

**Statement of Irvin B. Nathan
Attorney General for the District of Columbia**

Before the

**Committee on the Judiciary
Phil Mendelson, Chairperson**

**Office of the Attorney General
Performance Oversight Hearing
FY 2011 to Present**



**Office of the Attorney General
for the District of Columbia**

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INTRODUCTION

Good afternoon Chairman Mendelson, Councilmembers, staff, and guests. I am Irv Nathan, Attorney General for the District of Columbia. Thank you for allowing me the opportunity to testify about the performance of the Office of the Attorney General for fiscal year 2011 to the present.

Over the last 14 months since I had the privilege of being appointed Attorney General, I have learned what a talented, dedicated, and professional group of lawyers, including deputies and line attorneys, and support staff we have. This is not only my judgment, but the report I have repeatedly received from the judges of the four courts before which our lawyers regularly appear. The District is very fortunate to have their services, where they work under less than ideal circumstances, and I am honored to be able to lead and work with them as we seek to pursue justice in the District of Columbia.

I will testify today about the accomplishments of these lawyers in FY 2011 through the present. I will also address the challenges we face and my vision for the Office, including our priorities, for the coming years. I would then be pleased to answer your questions.

OAG's 2011 Accomplishments

OAG had a very productive year. Let me share just a few of the highlights:

- We investigated, filed civil suit, obtained a settlement and secured a consent judgment from a sitting Councilmember and in a separate matter from an ANC Commissioner for diversions of funds from the District. We also referred both matters for criminal prosecution to the U.S. Attorney's Office, which secured guilty pleas in both cases. These actions made clear that OAG, with independence, will do its part to help the District maintain high ethics standards, no matter the official's station.
- We helped secure a major and -- as the presiding Judge of the U.S. District Court here aptly put it-- "historic" achievement in the *Dixon* case on behalf of the District's Department of Mental Health, ending federal oversight of DMH in that 37-year-old class-action lawsuit. Based on the agency's performance and settlement agreement, the Court fully dismissed the lawsuit. It is a high priority of the Gray Administration that the resolution of this matter serve as a model for the remaining major class-action consent decree cases.
- At the direction of Mayor Gray, our office played a major role in the development of the recently enacted ethics reform law. Our staff worked closely in that effort with Councilmember Bowser and others on the Council. Also at the Mayor's direction, OAG developed an ethics pledge, which has been signed by all agency heads and will be presented for signature to all District employees. Our office also prepared an ethics manual available to all District employees and is heading an ethics training program that will be rolled out to all District government employees.

- We settled a number of complex and long-standing litigation matters on terms favorable to the District and reasonable to plaintiffs, including the suits stemming from the foreclosure during the Fenty Administration of the United Medical Center; the wrongful death suit resulting from the tragic killing of young Deonte Rawlings by an off-duty police officer; and a suit by a large health care provider. This reflects our willingness to talk with those suing the District and our willingness to reach reasonable accommodations, where possible and where it is in the District's interests.
- We obtained through litigation a \$6 million settlement for the District in the Georgetown Library fire case.
- We achieved a series of critical victories in the Skyland Shopping Center eminent domain cases, which will help allow the development of property with major economic value to residents of the District.
- Our Commercial Division's real estate lawyers have negotiated and produced the transactional documents that have been integral to a number of major District developments such as City Center, the Shops at Dakota Crossing, and the O Street Market, which will result in numerous new jobs for DC residents and significant increases in tax revenues. Their work has repeatedly drawn the enthusiastic praise of the Deputy Mayor for Planning and Economic Development.
- We also brought and sustained a suit over an unsuccessful motion to dismiss by online travel companies, who have for years failed to pay the requisite hotel taxes to the District. While this suit is far from over, securing the trial court's opinion denying the motion to dismiss was a major victory and a portent of success in our effort to secure tens of millions of dollars for the District in past unpaid taxes and penalties.

- We defeated nearly every demand for a temporary restraining order against the District or its officials that we defended against in the courts, in these instances saving the government substantial dollars and avoiding disruption of our agency clients' programs for the District.
- In our appellate work, we secured a major public safety victory for the District in the D.C. Circuit's *Heller II* decision, upholding the District's rights to regulate and require the registration of handguns. We have more work to do in the trial court, but this landmark ruling was a significant success for our outstanding Solicitor General's office.
- Related to the *Heller* case, OAG was successful in obtaining a reduction in the legal fees sought by plaintiff's counsel in *Heller I*. Plaintiff's counsel sought over \$3 million in fees and costs and OAG was successful in getting this amount reduced to a judgment of a little over \$1 million by federal Judge Emmet Sullivan.
- On the criminal justice side, we secured convictions in many drunk-driving cases even while having to overcome the obstacles of high-profile problems with some of the breath testing instruments, which were not used in obtaining these convictions. These prosecutions help keep our streets safer for District residents.
- Our Child Support Services Division earned over \$900,000 in federal audit-based performance awards, and rolled out the CSSD mobile van, which can access case files and initiate child support actions -- a key tool of engagement with District citizens.
- The Support Services Division, in conjunction with our Civil Litigation and Public Interest Divisions, led a major overhaul of our system for managing electronic discovery, an issue that had caused the District significant

