
U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

ANNUAL REPORT

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**U.S. Department of Justice
Office of Professional Responsibility**

Fiscal Year 2012 Annual Report

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OPR Annual Report for Fiscal Year 2012

Introduction

The Office of Professional Responsibility (OPR) was established in the Department of Justice (Department or DOJ) by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 37th Annual Report to the Attorney General, and it covers Fiscal Year 2012 (October 1, 2011 through September 30, 2012).

Jurisdiction and Functions of OPR

OPR has jurisdiction to investigate allegations of professional misconduct made against Department of Justice attorneys when the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice. This includes allegations relating to the actions of the Department's immigration judges and Board of Immigration Appeals members. OPR also has jurisdiction to investigate allegations of misconduct against DOJ law enforcement personnel that are related to allegations of attorney misconduct within the jurisdiction of OPR. In addition, OPR has authority to investigate other matters when requested or authorized to do so by the Attorney General or the Deputy Attorney General.

Misconduct allegations that OPR historically investigates include *Brady*, *Giglio*, Federal Rule of Criminal Procedure 16, and civil discovery violations; improper conduct before a grand jury; improper coercion, intimidation, or questioning of witnesses; improper introduction of evidence; lack of candor or misrepresentations to the court and/or opposing counsel; improper opening statements and closing arguments; failure to represent competently and diligently the interests of the government; failure to comply with court orders, including scheduling orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors apprised of significant developments in a case; and the exercise of prosecutorial discretion based on improper purposes. In addition, OPR examines cases in which courts have awarded Hyde Amendment fees to a defendant based on a finding that the government's conduct was frivolous, vexatious, or in bad faith.

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence of non-frivolous allegations of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated

to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Department employees are required to report to OPR all misconduct findings made by judges.

Upon receipt, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, in which it typically gathers documents and information and obtains written submissions from subjects and components, or a full investigation, in which it also interviews relevant witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation. Although some matters begin as investigations, OPR typically will open a matter as an inquiry and then assess the information obtained prior to conducting an investigation. An inquiry or investigation may have more than one Department attorney as the subject.

Each year, OPR determines that the majority of complaints do not warrant further inquiry because, for example, the complaint is outside OPR's jurisdiction, pertains to matters addressed by a court where no misconduct has been found, is frivolous on its face, or is vague and unsupported. In some cases, OPR initiates an inquiry because more information is needed to assess the matter. In such cases, OPR may request additional information from the complainant or obtain a written response from the attorney against whom an allegation was made. OPR also may review other relevant materials such as pleadings and transcripts. Most inquiries are resolved with no misconduct finding based on the additional written record.

In cases that are not resolved based solely on the written record, and in all cases in which OPR believes misconduct may have occurred, OPR conducts a full investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). Interviews of subject attorneys are conducted by OPR attorneys and are transcribed by a court reporter. The subject is given an opportunity, pursuant to a confidentiality agreement, to review the transcript and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations, once they have been provided warnings concerning the further use of their statements, and to provide information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal from federal service.

OPR ordinarily completes investigations relating to the actions of attorneys who resign or retire during the course of the investigation in order to better assess the litigation impact of the alleged misconduct, and to permit the

Attorney General and Deputy Attorney General to consider the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it deems such action is in the best interest of the Department. Terminated investigations may nevertheless result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which reports to the Deputy Attorney General and is responsible for all disciplinary actions relating to OPR findings of professional misconduct against DOJ attorneys employed by certain components, including the Criminal Division and the Executive Office for United States Attorneys (EOUSA). The PMRU reviews only those cases involving findings by OPR of intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and the applicable law.¹ The PMRU also determines the appropriate level of discipline in those cases. In matters where OPR concludes that a Department attorney engaged in professional misconduct and the DOJ attorney is not employed by a component within the purview of the PMRU, pursuant to Department policy, OPR recommends a range of discipline. Although OPR's recommendation is not binding on the management officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), the management official must notify the Office of the Deputy Attorney General in advance of implementing that decision.

Once a disciplinary action for a DOJ attorney is final, OPR notifies the bar counsel in each jurisdiction where the attorney is licensed of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under their jurisdiction) or the Office of the Deputy Attorney General, once they have completed their disciplinary process. The Department's bar notification policy includes findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. OPR does not make bar notifications when the conduct in question involved exclusively internal Department interests that do not appear to implicate a bar rule. In addition, OPR reviews reports issued by the Office of the Inspector General (OIG) concerning Department attorneys to determine whether the relevant state bar counsel should be notified of the misconduct at issue.

¹ OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, or to the relevant United States Attorney, for appropriate action.

OPR also reviews case files and statistical data relating to matters under investigation to identify any misconduct trends or systemic problems in the programs, policies, and operations of the Department. Trends and systemic problems are brought to the attention of appropriate management officials.

Intake and Initial Evaluation of Complaints and Correspondence

In Fiscal Year 2012, OPR received 1,026 complaints and other correspondence and memoranda, of which 505, or 49%, were from incarcerated individuals. Some of these matters did not relate to issues under the jurisdiction of OPR, or merely sought information or assistance, and were referred to the appropriate government agency or Department component. OPR determined that 98 of the matters warranted further review by OPR attorneys and they were opened as inquiries. In addition, OPR opened 25 matters as investigations. When information develops in an inquiry indicating that further investigation is warranted, the matter is converted to an investigation.

The remaining matters were determined not to warrant an inquiry or investigation by OPR because, for example, they sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department component. A supervisory or experienced OPR attorney reviewed all such dispositions as well.

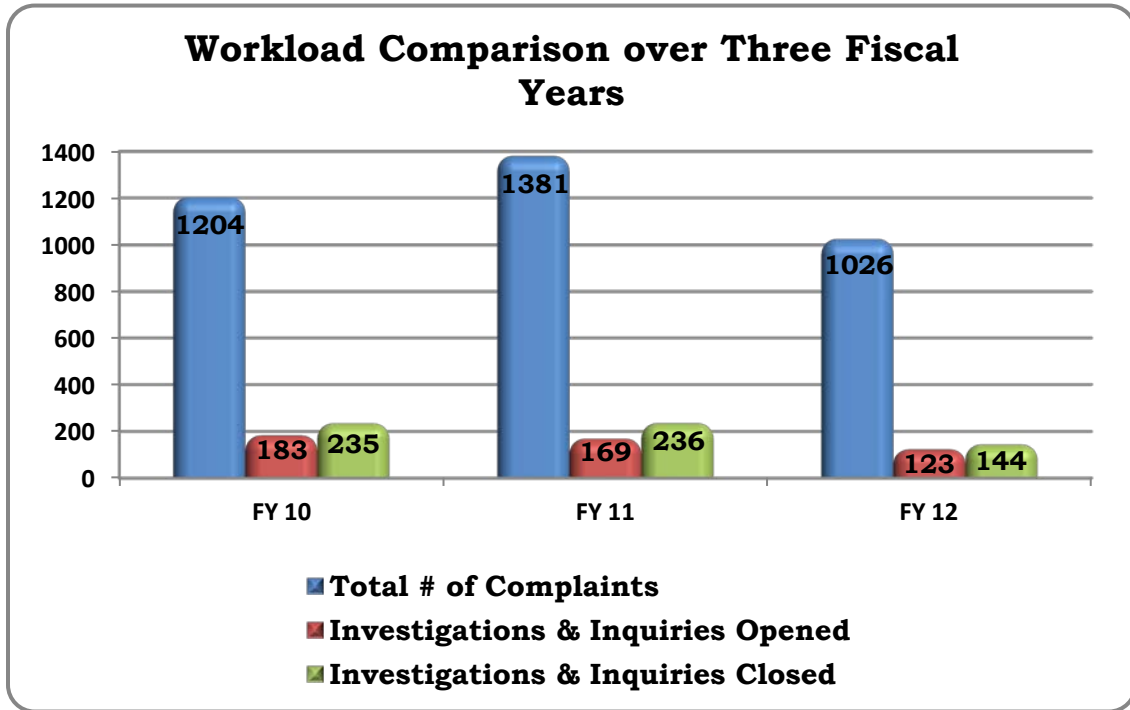
OPR Workload Summary for Fiscal Year 2012

The information in Graphs 1 and 2 depicts the number of complaints and correspondence matters, as well as the number of investigations and inquiries OPR opened and closed, in the past three fiscal years. Graph 3 depicts the number of inquiries and investigations that were pending at the end of each of the last three fiscal years. In Fiscal Year 2012, OPR opened 123 inquiries and investigations, while closing 144. More specifically, OPR opened 98 inquiries, while closing 112, and opened 25 investigations, while closing 32. During the fiscal year, OPR received 1,026 complaints and correspondence matters, which reflects a 25% decrease from Fiscal Year 2011. At the end of the fiscal year, there were 38 inquiries and 27 investigations pending, which, as compared to Fiscal Year 2010, reflects 50% fewer inquiries and 68% fewer investigations.

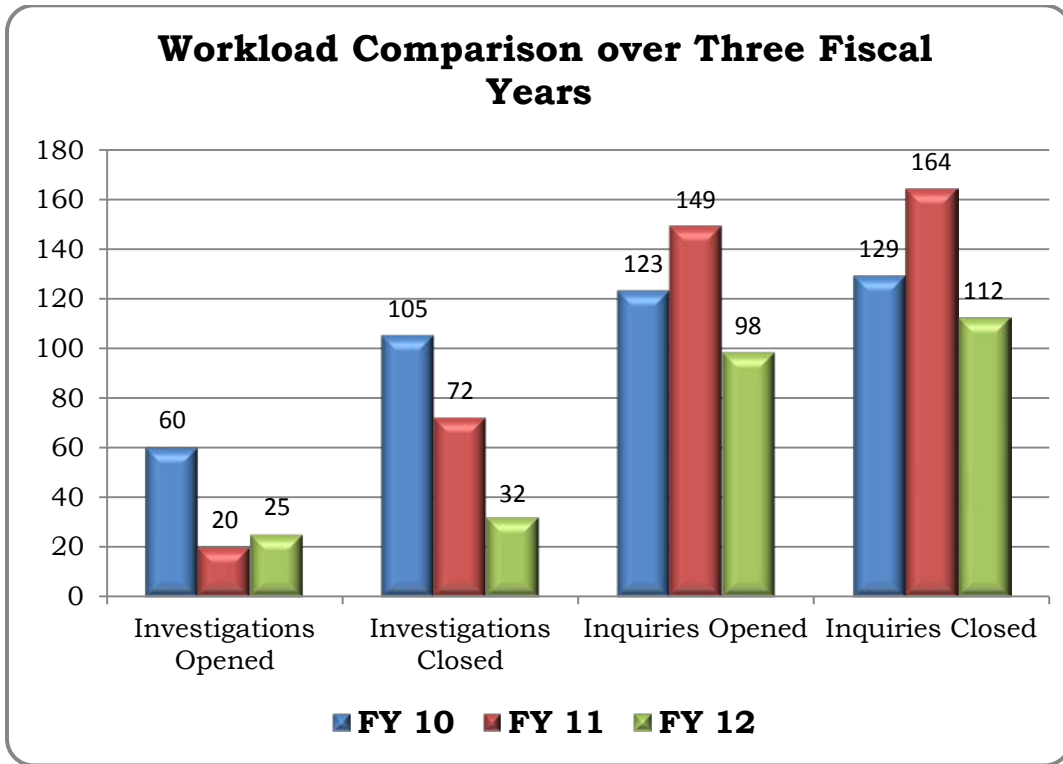
While OPR opened and closed fewer inquiries and investigations in Fiscal Year 2012 as compared to Fiscal Year 2011, OPR also received significantly fewer complaints and continued its trend of closing significantly more inquiries and investigations than it opened, thus substantially reducing a backlog of cases. OPR accomplished this with a significantly reduced attorney staff. At

the end of Fiscal Year 2012, OPR operated with 16 line attorneys assigned to its investigations. In Fiscal Year 2011, by comparison, OPR was staffed with 18 line attorneys, in addition to 4 attorneys detailed or on contract to OPR from another component. This reflects a 27% reduction in OPR's staffing.

