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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2020**

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

**Fiscal Year 2020 Annual Report**

Introduction .....	1
Section I: Overview of OPR .....	2
Section II: Overview of Professional Misconduct Allegations.....	4
A. Intake and Initial Evaluation of Professional Misconduct Complaints .....	4
B. Professional Misconduct Investigations and Inquiries by Fiscal Year .....	5
C. Professional Misconduct Inquiries Opened in Fiscal Year 2020.....	7
D. Professional Misconduct Inquiries Closed in Fiscal Year 2020 .....	8
E. Professional Misconduct Investigations Opened in Fiscal Year 2020.....	9
F. Professional Misconduct Investigations Closed in Fiscal Year 2020.....	10
Section III: Professional Misconduct Investigations Closed in FY 2020 .....	12
Section IV: Examples of Professional Misconduct Inquiries Closed in FY 2020.....	19
Section V: Non-Department Attorney and Judicial Misconduct Allegations.....	23
Section VI: FBI Whistleblower Retaliation Claims.....	25
Section VII: Examples of FBI Whistleblower Retaliation Claims Closed in FY 2020.....	25
Section VIII: Training and Outreach Efforts .....	27
Conclusion .....	27

## *Introduction*

This 45th Annual Report is submitted to the Attorney General on behalf of the U.S. Department of Justice (Department) Office of Professional Responsibility (OPR). The Report covers the activities of OPR during Fiscal Year 2020 (October 1, 2019, through September 30, 2020).

Fair, impartial, and competent accountability within the Department is critical to its mission and the rule of law. Department attorneys are privileged to represent the United States and wield significant power, but that power also carries the obligation to adhere to the high professional standards expected of the nation's principal law enforcement agency. OPR is a nonpartisan internal watchdog that helps ensure accountability by investigating allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. OPR reviews and investigates allegations with competence and independence, based solely on the facts and applicable standards, without bias or favoritism.

OPR applies its unique expertise to analyzing the complex legal and ethical standards applicable to Department attorneys. Through its four decades of proficiency in handling attorney professional misconduct investigations and a staff of attorneys with decades of prosecutorial and civil litigation experience, OPR provides the Department with a strong foundation in its efforts to ensure that Department attorneys maintain the highest ethical standards.

This report highlights some of OPR's work during Fiscal Year 2020, including instances in which Department attorneys failed to adhere to the high standards expected of them. Although any instance of professional misconduct is troubling, the vast majority of Department attorneys conducted themselves with the utmost integrity and professionalism throughout the year.

The information contained in this public report is necessarily limited due to requirements to protect personal records under the Privacy Act of 1974, and other legal and policy considerations. During Fiscal Year 2020, OPR continued to post anonymized summaries of professional misconduct reports on its website as soon as the decision became final. Additional information about OPR's transparency and its independence can be found on OPR's website ([www.justice.gov/opr](http://www.justice.gov/opr)). The website's new design has improved accessibility and has significantly increased the amount of publicly available information about OPR and its important mission. Individuals with questions about OPR should visit its website, particularly the Frequently Asked Questions section.

In Fiscal Year 2020, OPR faced challenges caused by the coronavirus pandemic. With creative problem solving, OPR's attorneys and staff continued to process inquiries and investigations by making use of video interviews, document-sharing platforms, and other technological tools.

## *Section I: Overview of OPR*

On December 9, 1975, Attorney General Edward H. Levi issued an order establishing OPR to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency.

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

Other OPR responsibilities include training and educating Department attorneys; evaluating claims of whistleblower retaliation by Federal Bureau of Investigation (FBI) personnel; reviewing misconduct allegations against non-Department attorneys and members of the judiciary and making referrals to disciplinary authorities when appropriate; representing the Department with external stakeholders on matters relating to attorney professional misconduct; and handling special projects at the request of the Attorney General and Deputy Attorney General.

OPR investigates allegations that Department attorneys have violated Constitutional or statutory obligations; Department policies, rules, or regulations; or state rules of attorney professional conduct. Professional misconduct allegations investigated by OPR include criminal and civil discovery violations; improper conduct before a grand jury; improper coercion, intimidation, or questioning of witnesses; improper introduction of evidence; lack of candor or misrepresentations to the court or opposing counsel; improper opening statements and closing arguments; failure to competently and diligently represent the interests of the government; failure to comply with court orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors informed of significant developments in a case; and conflicts of interest. In addition, OPR reviews criminal cases in which courts have awarded attorney's fees to defendants based on findings that the government's conduct was frivolous, vexatious, or in bad faith.

