions starting with the very first hearing this Court held.<sup>6</sup>

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<sup>2</sup>*Texas v. United States*, Case No. 1:14-cv-254, at 2 (May 19, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/05/Judge-Hanen-ethics-ruling-5-19-16.pdf>.

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

<sup>4</sup>*Id.* at 5.

<sup>5</sup>*Id.* at 4 (emphasis added).

<sup>6</sup>*Id.* at 2.

And:

Apparently, lawyers, somewhere in the halls of the Justice Department whose identities are unknown to this Court, decided unilaterally that the conduct of the DHS [implementing the Administration's directive on over 100,000 occasions] was immaterial and irrelevant to this lawsuit and that the DOJ could therefore just ignore it. Then, for whatever reason, the Justice Department trial lawyers appearing in this Court chose not to tell the truth about this DHS activity. The first decision was certainly unsupportable, but the subsequent decision to hide it from the Court was unethical.

Such conduct is certainly not worthy of any department whose name includes the word "Justice."<sup>7</sup>

The Court quoted the United States Court of Appeals for the Sixth Circuit, which also reprimanded DOJ attorney behavior, as follows:

In closing, we echo the district court's observations about this case. The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws—all of them, not just selective ones—in a manner worthy of the Department's name. The conduct of the IRS's attorneys in the district court [like the attorneys representing the DHS in this Court] falls outside that tradition. We expect that the IRS will do better going forward. And we order that the IRS comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions, and without further delay.<sup>8</sup>

The Court recounted in great detail the misrepresentations, the materiality of those misrepresentations, and the Government's admissions concerning those misrepresentations. "In sum, counsel twice in hearings and twice in pleadings knowingly made representations to the Court that they knew were not true."<sup>9</sup>

## II. The Specific Rules of Conduct DOJ Attorneys Violated

The Court identified a number of specific rules of conduct violated by the DOJ attorneys: (1) Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct, which provides lawyers shall not make a false statement of material fact to the court; (2) Rule 4.01, which provides lawyers shall not make a false statement of material fact to a third person in the course of representation; and (3) Rule 8.04, which provides that lawyers shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.<sup>10</sup> These are the applicable rules that are incorporated by reference as the controlling rules of the Southern District of Texas, pursuant to

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

<sup>8</sup>*Id.* n. 7 (quoting *In re United States*, No. 15-3793, 817 F.3d 953, 2016 U.S. App. LEXIS 5213, at \*11 (6th Cir. Mar. 22, 2016) (emphasis added)). The district court in that case had even questioned "whether or not the Department of Justice is doing justice." *Id.* (quoting *In re United States*, No. 15-3793, 2016 WL 1105077, at \*5).

<sup>9</sup>*Id.* at 12 n. 8.

<sup>10</sup>*Id.* at 14-16.

which the Court found the DOJ attorneys to be subject to discipline. (quoting S.D. Tex. Local Court Rules App. A).<sup>11</sup>

As the Court noted, compliance with the Court's local rules and State rules is specifically required by 28 U.S.C. § 530B, the "McDade Amendment," which requires 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."<sup>12</sup> Thus, the Court concluded, "[c]ounsel's conduct in this case was not only unethical, *but a failure to comply with federal law.*"<sup>13</sup> As to the DOJ attorneys' written misrepresentations in particular, the Court found the attorneys violated Federal Rule of Civil Procedure 11(b).<sup>14</sup>

"[T]he Court [found] no need for a comprehensive dissertation on the duty of candor and honesty" under these rules "because counsel in this case failed miserably at both."<sup>15</sup> The Government's lawyers in this case clearly violated their ethical duties."<sup>16</sup> As the Court explained, these violations had real consequences for the Court, the State Parties, and the individuals granted relief contrary to the DOJ attorneys' representations.<sup>17</sup> The violations were anything but trivial: "The Government knowingly acted contrary to its representations to this Court *on over 100,000 occasions.* This Court finds that the misrepresentations detailed above: (1) were false; (2) were made in bad faith; and (3) misled both the Court and the Plaintiff States."<sup>18</sup>

The over 100,000 violations did "not include the approximately 2,000 times the Government admitted it actually violated this Court's injunction."<sup>19</sup> "The misconduct in this case was intentional, serious and material. In fact, it is hard to imagine a more serious, more calculated plan of unethical conduct. There were over 100,000 instances of conduct contrary to counsel's representations; such a sizable omission cannot be classified as immaterial."<sup>20</sup>

"Clearly, there seems to be a lack of knowledge about or adherence to the duties of professional responsibility in the halls of the Justice Department."<sup>21</sup> The Court's concern was not limited to the misrepresentations, as it found that the Government's "admitted . . . violat[i]ons of