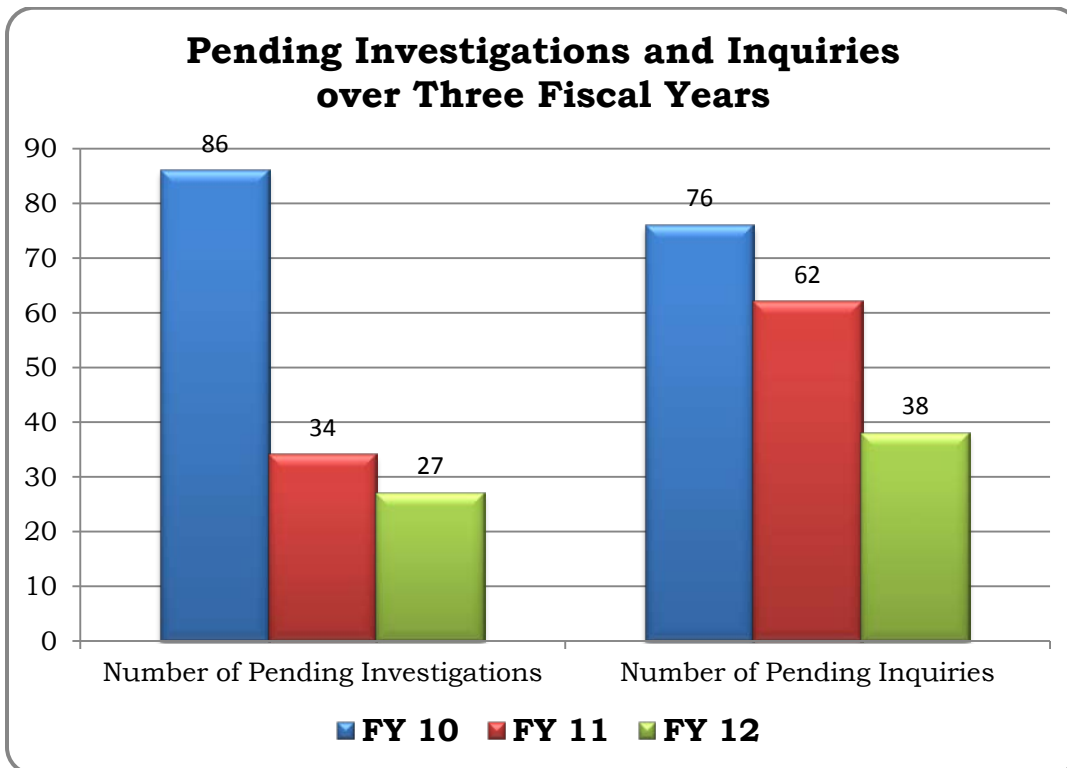
Graph 1



Graph 2



Graph 3



OPR Inquiries in Fiscal Year 2012

Inquiries Opened in Fiscal Year 2012: The sources of the complaints for the 98 matters designated as inquiries opened in Fiscal Year 2012 are set forth in Table 1.²

Table 1

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2012		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Judicial opinions & referrals, including referrals by Department employees of judicial criticism ³	48	49.0%
Private attorneys	15	15.3%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	25	25.5%
Private parties	6	6.2%
Other agencies	2	2.0%
Other sources	2	2.0%
Total	98	100%

The nature of the allegations against Department attorneys contained in the 98 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 98.

² OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department will make a referral to a state bar disciplinary organization. The 98 matters referred to above do not include matters involving proposed bar notifications involving non-DOJ attorneys.

³ This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

Table 2

Types of Misconduct Allegations in Inquiries Opened in FY 2012		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Abuse of authority, including abuse of prosecutorial discretion	31	25.6%
Improper remarks to a grand jury, during trial, or in pleadings	13	10.7%
Misrepresentation to the court and/or opposing counsel	11	9.1%
Unauthorized disclosure, including Fed. R. Crim. P. 6(e)	6	5.0%
Failure to competently or diligently represent the client's interests	6	5.0%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery	11	9.1%
Failure to comply with court orders or federal rules	14	11.6%
Failure to comply with DOJ rules and regulations	3	2.5%
Interference with defendants' rights	1	0.8%
Lateness (<i>i.e.</i> , missed filing deadlines)	5	4.0%
Lack of fitness to practice law	2	1.7%
Failure to maintain active bar membership	4	3.3%
Whistleblower complaints	8	6.6%
Failure to comply with federal law	2	1.7%
Conflict of interest	3	2.5%
Conduct of Immigration Judges	0	0.0%
Other	1	0.8%
Total	121	100%

Inquiries Closed in Fiscal Year 2012: OPR closed a total of 112 inquiries in Fiscal Year 2012 involving allegations against Department attorneys.⁴ The matters involved 168 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 168 allegations were resolved as inquiries in Fiscal Year 2012 is set forth in Table 3.⁵

Table 3

Categories of Inquiry Allegations Resolved in FY 2012		
Type of Resolution	Number of Occurrences	Percentage of Total
Performance or management matter. Referred to employing component.	15	9%
More appropriately handled by another component or agency.	7	4.2%
Issues previously addressed. No further action required by OPR at this time.	3	1.8%
No merit to matter based on review of allegation.	53	31.5%
No merit to allegation based on preliminary inquiry.	33	19.6%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	6	3.6%
Inquiry closed because further investigation not likely to result in finding of misconduct.	35	20.8%
Matter closed but being monitored for possible follow-up.	0	0.0%
FBI whistleblower claim.	11	6.5%
Other	5	3.0%
Total	168	100%

⁴ OPR may designate more than one Department attorney as the subject of an inquiry. OPR closed an additional 63 inquiries involving proposed bar notifications for misconduct of non-Department attorneys.

⁵ When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2012, 20 inquiries were converted to investigations.

OPR Investigations in Fiscal Year 2012

Investigations Opened in Fiscal Year 2012: OPR opened 25 investigations in Fiscal Year 2012, which were based on complaints from a variety of sources, as reflected in Table 4.

Table 4

Initial Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2012		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions & referrals ⁶	9	36.0%
Private attorneys	0	0.0%
Private parties	3	12.0%
Department components	13	52.0%
Total	25	100%

Some of the 25 investigations opened by OPR involved multiple attorney subjects. There were 66 separate allegations of misconduct (many investigations involved multiple misconduct allegations). The subject matter of the 66 allegations is set out in Table 5.

⁶ This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

Table 5

Types of Misconduct Allegations in Investigations Opened in FY 2012		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Abuse of authority, including abuse of prosecutorial discretion	6	9.1%
Improper remarks to a grand jury, during trial, or in pleadings	12	18.2%
Misrepresentation to the court and/or opposing counsel	12	18.2%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	4	6.1%
Failure to competently and/or diligently represent the client's interests	6	9.1%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	12.1%
Failure to comply with court orders or federal rules	5	7.6%
Conflict of interest	1	1.5%
Failure to comply with DOJ rules and regulations	3	4.5%
Interference with defendants' rights	0	0.0%
Whistleblower complaints	1	1.5%
Lack of fitness to practice law	1	1.5%
Failure to maintain active bar membership	5	7.6%
Failure to comply with federal law	2	3.0%
Conduct of Immigration Judges	0	0.0%
Total	66	100%

Investigations Closed in Fiscal Year 2012: OPR closed 32 investigations in Fiscal Year 2012. Some of these investigations included multiple attorney subjects, and two included non-attorney subjects (typically, these are law enforcement officers). Of the 32 investigations, OPR found professional misconduct in 14, or in approximately 44%, of the matters it closed. Of the 14 matters in which OPR found professional misconduct, 5 involved at least 1

finding of intentional professional misconduct by a Department attorney.⁷ In 11 of the 14 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.⁸ In resolving a matter, OPR may resolve one allegation by concluding, for example, that the attorney engaged in intentional misconduct but resolve another allegation in the same matter by concluding that the attorney acted recklessly.

In Fiscal Year 2012, OPR made a larger number of misconduct findings as compared to Fiscal Year 2011, both in terms of total numbers (14 in 2012 as compared to 11 in 2011), as well as in percentage of closed cases (44% of closed cases in Fiscal Year 2012 resulted in misconduct findings, as compared to 14% in Fiscal Year 2011).

The 14 misconduct findings in Fiscal Year 2012 related to 35 allegations of misconduct (some matters included more than one allegation of misconduct). Table 6 below depicts the 35 allegations sustained in the 14 misconduct cases closed during Fiscal Year 2012.

⁷ OPR finds intentional professional misconduct when it concludes that an attorney violated an obligation or standard by: (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and knowing that the consequence is a result that the obligation or standard unambiguously prohibits.

⁸ OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes that the attorney: (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

Table 6

Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2012	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Failure to represent the client's interests	6	17.1%
Other	4	11.4%
Failure to maintain an active bar membership	3	8.6%
Unauthorized disclosure to the media (including Privacy Act)	3	8.6%
Failure to Comply with DOJ rules and regulations	2	5.7%
Misrepresentation to opposing counsel	2	5.7%
IJ – failure to follow proper procedures	2	5.7%
Failure to comply with Federal Rules of Civil Procedure	2	5.7%
Discovery <i>Brady</i> /exculpatory information	1	2.9%
Misrepresentation/misleading the court	1	2.9%
Improper contacts with represented party/interference with attorney-client relationship	1	2.9%
Conflicting personal interests	1	2.9%
<i>Ex-Parte</i> communication	1	2.9%
Unauthorized disclosure, non-media (including Privacy Act)	1	2.9%
IJ – failure to recuse, conflict of interest	1	2.9%
IJ – bias, appearance of partiality	1	2.9%
IJ- violation of alien's due process rights	1	2.9%
IJ – general	1	2.9%
Failure to comply with other federal laws	1	2.9%
Total	35	100%

Disciplinary action already has been initiated and implemented against attorneys in eight of the matters in which OPR found professional misconduct. Disciplinary action was not initiated against an attorney in one instance

because the subject attorney was no longer employed by the Department at the conclusion of OPR's investigation. OPR, however, referred the matter to the appropriate state bar officials. Disciplinary action was initiated but was pending in five matters at the close of Fiscal Year 2012. With respect to the eight matters in which disciplinary proceedings were initiated and implemented, the subject attorneys in six of the matters were suspended and the subject attorneys in the other two matters received a written reprimand and written admonishment, respectively.