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

Supervisors and employees are encouraged to contact OPR for assistance in determining whether a matter should be referred to OPR.

Upon receipt, OPR reviews each allegation and determines whether further inquiry or investigation is warranted. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and its source. Although some matters begin as investigations, OPR typically will first initiate an inquiry and assess the information obtained prior to conducting a full investigation.

The majority of complaints received by OPR do not warrant further review because, for example, the complaint is outside OPR's jurisdiction, pertains to matters addressed by a court with no findings of misconduct, is frivolous on its face, or is vague and unsupported by any evidence. In some cases, OPR initiates an inquiry because more information is needed to assess the matter. OPR may request additional information from the complainant or obtain a written response from the attorney against whom the misconduct allegations were made. OPR also may review other relevant materials, such as pleadings and transcripts. Most inquiries are closed based on a determination that further investigation is not likely to result in a misconduct finding or that the matter lacks merit.

When information gathered in the course of an inquiry indicates that further investigation is warranted, the matter is converted to an investigation. Before making a finding of professional misconduct, OPR conducts a thorough investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). Interviews of subject attorneys are conducted under oath and are transcribed by a court reporter. When OPR finds professional misconduct, the subject is given an opportunity to review the draft report and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations and to provide complete and candid information to OPR. Employees who fail or refuse to cooperate with OPR investigations, after being given warnings concerning the use of their statements, may be subject to formal discipline, including termination of their employment.

OPR may initiate an inquiry or investigation into allegations concerning a subject attorney's work at the Department even if the attorney is no longer employed by the Department at the time of the inquiry or investigation. If a Department attorney resigns or retires during the course of an investigation, OPR ordinarily completes its investigation in order to assess the impact of the alleged misconduct and to permit the Attorney General and Deputy Attorney General to consider the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General may authorize OPR to terminate an investigation if OPR determines that it is in the best interest of the Department to do so.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and, when appropriate, to other components in the Department, including the litigating divisions, USAOs, and the Executive Office for U.S. Attorneys. OPR also reviews case files and statistical data relating to matters under investigation to identify any noteworthy trends or systemic problems in the programs, policies, and operations of the Department. Trends and systemic problems are brought to the attention of appropriate Department management officials.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which is responsible for reviewing OPR's findings of professional misconduct against Department attorneys. The head of the PMRU reports to the Deputy Attorney General. The PMRU has jurisdiction over most Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and the applicable laws, rules, and regulations.<sup>1</sup> The PMRU also determines the appropriate level of discipline to be imposed.

Once a disciplinary action becomes final and after authorization by the PMRU (for matters within its jurisdiction) or the Office of the Deputy Attorney General, OPR notifies the appropriate state attorney disciplinary authorities of any intentional or reckless violations of applicable bar rules. OPR does not make a bar notification when the conduct involves internal Department policies that do not implicate a rule of professional conduct. In addition, OPR reviews reports issued by the Department's Office of the Inspector General (OIG) containing findings against Department attorneys and makes recommendations to the PMRU when appropriate regarding whether state attorney disciplinary authorities should be notified of the attorney's conduct and the Department's findings.

## Section II: Overview of Professional Misconduct Allegations

This section provides information concerning OPR's review of allegations of professional misconduct involving Department attorneys, including immigration judges.

### A. Intake and Initial Evaluation of Professional Misconduct Complaints

In Fiscal Year 2020, OPR received 863 new complaints, 289 of which, or approximately 33 percent, were from inmates. Of the total complaints, many related to matters that did not fall within OPR's jurisdiction, while others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 30 complaints warranted further review and opened inquiries in those matters. OPR opened 13 matters as investigations.<sup>2</sup>

