



DEPARTMENT OF VETERANS AFFAIRS  
**OFFICE OF INSPECTOR GENERAL**

*Office of Special Reviews*

OFFICE OF GENERAL COUNSEL

Attorney Misconduct,  
Inadequate Supervision, and  
Mismanagement in the  
Office of General Counsel



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## Executive Summary

In October 2018, the Office of Special Reviews initiated an investigation in response to allegations received from an anonymous source that a GS-14 General Attorney employed by the VA Office of General Counsel (OGC) in Albany, New York (Attorney), spent VA time and resources working on matters related to his outside law practice. The complaint alleged that the conduct was “ongoing,” and that the Attorney’s supervisor knew about it and “look[ed] the other way.” The OIG substantiated that the Attorney used VA time and resources to conduct his private law practice. The OIG also found that OGC officials failed to appropriately supervise the Attorney and did not take other actions that could have detected his misconduct at an earlier stage.

In addition to discovering that the Attorney had made use of VA time and resources, the OIG determined that his conduct potentially implicated criminal conflict of interest statutes applicable to federal employees. In particular, the OIG’s analysis of the Attorney’s recent bankruptcy cases revealed that his work included representing clients in bankruptcy who owed money to the federal government. Federal law prohibits VA employees from representing parties in cases where the United States is a party or has a direct and substantial interest.<sup>1</sup>

The OIG found that similar allegations relating to the Attorney were disclosed to his supervisor in 2012. In response, the Attorney received a verbal counseling from his supervisor, admonishing him not to use government resources for private work and to avoid taking calls relating to his private practice while in his VA office. There is no evidence suggesting that the Attorney’s supervisor raised any questions concerning whether his private practice may conflict with his duties to the government.

A complainant in 2013 raised similar allegations concerning the Attorney to the then VA General Counsel, who assigned the matter to the Assistant General Counsel for review. At the direction of the Assistant General Counsel, a VA ethics attorney informally assessed the allegations. Based on facts learned during the informal review, the ethics attorney recommended to the Assistant General Counsel that the OGC initiate a formal administrative investigation into the Attorney’s conduct. This recommendation was never carried out. The Assistant General Counsel could not explain to OIG investigators why the recommendation was not acted upon, and instead speculated that the matter had gotten “lost.” The OIG did not identify any other evidence that explained why the OGC neglected to conduct the investigation.

While this investigation was still pending, due to the ongoing nature of the alleged misconduct, the OIG notified the OGC that the Attorney was currently representing private clients with

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<sup>1</sup> The OIG referred this matter to the U.S. Department of Justice (DOJ) for consideration. The DOJ Criminal Division declined to open an investigation. The matter remains under consideration by the DOJ Civil Division.

interests potentially adverse to the federal government. On March 17, 2020, the OIG learned that the OGC removed the Attorney from federal employment effective March 6, 2020.

During this investigation, the OIG expanded its scope to address OGC's failure to implement corrective actions in response to a 2016 OIG report concerning the outside business activities of another OGC attorney.<sup>2</sup> In December 2016, the OGC responded to the OIG's recommendations in that matter and committed to taking corrective action to revise its employee handbook provisions relating to outside employment of OGC attorneys. The OGC represented to the OIG that it would require its supervisors to engage in an annual ethics assessment of their respective offices. This assessment was to include "a formal discussion of the ethical ramifications" with subordinates engaged in outside business activities. On the basis of this representation by the OGC, the OIG closed its recommendation. The OIG found that the OGC did not amend its handbook, and that the annual assessments and formal ethics discussions did not occur. The attorney responsible for implementing the corrective actions told the OIG that the initiative "got lost in the transition . . . between administrations, between general counsel transitions, and staff changes."

By failing to follow through on its commitment to enhance its procedures relating to outside business practices, the OGC may have missed additional opportunities to identify and address the Attorney's misconduct prior to this investigation. The OIG made seven recommendations for corrective action and for consideration of administrative action in response to the Attorney's conduct as well as the conduct of others involved. VA concurred with each recommendation. The entirety of VA's response can be found in appendix B. The OIG considers all seven recommendations open and will monitor implementation of VA's planned actions.



R. JAMES MITCHELL, ESQ.  
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for the Office of Special Reviews

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<sup>2</sup> VA Office of Inspector General, *Administrative Investigation, Conduct Prejudicial to the Government and Misuse of Position in the VA Office of General Counsel Washington, DC*, Report No. 16-03330-91, Nov. 10, 2016, at 2, available at <https://www.va.gov/oig/pubs/VAOIG-16-03330-91.pdf>.

## Contents

Executive Summary.....	i
Abbreviations.....	iv
Introduction.....	1
Findings and Analysis .....	2
Finding 1: The Attorney Engaged in Misconduct in Connection with His Outside Law Practice .....	2
Finding 2: OGC Leaders Failed to Investigate and Hold the Attorney Accountable and Did Not Fully Implement Corrective Action Proposed in Response to a 2016 OIG Report Related to Similar Attorney Misconduct .....	11
Conclusion.....	18
Recommendations.....	18
Management Comments Summary .....	19
OIG Response .....	19
Appendix A: Scope and Methodology .....	20
Appendix B: Management Comments .....	21
OIG Contact and Staff Acknowledgments.....	24
Report Distribution .....	25

## Abbreviations

OGC	Office of General Counsel
OIG	Office of Inspector General



## Introduction

In October 2018, the Office of Special Reviews initiated an investigation in response to allegations received by the VA Office of Inspector General (OIG) Hotline Division. The anonymous complaint alleged that a GS-14 General Attorney employed by the VA Office of General Counsel (OGC) in Albany, New York (Attorney), spent VA time working on matters related to his outside law practice. The anonymous complaint alleged that the conduct was “ongoing,” and that the Attorney’s supervisor knew about it and “look[ed] the other way.”

The OIG substantiated that the Attorney misused government time and resources on his private law practice matters. Specifically, the OIG determined that the Attorney used his VA email and computer, a VA fax machine, and other government resources in support of his private law practice. Much of this use appeared to occur during the Attorney’s routine VA duty hours.

During its investigation, the OIG discovered that the Attorney was receiving compensation for representing private clients in federal bankruptcy cases in which the United States was a party or had a direct and substantial interest. This conduct implicated federal criminal conflict of interest statutes (18 U.S.C. §§ 203 and 205), which prohibit executive branch employees from representing private parties in federal court in cases in which the United States is a party or has a direct and substantial interest. This had been occurring since at least 1997.

The OIG also identified two issues attributable to mismanagement within the OGC. First, with respect to the Attorney’s outside law practice, allegations were raised to OGC managers in 2012, but his supervisors failed to investigate the allegations and instead held one counseling session, which the OIG determined did not change his behavior. When allegations were raised again in 2013, the OGC failed to take appropriate measures to investigate and address the Attorney’s conduct. Second, in 2016 the OIG issued a report concerning another OGC attorney who used his VA position for private gain and misused government resources in support of his outside employment as president of a nonprofit charity organization.<sup>3</sup> In response to the OIG’s report, the OGC represented that it would implement specific procedures to prevent ethical violations related to outside activities. The OGC did not fully implement the procedures it told the OIG it would adopt.