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<sup>11</sup>*Id.* at 16. The Court also found that the DOJ attorneys violated the threefold duties of a lawyer: (1) tell the truth; (2) do not mislead the Court; and (3) do not allow the Court to be misled, *id.* at 13 (citing MODEL RULES OF PROF'L CONDUCT R. 3.3 cmts. 2 & 3 (AM. BAR ASS'N 2013)), and noted that the DOJ attorneys' misconduct also violated these national standards of conduct as outlined in the Model Rules of Professional Conduct, *id.* at 15-16 (MODEL RULES OF PROF'L CONDUCT R. 3.3); *id.* at 17-18 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.3, 4.1, and 8.4).

<sup>12</sup>*Id.* at 17.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 12 n. 8.

<sup>15</sup>*Id.* at 18.

<sup>16</sup>*Id.*

<sup>17</sup>Due to the unique nature of the DOJ, the United States' representative in court, misconduct and misrepresentation by DOJ attorneys will often have real consequences on litigants and the rule of law. *See, e.g., United States v. Jones*, 609 F. Supp. 2d 113, 131 (D.Mass. 2009) (surveying a nonexclusive list of nine Massachusetts cases where DOJ attorney misconduct negatively impacted the administration of justice).

<sup>18</sup>*Id.* at 19.

<sup>19</sup>*Id.* n. 11.

<sup>20</sup>*Id.* at 20. The Court explained that, although the conduct merited "the ultimate sanction" of striking the Government's pleadings as well as attorney fees and costs, the Court would not impose such sanctions due to the harms they would cause to the State Parties, the taxpayers, the public and the higher courts. *Id.* at 20-22.

<sup>21</sup>*Id.* at 22.

this Court's injunction in over 2,000 instances," "and the failure of the Justice Department to insist that its clients immediately seek to remedy their violations of this Court's injunction are indicative of the unprofessional manner in which the attorneys for the Government have approached this case."<sup>22</sup>

### III. The Attorney General's Responsibility to Supervise and Direct All Litigation

It is absolutely critical that the DOJ attorneys be held accountable for their misconduct in this case because that misconduct reflects poorly upon the Attorney General — and the Department of Justice as a whole. The Attorney General, a member of the President's cabinet, is "the head of the Department of Justice and chief law enforcement officer of the Federal Government."<sup>23</sup> Indeed, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, *is reserved to officers of the Department of Justice, under the direction of the Attorney General.*"<sup>24</sup> And, "*the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.*"<sup>25</sup>

In sum, these statutes "require the Attorney General to direct and supervise all litigation in which the United States is a party,"<sup>26</sup> although that power may be delegated "to any other officer, employee, or agency of the Department of Justice,"<sup>27</sup> subject to certain legal and constitutional requirements.<sup>28</sup>

To be sure, the Court-sanctioned litigation actions of DOJ attorneys reflect upon the Attorney General because it is, after all, the Attorney General who sends these attorneys to court: "[A]ny officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."<sup>29</sup> And while the Attorney General "may personally conduct and argue any case in a court of the United States in which the United States is interested," "he may direct the Solicitor General or any officer of the Department of Justice to do so" instead.<sup>30</sup>

Given the grave findings of misconduct and accompanying sanctions imposed by the Court in this case, and the embarrassing reflection such misconduct casts on the Attorney

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<sup>22</sup>*Id.* n. 13.

<sup>23</sup>*About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ag/about-office>.

<sup>24</sup>28 U.S.C. § 516 (emphasis added).

<sup>25</sup>28 U.S.C. § 519 (emphasis added); see 7 AM. J. 2d ATTORNEY GEN. § 51 ("Congress has specifically conferred upon the Attorney General supervision of all litigation to which the United States, an agency, or officer thereof is a party.").

<sup>26</sup>*United States v. Libby*, 429 F. Supp. 2d 27, 30 (DC Dist. Ct. 2006) (citing 28 U.S.C.S. §§ 516, 519).

<sup>27</sup>*Id.* at 33 (citing 28 U.S.C. § 510).

<sup>28</sup>*Id.* The delegation in *Libby*, however, was not and "could never be wholesale." *Id.* at 33-34.

<sup>29</sup>28 U.S.C. § 517.

<sup>30</sup>28 U.S.C. § 518.

General, the United States Department of Justice, the federal Government, and the rule of law,<sup>31</sup> we respectfully urge you to undertake any and all action within your power as may be necessary to hold the offending attorneys accountable. Congress, Executive Orders, and federal regulations have equipped and empowered you, as Counsel for the Office of Professional Responsibility, with the authority and responsibility to do so.

