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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2015**

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

**Fiscal Year 2015 Annual Report**

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## **OPR Annual Report for Fiscal Year 2015**

### **Introduction**

On December 9, 1975, Attorney General Edward H. Levi issued an order establishing the Department of Justice Office of Professional Responsibility (OPR) to ensure that Department of Justice (Department or DOJ) employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 40th Annual Report to the Attorney General, and it covers Fiscal Year 2015 (October 1, 2014 through September 30, 2015).

### **Jurisdiction and Functions of OPR**

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

Misconduct allegations that OPR investigates include criminal 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 competently and diligently represent the interests of the government; failure to comply with court orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors informed of significant developments in a case; and the improper exercise of prosecutorial discretion. In addition, OPR reviews criminal cases in which courts have awarded attorney's fees to defendants based on findings that the government's conduct was frivolous, vexatious, or in bad faith.

OPR receives allegations from a wide variety of sources, including federal judges, U.S. Attorneys' Offices and litigating divisions; private individuals and attorneys; criminal defendants and civil litigants; other federal agencies; state and local government agencies; congressional referrals; media reports; and self-referrals from Department attorneys. OPR also conducts weekly searches of legal databases to identify, review, and analyze cases involving judicial criticism and judicial findings of misconduct to determine whether the criticism or findings warrant further inquiry or investigation by OPR. All Department employees are obligated to report non-frivolous allegations of misconduct to their supervisors, or directly to OPR. Supervisors must, in turn, report all non-frivolous allegations of serious misconduct to OPR. Supervisors and employees are encouraged to contact OPR for assistance in determining whether a matter should be referred to OPR. Department employees are required to report all judicial findings of misconduct to OPR.

Upon receipt, OPR reviews each allegation and determines whether further inquiry or investigation is warranted. If so, OPR may initiate an inquiry, during which it typically gathers documents and obtains written submissions from subjects and components, or open an investigation, during which it also interviews subjects and other 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 its source. Although some matters begin as investigations, OPR typically will initiate an inquiry and assess the information obtained prior to conducting a full investigation. An inquiry or investigation may have more than one Department attorney as subjects.

The majority of complaints received by OPR 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 was found, is frivolous on its face, or is vague and unsupported by any evidence. 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 the misconduct allegations were made. OPR also may review other relevant materials, such as pleadings and transcripts. Most inquiries are closed based on a determination that further investigation is not likely to result in a misconduct finding.

In cases that are not resolved during the inquiry stage, 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, subject 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 and to provide complete and candid information. Employees who fail or refuse to cooperate with OPR investigations, after being provided warnings concerning the further use of their statements, may be subject to formal discipline, including removal from federal service.

If a Department attorney resigns or retires during the course of an investigation, OPR ordinarily completes its investigation in order to assess the 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 authorize OPR to terminate an investigation if it determines that it is in the best interest of the Department to do so. Terminated investigations may nevertheless result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants such notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and, when appropriate, to other components in the Department, including the litigating divisions, the Executive Office for U.S. Attorneys (EOUSA) and the pertinent U.S. Attorney. OPR includes in its communications with management officials a discussion of any trends or policy issues that OPR believes require attention.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which is responsible for reviewing OPR's findings of professional misconduct against DOJ attorneys. The PMRU reports to the Deputy Attorney General. Initially, the PMRU had jurisdiction over only Criminal Division attorneys and Assistant U.S. Attorneys. In Fiscal Year 2015, the PMRU's jurisdiction was expanded to include nearly all Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional misconduct, and determines whether those findings are supported by the evidence and the applicable law.<sup>1</sup> The PMRU also determines the appropriate level of discipline to be imposed.

Once a disciplinary action for a DOJ attorney is final, OPR notifies the appropriate state bar disciplinary authorities of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under its jurisdiction) or the Office of the Deputy Attorney General, once the Department's disciplinary process is completed. The Department's bar notification policy includes the reporting of all 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 a bar notification when the conduct in question involved exclusively internal Department interests or policies 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 appropriate disciplinary authorities should be notified of any misconduct findings.

OPR also reviews case files and statistical data relating to matters under investigation to identify any noteworthy 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 2015, OPR received 846 complaints, of which 362, or 43%, were from incarcerated individuals. Many of those 846 complaints related to matters that did not fall within OPR's jurisdiction. Others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 44 of the matters warranted further review by OPR attorneys and opened inquiries on those matters. OPR opened 22 matters as investigations. When information gathered in the course of an inquiry indicates that further investigation is warranted, the matter is converted to an investigation.

The remaining matters did not warrant further inquiry or investigation by OPR because, for example, they sought review of allegations that were under consideration by a court, or had been considered and rejected by a court, or because they were frivolous, vague, or unsupported by the evidence. Those matters were addressed by experienced management analysts working under the supervision of an OPR attorney through correspondence or referral to another Department component or government agency.

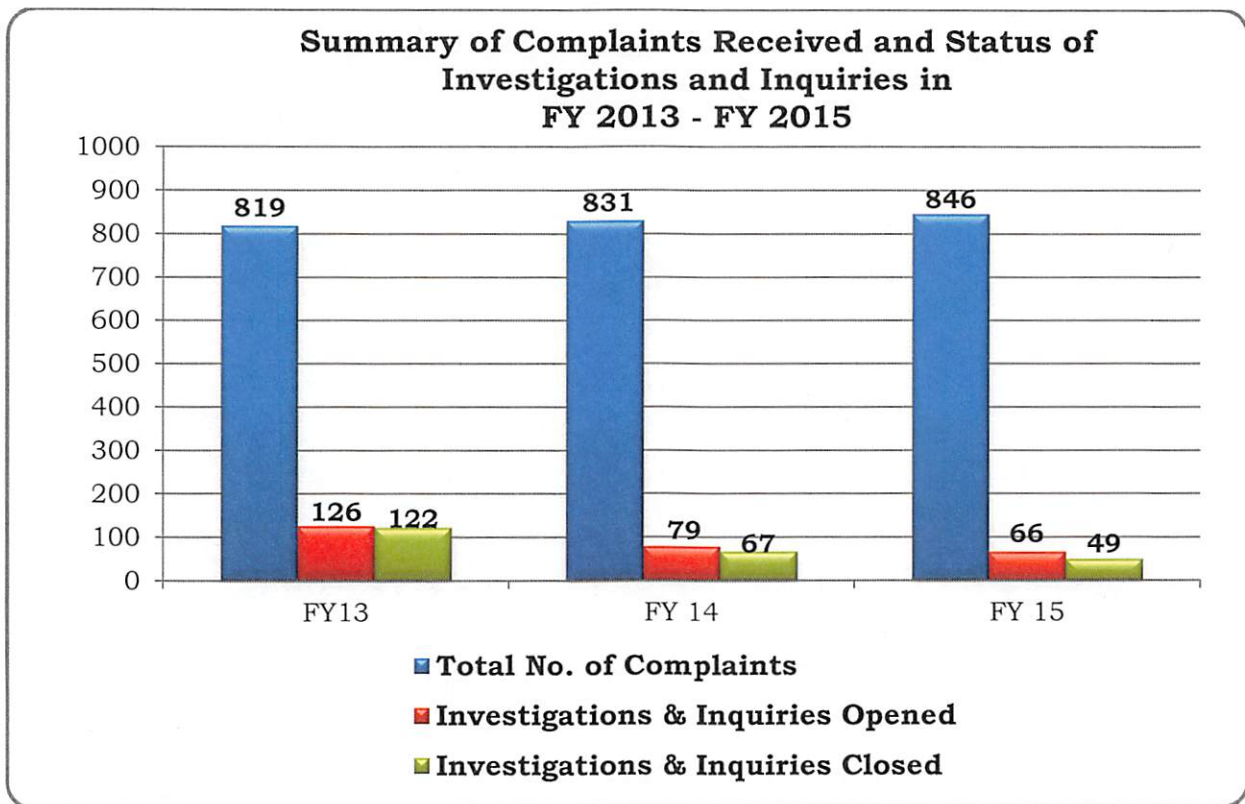
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<sup>1</sup> OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, and to the pertinent U.S. Attorney, for appropriate action.

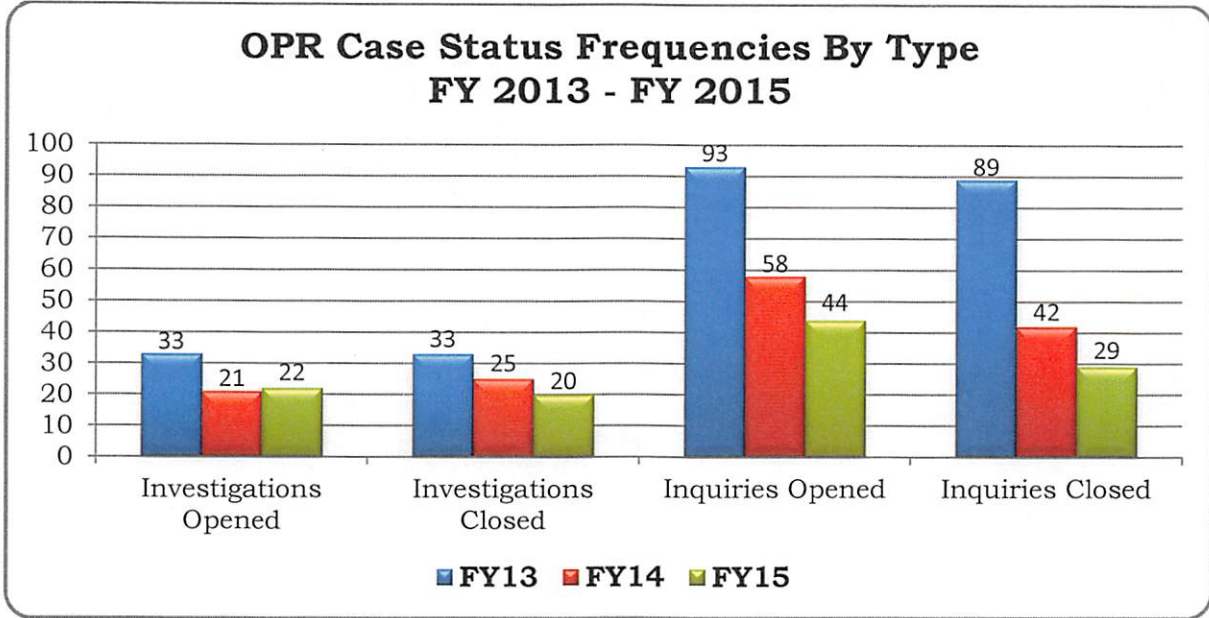
## Summary and Comparison of OPR's Investigations and Inquiries by Fiscal Year

In Fiscal Year 2015, OPR received 846 complaints, which represents a slight (1.5%) increase from Fiscal Year 2014. Graphs 1 and 2 provide comparisons over the last three fiscal years of the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, of the 846 complaints OPR received, 66 were opened as investigations or inquiries. As reflected in Graph 2, in Fiscal Year 2015, OPR closed 49 investigations and inquiries. In the same period, OPR opened 44 inquiries and closed 29, and opened 22 investigations and closed 20.