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<sup>3</sup> VA Office of Inspector General, *Administrative Investigation, Conduct Prejudicial to the Government and Misuse of Position in the VA Office of General Counsel, Washington, DC*, Report No. 16-03330-91, Nov. 10, 2016, at 2, available at <https://www.va.gov/oig/pubs/VAOIG-16-03330-91.pdf> (last visited Nov. 15, 2019).

## Findings and Analysis

### **Finding 1: The Attorney Engaged in Misconduct in Connection with His Outside Law Practice**

A federal employee may not use government resources or time to engage in an unauthorized purpose, which includes the use of government resources for the employee's outside employment or business activity.<sup>4</sup> Moreover, federal conflict of interest laws prohibit government attorneys from representing private parties in federal court in matters in which the U.S. Government is a party or has a direct and substantial interest other than as part of their official duties.<sup>5</sup> The Attorney received annual ethics training that explicitly stated that the use of government resources for a personal business or commercial enterprise was prohibited, even during off-duty hours. This ethics training also cautioned that employees are prohibited from undertaking outside business activities that involve seeking to influence official action by any federal agency or court.

### **The Attorney Used VA Property and Official Time to Engage in His Outside Law Practice**

The Attorney used the government's email, computer, telephone, printer, and fax machine to engage in his outside law practice. Much of this use appeared to occur during the Attorney's routine duty hours.

### **The Attorney Used VA Computer Systems in Support of His Outside Law Practice**

From July 19, 2017, through April 8, 2019, the OIG identified 537 emails in the Attorney's VA email account that related to the Attorney's outside law practice. The messages evidenced the Attorney's work on real estate transactions on behalf of private clients, and his representation of private clients in federal bankruptcy matters. The emails included attachments such as draft real estate documents and contracts of sale, and pleadings related to bankruptcy matters the Attorney handled on behalf of private clients. A few of the emails related to administrative aspects of the Attorney's private law practice, such as his law firm's renewal of its professional liability insurance policy.

The OIG's analysis of email time stamps reflected that all 537 emails related to the Attorney's outside law practice were sent during his routine VA duty hours and were not sent during a time when the Attorney had taken leave.

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<sup>4</sup> 5 C.F.R. §§ 2635.704 and 2635.705; VA Directive 6001, *Limited Personal Use of Gov't Office Equipment Including Infor. Tech.*, July 28, 2000 at 3-4.

<sup>5</sup> 18 U.S.C. §§ 203 and 205.

In addition to sending and receiving emails, the OIG found several documents stored in the Attorney's VA computer that evidenced his work on at least eight separate private real estate transactions. Many of these documents were in draft form, having not yet been signed by the parties to the transaction.

### **The Attorney Told the OIG That He Used Government Resources to Engage in His Outside Law Practice but Only on a Limited Basis**

The OIG asked the Attorney during his interview whether he had ever used VA equipment or official time to engage in his outside law practice. The Attorney stated that he had not. The Attorney then clarified that he may have "in an emergency" forwarded an email to his government computer so that he could "look it over." When the OIG asked what would constitute an emergency, the Attorney responded that when his clients "need[ed] to get a response to something in the same day."

The Attorney initially denied using the VA printer, fax machine, or any other government resources to perform his outside legal work. He later admitted that he may have used the VA printer to print out private work "once or twice," stating "I can't swear that I haven't in the past." The Attorney also denied ever soliciting business while at his VA office, and stated that whenever he did have to perform work for his private clients, he only did so during off-duty time, such as during breaks or lunch, or that he would take annual leave. The Attorney also stressed that he did not meet with private clients at his VA office.

The Attorney told the OIG that his private clients called about once or twice a day, but that he "usually" sent those calls through to voicemail or returned the calls during his break or lunch. The Attorney admitted bringing his personal computer to work but stated that he did not have access to the internet or email on that computer. When the OIG asked the Attorney if he ever used his VA computer to file any motions or briefs in court on behalf of private clients, the Attorney stated "I may have in the past. But I don't do it now." When the OIG asked how long ago, the Attorney responded "[y]ears ago."

### **The Attorney's Conduct Was Prohibited by the Standards of Ethical Conduct for Employees of the Executive Branch and VA Policy**

The Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Ethical Conduct") govern the conduct of federal government employees and require that they "place loyalty to the Constitution, laws and ethical principles above private gain."<sup>6</sup> This includes

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<sup>6</sup> 5 C.F.R. § 2635.101(a).

avoiding any actions that create “the appearance that they are violating the law or ethical standards.”<sup>7</sup>

The Standards of Ethical Conduct state that “[a]n employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.”<sup>8</sup> “Government property” includes “office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, Government records, and Government vehicles.”<sup>9</sup> The Standards of Ethical Conduct also state that “an employee shall use official time in an honest effort to perform official duties.”<sup>10</sup>

Under VA’s Directive titled “Limited Personal Use of Government Office Equipment Including Information Technology,” VA employees may make “limited use of Government office equipment for personal needs if the use does not interfere with official business and involves minimal additional expense to the Government.” Importantly however, the Directive states that this “limited personal use” exception does not apply to “commercial purposes or in support of ‘for profit’ activities or in support of other outside employment or business activity.”<sup>11</sup> In addition to the 537 emails and private practice-related documents found on the Attorney’s VA computer, two employees who worked with the Attorney in Albany reported that the Attorney received telephone calls from private clients during routine duty hours, and that they had seen documents related to the Attorney’s private law practice on the VA printer and fax machine.

### **The Attorney Knew That He Was Not Permitted to Use Government Resources in Support of His Outside Law Practice**

The Attorney told the OIG that he was current on his VA-required annual ethics training, and his VA training records confirmed that he took ethics training annually since at least 2013, and as recently as February 13, 2019. The VA ethics training the Attorney took stated that a VA employee “may not use Government resources, even during off-duty hours, to further a commercial enterprise.” Figure 1 provides an excerpt from the training, which advised that if an employee had a question about whether actions were permitted under the government ethics rules, the employee should “ask an OGC ethics official **before** taking action.”

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<sup>7</sup> 5 C.F.R. § 2635.101(b)(14).

<sup>8</sup> 5 C.F.R. § 2635.704(a).

<sup>9</sup> 5 C.F.R. § 2635.704(b)(1).

<sup>10</sup> 5 C.F.R. § 2635.705(a).

<sup>11</sup> VA Directive 6001, *Limited Personal Use of Gov’t Office Equipment Including Infor. Tech.*, July 28, 2000 at 3-4.