OPR also closed 12 investigations, or approximately 38% of the investigations closed in Fiscal Year 2012, with at least one finding that an attorney exercised poor judgment.⁹ Five of those 12 matters also involved a finding of professional misconduct and are included in the 14 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment alone, but rather refers the finding to the Department attorney's employing component for consideration in a management context. OPR also may recommend that management consider certain actions, such as additional training. Eight closed investigations, or approximately 25%, involved at least one finding that an attorney made an excusable mistake. Three of those eight matters also included a finding of professional misconduct or poor judgment. Thus, of the 32 investigations closed, OPR found professional misconduct or poor judgment in 21 matters, or approximately 66%, which is substantially higher than the 17 matters, or approximately 24% of matters, in which OPR found professional misconduct or poor judgment in Fiscal Year 2011.

Policy and Training Activities in Fiscal Year 2012

During Fiscal Year 2012, OPR participated in policy development and training for the Department. OPR attorneys participated in numerous educational and training activities within and outside of the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During Fiscal Year 2012, an OPR attorney participated in a presentation in a media relations workshop focusing on the policies and ethical issues concerning contacts with the media. OPR attorneys also made presentations to attorneys in the Civil Rights and Civil Divisions and participated in the

⁹ OPR finds that an attorney has exercised poor judgment when, faced with alternative courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

National Advocacy Center's Criminal Chiefs' Conference. OPR attorneys made presentations to new Assistant United States Attorneys as part of the Department's orientation and training programs and participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* disclosure obligations.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys participated in presentations to Chinese, Brazilian, and Kyrgyzstani delegations about OPR's role in the Department and issues associated with professional ethics. OPR attorneys also participated in presentations both in the United States and Israel to the Israeli Justice Minister, Attorney General, and other officials about OPR's mission in the Department and how OPR conducts investigations. An OPR attorney also completed a detail through OPDAT to Iraq to assist criminal justice officials there in developing their criminal justice system.

OPR continued to serve as the Department's liaison to state bar councils on matters affecting the professional responsibility of Department attorneys. OPR attorneys attended the mid-year and annual meetings of the National Organization of Bar Counsel (NOBC) which addressed current trends in attorney regulation and discipline. An OPR attorney participated in the NOBC's program committee, which is responsible for choosing topics for presentations at the mid-year and annual meetings. An OPR attorney also served as the NOBC Articles Officer. The Articles Officer collects ethics, professional responsibility, and disciplinary proceeding articles written by NOBC members, catalogs them, and distributes them to requesting members.

In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also consulted with and advised other Department components regarding requests for notification to a state bar of instances of possible professional misconduct by non-DOJ attorneys. In 62 such matters that OPR opened during Fiscal Year 2012, OPR reviewed information relating to possible misconduct by non-DOJ attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly of the allegations of misconduct.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against such agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the OIG responsibility for reviewing and investigating (as appropriate) whistleblower complaints by FBI employees.

Examples of Inquiries Closed in Fiscal Year 2012

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2012.¹⁰

- *Improper Examination of a Witness.* A district court found that a DOJ attorney improperly vouched for the credibility of a cooperating witness on redirect examination. OPR initiated an inquiry. Following a line of questioning intended to bolster the cooperating witness' veracity, the witness affirmed that his testimony under cross-examination was truthful. The DOJ attorney responded in agreement. Defense counsel did not object to the remark, but the court raised the issue *sua sponte*, admonishing the DOJ attorney for improperly vouching for the witness' veracity. The defense filed a motion for a mistrial, or alternatively for a curative instruction. The court agreed to give a curative instruction and told the jury that it must disregard anything a lawyer said that would imply that the lawyer believed that the witness was telling the truth. Following the guilty verdict, the defense renewed its motion for a new trial based on the DOJ attorney's improper comment. The court found that the DOJ attorney's comment constituted improper vouching but denied the motion for a new trial, ruling that the DOJ attorney's fleeting comment occurred early in a multiple-day trial and was not prejudicial to the defendant. Because the DOJ attorney's improper comment constituted a single word in a long trial and there was no evidence of intentional misconduct or prejudice to the defendant, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for stating in closing argument that the defendant, who was on trial for health care fraud, escaped conviction for a prior fraud because the statute of limitations had expired. The court found that the DOJ attorney's statement lacked relevance and suggested to the jury that the defendant escaped criminal liability due to a technicality. Although the remarks were improper, the court affirmed the defendant's conviction, finding that the evidence against the defendant was overwhelming. OPR initiated an inquiry and found that the district court admitted evidence of the defendant's prior fraudulent activity on the basis that the earlier fraud was closely related to the charged crime. Based on the introduction of this evidence, the DOJ attorney explained to the jury in closing argument that the reason the government did not charge the defendant for the prior fraud was because the statute of limitations had passed. The

¹⁰ To protect the privacy of the Department attorneys and other individuals involved in the inquiries summarized, as well as with the investigations summarized in the next section of this report, OPR has omitted names and identifying details from these examples. In addition, OPR has used male pronouns in the examples regardless of the actual gender of the individual involved. Female pronouns will be employed next year, and the genders will alternate each year thereafter.

defense did not object to the statement. Although the DOJ attorney's choice of words may have been poor, OPR found that the DOJ attorney's explanation for why the defendant was not previously charged was not gratuitous and did not prejudice the defendant or affect the outcome of the trial. OPR thus closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Discovery Violations.* A DOJ component referred to OPR correspondence and supporting materials from defense counsel in a fraud case in which counsel raised a number of allegations of prosecutorial misconduct against a DOJ attorney, including multiple discovery violations. OPR initiated an inquiry and found that defense counsel repeatedly made these same allegations during the course of litigation, and that the court never made any professional misconduct findings. Although OPR recognized that errors did occur in discovery, OPR determined that they were unintentional. Although OPR closed this matter because further investigation was not likely to result in a professional misconduct finding, OPR referred the matter to the DOJ component to review the manner in which the government had complied with its discovery obligations in the prosecution, and to take managerial action as it deemed appropriate.

- *Duty to Keep Client Informed; Duty of Diligence.* OPR received an allegation that the government, without explanation, failed to collect a judgment against a defendant who violated the terms of a federal grant. The defendant received a scholarship that covered his graduate school tuition in exchange for a commitment to provide four years of service after graduation. He submitted forms certifying the completion of his service requirement for three years but failed to submit a certification form for his fourth year of service. The allegation claimed that the case was dismissed even though the defendant failed either to provide certification of his fourth year of service or to repay the costs of his graduate school tuition. OPR initiated an inquiry and found that the government and defendant had entered into a settlement agreement, whereby the defendant agreed to provide the missing certification form within 60 days, failing which the government was authorized to file a consent judgment against him. While a form was not submitted in a timely fashion, the DOJ attorney's supervisor eventually learned of the problem in the case, and the supervisor ultimately contacted the defendant's attorney and was able to obtain the missing certification form to consummate the settlement agreement. Although the DOJ attorney's conduct in this matter implicated his duty of diligence and his duty to keep his client informed, OPR found that, under the circumstances, the DOJ attorney's conduct was more appropriately addressed as a performance matter by the DOJ component.

- *Violation of Federal Rule of Criminal Procedure 6(e).* An attorney representing a party in a state civil lawsuit alleged that a DOJ attorney instructed a witness in a federal criminal matter not to reveal that he had

received a federal grand jury subpoena. The subpoena sought materials that the witness, a party in the state matter, had obtained through discovery in the state court proceeding. The attorney asserted, in part, that the DOJ attorney's instruction constituted a violation of Federal Rule of Criminal Procedure 6(e) (Rule 6(e)), which permits witnesses to disclose grand jury information. Because Rule 6(e) does not restrict disclosure by witnesses, courts have prohibited government attorneys from instructing witnesses that they may not disclose information pertaining to their own appearance before the grand jury. OPR initiated an inquiry and concluded that the evidence did not support a finding that the DOJ attorney instructed the witness not to disclose the existence of the grand jury subpoena. Instead, written communications reviewed by OPR indicated that the DOJ attorney asked the witness to keep the matter confidential but did not prohibit him from disclosing the existence of the subpoena. Because the DOJ attorney never prohibited the witness from disclosing the subpoena, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Misrepresentation/Misleading the Court.* Defense attorneys representing a company charged with falsifying environmental test results alleged that a DOJ attorney engaged in improper communications with the agency responsible for interpreting the environmental standards at issue. Defense attorneys also alleged that the DOJ attorney misled the court about the impartiality of the opinion issued by the agency. OPR initiated an inquiry and found several e-mail communications between the DOJ attorney and the agency. The e-mails revealed, in part, that the DOJ attorney reviewed a draft of the agency's opinion. Notwithstanding these communications, the agency filed an affidavit with the court attesting that the DOJ attorney did not influence the agency's final opinion. The court, after reviewing the evidence, declined to make a misconduct finding against the DOJ attorney. Because the court was adequately briefed on the misconduct allegations and made no determination that the DOJ attorney acted inappropriately, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Unauthorized Disclosure to the Media.* A DOJ component reported to OPR that a DOJ attorney may have disclosed confidential prosecutorial and investigative information about an investigation to an author. The information appeared in the author's book about the investigation, and the DOJ attorney was identified as a source of information for the book. OPR initiated an inquiry and reviewed the book as well as a written response to the allegations from the DOJ attorney. The DOJ attorney adamantly denied that he was the source of any improper disclosure. OPR also spoke with the DOJ attorney's supervisors and found that the supervisors had authorized the DOJ attorney to speak to the author without prohibitions regarding such communications. OPR further determined that the information in the book could have come from many sources, not just the DOJ attorney, because the author had numerous

contacts in the government. Lastly, OPR determined that the information contained in the book did not compromise any ongoing investigations nor place anyone in danger. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for vouching for a witness. OPR initiated an inquiry and found that the DOJ attorney improperly vouched for the credibility of a police officer during closing argument. Defense counsel, however, did not object to the statement at trial, and OPR found that the statement was made in direct response to remarks made by defense counsel. OPR also found that although the court criticized the DOJ attorney, it determined that the defendant failed to show a reasonable probability that the jury would have ruled differently had a timely objection to the statement been made. Because the error was not prejudicial, the comment was made in the heat of trial, and the comment was made in response to remarks made by defense counsel, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding. Although OPR closed the matter, OPR referred the issue to the DOJ attorney's component for consideration in a management context.

