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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2010**

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U.S. Department of Justice  
Office of Professional Responsibility

Fiscal Year 2010 Annual Report

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# Annual Report for Fiscal Year 2010

## **Introduction**

The Office of Professional Responsibility (OPR) was established in the Department of Justice (DOJ) by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 35<sup>th</sup> Annual Report to the Attorney General, and it covers fiscal year 2010 (October 1, 2009 - September 30, 2010).

## **Jurisdiction and Functions of OPR**

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

Typical misconduct allegations that OPR investigates include *Brady*, *Giglio*, Federal Rule of Criminal Procedure 16, and civil discovery violations; improper conduct before a grand jury; improper coercion or intimidation of witnesses; improper use of peremptory strikes during jury selection; improper questioning of witnesses; improper introduction of evidence; misrepresentations to the court and/or opposing counsel; improper opening statements and closing arguments; failure to represent diligently the interests of the government; failure to comply with court orders, including scheduling orders; unauthorized disclosure of non-public information; and the exercise of prosecutorial discretion based on improper purposes. In addition, OPR examines cases in which courts have awarded Hyde Amendment fees to the defendant based on a finding that the government's conduct was frivolous, vexatious, or in bad faith.

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal

agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence or non-frivolous allegation of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Information provided to OPR may be confidential. In appropriate cases, OPR will disclose that information only to the extent necessary to resolve the allegation, or when required by law.

Upon receipt, OPR reviews each allegation and determines whether further investigation is warranted. If it is, OPR determines whether to conduct an inquiry or a full investigation. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation.

The majority of complaints reviewed by OPR each year are determined not to warrant further investigation because, for example, the complaint is frivolous on its face, is outside OPR's jurisdiction, or is vague and unsupported by any evidence. In some cases, OPR initiates an inquiry because more information is needed to resolve the matter. In such cases, OPR may request additional information from the complainant or obtain a written response from the attorney against whom the allegation was made, and may review other relevant materials such as pleadings and transcripts. Most inquiries are resolved with no misconduct finding based on the additional written record.

In cases that cannot be resolved based solely on the written record, OPR ordinarily conducts a full on-site investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). The interviews ordinarily are conducted by two OPR attorneys. Interviews of subject attorneys ordinarily 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 information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal.

Judicial findings of misconduct must be referred to OPR by Department employees. Except in extraordinary cases, such findings are, pursuant to Department policy, investigated by OPR regardless of any planned appeal.

OPR ordinarily completes investigations relating to the actions of attorneys who resign or retire during the course of the investigation in order to better assess the litigation impact of the alleged misconduct and to permit the Attorney General and Deputy Attorney General to judge the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it deems such action, in light of OPR's limited resources, to be in the best interest of the Department. Terminated investigations may still result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. It is those officials who are responsible for imposing any disciplinary action that may be appropriate. In matters where OPR concludes that a Department attorney engaged in professional misconduct, pursuant to Department policy OPR recommends a range of discipline.<sup>1</sup> Although OPR's recommendation is not binding on the management officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), he or she must notify the Office of the Deputy Attorney General in advance of implementing that decision. Once a disciplinary action is final, OPR, pursuant to Department policy, notifies the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed. The Department's notification policy includes findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. Consistent with Department policy, OPR does not make bar notifications where the conduct in question involved exclusively internal Department interests which do not appear to implicate a bar rule. In addition, OPR reviews reports issued by the Office of the Inspector General (OIG) concerning Department attorneys to determine whether the relevant state bar counsel should be notified of the misconduct at issue, again pursuant to Department policy.

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<sup>1</sup> During fiscal year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which is responsible for all disciplinary and state bar referral actions relating to OPR findings of professional misconduct against DOJ attorneys. The PMRU will review only those cases involving findings by OPR of intentional or reckless professional misconduct, and will determine whether those findings are supported by the evidence and the applicable law. OPR findings of poor judgment or mistake will continue to be referred to the Department component head or through the Executive Office for United States Attorneys (EOUSA) to the relevant United States Attorney for appropriate action.

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

### **Significant Activities in Fiscal Year 2010**

During fiscal year 2010, OPR participated in non-investigative, policy, and project-oriented activities of the Department. OPR attorneys participated in numerous educational and training activities within and outside the Department of Justice to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During fiscal year 2010, an OPR attorney participated in presentations in media relations workshops focusing on the policies and ethical issues concerning contacts with the media. An OPR attorney participated in the National Advocacy Center's (NAC) Criminal Case Management Discovery Conference, Civil Chiefs' Conference, and Criminal Chiefs' Conference. An OPR attorney made presentations as part of the Department's Orientation for new Assistant United States Attorneys. An OPR attorney also participated in the Executive Office for Immigration Review Legal Training Conference and District of Columbia Circuit Judicial Conference. In addition, OPR attorneys made a presentation to a University of Virginia Law School class about OPR's role at the Department and participated in a panel discussion at a United States Attorney's Office retreat concerning professionalism.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR attorneys participated in presentations to Brazilian and Afghan delegations about OPR's role in the Department and issues associated with prosecutorial ethics. An OPR attorney also served in Tokyo, Japan as a visiting expert at the 143<sup>rd</sup> International Training Course at the United Nations Asia Far East Institute for the Prevention of Crime and the Treatment of Offenders. The theme of the course was Ethics and Codes of Conduct for Judges, Prosecutors, and Law Enforcement Officials. The OPR attorney presented several lectures about OPR's mission to prosecutors, judges, and law enforcement officials from several countries, including Japan, Vietnam, and Mongolia.

OPR continued to serve as the Department's liaison to state bar counsel on matters affecting the professional responsibility of Department attorneys. OPR attorneys attended the mid-year and annual meetings of the National Organization of Bar Counsel that addressed current trends in attorney

regulation and discipline. OPR attorneys participated in the National Organization of Bar Counsel's program committee, which is responsible for organizing topics for presentations at the mid-year and annual meetings. An OPR attorney made a presentation at the annual meeting on the ethical implications of social media for disciplinary organizations. In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also consulted with and advised other Department components regarding requests for notification to a state bar of instances of possible professional misconduct by non-DOJ attorneys. In 67 such matters which OPR opened during fiscal year 2010, OPR reviewed information relating to possible misconduct by non-DOJ attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly of the allegations of misconduct.

In fiscal year 2003, the Attorney General's Advisory Committee approved a plan under which OPR created a Rapid Response Team designed to enhance OPR's ability to respond quickly and effectively to misconduct allegations that arise in matters of particular importance to the Department. The work of the Rapid Response Team, like the other work at OPR, is directed and supervised by the Counsel and the Deputy Counsel. In fiscal year 2010, the Rapid Response Team was composed of 1 OPR Associate Counsel, 2 permanent OPR attorneys, 3 attorneys detailed to OPR from other DOJ components, and 1 contract attorney. The Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

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

### **Intake and Initial Evaluation of Complaints**

In fiscal year 2010, OPR received 1,204 complaints and other letters and memoranda requesting assistance. OPR determined that 183 of the matters, or approximately 15%, warranted further review by OPR attorneys. OPR opened full investigations in 60 of those matters; most of the remaining 123, which are termed "inquiries," were resolved with no findings of professional misconduct,

based on further review, additional information from the complainants, responses from the subjects, or other information. When information developed in an inquiry indicated that further investigation was warranted, the matter was converted to a full investigation.

The remaining 1,021 matters were determined not to warrant an inquiry by OPR because, for example, they related to matters outside the jurisdiction of OPR; sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported by any evidence; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department of Justice component. A supervisory OPR attorney reviewed all such dispositions.

### **OPR Investigations in Fiscal Year 2010**

*Characteristics of Investigations Opened in Fiscal Year 2010:* OPR investigations opened in fiscal year 2010 were based on complaints from a variety of sources, as reflected in Table 1.

**Table 1**

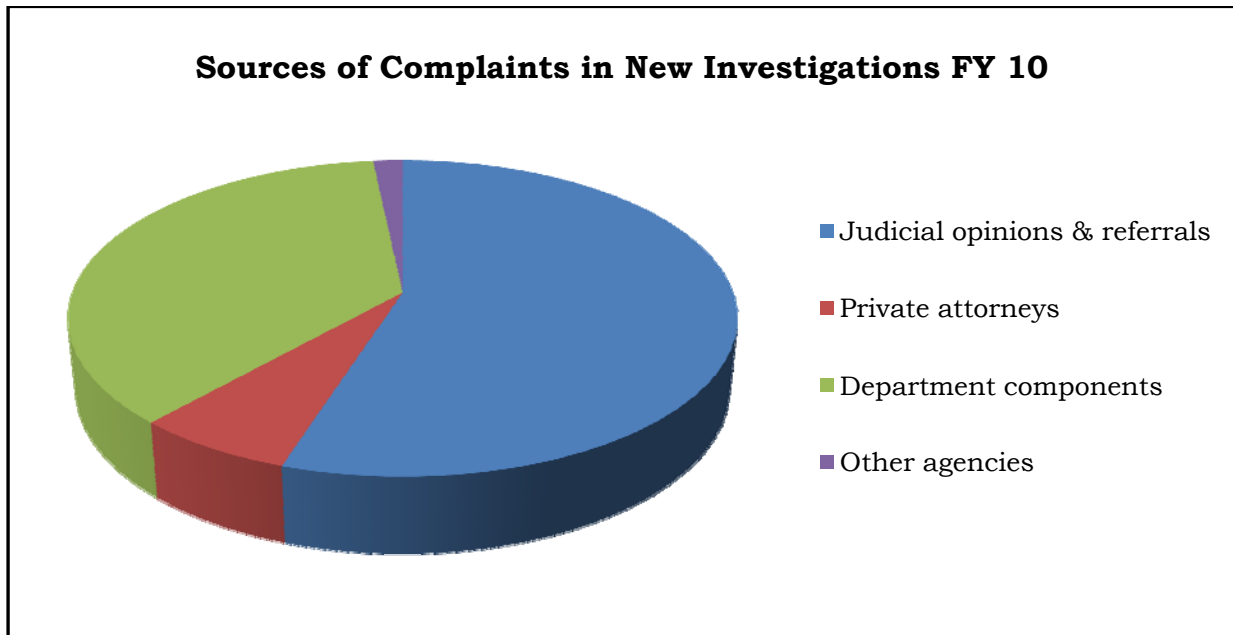
<b>Sources of Complaints Against Department Attorneys in Investigations Opened in FY 10</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Judicial opinions & referrals <sup>2</sup>	33	55.0%
Private attorneys	4	6.7%
Department components	22	36.7%
Other agencies	1	1.6%
<b>Total</b>	<b>60</b>	<b>100%</b>

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<sup>2</sup> This category includes self-reporting by Department employees of serious judicial criticism and judicial findings of misconduct.