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

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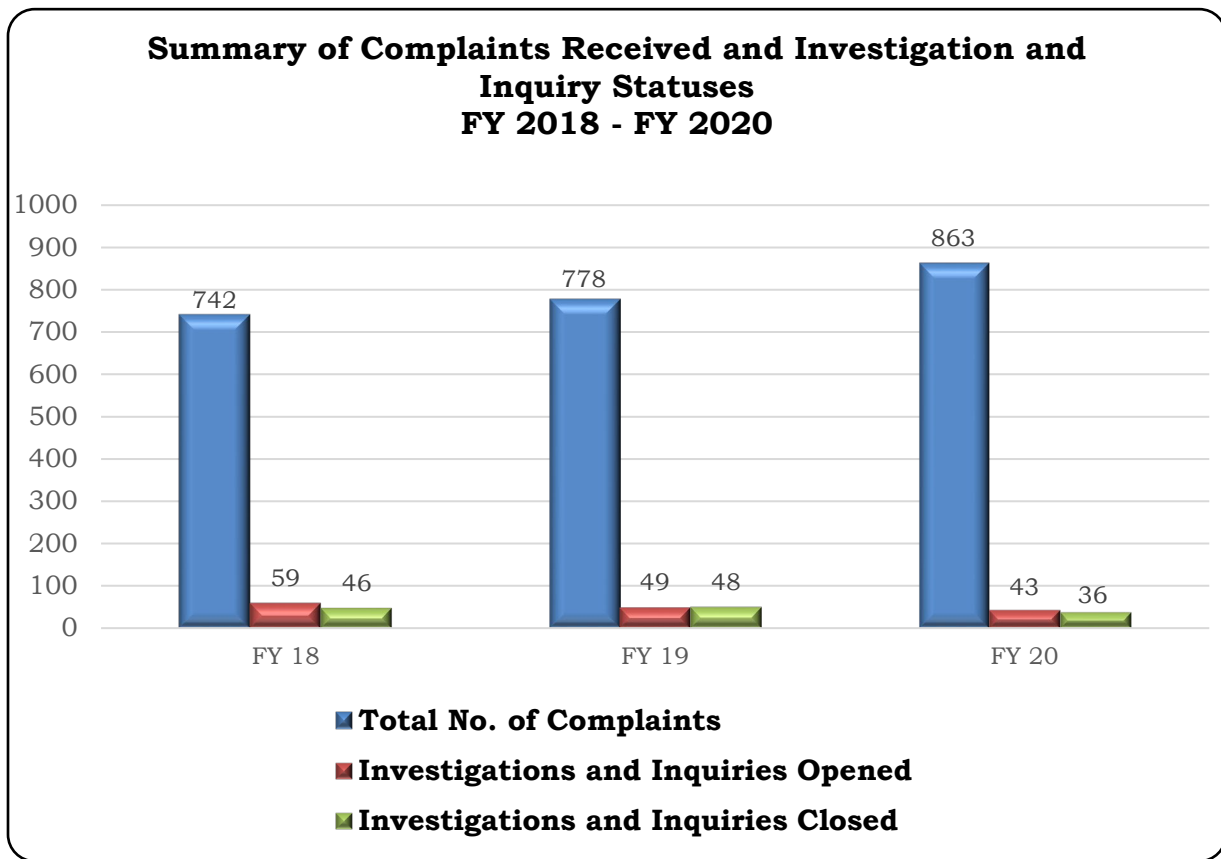
<sup>1</sup> OPR's findings of poor judgment or mistake are referred to Department component heads, the Executive Office for U.S. Attorneys, and U.S. Attorneys, for appropriate action.

<sup>2</sup> Some of the complaints that were opened as inquiries or later were converted to an investigation may have been received by OPR prior to Fiscal Year 2020.