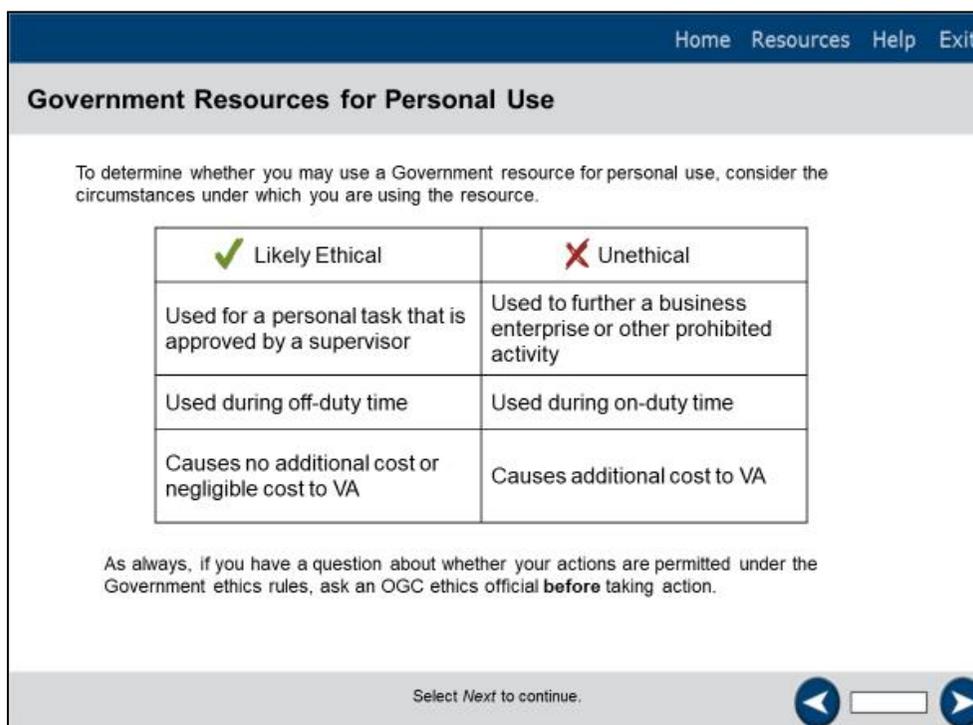


Figure 1. Excerpt from VA ethics training.

Source: VA’s Training Management System (TMS). Accessed on August 21, 2019.

The Attorney told the OIG that he never sought an ethics opinion regarding his outside law practice. The OGC confirmed that they had no record of ever providing the Attorney with any guidance related to his outside practice of law.

### **The Attorney Represented Private Clients in U.S. Bankruptcy Court in Matters in Which the United States Appeared to Be a Party or Had a Direct and Substantial Interest**

While he was a VA attorney, the Attorney represented private clients in federal bankruptcy court in matters in which the United States appeared to be a party or had a direct and substantial interest, which is prohibited by 18 U.S.C. §§ 203 and 205.

Under 18 U.S.C. § 203, government officials are prohibited from representing third parties for compensation before any federal court or agency, other than as part of their official duties, in matters in which the United States is a party or has a direct and substantial interest.<sup>12</sup> The essence “of the offense punishable by section 203 is the knowing receipt of compensation for services rendered or to be rendered” before a federal agency or court.<sup>13</sup> Neither specific intent nor the

<sup>12</sup> 18 U.S.C. § 203(a)(1)(B).

<sup>13</sup> *United States v. Eilberg*, 465 F. Supp. 1076, 1078 (E.D. Pa. 1979). See also *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978) (“The gravamen of [a section 203 offense] is not an intent to be corrupted or influenced, but

official's knowledge that his conduct is illegal is necessary to prove a violation of the statute.<sup>14</sup> The conduct prohibited by 18 U.S.C. § 205 is similar to the conduct prohibited under § 203, but § 205 does not require that the government official be compensated for his or her representational activities.<sup>15</sup>

### **The Attorney's Bankruptcy Cases on Behalf of Private Clients**

The Attorney was listed as an attorney of record for private parties in matters in which the United States was also a party and/or had a direct and substantial interest in 87 different cases filed in U.S. Bankruptcy Court during the time he was employed as a VA attorney (1997 through March 2020). Of these 87 cases, the OIG identified 10 from October 2014 to October 2019 that appeared to fall within 18 U.S.C. §§ 203 and 205's five-year statute of limitations.<sup>16</sup>

In nine of the 10 cases, the Attorney was compensated for his representational services, implicating both 18 U.S.C. §§ 203 and 205. In one of the cases, the Notice of Bankruptcy Filing indicated that the Attorney was not compensated for his representation of the debtor. Nonetheless, this case still implicates 18 U.S.C. § 205, which does not require that the attorney be compensated. As of November 2019, two of the cases still appeared open.<sup>17</sup>

### **The Attorney Neither Sought nor Received Approval from the OGC to Represent Private Clients in U.S. Bankruptcy Court**

The Attorney told the OIG that he never sought an ethics opinion to engage in his outside law practice, nor did he seek approval from his VA supervisors to engage in his outside law practice. The OGC Ethics Specialty Team confirmed that it never provided the Attorney with advice related to his outside law practice, including the Attorney's representation of clients in U.S. Bankruptcy Court.

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simply the acceptance of an unauthorized compensation.”); *United States v. Wallach*, 979 F.2d 912, 920 (2d Cir. 1992) (stating that the statute “punishes receipt of compensation” by the federal official for services rendered by the official or another).

<sup>14</sup> *Evans*, 572 F.2d at 481 (stating that specific intent is not a required element under section 203) (citing cases). *United States v. Podell*, 519 F.2d 144, 150 n.7 (2d Cir. 1975) (citing *United States v. Quinn*, 141 F. Supp. 622, 627 (S.D.N.Y. 1956)).

<sup>15</sup> U.S. Office of Gov't Ethics, Outside Employment and Activities, *Communications with the Gov't*, available at <https://www.oge.gov/web/oge.nsf/Resources/Comunications+with+the+Government> (last visited Feb. 24, 2020). See also Daniel A. Klein, Criminal Conflicts of Interest Under 18 U.S.C. A. §§ 203 and 205, 29 A.L.R. Fed. 3d Art. 7 (2018) (stating that 18 U.S.C. § 205 “is largely coextensive with § 203, but unlike that provision, § 205 does not focus on compensation, but rather on the prevention of impermissible representational activity by government officials”).

<sup>16</sup> 18 U.S.C. § 3282(a).

<sup>17</sup> Because two of the bankruptcy cases still appeared open according to PACER, the OIG notified the OGC of the Attorney's representations in these matters in November 2019.

The OIG determined, however, that the OGC, including the Attorney’s supervisors, knew that the Attorney had an outside law practice that included federal bankruptcy law. In a General Counsel Newsletter released by the OGC in October 2010, the OGC featured the Albany office, which included a section about the Attorney. The newsletter stated that the Attorney “continue[d] to maintain a limited boutique private practice in the Albany area, primarily focusing on bankruptcy related matters.”