- *Failure to Honor Plea Agreement.* A court of appeals found that the government breached a plea agreement, and that the breach prejudiced the defendants. OPR initiated an inquiry and found that a DOJ attorney offered the defendants a plea agreement that contained the wrong stipulations. Upon recognizing his mistake, the DOJ attorney immediately disclosed the mistake to the defendants and the parties worked out a way to correct the stipulations. The parties explained the agreement that they had reached to the district court on the record. On appeal, the defendants argued for the first time that the government had breached the plea agreement. The government, in turn, argued that in light of the record at trial no breach occurred. Because the DOJ attorney immediately recognized and rectified his mistakes, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Whistleblower -- Retaliation for Protected Disclosure.* An FBI employee filed a whistleblower complaint with the Department's Office of the Inspector General (OIG) alleging retaliation by FBI management. The whistleblower complaint was referred by OIG to OPR for appropriate handling. After reviewing the matter, OPR sought to schedule an interview with the whistleblower and asked that the whistleblower provide OPR with numerous documents that had been referred to in the whistleblower's complaint. Over many months, OPR made repeated requests for the documents. Although the whistleblower agreed to extend the time for OPR to investigate his claims beyond the 240-day time period allowed by the FBI whistleblower regulations, 28 C.F.R. Part 27, the whistleblower never complied with OPR's repeated

requests for documents. Finally, OPR notified the whistleblower that it would terminate the investigation unless the whistleblower responded and provided the requested information. The whistleblower never responded to OPR. Because of the whistleblower's lack of cooperation and apparent abandonment of his claims of retaliation, OPR closed this matter.

- *Improper Examination of a Witness.* An expert witness who testified at trial for the defense alleged that a former DOJ attorney engaged in misconduct in the trial in which the witness testified by implying during cross-examination that the expert witness lied on his *curriculum vitae*. The complainant offered support for the accuracy of his *curriculum vitae*. OPR initiated an inquiry and reviewed a transcript of the complainant's testimony. OPR found that although the DOJ attorney made inappropriate statements during cross-examination, defense counsel did not object, did not raise the issue on re-direct, and did not file any post-trial motions concerning the conduct. OPR also noted that the defendant appealed the verdict and thus had an opportunity to raise this issue on appeal if he so chose. OPR closed this matter because the DOJ attorney was no longer employed by the Department and further investigation was not likely to result in a professional misconduct finding, and it is OPR's policy to refrain from investigating issues or allegations that could have been or still may be addressed in the course of litigation.

- *Failure to Maintain Active Bar Membership.* A DOJ attorney failed to notify the client protection fund of his state bar when his judicial clerkship ended. Accordingly, his state bar membership status remained inactive, as it was when he was a judicial clerk, even after he began working as an attorney with the Department. OPR initiated an inquiry and found that the DOJ attorney's bar membership status remained inactive for one year, until the DOJ attorney learned that notice to the client protection fund was required in order to activate his membership. The DOJ attorney also received confusing information from the state bar that suggested he was in active status. Upon learning that there was a problem, the DOJ attorney immediately contacted his state bar and took steps to correct the situation, and the state bar retroactively changed the DOJ attorney's membership status to active as of the date his judicial clerkship ended.

OPR concluded that the DOJ attorney mistakenly believed that he was an active member of the state bar when he began working for the Department, and did not realize his mistake until one year later. OPR found no evidence that the DOJ attorney knew that his bar membership was inactive, that he intended to violate the Department's active bar membership requirement, or that he acted in reckless disregard of his obligation to comply with this requirement. OPR found that the DOJ attorney had taken steps to ensure that he was in compliance with his active bar membership requirement, and that the information provided to him by the state bar had not clearly indicated that his status was inactive. Under these unique circumstances, OPR closed this

matter because further investigation was not likely to result in a professional misconduct finding.

- *Improper Closing or Rebuttal Argument.* A court of appeals found that DOJ attorneys made improper remarks during closing argument. Despite the improper remarks, the court affirmed the conviction because the defendant's substantial rights had not been affected. OPR initiated an inquiry and determined that the statements at issue were made during the government's initial and rebuttal closing arguments by two DOJ attorneys. OPR concluded that neither DOJ attorney intended to make improper closing arguments or to otherwise deprive the defendant of a fair trial. OPR determined that the remarks by one of the DOJ attorneys during the government's initial closing argument about the witnesses' backgrounds were made in response to defense counsel's attacks on the witnesses' credibility and were an attempt by the DOJ attorney to demonstrate the witnesses' training and expertise. In making the remarks, the DOJ attorney did not allude to facts outside of the evidentiary record or provide the jury with his personal opinion. As to the rebuttal closing argument made by the other DOJ attorney, OPR determined that the remarks were inappropriate and constituted deficient performance. However, OPR found that the statements did not rise to the level of professional misconduct. OPR noted that the DOJ attorney's rebuttal remarks were made in the heat of argument and without time for reflection. Moreover, they were made in direct response to defense counsel's closing argument and did not deprive the defendant of a fair trial. OPR referred the matter to the DOJ attorney's component for handling in a management context.

- *Improper Examination of a Witness.* A court of appeals criticized a DOJ attorney for his cross-examination of a defense expert about information that had not been admitted into evidence. Although criticizing the DOJ attorney, the court determined that reversal was not warranted because any error was harmless in light of the jury instructions and an otherwise strong government case. OPR initiated an inquiry and found that the defendant raised the claims of prosecutorial misconduct at trial and that the district court rejected the claims. OPR also found that no other case in the circuit had addressed whether an expert may be cross-examined based on inadmissible evidence, and the Federal Rules of Evidence do not preclude such questioning. Moreover, other circuits that had addressed the issue found such questioning to be proper. OPR determined that the DOJ attorney thus did not violate a clear and unambiguous rule or law. Under these unique circumstances, OPR closed this matter because further inquiry was not likely to result in a professional misconduct finding.

- *Misrepresentation/Misleading the Court.* A district court issued an order disqualifying a DOJ attorney from further representing the government in a criminal case on the grounds that the DOJ attorney had misrepresented evidence sought to be introduced against the defendant under Federal Rule of

Evidence 404(b), and failed to correct it in a timely manner. The defendant subsequently pled guilty. OPR initiated an inquiry and found that the alleged misrepresentation related to a proffer that the DOJ attorney made regarding the expected testimony of a government witness. OPR reviewed the allegations and the evidence, including pleadings, transcripts, and written opinions. Based on its review, OPR concluded that the DOJ attorney did not intend to mislead the court or the defendant, and that the DOJ attorney's misrepresentation of the expected testimony resulted from a misunderstanding. The government otherwise had consistently and accurately represented the nature of the evidence to the court and to the defendant. OPR's review of the record also indicated that the defendant accurately understood the 404(b) evidence before he pled guilty and that his guilty plea had not been involuntary or coerced. OPR noted that the court found that the DOJ attorney did not intentionally mislead the court or the defendant; that the defendant was aware of the government's mistake; and that the matter would have been resolved on the record during the 404(b) hearing had the defendant not waived his right to the hearing and pled guilty. Under these circumstances, OPR closed this matter because further investigation was not likely to lead to a professional misconduct finding.

- *Failure to Comply with Court Order or Federal Rule.* A district court declared a mistrial after a jury was unable to reach a verdict in a case involving the possession of a stolen firearm. The defendant was later re-tried and convicted. Shortly before re-trial and ten months after the mistrial, OPR received an anonymous letter alleging that the DOJ attorney who handled the firearm case improperly discussed the case with at least two jurors from the first trial immediately after the judge discharged them from service. OPR initiated an inquiry.

The DOJ attorney informed OPR that following the mistrial, a juror approached him outside the courthouse. The DOJ attorney informed the juror that he could not speak to him because it was prohibited by the court's rules. The juror told the DOJ attorney that the judge had authorized the juror to speak to the DOJ attorney and had given him the DOJ attorney's contact information. The DOJ attorney asked the juror whether the judge expressly stated that the juror should talk to him, and the juror confirmed that the judge had done so. The juror then began to report to the DOJ attorney his concerns about potential jury misconduct. In addition, the DOJ attorney said that while he was speaking with the juror, the judge drove by and stopped his car, rolled down his window, and told them not to stay in the parking lot talking all night. Based on that encounter, the DOJ attorney concluded that the judge knew about, did not object to, and had permitted the juror's conversation with him. The DOJ attorney stated that although he did not believe that he had violated any ethical rule or rule of professional conduct by speaking to the juror under these circumstances, he nevertheless reported the incident to his supervisors the following morning, and they concurred with his view that he had acted

appropriately. OPR was unable to speak to the judge to confirm the DOJ attorney's account because the judge had died. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Failure to Comply with Court Order or Federal Rule.* A district court found that a DOJ attorney violated a court order by communicating with another DOJ attorney who had been designated to address mental health issues that could be relevant in sentencing and who had been "walled-off" from the underlying prosecution of the defendant. OPR initiated an inquiry and found that the court issued an order precluding communications between the DOJ attorneys prosecuting the case and the DOJ attorney involved with the mental health issues. OPR found that although the DOJ attorney violated the court's order by briefly communicating with the walled-off DOJ attorney shortly after the court's order was issued, there was no evidence that the DOJ attorney acted intentionally to violate the order. Nor did OPR find any credible evidence that by contacting the walled-off attorney, the DOJ attorney attempted to obtain substantive information to which the trial team was not entitled. OPR found, instead, that the DOJ attorney's failure to learn of and read the court's recently issued order resulted in an inadvertent and isolated violation of the court's order that did not lead to release of substantive information or any prejudice to the defendant. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Failure to Abide by Disclosure Obligations.* DOJ attorneys reported to OPR that in responding to a defendant's motion for a judgment of acquittal in a naturalization and visa fraud case, it became apparent that notes from an interview of the government official who processed and approved the defendant's immigrant visa application had not been disclosed. This omission, the DOJ attorneys stated, may have constituted a *Brady* violation. Upon discovering the omission, the government moved to set aside the verdict as to the visa fraud charge and to dismiss the indictment with prejudice. The court granted the government's motion. OPR initiated an inquiry and determined that the interview notes constituted *Brady* material only if materiality of a misrepresentation was an element of the visa fraud charge. OPR found that the DOJ attorneys reasonably believed that the visa fraud charge did not require proof of materiality. First, there was little case law interpreting the visa fraud statute, and the existing case law did not mandate materiality as an element. Second, under a plain language interpretation of the statute, materiality did not appear to be required. Third, the jury instructions proposed by defense counsel and adopted by the court did not mention materiality as an element of the statute. Defense counsel first identified materiality as an element of the statute after trial. Because it was not clear and unambiguous that materiality was a required element of the visa fraud charge, there similarly was no clear and unambiguous duty to disclose the interview notes under

these circumstances. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Brady; Attorney-Client Privilege; False Testimony.* A defendant who had been convicted at trial filed complaints with the state bar against three DOJ attorneys who were involved in his prosecution. In the bar complaints, the defendant accused the DOJ attorneys of, among other things, violating the attorney-client privilege by recording and listening to phone calls between the defendant and his lawyers while the defendant was in jail; and coaching a law enforcement witness to lie during his testimony. Upon being notified of the complaints, OPR initiated an inquiry and found that the allegations largely were addressed and denied by the district court, were addressed and denied by the state bar and state supreme court, or otherwise lacked merit. Significantly, OPR found that an order issued by the district court refuted many of the allegations that the defendant made in his complaints to the state bar. In its order, the court found that: (1) the DOJ attorneys did not improperly invade the defendant's attorney-client privilege by listening to his telephone calls with non-retained counsel; and (2) there was no evidence of misconduct relating to the law enforcement witness' testimony. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