challenges in the past. In a related vein, I am proud to report that as a result of efforts by our IT team, the Case Initiation Project has been nominated as one of five finalists for an “Excellence.GOV” award. The winner will be announced in March.

In addition to these highlights, OAG’s individual divisions have amassed impressive statistical records during FY 2011. These individual Division records demonstrate that, despite some highly publicized defeats, OAG has a very high success rate. For example, in our civil and administrative appeals cases, we won in over *90 percent* of our 269 appeals. In our criminal prosecutions of adults, we secured a “win” -- that is securing conviction by trial or plea -- in 1,499 out of 1,553 -- *i.e.*, in over *96 percent* of the cases we elected to bring. Similarly, in cases brought against the District handled by our Civil Litigation Division, headed by long-time OAG stalwart George Valentine, of the 170 cases decided in 2011, we won on 161 on motion or at trial, a success rate of over *91 percent*.

The successes of our OAG Divisions are evident not only in win-loss statistics, but also in terms of dollars saved for the District. In the last year, we resolved hundreds of suits where the total demand against the District was approximately one-half *billion* dollars. As a result of settlements and trials, we resolved all of these actions for about \$33.2 million, a tiny percentage of our exposure. Similarly, in our tax assessment cases, where we faced over \$31 million in potential exposure in 141 cases that closed in 2011, we won in 129 of those 141

cases -- over 91 percent -- and saved the District over \$25 million. Although justice cannot be measured in terms of just dollars and cents, it should be clear from what I've said that the OAG, funded by less than sixty million of local budget dollars-- is a sound and productive investment for the District.

While, as this record demonstrates, OAG has enjoyed many successes in the past year, we have also suffered some setbacks and continue to face some challenges. We lost money judgments in 11 cases for a total of about \$10 million in liability, about \$8 million of which was in two cases. We have appealed or intend to appeal in those two cases, and believe we have substantial grounds on appeal to seek reversals of those judgments. In addition, in the *D.L.* case, involving the identification and education of very young children with special needs, the Court made adverse findings against the District and criticized our handling of discovery. We are addressing those issues. In the *Barnes* case, involving the allegations of unlawful strip searching and over-detention by the Department of Corrections, we have sustained adverse liability rulings and will go to trial on damages.

In addition, in our Public Safety Division, OAG continues to face challenges related to the breathalyzer program. As a result of the sustained, good-faith efforts by the OCME and the MPD, the program continues to move steadily (but more slowly than all involved would prefer) towards being back up and running at MPD.

Despite the absence of functioning breathalyzer equipment in the last year, we have continued vigorously to prosecute drunk driving cases using evidence other than breath test scores. This has made these prosecutions more complicated and expensive. We are hopeful of having a state of the art system in effect at MPD in this fiscal year. OCME has agreed to provide oversight for MPD's breath test program and has reviewed the software involved and is awaiting further information from the manufacturer regarding price and timeframe.

Likewise, we are continuing to work with our partners at the United States Capitol Police in connection with their breath test program, which has been used as a basis for a number of OAG prosecutions of defendants in the District arrested and then brought to the USCP facility for testing. We recently learned that some of the reporting protocols for USCP that require the logging of all test scores may not have not fully followed -- in particular that a sign had for a number of years been hanging in the USCP breath testing room that instructed USCP technicians that they did not need enter in the USCP log book certain practice test results. USCP has assured us that any failures to follow the log-in protocols were limited to "simulator" tests performed by USCP for the purpose of training their officers, and that they are quite confident that no defendants were prosecuted by OAG on the basis of faulty breath tests administered by USCP. We continue to have confidence in the integrity of USCP's program technicians and in the accuracy of

the machine-generated breath tests of individuals accused of drunk-driving related offenses that are performed by USCP. We do not have reason at this time to believe that any convictions in cases where these USCP breath tests were used will be jeopardized. Nonetheless, out of an abundance of caution, we will very shortly be making a formal disclosure in the form of a letter to the defense bar to place counsel for all prior defendants who were subjected to a USCP instrument on notice regarding the issue. We will also publish this notice in a newspaper. In light of our obligations as prosecutors and the importance in public confidence in the prosecutions of drunk-driving and the validity of tests underlying those prosecutions, we will err on the side of disclosure here, just as I indicated in 2011 that we would in connection with controversies surrounding the breath test program administered by MPD and OCME.