Graph 1

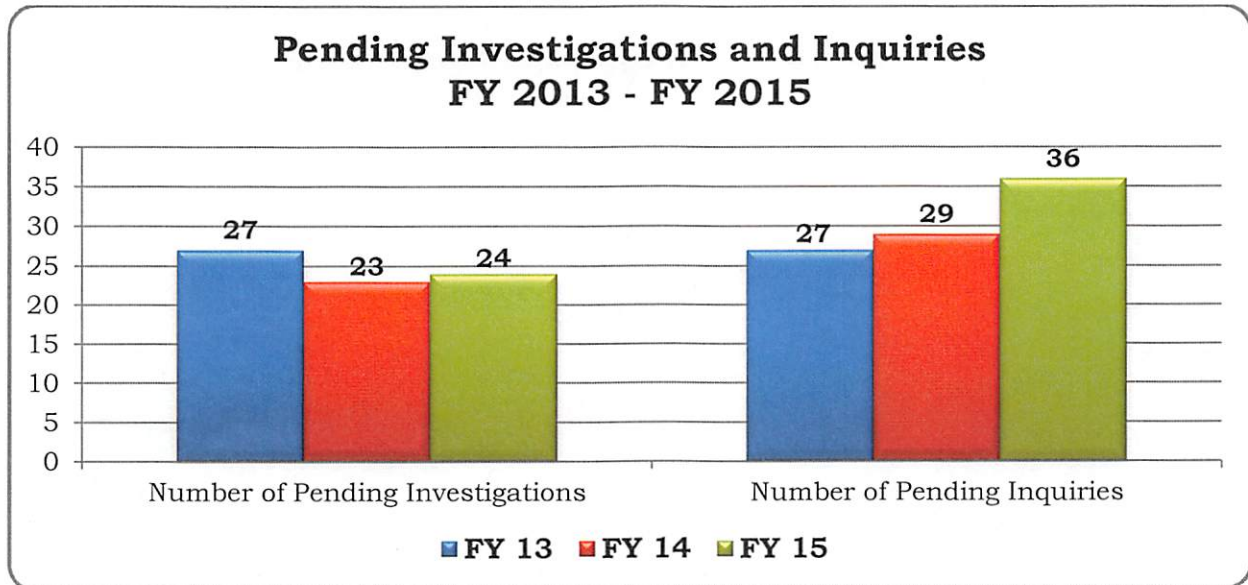


Graph 2



Because of the complexity of the allegations that OPR receives, many investigations and inquiries opened remain under review at the close of the fiscal year. OPR assigns a pending status to those cases and reports the outcome of those matters in the fiscal year in which they were closed. At the end of Fiscal Year 2015, there were 24 investigations, and 36 inquiries, pending. Graph 3 compares the number of inquiries and investigations that were pending at the end of each of the last three fiscal years.

Graph 3



## OPR Inquiries in Fiscal Year 2015

*Inquiries Opened in Fiscal Year 2015:* The sources of the complaints for the 44 matters designated as inquiries opened in Fiscal Year 2015 are set forth in Table 1.<sup>2</sup>

Table 1

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2015		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>3</sup>	19	43.2%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	13	29.5%
Private attorneys	5	11.4%
Private parties	3	6.8%
Other agencies	4	9.1%
<b>Total</b>	<b>44</b>	<b>100%</b>

The nature of the allegations against Department attorneys contained in the 44 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 44.

<sup>2</sup> OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department should make a referral to a state bar disciplinary organization. The 44 matters referred to above do not include matters involving proposed bar notifications of non-DOJ attorneys.

<sup>3</sup> 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 2015		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Misrepresentation to the court and/or opposing counsel	17	25.4%
Abuse of authority, including abuse of prosecutorial discretion	16	23.9%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	11.9%
FBI Whistleblower complaints	8	11.9%
Failure to comply with court orders or federal rules	5	7.5%
Failure to competently or diligently represent the client's interests	4	5.9%
Improper remarks to a grand jury, during trial, or in pleadings	3	4.5%
Failure to comply with DOJ rules and regulations	2	3.0%
Failure to maintain active bar membership	2	3.0%
Interference with defendants' rights	1	1.5%
Conflict of interest	1	1.5%
<b>Total</b>	<b>67</b>	<b>100%</b>

*Inquiries Closed in Fiscal Year 2015:* OPR closed a total of 29 inquiries in Fiscal Year 2015 involving allegations against Department attorneys.<sup>4</sup> These matters involved 38 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 38 allegations were resolved in Fiscal Year 2015 is set forth in Table 3.<sup>5</sup>

<sup>4</sup> OPR may designate more than one DOJ attorney as the subject of an inquiry. OPR closed an additional 44 inquiries involving proposed bar notifications for misconduct of non-DOJ attorneys.

<sup>5</sup> 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 2015, 21 inquiries were converted to investigations.

Table 3

Categories of Inquiry Allegations Resolved in FY 2015		
Types of Resolution	Number of Occurrences	Percentage of Occurrences
No merit to matter based on review of allegation	14	36.8%
Inquiry closed because further investigation not likely to result in finding of misconduct	12	31.6%
FBI Whistleblower complaint	6	15.8%
Performance or management matter. Referred to employing component	3	7.9%
No merit to allegation based on preliminary inquiry	2	5.3%
Consolidated with another matter	1	2.6%
<b>Total</b>	<b>38</b>	<b>100%</b>

**OPR Investigations in Fiscal Year 2015**

*Investigations Opened in Fiscal Year 2015:* Table 4 lists the sources for the 22 investigations that OPR opened in Fiscal Year 2015.

Table 4

Sources of Complaints Against Department Attorneys for Investigations Opened in FY 2015		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>6</sup>	7	31.8%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	12	54.6%
Private attorneys	1	4.5%
Other agencies	2	9.1%
<b>Total</b>	<b>22</b>	<b>100%</b>

Some of the 22 investigations that OPR opened involved multiple subjects. In addition, because many investigations involved multiple misconduct allegations, there were 59 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

<sup>6</sup> 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 2015		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	15	25.4%
Misrepresentation to the court and/or opposing counsel	12	20.3%
Abuse of authority, including abuse of prosecutorial discretion	7	11.9%
Interference with defendants' rights	7	11.9%
Failure to comply with DOJ rules and regulations	5	8.5%
FBI Whistleblower complaints	4	6.7%
Improper remarks to a grand jury, during trial, or in pleadings	3	5.1%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	2	3.4%
Failure to maintain an active bar membership	2	3.4%
Lack of fitness to practice law	1	1.7%
Failure to comply with federal law	1	1.7%
<b>Total</b>	<b>59</b>	<b>100%</b>

*Investigations Closed in Fiscal Year 2015:* OPR closed 20 investigations in Fiscal Year 2015. Some of these investigations included multiple attorney subjects, and four included non-attorney subjects (typically, law enforcement officers). Of the 20 investigations, OPR found professional misconduct in 8, or 40%, of the matters it closed. Of the 8 matters in which OPR found professional misconduct, 3 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>7</sup> In 7 of these 8 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>8</sup> (OPR may resolve one of several allegations against a subject by

<sup>7</sup> 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.

<sup>8</sup> 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.

concluding, for example, that the subject engaged in intentional misconduct, and resolve another allegation against the same subject by concluding that he acted recklessly.)

In Fiscal Year 2015, OPR found professional misconduct in the same number of investigations as in Fiscal Year 2014. The 8 investigations in which OPR made findings of professional misconduct in Fiscal Year 2015 included a total of 22 sustained allegations of misconduct. (Some matters included more than one allegation of misconduct.) Table 6 below depicts the 22 allegations sustained in the 8 investigations closed in Fiscal Year 2015.

**Table 6**

Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2014	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Misrepresentation to the court and/or opposing counsel	4	18.2%
Failure to comply with DOJ rules and regulations	4	18.2%
Failure to keep client informed	3	13.7%
Failure to competently or diligently represent the client's interests	2	9.1%
Failure to comply with federal law	2	9.1%
Conflict of Interest	2	9.1%
Abuse of authority, including abuse of prosecutorial discretion	2	9.1%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	1	4.5%
Lack of fitness to practice law	1	4.5%
Other	1	4.5%
<b>Total</b>	<b>22</b>	<b>100%</b>

Disciplinary action was imposed against attorneys in 7 of the 8 matters in which OPR found professional misconduct. Disciplinary action was not initiated against an attorney in one matter because the attorney was no longer employed by the Department at the conclusion of OPR's investigation or review by the PMRU. Where appropriate, OPR referred these matters to state bar disciplinary authorities. With respect to the 7 matters in which disciplinary proceedings were initiated and discipline was imposed, 6 attorneys received suspensions and 1 received a written reprimand.

Ten, or 50%, of the investigations OPR closed in Fiscal Year 2015 had at least one finding that an attorney exercised poor judgment.<sup>9</sup> Five of those 10 matters also involved a finding of professional misconduct. OPR refers poor judgment findings to the Department

<sup>9</sup> 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 may be found when an attorney acts inappropriately, even though he or she may not have violated or acted in reckless disregard of a clear and unambiguous 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.

attorney's component for consideration in a management context, which may include recommendations for additional training. Three closed investigations, or 15%, involved at least 1 finding that an attorney made an excusable mistake. One of those 3 matters also included a finding of professional misconduct or poor judgment. Thus, of the 20 investigations closed, OPR found professional misconduct or poor judgment in 13, or 65%, of the investigations it closed in FY 2015.