#### IV. The Critical Role of OPR in Investigating DOJ Attorney Misconduct

Federal regulations direct that you, as OPR Counsel, “shall (1) Receive, review, investigate and refer for appropriate action allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice.”<sup>32</sup> Among other tools at your disposal, your office is directed to “[r]eport to the responsible Department official the results of inquiries and investigations arising under paragraphs (a)(1) . . . of this section, and, when appropriate, make recommendations for disciplinary and other corrective action.”<sup>33</sup>

The regulations make clear that “[p]rimary responsibility for assuring the maintenance of the highest standards of professional responsibility by Department employees rests with the heads of the offices, divisions, bureaus, and boards of the Department”<sup>34</sup> This case was significant, a focal point for the Administration, and it defies logic and strains credulity to suggest that the heads of the offices or divisions were not involved in the litigation decisions and preparation of briefs. At least as to the written misrepresentations referenced by the Court, a supervisor or office head surely must have approved the briefs prior to filing.

This concept of hierarchical responsibility for attorney misconduct within the DOJ has been addressed by federal courts. For example, the Seventh Circuit Court of Appeals reprimanded a DOJ attorney for making a false statement in a filing, but warned:

*We are more troubled by the attitudes and behavior of the Justice Department. The U.S. Attorney for the Northern District of Illinois in his brief and in his oral statement at the disciplinary hearing emphasized the importance of hierarchy in the Justice Department. The inference we draw is not the intended one, but that the more serious misconduct in this matter was institutional rather than personal.*<sup>35</sup>

With these institutional realities in mind, we trust that your investigation will look beyond merely the attorneys who actually made the misrepresentations so that those supervising or directing the litigation may be held responsible.

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<sup>31</sup>*United States v. Libby*, 429 F. Supp. 2d 27, 45 (DC Dist. Ct. 2006) (“The integrity of the rule of law, which is a core ingredient of the American system of government, is challenged to the greatest degree when high-level government officials come under suspicion for violating the law.”).

<sup>32</sup>28 C.F.R. § 0.39a(a)(1).

<sup>33</sup>28 C.F.R. § 0.39a(a)(3); *see id.* 0.39(a)(4) (“Refer any allegation not arising under paragraphs (a)(1) or (2) of this section to the Inspector General or another appropriate Department official.”).

<sup>34</sup>28 C.F.R. § 0.39c(a).

<sup>35</sup>*In re Lightfoot*, 217 F.3d 914, 918 (7th Cir. 2000); *id.* at 918-19 (discussing role of DOJ supervisors in litigation misconduct).

As the federal regulations also require, “[t]he heads of the offices, divisions, bureaus, and boards shall assure that any judicial finding of misconduct or serious judicial criticism relating to the duties described in § 0.39(a)(1), or any nonfrivolous allegation of serious misconduct concerning an employee in their component and relating to those duties, is reported to the Counsel.”<sup>36</sup> As such, we trust that the appropriate heads have already reported to you, as OPR Counsel, the Court’s findings of misconduct and serious criticism. If they have not, we urge you to investigate the reason for that failure.

And, as you are no doubt aware, the regulations require that “all Department personnel, including the subject(s) of any inquiry or investigation, shall cooperate fully with any investigation conducted by the Counsel or his designee.”<sup>37</sup> And again, “Department employees have a duty to, and shall, cooperate fully with the Office of the Inspector General and Office of Professional Responsibility, and shall respond to questions posed during the course of an investigation upon being informed that their statement will not be used to incriminate them in a criminal proceeding. Refusal to cooperate could lead to disciplinary action.”<sup>38</sup> Armed with this authority, we urge you to demand the required cooperation.

In addition to the rules set forth in Part 45 of Title 28 of the Code of Federal Regulations, “[e]mployees of the Department of Justice are subject to . . . executive branch-wide employee responsibilities and conduct regulations at 5 CFR part 735.”<sup>39</sup> The Standards of Conduct found in 5 C.F.R. part 735 are proscribed by the President for the conduct of employees in the executive branch pursuant to 5 U.S.C. § 7301. As relevant here, these Standards require that “[a]n employee shall not engage in criminal, infamous, *dishonest*, immoral, or notoriously disgraceful conduct, or *other conduct prejudicial to the Government*.”<sup>40</sup> “An employee’s violation of” this regulation “may be cause for disciplinary action by the employee’s agency, which may be in addition to any penalty prescribed by law.”<sup>41</sup>