Another challenge, looming in the near future, is preparing the agency for an elected Attorney General. Although we are just over two years away from the 2014 primary and general election of our first elected Attorney General, we see significant issues in connection with that development that need to be addressed promptly -- and hopefully during this calendar year -- for a smooth transition to an elected Attorney General. This will require thoughtful action by the Administration and legislation by the Council in determining, among other things, what the reporting lines should be for agency counsel once there is an elected

Attorney General, as well as what functions and responsibilities should continue under the control of an elected Attorney General and which should be transferred to agencies or persons under the control of the Mayor. In addition, there is a serious question as to whether the election for Attorney General should be held on a partisan basis, as it is currently slated to be. If that rule is left in place and the federal Hatch Act is not amended by Congress to resolve the issue, then we will have the unfortunate situation where, other than the Mayor and the members of this Council, no official of the District of Columbia, not even the sitting appointed Attorney General or senior officials in my office or elsewhere in the executive branch or in the independent agencies, can run for the position. Apart from the Hatch Act, I believe that the election should be non-partisan because the office should be run on a non-partisan basis, as I have tried to do in the last year. These and related issues should be addressed by the Council and, as necessary, by a voter referendum in the coming year before specific candidates for the elected position emerge publicly. This will allow the debate to be focused on institutional issues rather than being influenced by the interests of or concerns about any individual candidates. We look forward to assisting the Council this year in this endeavor.

Despite this set of challenges, I am confident that OAG is continuing to move in the right direction. We have improved relations with the courts before which our office practices, we have improved the morale of our line lawyers and

staff, and we have successfully recruited a number of outstanding lawyers from private practice or federal agencies. I believe that our ability to recruit and retain such outstanding individuals will continue to enhance the reputation and performance of OAG.

Let me turn now to our top priorities going forward in Fiscal Year 2012. There are five, and I will touch briefly on each one.

OAG Priorities for FY 2012 and Beyond

1. Continue to Improve OAG Morale

OAG's highest priority continues to be building on the important work of my predecessors and on the work we have done in the past 14 months towards the goal of maintaining a first-class legal office for the District of Columbia. Continuing to build morale is critical, particularly in this challenging budgetary environment where we have been subject to a long-standing freeze on the provision of bonuses or salary raises for our hard-working lawyers and staff.

Along with my senior staff, and as coordinated by Chief Deputy Gene Adams and Chief Labor Counsel Nadine Wilburn, I have closely studied concerns the unions and individual line attorneys have raised with an emphasis on an open line of communication and respectful dialogue. I have met individually and collectively with numerous staff and line attorneys to address their concerns, have participated in regular, frequent formal labor-management meetings, and have

attended informal gatherings of the line attorneys. We have attempted to respond promptly and positively to the concerns they have raised that are within our power.

We have also focused on training, despite having a relatively small training budget. We have worked with the National Association of Attorneys General and the U.S. Attorney for the District of Columbia to provide training to keep our attorneys and staff on the cutting edge of developments in their various areas of practice. In addition, we have been fortunate enough to have a number of judges from the federal and local bench volunteer to provide cost-free training and practice insights to our attorneys. I have also reached out to the D.C. Bar to explore the possibility of our lawyers receiving scholarships to the D.C. Bar's continuing legal education programs.

2. Continue to Improve OAG's Capacity By Leveraging Our Resources and Pursuing Necessary Legal Reform

To help ensure that our legal teams have the necessary capabilities and manpower without adding materially to our costs, we are pursuing several initiatives.

During 2011, we began taking steps that require no legislative change and are designed to maximize our capability through the increase of lawyers at little or no additional cost to the District. We have actively pursued an expansion of the OAG's *pro bono* attorney support from the local private bar, and of OAG's law student internship programs. In addition, as I announced earlier this year, we have

secured commitments from three area law schools – Georgetown Law Center, George Washington law school, and the David A. Clarke School of Law at UDC – to fund on a matching basis with the District salaries for Charles F.C. Ruff Fellows. This program is named after one of my predecessors in this job and a mentor and role model for me, the late Chuck Ruff. In the inaugural year, eleven newly minted, talented lawyers will soon join our office. These are recent law school graduates with outstanding records who are committed to public service, selected after a highly competitive process.

We are also working -- along with the Mayor and his team -- to promote key legislative initiatives that will augment our capacity. In particular, we are focused on three such legislative initiatives for FY 2012.

