

HAVE DOJ LAWYERS LOST THE “PRESUMPTION OF REGULARITY” IN U.S. COURTS? AND HAVE AGENCY CONTRACT ATTORNEYS LOST IT AS WELL?

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It has been well documented that Department of Justice (“DOJ”) attorneys have lost the presumption of regularity in their pleadings and statements before the courts. Frequent arguments have been made that DOJ attorneys skills have declined in the current administration. But this problem is not limited to the DOJ, it seems to include government contract attorneys in federal agencies that litigate contract cases before the Boards of Contract Appeals. A recent case at the Armed Services Board of Contract Appeals showed “rookie” errors by government contracts attorneys. See *ACC Construction Co, Inc.*, ASBCA Nos. 63258,64047, July 16, 2026, which will be discussed after considering some of the problems that courts have had with DOJ attorneys.

For DOJ attorneys, see for example, a New York Times article: *Losing Trust in Justice Dept., Judges Call Out Its Lawyers’ Behavior at* <https://www.nytimes.com/2026/06/01/us/justice-department-lawyers-judges-trump.html>. A few quotes show the gist of it:

The federal courts have long assumed that the government’s lawyers are trustworthy. Now judges across the country are criticizing their lack of candor.[]

A judge in Chicago said [transcripts of grand jury proceedings](#) had been redacted to hide misconduct by her district’s U.S. attorney’s office. Another judge in Rhode Island referred an assistant U.S. attorney [for potential discipline](#) after he admitted that he had knowingly withheld information from the court.[]

Judges have over the past year called out the administration for making [dodgy legal arguments](#), filing [dishonest testimony](#) and [failing to comply with court orders](#). Some of the earlier problems stem from the fact that Justice Department lawyers often represent other government agencies in court, including the Homeland Security Department, which has proved to be a difficult client, particularly in immigration cases.

But judges have taken a distinctly harsher tone in recent weeks, assigning responsibility directly to individual Justice Department lawyers for their own representations in court.[]

A recent Bloomberg article shows similar problems for DOJ: “Federal Judges Scold DOJ lawyers over courtroom conduct” at <https://news.bloomberglaw.com/us-law-week/federal-judges-scold-doj-lawyers-over-courtroom-conduct-in-2025>. See a snippet from that article:

Federal judges rebuked the Justice Department numerous times this year over its conduct, as they field hundreds of legal challenges to the Trump administration’s agenda.

Government lawyers have been scolded for making misrepresentations in court, making legally flawed arguments, and sidestepping typical procedures. Their actions have prompted current and former judges to question if the government should still be entitled

to the so-called “presumption of regularity,” the judicial doctrine that assumes the government is acting properly in court.

But the harsh language comes from the actual U.S. Court decisions themselves. Here’s an example from a memorandum and order from U.S. District Judge for the District of Rhode Island, Mary S. McElroy, United States District Judge, *In Re: Administrative Subpoena 25-1431-032 to Rhode Island Hospital* C.A. No. 1:26-mc-0007-MSM-AEM

The United States Department of Justice (“DOJ”) possesses immense prosecutorial authority and discretion. As citizens, we trust that federal prosecutors, when wielding this awesome power against a state, a company, or certainly against vulnerable children, will play fair and be honest with its counterparts and the judiciary.

DOJ has proven unworthy of this trust at every point in this case. It has misrepresented and withheld information to both this Court and the United States District Court for the Northern District of Texas (the “Texas court”). It did so in an obvious effort to shield its recent investigative tactics—previously rejected by every other court to review them—from this Court’s review, in favor of a distant forum that DOJ deems friendly to its political positions. (footnote omitted)

Its representatives have, under oath, misrepresented salient facts. It has misled the parties with whom it was negotiating in Rhode Island, who have now been placed in an untenable and unprecedented procedural position. And when its attorneys came to this Court to explain their conduct, the senior attorney—who was present at many of the events that took place in this case—sat silently by as his counterpart, a junior attorney who has been practicing law for approximately six months and had no relevant information, was forced to answer questions about DOJ’s blatant disregard for the proper course of negotiations.

Now, to consider the ACC case at the Armed Services Board cited in the first paragraph, the government moved to dismiss a contractor’s claim for liquidated damages, and the Board rejected all of the government’s arguments.

The Board rejected the government assertions that “pay estimates” were final decisions pursuant to the Contract Disputes Act (“CDA”) and that they assessed liquidated damages. These pay estimates were signed only by a Contracting Officer’s Representative (“COR”), who was not a contracting officer and was not authorized to issue a final decision for the CDA. The opinion says this:

The government has made no effort to show, either in the main briefing or its supplemental submissions, that a contracting officer’s final decision triggering appeal rights [under the CDA] can be issued by someone only clothed with the authority of a COR. Given that [a] prerequisite for jurisdiction...over a CDA claim is a *final decision* by a contracting officer [cite omitted] [these pay estimates] did not constitute anything that ACC could have appealed.[]

Having been forced to recognize that, in supplemental filings that most of the documents it claims are contracting officer decisions were only signed by a COR, the government's supplemental findings observe that the government need not issue a final decision to withhold liquidated damages. That is true, and undercuts the government's position since the entire premise of the government motion is that its pay estimates are contracting officer final decisions... The government's contentions that [pay estimates signed by a COR] are final decisions ...are completely baseless. The government is reminded that it is bound to a duty of candor in advancing its arguments.

In addition to the issue of liquidated damages, the government sought dismissal of ACC's count V, which alleged that the government breached the implied duty of good faith and fair dealing because ACC did not present it in its claim to the contracting officer. (The Board cannot exercise jurisdiction over new claims not previously presented to the contracting officer). The Board rejected this allegation, noting that count V did not "allege grounds materially different from the claim factually or legally; it arises from the same operative facts as the claim, seeks the same relief and advances the same legal theory. The government's meritless motion to dismiss Count V for lack of jurisdiction is denied."

Finally the government sought summary judgment for delays claimed by ACC, arguing that there had been an accord and satisfaction for these amounts. But there was no "meeting of the minds" on this matter, and no consideration. It was based on a government unilateral modification to which ACC did not consent. The Board concluded that "Nothing [in the government's assertion] establishes an accord and satisfaction [to this delay claim]. The government's contention is meritless and accordingly its request for summary judgment is denied.

Takeaway. The opinion on the ACC case leads to the possible conclusion that the skills of government contract lawyers are declining, perhaps in the same way as DOJ lawyers. Identifying a decision of a COR as a final decision, when only a warranted contracting officer may make such a decision is clearly a "rookie" mistake in the government's pleadings. When a Board calls government arguments "completely baseless" or reminds attorneys that they have "a duty of candor in advancing" the government's arguments, and when the Board dismisses two of the government's motions as "meritless," these statements raise the question of the attorney's competence.

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