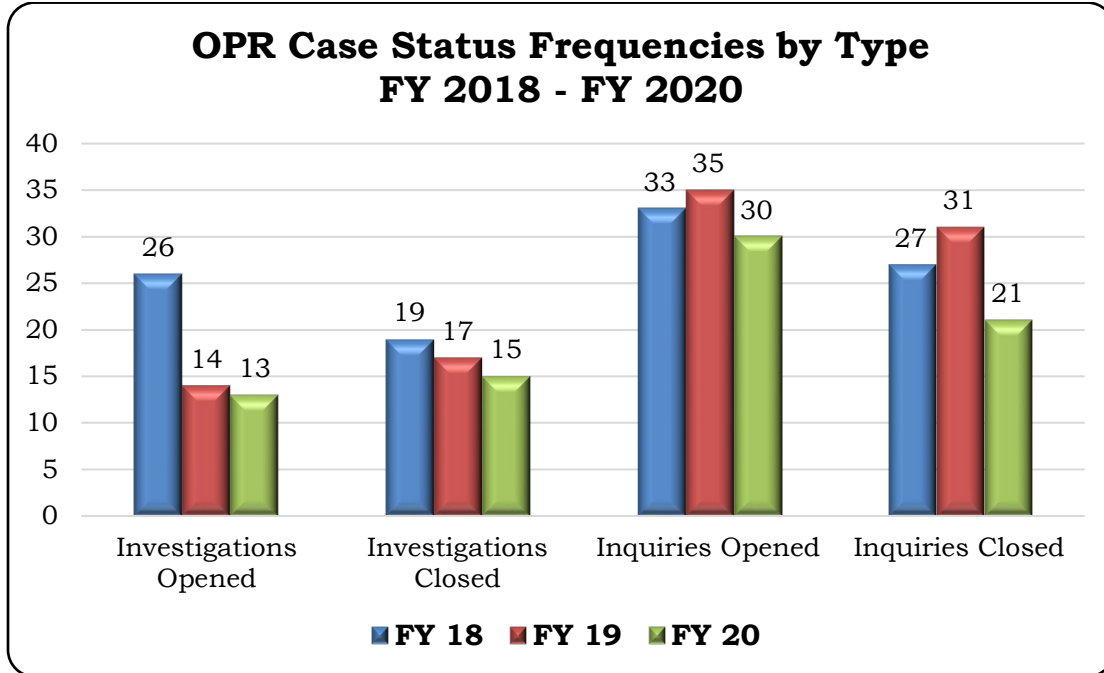
**B. Professional Misconduct Investigations and Inquiries by Fiscal Year**

In Fiscal Year 2020, OPR received 863 new complaints, which represents an 11 percent increase from Fiscal Year 2019. Graphs 1 and 2 compare for the last three fiscal years the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, in Fiscal Year 2020, OPR opened 43 investigations or inquiries and closed 36 investigations and inquiries. As reflected in Graph 2, in Fiscal Year 2020, OPR opened 30 inquiries and closed 21, and opened 13 investigations and closed 15.