**Chart 1**

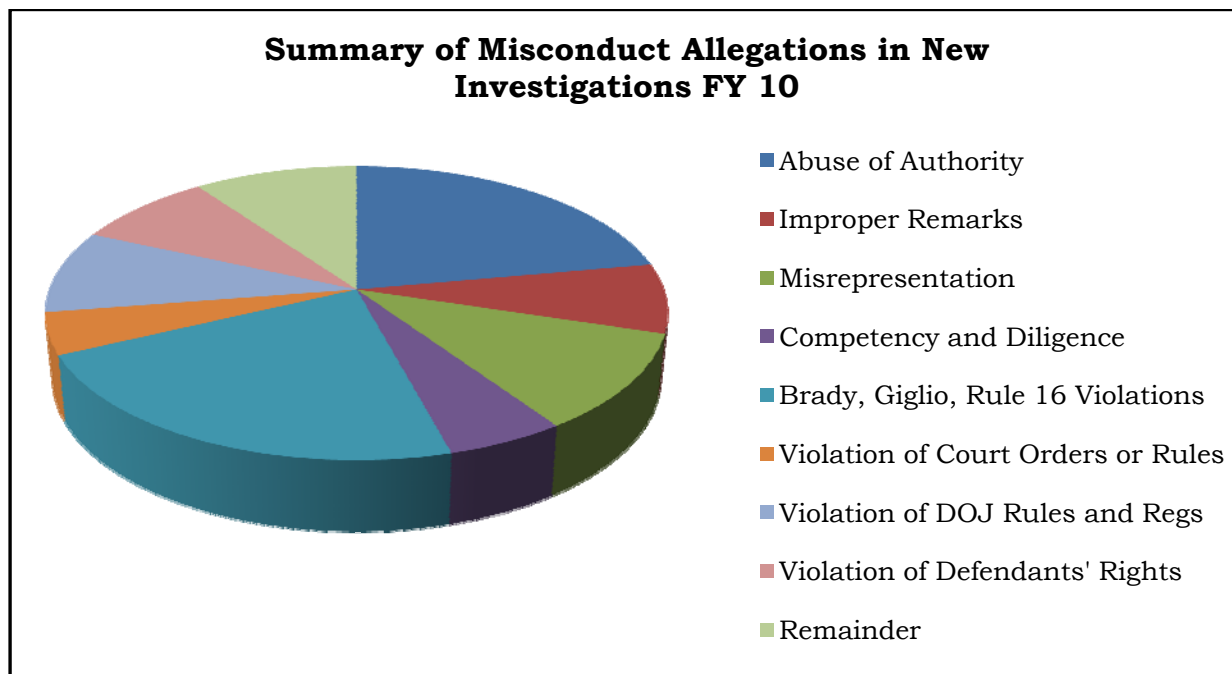


OPR opened a total of 60 new investigations in fiscal year 2010. Three of these matters also involved non-attorney subjects. The 60 investigations involved 131 separate allegations of misconduct. The subject matter of the 131 allegations is set out in Table 2.

**Table 2**

<b>Types of Misconduct Allegations in Investigations Opened in FY 10</b>		
<b>Type of Misconduct Allegation</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations in Investigations</b>
Abuse of authority, including abuse of prosecutorial discretion	29	22.1%
Improper remarks to a grand jury, during trial, or in pleadings	10	7.6%
Misrepresentation to the court and/or opposing counsel	14	10.7%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	1	0.8%
Failure to competently and/or diligently represent the client's interests	7	5.3%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	29	22.1%
Failure to comply with court orders or Federal Rules	6	4.6%
Conflict of interest	1	0.8%
Failure to comply with DOJ rules and regulations	12	9.2%
Interference with defendants' rights	11	8.4%
Lateness ( <i>i.e.</i> , missed filing dates)	2	1.5%
Lack of fitness to practice law	1	0.8%
Failure to maintain active bar membership	2	1.5%
Failure to comply with federal law	2	1.5%
Conduct of Immigration Judges	4	3.1%
<b>Total</b>	<b>131</b>	<b>100%</b>

**Chart 2**



*Investigations Closed in Fiscal Year 2010:* OPR closed a total of 105 investigations in fiscal year 2010. Five of the investigations closed involved non-attorney subjects. Of the 105 investigations that were closed during the fiscal year, OPR found professional misconduct in 24, or approximately 23%, of the matters. Of the 24 matters in which OPR found professional misconduct, 6 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>3</sup> In 20 of the 24 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>4</sup> The number and percentage of investigations resulting in findings of professional misconduct on the part of Department attorneys was higher in fiscal year 2010 than in fiscal year 2009, in which OPR closed 77 investigations and found professional misconduct in 12, or approximately 16%, of those matters.

<sup>3</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>4</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: (1) that the attorney knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) that the attorney 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) that the attorney nevertheless engaged in the conduct, which was objectively unreasonable under all the circumstances.

Disciplinary action was initiated against attorneys in 17 of the 24 matters in which OPR found professional misconduct by Department attorneys. Disciplinary action was not initiated against attorneys in 7 instances because the subject attorneys were no longer employed by the Department at the conclusion of OPR's investigation. Disciplinary action was initiated but was pending at the close of fiscal year 2010 in 7 matters. With respect to the 10 matters in which disciplinary proceedings were initiated and implemented, the subject attorneys in 6 of the matters were suspended and the subject attorneys in 4 of the matters received a written reprimand.

OPR also closed 19 investigations, or approximately 18% of the 105 investigations, with at least 1 finding that an attorney exercised poor judgment.<sup>5</sup> Eight of those 19 matters also involved a finding of professional misconduct, and are included in the 24 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment alone, but rather refers the finding to the DOJ attorney's employing component for consideration in a management context. OPR may also recommend that management consider certain actions, such as additional training. Thirty-one matters, or approximately 30%, involved at least 1 finding that an attorney made an excusable mistake.<sup>6</sup> Six of those 31 matters also included a finding of professional misconduct or poor judgment. Thus, of the 105 matters closed, OPR found professional misconduct or poor judgment in 35 matters, or approximately 33%, which is up from the 22 matters, or approximately 29% of matters, in which OPR found professional misconduct or poor judgment in fiscal year 2009.

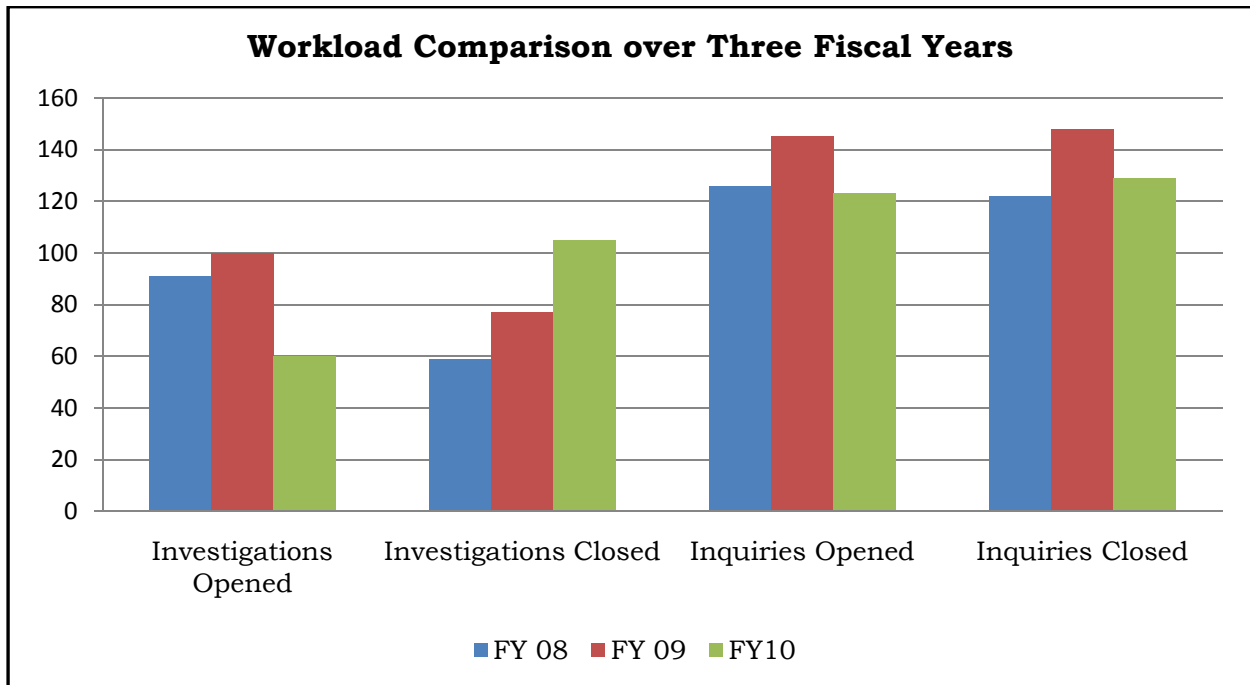
The information in Graphs 1 and 2 highlights the number of investigations and inquiries OPR has opened and closed in the past three fiscal years, as well as the total number of complaints received and reviewed by OPR in the past three fiscal years. OPR was able to close 36% more investigations than it had in FY 2009 (105 compared to 77), and 78% more than it had in FY 2008 (105 compared to 59). OPR closed 15% fewer inquiries than it had in FY 2009 (129 compared to 148), and 6% more than it had in FY 2008 (129 compared to 122). These statistics demonstrate OPR's overall improved efficiency in resolving allegations of professional misconduct.

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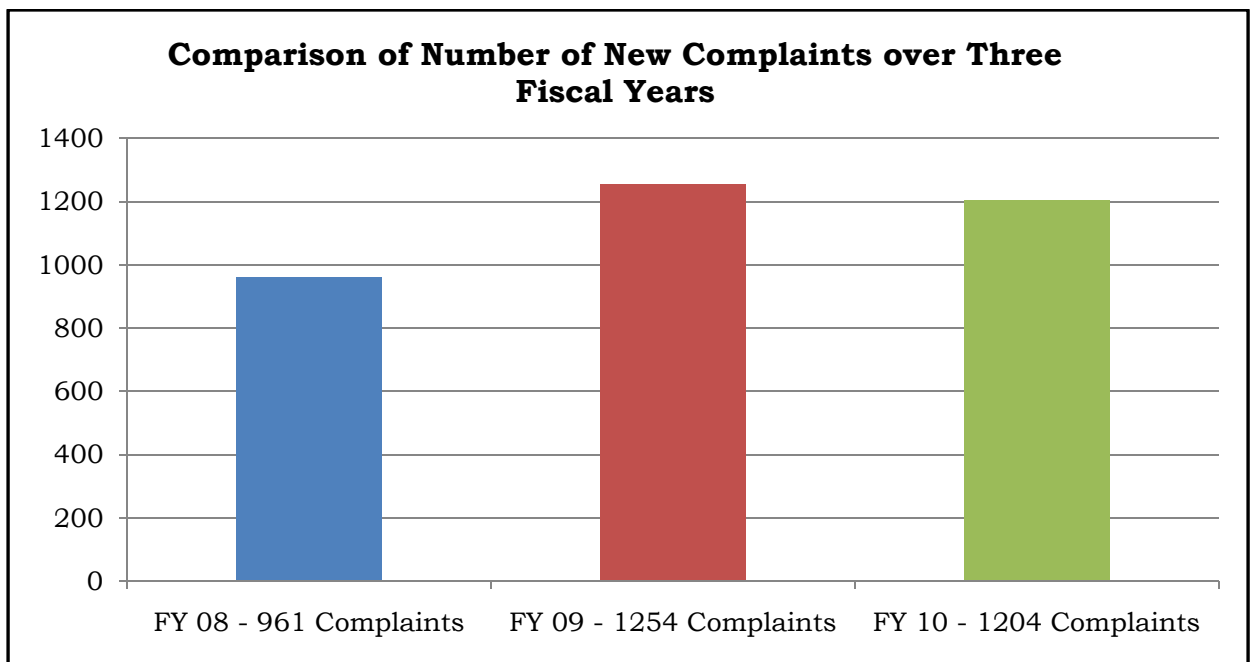
<sup>5</sup> OPR finds that an attorney has exercised poor judgment when, faced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

<sup>6</sup> OPR finds that an attorney made a mistake when the attorney's conduct constituted excusable human error despite the exercise of reasonable care under the circumstances.