- *Whistleblower – Retaliation for Protected Disclosure.* The OIG referred to OPR a claim under the FBI whistleblower regulations that an FBI employee had suffered retaliation for testifying against a supervisor and cooperating in an Equal Employment Opportunity (EEO) matter. OPR initiated an inquiry. After reviewing the matter, OPR terminated its inquiry because it found no evidence that the FBI employee had made a protected disclosure to one of the nine Department of Justice/FBI officials or components designated in the FBI whistleblower regulations to receive protected disclosures. OPR also found that the FBI employee had failed to allege a violation of law, rule or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health, which is a jurisdictional requirement of 28 C.F.R. § 27.1(a). Accordingly, OPR advised the whistleblower that OPR was terminating its inquiry.

Summaries for Investigations Closed in Fiscal Year 2012

The following are examples of investigations closed by OPR during Fiscal Year 2012.

- *Brady Violation; Failure to Keep Supervisor Informed.* A DOJ attorney advised OPR that a court granted the defendant's motion for a new trial on the ground that a DOJ attorney failed to disclose material exculpatory evidence in violation of *Brady*. OPR conducted an investigation and found that the DOJ attorney failed to disclose information from a non-testifying witness that

contradicted the testimony of a key government witness regarding the defendant's actions, as well as discrepancies concerning the clothing that the defendant wore on the day of the crime. OPR also found that the DOJ attorney failed to disclose information provided by the non-testifying witness that implicated the government witness in the crime for which the defendant was charged. Although the DOJ attorney alleged that his supervisor was aware of and agreed with the DOJ attorney's conclusion that the information implicating the government witness in the crime need not be disclosed, OPR determined that the DOJ attorney had not provided his supervisor with critical facts that revealed the exculpatory nature of the evidence.

OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligations arising under the constitution, state bar rules, and Department policy to disclose to the defense evidence that is material and favorable to the accused. OPR also concluded that the DOJ attorney exercised poor judgment by failing to inform his supervisor of critical facts when he sought the supervisor's advice regarding the government's disclosure obligations.

OPR referred its finding of professional misconduct to the PMRU. The PMRU affirmed OPR's finding of professional misconduct and imposed a 10-day suspension. OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context. OPR has notified the appropriate state bar of DOJ's professional misconduct findings.

- *Discovery Violations; Candor to the Court.* A DOJ attorney advised OPR of an adverse court decision in which the court criticized the DOJ attorney for failing to disclose information that a key government witness expected to receive a substantial reward following his testimony at trial. The court also found that the DOJ attorney failed to disclose information that a witness claimed that the defendant was known to possess a gun of a different caliber than the weapon used in the crime. As a result of the discovery violations, the court granted the defendant a new trial. In its opinion, the court also criticized the DOJ attorney for making misrepresentations and engaging in a pattern of discovery violations.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct with respect to the two findings that formed the basis for the court's decision to grant the defendant a new trial. OPR determined that the evidence was insufficient to support a conclusion that the DOJ attorney was aware of the witness' expectation that he would receive a reward. OPR also determined that the witness' knowledge about the defendant's possession of a handgun, different in caliber from the weapon used in the crime, did not constitute material exculpatory evidence that the government was required to disclose. The witness provided no information that was inconsistent with the defendant's possession of the murder weapon.

OPR also reviewed the DOJ attorney's representations to the court that the government had no evidence that a key witness suffered from or had been diagnosed with a mental health disorder, and that the government's assertion was based in part on a search of the witness' mental health records. OPR concluded that the DOJ attorney committed intentional professional misconduct in violation of his duty of candor to the court because the DOJ attorney knew, but did not disclose, that the witness had revealed that he previously had been diagnosed with a mental health illness, and that the government possessed evidence indicating that the witness suffered from an ongoing mental health disorder.

With respect to OPR's investigation of other discovery disputes and misrepresentations relating to the DOJ attorney's conduct, OPR concluded that the DOJ attorney exercised poor judgment by: (1) failing to timely disclose the identity of an exculpatory witness and the information that he provided; (2) failing to timely disclose to the defense a tape recording of the crime despite repeated defense requests for the information; (3) testifying in a hearing that he had no familiarity with a reward program when in fact he was aware of the program but was not familiar with its details; and (4) failing to provide accurate information in response to the court's inquiries regarding when the government had disclosed certain information.

OPR referred its professional misconduct findings to the PMRU. The PMRU concluded that based on information that the DOJ attorney provided to it, the DOJ attorney did not commit intentional professional misconduct but rather acted in reckless disregard of his obligation of candor to the court. The Department imposed a 14-day suspension. OPR referred its findings of poor judgment to the DOJ attorney's component for consideration in a management context. OPR has notified the appropriate state bar of DOJ's professional misconduct findings.

- *Conflicting Personal Interest; Improper Contacts with Represented Person; Failure to Competently Represent the Interests of the Client; Failure to Keep the Client Reasonably Informed.* A DOJ attorney reported to OPR that he had formed a personal relationship with a defendant in a case that he was prosecuting. OPR conducted an investigation and found that during the pendency of the case and without the consent of the defendant's lawyer, the DOJ attorney and defendant had numerous personal contacts, including text messages and lengthy phone calls, some of which related to the case. OPR also found that the DOJ attorney failed to inform his supervisors that the defendant would plead guilty, or that the DOJ attorney had negotiated a plea agreement permitting release of the defendant from custody and including ongoing cooperation.

OPR determined that the DOJ attorney committed: (1) intentional professional misconduct by discussing the ongoing criminal case with the

defendant without defense counsel's consent; (2) intentional professional misconduct by deliberately concealing these communications from defense counsel; (3) misconduct in reckless disregard of the DOJ attorney's professional obligations by failing to disclose to his client that a close personal relationship had developed between the DOJ attorney and the defendant; (4) intentional professional misconduct by failing promptly to communicate to the DOJ attorney's supervisors the defendant's offer to plead guilty; and (5) intentional professional misconduct by failing to keep supervisors reasonably informed of his decision to arrange for the defendant's release on bond.

OPR referred its findings of professional misconduct to the PMRU, which has this matter under review.

- *Violation of Speedy Trial Act; Failure to Keep Client Informed.* A DOJ component reported to OPR that a DOJ attorney violated the Speedy Trial Act (STA) by failing to indict or dismiss a case within 30 days of filing a complaint. The component also alleged that the DOJ attorney did not inform his supervisors of the STA violation.

OPR conducted an investigation and found that six weeks after the STA deadline passed, the district court ordered the government to show cause why the pending complaint should not be dismissed for want of prosecution. On the eve of the court's show cause deadline, the DOJ attorney moved for dismissal of the complaint without prejudice, and the motion was granted. The DOJ attorney told OPR that he did not pursue the case within the requisite 30-day period because he was engaged in plea negotiations with defense counsel and he believed that the STA deadline had been tolled by mutual agreement. The evidence that OPR gathered during its investigation, however, did not support the notion that the STA deadline had been tolled by mutual agreement, or that there were active plea negotiations. OPR found that the DOJ attorney never told his supervisor that the STA case was dismissed, much less that he had moved for its dismissal.

OPR concluded that by failing to pursue the case in a timely manner, the DOJ attorney engaged in professional misconduct in reckless disregard of the STA and his obligation to meet legal deadlines. OPR also concluded that in failing to keep his supervisors apprised, the DOJ attorney engaged in professional misconduct in reckless disregard of his obligations to abide by the client's decisions, consult with supervisors, and keep supervisors reasonably informed.

OPR referred its professional misconduct findings to the PMRU. Before the PMRU took any action regarding the matter, however, the DOJ attorney resigned. The PMRU upheld OPR's findings, and the matter has been referred to the appropriate state bar.

- *Failure to Maintain Active Bar Membership; Failure to Comply with DOJ Rules and Regulations.* A DOJ component reported to OPR that a DOJ attorney's active bar membership had been suspended because of a failure to pay bar dues.

OPR determined that the DOJ attorney did not intentionally fail to maintain an active bar membership or mislead DOJ about his bar membership status. In coming to this determination, OPR noted that the DOJ attorney reported his suspension to his supervisor soon after discovering it and took measures to promptly reinstate his active membership. The DOJ attorney stated to OPR that he believed another person had paid his bar membership dues. Although unintentional, OPR determined that by failing to maintain an active bar membership between 2007 and 2010, the DOJ attorney engaged in professional misconduct in reckless disregard of his obligation to maintain an active membership in at least one state bar. OPR also determined that the DOJ attorney acted in reckless disregard of his professional obligations by asserting in his annual DOJ bar certifications that he was an active member of the bar, when he was not.

OPR referred this matter to the DOJ attorney's component for disciplinary action, with a recommended range of discipline from a written reprimand to a three-day suspension. The component issued a written reprimand to the DOJ attorney.

- *Discovery Violations.* OPR learned that a district court criticized the government for its discovery responses and failure to produce information in a civil case. As sanctions, the court granted attorneys' fees and costs to the plaintiffs.

OPR conducted an investigation and concluded that two DOJ attorneys engaged in professional misconduct by acting in reckless disregard of their obligations to truthfully and completely answer requests for documents and requests for admissions. In particular, OPR found that the DOJ attorneys committed professional misconduct by failing to reconsider whether the law enforcement privilege applied to a document that otherwise was responsive to a request for documents. The DOJ attorneys continued to maintain that the privilege applied, and thus the report need not be disclosed, despite legitimate questions and concerns raised by other DOJ attorneys about the applicability of the privilege to the document. OPR found that the DOJ attorneys also committed professional misconduct by providing incomplete and misleading responses to the plaintiffs' request for admissions. Allegations of misconduct were raised concerning other DOJ attorneys in the matter; however, OPR determined that none of these attorneys had engaged in professional misconduct.

OPR referred its findings to the PMRU; however, the DOJ attorneys retired from DOJ prior to the PMRU resolving the matter. The PMRU determined as to one attorney that there was an insufficient basis for a misconduct finding and is considering whether a referral to the applicable state bar is appropriate for the other DOJ attorney.