### **Policy and Training Activities in Fiscal Year 2015**

During Fiscal Year 2015, 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, rules and regulations. During Fiscal Year 2015, OPR attorneys participated in presentations that focused on, among other things, the Department's social media policies and ethical issues concerning inappropriate relationships. OPR attorneys also made presentations to new Assistant U.S. 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 international delegations about OPR's role in the Department and issues associated with professional ethics.

OPR continued to serve as the Department's liaison to state bar disciplinary authorities on matters affecting the professional responsibility of Department attorneys. As part of this effort, OPR attorneys attend the annual meeting of the National Organization of Bar Counsel, in which current trends in attorney discipline are examined and discussed.

In accordance with Department 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 concerning those matters. OPR also consulted with and advised other Department components regarding referrals to state bar authorities of possible professional misconduct by non-DOJ attorneys. In 44 such matters, OPR reviewed allegations of misconduct against non-DOJ attorneys and advised components whether referrals to state bar disciplinary authorities were warranted. In some cases, OPR notified the applicable bar disciplinary authorities directly of the misconduct allegations.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against the agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the Department's Office of the Inspector General responsibility for reviewing and investigating whistleblower complaints by FBI employees.

## Examples of Inquiries Closed in Fiscal Year 2015

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2015.<sup>10</sup>

*Brady and Giglio Disclosures; Obligation to Correct False Testimony.* A court of appeals criticized a DOJ attorney for failing to disclose a proffer letter agreement and similar documents that might have been used to impeach a government witness, and for failing to correct some related witness testimony that the court considered to be false. OPR initiated an inquiry into the DOJ attorney's conduct. In the course of its inquiry, OPR reviewed the court of appeals' opinion, the parties' briefs, selected trial transcripts, and pertinent district court pleadings.

Based on the results of its inquiry, OPR determined that further investigation was unlikely to result in a professional misconduct finding. At trial, the government called a witness who previously was convicted following a lengthy investigation and trial. After the trial, the witness met with prosecutors pursuant to a standard proffer letter agreement that prohibited the government from using against the witness any statements the witness made during the debriefing interview. When the witness testified during the subsequent trial, he did not testify pursuant to any plea or cooperation agreement. The court of appeals nonetheless criticized the DOJ attorney for failing to produce to the defense the proffer letter agreement relating to the witness. The court of appeals, however, expressly held that the failure to disclose the proffer letter agreement, as well as other related, minor discovery lapses, were not material for purposes of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Further, the documents in question were not witness statements subject to disclosure under the Jencks Act, nor did they fall within any of the categories of discoverable documents set forth in Rule 16 of the Federal Rules of Criminal Procedure. As both the trial court and the court of appeals emphasized, the documents did nothing to negate the overwhelming evidence of the defendant's guilt.

Given both the trial court's and the court of appeals' evaluation of the limited impeachment value of the proffer letter agreements and related documents, OPR determined that further investigation was unlikely to result in a finding that the DOJ attorney violated her discovery duties, as set forth in state bar rules and DOJ policy. Finally, OPR determined that, in light of the voluminous and more valuable impeachment material properly disclosed in discovery, the DOJ attorney's failure to find and disclose the proffer letter agreement did not reflect an intentional or reckless violation of office or DOJ policy, but instead was an oversight.

OPR also considered whether the DOJ attorney violated her duty of candor by failing to correct the witness' testimony at trial. On direct examination, the DOJ attorney had asked the

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<sup>10</sup> To protect the privacy of the Department attorneys and other individuals involved in the inquiries summarized, as well as in the investigations summarized in the next section of this report, and to comply with the requirements of the Privacy Act, OPR has omitted names and identifying details from these examples. Moreover, in certain cases, information and evidence learned by OPR during the course of its inquiries and investigations is protected from disclosure by orders of the court, privileges, or grand jury secrecy rules. OPR has used female pronouns in the examples regardless of the actual gender of the individual involved. Male pronouns will be employed next year, as OPR alternates the use of gender pronouns each year.

witness what promises, if any, had been made “about his testimony here today,” to which the witness truthfully answered that there were none. On cross-examination, however, defense counsel re-characterized the witness’ testimony as indicating that the government had made the witness no promises, at any time, without the limitation about “his testimony here today.” The witness agreed, and the DOJ attorney, having forgotten about the proffer letter agreement, failed to correct the witness’s testimony. Although the court of appeals found this testimony to be false, the trial court had reached the opposite conclusion, and OPR determined that in context, the question on cross-examination was ambiguous and could have implied that no promises had been made to the witness with respect to his trial testimony, as opposed to his much earlier proffer.

*Abuse of Prosecutive or Investigative Authority; Failure to Comply with Federal Law; Failure to Cooperate with Congressional Inquiry.* Certain Members of Congress expressed concern to OPR that DOJ attorneys participating in a Department law enforcement initiative abused their authority to conduct civil investigations under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1833a. Their concerns were that: (1) DOJ attorneys inappropriately expanded the Department’s authority to issue FIRREA subpoenas by misusing the statute as a tool to protect consumers from fraud committed by banks and their customers, rather than using it to pursue fraud perpetrated against banks; (2) DOJ attorneys misused FIRREA subpoenas to target lawful participants in certain politically disfavored industries and thereby to improperly pressure banks not to do business with them; and (3) DOJ attorneys were not forthright and responsive to congressional inquiries about the Department’s use of its FIRREA authority.

OPR initiated an inquiry that included, among other things, the review of voluminous internal Department memoranda, e-mails, subpoenas, and pleadings, as well as the review and legal analysis of the FIRREA statutory text, its legislative history, related case law, and academic commentary. OPR also reviewed a congressional staff report on the Department’s initiative. Based on the results of its inquiry, OPR concluded that the DOJ attorneys did not engage in professional misconduct or otherwise act inappropriately.

First, OPR found that the DOJ attorneys’ interpretation and use of the FIRREA statute were supported by case law, and that the great weight of legal authority indicated that FIRREA may be used to address fraud schemes in which a financial institution increased institutional risk to itself by participating in or facilitating the fraud scheme. Moreover, the FIRREA cases filed by the DOJ attorneys were resolved by negotiated settlements and consent judgments entered by U.S. District Courts, lending further support to the DOJ attorneys’ interpretation of FIRREA.

Second, OPR determined that DOJ attorneys did not improperly target persons or entities engaged in certain allegedly disfavored but nevertheless lawful businesses. Neither the design nor initial implementation of the enforcement initiative focused on a specific type of business engaged in lawful business practices. Furthermore, OPR’s review of the subpoenas issued by the DOJ attorneys revealed that relatively few related to a particular category of lawful business. Of the number that did relate to a bank customer engaged in a particular line of business, the DOJ attorneys had specific and articulable evidence of consumer fraud for each subpoena they issued.

Nor did OPR find evidence establishing that the DOJ attorneys issued FIRREA subpoenas to compel banks to terminate legitimate business relationships with persons or entities that were engaged in lawful business activities. Indeed, in the memoranda, subpoenas, and contemporaneous e-mails OPR reviewed, OPR did not find any evidence of an effort to improperly pressure banks to cease doing business with specific lawful enterprises. Finally, OPR did not find any evidence to support the allegation that DOJ attorneys provided inaccurate or incomplete information in response to congressional inquiries. OPR advised the members of Congress of OPR's findings and that it was closing its inquiry in the matter.

*Failure to Comply with Brady Obligations; Misrepresentation/Misleading the Court.* A court of appeals' dissenting opinion criticized a DOJ attorney for failing to obtain and provide to the defense information about a state investigation of a forensic scientist who testified for the government at trial. The dissent concluded that the DOJ attorney had violated her *Brady* obligations and made factual misrepresentations to the trial court regarding the status and scope of the investigation. OPR initiated an inquiry. Because the trial took place before the issuance of the "Ogden Memorandum" and the current standards set forth in Section 9-5.001 *et seq.*, of the U.S. Attorneys' Manual (USAM), OPR evaluated the DOJ attorney's conduct in light of the standards set forth in *Brady v. Maryland*, Rule 16 of the Federal Rules of Criminal Procedure, and the applicable state rules of professional conduct.

OPR found that the DOJ attorney had made several attempts to obtain information from the state agency regarding the status of its investigation, both before and at the time of the trial. Her attempts were unsuccessful, however, because the investigating agency's policies did not permit the release of information before the investigation was concluded and administrative findings were made. Although OPR found that the DOJ attorney made several inaccurate statements to the court regarding the status and scope of the state investigation, those statements were based on the limited information that was available to the DOJ attorney at the time. OPR found no evidence that the DOJ attorney intentionally misled the court or the defense.

Finally, OPR concluded that even if the defense had gained access to the investigation materials and used that information to undermine the credibility of the forensic scientist, the result of the trial would not have been different, as the government had presented substantial evidence of the defendant's guilt. OPR therefore determined that the information was not material under the *Brady* doctrine. Accordingly, OPR concluded that further investigation was not likely to result in a finding that the DOJ attorney engaged in professional misconduct and therefore closed its inquiry.

*Failure to Comply with DOJ Press Guidelines.* OPR received several anonymous complaints alleging that a DOJ attorney made improper, inflammatory comments in a press release, and during a press conference, announcing the indictment of a public official. OPR initiated an inquiry, and asked the DOJ attorney to provide a written response, which she did. Based on its inquiry, OPR found that although the comments at issue went beyond a strict recitation of the facts set forth in the indictment, the remarks were grounded in the public allegations, and therefore did not violate a clear and unambiguous standard. Moreover, the DOJ attorney neither expressed a personal belief in the defendant's guilt nor commented on the defendant's character. OPR concluded that further investigation was not warranted and therefore closed its inquiry.



*Failure to Comply with DOJ Press Guidelines.* Two DOJ attorneys reported to OPR that a defendant in a civil case alleged that a DOJ press release regarding the case contained statements that were false and intended to inflame public sentiment, in violation of several provisions of the U.S. Attorneys' Manual and the Code of Federal Regulations.