**Graph 1**



**Graph 2**



## *Examples of Investigations Closed in Fiscal Year 2010<sup>7</sup>*

1. *Failure to Abide by the Client's Decisions; Failure to Keep the Client Reasonably Informed.* A DOJ component reported to OPR that a DOJ attorney violated several Department policies in connection with the guilty plea and sentencing of a defendant. Specifically, the DOJ attorney: (1) failed to obtain proper supervisory approval for a plea agreement that did not require a guilty plea to the most serious indicted charge in violation of a then existing directive by the Attorney General; (2) misled her supervisors in a memorandum requesting authorization to seek a downward departure from the United States Sentencing Guidelines (Guidelines); (3) recommended to the court a sentence reduction that exceeded the reduction approved by her supervisors; (4) failed to oppose the defendant's motion to reduce the criminal history category under the Guidelines; and (5) failed to object to a sentence of probation.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by: (1) allowing the defendant to plead to a count other than the charge entailing the most significant period of confinement without obtaining supervisory approval; (2) failing to include material information about the Guidelines range in the departure memorandum she prepared for her supervisors; (3) failing, as required by the then existing Attorney General directive that sentencing recommendations be fully consistent with the readily provable facts about the defendant's history, to oppose the defendant's motion to reduce the criminal history category under the Guidelines; (4) recommending to the court a reduction in the defendant's Guidelines minimum sentence which exceeded the reduction approved by her supervisors; and (5) failing to object to a sentence of probation in violation of the then existing Attorney General directive that sentencing recommendations be consistent with the Guidelines. OPR found that by engaging in the foregoing acts, the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her duties to consult the client, keep the client informed, and abide by the client's decisions.

OPR recommended a range of discipline from a seven-day to a twenty-day suspension without pay. This recommendation took into account OPR's findings of misconduct as to the same DOJ attorney in a separate matter. The DOJ attorney received a fourteen-day suspension. OPR intends to notify the appropriate state bar authorities of its findings of professional misconduct.

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<sup>7</sup> To protect the privacy of the Department attorneys and other individuals involved in the investigations summarized, OPR has omitted names and identifying details from these examples. In addition, OPR has used female pronouns in odd numbered examples and male pronouns in even numbered examples regardless of the actual gender of the individual involved.

2. *Improper Closing or Rebuttal Argument; Prejudicial Statement to a Jury.* A court of appeals criticized a DOJ attorney for improperly bolstering witness testimony during the closing argument of a drug case. The court of appeals reversed the defendant's conviction and remanded the case for a new trial.

At trial, the DOJ attorney mentioned that the co-defendant pleaded guilty, and stated that the defendant never denied knowing about the drugs in his post-arrest interview. In closing argument, defense counsel questioned the credibility and integrity of the agents. In response, the DOJ attorney argued in rebuttal closing argument that the agents would not risk their careers by lying under oath; that to believe the defendant the jurors would have to find that the agents conspired to wrongfully convict the defendant; that the jurors should respect the agents' efforts and believe their testimony; and that the agents were credible witnesses.

On appeal from the defendant's conviction, the court of appeals held that the DOJ attorney improperly vouched for the government's witnesses. The court found that the cumulative prejudice from the vouching resulted in reversible plain error which seriously affected the fairness of the trial.

OPR conducted an investigation and concluded that the DOJ attorney committed professional misconduct when he acted in reckless disregard of his obligation not to vouch for the credibility of government witnesses. The sole issue at trial was whether the defendant knew about the drugs. The agents testified that the defendant admitted knowing about the drugs, and the defense strategy was to discredit this testimony. OPR found that in attempting to rehabilitate the government witnesses, the DOJ attorney went beyond permissible bounds by stating his personal opinion about the agents' credibility and his belief as to why the agents would not lie on the stand. OPR noted that the improper statements did not represent one or two slips of the tongue, but were more sustained in nature.

OPR also considered whether the DOJ attorney acted improperly by referring to the co-defendant's guilty plea, and determined that he did not. The DOJ attorney referred to the guilty plea because he understood that the defense strategy was that the co-defendant, not the defendant, was the guilty party. The DOJ attorney reasonably expected that if he did not mention the co-defendant's guilty plea during the opening statement, the defense would do so, and would likely suggest that the government was trying to hide it from the jury. OPR noted that courts have recognized that a legitimate reason for eliciting testimony about a co-conspirator's guilty plea exists when the record reflects a defense strategy to emphasize or rely on the co-conspirator's guilt. Accordingly, OPR concluded that the DOJ attorney did not violate any clearly established rule of law or exercise poor judgment in referring to the guilty plea.

Lastly, OPR considered whether the DOJ attorney improperly commented on the defendant's post-arrest silence by stating in closing argument that the

defendant during the post-arrest interview never claimed innocence or denied knowing about the drugs. OPR found that although a prosecutor may not refer to a defendant's post-arrest silence following *Miranda* warnings in order to suggest guilt, the Supreme Court has ruled that a prosecutor may refer to a defendant's post-*Miranda* silence when the prosecutor is attempting a fair response to a contention made by the defendant. Similarly, courts have permitted prosecutors to comment on a defendant's post-arrest statements when the purpose is to highlight inconsistencies between the defendant's post-arrest statements and the defendant's position at trial. Here, the DOJ attorney properly framed the argument in an effort to contrast the defendant's confession of guilt to the agents with the defendant's position at trial that he was innocent. Accordingly, OPR concluded that the Department attorney did not commit professional misconduct or exercise poor judgment by commenting on the defendant's claimed innocence during the post-arrest interview.

OPR recommended a range of discipline from a written reprimand to a one-day suspension. The DOJ attorney received a written reprimand. OPR intends to notify the appropriate state bar authorities of its finding of professional misconduct.

3. *Candor to the Court.* A DOJ component reported to OPR that a DOJ attorney may have misled a court when the court asked the attorney why she was not available for a hearing and the attorney responded with evasive and incomplete answers. The DOJ component also reported that the DOJ attorney regularly failed to keep her office apprised of her whereabouts throughout the day.

OPR conducted an investigation and found that the day before the DOJ attorney was scheduled to try a criminal case, the court attempted to conduct a last minute hearing on a defense motion. Neither the court nor the DOJ component could locate the DOJ attorney and the hearing had to be postponed until the next morning. The court questioned the DOJ attorney the next morning about why no one was able to locate her for the hearing. The DOJ attorney told the court that she could not be reached because she did not have a cell phone.

OPR determined that several of the statements that the DOJ attorney made to the court were inaccurate or incomplete. The DOJ attorney, for instance, had a cell phone that she had borrowed from one of her children on the day that the court and her office attempted to reach her. OPR found, however, that because the inaccurate and incomplete statements were motivated in part by the attorney's reluctance to discuss the chronic illness of one of her children, to whom she was attending when the court and DOJ component attempted to locate her, the DOJ attorney did not commit professional misconduct. Rather, the DOJ attorney made a mistake when she gave the court inaccurate or incomplete responses. OPR referred for



consideration as a management issue the DOJ attorney's failure to keep her office informed about her whereabouts during working hours.

4. *Failure to Abide by the Client's Decisions; Failure to Maintain Client Confidences.* A DOJ component reported to OPR that during a hearing on the government's motion to revoke bond, defense counsel told the court that the lead DOJ attorney had refused to sign the motion because he believed it lacked merit. The DOJ component expressed concern to OPR that the DOJ attorney failed to abide by the client's wishes and had revealed client confidences to defense counsel.

OPR conducted an investigation and found that on the same day the defendant signed a plea agreement for Mann Act and drug related violations, the government filed a notice with the court informing it that the government possessed information that the defendant may have violated the terms and conditions of his bond by traveling outside the jurisdiction. The DOJ attorney and his co-counsel investigated the allegations and determined they were not true. In the course of the investigation, however, the DOJ attorneys discovered that the defendant had contacted a potential witness, an old family friend, in violation of the terms and conditions of the defendant's bond. The question as to whether to file a motion to revoke the defendant's bond based on his contact with an old family friend generated disagreement within the component. The DOJ attorney argued against filing the motion and told his supervisors that he was uncomfortable doing so. The supervisors decided to file the motion and the DOJ attorney's co-counsel signed and filed it. The DOJ attorney called defense counsel the weekend after the motion was filed. At the hearing on the motion, defense counsel told the court that based on his weekend conversation with the DOJ attorney, defense counsel knew that the DOJ attorney had refused to sign and file the motion because he did not agree with the government's decision to file the motion.

OPR interviewed defense counsel. During the interview, defense counsel distanced himself from the statements that he made to the court. Although defense counsel told the court that the DOJ attorney's signature did not appear on the motion because the DOJ attorney believed the motion lacked merit, defense counsel told OPR that the DOJ attorney never told him why his name did not appear on the motion. Defense counsel had merely surmised this from the fact that the DOJ attorney had not, as usual, signed the motion. OPR interviewed the DOJ attorney who stated that defense counsel was upset that a motion to revoke bond was being filed and asked the DOJ attorney why he was filing it. The DOJ attorney responded merely that *he* was not filing it, without elaboration.

OPR concluded that the DOJ attorney did not commit professional misconduct by failing to abide by the client's wishes in the litigation because he did not refuse to sign the motion. Rather, his supervisors decided to have his co-counsel file and argue the motion after the DOJ attorney expressed his

disagreement with the motion. The DOJ attorney told OPR that he would have signed the motion if given a chance to do so. OPR also found that the DOJ attorney did not commit professional misconduct by revealing client confidences because defense counsel credibly told OPR that he had inferred, but not been told, that there was disagreement within the DOJ component based on the fact that co-counsel had signed the motion. Although the DOJ attorney did not commit professional misconduct, OPR found that he exercised poor judgment when he called defense counsel to discuss the motion and implied that an internal disagreement existed over whether to file the motion. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

5. *Candor to the Court; Failure to Abide by Court Orders.* A district court criticized a DOJ attorney for failing to disclose impeachment information about an informant and a police officer that the court ordered to be disclosed. The court also found that the DOJ attorney misled the court by filing an opposition stating that the government was unaware of any sustained complaints against the police officer when, in fact, documents reflecting a sustained complaint had been provided to the DOJ attorney, but she did not review the documents. As a result of these actions, the court granted the defendant a new trial.

OPR conducted an investigation and found that as part of discovery, defense counsel asked the government to produce disciplinary records from the personnel file of the arresting police officer. The DOJ attorney requested this information from the police department, but did not receive it. When defense counsel brought this to the court's attention, the court ordered the DOJ attorney to obtain the information and provide it to defense counsel. The DOJ attorney told the court that additional efforts would be made to obtain the disciplinary records. OPR found, however, that after the hearing, the DOJ attorney heard from a colleague that case law did not require a prosecutor to obtain records that were not in the possession, custody, or control of the government. Because the complaints were maintained by the police department, the DOJ attorney suspended her efforts to obtain the disciplinary records. The DOJ attorney did not advise the court of her suspension of efforts.