- *Failure to Comply with Wiretap Requirements.* A DOJ component reported to OPR that a DOJ attorney had failed to comply with the requirements of the federal wiretap statute in connection with his supervision of wiretaps in an Organized Crime and Drug Enforcement Task Force investigation. The DOJ attorney allegedly failed to seek judicial sealing of the wiretap evidence in a timely manner.

OPR concluded that the DOJ attorney acted in reckless disregard of his obligation to seal the wiretap evidence in a case “immediately,” as required by statute, by repeatedly failing to seek a sealing order immediately upon the expiration of the authorizing orders. OPR also concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his duty to provide competent representation to his client, the United States.

OPR referred its findings of professional misconduct to the PMRU. The PMRU affirmed OPR’s findings of professional misconduct and imposed a one-day suspension. OPR notified the appropriate state bar of its professional misconduct findings.

- *Failure to Maintain an Active Bar Membership; Failure to Comply with DOJ Rules and Regulations; Unauthorized Practice of Law.* A DOJ component reported to OPR that a DOJ attorney was not an active member of any state bar from 2009 to 2011. The DOJ attorney changed his bar membership from “active” to “inactive” on his June 2009 state bar registration statement and did not change his membership back to active until February 2011. During this time period, the DOJ attorney certified on his DOJ annual bar certification forms that he was an active member of at least one state bar.

OPR determined that the DOJ attorney committed professional misconduct in reckless disregard of his obligations under law and DOJ policy by failing to maintain an active bar membership from 2009 to 2011. OPR determined that the DOJ attorney did not act intentionally because he changed his bar status as a result of a misunderstanding about his state bar’s registration materials. OPR found that the DOJ attorney had a genuine, albeit erroneous and unreasonable, belief that his inactive bar membership still authorized him to practice law outside of his state of licensure. Although unintentional, OPR determined that the DOJ attorney should have known that changing his bar membership to inactive would violate his obligation to maintain an active membership in at least one state bar, and as such constituted reckless misconduct.

OPR similarly concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his professional obligation to comply with Department policy when he asserted on his annual DOJ bar certification forms that he was an active member of his state bar when he was not. OPR also found that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligation to comply with his state bar's rule of professional conduct prohibiting the unauthorized practice of law when he represented DOJ in litigation in various states in which the district courts' local rules required him to possess an active bar membership in order to appear in court.

The DOJ attorney resigned from the Department while OPR's investigation was pending. Upon approval of the Office of the Deputy Attorney General, which sustained OPR's findings, OPR notified the appropriate state bar of DOJ's professional misconduct findings.

- *Ex Parte Communications; Unauthorized Disclosures.* A DOJ component reported to OPR that a DOJ attorney, after being removed from a criminal case by his supervisor, initiated *ex parte* communications with the district court and disclosed confidential information without the knowledge or consent of his supervisor.

OPR conducted an investigation and found that the DOJ attorney conducted *ex parte* communications with the court. Moreover, OPR found that during those communications, the DOJ attorney made misconduct allegations against other DOJ attorneys and informed the court about inculpatory evidence against the defendant. Although OPR found that the evidence was inconclusive as to whether the DOJ attorney had been removed from the case by his supervisor prior to his *ex parte* communications with the court, OPR found that the DOJ attorney had not obtained supervisory approval prior to making *ex parte* communications with the court, which was required under these circumstances. OPR concluded that by engaging in *ex parte* communications with the court without supervisory approval, and disclosing confidential and inculpatory information relating to the case during such communications, the DOJ attorney committed intentional professional misconduct in violation of the rules of professional conduct.

OPR referred its findings of professional misconduct to the PMRU. The PMRU affirmed OPR's findings of professional misconduct and imposed a five-day suspension. OPR notified the appropriate state bar of DOJ's findings of professional misconduct.

- *Unauthorized Disclosures to the Media; Misrepresentations to the Client.* A DOJ component asked OPR to investigate the unauthorized disclosure of an internal DOJ document to the media. In the course of its investigation, OPR

also learned of allegations that a DOJ attorney misled his supervisor about that unauthorized disclosure.

OPR found that the DOJ attorney authorized the disclosure of the internal document to the media without first obtaining his client's consent. OPR also found that when questioned about that disclosure by a supervisor, the DOJ attorney misled the supervisor about his role and the roles of others in the disclosure. OPR concluded that the DOJ attorney committed intentional professional misconduct in violation of his duties to consult with his client concerning media disclosures and to keep his client reasonably informed concerning the matter.

Because the DOJ attorney resigned from DOJ prior to the conclusion of OPR's investigation, no discipline was imposed in this matter. With the approval of the Office of the Deputy Attorney General, which sustained OPR's findings, OPR notified the appropriate state bar of OPR's professional misconduct findings.

- *Unauthorized Disclosure to the Media; Improper Coercion of a Witness.* A DOJ component reported to OPR that a DOJ attorney provided information to a newspaper reporter about an ongoing investigation, in violation of the Department's policy on communications with the media. OPR initiated an investigation. While the OPR investigation progressed, the government proceeded to trial in the case. At the conclusion of one of the defendant's trials, the district court dismissed the charges because it found that the government violated the defendant's Sixth Amendment rights, did not present sufficient evidence to support a conviction, and coerced witness testimony. While the Department appealed the court's decision, defense counsel publicly criticized the DOJ attorney. The DOJ attorney commented on the criticism to a newspaper reporter. OPR expanded its investigation to include the district court's criticism and the DOJ attorney's additional comments to the media.

OPR conducted an investigation and concluded that in disclosing information about the ongoing investigation to the media, the DOJ attorney committed professional misconduct by acting in reckless disregard of Department policy prohibiting disclosures of information relating to active investigations. OPR also concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of Department policy when he responded to defense counsel's post-trial criticism by making a statement to a newspaper reporter. The DOJ attorney did so without first consulting with a supervisor, and after he had been admonished not to make inappropriate remarks to the media. OPR further concluded that the DOJ attorney exercised poor judgment in suggestions he made to counsel for a witness concerning the witness' direct and cross-examination. As to the remaining criticisms by the district court, OPR found that the prosecuting DOJ attorneys acted appropriately.

OPR referred its findings of professional misconduct to the PMRU. The PMRU reviewed OPR's findings and found that the DOJ attorney did not commit professional misconduct when he provided information to the media about the ongoing investigation. The PMRU found that contacts with the media were condoned and actively encouraged by the DOJ attorney's office, and that the DOJ attorney had not received training on Department policy regarding communications with the media. The PMRU affirmed OPR's other finding of professional misconduct and imposed a one-day suspension. OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

- *Bias, Appearance of Partiality; Conflict of Interest; Violation of an Alien's Due Process Rights.* A DOJ component informed OPR of allegations of professional misconduct made by an immigration attorney against an Immigration Judge (IJ). The allegations arose out of the IJ's conduct in two cases where a father and his minor daughter were contesting removal proceedings. The IJ was alleged to have participated inappropriately in a state court proceeding involving the father and daughter, conducted proceedings without their lawyer present, and later required the state court lawyer to enter an appearance in the immigration matter, over the attorney's objection.

OPR conducted an investigation and concluded that the IJ: (1) engaged in intentional professional misconduct by failing to recuse himself from the immigration cases as a result of his bias in the matters as evidenced through his conduct and statements made in the state court proceedings; (2) engaged in professional misconduct by acting in reckless disregard of his authority as an IJ when he participated in the state court proceedings; (3) engaged in professional misconduct by acting in reckless disregard of his obligation to give proper notice of a removal hearing; (4) engaged in professional misconduct by acting in reckless disregard of his obligation to appear to be fair and impartial in the administration of justice when he remarked on the testimony and evidence in the state court proceedings and made disparaging remarks about foreign nationals; (5) engaged in professional misconduct by acting in reckless disregard of immigration court practice and procedure that required a written notice of appearance before an attorney could represent an alien; and (6) engaged in professional misconduct by acting in reckless disregard of immigration court practice and procedure when he had copies of the notice of appearance from one case placed into the court's files in another immigration case.

OPR referred the matter to the Executive Office for Immigration Review (EOIR) and recommended a range of discipline from a seven-day suspension to termination. EOIR affirmed OPR's findings and imposed a 30-day suspension.

- *Failure to Maintain Active Bar Membership; Failure to Comply with DOJ Rules and Regulations.* A DOJ attorney reported to OPR that he changed his

state bar membership status from “active” to “inactive” in June 2011, and he remained in inactive status until he changed his status back to active in October 2011. The DOJ attorney was not an active member of any other state bar during this time.

OPR conducted an investigation and determined that the DOJ attorney failed to maintain an active bar membership from June 2011 to October 2011. OPR concluded that the DOJ attorney did not intentionally fail to maintain an active bar membership. OPR credited the DOJ attorney when he stated that in mid-2011, as the deadline for completing his continuing legal education (CLE) requirements approached, he contacted his state bar because he did not believe that he could complete the requisite courses by the deadline. Upon contacting his state bar, the DOJ attorney was advised to switch his bar membership to inactive status, which would allow him to avoid the CLE requirement, while he completed the CLE courses. The DOJ attorney did as the state bar advised, without considering the DOJ requirement that he maintain an active bar membership. Under these circumstances, OPR concluded that the DOJ attorney did not intentionally violate the Department’s rule, but rather acted in reckless disregard of his obligation to maintain an active bar membership.

OPR referred its finding of professional misconduct to the DOJ attorney’s component, with a recommended range of discipline from a written reprimand to a one-day suspension. The DOJ attorney was issued a letter of reprimand.

- *Failure to Competently Represent the Interests of the Client; Failure to Adequately Communicate with the Client; Failure of Supervision.* A DOJ attorney and his supervisor (DOJ supervisory attorney) reported to OPR that they failed to file criminal charges in a case within the statute of limitations period.

OPR conducted an investigation and determined that the case was assigned to the DOJ attorney fifteen months prior to the expiration of the statute of limitations. After doing an initial review of the investigative file, the DOJ attorney reported to the DOJ supervisory attorney that he did not believe that there was a viable criminal case to prosecute. The DOJ supervisory attorney was not convinced and asked the DOJ attorney to review the case again. The statute of limitations subsequently expired. In explaining his failure to assess again the viability of charges within the statute of limitations, the DOJ attorney told OPR that because of the nature of the offense, he mistakenly believed that another, longer statute of limitations applied.

OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation to competently represent his client when he failed to research the applicable statute of limitations. OPR found that the applicable statute of limitations was clear and

unambiguous and that the DOJ attorney had an obligation to be familiar with it. OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation to inform his client about the impending expiration of the limitations period so that the government could make an informed decision as to whether to proceed with the criminal prosecution before the statute of limitations expired.