OPR determined that factual allegations set forth in the press release reflected the facts alleged in the publicly-available complaint. The press release also provided a brief explanation of the relevant statute and DOJ's enforcement efforts in this area and included cautionary language, reminding the reader that factual assertions are unproven allegations. OPR concluded that the DOJ attorneys' quotes did not violate applicable standards, as they were not so inflammatory that they were likely to influence the outcome of any future proceedings in the case, and the remarks did serve the legitimate purpose of explaining the importance of the government's action in the case. OPR closed its inquiry because further investigation was not likely to result in a finding of professional misconduct.

*Failure to Comply with DOJ Press Guidelines.* As a result of a routine Westlaw search, OPR learned that a defendant in a criminal case moved to dismiss an indictment on the ground that a DOJ attorney's inflammatory language in a press release, and particularly a disparaging analogy used to describe the defendant's conduct, violated the defendant's due process rights. The district court denied the defendant's motion, noting that the press release was issued more than a year before the scheduled trial date and therefore was unlikely to interfere with the defendant's right to a fair trial.

OPR initiated an inquiry and determined that the language in the press release did not run afoul of the regulations that prohibit DOJ employees from making "observations regarding a defendant's character," because the DOJ attorney was not commenting on the character of the individual defendant; rather, she was using an analogy to describe the conduct alleged in the indictment. OPR was unable to conclude that the DOJ attorney violated a clear and unambiguous standard. OPR compared the statements at issue in the press release with dozens of other recent press releases, including those that had been the subject of OPR inquiries or investigations. OPR found that the regulations and Department policy governing press statements have been interpreted broadly, and concluded that those standards do not strictly prohibit strongly-worded press releases, particularly when the remarks are based on facts alleged in the indictment, are unlikely to affect a defendant's right to a fair trial, and the press release as a whole serves to inform the public about the government's enforcement of the law. OPR concluded that further investigation was unlikely to lead to a finding that the DOJ attorney engaged in professional misconduct, and therefore closed its inquiry.

*Failure to Honor Plea Agreement; Failure to Disclose Terms of Plea Agreement to the Court.* A DOJ attorney reported to OPR that a district court found that the government breached a plea agreement based on a DOJ attorney's recommendation for a split sentence that included a period of incarceration. The court found that the recommendation violated an alleged undisclosed oral understanding with defense counsel that the government would not seek a sentence of imprisonment.

OPR conducted an inquiry and learned that the case was handled by two different DOJ attorneys. One DOJ attorney negotiated the plea agreement; the other handled the sentencing but

was not involved in the plea negotiations. OPR determined that the attorney who negotiated the plea agreement did not promise that the government would not seek a prison sentence for the defendant. Rather, during plea negotiations, the DOJ attorney told defense counsel that, in her opinion, a sentence of incarceration was not warranted. Although defense counsel inferred from the DOJ attorney's statement that she thought a lenient sentence for the defendant would be appropriate, both the defendant and his attorney understood that the DOJ attorney's opinion did not amount to a binding commitment by the government to refrain from seeking a sentence that included a period of incarceration. OPR examined documents in the case file, including a sworn declaration from the defendant, which established that, during plea negotiations, defense counsel informed the defendant that the DOJ attorney's opinion: (1) was not a condition for the plea agreement; (2) did not amount to a binding promise; (3) did not represent the official position of the United States; and (4) could not be relied upon unless it was memorialized in the final plea agreement. OPR's inquiry also uncovered an e-mail that the DOJ attorney sent defense counsel during plea negotiations in which she expressly cautioned that her opinion regarding a possible sentence for the defendant had not been approved for plea agreement purposes.

Based on the results of its inquiry, OPR determined that the second DOJ attorney's advocacy at sentencing was consistent with the understanding of the parties when they entered into the plea agreement, and did not violate any agreement or understanding between the parties regarding the government's sentencing position. Because the evidence did not support a conclusion that there was an undisclosed, binding agreement between the parties with respect to the government's sentencing recommendation, OPR determined that further investigation was not warranted and therefore closed its inquiry.

*Whistleblower – Retaliation for Protected Disclosure.* An FBI employee alleged that her supervisors retaliated against her for filing complaints with the Office of Equal Employment Opportunity (EEO) and the Office of Integrity and Compliance (OIC). OPR conducted an inquiry and concluded that the employee's complaints did not constitute protected disclosures within the meaning of the FBI whistleblower regulations because the EEO and OIC complaints were not made to one of the nine entities designated to receive protected disclosures. Accordingly, the allegations did not state a claim under the FBI whistleblower regulations, and OPR lacked jurisdiction to investigate the complaint.

*Discovery Violation; Failure to Disclose Exculpatory Information.* A DOJ attorney self-reported judicial criticism that her late disclosure of exculpatory information to the defense constituted gross negligence and was prejudicial to the defense. During a file review for exculpatory information conducted just prior to a murder trial, a DOJ attorney learned that an individual had used the victim's credit card shortly after the murder. Although the government had documentation of the post-murder credit card purchases in its possession for more than two years prior to the trial date, the DOJ attorney did not notice or produce the document until just before the trial. Nevertheless, the government was able to locate and interview the individual who used the victim's credit card. After concluding that the DOJ attorney's conduct was the result of gross negligence, the court continued the trial date for the defense to investigate the potential witness. The defense interviewed the individual prior to trial and cross-examined her at trial.

OPR conducted an inquiry and concluded that the defense was able to make effective use of the information at trial, notwithstanding DOJ attorney's late discovery and disclosure of that information. OPR determined that further investigation was unlikely to result in a finding of professional misconduct and referred the matter to the DOJ component to be handled as a performance issue.

*Abuse of Prosecutive or Investigative Authority.* A DOJ component reported that a cooperating witness testified at trial that she pled guilty because the DOJ attorney misled her during her grand jury testimony. Following the witness' claim, replacement government counsel reviewed the evidence, after which the government moved to dismiss the case due to concerns that the available evidence did not support the allegations in the indictment. The government also allowed the cooperating witness to withdraw her guilty plea.

OPR initiated an inquiry, during the course of which it received allegations that the government dismissed three similar cases due to concerns that the indictments were unsupported by competent evidence. OPR concluded that preponderant evidence did not support a finding of misconduct by the DOJ attorney in the first case. OPR determined that any misstatement by the DOJ attorney before the grand jury was immaterial to the witness' decision to plead guilty because the witness entered her guilty plea, with the assistance of counsel, prior to her grand jury appearance. Further, in dismissing a claim for attorney's fees under the Hyde Amendment, the district court did not criticize the DOJ attorney and concluded that the evidence justified the charges against the defendants. With regard to the other three cases brought to OPR's attention, OPR found that preponderant evidence did not support a finding that the DOJ attorney misrepresented the evidence to her supervisors, made inappropriate prosecution recommendations, or intentionally omitted facts. The prosecutions at issue were complex matters based on a novel theory, and OPR noted that the strength of each case may have deteriorated between indictment and trial. Because there was not a reasonable likelihood that OPR would find professional misconduct, it closed its inquiry.

*Whistleblower – Retaliation for Protected Disclosure.* An FBI employee alleged that she received a downgraded performance appraisal rating, a demotion, and ultimately termination from the FBI in retaliation for reporting a violation of law and Department policy. OPR conducted an inquiry and concluded that many of the entities to whom the FBI employee complained were not one of the nine entities designated in the FBI whistleblower regulations to receive complaints or, if they were, the alleged retaliation predated the complaint and therefore could not have been taken in retaliation for the complaint. Finally, although the FBI employee alleged that she made a protected disclosure to the Director of the FBI, OPR found by clear and convincing evidence that the FBI employee would have been terminated for cause even in the absence of the alleged protected disclosure. Accordingly, OPR terminated its investigation.

*Improper Closing or Rebuttal Argument.* An appellate court criticized a DOJ attorney, finding that her rebuttal closing argument contained affirmative statements of fact which were not supported by evidence in the record. Although no evidence had been admitted at trial regarding whether a certain item was present in the defendant's vehicle, the DOJ attorney argued during rebuttal that if the item were present, the defendant's explanation was not credible, and if it were not present, other parts of her testimony were suspect. After the court of appeals' strong

criticism, the DOJ component filed a motion to summarily vacate the conviction, arguing that the DOJ attorney should not have referenced the item during her rebuttal.

OPR conducted an inquiry and concluded that further investigation was not likely to result in a finding of professional misconduct. The DOJ attorney was not attempting to refer to facts not in evidence. Rather, OPR found that she was attempting to make an alternative and hypothetical argument, and did not intend to argue to the jury that the evidence showed that the item was or was not in the vehicle.

*IJ – Failure to Recuse; Conflict of Interest.* A DOJ component referred to OPR allegations that an Immigration Judge’s (IJ) decision to schedule a preliminary hearing was influenced by the IJ’s friendship with the attorney who appeared at a hearing on behalf of the respondent, and the fact that the respondent’s spouse, who was a potential witness, was a former employee of the immigration court. During regularly scheduled hearings, the IJ’s clerk handed her a file and asked if she would hear a motion that was not on the calendar. The IJ reviewed the file and noted that the respondent’s spouse was a likely witness. Because of the involvement of a former DOJ employee, the IJ asked the respondent’s attorney to enter the courtroom with the government attorney, to determine whether the government would seek recusal. The attorney who appeared on behalf of the respondent was not the attorney who had entered a notice of appearance in the case, but was the IJ’s friend, who explained that she was appearing only as a favor to the attorney of record who was then unavailable. Because the IJ’s friend did not intend to participate in further proceedings, the IJ resolved the motion.

OPR conducted an inquiry and concluded that the IJ did not violate the rules of professional conduct regarding conflicts of interest created by a lawyer’s personal interests. OPR found no evidence that the IJ’s friendship with the attorney, or her acquaintance with the former federal employee, influenced her decision on the motion. OPR also considered whether the IJ complied with rules of ethics requiring DOJ attorneys to avoid creating the appearance of a lack of impartiality. With no prior notice or time for reflection, the IJ resolved the matter by clarifying her friend’s limited role in the matter and obtained the government’s views on whether recusal was necessary due to the former DOJ employee’s status as a potential witness. Given these unique circumstances, OPR concluded that further investigation was not likely to lead to a finding of professional misconduct and therefore closed its inquiry.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee alleged that she suffered retaliation for communicating safety concerns about a proposed plan of operation to her immediate supervisors. The FBI employee alleged that as a consequence of raising her safety concerns, she was denied a travel opportunity, and her supervisory responsibilities were reduced.