**Graph 1**

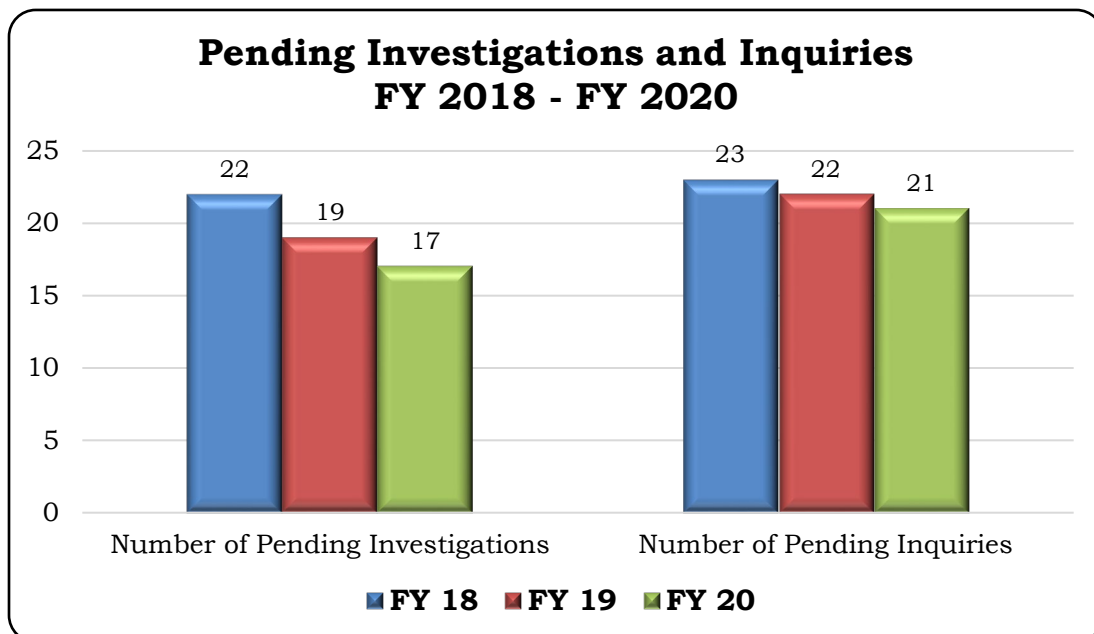


**Graph 2**



Because of the complexity of many of the matters received by OPR, many investigations and inquiries remain under review at the close of the fiscal year, and the outcomes of those matters are reported in the fiscal year they are closed. At the end of Fiscal Year 2020, there were 17 pending investigations and 21 pending inquiries. Graph 3 compares the number of inquiries and investigations pending at the end of each of the last three fiscal years.

**Graph 3**





**C. Professional Misconduct Inquiries Opened in Fiscal Year 2020**

The sources of the complaints for the 30 inquiries opened in Fiscal Year 2020 are set forth in Table 1.<sup>3</sup>

**Table 1**

<b>Sources of Professional Misconduct Complaints against Department Attorneys in Inquiries Opened in FY 2020</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions and referrals, including self-reports and referrals by Department employees of judicial criticism and findings of misconduct	6	20.0%
Department components, including self-reports (unrelated to judicial findings of misconduct)	20	66.7%
Private attorneys	1	3.3%
Private parties	3	10.0%
<b>Total</b>	<b>30</b>	<b>100%</b>

The types of allegations in these inquiries are set forth in Table 2. Because some inquiries included more than one allegation, the total number of allegations exceeds 30.

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<sup>3</sup> OPR evaluates all misconduct allegations against non-Department attorneys by Department employees to determine whether the Department should make a referral to a state attorney disciplinary authority. The 30 matters referred to above do not include matters involving proposed bar notifications relating to non-Department attorneys.

**Table 2**

<b>Types of Professional Misconduct Allegations in Inquiries Opened in FY 2020</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Misrepresentation to the court or opposing counsel	8	20.5%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	7	17.9%
Improper remarks to a grand jury, during trial, or in pleadings	7	17.9%
Abuse of authority, including abuse of prosecutorial discretion	5	12.8%
Failure to maintain an active bar membership	4	10.3%
Misconduct allegations involving immigration judges	3	7.7%
Failure to comply with federal law	2	5.1%
Failure to comply with court orders and federal rules	1	2.6%
Interference with defendant's rights	1	2.6%
Missed deadlines	1	2.6%
<b>Total</b>	<b>39</b>	<b>100%</b>

**D. Professional Misconduct Inquiries Closed in Fiscal Year 2020**

OPR closed 21 inquiries in Fiscal Year 2020 involving allegations against Department attorneys.<sup>4</sup> These matters involved 48 separate allegations of professional misconduct. OPR may designate more than one Department attorney as the subject of an inquiry, and many matters involved multiple allegations. The manner in which the 48 allegations were resolved in Fiscal Year 2020 is set forth in Table 3.<sup>5</sup>

<sup>4</sup> OPR closed an additional 67 inquiries involving the alleged misconduct of non-Department attorneys. Additional statistical information regarding OPR's review of non-Department attorney allegations is set forth in Section V.

<sup>5</sup> When an inquiry is converted to an investigation, the initial inquiry is not closed and is not included in these statistics. In Fiscal Year 2020, 13 inquiries were converted to investigations.

**Table 3**

<b>Categories of Professional Misconduct Inquiry Allegations Resolved in FY 2020</b>		
<b>Types of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Occurrences</b>
No merit to allegation based on preliminary inquiry	18	37.5%
No merit to matter based on review of allegation	17	35.4%
Further investigation not likely to result in finding of professional misconduct	10	20.8%
Performance or management matter; referred to component	2	4.2%
Other	1	2.1%
<b>Total</b>	<b>48</b>	<b>100%</b>

**E. Professional Misconduct Investigations Opened in Fiscal Year 2020**

Table 4 identifies the sources for the 13 investigations that OPR opened in Fiscal Year 2020.