While the OIG did not find evidence indicating that the Attorney ever attempted to hide his outside bankruptcy practice from anyone at VA, investigators also did not find evidence that the Attorney told his superiors that he was representing private clients in federal bankruptcy court in cases in which the United States was also a party, or that VA knew that the Attorney was doing this.<sup>18</sup>

### **The Attorney Should Have Known That His Representation of Private Clients in U.S. Bankruptcy Court Presented Potential Conflicts**

The Attorney had reason to know that his outside bankruptcy law practice might present conflicts of interest. First, he received annual ethics training that stated VA employees may not “represent, with or without compensation, their outside employer before any Federal agency or Federal court with an intent to influence official action on a matter.” Moreover, in September 2017, the OGC published an article in its newsletter titled “Outside Practice of Law/Outside Activities for OGC Attorneys,” which the Attorney received. This article stated, among other matters,

[T]he ethics laws place some limits on our outside activities. Perhaps most significantly for attorneys, criminal conflict of interest law generally prohibits us from representing non-Federal parties, other than as part of our official duties, before Federal agencies or courts. 18 U.S.C. §§ 203, 205. Representing clients in certain types of practices that are exclusively Federal is a non-starter, e.g.,] immigration, tax, most securities matters, patent and trademark issues. However, behind-the-scenes work is permissible. You can advise individuals as to exclusively Federal matters, including Veterans benefits claims, if you do not appear on their behalf before an administrative or judicial body or make a contact with the intent to influence their decision. Don’t sign any pleadings or letters and be very careful about telephone or email contact.

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<sup>18</sup> Had the Attorney sought advice from an agency ethics official and received approval to engage in these representations after making full disclosure of all relevant circumstances, he would have been shielded from any disciplinary action by the VA, and his good faith reliance on ethics office approval (if received) could have been taken into account by the U.S. Department of Justice in its prosecution determinations. 5 C.F.R. § 2635.107(b).

No approval is required to engage in outside practice of law or other outside activities, but you are encouraged to contact an ethics official where the outside practice is necessarily before the Federal Government, or you have any concerns you wish to discuss. Indeed, at the end of last year your respective Deputy Chief/Chief Counsels addressed outside activities and the importance of seeking guidance from the Ethics Team with any concerns you may have.

Finally, the OGC's General Counsel Handbook, which all new OGC attorneys receive and continue to have access to on the OGC's internal website, contains a section on outside employment. The handbook has stated since at least 1996 through October 2019 that private professional practice or other outside employment in the field of law is not considered "consonant" with the best interest of VA or the OGC.

The Attorney denied ever representing a debtor in a case for which VA had a claim against the debtor, and the OIG is not aware of any. The Attorney also told the OIG that his representation of private clients in U.S. Bankruptcy Court in cases in which the United States was also a party was "not really a conflict because the government is getting paid." Whether the government is (or will be) paid is not an element of the offense under 18 U.S.C. §§ 203 or 205, and thus, does not appear to be a relevant consideration under the federal conflict of interest statutes discussed above.

By representing private clients in federal bankruptcy court in matters in which the United States was also a party, the Attorney put himself in a position to represent clients potentially adverse (if not actually adverse) to the U.S. Government. For example, since October 2014, the OIG identified four cases in which the Attorney represented debtors who had outstanding federal student loans with the U.S. Department of Education, which was a named creditor in the case.<sup>19</sup> Under the federal Bankruptcy Code, federal student loans are dischargeable in bankruptcy upon a showing by the debtor that enforcing repayment "would impose undue hardship on the debtor and the debtor's dependents."<sup>20</sup> This type of proceeding constitutes an adversarial proceeding under the Federal Rules of Bankruptcy Procedure.<sup>21</sup> Thus, the Attorney appeared to be in a position of representing debtors with interests potentially adverse to the United States government, a situation the federal conflict of interest laws seek to prevent.

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<sup>19</sup> *In re Karen M. Borsh and David J. Borsh*, Case No. 13-11454-1-rel, June 3, 2013; *In re Tonya L. Lamont*, Case No. 14-12173-1-rel, Oct. 1, 2014; *In re Donald J. Coons, Jr. and Debra A. Dann-Coons*, Case No. 17-12260-1-rel, Dec. 5, 2017; and *In re Julia J. Robbins*, Case No. 17-11294-1-rel (U.S. Bankruptcy Court for the N.D.N.Y., July 14, 2017).

<sup>20</sup> 11 U.S.C. § 523(a)(8).

<sup>21</sup> Fed. R. Bankr. P., Rule 7001(6) (stating that "a proceeding to determine the dischargeability of a debt" is an adversary proceeding).

## The Attorney Engaged in Conduct that May Have Violated the New York Rules of Professional Conduct

The New York Rules of Professional Conduct govern professional behavior and “provide a framework for the ethical practice of law” for attorneys licensed to practice in the State of New York.<sup>22</sup>

### Rule 1.7 Conflict of Interest: Current Clients

Rule 1.7 of the New York Rules of Professional Conduct states,

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.<sup>23</sup>

As discussed in detail above, the Attorney’s representation of private clients in federal bankruptcy court in matters in which the United States is a party or has a direct and substantial interest appears to be prohibited by the federal conflict of interest laws. Moreover, the Attorney’s representation of debtors with outstanding federal student loans owed to the U.S. Department of Education appeared to put the Attorney in a conflicted position. In these cases, the Attorney was under an obligation to advise his clients of their right to argue that repayment of their student loans would impose an “undue hardship.” Advancing this argument would place his clients in a direct adversarial proceeding with the U.S. Government. Thus, the Attorney’s representation of the debtors in these cases presented a risk that his professional judgment on behalf of the debtors could be adversely affected by his own financial interest in continuing to represent and collect fees from the private client, which may implicate Rule 1.7 of the New York Rules of Professional Conduct.

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<sup>22</sup> N.Y. Rules of Prof’l Conduct, Scope (6), (8) (N.Y. State Bar Assoc. June 1, 2018).

<sup>23</sup> N.Y. Rules of Prof’l Conduct, R. 1.7 (N.Y. State Bar Assoc. June 1, 2018).

## Rule 8.4 Misconduct

Rule 8.4 of the New York Rules of Professional Conduct states in relevant part,

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, . . . ;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice; [or]

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(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.<sup>24</sup>

The Attorney's use of government resources and official time in support of his outside law practice in violation of the Standards of Ethical Conduct raises questions about the Attorney's integrity and fitness to practice law, and thus, appears to implicate Rule 8.4 of the New York Rules of Professional Conduct.<sup>25</sup>

## Rule 8.3 Reporting Professional Misconduct

Rule 8.3 of the New York Rules of Professional Conduct states the following:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.<sup>26</sup>

The OGC also has a written policy setting forth procedures OGC employees must follow for reporting attorney misconduct to State Bars.<sup>27</sup> Accordingly, the OGC should determine whether

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<sup>24</sup> N.Y. Rules of Prof'l Conduct, R. 8.4 (N.Y. State Bar Assoc. June 1, 2018).

<sup>25</sup> The Attorney's use of government systems to store and transmit information pertaining to his private clients may also raise concerns related to attorney-client confidentiality because federal employees have no expectation of privacy when using government systems. VA Directive 6001, *Limited Personal Use of Gov't Office Equipment Including Infor. Tech.*, July 28, 2000 at 5-6 ("VA employees do not have a right, nor should they have an expectation of privacy while using any Government office equipment at any time, including accessing the World Wide Web or using E-mail. By using Government office equipment, VA employees imply their consent to disclosing the contents of any files or information maintained or passed through Government office equipment, and to management monitoring and recording with or without cause by authorized officials, e.g., VA managers, supervisors, or systems administrators. Any use of Government communications resources is made with the understanding that such use is generally not secure, is not private, and is not anonymous.").