OPR conducted an inquiry and proposed to terminate its inquiry because the FBI employee’s immediate supervisors were not entities designated to receive protected disclosures under the FBI whistleblower regulations, and therefore OPR lacked jurisdiction to conduct an investigation. In response, the FBI employee alleged that she had made protected disclosures about her safety concerns to a senior FBI management official, and in retaliation for those disclosures, she had suffered additional adverse personnel decisions, including transfer, demotion, and dissolution of her work unit. After considering this additional information and

conducting further inquiry, OPR concluded that the senior management official whom the FBI employee contacted was not one of the nine entities designated to receive protected disclosures. In addition, OPR also found that the decision to phase out the employee's work unit had been under consideration for at least four months prior to the time when the FBI employee first voiced her safety concerns, and that the FBI had been prepared to offer the employee a job at the same grade level, but she withdrew from consideration for that position and voluntarily sought a lower grade level position with a different FBI component. OPR accordingly terminated its inquiry.

The FBI employee subsequently filed a Request for Corrective Action with the Office of Attorney Recruitment and Management (OARM). After consideration of the FBI employee's submissions, OARM found that the FBI employee's voicing of her safety concerns involved a disagreement with operational decisions and that such disagreements do not constitute protected whistleblowing activity. Accordingly, OARM dismissed the FBI employee's Request for Corrective Action.

*Improper Contacts with Represented Party; Interference with Attorney-Client Relationship.* A district court opinion criticized a former DOJ attorney, who had been in charge of the government's filter team in a case, for disclosing to the prosecution team communications between the defendant and certain attorneys who represented a debtor corporation solely owned by the defendant. The filter team was established to review potentially attorney-client privileged documents in the government's possession, so that privileged documents could be shielded from the government's trial team. Although the court criticized the filter team's action, it denied the defendant's motion to dismiss because the disclosure did not violate or prejudice the defendant's constitutional rights, the government's trial strategy had not been impacted by the documents, and the documents were not introduced into evidence.

OPR initiated an inquiry and learned that the DOJ attorney decided that certain documents she reviewed were not privileged because the documents reflected the debtor corporation's interests rather than the defendant's personal interests. The DOJ attorney reached that conclusion only after the Chapter 7 bankruptcy trustee waived the corporate debtor's attorney-client privilege.

OPR concluded that there was no evidence that the DOJ attorney intentionally or recklessly violated the defendant's personal attorney-client privilege. OPR found that the DOJ attorney marked as privileged hundreds of documents reflecting the defendant's personal attorney-client communications, and those personal documents were never made available to the prosecution team to review. OPR further concluded that the DOJ attorney's decision that the Chapter 7 trustee's waiver of the corporate attorney-client privilege provided a bright line between the defendant and the corporate attorney-client communications reflected the DOJ attorney's inexperience and the complexity of the issues, rather than a disregard for the defendant's right to protect her attorney-client communications. In this closely-held corporation, the defendant, as a corporate officer, not only acted on the corporation's behalf, but she had also assumed personal liability for some of the corporate debt. The issues resulting from the defendant's and the corporation's intersecting financial liabilities, as well as their respective attorney-client privilege claims, were not readily apparent. Given these factual circumstances, OPR concluded that further investigation was not likely to lead to a finding of professional misconduct and therefore closed its inquiry.

*Introduction of Inflammatory Evidence at Trial.* At the trial of a defendant charged with possessing child pornography, the defendant sought to establish that she did not have exclusive access to her computer, where the child pornography was stored. The DOJ attorney introduced into evidence other, sexually graphic materials stored on the defendant's computer, relating to the defendant's sexual orientation, and argued that the defendant would have restricted access to her computer to conceal those materials. On appeal, the court of appeals criticized the DOJ attorney for questioning witnesses about the material, stating that it was likely to, and may have been intended to, inflame the jury. At the trial, however, the district court had overruled repeated defense objections to questions about the allegedly inflammatory material. In addition, the court of appeals reversed the defendant's conviction on other grounds, and left undecided the issue of whether the district court erred in overruling the defense objections. OPR closed the matter without further inquiry because further investigation was unlikely to result in a finding of professional misconduct.

*Breach of Plea Agreement.* A defendant in a reentry-after-deportation case entered into a plea agreement that provided the government would not "suggest in any way" a higher sentence than the sentence stipulated in the agreement. The DOJ attorney filed a sentencing memorandum recommending that the court impose the stipulated sentence but also recited the facts underlying the defendant's two prior convictions. The defendant contended that the government breached the plea agreement by giving the court the impression that it was seeking a higher-than-stipulated term of confinement. The district court rejected the defendant's contention but imposed a higher-than-stipulated term of confinement, stating for the record that the government's sentencing memorandum had no influence on the sentence it imposed. The court of appeals found, however, that by reciting the underlying facts of the defendant's prior convictions in the sentencing memorandum, the government effectively urged the court to impose a higher-than-stipulated sentence and thereby breached the plea agreement.

OPR initiated an inquiry and also concluded that the government breached the plea agreement, which clearly prohibited the government from "suggest[ing] in any way" that the court impose a higher-than-stipulated sentence. By reciting the underlying facts of the defendant's prior convictions, the government's sentencing memorandum gave the court the impression that the government was urging the court to impose a higher-than-stipulated sentence.

OPR found no evidence, however, that the DOJ attorney either intentionally or recklessly violated the plea agreement. The plea agreement specifically permitted the parties to provide the court with relevant information in support of the stipulated sentence, and the DOJ attorney included the facts underlying the defendant's prior convictions in support of a lengthy stipulated term of supervised release, not a higher term of confinement. (A revision to the U.S. Sentencing Guidelines, which were promulgated after the plea agreement was entered into, recommended that a term of supervised release not be imposed in alien reentry-after-deportation cases such as this.) Furthermore, after the defendant objected to the sentencing memorandum, the DOJ attorney filed a supplemental memorandum specifically stating that the government was not seeking a higher-than-stipulated term of confinement and provided the court with additional information that supported the stipulated sentence.

*Improper Remark to Grand Juror.* OPR initiated an inquiry after receiving a report that during the grand jury's proceedings in a case, one of the grand jurors asked the DOJ attorney who was conducting the proceedings why the DOJ attorney was "picking on" her, and the DOJ attorney responded that the juror had shown "an unhealthy amount of skepticism." The DOJ attorney told OPR that other grand jurors and other members of the prosecution team had expressed concerns about the grand juror because her questions and comments during the proceedings raised serious concerns about her impartiality. The DOJ attorney said that her remark to the grand juror was made hastily, and was intended, not to silence or intimidate the grand juror, but to remind her of her obligation to be objective and disinterested. The DOJ attorney resigned from the Department for reasons unrelated to OPR's inquiry. OPR closed its inquiry because further investigation of the DOJ attorney's single, isolated comment was unlikely to result in a finding of professional misconduct. Moreover, the grand jury was instructed that any level of skepticism on the grand jurors' part was welcome, and that the DOJ attorney's remark was improper and should be disregarded.

*Lack of Candor to the Court.* A district court issued an order that was critical of a DOJ attorney who allegedly made numerous misrepresentations in the government's trial brief, and the attorney's component referred the matter to OPR.

OPR initiated an inquiry and reviewed the court's order and the pleadings in the case. OPR determined that the government's brief accurately, but inartfully, stated the law and the facts, and that there was no basis for concluding that the DOJ attorney engaged in professional misconduct. However, because the trial brief was imprecise and led the court to conclude that it contained misstatements, OPR referred the matter to the attorney's component so that the attorney's conduct could be addressed as a management or personnel matter.

### **Examples of Investigations Closed in Fiscal Year 2015**

The following are examples of investigations OPR closed during Fiscal Year 2015.

*Failure to Comply with Federal Law; Misrepresentation; Failure to Competently and Diligently Represent the Interests of the Client; Unprofessional Behavior.* A DOJ attorney reported to OPR that in a case she was prosecuting, the court issued an order dismissing the indictment with prejudice for violation of the Speedy Trial Act. The court found that the DOJ attorney repeatedly failed to prepare a plea agreement as promised, and that she filed a stipulation for a continuance of the trial stating that defense counsel had consented to the continuance, when he had not.

OPR initiated an inquiry, which it later converted to an investigation. OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligation of diligence under the Rules of Professional Conduct, by failing to provide a proposed plea agreement to the defendant's attorney in a timely manner. OPR further concluded that the DOJ attorney acted in reckless disregard of her duty of candor to the court under the Rules of Professional Conduct by signing the defense attorney's name to a joint stipulation for continuance without that attorney's consent. In addition, OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her duty of candor to the court by failing to inform the court that she had signed the defense attorney's name to the joint

stipulation for continuance without that attorney's consent. Finally, OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligation to commence the trial within the statutory deadline.

OPR referred its misconduct findings to the PMRU for its review. The PMRU upheld OPR's findings of misconduct, suspended the DOJ attorney without pay for five days, and authorized OPR to notify the appropriate state bar of its findings.

*Conflict of Interest, Including Appearance of Conflict of Interest; Failure to Keep Client Informed; Abuse of Authority or Misuse of Official Position; Failure to Comply with Discovery; Conduct Unbecoming a Federal Agent.* A defendant's attorney made misconduct allegations against both a DOJ attorney and a law enforcement agent in connection with the investigation and prosecution of a former law enforcement official. Defense counsel alleged that the DOJ attorney and the agent were engaged in a long-term romantic relationship while they were investigating the case. Defense counsel also alleged that during a telephone conversation with the defendant's prior attorney, the DOJ attorney threatened to arrest the defendant, and force him to take a "perp walk" out of his office, if the defendant did not stop spreading rumors about the DOJ attorney's relationship with the agent. Further, defense counsel alleged that the DOJ attorney violated her assurances to the defendant's former attorney that the defendant would not be indicted while the attorney was in trial in another case.