**Table 4**

<b>Sources of Complaints against Department Attorneys for Professional Misconduct Investigations Opened in FY 2020</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Department components, including self-reports (unrelated to judicial findings of misconduct)	7	53.8%
Judicial opinions and referrals, including self-report and referrals by Department employees of judicial criticism and findings of misconduct	6	46.2%
<b>Total</b>	<b>13</b>	<b>100%</b>

Some of these investigations involved multiple subjects. In addition, because many investigations involved multiple professional misconduct allegations, there were 70 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

**Table 5**

<b>Types of Professional Misconduct Allegations in Investigations Opened in FY 2020</b>		
<b>Types of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations in Investigations</b>
Failure to comply with discovery obligations	27	38.6%
Misrepresentation to the court or opposing counsel	22	31.4%
Misrepresentation to others	1	1.4%
Failure to comply with Department rules and regulations	4	5.7%
Abuse of authority, including abuse of prosecutorial discretion	4	5.7%
Failure to comply with court orders and federal rules	4	5.7%
Improper remarks to a grand jury, during trial, or in pleadings	4	5.7%
Failure to competently or diligently represent the client's interests	2	2.9%
Interference with defendant's rights	2	2.9%
<b>Total</b>	<b>70</b>	<b>100%</b>

**F. Professional Misconduct Investigations Closed in Fiscal Year 2020**

OPR closed 15 investigations in Fiscal Year 2020, some of which involved more than one attorney. OPR found professional misconduct in 8, or 53 percent, of the 15 investigations it closed. OPR finds the subject attorney committed professional misconduct when the subject attorney (1) intentionally violated a clear and unambiguous obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy; or (2) recklessly disregarded his or her obligation to comply with that obligation or standard. Five of the 8 investigations involved at least one finding of intentional professional misconduct by a Department attorney.<sup>6</sup> OPR found

<sup>6</sup> OPR finds intentional professional misconduct when 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

that a Department attorney acted in reckless disregard of a clear and unambiguous obligation or standard in 5 of the 8 investigations.<sup>7</sup> (When several misconduct allegations have been made against a subject, each allegation is resolved separately. Therefore, OPR may conclude that the subject engaged in intentional misconduct with respect to one allegation but find that the subject acted recklessly or made a mistake with respect to another allegation.)

In Fiscal Year 2020, OPR made more professional misconduct findings than Fiscal Year 2019; 53 percent of cases closed in Fiscal Year 2020 resulted in professional misconduct findings, compared to 47 percent in Fiscal Year 2019. The 8 investigations closed with professional misconduct findings included 18 sustained allegations of misconduct. (Some investigations included more than one allegation of misconduct.) Table 6 below sets forth the 18 allegations sustained in those investigations.

**Table 6**

<b>Types of Professional Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2020</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Improper remarks	7	38.8%
Misrepresentation to others	3	16.7%
Misrepresentation to the court or opposing counsel	2	11.1%
Failure to keep client informed	2	11.1%
Conflict of interest	2	11.1%
Failure to comply with Department rules and regulations	1	5.6%
Unauthorized leaks or disclosures	1	5.6%
<b>Total</b>	<b>18</b>	<b>100%</b>

OPR made professional misconduct findings against eight Department attorneys. The PMRU issued final decisions with respect to five of those attorneys and, in all cases, sustained OPR’s findings of professional misconduct. One attorney resigned and one attorney retired from

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(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>7</sup> OPR finds that an attorney acted in reckless disregard of a professional obligation or standard when it concludes that the attorney (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney’s conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

the Department after OPR's report of investigation was completed, but before discipline was imposed by the Department. In those cases in which OPR found a violation of state rules of professional conduct, the PMRU authorized OPR to refer the violations to the appropriate state attorney disciplinary authorities.

In 4 of the 7 remaining investigations closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 15 investigations OPR closed in FY 2020, OPR made a finding of professional misconduct or poor judgment in 12 cases, or 80 percent of the investigations it closed. OPR refers its poor judgment findings to the Department attorney's component for further action, which may include disciplinary action or additional training. In 3 cases, OPR found that an attorney made a mistake.

### *Section III: Professional Misconduct Investigations Closed in FY 2020*

The following professional misconduct investigations were closed during Fiscal Year 2020. This report includes actions taken by the PMRU or other entities when such action occurred in the fiscal year.