OPR determined that once the DOJ attorney told the court that the material would be provided to defense counsel, the DOJ attorney was under an obligation to seek the records, notwithstanding existing case law on the subject. Moreover, as soon as the court ordered the government to obtain the records, the DOJ attorney had a clear and unambiguous obligation to comply with the court's order or, alternatively, request that the court clarify or vacate its order because the order was in conflict with existing case law. Because the DOJ attorney did not take either step, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the obligation to obey a court order.

As to the issue of misleading the court, OPR found that the DOJ attorney received a sustained complaint against the police officer, but she did not examine the information in a timely manner. As a result, the government filed an opposition to a motion *in limine* stating incorrectly that the government was unaware of any sustained complaints against the police officer.

OPR determined that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her duty of candor to the court when she told the court that the government was unaware of any sustained complaints against the police officer when, in fact, the government had in its possession documents reflecting a sustained complaint against the police officer. Lastly, OPR concluded that the DOJ attorney exercised poor judgment with regard to statements she made to defense counsel during discovery about prior benefits given to a confidential informant.

OPR recommended a range of discipline from a one-day to a five-day suspension. The DOJ attorney received a two-day suspension. OPR intends to notify the appropriate state bar authorities of its finding of professional misconduct.

6. *Discovery Violation; Misrepresentation/Misleading the Court.* A DOJ supervisor reported to OPR that a DOJ attorney failed to disclose exculpatory and impeachment information that was relevant to the government's efforts to seek a sentencing enhancement. The DOJ supervisor also reported that in a related case the DOJ attorney included inaccurate language in an arrest warrant affidavit.

OPR conducted an investigation. In the first case, the defendant pleaded guilty to drug conspiracy offenses. After entering the plea agreement, three co-defendants informed law enforcement agents that the defendant attempted to obstruct justice by placing a weapon and drugs in the trunk of the car owned by a witness who was going to testify against the defendant's friend. The government alleged that the defendant's conduct constituted witness tampering. When the defendant denied the obstruction allegation in a meeting with the DOJ attorney, the DOJ attorney informed him that the government was going to seek a sentencing enhancement. Defense counsel sent a letter to the DOJ attorney requesting information in the government's possession about the three co-defendants. Although the DOJ attorney anticipated that the co-defendants would testify at the defendant's sentencing hearing, he did not disclose to defense counsel prior to the hearing the fact that one of the co-defendants had previously lied to law enforcement agents about the obstruction of justice allegation, or copies of the plea agreements with the three co-defendants which would have shown that one co-defendant was allowed to plead to a lesser charge. At the sentencing hearing, defense counsel filed a motion to compel discovery about the co-defendants. The court granted the motion, ordered the government to produce the plea agreements, and continued the sentencing hearing. The DOJ attorney complied with the court

order and the defendant received the requested information prior to his sentencing at the continued sentencing hearing.

OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligations, as set forth in the United States Attorney's Manual, to disclose exculpatory and impeachment information to the defense. In particular, OPR found that prior to the initial sentencing hearing the DOJ attorney should have disclosed the plea agreements of the co-defendants whom the government intended to use as witnesses at sentencing, as well as relevant law enforcement reports so that the defendant's attorneys could make effective use of that information at the sentencing hearing.

In the second case, the DOJ attorney planned on arresting the individual who allegedly supplied drugs to the defendant. Because the DOJ attorney was concerned that the supplier might flee the country as a result of an ongoing Internal Revenue Service investigation, the DOJ attorney obtained an arrest warrant for the supplier. The arrest warrant was based, in part, on information provided to the government by the defendant whose sentencing the government was seeking to enhance for his obstructive activity. The DOJ attorney inserted language in the affidavit stating that the reliability of the informant (the defendant) was established by independent evidence and investigation. The DOJ attorney did not disclose the fact that the government was seeking an enhanced sentence based on untruthful statements made by the defendant to the government.

OPR concluded that the DOJ attorney did not commit professional misconduct because he did not intend to mislead the court and he submitted the affidavit under time pressure. OPR concluded, however, that the DOJ attorney exercised poor judgment. The Rules of Professional Conduct require a lawyer to be candid with the court and all federal prosecutors have a general duty of candor to the court. Given the fact that the DOJ attorney was accusing the defendant of obstructive practices, the attorney exercised poor judgment by vouching without qualification for the reliability of the defendant.

OPR recommended a range of discipline from a ten-day suspension to termination. This recommendation took into account OPR's finding of misconduct as to the same DOJ attorney in separate matters. Disciplinary proceedings are pending.

7. *Breach of Plea Agreement.* A district court found that a DOJ attorney violated a plea agreement by advocating for a higher base offense level than the one agreed upon in the plea agreement.

OPR conducted an investigation. The plea agreement called for a certain base offense level based on a specific quantity of drugs. When the presentence report (PSR) came out three months later, a much greater quantity of drugs

was used to determine the base offense level. The DOJ attorney filed a sentencing memorandum supporting the PSR's base offense level calculations. Defense counsel filed a sentencing memorandum urging the court to adopt the stipulation agreed upon in the plea agreement. The next day, the DOJ attorney filed an amended sentencing memorandum affirming the stipulation in the plea agreement and maintaining that the defendant should be sentenced based on the lesser quantity of drugs. The court concluded that the plea agreement had been breached despite the filing of the amended sentencing memorandum. The defendant was sentenced and the court to which the matter was transferred issued an opinion stating that the breach had been inadvertent in nature.

OPR conducted an investigation and found that the DOJ attorney had prepared the sentencing memorandum while at home over a long holiday weekend. She did not have the file with her at home and did not remember that the plea agreement stipulated to the lesser amount of drugs. Once the stipulation was called to her attention, the DOJ attorney filed an amended sentencing memorandum that abided by the terms of the plea agreement. Because relevant case law was ambiguous as to whether asserting an improper argument and then retracting it before sentencing constituted a breach, OPR concluded that the DOJ attorney did not commit professional misconduct. OPR found, however, that the DOJ attorney exercised poor judgment when she filed the initial sentencing memorandum without first reviewing the plea agreement and case file. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

8. *Improper Rebuttal Argument.* A court of appeals criticized a DOJ attorney for stating in his rebuttal closing argument that in order to find the defendant not guilty the jurors would have to believe that all of the law enforcement officers who testified at trial conspired against the defendant. Although the court found the comment improper, it upheld the defendant's conviction.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR found that the case law cited by the court for the proposition that the DOJ attorney erred had been decided after the close of the trial. Previously, circuit law addressing the propriety of similar comments was unclear and ambiguous and addressed comments that were either broader in scope or more extreme in presentation. OPR also found that the DOJ attorney's argument was in direct response to defense counsel's attacks on the law enforcement officers' credibility; the DOJ attorney had no time to prepare for his rebuttal argument; and the DOJ attorney's reference to the implausibility of a conspiracy among law enforcement witnesses was not a major theme of the rebuttal argument but, rather, a brief comment amidst a thorough review of the testimony that the jurors had heard at trial. Under these circumstances, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment.

9. *Duty of Competence.* A DOJ component reported to OPR that a DOJ attorney failed to file a timely motion for a default judgment in a bankruptcy case, causing the court to dismiss the case. The component also reported that in a second case handled by the DOJ attorney, the court denied a joint stipulation seeking an extension of time because the court had previously ruled that further extensions would not be granted.

OPR conducted an investigation. With respect to the first case, OPR concluded that the DOJ attorney engaged in professional misconduct in reckless disregard of her obligation to represent her client in a competent manner. OPR found that the DOJ attorney failed to file the default judgment even after the court directed her to do so at a hearing, and despite two subsequent reminders from the court following the hearing.

With respect to the second case, OPR found that the DOJ attorney did not commit professional misconduct or exercise poor judgment when she filed a joint stipulation seeking an extension of time, in violation of a court order stating further extensions would not be granted. OPR found that the court clerk neither notified counsel by e-mail nor served counsel with a hard copy of the court's previous order limiting further extensions. OPR also found that the clerk's docket entry of the court order did not reflect the fact that further extensions would not be granted. OPR also found that it was customary practice in that district for courts to grant such extensions. Given these circumstances, OPR concluded that the DOJ attorney made an excusable mistake.

OPR recommended a range of discipline ranging from a written reprimand to a two-day suspension without pay for its misconduct finding. The DOJ attorney served a two-day suspension without pay. OPR also notified the appropriate state bar authorities of its finding of professional misconduct.

10. *Improper Contact with Represented Persons; Abuse of Prosecutive or Investigative Authority.* Counsel for a local law enforcement office alleged that DOJ attorneys violated the rules of professional conduct by directing inspectors from another federal agency to contact employees of the local law enforcement office, which was under investigation by the Department, without counsel's permission or knowledge. Counsel also alleged that the DOJ investigation was motivated by improper partisan political considerations.

OPR conducted an investigation and concluded that the DOJ attorneys did not engage in professional misconduct or exercise poor judgment. At the same time that the DOJ attorneys began discussing its investigation with counsel for the local law enforcement office, another federal agency scheduled an inspection of the local office. The DOJ attorneys contacted the other federal agency to learn more about the scope of the inspection and to discuss whether document requests could be coordinated so that the local office would not be overburdened by the requests. Counsel for the local office, who had not

previously dealt with a federal inspection or a Department investigation, were concerned that the interviews conducted for the inspection would be shared with the DOJ attorneys. OPR determined that the DOJ attorneys did not direct the inspection or use non-DOJ personnel to conduct interviews. As such, there was no violation of the rule against contacts with represented persons. Although under certain circumstances contacts may be “authorized by law” under the applicable rules of professional conduct and case law, it was unnecessary for OPR to make such a determination because the DOJ attorneys maintained no control over the inspection interviews. OPR also found that the DOJ investigation was not motivated by improper partisan political considerations. A preliminary inquiry of the local office was initiated under the previous administration based on standard criteria, and a full investigation was authorized under the next administration, also based on sufficient evidence pursuant to DOJ standards for such an investigation.

11. *Misconduct Before the Grand Jury.* A district court dismissed an indictment based on a DOJ attorney’s conduct before the grand jury. The defendant was indicted on tax charges for failing to report income he received as a speaker at various events in the United States and abroad. The court found that the DOJ attorney misled the grand jury by failing to properly instruct the grand jurors on the issue of donor intent. The court found that this failure may have influenced the grand jury’s decision to indict and that dismissal of the indictment was warranted.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct. OPR considered whether the Supreme Court's opinion imposed a clear and unambiguous duty on the DOJ attorney to instruct the grand jury on the subject of donor intent, and concluded that it did not. In its opinion, the Supreme Court reviewed two conflicting circuit court cases posing the question of whether a specific transfer to a taxpayer amounted to a “gift” within the meaning of the Tax Code. In an effort to bring clarification to the issue, the government urged the Court to establish a “test” to serve as a standard for courts to apply to cases raising this same issue. The Supreme Court expressly declined to do so. After eschewing the creation of a litmus test, the Court proceeded to set forth the guiding principles that led it in prior cases to conclude that a particular transfer was not a gift for tax purposes, leaving it to the lower courts to determine on a case-by-case basis whether, based on the totality of the circumstances, a particular item constituted a gift or income. More importantly, OPR determined that the Supreme Court's opinion was not clear or unambiguous on the very issue for which the district court relied on it: the importance of the donor's intent. Although the Court did quote from one of its prior cases for the proposition that the most critical factor in the analysis was the donor's intent, the Court qualified its reliance on that proposition by noting that the donor’s subjective intent does not control and that there must be an objective inquiry to determine whether what is characterized as a gift constitutes a gift within the meaning of the Tax Code. Because the opinion offered insufficient clarity on

the issue of the importance of donor intent, OPR concluded that the DOJ attorney did not breach her professional obligations under Department policy or the applicable state bar rules.

