

How The Mueller Investigation Could Look Without Rosenstein

By Sindhu Sundar

Law360 (September 25, 2018, 10:55 PM EDT) -- Uncertainty about Deputy Attorney General Rod Rosenstein's future at the U.S. Department of Justice has rekindled fears about Special Counsel Robert Mueller's fate, but potential Rosenstein successors could find ways to slow Mueller down rather than outright dismantle an investigation that has already felled some of the president's associates.

News reports Monday indicated that the beleaguered deputy attorney general was attending a meeting in the White House amid his reported plans to resign. But Rosenstein retains his role and will meet with President Donald Trump on Thursday, according to a statement Monday by White House press secretary Sarah Huckabee Sanders.

Rosenstein's potential exit has fueled concerns about whether Trump might use the opportunity to install a replacement who would shut down the Mueller investigation, which began in May 2017. Trump has reportedly already considered steps to fire Mueller, although outgoing White House Counsel Don McGahn has stood in the way, The New York Times reported in January.

If Trump were to appoint a replacement for Rosenstein to dismiss an investigation perceived to be closing in on Trump and his inner circle, it would be politically cataclysmic. But there is enough room in federal regulations governing the DOJ's oversight of the special counsel for such an investigation to be slowed down.

"Rosenstein has made it an important part of his perception of his job to protect Mueller from political interference," said Robert Litt, of counsel at Morrison & Foerster LLP, and a former deputy assistant attorney general in the DOJ's Criminal Division in the 1990s, where he worked with Rosenstein.

"The question will be whether the person who succeeds him — if he is in fact fired or resigns — whether that person is both equivalently dedicated to protecting Mueller and has the political strength to do so," said Litt.

Litt wrote to Senate Judiciary Committee leaders in February 2017 to support the confirmations of Rosenstein as deputy attorney general and Rachel Brand as associate attorney general. Brand stepped down from her role in February this year.

Federal regulations governing special counsels' powers outline a number of ways in which they could be scrutinized by the DOJ official overseeing their work, and potentially delayed.

Regulations listed under Section 28 CFR 600 state, for instance, that a special counsel would need to seek permission to expand an investigation beyond its original scope and could be called on to provide "an explanation for any investigative or prosecutorial step."

The DOJ official overseeing the investigation, usually the attorney general, can also order the special counsel not to take steps that are "inappropriate or unwarranted under established Departmental practices," according to the regulations. Attorney General Jeff Sessions, who had worked on Trump's campaign, recused himself from overseeing the investigation of alleged Russian interference in the 2016 presidential election, handing the reins to Rosenstein.

The language in the regulations appears to allow enough room for DOJ officials to exercise some discretion in how much freedom to grant the special counsel. Former prosecutors say that a successor inclined to impede Mueller could decline to grant him additional authority to expand his investigation as it proceeds, or turn down requests for resources.

"By all accounts, Rosenstein has not exercised that authority over the Mueller investigation in a way that has hindered it or slowed it down significantly," said Jessica Roth, a professor at the Cardozo School of Law and a former prosecutor at the U.S. Attorney's Office for the Southern District of New York.

"The concern that many are raising is that somebody who is less protective of that investigation and of Mueller could use a soft authority to slow it down, and do that in a way that wouldn't provoke the same kind of political crisis as outright firing Mueller," she said.

Mueller's investigation has already yielded guilty pleas and convictions, including of Trump's former campaign chairman Paul Manafort, and helped federal prosecutors in New York pursue Trump's former personal attorney Michael Cohen, who pled guilty in August to campaign finance charges.

Dismantling Mueller's investigation could potentially also lead to greater clamor about obstruction of justice. The Mueller investigation itself followed Trump's controversial firing of then-FBI Director James Comey, who was overseeing an investigation into Russian interference in the 2016 election.

"At that point, there would be a call for another special prosecutor to be appointed and to investigate here, much in the same way that Mueller was put into place," said David Weinstein, a white collar partner at Hinshaw & Culbertson LLP, and a former federal prosecutor at the U.S. Attorney's Office for the Southern District of Florida. "You're sort of back to square one, which is why ... as opposed to prolonging this and creating another investigation, creating another crisis, it would be best to let it run its course."

--Editing by Pamela Wilkinson and Peter Rozovsky.