OPR initiated an inquiry, which it later converted to an investigation. OPR expanded its investigation to determine whether the DOJ attorney's supervisor improperly instructed her to obtain an indictment after the DOJ attorney informed her supervisor that she had assured the defendant's former attorney that the defendant would not be indicted while the attorney was in trial in another case. OPR also investigated allegations that the agent may have lied when he testified at the defendant's bail modification hearing. In addition, OPR investigated allegations that the alleged romantic relationship between the DOJ attorney and the agent affected a second case, in which, after the DOJ attorney was removed from the case, she filed a pleading with the court in her "personal capacity," responding to allegations that she was involved in a romantic relationship with the agent, who was also the case agent in that case.

OPR concluded that the DOJ attorney engaged in intentional professional misconduct by: (1) engaging in intimate sexual conduct with the agent during regular work hours in government offices and government vehicles; (2) concealing her relationship with the agent from the management of her component; (3) making false representations to management about the nature of her relationship with the agent; (4) making threats to have the defendant arrested and forced to take a "perp walk"; and (5) failing to keep her supervisors informed of her assurance to the defendant's attorney that the defendant could appear in response to a summons, rather than being arrested. OPR also concluded that the DOJ attorney exercised poor judgment by not producing drug test results of an important government witness to the defense in the first case, and by failing to disclose her long-term relationship with the agent to the court *in camera* in the second case. OPR further concluded that the DOJ attorney did not engage in misconduct or exercise poor judgment by failing to honor her agreement with the defendant's former attorney regarding the timing of the defendant's indictment because she acted pursuant to her supervisor's instructions that the defendant be indicted. OPR also found that the DOJ attorney did not



commit misconduct or exercise poor judgment by filing a pleading in her personal capacity because she had a good faith belief that her supervisor had authorized her to file it with the court.

OPR found that the DOJ attorney's supervisor exercised poor judgment when he instructed the DOJ attorney to renege on the promise to the defendant's former attorney that the case would not be indicted while the attorney was in trial in another case. OPR further found that the agent violated the Code of Federal Regulations and the investigative agency's code of conduct by engaging in intimate sexual conduct with the DOJ attorney during regular work hours in government offices and government vehicles. Finally, OPR found that the agent did not commit perjury when he testified at defendant's bail modification hearing.

OPR referred its misconduct findings against the DOJ attorney to the PMRU for its consideration of appropriate discipline and to determine whether the DOJ attorney's misconduct should be referred to the bar. The PMRU upheld OPR's findings and suspended the DOJ attorney without pay for 14 days. The PMRU also authorized OPR to refer its findings to the bar. OPR also referred its findings against the agent to the DOJ investigative agency for its consideration of appropriate discipline.

*Failure to Maintain Active Bar Membership; Failure to Accurately Certify Bar Membership Status; Failure to Keep the Client Informed; Misrepresentation to OPR and the State Bar.* A DOJ component notified OPR that a Department attorney was not an active member of any state bar for a period of more than two years. The attorney was administratively suspended by her state bar for failing to timely pay a late fee imposed for her failure to complete the final hour of her Continuing Legal Education (CLE) requirement until one month after the deadline had passed. Upon being notified by her component that her license was under suspension, the attorney contacted the bar, paid the outstanding fees and dues that had accrued during her suspension, and was retroactively reinstated that same day. During the period of her administrative suspension, the attorney three times certified that she was an active member of the bar.

Based on the results of its investigation, OPR concluded that the Department attorney committed intentional professional misconduct in violation of state bar rule. OPR further concluded that the attorney committed professional misconduct by acting in reckless disregard of her obligation to comply with Department policy by certifying to the Department in three successive years that she was an active member of the bar when, at the time of each certification, her membership had been suspended. OPR concluded that the attorney knew or should have known at the time of each certification that the certification was inaccurate. Under the circumstances, the attorney's failure to inquire of the bar as to her membership status prior to signing the certifications represented a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR further concluded that the attorney acted in reckless disregard of her duty under the pertinent state bar rule to keep her client reasonably informed by failing to inform her component that she had been suspended by the bar.

Finally, because the state bar reinstated the attorney, retroactive to the date of her suspension, OPR could not conclude that the attorney violated her obligation to maintain an

active bar membership. But for the Bar's retroactive reinstatement of the attorney's active bar membership, OPR would have concluded that she had engaged in professional misconduct by acting in reckless disregard of her obligation to be authorized to practice law by maintaining an active membership in at least one state bar, as mandated by statute and Department policy. Because the Bar retroactively reinstated the attorney's active bar membership and treated her membership as though she were continuously active, OPR was unable to conclude that the attorney engaged in professional misconduct by violating her obligation to be authorized to practice law by maintaining at least one active bar membership. OPR concluded, however, that the attorney exercised extremely poor judgment when she failed to take proper steps to ensure that she was in compliance with her obligation to maintain an active bar membership.

Upon completion of its investigation, OPR referred the results of its investigation to the PMRU, which overturned OPR's finding that the attorney engaged in intentional professional misconduct but upheld OPR's findings in all other respects, including that she committed professional misconduct in violation of her duty under state bar rules to keep her client reasonably informed. Because the attorney resigned from the Department before the PMRU completed its review, no discipline could be imposed. The PMRU, however, authorized OPR to refer its professional misconduct finding to the appropriate state bar disciplinary authority, and OPR has done so.

*Failure to Comply with DOJ Press Guidelines.* A district judge complained to OPR that during a criminal trial, a DOJ attorney posted on social media inappropriate comments criticizing the judge, the defendant, and defense counsel. The court found the comments prejudicial and granted a mistrial. OPR initiated an inquiry, which was later converted to an investigation.

The DOJ attorney admitted, to both the court and OPR, that she had posted on social media inappropriate comments about a trial while the trial was in progress. OPR credited the DOJ attorney's explanation, however, that she believed that her social media posts were visible only to her social media friends, none of whom had any connection to the case. OPR therefore concluded that the DOJ attorney did not engage in intentional misconduct, as she apparently did not recognize that her posts would violate Department policy governing public statements on a pending criminal case. Nevertheless, OPR concluded that the DOJ attorney acted in reckless disregard of her obligations as a Department attorney by publicly disseminating extrajudicial statements regarding a pending case, in violation of the Department's Guidance on the Personal Use of Social Media, as well as the regulations governing public statements set forth in the U.S. Attorneys' Manual and the Code of Federal Regulations. OPR also concluded that by making inappropriate comments online about the presiding judge, defense counsel, and the defendant during the trial, the DOJ attorney engaged in conduct that was detrimental to the interests of the Department. Because of the DOJ attorney's online comments, the court declared a mistrial, and the government ultimately extended a more favorable plea offer than it otherwise would have, had the online postings not become an issue in the case.

OPR referred its findings to the PMRU, which upheld OPR's findings of professional misconduct and imposed an 8-day suspension without pay.

*Failure to Disclose Exculpatory Information; Failure to Comply with Department Policy.* A court found that a DOJ attorney violated her *Brady* obligations by failing to disclose to the

defense an exculpatory statement made by a non-testifying co-defendant during a debriefing session. During a proffer session, the co-defendant told the DOJ attorney that the defendant was unaware of the narcotics that law enforcement agents recovered from a vehicle. Shortly after the debriefing session ended, the co-defendant's attorney requested another meeting with the DOJ attorney, claiming that her client had lied but was now ready to tell the truth. The DOJ attorney arranged a second debriefing, during which the co-defendant recanted his earlier statement and told the DOJ attorney that the defendant knew about the presence of the narcotics in the vehicle. The DOJ attorney did not disclose the co-defendant's statements to the defendant before trial. OPR initiated an inquiry, which was subsequently converted to an investigation.

The DOJ attorney explained that she did not disclose the witness' statements because the co-defendant recanted his initial statement, and the DOJ attorney believed that the defendant could have obtained the information through the exercise of due diligence because the defendant and co-defendant were together in the vehicle at the time of their arrest. Prevailing law at the time held that there was no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source.

OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligations pursuant to Department policy, as set forth in the U.S. Attorneys' Manual, § 9-5.001 *et seq.*, to disclose evidence favorable to the defense without regard to materiality. Although a close question under the unique circumstances presented in this case, OPR was constrained to conclude that the DOJ attorney did not violate a clear and unambiguous obligation pursuant to *Brady* or the applicable state rules of professional conduct because the defendant and co-defendant were together in the vehicle at the time of their arrest; thus, the defendant arguably knew or should have known how the co-defendant would testify at trial concerning whether the defendant knowingly participated in a conspiracy to distribute the narcotics in the vehicle. The defendant did not seek his former co-defendant's testimony at trial.

OPR referred its findings to the PMRU, which sustained OPR's findings and issued a letter of reprimand to the DOJ attorney.

*Failure to Comply with Federal Rules of Criminal Procedure.* A district court criticized a DOJ attorney and her supervisor for issuing subpoenas that summoned witnesses to attend pretrial interviews at the DOJ attorney's office. Although the court found that the defense had not been prejudiced because most of the subpoenas had been issued to law enforcement personnel, it disqualified the DOJ attorney from further involvement in the case.

OPR conducted an investigation and concluded that neither the DOJ attorney nor her supervisor engaged in professional misconduct because neither knowingly issued subpoenas for the improper purpose of compelling pretrial interviews. OPR's investigation revealed that the legal assistant who prepared the subpoenas did so based on erroneous guidance she received from her supervisor, and because she relied on a flawed model that another legal assistant had previously used to prepare subpoenas. OPR's investigation did not uncover evidence that the DOJ attorney or her supervisor knew that the legal assistant had received erroneous guidance or that the subpoenas were defective when they signed them.

OPR nonetheless concluded that the DOJ attorney and her supervisor exercised poor judgment by failing to carefully review the subpoenas before signing them. The DOJ attorney and her supervisor were responsible for ensuring that the subpoenas they signed were prepared and issued for a proper purpose. Instead, they treated the signature of the subpoenas as a clerical matter requiring no substantive review. The DOJ attorney and her supervisor may not have foreseen the specific defects that resulted from the erroneous guidance the legal assistant received, but they should have foreseen the possibility that mistakes could have been made due simply to human error, if nothing more. That possibility was all the more concrete in light of the fact that the legal assistant was a contractor who had limited experience working for the government. OPR's poor judgment findings were referred to the DOJ attorneys' component for consideration in a management context.