<sup>26</sup> N.Y. Rules of Prof'l Conduct, R. 8.3 (N.Y. State Bar Assoc. June 1, 2018).

<sup>27</sup> OGC General Counsel Handbook, Chapter 1, *Management and Operations*, Appendix B, Jan. 30, 2014.

it has an obligation to report the Attorney to the relevant disciplinary authority under Rule 8.3 or any other governing authority in light of the issues raised in this report.

### **Finding 1 Conclusion**

The OIG determined that the Attorney used government property and official time in support of his outside law practice in violation of the Standards of Ethical Conduct and VA policy; represented private clients in U.S. Bankruptcy Court in matters in which the United States was a party, or had a direct and substantial interest in contravention of the federal conflict of interest laws; and engaged in conduct that appears to implicate the New York Rules of Professional Conduct.

On March 17, 2019, the OIG learned that the OGC had removed the Attorney from VA employment effective March 6, 2020.

### **Recommendations 1–3**

1. The Acting VA General Counsel confers with the Designated Agency Ethics Official and the Assistant Secretary for Human Resources and Administration to determine whether any remaining administrative action should be taken with respect to the Attorney's conduct.
2. The Acting VA General Counsel confers with the Designated Agency Ethics Official to determine whether VA should take any further action with respect to the Attorney's representation of private parties in matters currently pending in U.S. federal court in which the United States is a party or has a direct and substantial interest to address any other government ethics issues.
3. The Acting VA General Counsel determines what, if any, obligation the Office of General Counsel has with respect to reporting the Attorney's conduct to the relevant disciplinary authority under Rule 8.3 of the New York Rules of Professional Conduct or any other governing authority.

### **Finding 2: OGC Leaders Failed to Investigate and Hold the Attorney Accountable and Did Not Fully Implement Corrective Action Proposed in Response to a 2016 OIG Report Related to Similar Attorney Misconduct**

Despite receiving allegations about the Attorney as early as 2012, the OGC failed to meaningfully investigate those allegations or put measures in place that could have detected and potentially stopped the Attorney's misconduct. It was not until after November 2019, when the OIG alerted the OGC to the Attorney's ongoing representations of private clients in matters potentially adverse to the United States, that the OGC appeared to take any meaningful action. In addition, in response to a 2016 OIG report of attorney misconduct related to outside

employment, the OGC stated in a memorandum to the OIG that it would take corrective action to address outside employment by OGC attorneys, which it failed to do.

## **The OGC Was Aware of the Attorney’s Alleged Misconduct and Failed to Hold Him Accountable**

The OGC began receiving complaints about the Attorney’s outside law practice interfering with his official VA duties as early as 2012. Specifically, in February 2012, a fellow attorney in the Attorney’s office (the “Albany Attorney”) reported to the Attorney’s supervisor that the Attorney “was receiving telephone calls from private clients at his VA office.”<sup>28</sup> The Albany Attorney also told the Attorney’s supervisor about “[having] found [the Attorney’s] private practice work in the [VA] printer.” When the Attorney’s supervisor questioned another employee in the Albany office about these allegations, the employee confirmed the Albany Attorney’s allegations in part, telling the Attorney’s supervisor that “a private client of [the Attorney] did call the VA office.”

### **Verbal Counseling by the Attorney’s Direct Supervisor Was Ineffective**

The Attorney’s supervisor spoke to him about the allegations on February 7, 2012. According to a memorandum drafted by the supervisor at the time, the supervisor told the Attorney about the Albany Attorney’s allegations and advised him that “his private clients cannot call his VA office” and that “he cannot use VA property (fax, printer, copier, and computer) to do private work.” The memorandum stated that the Attorney denied using government resources to engage in work for his private clients and that the Attorney “adamantly advise[d] that particular client not to call the VA office” again.

Despite having this conversation with the Attorney in February 2012, the OIG determined that the Attorney continued using government resources in support of his outside private law practice.

### **Senior OGC Officials Failed to Investigate the Attorney as Recommended by a VA Deputy Ethics Official**

In September 2013, the Albany Attorney who previously complained to the Attorney’s supervisor submitted a written complaint to then VA General Counsel William Gunn. Among other matters, the Albany Attorney’s complaint contained numerous allegations about the Attorney, including that he worked on his private practice matters in the VA office. The complaint stated that the Albany Attorney and others in the office had complained to the

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<sup>28</sup> The Attorney’s supervisor’s recollection of the 2012 incident was “very fuzzy” during his interview with the OIG, but he was able to provide the OIG with a February 2012 memorandum, which he drafted for his own records on the same day that he spoke to the Attorney. This memorandum is discussed below.

Attorney's supervisor about his conduct on numerous occasions, but that the Attorney's supervisor refused to do anything to address these concerns.

It appears Mr. Gunn assigned Assistant General Counsel Michael Hogan the responsibility for addressing the allegations raised by the Albany Attorney.<sup>29</sup> Subsequently, on November 15, 2013, Mr. Hogan appointed an OGC Deputy Ethics Official/Staff Attorney to conduct a "preliminary inquiry" into the Attorney's alleged misuse "of government equipment and/or duty time for personal business."<sup>30</sup> Mr. Hogan's memorandum directed the Deputy Ethics Official/Staff Attorney to present the findings to him in a written summary format in accordance with VA Handbook 0700.<sup>31</sup> Mr. Hogan's memorandum stated that he would "use the results of [the Deputy Ethics Official's] inquiry to determine whether an administrative investigation [was] needed."

On February 7, 2014, the Deputy Ethics Official transmitted the written report summarizing the preliminary inquiry results to Mr. Hogan. The Deputy Ethics Official's report stated that the Deputy Ethics Official had reviewed documents and interviewed two witnesses, both VA employees who worked with the Attorney. The report concluded,

Based on the credible allegations and the specific details provided in support of those allegations, it is my recommendation that this preliminary investigation be closed and an Administrative Board of Investigation be convened.

The OGC had no record of anything further being done after the Deputy Ethics Official sent the report to Mr. Hogan.<sup>32</sup> The Deputy Ethics Official recalled speaking to Mr. Hogan about the recommendation before submitting the report to him. Mr. Hogan also recalled this conversation. The Deputy Ethics Official also spoke to Mr. Hogan about the report after it was sent to him.

Mr. Hogan told OIG investigators that he had "no recollection of whether [a more formal investigation] was done," but stated that he could "find no record of one having been done." Mr. Hogan told OIG investigators that he did not know why a formal investigation was not conducted. Mr. Hogan stated that the OGC was "undergoing some organizational changes at the leadership level," and that his position and official duties changed in June 2014. Mr. Hogan speculated that the matter "simply got lost during that transition."

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<sup>29</sup> Mr. Hogan is now the Deputy General Counsel for General Law.