OPR next considered whether the DOJ attorney's conduct constituted an exercise of poor judgment, and concluded that it did not. OPR found that the attorney advised the grand jury that the overriding question to be answered was whether the honoraria and other payments the speaker received were in fact compensation for services rendered. If so, it did not matter how the donor or the speaker labeled the transaction. OPR determined that such advice was consistent with the evidence and the Supreme Court opinion. As such, the advice was within the range of what the Department may reasonably expect an attorney exercising good judgment to give.

Although OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment, OPR found that the attorney made a mistake when she failed to correct an agent's statement in the grand jury downplaying the importance of donor intent. Although the agent's testimony, on the whole, comported with the principles outlined in the Supreme Court opinion, one statement did not. Because the agent's testimony may have left the incorrect impression that donor intent was irrelevant, the DOJ attorney should have corrected the agent's statement or instructed the grand jury on the importance of donor intent. In light of the ambiguous nature of the law, OPR concluded that her failure to do so in this instance constituted an excusable mistake.

12. *Failure to Maintain Active Bar Membership.* A DOJ attorney reported to OPR that he had been practicing law without a license, in violation of the statutory requirement that Department attorneys maintain an active bar membership in at least one state at all times.

OPR conducted an investigation and found that the DOJ attorney's state bar required each active member to take a certain number of continuing legal education (CLE) credits annually and report his or her compliance with the CLE requirement to the state bar. The DOJ attorney was missing one credit-hour of the annual CLE requirement and, as such, did not report to the bar that he had met his mandatory yearly CLE requirement. The state bar subsequently sent the DOJ attorney multiple notices of his non-compliance. The attorney ignored these notices, and the bar eventually suspended his license. Upon suspension, the DOJ attorney took immediate steps to restore his active bar membership by completing the remaining one credit hour, submitting the required report, and paying his fine and dues. In total, the DOJ attorney was an inactive member of his state bar for approximately one month.

OPR concluded that the DOJ attorney committed professional misconduct by failing to maintain an active bar membership in any state bar, in reckless disregard of his statutory obligation and Department policy. OPR



found that by failing to act in the face of numerous notices of non-compliance, the DOJ attorney's actions represented a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR recommended a range of discipline from a written reprimand to a three-day suspension. The DOJ attorney received a two-day suspension.

13. *Breach of a Plea Agreement.* A district court found that the government breached a plea agreement by advocating for a higher sentence than the one contemplated by the agreement.

OPR conducted an investigation. The plea agreement estimated that the defendant would fall within a specific sentencing guideline range based on a certain total offense level and a certain criminal history category. According to the terms of the plea agreement, the DOJ attorney would not move for an upward departure.

Several days before the sentencing hearing, the DOJ attorney filed a letter with the court indicating for the first time that the defendant had been involved in a murder. Based on that information, the Probation Office issued a revised Presentence Report (PSR) recommending a sentence of almost three times the duration of that set forth in the range negotiated by the government and the defendant. The court found that the DOJ attorney had been aware of the murder when she entered into the plea agreement with the defendant and the letter constituted a breach because the purpose of the letter was to obtain a higher sentence.

OPR found that the DOJ attorney first learned about the murder charge after the plea agreement was signed. The DOJ attorney learned about the murder charge from DOJ colleagues who had waited until their case was over to tell her because they feared for the safety of cooperating witnesses in their case and knew the DOJ attorney would have to disclose the information to the court. The DOJ attorney, as required, did disclose the murder charge as soon as she learned about it by filing a letter with the court. Despite the disclosure, OPR found that the DOJ attorney did not violate the plea agreement. The DOJ attorney consistently represented that the government was constrained by its promises in the plea agreement, and emphasized that she had presented the murder information to the court without intending to advocate that it be used or considered in sentencing the defendant. The DOJ attorney also did not call witnesses at a hearing scheduled by the court to substantiate the murder charge. Although the disclosure caused the Probation Office to upwardly adjust the sentencing guidelines, the government did not advocate for a higher level at sentencing. Accordingly, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in this matter.

14. *Failure to Diligently Represent the Interests of the Client.* In vacating a narcotics conviction, a district court criticized a DOJ attorney for filing what it deemed to be superficial and inadequate post-trial briefs. The court also criticized the DOJ attorney for relying on legal authority that was inapposite and outside of the governing circuit.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR reviewed the briefs as well as governing case law and determined that the government's briefs were substantive and accurate. OPR determined that the DOJ attorney carefully analyzed the cases cited by the defendant, and demonstrated how each case was inapposite. OPR also determined that there was no circuit authority directly on point and, in the absence of circuit precedent, the DOJ attorney legitimately looked to other circuits to assess how courts had ruled on the issue and reasoned by analogy. OPR found that at a hearing the court acknowledged that the legal issue in question was unclear and the court had been unable to find circuit cases directly on point. Although the legal arguments made by the DOJ attorney ultimately did not sway the court, OPR found that the DOJ attorney competently and diligently represented the interests of the United States.

15. *Failure to Comply With a Court Order.* A district court issued an order precluding the United States from seeking the death penalty in a narcotics trafficking and murder case because the government failed to timely file a notice of intent to seek the death penalty.

OPR conducted an investigation and concluded that the DOJ attorneys did not engage in professional misconduct or exercise poor judgment. During a status conference, the court orally issued an order setting a deadline for the government to file a formal notice of intent to seek the death penalty. The DOJ attorneys misunderstood the court's oral order and instead of filing a formal notice of intent, they filed a status report on the date the notice of intent was due. In the status report the DOJ attorneys advised the court that the Department's death penalty determination had not yet been made. Although the failure to comply with the court-ordered deadline did not amount to misconduct or poor judgment, OPR found that the attorneys made a mistake by filing a status report that did not contain a more definite statement about the government's plans. Based on the court's order at the status conference, the attorneys were on notice that the court was expecting at least an informal notice of whether the government would seek the death penalty.

16. *Unprofessional or Unethical Behavior/Conflict Of Interest.* A DOJ component informed OPR that a DOJ attorney failed to report a conflict of interest that arose from his relationship with a government contractor.

OPR conducted an investigation and found that the DOJ attorney engaged in a romantic relationship with a government contractor who worked

on two of the attorney's cases. In one such case, the contractor testified at trial. The DOJ attorney did not disclose the relationship to the court, defense counsel, or Department supervisors. The contractor submitted invoices for work to the Department in excess of \$500,000 and most, if not all, of the invoices were certified for payment by the DOJ attorney. During part of the time period that the DOJ attorney approved the invoices, he was living with the contractor in a condominium that he had purchased with the contractor. The DOJ attorney did not disclose his romantic and financial relationship with the contractor until after their relationship soured and the contractor threatened to inform the DOJ attorney's supervisors.

OPR concluded that the DOJ attorney committed intentional professional misconduct by knowingly and purposefully failing to make timely disclosure to his supervisors, the courts, and defense counsel about his romantic and financial relationship with the government contractor.

OPR did not make a disciplinary recommendation because the DOJ attorney resigned from the Department before OPR completed its investigation. OPR is seeking authorization from the Office of the Deputy Attorney General to notify the appropriate state bar authorities of its finding of professional misconduct.

17. *Failure to Competently Represent the Interests of the Client; Misrepresentation – Misleading the Court.* The debtor in a bankruptcy case alleged that a DOJ attorney failed to consult with her in connection with the selection of the Chapter 11 trustee, as required by 11 U.S.C. § 1104(d). The debtor also alleged that the DOJ attorney misled the court by filing an application stating that the consultation occurred.

OPR conducted an investigation and found that during a routine status conference the bankruptcy court *sua sponte* ordered that a Chapter 11 trustee be appointed. The Bankruptcy Code, 11 U.S.C. § 1104(d), provides that if a bankruptcy court orders the appointment of a Chapter 11 trustee the United States Trustee, after consultation with the parties in interest, shall appoint, subject to court approval, a disinterested person to serve as the trustee. After the court hearing, the DOJ attorney met with the debtor's attorney and the debtor's representative and they discussed the court's directive. They did not discuss specific names of potential Chapter 11 trustees. Thereafter, the United States Trustee chose a trustee, and the DOJ attorney submitted the trustee's name to the court for approval. As part of the submission, the DOJ attorney and the attorney's supervisor filed an application stating that the government had consulted with the debtor's attorney about the selection. The bankruptcy court approved the appointment of the trustee and sent an order to that effect to the parties. Upon receiving the court's order, the debtor's attorney filed a motion for leave to appeal, a notice of appeal, and a motion for reconsideration stating that he had not been consulted about the selection of the trustee. The bankruptcy court declined to hear the motions because of the pending appeal.

OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment with respect to the consultation requirement. After the bankruptcy court ordered the appointment of a trustee, the DOJ attorney met with the debtor's attorney and the debtor's representative. As a result, OPR determined that the DOJ attorney mistakenly believed that the requisite consultation had taken place. OPR noted that because the court *sua sponte* ordered the appointment of a Chapter 11 trustee, the DOJ attorney was not afforded the usual opportunity to prepare for the consultation. OPR also found that the debtor's attorney's lack of experience in bankruptcy practice complicated the process of selecting a Chapter 11 trustee.

OPR also concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment with respect to her obligation to be candid with the court. OPR found that when the application was filed the DOJ attorney reasonably believed that a proper consultation occurred when she met with the debtor's attorney and the debtor's representative after the court hearing. Thus, the statement in the application about the consultation was truthful based on what the DOJ attorney believed at the time. Furthermore, OPR concluded that the DOJ attorney's supervisor did not commit professional misconduct or exercise poor judgment when she signed the application because she also reasonably believed that a proper consultation had occurred.

18. *Discovery Violation - Brady*. A district court granted a defendant's motion for a new trial, finding the government violated *Brady* when it failed to produce certain interview notes.

In the underlying case, a police officer was arrested for committing a rape. The police department received an anonymous call from someone claiming to be a relative of the rape victim. The caller stated that the victim fabricated the rape allegation in order to obtain money from the city. The DOJ attorney assigned to the case received a report of the anonymous phone call and asked the FBI to determine the identity of the caller. FBI agents investigated and identified an individual whom they believed placed the call. The DOJ attorney interviewed the individual and concluded that he did not possess relevant information. The attorney did not disclose any notes that he took at the interviews with the individual.