*Failure to Comply with Brady Obligations; Abuse of Prosecutive Authority; Improper Coercion of a Guilty Plea.* OPR received complaints alleging that a DOJ attorney engaged in professional misconduct by: (1) failing to timely disclose information that supported arguments the defense raised in a motion to suppress; (2) attempting to coerce the defendant into pleading guilty; and (3) acting vindictively as a result of the defendant's effort to defend himself and exercise his First Amendment rights. OPR initiated an inquiry, which was subsequently converted to an investigation.

Based on the results of its investigation, OPR determined that the DOJ attorney did not commit professional misconduct or exercise poor judgment. First, OPR learned that approximately six weeks before a hearing on the defendant's motion to suppress, the DOJ attorney disclosed to the defense an e-mail that related to an argument the defense raised in its reply brief. OPR determined that the information contained in the e-mail was already known to the defense, was not exculpatory or material, and did not contradict arguments raised in the government's opposition to the motion to suppress. Moreover, the defense was afforded ample time to make use of the information contained in the e-mail at the impending suppression hearing. OPR concluded that the DOJ attorney did not violate her obligations pursuant to *Brady*, Department policy, or the applicable state rules of professional conduct.

Second, OPR's investigation revealed no evidence that the DOJ attorney attempted to coerce the defendant into entering a guilty plea, or that she abused her prosecutorial discretion when she informed the defendant that the government would recommend a sentence well below the applicable, voluntary U.S. Sentencing Guidelines range if the defendant pled guilty to felony charges. OPR found that the DOJ attorney's sentencing recommendation reflected her view that a sentence well below the applicable Guidelines range would be more appropriate than a higher range, in light of the unique circumstances of the case. Moreover, the DOJ attorney discussed her views with supervisors and conveyed the plea offer only after obtaining supervisory approval.

Third, OPR also found no evidence that the DOJ attorney changed her position during plea negotiations or sought a superseding indictment that included additional counts in an effort to retaliate against the defendant for exercising her First Amendment rights.

OPR concluded that the DOJ attorney acted appropriately under the circumstances.

*Discovery – Failure to Disclose Impeachment/Jencks Act Material; Failure to Keep the Client Informed; Failure to Comply with DOJ Rules and Regulations.* A DOJ component advised OPR that a DOJ attorney had been engaged in an intimate relationship with a law enforcement officer who was assigned to a task force investigating offenses that were prosecuted by the DOJ component and who was the case agent on a number of cases that were prosecuted by the DOJ attorney and other component attorneys. The DOJ attorney failed to disclose the relationship to her supervisors, the defense, and the court in cases she prosecuted in which the law enforcement officer was a possible trial witness. The DOJ component learned of the relationship between the DOJ attorney and the law enforcement officer after the cases they handled together had concluded. The DOJ component delivered an *ex parte* sealed letter disclosing the relationship to one of the district judges who had presided over a number of the cases; the judge concluded that the information need not be disclosed to the defense in the applicable cases.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct when she failed to disclose to the defense her relationship with the law enforcement officer, but that she exercised extremely poor judgment when she failed to disclose the relationship to the court *in camera* so that the court could make a determination as to whether the relationship should be disclosed in particular cases. OPR further concluded that the DOJ attorney engaged in professional misconduct in violation of a state bar rule by acting in reckless disregard of her obligation to keep the DOJ component reasonably informed about the status of the matters she was handling, when she failed to disclose that she was involved in an intimate relationship with the law enforcement officer. Her failure to disclose the relationship precluded the DOJ component from making informed decisions with regard to the DOJ attorney's cases. In particular, the DOJ component's management did not have the opportunity to consider the extent to which the relationship between the DOJ attorney and the law enforcement officer affected case assignments, the DOJ attorney's handling of cases, or the disclosure of impeachment information, as might be required by *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), the Jencks Act, Rule 16 of the Federal Rules of Criminal Procedure, and DOJ and component discovery policies. Finally, OPR concluded that the DOJ attorney violated DOJ's *de minimis* use policy regarding the personal use of government equipment and resources when she communicated with the law enforcement officer in an excessive number of text messages on her government-issued cellular telephone.

OPR referred its findings to the PMRU, which upheld OPR's finding of professional misconduct, imposed a 3-day suspension without pay, and authorized OPR to refer its findings to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

*Overzealous Prosecution; Failure to Report Misconduct.* Following conviction and sentencing, a defendant moved to vacate her sentence pursuant to 28 U.S.C. § 2255. The court granted the motion to vacate the sentence. During resentencing, the government objected to the presentence report and sought a higher sentence based on relevant conduct not previously disclosed to the court. The court ruled that the government's objections were inappropriate and found that the DOJ attorney was motivated by vindictiveness in response to the defendant's § 2255 motion. The DOJ attorney failed to inform her supervisors of the court's ruling, which was critical of her handling of the resentencing.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct because she did not engage in vindictive prosecution. The DOJ attorney was not motivated by vindictiveness as a result of the court's granting of the defendant's § 2255 motion. OPR found that the DOJ attorney only objected to the presentence report at resentencing in response to the defendant's sentencing memorandum that had argued for reductions and adjustments not previously raised, resulting in a potential sentence that was well below the original sentencing range. OPR also concluded that there was insufficient preponderant evidence to establish that the DOJ attorney engaged in professional misconduct in violation of her obligations to keep the DOJ component reasonably informed and to report judicial findings of misconduct. OPR was unable to find that the DOJ attorney purposely, knowingly, or recklessly decided not to report to her supervisor the court's criticism of her resentencing arguments. Rather, the DOJ attorney exercised poor judgment by not advising the DOJ component or OPR of the court's ruling. The DOJ attorney retired prior to the conclusion of OPR's investigation.

*Failure to Maintain Active Bar Membership.* A DOJ attorney self-reported to OPR that she failed to timely pay her annual bar dues in 2014, causing her to be ineligible to practice law for 22 days. The DOJ attorney advised OPR that although her bar payment was due on July 1, 2014, she did not make it until September 23, 2014, due to an oversight. Under the bar's rules, a member becomes ineligible to practice law if her annual bar dues are not paid by September 1.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment when she failed to timely pay her annual dues to the state bar. Rather, OPR concluded that the DOJ attorney made a mistake when she inadvertently placed her bar dues payment in her desk drawer instead of mailing it, as she had intended to do. Similarly, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment by practicing law without a license, but made a mistake by operating under the inaccurate belief that she remained at all pertinent times authorized to practice law.

*Failure to Comply With DOJ Policy.* OPR received allegations that a DOJ attorney unjustly filed an application for a criminal complaint against two attorneys. In the course of an investigation, the grand jury issued a subpoena for documents in the possession of the attorneys' client, who was not a target of the investigation. Following the attorneys' motion to quash, the magistrate judge issued an order requiring production of the documents but allowing the attorneys to make certain redactions. After the attorneys produced the documents with more redactions than the court's instruction allowed, the DOJ attorney requested that the attorneys appear in court with the documents in unredacted form accompanied by an individual who could authenticate the material. Rather than appear in court, the attorneys filed a motion for a protective order. Thereafter, the DOJ attorney brought an application for a criminal complaint charging the attorneys with conspiring to alter and conceal records. The magistrate judge signed the complaint, issued a summons for the attorneys to appear, and scheduled a hearing to address both the complaint and the protective order. After management was made aware of the matter, the government promptly moved to dismiss the complaint.

OPR conducted an investigation and concluded that in filing the application for a criminal complaint, the DOJ attorney committed professional misconduct by acting in reckless

disregard of her obligations under DOJ policy because: (1) she did not have an objectively reasonable belief that the admissible evidence would probably be sufficient to obtain and sustain a conviction; (2) she did not have an objectively reasonable belief that the charges were supported by probable cause; (3) she did not reasonably or adequately consider whether a substantial federal interest would be served by prosecution, or whether adequate non-criminal alternatives to prosecution existed; and (4) she failed to secure appropriate approval to file the complaint application. OPR further concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligations to keep her client reasonably informed, and by failing to explain the matter to her supervisor to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Finally, OPR concluded that the DOJ attorney exercised poor judgment by failing to avoid the appearance of a loss of impartiality.

OPR did not determine whether the DOJ attorney committed professional misconduct by knowingly filing a complaint lacking probable cause. Although the facts supported a conclusion that the DOJ attorney knew that the complaint lacked probable cause, case law was not sufficiently clear for OPR to reach such a conclusion under the unique circumstances presented in this case. Nevertheless, OPR concluded that the DOJ attorney exercised extremely poor judgment by filing a complaint lacking probable cause.

OPR referred its misconduct findings to the PMRU, which upheld OPR's findings and imposed a 14-day suspension without pay.

*Misrepresentation/Misleading the Court and Defense Counsel.* A DOJ attorney self-reported to OPR that, following a hearing on the defendants' motion to dismiss a complicated international narcotics case due to outrageous government conduct, the court ruled that the government knew or should have known that foreign law enforcement witnesses had received payments from the United States government for their work on the underlying investigation and that the DOJ attorney failed to make a timely disclosure of that information to the defense. Prior to the trial, defense counsel requested that the government provide information as to whether its foreign law enforcement witnesses had received payments from the United States government. The government did not respond to the request or to a related motion to compel filed by the defense.

During a witness preparation meeting prior to the hearing on the motion to compel, the government learned that the foreign law enforcement witnesses had received money from the United States government for operational expenses. At the hearing on the motion to compel, the DOJ attorney denied defense claims that the foreign law enforcement officer witnesses had received payments from the United States and asserted that while the witnesses worked in cooperation with United States law enforcement, they were paid only by their own government. On three separate occasions following the hearing and prior to the start of trial, three different law enforcement agents informed the DOJ attorney that the foreign law enforcement officers received payments from the United States. The DOJ attorney did not provide the information to the court or defense counsel or correct her previous statement to the contrary. During cross-examination at trial, a foreign law enforcement witness testified that she had received

payments from the United States for her work on the case and that she could spend the money at her discretion.