To protect the privacy of the Department attorneys and other individuals involved in the investigations and inquiries summarized in this report, as required by the Privacy Act, OPR has omitted names and identifying details from the examples. Moreover, in certain cases, information and evidence obtained by OPR is protected from disclosure by orders of the court, privileges, and grand jury secrecy rules. OPR has used male pronouns in the examples regardless of the actual gender of the individual involved. OPR alternates the use of gender pronouns each year.

#### [Allegations of Misrepresentations to the Court and Failure to Advise the Client](#)

Following a report from a USAO, OPR investigated allegations that an AUSA made misrepresentations to the court, defense counsel, and his supervisors concerning the status of testing of drug evidence and his purported contacts with the laboratory conducting the testing. OPR also investigated whether the AUSA failed to keep his supervisors reasonably informed of the status of his compliance with a court order.

Based on its investigation, OPR determined that the AUSA committed intentional professional misconduct by making a series of oral and written false statements to the court, defense counsel, and his USAO supervisors. OPR also determined that the AUSA committed intentional professional misconduct by failing to keep his supervisors reasonably informed of the status of his compliance with a court order. OPR referred the matter to the PMRU, which affirmed OPR's findings and authorized referral to the appropriate state attorney disciplinary authority. The AUSA resigned from the Department following OPR's investigation.

### Allegation of Improper Closing Argument

A district court granted a defendant's post-trial motion for a mistrial due to improper closing and rebuttal arguments made by an Assistant U.S. Attorney (AUSA). The court concluded that the AUSA committed misconduct by mischaracterizing evidence; arguing that facts not in the record proved the defendant's guilt; and inappropriately characterizing the jurors as future victims of the defendant.

OPR conducted an investigation and concluded that the former AUSA who presented the government's closing and rebuttal arguments engaged in professional misconduct by recklessly disregarding his obligation to base summation arguments only on evidence that was in the record when he referred to recorded telephone calls that had not been introduced into evidence. In addition, OPR concluded that the AUSA engaged in intentional professional misconduct when, during closing arguments, the attorney referenced other facts not in the record, including the amount of time the AUSA and an agent had spent listening to the recorded telephone calls and the fact that a witness had a pending case in which he faced significant imprisonment. Finally, OPR concluded that the AUSA engaged in professional misconduct during rebuttal argument in reckless disregard of the attorney's obligation to refrain from improper argument when he characterized jurors as victims. OPR referred its findings to the PMRU.

### Allegations of Interference with Defendant's Rights, Improper Coercion, and Unprofessional Statements

A district court found that an AUSA violated a defendant's Sixth Amendment right to present a defense by intimidating a defense trial witness through a conversation with the witness's attorney, after which the witness declined to testify. OPR conducted an investigation and concluded that the preponderance of the evidence did not establish that the AUSA made the impermissible or threatening statements that the trial judge inferred or that the AUSA's actions proximately caused the witness to decline to testify. However, OPR concluded that in his interactions with the attorney regarding the witness's prospective testimony, the AUSA exhibited poor judgment by failing to conduct himself in a more measured and less aggressive manner and by failing to more carefully consider whether it was necessary to convey to the witness's attorney the potential consequences the witness might face should the witness not truthfully testify.

### Allegations of Conflict of Interest and Failure to Advise the Client

A USAO advised OPR that it had received information that an AUSA had a close personal relationship with a witness in a prosecution, a relationship which the AUSA had never disclosed to USAO supervisors, the district court, or the defense. The AUSA resigned during OPR's investigation. After a thorough investigation, OPR determined that the former AUSA was involved in a close personal relationship with the witness, which included purchasing items for and services from the witness, during the time the AUSA prosecuted the case. OPR concluded that the AUSA committed, at a minimum, reckless professional misconduct in violation of Rules of Professional Conduct 1.4, 1.6, 1.7, and 1.8 when he failed to advise USAO managers of his personal relationship with the witness, continued to represent the government despite a conflict of interest when he had not obtained consent from the client (in this case, his supervisors), and

disclosed confidential information to the witness without the client's consent. Following the PMRU's authorization, OPR referred the AUSA's conduct to the appropriate state attorney disciplinary authorities.