<sup>30</sup> A "preliminary inquiry" is "[a]n informal process to obtain and assemble readily available information about an incident, the results [of] which may be used for a variety of purposes, including to determine the need for an AIB [Administrative Investigation Board]." VA Handbook 0700, *Administrative Investigations*, Chapter 6, Appendix A at A-2, July 31, 2002.

<sup>31</sup> VA Handbook 0700, *Administrative Investigations*, Chapter 6 July 31, 2002.

<sup>32</sup> The OIG's analysis of OGC officials' email (including Mr. Hogan's) identified no evidence that Mr. Hogan ever forwarded the Deputy Ethics Official's report or corresponded with anyone about the matter further.

The OIG concluded that Mr. Hogan failed to take appropriate action with respect to the allegations raised regarding the Attorney. Mr. Hogan told the OIG during his interview that he takes responsibility for the matter not being addressed by the OGC.

## **OGC Leaders Failed to Fully Implement Corrective Action in 2016 That Might Have Addressed, Detected, or Prevented the Attorney's Ongoing Misconduct**

During its investigation, the OIG learned that the OGC failed to fully implement corrective action it proposed in response to a November 2016 OIG report. In the November 2016 report, the OIG found that an OGC attorney engaged in conduct prejudicial to the government, used his public office for private gain, and misused government resources in connection with his outside employment as president of a nonprofit charity organization.<sup>33</sup> In response to the OIG's report and recommendations, the OGC stated,

OGC is committed to mitigating the risk of ethical violations by OGC employees who are employed outside the Government and draw a salary. To that end, OGC will formalize an enterprise-wide review process to help supervisors, on an annual basis, engage those employees with outside employment to remind them about their ethical obligations and consequences if those obligations are not met.

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[W]e agree that in order to enhance the public's trust in OGC and its business operations, we should take additional steps to minimize the chance that ethics violations like those that occurred in this matter occur in the future. Accordingly we will amend Section 1.05 of our OGC Handbook, Outside Employment, to clarify that all OGC supervisors will be required to conduct an annual ethics self-assessment of their offices, which shall include, in part, a focus on the outside activities of subordinate employees. In instances in which an employee has outside employment for which he or she draws a salary, a formal discussion of the ethical ramifications of that employment will be conducted with that employee on an annual basis. Importantly, this discussion will highlight the conflict of interest laws and rules governing misuse of Government equipment and resources that can be implicated by outside employment.<sup>34</sup>

In January 2017, the Deputy Chief Counsel of the OGC Ethics Specialty Team directed OGC supervisors to conduct an "initial risk assessment" with their employees focusing on outside

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<sup>33</sup> VA Office of Inspector General, *Administrative Investigation, Conduct Prejudicial to the Government and Misuse of Position in the VA Office of General Counsel Washington, DC*, Report No. 16-03330-91, Nov. 10, 2016, at 2, available at <https://www.va.gov/oig/pubs/VAOIG-16-03330-91.pdf> (last visited Nov. 15, 2019).

<sup>34</sup> OGC Mem. to the OIG, Response to Burch Recommendations (2016-03330-IQ-0005), Dec. 12, 2016 at 1, 5.

activities, financial conflicts of interest, impartiality, and misuse of position. On February 2, 2017, the Attorney's supervisor reported to the Chief Counsel that he had "completed the ethics risk assessment with all of [the supervisor's] attorneys," and that "no risks [were] identified." This information was relayed to the Deputy Chief Counsel the same day.

The OIG did not find evidence that the OGC continued these assessments on an annual basis after the "initial risk assessment" in 2017. Contrary to its written response to the OIG, the OGC did not amend its handbook to require supervisors to conduct annual ethics assessments of their offices focusing on outside employment of subordinate employees, and in instances where the employee engaged in compensated outside employment, it did not require supervisors to engage in "a formal discussion of the ethical ramifications of that employment . . . on an annual basis." The Deputy Chief Counsel told the OIG that the OGC failed to implement this corrective action because "it kind of got lost in the transition, I think, between administrations, between general counsel transitions, and staff changes."

### **The Deputy Chief Counsel Did Not Take Sufficient Action to Fully Implement OGC's Proposed Corrective Action**

The Deputy Chief Counsel told the OIG that he was the attorney liaison between the VA General Counsel and the OIG with respect to the OIG's 2016 investigation, and that he helped draft the OGC's proposed corrective action. Moreover, in this position, the Deputy Chief Counsel directed and oversaw the initial risk assessment. Thus, the OIG determined that the Deputy Chief Counsel had responsibility for ensuring that OGC update its handbook to implement the annual risk assessment and counseling regarding outside employment as proposed by the OGC in 2016.

The OIG found that the OGC's failure to implement the corrective action it proposed in 2016 may have been a contributing factor in allowing the Attorney's misconduct to continue. Although the Attorney was not required to receive prior approval of his outside activity or file a financial disclosure report revealing his outside employment, the OIG found evidence that the Attorney's supervisor was aware of the Attorney's outside law practice.<sup>35</sup> This should have triggered "a formal discussion of the ethical ramifications of [the Attorney's] employment" between the Attorney and his supervisor under the OGC's 2016 proposed corrective action.

Had the OGC required the Attorney and his supervisor to engage in annual formal discussions regarding the Attorney's outside law practice, they may have been more mindful of the risks and potential conflicts of the Attorney's outside employment.

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<sup>35</sup> Employees required to file financial disclosures must report outside positions and sources of income annually, but the Attorney was not required by his position to file an annual financial disclosure report.

## **In November 2019, OGC Issued a Memorandum to Its Chief Counsels Regarding Outside Activities**

The Deputy Chief Counsel told the OIG during his interview in October 2019 that the OGC was finalizing a policy that would implement the corrective action the OGC proposed in 2016. He stated that the OGC's decision to take this action now was a result of the OIG's inquiry related to this investigation.

On November 8, 2019, OGC's Designated Agency Ethics Official issued a memorandum to all Chief Counsels "establishing an annual ethics risk assessment process focusing on [OGC] employees' outside activities."<sup>36</sup> The memorandum requires all OGC Chief Counsels to conduct an annual meeting with their entire staff that "highlights the conflict of interest laws and rules governing misuse of Government equipment and resources that can be implicated by outside employment."<sup>37</sup> The memorandum requires that the discussion include financial conflicts of interest, impartiality, and misuse of position.<sup>38</sup> The memorandum further states that Chief Counsels should "[e]ncourage staff to contact [them] individually if they engaged in outside activity that may raise potential conflict of interest or other concerns."<sup>39</sup> In cases where an employee contacts his or her Chief Counsel, "[e]ither the Chief Counsel or Deputy Chief Counsel will have an individual discussion with the employee."<sup>40</sup>

For OGC employees who file confidential financial disclosure reports, the memorandum requires Chief Counsels to complete a "supervisory review" of these reports beginning January 2, 2020.<sup>41</sup> If the "review discloses potential conflicts or other potential issues, the Chief Counsel or Deputy Chief Counsel will have an individual discussion with the employee."<sup>42</sup> The memorandum requires that Chief Counsels "confirm by February 15, 2020, and annually thereafter, completion of this self-assessment via an email to the Deputy Chief Counsel, Ethics Specialty Team and whether this self-assessment identified any concerns within [the Chief Counsel's] organization."<sup>43</sup>

The OIG determined that the corrective action proposed in the OGC's November 2019 memorandum is insufficient to meaningfully address the risks posed by OGC employees' outside

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<sup>36</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 1, Nov. 8, 2019.