The police officer was tried and convicted. After the conviction, the defendant learned that the government had identified an individual whom they believed placed the anonymous call, and the DOJ attorney possessed notes from interviews with that individual. The defendant filed a motion for a new trial, arguing that the notes contained newly discovered evidence which entitled him to a new trial. The government argued that the defendant could have discovered the evidence on his own because the defendant received a copy of the police department's report of the anonymous call. The court granted the motion for a new trial, finding unreasonable the government's position that the

defendant, working solely off the police report, could have tracked down the caller and obtained the information possessed by the government.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct. Although OPR found that the information contained in the notes was material to the defense, OPR determined that there was no clear and unambiguous rule requiring the DOJ attorney to provide the documents because the defendant, arguably, could have obtained that information with the exercise of due diligence. Although the DOJ attorney did not engage in professional misconduct, OPR concluded that he exercised poor judgment by failing to carefully review his notes prior to trial and produce the documents in question to the defendant in time for the defendant to make effective use of the information at trial. Although the law did not clearly and unambiguously require disclosure, OPR found that a Department attorney exercising good judgment would have reviewed all of the relevant documents and provided them to the defendant or submitted them to the court for *in camera* review. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

19. *Discovery Violation - Brady.* A court of appeals found that the government violated *Brady* by failing to disclose until the morning of trial telephone records showing the phone numbers of fifty calls received on the victim's cell phone shortly after it had been stolen during a carjacking. Of relevance, the records reflected that someone using the cell phone of the government's key witness placed a 4-minute call to the stolen cell phone within hours of the carjacking. The court reversed the conviction and remanded the case for a new trial.

OPR conducted an investigation and concluded that the DOJ attorneys and FBI agent did not engage in professional misconduct or exercise poor judgment. The FBI agent did not receive the telephone records until Thursday (the trial was scheduled to begin the following Monday). Upon receiving the telephone records, the agent researched the records, issued a subpoena for subscriber information, and examined the subscriber information as soon as she received it from the telephone company. The agent spent Friday evening and Saturday contacting some of the subscribers to see if they knew the defendant. On Sunday, the agent told the DOJ attorneys about the records. The DOJ attorneys disclosed the records to the defendant the next morning.

OPR found that because the agent was working under an extremely compressed time schedule, she failed to notice that the government's witness' phone number appeared in the records. Given the time pressure, OPR concluded that the agent's oversight was excusable. OPR also concluded that, although the DOJ attorneys should have disclosed the telephone records to the

defendant on Sunday, their failure to wait until the next business day to do so did not amount to misconduct or poor judgment.

20. *Immigration Judge, Improper Bias, Abuse of Authority.* A court of appeals criticized a DOJ Immigration Judge (IJ) for basing an adverse credibility finding on improper speculation about the respondent's religion. The court also criticized the IJ for testing the respondent's knowledge of his religion as the basis for the IJ's adverse credibility finding. The court concluded that the IJ's adverse credibility determination was not supported by substantial evidence.

OPR conducted an investigation and concluded that the IJ did not engage in professional misconduct or exercise poor judgment when he questioned the respondent. OPR found that IJs have the statutory authority to interrogate, examine and cross-examine respondents. Although case law provides that an IJ must be careful not to expect a respondent who is claiming protection based on religious grounds to have a theologian's knowledge of religion, courts have found that inquiring about a respondent's overall familiarity with his faith is not prohibited nor is it impermissible to require a respondent to prove membership in a particular religion. OPR noted that the respondent made religious references in response to questions posed by his counsel, and claimed that he studied his religion. OPR also reviewed the training materials provided to IJs on the topic of religious persecution and found that a sign of a valid religion-based claim is the respondent's general knowledge of the basic tenets of his faith. The training materials also suggested that a demonstration of a general knowledge of the faith's tenets is an indicator of a valid claim. Accordingly, OPR concluded that the IJ did not act improperly when he examined the respondent about his knowledge of his faith.

## OPR Inquiries in Fiscal Year 2010

*Characteristics of Inquiries Opened in Fiscal Year 2010:* The sources of the 123 matters designated as inquiries are set forth in Table 3. The 123 matters do not include an additional 67 matters involving proposed bar notifications on non-Department attorneys.

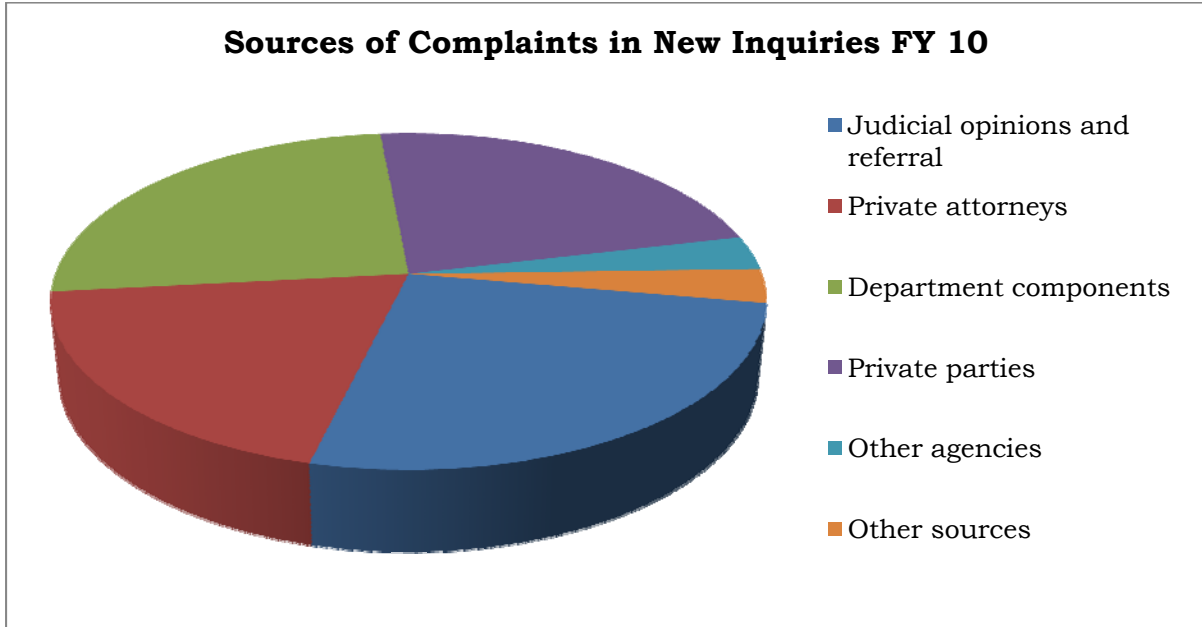
**Table 3**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 10</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions & referrals <sup>8</sup>	32	26.0%
Private attorneys	24	19.5%
Department components	31	25.2%
Private parties	28	22.7%
Other agencies	4	3.3%
Other sources	4	3.3%
<b>Total</b>	<b>123</b>	<b>100%</b>

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<sup>8</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Chart 3**



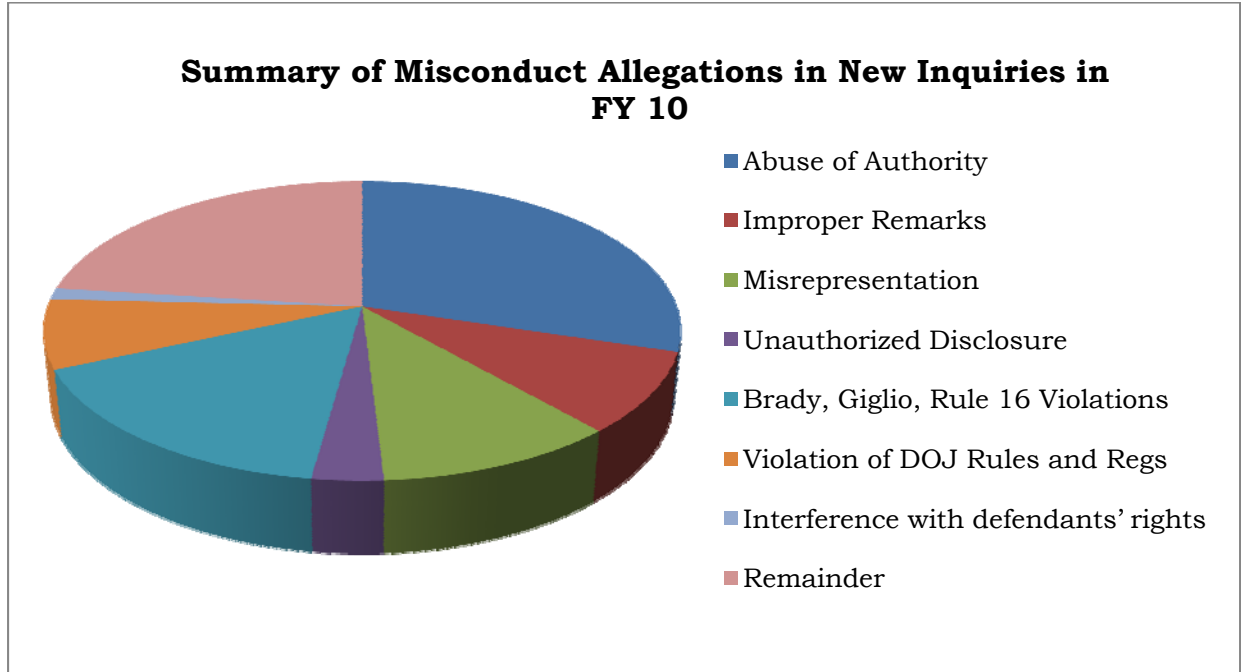
The nature of the 161 allegations against Department attorneys contained in the 123 inquiries is set forth in Table 4.



**Table 4**

<b>Types of Misconduct Allegations in Inquiries Opened in FY 10</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Abuse of authority, including abuse of prosecutorial discretion	48	29.8%
Improper remarks to a grand jury, during trial, or in pleadings	14	8.7%
Misrepresentation to the court and/or opposing counsel	17	10.6%
Unauthorized disclosure, including Fed. R. Crim. P. 6(e)	5	3.1%
Failure to competently or diligently represent client's interests	8	5.0%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery	26	16.2%
Failure to comply with court orders or Federal Rules	5	3.1%
Failure to comply with DOJ rules and regulations	12	7.5%
Interference with defendants' rights	2	1.2%
Lateness ( <i>i.e.</i> , missed filing dates)	3	1.9%
Lack of fitness to practice law	7	4.3%
Failure to maintain active bar membership	6	3.7%
Whistleblower	3	1.9%
Failure to comply with federal law	1	0.6%
Conduct of Immigration Judges	2	1.2%
Other	2	1.2%
<b>Total</b>	<b>161</b>	<b>100%</b>