Finally, OPR concluded that the DOJ supervisory attorney did not commit professional misconduct because there was no clear and unambiguous standard requiring a supervisory attorney to keep track of the applicable limitations period for all of the cases that he supervises. Although not misconduct, OPR concluded that the DOJ supervisory attorney exercised poor judgment by failing to take sufficient steps to ensure that he continued to effectively supervise the progress of the investigation.

OPR referred its findings of professional misconduct against the DOJ attorney to the PMRU. The PMRU affirmed OPR's findings of professional misconduct and issued a letter of admonishment. OPR has notified the appropriate state bar of OPR's findings of professional misconduct. OPR referred its finding of poor judgment against the DOJ supervisory attorney to the DOJ supervisory attorney's component for consideration in a management context.

- *Failure to Comply with the Federal Rules of Criminal Procedure.* During trial, a DOJ attorney offered into evidence two documents produced by a witness at trial. The defense objected on the ground that the documents had not been produced in discovery. The court overruled the objection and admitted the documents based on the DOJ attorney's representation that the documents were not in the government's possession until the witness produced them at trial. During a recess in the trial, the DOJ attorney and the case agent reviewed the agency file and discovered that the two documents in question were in the agency file all along and should have been produced in response to a discovery request. The DOJ attorney promptly informed the court, which declared a mistrial. As a sanction for the discovery violation, the court precluded the government from using the two documents at any retrial. Following the court's ruling, the government voluntarily dismissed the case because the documents at issue were essential to the government's proof of the charged offense.

OPR conducted an investigation and determined that the DOJ attorney had made efforts to obtain all discoverable material from the investigative agency, including traveling to the agency to review the file himself, and thus did not commit professional misconduct or exercise poor judgment with regard to discovery. OPR found, however, that the DOJ attorney should have known that these or similar documents, which reflected the transactions on which the crime was predicated, would be necessary to the proof of the government's

case. Without this type of documentary evidence, the government could not prove the charged offense. Thus, OPR found that the DOJ attorney should have recognized the need for this type of documentation and should have obtained the documents and provided them to the defense. OPR concluded that while the DOJ attorney did not violate any clear and unambiguous obligation, and therefore did not commit professional misconduct, the DOJ attorney exercised poor judgment by failing to take the necessary steps to determine what documentary evidence was necessary to sustain the charge against the defendant. OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

- *Failure to Abide by Disclosure Obligations; Bad Faith Prosecution; Misrepresentations to Defense Counsel.* A DOJ component forwarded to OPR complaints from a defense attorney alleging that DOJ attorneys had engaged in professional misconduct in their handling of a case. Among the allegations raised by the defense attorney were that the prosecution had been brought in bad faith and was supported by insufficient evidence. The defense attorney further alleged that the government failed to meet its disclosure obligations and that DOJ attorneys had made misrepresentations while handling the case.

OPR conducted an investigation and determined that the DOJ attorneys did not engage in professional misconduct but made a mistake in the failure to disclose certain documents. OPR uncovered insufficient evidence to conclude that the case had been brought in bad faith, and instead determined that the government had presented sufficient evidence to meet the elements of the charged offenses. OPR determined that the DOJ attorneys had not made misrepresentations to the defense attorney and that they were not required to disclose certain materials that the defense attorney claimed were producible. Instead, OPR concluded that the DOJ attorneys made a mistake by failing to disclose certain documents that could have been material to the preparation of the defense.

- *Discovery Violation; Presentation of Perjured Testimony.* OPR learned that a district court declared a mistrial in a criminal case upon finding that a DOJ attorney committed a discovery violation by failing to disclose that a witness had disavowed a statement that appeared in a case agent's report. The witness originally stated that he saw the defendant commit the charged crime, but subsequently recanted. The case was retried and the defendant was convicted. The defendant appealed, alleging that an agent testified falsely when he stated that he spoke directly with the witness. The court of appeals abated the appeal and remanded the case to the district court to determine whether the case agent testified falsely. On remand, the defendant withdrew his perjury allegation in exchange for a guilty plea to a lesser offense and was sentenced to time-served.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct by failing to disclose that the witness had disavowed a statement in the agent's report because the DOJ attorney did not have a clear and unambiguous obligation to do so, given that the witness did not testify at trial inconsistently with his prior statement. Although not misconduct, OPR found that the DOJ attorney should have promptly notified the defendant of mistakes in previously-disclosed reports. By failing to alert the defendant to the witness' changed story, OPR concluded that the DOJ attorney exercised poor judgment. OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

OPR also concluded that the case agent did not commit professional misconduct. Although the case agent inaccurately testified at a pre-trial hearing that he spoke directly to the witness, OPR found that the error arose from the agent's inartful attempt to protect the identity of a paid confidential informant. Although not misconduct, OPR concluded that the case agent exercised poor judgment by providing inaccurate testimony. OPR found that the agent had a duty to ensure that his testimony was accurate and complete, and in trying to protect the identity of the confidential informant, he failed to do so. OPR referred its finding of poor judgment to the agent's component for consideration in a management context.

- *Presentation of False Testimony.* A district court criticized a DOJ attorney for eliciting false testimony from a government witness. The witness testified that he did not receive any promises from the government. The government, however, provided the witness with two immunity letters, one after the witness testified in the grand jury and the other when he was debriefed by the government. The court found that the letters constituted a promise of immunity and that the witness' testimony left a false impression. The court ultimately concluded that the false testimony was not material and that the DOJ attorney did not violate the defendant's due process rights.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct. This finding was consistent with the finding made by the district court. OPR credited the DOJ attorney when he stated that he had intended only to ask whether the witness had received any monetary or tangible benefits from the government and whether any promises had been made to the witness' family. OPR also credited the DOJ attorney when he stated that he believed that the witness' answer was a truthful response to the question that he had intended to ask. Because the applicable state bar rule prohibits attorneys from knowingly offering false evidence, OPR found that the DOJ attorney's unintentional presentation of false evidence did not clearly and unambiguously violate the governing rule of professional conduct.

Although the DOJ attorney's conduct did not constitute misconduct, OPR determined that the DOJ attorney exercised poor judgment by inadvertently eliciting false testimony from the witness. OPR found that the DOJ attorney demonstrated a marked lack of attention when questioning the witness about whether he had received any promises from the government, and that the DOJ attorney's inattentiveness led to the presentation of false testimony. Because the DOJ attorney retired from the Department before OPR completed its investigation, OPR did not refer its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

- *Improper Legal Argument.* A district court found that an argument that the government made in defense of the plaintiffs' claims in a civil case against the government was made in bad faith. Accordingly, the court granted attorneys' fees to the plaintiffs.

OPR conducted an investigation. During the pendency of OPR's investigation, the court of appeals issued an opinion reversing the district court. The court of appeals found that the government's assertion was supported by state law and, as such, was not baseless. The court of appeals also found that the government did not open itself up to sanctions by merely raising a legal defense. Based on the court of appeals' opinion and OPR's own research and analysis, OPR determined that the DOJ attorneys who defended the case did not commit professional misconduct or exercise poor judgment.

- *Failure to Abide by Court Order; Inappropriate Relationship with a Witness.* A DOJ component reported to OPR that a DOJ attorney may have violated a court order recusing him from actively participating in the case by continuing to accept telephone calls from a witness in the case. The DOJ component also reported that the DOJ attorney who inherited the case from the first DOJ attorney may have developed a personal, platonic relationship with the witness.

OPR conducted an investigation and concluded that neither DOJ attorney committed professional misconduct. As for the first DOJ attorney, OPR found that the court's order recusing the attorney from the case did not clearly and unambiguously proscribe the conduct engaged in by the attorney. OPR determined that the court's order was susceptible to various interpretations, and the DOJ attorney's belief that he could continue to communicate with the witness was not objectively unreasonable. However, OPR determined that the DOJ attorney exercised poor judgment by accepting calls from the witness after the recusal order had been entered because the DOJ attorney put himself at risk of violating the order.

As for the second DOJ attorney, OPR found that the DOJ attorney did not commit professional misconduct but also exercised poor judgment by developing a personal, platonic relationship with the witness. OPR also found

that the DOJ attorney exercised poor judgment by making offensive statements to the witness about the district court judge and defense attorney.

OPR referred its findings of poor judgment to the DOJ attorneys' components for consideration in a management context.

- *Brady Violation; Improper Closing Remarks.* A DOJ attorney reported to OPR that he failed to disclose to the defense in a criminal case a cooperating witness' plea agreement. The DOJ attorney also reported to OPR that during his closing argument, he suggested that the witness was credible because he was not seeking any future benefit from his testimony at trial. This assertion referred to facts not in evidence and was inconsistent with the witness' undisclosed plea agreement, which contemplated a reduction of sentence under Federal Rule of Criminal Procedure 35(b).

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct but rather made a mistake by failing to disclose the witness' plea agreement. OPR found that the DOJ attorney's failure to disclose the plea agreement was an oversight and that he had disclosed information to put the defense on notice that there was a plea agreement for the witness. For example, the DOJ attorney referenced the witness' plea agreement in the government's trial memorandum filed with the court. OPR concluded, however, that the DOJ attorney exercised poor judgment when he made statements in closing argument that were inconsistent with the witness' plea agreement and outside the evidentiary record.

OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

- *Misrepresentations to Defense Counsel.* OPR learned that a court of appeals criticized a DOJ attorney for lack of candor in dealing with defense counsel. The court found that the DOJ attorney should have been more direct with defense counsel about a cooperating witness' status at trial. The court found that defense counsel, in part based on a jury instruction submitted by the DOJ attorney, mistakenly believed that the witness had been given immunity.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. OPR first considered whether the DOJ attorney told defense counsel that the cooperating witness had been immunized, which would have been a false statement, and concluded that he did not. OPR found no evidence that the DOJ attorney represented to defense counsel that the government had conferred immunity upon the witness. OPR next considered whether the DOJ attorney committed professional misconduct by violating his duty of fairness to opposing counsel

when he submitted a jury instruction that contributed to defense counsel's erroneous belief that the witness had been immunized, and concluded that he did not. OPR found no evidence that the DOJ attorney acted with the intent to mislead. Nor did OPR find that the DOJ attorney acted in reckless disregard of his duty of fairness to opposing counsel or exercised poor judgment by submitting the jury instruction. Instead, OPR found that the DOJ attorney attempted to adhere closely to the pattern jury instruction, with which the court was comfortable, while simultaneously attempting to prepare for a number of issues that might later arise at trial. By attempting to fully prepare for the way in which the trial might unfold, the DOJ attorney admittedly composed a poorly-worded jury instruction that contributed to defense counsel's misunderstanding about the witness' status. Although OPR concluded that the DOJ attorney did not commit misconduct or exercise poor judgment, OPR concluded that he made a mistake by submitting a proposed jury instruction that contributed to defense counsel's misinterpreting the witness' status.