Congress also authorized the Attorney General to “investigate the official acts, records, and accounts of—(1) the United States attorneys.”<sup>42</sup> To the extent any criminal action is uncovered, Congress also specifically authorized the Attorney General to “investigate any violation of Federal criminal law involving Government officers and employees—(1) notwithstanding any other provision of law; and (2) without limiting the authority to investigate any matter which is conferred on them or on a department or agency of the Government.”<sup>43</sup>

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<sup>36</sup>28 C.F.R. § 0.39c(b). Other regulations provide that “Department employees,” not just heads, “have a duty to, and shall, report to the Department of Justice Office of Professional Responsibility (DOJ-OPR), or to their supervisor, or their component’s internal affairs office for referral to DOJ-OPR, any allegations of misconduct by a Department attorney that relate to the exercise of the attorney’s authority to investigate, litigate or provide legal advice.” 28 C.F.R. § 45.12.

<sup>37</sup>28 C.F.R. § 0.39c(c).

<sup>38</sup>28 C.F.R. § 45.13.

<sup>39</sup>28 C.F.R. § 45.1.

<sup>40</sup>5 C.F.R. § 735.203 (emphasis added).

<sup>41</sup>5 C.F.R. § 735.102.

<sup>42</sup>28 U.S.C. § 526(a).

<sup>43</sup>28 U.S.C. § 535(a); see 7 AM J. 2d ATTORNEY GEN. § 47.

As noted above, the Court found the DOJ attorneys violated federal law, 28 U.S.C. § 530B, by violating local court rules and Texas rules of conduct concerning dishonesty. In this statute, Congress directed that “[t]he Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.”<sup>44</sup> This has been done, and these rules are found in 28 C.F.R. part 77, entitled “Ethical Standards for Attorneys for the Government.” Notably, these rules are introduced by the assurance that “[t]he Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards.”<sup>45</sup>

According to the Attorney General’s rule, “in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney’s duties.”<sup>46</sup> Importantly, “[e]ach attorney, *including supervisory attorneys*, must assess his or her ethical obligations with respect to particular conduct.”<sup>47</sup> It would be appropriate, then, for your investigation to inquire into what steps, if any, were taken by the DOJ attorneys to comply with this rule. And, “*Department attorneys shall not direct any attorney to engage in conduct that violates section 530B.*”<sup>48</sup> This rule provides another key subject of inquiry for your investigation and provides support for our request that your investigation look beyond just the attorneys who made the misrepresentations to the Court.

We emphasize that because these rules provide no private remedy,<sup>49</sup> it is paramount that these rules be enforced by the appropriate court or the DOJ itself — by way of the OPR in your charge.

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The importance of the current credibility crisis cannot be overstated. The shockwaves will continue to ripple across the nation — directly and indirectly impacting the courts, the government, litigants, and the American people. News reports and headlines bearing testimony to that fact are too numerous to cite here. One article, however, neatly sums up where the DOJ now finds itself: “AG Lynch could salvage the credibility of the Justice Department by explaining how this breakdown happened.”<sup>50</sup> There can be no doubt that the DOJ’s credibility has been severely damaged by the actions of its attorneys in this case. Your investigation will play a pivotal role in whether that credibility may be salvaged, or whether that damage is irreparable.

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<sup>44</sup>28 U.S.C. § 530B(b).

<sup>45</sup>28 C.F.R. § 77.1(a) (emphasis added).

<sup>46</sup>28 C.F.R. § 77.3. Section 77.2 specifies that “attorneys for the Government” includes the Attorney General, any Deputy Attorneys General, Assistant Attorneys General, United States Attorneys, Assistant United States Attorneys, and any attorney in the Civil Division. 28 C.F.R. § 77.2.

<sup>47</sup>28 C.F.R. § 77.4(e) (emphasis added).

<sup>48</sup>*Id.* (emphasis added).

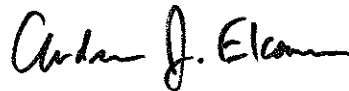
<sup>49</sup>28 C.F.R. § 77.5.

<sup>50</sup>*The Miscarriage of Justice Department*, WALL ST. J. (May 22, 2016, 5:40 PM), <http://www.wsj.com/articles/the-miscarriage-of-justice-department-1463953209>.



We, therefore, respectfully urge you to (1) undertake a thorough investigation pursuant to your authority and responsibility; (2) ensure that your investigation will address any supervisor or office head misconduct and look beyond those attorneys who made the misrepresentations to the Court; and (3) take and all action to require complete cooperation, regardless of a particular attorney's rank. Again, we thank you for your prompt attention to this serious matter. The ACLJ, and the American people, eagerly await your investigation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew J. Ekonomou". The signature is written in a cursive style with a prominent initial "A".

Andrew J. Ekonomou  
General Counsel