First, we are seeking to restore the subpoena authority of OAG that was reduced by this Council in 2010. This can be done through legislation passed by this Council. Restoring OAG's subpoena power will allow our investigators and attorneys to do their work on behalf of the District more effectively and efficiently.

Second, we are working to seek congressional approval of a statutory provision that would make clear that the District has the authority to retain outside counsel on a contingency fee basis, where outside counsel bears the burden of the up-front costs and the financial risk of a loss and gets paid only out of any funds collected in the matter. There is currently some legal uncertainty on this issue, and

the District, like most jurisdictions in the country, ought to have this tool at its disposal. This will help us bring sufficient resources to bear in order for the District to prevail in cases in which the District seeks damages, particularly in matters involving heavy, resource-intensive discovery.

Finally, with the support of the Mayor, we are pursuing federal legislation to restore our criminal prosecutorial authority over false claims offenses and similar offenses against the District. Our criminal jurisdiction over such matters was reduced by the D.C. Court of Appeals' decision in the 2009 *Crawley* case, which interpreted our Code provisions, contrary to our views, to mean that Congress intended to restrict very narrowly the crimes against the District that the OAG may prosecute.

3. Resolve Judicial Consent Decree Actions Against the District

It is critical that we continue to work with agencies, affected stakeholders, and the courts to resolve the long-standing major class-action cases against the District in which we are operating under consent decrees. Judicial oversight of our government programs or operations -- however necessary it may have been in the past -- is a significant impediment to full self-government and has had adverse financial and other impacts on the District over the past several decades. We will continue to pursue frank and results-driven conversations with our agency clients, with the plaintiffs' bar, the courts, and other stakeholders to find solutions to these

matters and chart a path forward. Following on our achievements in the *Dixon* and *Blackmun* cases and applying lessons learned from those matters, we will work with our agency clients and the appropriate Deputy Mayors to obtain results that will demonstrate to all interested parties, particularly the courts, that the District is in full compliance with the governing laws and that the time has come to end federal judicial oversight over the day-to-day operations of the District's executive branch government agencies.

4. Reaffirm the OAG's Independence and Prepare for an Elected AG

We must continue to ensure the independence of the Office of the Attorney General -- especially when it comes to the provision of legal advice, the rendering of opinions, and investigations. I strongly endorse the Mayor's repeated, public statements that OAG must be independent and must have as its principal client the citizens of the District of Columbia. I believe the actions we have taken and the legal opinions we have rendered to the Mayor, the agency heads, and the Council over the last year have demonstrated the independence of this office.

As to preparing for an elected Attorney General, I have appointed an internal task force chaired by my Senior Counsel Ariel Levinson-Waldman to study the issues and to present recommendations to me for ultimate decisions by the Mayor and the Council.

5. Protect and Augment the District's Treasury Through Litigation

In light of the ongoing budget challenges that the District of Columbia continues to face, we are committed to making OAG a part of the solution. The most important role we play in the protection of the District's fiscal well-being is through our representation of the District and its officials sued in their official capacity in defensive litigation. As noted, each year, we resolve several hundred million dollars of litigation exposure for the District at a very small fraction of that number.

In addition, OAG has been and will continue to pursue affirmative litigation on a number of fronts. To emphasize our commitment to these affirmative cases for the District and allow for more efficient management of these matters, I created a new division -- the Public Interest Division -- which encompasses, among other things, our Civil Enforcement and Public Advocacy sections that perform this affirmative work on the District's behalf.

Using in some cases statutory provisions for treble damages and attorneys' fees, to recover money owed the District by those corporations and individuals who have taken advantage of the District's government or its citizens. These actions, along with collection efforts on behalf of our sister agencies, could in the long-term recoup many millions of dollars for the District. For example, as was recently announced, we secured as part of the multi-state and federal investigation

into housing finance issues over \$4.4 million recovery for the District as well as access for District homeowners to about \$40 million. In addition, we will, as was recently announced, be seeking recovery of funds unlawfully taken from the District's unemployment compensation fund by District employees who were in fact employed during the relevant time period. As we have done in the past year, we will continue to look for ways to use our civil authority and our ability to make criminal referrals to send the message that taking money that rightfully belongs to the District will have consequences, and that we will be vigilant in continuing to protect the District's limited treasury.

Conclusion

Thank you for the opportunity to discuss the work of the Office of the Attorney General. It is our goal that the OAG continue to provide the District of Columbia government the highest quality legal services while promoting the public interest. I and my staff that have accompanied me are pleased to answer any questions that the members of the Committee may have. Thank you.