- *Improper Examination of a Witness.* OPR learned that a court of appeals vacated the defendants' convictions and remanded for a new trial, in part, on the ground that the district court committed reversible error by admitting certain evidence. OPR conducted an investigation and found that the district court allowed the government to present the evidence over defense counsel's repeated objections. Subsequently, while the district court was considering the defendants' motion for judgment of acquittal, the court of appeals issued an opinion in another case that addressed the type of evidence that the district court had admitted. In that opinion, the court of appeals criticized the government for its continued practice of introducing this type of evidence. Based on the court of appeals' criticism of this practice, the district court issued an opinion denying the motion for judgment of acquittal, but acknowledging that the court had improperly admitted the evidence.

OPR conducted an investigation and concluded that the DOJ attorney's conduct in introducing the evidence did not warrant a professional misconduct or poor judgment finding. The district court repeatedly overruled defense objections to the evidence, thus suggesting that even the district court believed at the time that the evidence was properly presented. It was only after the court of appeals issued an opinion in another case that the district court took a different view of the matter. Although the court of appeals in this case criticized the government's presentation of the evidence, the court did not find that the DOJ attorney had engaged in prosecutorial misconduct. In light of the foregoing considerations, OPR found that the DOJ attorney's conduct constituted a mistake.

- *Failure to Comply with Principles of Federal Prosecution; Failure to Comply with Plea Agreement Policies.* A DOJ component notified OPR of possible professional misconduct by a DOJ attorney in the prosecution of a defendant.

The defendant initially rejected the government's plea offer to a lesser charge, and the case was scheduled for trial. On the eve of trial, the government learned of additional incriminating evidence and disclosed that evidence to the defense. After reviewing the evidence, defense counsel asked the government to allow the defendant to accept the original plea offer. After consulting with the victim, the DOJ attorney obtained supervisory approval for the original plea offer. The defendant pled guilty to the lesser charge the following day.

In the referral to OPR, the DOJ component alleged that: (1) the DOJ attorney misrepresented facts to his supervisor in order to obtain supervisory approval for the guilty plea; and (2) the victim objected to the plea agreement. OPR conducted an investigation and concluded that there was insufficient evidence to support the allegation that the DOJ attorney misrepresented facts in order to obtain supervisory approval for the guilty plea. OPR further concluded that, under the circumstances, the disposition of the case was consistent with applicable principles of federal prosecution. Finally, OPR concluded that the DOJ attorney complied with the Attorney General Guidelines for Victim and Witness Assistance, which required the attorney to consult with the victim about the proposed plea agreement and afford him an opportunity to provide input about the possible disposition of the case. Accordingly, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment in the matter.

- *Failure to Provide Competent Representation; Conflict of Interest.* Attorneys representing a client in an immigration matter reported allegations of misconduct by a DOJ attorney to OPR. Specifically, the attorneys alleged that the DOJ attorney, who had been a longtime friend of the client's, inappropriately acted as the client's attorney in connection with his immigration matter.

OPR conducted an investigation and concluded that the allegations against the DOJ attorney were uncorroborated and unsubstantiated. OPR found the DOJ attorney to be credible in his interview when he acknowledged his longtime friendship with the client but denied the allegations of misconduct. Furthermore, the DOJ attorney did not appear in court on behalf of the client and sought supervisory approval prior to writing a personal letter on behalf of the client, which did not reference his position as a DOJ attorney. Efforts to interview the client were unsuccessful, as the client was repeatedly unavailable and, after receiving a favorable ruling in the immigration matter, advised OPR that he no longer wished to pursue the complaint against the DOJ attorney. Because the allegations against the DOJ attorney could not be substantiated without the client's cooperation, and because the DOJ attorney's credible explanation of events was supported by the available evidence, OPR terminated its investigation.

- *Abuse of Authority or Misuse of Official Position; Overzealous Prosecution; Unprofessional or Unethical Behavior.* On two occasions, a DOJ component made allegations of misconduct against a DOJ attorney that arose out of a number of cases the attorney was handling. The complaints, in general, alleged that the DOJ attorney did not handle his assigned matters with sufficient diligence, and that he misled, or failed to inform, supervisors about the status of his cases.

OPR investigated the two complaints. Shortly after undertaking the investigations, the DOJ attorney resigned from the Department. OPR thereafter terminated the investigations because the DOJ attorney was no longer a DOJ employee, he refused to cooperate with the investigation, the investigation likely could not be completed without information from the attorney, and continuation of the investigations was not otherwise merited.

- *Improper Closing or Rebuttal Argument.* A district court ordered a new trial, finding that a DOJ attorney engaged in prosecutorial misconduct during the government's rebuttal closing argument. The court found that the DOJ attorney committed misconduct by attempting to bolster the credibility of a government witness by making personal assurances and relying on the prestige of the government; referred to matters not in evidence; and repeatedly impugned the defense bar.

OPR conducted an investigation and found that during his rebuttal closing argument, the DOJ attorney argued that the government witness would not lie and that the DOJ attorney had been attacked personally. The DOJ attorney also told two anecdotes, unsupported by evidence introduced at trial, suggesting that defense attorneys attempt to confuse the jury and do not make sense. Prior to the completion of OPR's investigation, the DOJ attorney retired from the Department. Although OPR found that the DOJ attorney's arguments were improper, OPR concluded that he did not commit professional misconduct. OPR credited the DOJ attorney when he stated that he did not intend to improperly vouch for the government's witness or disparage the defense attorney. Instead, he made the concededly inappropriate statements in an attempt to respond to the defense attorney's arguments. OPR determined that the DOJ attorney did not plan to make those arguments in advance and did not have time to reflect on how they could be perceived by the jury. Under the unique circumstances of this case, which also involved a defense counsel who made numerous improper personal attacks on the government's case and witnesses, OPR concluded that the DOJ attorney's improper arguments did not represent professional misconduct or poor judgment, but rather, the DOJ attorney made mistakes in his responses to improper arguments offered by defense counsel.

- *Failure to Comply with the Federal Rules of Evidence.* A district court found that a DOJ attorney violated the Federal Rules of Evidence by improperly

questioning a defendant about his plea negotiations. During trial, the defendant testified on direct examination that, although he had pled guilty in prior criminal cases, he never considered pleading guilty in the case at issue because he was innocent. In later cross-examination, the DOJ attorney asked the defendant why, if he never considered pleading guilty, the defendant's attorney had proposed a plea agreement to the DOJ attorney months earlier. Upon objection by the defense, the district court declared a mistrial, finding that the DOJ attorney improperly cross-examined the defendant about plea negotiations in violation of Federal Rule of Evidence 410, which prohibits the admissibility of statements made in the course of plea negotiations.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct. OPR credited the DOJ attorney when he stated that he understood Rule 410's prohibition on the admissibility of statements made in the course of plea negotiations, but thought that Rule 410 permitted him to ask the defendant to affirm that plea negotiations had occurred, given the defendant's testimony on direct examination about never having considered a guilty plea. The DOJ attorney believed that as long as he did not ask the defendant about the substance of the negotiations, he was acting in accordance with Rule 410. Based on a limited opportunity to research the issue, the DOJ attorney attempted to craft a question within the parameters of Rule 410. Accordingly, OPR did not find by a preponderance of the evidence that the DOJ attorney committed professional misconduct.

Although not professional misconduct, OPR concluded that the DOJ attorney's decision not to seek an advance ruling from the district court about his question constituted poor judgment. OPR determined that an objectively reasonable attorney in similar circumstances would have requested a bench conference to allow the district court an opportunity to rule on the issue before potentially tainting the jury with an objectionable question. OPR referred its finding of poor judgment to the DOJ attorney's component for consideration in a management context.

- *Unauthorized Disclosure of Sensitive and Privileged Information.* OPR learned that detailed information regarding a draft felony indictment appeared in two separate news reports. The draft indictment contained information that ultimately was not included in the final indictment presented to the grand jury and publicly filed in district court.

OPR conducted an investigation and determined that a DOJ attorney attached the wrong document to two e-mails, one sent to defense counsel and another to an attorney representing potential trial witnesses. Both e-mails attached a file containing the draft indictment instead of the final indictment. One of the copies sent to defense counsel appears to have been subsequently shared with news reporters. Based on its investigation, OPR concluded that the DOJ attorney did not engage in professional misconduct or exhibit poor

judgment in the matter, but instead made a wholly inadvertent mistake by accidentally attaching the draft indictment rather than the final indictment to the e-mails.

- *Failure to Disclose Brady/Exculpatory Information.* A defense attorney advised OPR of a court of appeals opinion overturning the defendant's conviction and remanding the case for a new trial based on the government's failure to disclose *Brady* material. The conviction was based, in substantial part, on the testimony of a witness who was working with a local law enforcement agency. The DOJ attorney, as part of discovery, provided the defense with an agreement between the witness and the local law enforcement agency. Following the defendant's conviction, however, the defense attorney learned of additional agreements between the witness and another law enforcement agency that had not been disclosed to the defense.

OPR initiated an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment by failing to disclose the information. Rather, OPR determined that the DOJ attorney had made reasonable efforts to gather all relevant documents, including personally reviewing law enforcement files. Despite the exercise of due diligence, the DOJ attorney was unaware of the additional agreements, which were not otherwise brought to his attention. Accordingly, OPR determined that the failure of the government to disclose the information was neither intentional nor the result of the DOJ attorney acting in reckless disregard of his obligations.

- *Failure to Maintain an Active Bar Membership; Failure to Comply with DOJ Rules and Regulations.* A DOJ component reported to OPR that a DOJ attorney claiming a military exemption from his state bar's licensing requirements was not authorized to practice law under that status. The DOJ attorney served in the military prior to joining the Department and qualified for his state bar's military exemption during that time. Pursuant to this exemption, the DOJ attorney was classified as an "inactive" member of his state bar and was exempt from paying annual bar dues. The state bar rules provided that when an attorney left military service, his membership status automatically changed to "active," and he had to begin paying the annual bar dues. If the attorney did not pay the annual bar dues, the state bar deemed him "ineligible to practice law," despite his active status.

OPR conducted an investigation and found that when the DOJ attorney left military service and joined the Department, he automatically became an active member of his state bar who was required to pay annual bar dues. The DOJ attorney, however, failed to notify the state bar of the change in his military status. As a result, the DOJ attorney remained classified as an inactive attorney who was exempt from paying annual bar dues when he was, in fact, an active member of the state bar who was ineligible to practice law because he failed to pay the annual bar dues. Because the DOJ attorney was

still technically an active member of his state bar, OPR concluded that he exercised poor judgment by failing to pay his bar dues. OPR further concluded that the DOJ attorney exercised poor judgment by twice certifying on his annual bar certification forms that he was an active member of his state bar when he was ineligible to practice law. OPR referred its findings of poor judgment to the DOJ attorney's component for consideration in a management context.

Conclusion

During Fiscal Year 2012, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of several foreign countries to discuss issues of prosecutorial ethics. OPR's activities in Fiscal Year 2012 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.