<sup>37</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 1, Nov. 8, 2019.

<sup>38</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 1-2, Nov. 8, 2019.

<sup>39</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 2, Nov. 8, 2019.

<sup>40</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 2, Nov. 8, 2019.

<sup>41</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 1, 2, Nov. 8, 2019. Confidential financial disclosure reports require disclosure of all sources of income above \$1,000 and the reporting of certain outside positions regardless of whether the position is compensated.

<sup>42</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 2, Nov. 8, 2019.

<sup>43</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 2, Nov. 8, 2019.

activities. First, while the memorandum requires Chief Counsels to discuss “conflict of interest laws,” it does not specifically mention 18 U.S.C. §§ 203 and 205, the federal conflict of interest laws implicated by the conduct discussed in this report, or the Standards of Ethical Conduct subpart on outside activities, except in an unexplained attachment to the memorandum.<sup>44</sup> Moreover, the memorandum requires that Chief Counsels review their employees’ confidential financial disclosure reports and “confirm by February 15, 2020, and annually thereafter, completion of this self-assessment.”<sup>45</sup> Under governing regulations, however, incumbent employees’ confidential financial disclosure reports are not due until February 15.<sup>46</sup> It is unclear how Chief Counsels can meaningfully incorporate their review of confidential financial disclosure reports into their annual ethics assessment when they are required to have the assessment completed on the date reports are due. Finally, the memorandum does not identify the OGC official who is responsible for ensuring that Chief Counsels complete the ethics risk assessment focusing on outside activities on an annual basis.

## **Finding 2 Conclusion**

The OIG determined that OGC leaders failed to conduct a meaningful investigation of the Attorney’s alleged misconduct or hold him accountable for it until after the OIG informed the agency of the Attorney’s representations of private clients in matters potentially adverse to the United States. The OGC also failed to fully implement the corrective action it proposed in 2016 meant to reduce the risk of future violations of the outside employment restrictions. Moreover, the actions set forth in OGC’s November 2019 memorandum are insufficient to identify and address the risks posed by OGC employees’ outside activities.

## **Recommendations 4–7**

4. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to Mr. Hogan’s failure in his official duties to take appropriate action.
5. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to the Deputy Chief Counsel’s failure in his official duties to take appropriate action.
6. The Acting VA General Counsel confers with VA’s Designated Agency Ethics Official to revise its November 8, 2019 memorandum. The revision should at a minimum
  - (a) emphasize all criminal conflict of interest statutes relevant to outside employment,
  - (b) ensure appropriate time for supervisory review of confidential financial disclosure reports to identify potential conflicts or other issues, (c) identify the official responsible for ensuring that the annual risk assessment focused on outside activities is completed on

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<sup>44</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management, attachment, Nov. 8, 2019.

<sup>45</sup> OGC Mem. to Chief Counsels, Ethics Enterprise Risk Management at 2, Nov. 8, 2019.

<sup>46</sup> 5 C.F.R. § 2634.903(a).

an annual basis to assist Chief Counsel in identifying employees with outside employment, (d) engage employees with outside employment in formal discussions regarding applicable ethical rules and the consequences of noncompliance, and (e) document the annual meetings and formal discussions they have with employees.

7. The Acting VA General Counsel confers with VA's Designated Agency Ethics Official to determine whether VA should consider implementing a supplemental agency regulation requiring VA employees, or any category of employees, to disclose and obtain prior approval before engaging in any outside activities for which they receive compensation in accordance with 5 C.F.R. § 2635.803.

## Conclusion

The OIG found that the Attorney used VA resources and time to engage in his outside law practice in violation of the Standards of Ethical Conduct and VA policy. In addition, the Attorney represented private clients in federal bankruptcy court in cases where the United States was also a party or had a direct and substantial interest, implicating federal conflict of interest laws. The OIG also found that the OGC received credible allegations about the Attorney's misuse of official resources in support of his outside law practice in 2012 but failed to meaningfully investigate or hold the Attorney accountable for his conduct until the OIG informed the OGC in 2019 of misconduct it identified during this investigation. The OGC also failed to fully implement corrective action it proposed in 2016, which may have contributed to the Attorney's ongoing misconduct, and its current proposed action does not do enough to identify and address the risks posed by OGC employees' outside activities.

## Recommendations

1. The Acting VA General Counsel confers with the Designated Agency Ethics Official and the Assistant Secretary for Human Resources and Administration to determine whether any remaining administrative action should be taken with respect to the Attorney's conduct.
2. The Acting VA General Counsel confers with the Designated Agency Ethics Official to determine whether VA should take any further action with respect to the Attorney's representation of private parties in matters currently pending in U.S. federal court in which the United States is a party or has a direct and substantial interest to address any other government ethics issues.
3. The Acting VA General Counsel determines what, if any, obligation the Office of General Counsel has with respect to reporting the Attorney's conduct to the relevant disciplinary authority under Rule 8.3 of the New York Rules of Professional Conduct or any other governing authority.
4. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to Mr. Hogan's failure in his official duties to take appropriate action.

5. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to the Deputy Chief Counsel's failure in his official duties to take appropriate action.
6. The Acting VA General Counsel confers with VA's Designated Agency Ethics Official to revise its November 8, 2019 memorandum. The revision should at a minimum (a) emphasize all criminal conflict of interest statutes relevant to outside employment, (b) ensure appropriate time for supervisory review of confidential financial disclosure reports to identify potential conflicts or other issues, (c) identify the official responsible for ensuring that the annual risk assessment focused on outside activities is completed on an annual basis to assist Chief Counsel in identifying employees with outside employment, (d) engage employees with outside employment in formal discussions regarding applicable ethical rules and the consequences of noncompliance, and (e) document the annual meetings and formal discussions they have with employees.
7. The Acting VA General Counsel confers with VA's Designated Agency Ethics Official to determine whether VA should consider implementing a supplemental agency regulation requiring VA employees, or any category of employees, to disclose and obtain prior approval before engaging in any outside activities for which they receive compensation in accordance with 5 C.F.R. § 2635.803.

## **Management Comments Summary**

VA concurred with the recommendations in this report and provided action plans with target completion dates for each. VA's response in its entirety can be found in appendix B.

## **OIG Response**

The OIG considers all seven recommendations open and will monitor implementation of VA's planned actions.

## Appendix A: Scope and Methodology

### Scope

In October 2018, the Office of Special Reviews initiated its investigation in response to allegations that a GS-14 General Attorney employed by the VA Office of General Counsel in Albany, New York, spent VA time and resources working on matters related to his outside law practice. The OIG's review period began in 2012, the year the evidence indicated that the OGC first received allegations that the Attorney was using VA time and resources to perform legal work for his private clients. With respect to the Attorney's appearances as an attorney in U.S. Bankruptcy Court, the OIG searched cases for the period February 1997 (when the Attorney began his VA employment) to January 2020. The OIG collected and reviewed email and other documents for the period 2012 through 2019.