**Chart 4**

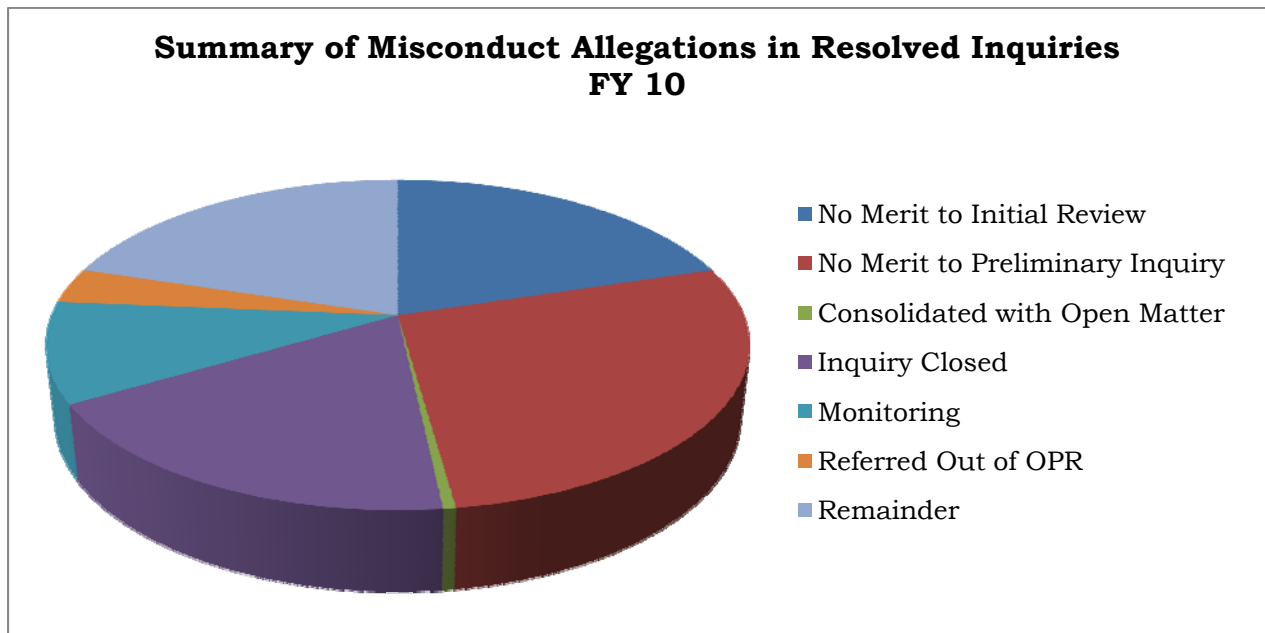


*Inquiries Closed in Fiscal Year 2010:* OPR closed a total of 129 inquiries in fiscal year 2010 involving allegations against Department attorneys, and an additional 66 inquiries involving proposed bar notifications on non-Department attorneys. The matters involved 203 separate allegations of professional misconduct. The manner in which the 203 allegations were resolved as inquiries in fiscal year 2010 is set forth in Table 5.

**Table 5**

<b>Categories of Inquiry Allegations Resolved in FY 10</b>		
<b>Type of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Total</b>
Performance or management matter. Referred to employing component.	4	2.0%
More appropriately handled by another component or agency. Referred.	7	3.4%
Issues previously addressed. No further action required by OPR at this time.	1	0.5%
No merit to matter based on review of allegation.	41	20.2%
No merit to allegation based on preliminary inquiry.	56	27.6%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	1	0.5%
Inquiry closed because further investigation not likely to result in finding of misconduct.	37	18.2%
Matter closed but being monitored for possible follow-up.	20	9.9%
FBI whistleblower claim.	2	1.0%
Other	34	16.7%
<b>Total</b>	<b>203</b>	<b>100%</b>

**Chart 5**



## *Examples of Inquiries Closed in Fiscal Year 2010*

1. *Failure to Competently Represent the Interests of the Client.* A DOJ component reported to OPR that a DOJ attorney sought an extension of a court-ordered wiretap without submitting the requisite affidavit in support of the wiretap application.

OPR initiated an inquiry and found that two DOJ attorneys were assigned to the case: Attorney X and Attorney Y. Attorney X was experienced in wiretap cases and drafted the initial application approved by the court. Attorney X subsequently drafted an application to extend the wiretap beyond the initial 30 days granted by the court. Because the judge who approved the initial wiretap was out of the office on the 30<sup>th</sup> day, a Friday, the prosecution team decided to wait until Monday to present the application to that judge.

On Friday afternoon, a law enforcement agent contacted Attorney X and asked her to seek an immediate extension of the wiretap because the agent had just learned of criminal activity that needed to be intercepted over the weekend. Attorney Y volunteered to handle the wiretap application. Attorney X gave Attorney Y an envelope with the completed package of paperwork, and the latter took the envelope to a judge and obtained an order continuing the wiretap. On Monday morning, the law enforcement agent e-mailed Attorney Y asking for a copy of the affidavit in support of the wiretap application. As a result of the e-mail, Attorney Y realized that she had not submitted an affidavit.

OPR found that Attorney Y had only conducted one wiretap in her time at the Department. Given her inexperience, and the time pressure involved in obtaining the agent's last minute request, OPR determined that Attorney Y's incomplete wiretap application was inadvertent. OPR noted that a supervisory DOJ attorney was able to quickly remedy the error and the government's position had not been damaged by Attorney Y's mistake. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

2. *Failure to Competently Represent the Interests of the Client.* A court of appeals criticized a Special Assistant United States Attorney (SAUSA) for providing a witness with a script of his testimony prior to the witness' testimony. OPR initiated an inquiry and found that the SAUSA, who was on detail from another government component, had since left the Department. OPR also found that during the trial the SAUSA had not been supervised by permanent Department personnel and, as a result of the court's criticism, the DOJ component had implemented new practices to ensure closer supervision of SAUSAs in the future. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

3. *Misuse of Official Position.* OPR received an allegation from a component that a DOJ attorney met with a Member of Congress and asked for the Member's intervention in an ongoing internal investigation of a law enforcement officer with whom the DOJ attorney had worked. OPR initiated an inquiry and requested a written response from the DOJ attorney. OPR found that the DOJ attorney met with the Member of Congress in the attorney's personal capacity during non-working hours. OPR found that the DOJ attorney did not provide the Member with any nonpublic information about the investigation of the law enforcement officer. Although OPR closed this matter because further investigation was not likely to result in a professional misconduct finding, OPR recommended that the DOJ attorney's component conduct additional training regarding the rules governing contacts with elected officials.

4. *Unauthorized Disclosure to the Media.* A DOJ component reported to OPR that a DOJ press officer e-mailed to a newspaper: (1) a copy of the government's sentencing memorandum, which had been publicly filed; and (2) a copy of the defendant's sentencing memorandum, which had been filed under seal. OPR initiated an inquiry and found that the DOJ attorney prosecuting the case sent the press officer a copy of the defendant's sentencing memorandum without knowing that the press officer intended to forward it to the media. The press officer did not review the documents before he forwarded them to the newspaper. As soon as the DOJ attorney learned about the transmittal of the sealed memorandum, he contacted the press officer, who contacted the newspaper and requested that it not publicize the document. The newspaper agreed not to publicize it prior to sentencing. OPR found that the transmittal of the sealed memorandum was inadvertent. The DOJ attorney did not realize that the sealed memorandum would be sent to the media, and the press officer thought that he was e-mailing public information. The DOJ component informed OPR that as a result of this incident, new procedures for preparing and sending materials to the media had been implemented. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

5. *Duty of Competence.* A DOJ attorney reported to OPR that a district court imposed sanctions in a civil case because the government determined on the eve of trial that a defendant who had been sued in her individual capacity had performed work for the government, but was not a government employee. Inasmuch as the court lacked subject matter jurisdiction to consider claims against the United States arising from the acts of non-government employees, the civil suit was dismissed. The court sanctioned the government and ordered it to pay reasonable costs and attorneys' fees the plaintiff incurred as a consequence of the government's late discovery about the defendant's real status. OPR initiated an inquiry and found that the DOJ attorney had repeatedly been told by the client agency for whom the defendant performed work that the defendant was an agency employee. OPR noted that because Department attorneys cannot physically search a client agency's files, they

must reasonably rely on the client agency to locate and provide accurate information. OPR found that the DOJ attorney made good faith and reasonable efforts to ascertain the truth of the client agency's representations. Consequently, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

6. *Prosecutorial Misconduct.* An inmate alleged that a DOJ attorney who prosecuted his case urged him to lie to law enforcement agents who were investigating the inmate's allegations against another agency. OPR initiated an inquiry and found that the validity of the inmate's allegation was undercut by the ever-changing nature of his story. During an initial interview with the agents, the inmate did not make any allegations against the DOJ attorney. During a second interview, the inmate stated that the DOJ attorney told him that he should lie to the agents. In a third interview, the inmate changed his mind and stated that his initial allegation against the DOJ attorney was a lie. At yet another interview, the inmate alleged for the first time that the DOJ attorney threatened to block his post-conviction relief if he did not lie to the agents. OPR found, however, that by that time the DOJ attorney had transferred offices and had no further role in the case. Given the numerous inconsistencies, OPR closed this matter because further investigation was not likely to result in a finding of professional misconduct finding.

7. *Disclosure of Grand Jury Material.* OPR received an allegation from a private citizen that a company filed a civil action against her based on grand jury material that had been disclosed in violation of Fed. R. Crim. P. 6(e). OPR initiated an inquiry and found that FBI agents had executed a search warrant on the complainant's company's premises. The search resulted in the seizure of a number of computers and business documents indicating that the complainant was engaged in copyright infringement. A DOJ attorney overseeing the search warrant correctly informed the FBI agents that a Privacy Act "routine use" exception enabled the agents to share non-grand jury materials from its investigation with the victims of the copyright infringement. The agents subsequently did so. Some of this non-grand jury information appeared in the complaint filed by the plaintiff (the victim of the copyright infringement). Because the civil action complaint involved non-grand jury materials that had been disclosed in accordance with the Privacy Act, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for referring to matters not in evidence in his closing argument. The DOJ attorney told the jury that the government did not present all of the evidence in its possession because, had it done so, the jurors would still be listening to the testimony of individuals who participated in the conspiracy. The comment did not draw an objection from defense counsel. Although the court of appeals found that the reference to external evidence was improper, it affirmed the defendant's conviction on the ground that the error was not prejudicial.

OPR initiated an inquiry and found that because only four participants testified at trial the DOJ attorney's reference to additional participants was improper. OPR noted, however, that the jurors had heard evidence via wiretap and surveillance testimony about the large number of participants in the conspiracy. Also, in matters involving allegations of misconduct during closing argument, OPR is mindful that trials are semi-spontaneous events, not scripted plays, and it is not uncommon for those who try cases to find themselves expressing inartfully constructed sentences and thoughts. Because the DOJ attorney's reference to external evidence had been corroborated by evidence heard by the jurors, and the remark constituted a single poorly conceived sentence uttered forty minutes into a two-hour closing argument, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

9. *Improper Examination of a Defendant.* A court of appeals criticized a DOJ attorney for cross-examining the defendant about the nature of a prior conviction, the existence of which had been stipulated to prior to trial. Although the court found that the DOJ attorney erred, it upheld the defendant's conviction.

OPR initiated an inquiry. Prior to trial, the parties executed several stipulations, including one in which the defendant – who was on trial for possession with intent to distribute narcotics and possession of a firearm by a convicted felon – acknowledged his prior aggravated assault with a deadly weapon conviction. The defendant took the stand and denied that the weapon and narcotics found in his girlfriend's apartment were his. During cross-examination, the DOJ attorney questioned the defendant about his prior conviction. Defense counsel objected, and the court sustained the objection.