Based on the results of its investigation, OPR concluded that the DOJ attorney committed intentional professional misconduct by knowingly failing to correct false statements of material fact she made to the court and by making statements to the court that were not based on a reasonably diligent inquiry. Although OPR did not conclude that the DOJ attorney committed professional misconduct in violation of her obligations to disclose witness impeachment material, OPR concluded that the DOJ attorney acted in reckless disregard of the broader disclosure obligations imposed by DOJ policy by failing to locate and disclose the impeachment material. OPR referred its misconduct findings to the PMRU, which upheld OPR's findings of professional misconduct but reduced the finding of intentional misconduct to reckless misconduct. The PMRU imposed a 10-day suspension without pay and authorized OPR to notify the DOJ attorney's state bar of its findings. OPR subsequently reported the matter to state bar disciplinary authorities.

*IJ – Failure to Follow Proper Procedures; Violation of Alien's Due Process Rights.* An immigration attorney complained that an Immigration Judge demonstrated bias and prejudice by: (1) failing to inform the respondent that her unopposed motion to change venue had been denied or deferred until the day before the master hearing, and ordering the respondent to appear for the hearing the next morning; (2) ordering at the hearing that the respondent be removed *in absentia*, even though the government did not seek that ruling and did not oppose a change of venue or a continuance; (3) making defamatory statements about respondent's counsel; and (4) filing an unsubstantiated complaint against respondent's counsel. OPR initiated an investigation, and learned during the course of its investigation that the Immigration Judge's supervisor had already counseled her about her conduct in the case and represented to her that she would be subject to no further discipline in connection with the matter. Accordingly, OPR closed its investigation.

*Abuse of Authority; Failure to Honor Plea Agreement.* An appellate court held that a DOJ attorney breached a plea agreement by advocating for an upward departure from the U.S. Sentencing Guidelines range. The appellate court affirmed the sentence, finding that there was no evidence that the district court would not have departed upward in sentencing the defendant in the absence of the DOJ attorney's advocacy. The court did not find that the DOJ attorney acted in bad faith or engaged in professional misconduct.

Two defendants were charged as a result of their participation in the same criminal scheme. One defendant pled guilty, but declined to enter into a plea agreement with the government. The second defendant pled guilty pursuant to a plea agreement. Both defendants were sentenced at separate hearings held on the same day. At the first sentencing hearing, for the defendant who lacked a plea agreement, the DOJ attorney argued for a sentence within the applicable Guidelines range. A visiting judge, in a significant departure from the long-standing local practice of applying the applicable Guidelines range even in the absence of a plea agreement, sentenced the defendant to a term substantially in excess of the Guidelines range. Because the DOJ attorney's supervisors had repeatedly stressed the importance of ensuring that similarly-situated defendants are treated comparably at sentencing, the DOJ attorney believed she was obligated to argue that the second defendant, who had entered into a plea agreement, should receive a similar sentence. The DOJ attorney did not consider the plea agreement to be



an impediment because it did not include a provision requiring the government to make a specific sentencing recommendation. The DOJ attorney had never before argued for an upward departure from the Guidelines range and the DOJ attorney failed to recall that one of the plea agreement's standard provisions prohibited her from arguing for an upward departure from the applicable Guidelines range. Prior to the second sentencing hearing, the DOJ attorney told the defense counsel that she intended to ask for a sentence comparable to that imposed during the first hearing. Defense counsel, who was aware of the outcome of the prior hearing, did not object and acknowledged that she anticipated her client would receive a similar sentence. During the sentencing hearing, defense counsel did not argue that the DOJ attorney's argument in favor of an upward departure violated the plea agreement. The second defendant was sentenced to a term of incarceration similar to that of her co-defendant.

OPR conducted an investigation and concluded that although the DOJ attorney violated the plea agreement by arguing for an upward departure from the applicable Guidelines range, the preponderant evidence did not support a finding that the DOJ attorney intentionally or recklessly violated her obligation to honor the plea agreement. OPR credited the DOJ attorney's statement that she did not remember that she was prohibited from asking for an upward departure. The provision had not been the subject of any negotiation between the parties and was a standard provision in a form agreement utilized by the DOJ component. In addition, it was a provision that usually had no practical application because the DOJ attorney had never requested, and the local court did not customarily impose, a sentence that exceeded the Guidelines range. OPR found plausible the DOJ attorney's assertion that, based on the unexpected outcome of the first sentencing hearing, her entire focus shifted to her obligation to advocate for proportionate sentences for two similarly-situated defendants. OPR concluded that the DOJ attorney's failure to recall that the plea agreement specifically prevented her from arguing for an upward departure was a serious mistake. The DOJ attorney should have more closely reviewed the plea agreement prior to the sentencing hearing. Had she done so, she would have recognized that an argument that both defendants should receive proportionate sentences would violate the plea agreement.

*Conflict of Interest; Appearance of Impropriety.* A DOJ component referred to OPR the allegation that a DOJ attorney improperly hired a criminal defendant on supervised release to perform home improvement tasks for her. OPR conducted an investigation and concluded that the DOJ attorney did not violate the rules of professional conduct concerning conflicts of interest because the DOJ attorney's first contact with the defendant occurred after she communicated her decision not to oppose the early termination of the defendant's supervised release; the DOJ attorney's decision not to oppose the early termination of the supervised release did not violate DOJ policy and reflected component policy; and her recommendation was in line with recommendations that she had made in similar cases.

OPR concluded that the DOJ attorney violated 5 C.F.R. § 2635.502 and 5 C.F.R. § 2635.101(a)(14) by acting in a way which might cause a reasonable person with knowledge of the facts to question her impartiality or that might create an appearance of impropriety. OPR, however, did not find preponderant evidence that the DOJ attorney intentionally or recklessly violated her obligations to avoid the appearance of impropriety. OPR credited the DOJ attorney's explanation that her decision to offer employment to this individual was informed by her knowledge of the employment problems encountered by a convicted felon, and that it never

occurred to her that her conduct might give rise to an appearance of impropriety or that her impartiality might be questioned. Nonetheless, because the DOJ attorney failed to appreciate that her intentions might be misunderstood, and failed to realize that at a minimum she should have sought the advice of a supervisor or the component's Professional Responsibility Officer, OPR concluded that the DOJ attorney exercised poor judgment. OPR referred its findings to the DOJ attorney's component to address in a management context.

*Misuse of Grand Jury.* A month before a scheduled trial, a DOJ attorney sent letters to two defense witnesses informing them that they were "subjects of a federal grand jury investigation" and that the grand jury had "asked" for their testimony. After the two witnesses announced they would not testify for the defendant at trial, the defendant moved to dismiss the indictment, alleging misuse of the grand jury. The district judge credited the DOJ attorney's denial that she intended to discourage the witnesses from testifying for the defendant. The district court found, however, that the letters were intimidating, and that in sending the letters, the DOJ attorney impermissibly used the grand jury to conduct pretrial discovery and "lied" when she represented in the letters that: (1) the witnesses were "subjects of a federal grand jury investigation"; (2) the grand jury had "asked" the DOJ attorney to invite them to testify before the grand jury; and (3) the grand jury had "requested" that they provide handwriting exemplars. The government moved to dismiss the case with prejudice.

OPR conducted an investigation and concluded that the DOJ attorney, who resigned during the course of the investigation, did not misuse the grand jury in an attempt to conduct pretrial discovery. OPR determined that after the defendant was initially indicted, there was sufficient evidence to initiate a grand jury investigation of obstruction of justice by the witnesses, and that the DOJ attorney's primary purpose in sending the letters was not to conduct pretrial discovery, but to gather evidence to bring additional charges against the defendant and the witnesses. OPR also determined that the letters did not contain a false statement of material fact because they accurately described the witnesses as "subjects of a federal grand jury investigation." Furthermore, the representations that the grand jury had "asked" the DOJ attorney to invite the witnesses to testify before the grand jury and had "requested" that the witnesses provide handwriting samples were not intended to be false or misleading. Although the grand jury had neither specifically "asked" nor "requested" the witnesses to testify or provide handwriting exemplars, the DOJ attorney was acting on behalf of the grand jury, and her inclusion of this language in her letters resulted not from willful misconduct or recklessness, but from her use of language from a standard form letter without sufficiently scrutinizing it. Moreover, the language in the letters would have conformed to accepted practice with a simple wording change stating that the requests were made "on behalf of" the grand jury. OPR concluded, however, that in sending the letters as written, the DOJ attorney exercised poor judgment.

*Failure to Disclose Exculpatory Evidence.* The defendant in a murder case alleged that the prosecution failed to disclose that a third-party had threatened to kill the victim shortly before she was murdered. After her conviction, the defendant filed a motion for a new trial. During the litigation of that motion, the government found in its file an internal memorandum transferring the case from the prosecutor initially assigned to the case to her immediate supervisor. The memorandum and the initial prosecutor's notes contained information suggesting that a

third-party had threatened the victim shortly before she was murdered. The information contained in the memorandum and the notes had not been disclosed to the defense prior to trial. Moreover, prior to trial, the government had successfully moved to exclude evidence that a third-party had committed the crime. Upon discovering the memorandum and the notes in the file, the government withdrew its opposition to the defendant's motion for a new trial. The court granted the motion, dismissed the indictment without prejudice, and vacated the defendant's conviction. The defendant later pled guilty to a lesser offense and was resentenced. OPR initiated an inquiry, which it later converted to an investigation.

The OPR investigation revealed that the case was reassigned twice before the trial, and the Department attorney who ultimately tried the case credibly asserted that she never saw the memorandum or the notes, and that neither the memorandum nor the notes were in the file when the case was reassigned to her. OPR found no evidence that the Department attorney who tried the case was ever informed about the third-party threat to the victim, that she ever saw the memorandum or the notes, or that they were in the case file when the case was reassigned to her. Accordingly, OPR found that the attorney did not commit professional misconduct or exercise poor judgment by failing to disclose to the defense that a third-party had threatened to kill the victim shortly before she was murdered.

## **Conclusion**

During Fiscal Year 2015, 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 inside 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 2015 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.