### Methodology

The OIG reviewed applicable laws, regulations, policies and procedures. It interviewed numerous individuals including the Attorney, his coworkers and supervisor, and officials from the Office of General Counsel. Additionally, the OIG collected and reviewed emails of the Attorney and relevant OGC officials and documents collected from the Attorney's VA computer. With respect to the Attorney's appearances in U.S. Bankruptcy Court, the OIG searched PACER, the federal courts' online docketing system.<sup>47</sup>

### Scope Limitation

In the interest of efficiency, the OIG limited its review of the Attorney's emails in determining whether he was using government time and resources in support of his outside law practice to the period January 1, 2017, through April 11, 2019. In reviewing cases that may have implicated 18 U.S.C. §§ 203 and 205, the OIG focused its review on August 2014 through January 2020 to account for the federal statutes' five-year limitations period. The OIG additionally searched PACER, however, for all cases in which the Attorney was listed as the attorney of record during the period he was also employed as a VA attorney (February 1997 through January 2020). This search revealed 311 instances in which the Attorney represented private clients in U.S. Bankruptcy Court. Of these, the OIG determined that the United States was a party or had a direct and substantial interest in 87 of the cases.

### Government Standards

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Investigations*.

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<sup>47</sup> PACER stands for Public Access to Court Electronic Records and is available at [www.pacer.gov](http://www.pacer.gov).

## Appendix B: Management Comments

### Department of Veterans Affairs Memorandum

Date: April 22, 2020

From: Principal Deputy General Counsel, performing the delegable duties of the General Counsel

Subj: Draft OIG Report, Attorney Misconduct, Inadequate Supervision, and Mismanagement in the Office of General Counsel, Project No. 2018-06501-SR-0065

To: Inspector General

The Office of General Counsel (OGC) takes very seriously the matters raised in the above-referenced draft OIG report. As soon as we received clearance from the OIG to pursue administrative action, even prior to receipt of this draft report, we conducted an administrative inquiry and implemented several measures to ensure OGC staff understood their responsibilities with respect to outside employment. In addition to terminating [the Attorney's]<sup>48</sup> employment, we reinstated our annual ethics risk assessment on November 8, 2019 and, on March 26, 2020, provided comprehensive all-hands training to OGC staff focused on outside employment and the criminal conflicts of interest laws.

The following responses address the specific recommendations made by the OIG in its draft report.

#### OIG Recommendations

1. The Acting VA General Counsel confers with the Designated Agency Ethics Official and the Assistant Secretary for Human Resources and Administration to determine whether any remaining administrative action should be taken with respect to the Attorney's conduct.

OGC Response: Concur. Upon being advised by the OIG of [the Attorney's] outside activities, OGC immediately sought clearance to begin its own administrative inquiry. Once the OIG notified OGC that it could pursue administrative action, OGC promptly conducted an internal investigation and, based on evidence it gathered, terminated [the Attorney's] employment effective March 5, 2020. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will confer with the Designated Agency Ethics Official and the Assistant Secretary for Human Resources and Administration to determine whether any remaining administrative action should be taken with respect to the Attorney's conduct by June 1, 2020.

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<sup>48</sup> The OIG withheld the name of the Attorney for privacy reasons.

2. The Acting VA General Counsel confers with the Designated Agency Ethics Official to determine whether VA should take any further action with respect to [the Attorney's] representation of private parties in matters currently pending in U.S. federal court in which the United States is a party or has a direct and substantial interest to address any other government ethics issues.

OGC Response: Concur. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will confer with the Designated Agency Ethics Official to determine whether VA should take any further action with respect to [the Attorney's] representation of private parties in matters currently pending in U.S. federal court in which the United States is a party or has a direct and substantial interest to address any other government ethics issues by June 1, 2020.

3. The Acting VA General Counsel determines what, if any, obligation the Office of General Counsel has with respect to reporting the Attorney's conduct to the relevant disciplinary authority under Rule 8.3 of the New York Rules of Professional Conduct or any other governing authority.

OGC Response: Concur. [The Attorney's] supervisors are already researching their responsibilities with respect to reporting his conduct to his state licensing authority. We expect to make a determination and any appropriate referral by June 1, 2020.

4. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to Mr. Hogan's failure in his official duties to take appropriate action.

OGC Response: Concur. Because Mr. Hogan is a Senior Executive Service member, consistent with VA policy, OGC will refer this matter to the Office of Accountability and Whistleblower Protection (OAWP) upon release of the OIG's final report. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will determine the appropriate action to take, if any, with respect to Mr. Hogan's failure in his official duties to take appropriate action based upon his review of OAWP's recommendations.

5. The Acting VA General Counsel determines the appropriate action to take, if any, with respect to the Deputy Chief Counsel's failure in his official duties to take appropriate action.

OGC Response: Concur. OGC will appoint an official to conduct an administrative inquiry into [the Deputy Chief Counsel's]<sup>49</sup> actions by June 1, 2020 and will require a report of investigation by July 15, 2020. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will determine the appropriate action to take, if any, with respect to [the Deputy Chief Counsel's] failure in his official duties to take appropriate action, based on the results of that inquiry.

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<sup>49</sup> The OIG withheld the name of the Deputy Chief Counsel for privacy reasons.

6. The Acting VA General Counsel confers with VA's Designated Agency Ethics Official to revise its November 8, 2019 memorandum. The revision should at a minimum (i) emphasize all criminal conflict of interest statutes relevant to outside employment, (ii) ensure appropriate time for supervisory review of confidential financial disclosure reports to identify potential conflicts or other issues, (iii) identify the official responsible for ensuring that the annual risk assessment focused on outside activities is completed on an annual basis to assist Chief Counsel in identifying employees with outside employment, (iv) engage employees with outside employment in formal discussions regarding applicable ethical rules and the consequences of noncompliance, and (v) document the annual meetings and formal discussions they have with employees.

OGC Response: Concur. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will confer with VA's Designated Agency Ethics Official to revise its November 8, 2019 memorandum to address the OIG recommendations by June 15, 2020.

7. The Acting VA General Counsel confers with VA's Designated Agency Ethics Official to determine whether VA should consider implementing a supplemental agency regulation requiring VA employees, or any category of employees, to disclose and obtain prior approval before engaging in any outside activities for which they receive compensation in accordance with 5 C.F.R. § 2635.803.

OGC Response: Concur. The Principal Deputy General Counsel, performing the delegable duties of the General Counsel will confer with VA's Designated Agency Ethics Official to determine whether VA should consider implementing a supplemental agency regulation requiring VA employees, or any category of employees, to disclose and obtain prior approval before engaging in any outside activities for which they receive compensation in accordance with 5 C.F.R. § 2635.803 by June 1, 2020.

(Original signed by:)

William A. Hudson, Jr.

## OIG Contact and Staff Acknowledgments

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