OPR found that the DOJ attorney understood the stipulation to mean that the government would not seek to admit evidence of the defendant's prior conviction during the government's case-in-chief. OPR found that prior to taking the stand there was no indication that the defendant was going to testify and, had the defendant not testified, the DOJ attorney would not have sought to introduce the nature of the prior conviction. OPR found that the DOJ attorney believed that the stipulation did not limit her from impeaching the defendant if the latter, like any other witness, took the stand to testify and placed his credibility at issue. Because circuit precedent supported the proposition that a defendant who chooses to testify subjects himself to impeachment, OPR determined that no clear and unambiguous rule prevented the DOJ attorney from cross-examining the defendant about his prior conviction, notwithstanding the stipulation. Given the absence of a clear and unambiguous rule, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

10. *Abuse of Authority/Misuse of Official Position.* OPR received allegations from two potential defendants that the consideration of political corruption

charges against them by a DOJ litigating component (Component A) was improper. One potential defendant alleged that: (1) the consideration of charges was fueled by improper political motives; (2) the consideration of charges violated the Principles of Federal Prosecution because a second DOJ litigating component (Component B) had previously reviewed the results of the investigation and declined prosecution; and (3) DOJ attorneys made misstatements to the media about the case. The second potential defendant alleged that the consideration of charges was improper because the statute of limitations had run. The second potential defendant stated that a tolling agreement he had signed with Component B was only binding to potential charges brought by Component B.

OPR initiated an inquiry and reviewed written responses from current and former DOJ attorneys from Components A and B who had worked on the investigation. OPR also reviewed documents and correspondence related to the matter. As to the allegations of the first potential defendant, OPR found no evidence that politics played a role in Component A's decision to review the case for potential prosecution; that there had been no violation of the Principles of Federal Prosecution; and that no material misstatements had been made to the media by DOJ attorneys. As to the allegations of the second potential defendant, OPR found that Component A had a good faith argument that the statute of limitations had not run against the complainant because the tolling agreement he signed with Component B was not limited to charges brought by Component B. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

11. *Abuse of Authority/Misuse of Official Position.* Complainant, a defendant who pled guilty to a felony criminal charge, alleged that her prosecution had been the result of overzealousness by several DOJ attorneys, and that those attorneys had been improperly influenced by a non-DOJ attorney. OPR initiated an inquiry and reviewed responses to the allegations from four current DOJ attorneys and one former DOJ attorney. OPR also reviewed court filings, case files, correspondence, and other relevant documents. OPR found no evidence that the DOJ attorneys acted improperly. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Unauthorized Disclosure -- Non-Media -- Other.* OPR received an allegation from the U.S. Department of Homeland Security (DHS) regarding the disclosure of a non-public decision issued by an immigration judge. DHS alleged that the disclosure was made by a DOJ attorney who had previously prosecuted the alien. OPR initiated an inquiry and found that the alien, whom the DOJ attorney had successfully prosecuted for making false statements on his immigration application, challenged his deportation after he was released from jail. After a merits hearing before an immigration judge, a decision was issued denying the alien's request to stay in the United States. The DOJ attorney was not involved in the immigration case, but received a copy of the decision by e-



mail from a DHS agent. The DOJ attorney mentioned the decision to a friend, who was a law professor, and e-mailed the professor a copy of the decision. The professor responded by providing his analysis of the decision. The DOJ attorney forwarded the e-mail to the agent at DHS. Upon receiving the e-mail, the DHS agent informed the DOJ attorney that the immigration decision was not a public record and disclosure of the decision was potentially a violation of the asylum confidentiality regulation set forth at 8 C.F.R. § 208.6. At DHS's request, the DOJ attorney asked the professor (and another individual to whom the professor had e-mailed the decision) to destroy all copies of the decision, which they did. OPR found that the DOJ attorney mistakenly believed that the decision, like the decisions he received in his criminal cases, was public and thus could be shared with the professor. OPR found that the immigration decision was not marked confidential, was not filed under seal, and did not reference the limitations on disclosure contained in 8 C.F.R. § 208.6(a). Because there was nothing to alert the DOJ attorney to the non-public nature of the immigration decision, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

13. *Outside Unauthorized Practice of Law.* A DOJ attorney reported to OPR that a subpoena had been issued to the Department to determine what role, if any, the DOJ attorney played in representing her brother, a defendant in a civil lawsuit brought by the party issuing the subpoena. OPR initiated an inquiry to determine whether the DOJ attorney's activities implicated the outside employment limitations set forth at 5 C.F.R. § 3801.106, the Supplemental Standards of Ethical Conduct for Employees of the Department of Justice. OPR found that the DOJ attorney did not represent her brother in the civil lawsuit. The only assistance the DOJ attorney provided her brother was in helping her brother identify, select, and retain competent and experienced counsel. Because the DOJ attorney did not appear as counsel in the civil case, did not broadcast her position with the Department when she assisted her brother in obtaining counsel, did not sign any documents citing her position or employment with the Department, and did not use any Department resources or supplies, OPR found that the DOJ attorney did not violate the employment limitations set forth at 5 C.F.R. § 3801.106. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Discovery Violation; Misrepresentation/Misleading the Court.* OPR received an allegation from a private attorney that DOJ attorneys did not produce relevant, responsive documents during discovery and misrepresented facts to the court. OPR initiated an inquiry and reviewed the pleadings and other materials from the civil case. OPR found that the private attorney had raised the same allegations at both the district court and the court of appeals levels and neither court made a finding of misconduct. Because the allegations were addressed in the course of litigation, and both courts reviewing the allegations did not find misconduct against the DOJ attorneys, OPR closed this

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

15. *Failure to Comply with Principles of Federal Prosecution.* OPR received an allegation from a public interest group that the criminal prosecution of a company was resolved prematurely and settled improperly due to improper political considerations. The public interest group expressed concerns about a sudden decision to settle the case, the failure to pursue felony charges, and a failure to obtain an appropriate fine. OPR initiated an inquiry. The case at issue was resolved when the company pleaded guilty to a corporate misdemeanor violation of the Clean Water Act (CWA) and agreed to pay a fine. OPR reviewed the underlying evidence and determined that the DOJ prosecution team settled the case after reasonably determining that there were serious questions about the sufficiency of the evidence to establish a felony CWA violation. OPR also found that the DOJ prosecution team appropriately considered the strength of the evidence, the company's culpability, the company's cooperation, and the company's corrective expenditures in calculating the fine imposed upon the company. OPR found no evidence of improper political considerations. Because the DOJ prosecution team's actions were consistent with applicable federal law and the Principles of Federal Prosecution, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

16. *Failure to Comply with DOJ Rules and Regulations.* A DOJ attorney reported to OPR that he failed to obtain prior authorization from the Deputy Attorney General, as required by the United States Attorney's Manual (USAM) § 9-5.150 and 28 CFR § 50.9, before consenting to defense counsel's request to conduct a change of plea hearing in a closed courtroom. The DOJ attorney's supervisor subsequently reported to OPR that he was aware that the DOJ attorney had consented to the closure of the hearing, and the supervisor failed to advise him to obtain authorization from the Deputy Attorney General. OPR opened an inquiry and found that at the time the government agreed to the closure neither the DOJ attorney nor his supervisor was aware of the USAM and CFR provisions requiring approval from the Deputy Attorney General. OPR determined that it was common practice in that district for courts to routinely close hearings *sua sponte* for *ex parte* motions, plea hearings, and sentencing, sometimes without notice to the parties. As a result, the DOJ attorney was adhering to local practice when he agreed to defense counsel's request to close the hearing. OPR also found that the DOJ component had since amended its training to ensure that all DOJ attorneys were aware of and complied with USAM § 9-5.150 and 28 CFR § 50.9. Given the immediate corrective measures taken by the DOJ attorney, his supervisor, and the DOJ component, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Immigration Judge, Abuse of Authority.* OPR received an allegation from a private attorney that an Immigration Judge (IJ) denied her client the right to a

Master Calendar hearing. The attorney stated that when she brought her own court reporter to the Master Calendar hearing, the IJ refused to let the private court reporter transcribe the hearing. The attorney stated that the IJ did not give her client an opportunity to address the court and immediately reset the case for another Master Calendar hearing. The attorney stated that the IJ failed to record this exchange and exhibited bias toward her client as well as other respondents who appeared in the IJ's court. OPR initiated an inquiry and reviewed the tapes from Master Calendar hearings. OPR's review of the tapes confirmed the attorney's claim that her client's hearing was not recorded. Because there was no recording, OPR was unable to confirm or refute the claim that the IJ engaged in improper behavior toward the attorney's client. OPR learned that the IJ had gone off the record on other occasions and asked the Executive Office for Immigration Review to notify OPR if the IJ engaged in similar conduct in the future. Because the tapes OPR reviewed of other Master Calendar hearings did not contain intemperate behavior by the IJ, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Abuse of Authority.* OPR received an allegation from a detained alien that two DOJ attorneys who handled the alien's *habeas* petition committed perjury and neglected their professional obligations. OPR initiated an inquiry and found that the alien initially entered the United States on a valid student visa but later returned to his home country. The alien subsequently reentered the United States illegally and filed for asylum and withholding of removal. An Immigration Judge (IJ) denied the applications for relief and the Board of Immigration Appeals and court of appeals affirmed the IJ's order. OPR reviewed the alien's allegations of misconduct and found that the alien made the same allegations in his *habeas* petition challenging his detention. The district court reviewed the allegations and rejected them, and the court of appeals subsequently denied the alien's motion for sanctions against the DOJ attorneys. In light of the court rulings, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

19. *Misrepresenting Record Evidence.* A court of appeals issued an order to show cause why a DOJ attorney should not be sanctioned for characterizing a witness' observations of the defendant's behavior in a murder trial as "ordered" and "composed" when there was no support in the record for such characterizations. OPR initiated an inquiry. The DOJ attorney responded to the order to show cause by stating that she did not intend to mislead the court and the evidence was sufficient for a rational juror to conclude that the defendant had acted in an orderly manner and with premeditation. At the hearing on the order, the DOJ attorney's counsel told the court that the DOJ attorney had learned the importance of making a clear distinction between statements of fact and inferences, and that her intent had been to draw inferences from the facts; not to misrepresent the facts. Upon hearing this explanation, a member of the panel said the court was satisfied and noted that the DOJ attorney had a reputable record. The day after the hearing, the court

entered an order discharging the order to show cause. Given that there was no evidence that the DOJ attorney acted in bad faith, and the attorney's otherwise upstanding practice before the court, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

20. *Failure to Offer Use Immunity.* A district court dismissed an indictment against two defendants, finding DOJ attorneys violated the defendants' due process rights by failing to offer use immunity to a defense witness in an honest services fraud case. The court stated that because the defense witness' testimony would have been relevant to whether the defendants committed honest services fraud, the government was required to offer the witness use immunity. OPR initiated an inquiry and found that the court of appeals reversed the district court's ruling, finding the government is only required to offer use immunity to a defense witness whose anticipated testimony will directly contradict the testimony of a government witness who has been offered use immunity. Because the testimony of the defense witness would not have directly contradicted the testimony of a government witness who had received use immunity, the court of appeals found that the DOJ attorneys had not erred. Given the court of appeal's ruling and case law finding that the government is not required to offer use immunity to a defense witness who merely contradicts the government's position or theory at trial, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

## **Conclusion**

During fiscal year 2010, Department attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in fiscal year 2010 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department to meet the challenge of enforcing the law and defending the interests of the United States in an increasingly complex environment.