#### Allegation of Lack of Candor and Professionalism

A USAO advised OPR that it had received a complaint from a local law enforcement office that an AUSA who had contacted the law enforcement office to obtain official reports may have made misrepresentations regarding the purpose for which the AUSA sought the reports. The complaint also alleged that during the conversations, the AUSA cursed and spoke to an employee of the law enforcement office in an unprofessional tone and manner. As a result of information it learned during its investigation, which included conducting multiple interviews, reviewing court filings, and examining thousands of emails, OPR concluded that the AUSA committed intentional professional misconduct in violation of Rules of Professional Conduct 4.1 and 8.4 when he knowingly made false statements of material fact to a third person and engaged in conduct involving dishonesty, deceit, or misrepresentation that reflected adversely on his fitness to practice law. OPR also concluded that the AUSA violated a local rule governing attorney professionalism when he failed to conduct himself in a courteous, fair, and respectful manner; knowingly misstated the facts; and knowingly caused a person to form a mistaken conclusion of fact. The matter was referred to the PMRU.

#### Allegation of Conflict of Interest

A Department attorney self-reported to OPR that defense counsel alleged that his involvement in a criminal prosecution amounted to a per se due process violation because he previously represented the defendant in the same matter while in private practice. After joining the Department, the attorney assisted in the processing of a request related to the government's efforts to conduct a witness interview for use in the government's prosecution of the attorney's former client.

The attorney resigned from the Department during OPR's investigation. Following its investigation, OPR determined that the attorney engaged in intentional professional misconduct in violation of 5 C.F.R. § 2635.502 and Rules of Professional Conduct 1.7 and 1.9 when he knowingly represented the government despite a conflict of interest and without obtaining the consent of his current and former clients.

OPR referred the matter to the PMRU, which concluded that OPR's finding that the attorney committed professional misconduct by representing the government despite a conflict of interest and without obtaining the consent of his former client implicated Rule 1.9, but that the attorney's conduct did not implicate Rule 1.7. Although the PMRU did not make a specific finding regarding intentionality, it concluded that the attorney's conduct was at a minimum reckless. The PMRU further determined that the attorney's conduct implicated rule 1.1(a), through a serious deficiency in the performance of his duties that prejudiced the government, and authorized OPR to provide the results of its investigation and the PMRU decision to the appropriate attorney disciplinary authorities.



## Allegations of Failure to Comply with Discovery Obligations and Department Policies Governing Disclosure of Exculpatory Information

A USAO notified OPR of a judicial finding that an AUSA violated his *Brady* obligations by failing to timely disclose to the defense information about a possible third-party perpetrator. Although the AUSA timely disclosed some information concerning the alleged third-party perpetrator's possible involvement in the offense, the AUSA did not disclose other information relevant to the alleged third-party perpetrator's identity until two weeks prior to the trial and more than two years after the government learned of the information. The court denied the defendant's motion to dismiss the case, concluded that the defense suffered no prejudice due to the late disclosures, and remedied the untimely disclosures by continuing the defendant's trial date. The court also found that the AUSA did not act in bad faith, observing that the AUSA (1) promptly disclosed the additional information upon realizing it had not been disclosed and (2) took appropriate action to mitigate the effect of the late disclosures. The court nonetheless found a *Brady* violation based on the late disclosures.

OPR conducted an investigation and concluded that the AUSA did not violate the defendant's due process rights and, therefore, did not engage in professional misconduct. OPR agreed with the court's conclusion that the defense was not prejudiced by the late disclosures because it effectively used the disclosed information to prepare a viable third-party perpetrator defense. In addition, OPR determined that the AUSA did not violate the special obligations required of prosecutors by the applicable rules of professional conduct. OPR found no evidence that the attorney purposefully or knowingly withheld the information relevant to the alleged third-party perpetrator's identity or delayed disclosing it for an improper purpose. Rather, OPR found that the AUSA intended from the outset of the case to be forthcoming with the exculpatory information about the alleged third-party perpetrator and that the AUSA's failure to timely disclose the additional information relevant to the alleged third-party perpetrator's identity was inadvertent. Finally, OPR found that, although the AUSA generally complied with Departmental policies governing the prompt disclosure of exculpatory information, the AUSA nonetheless acted in contravention of the policies in failing to timely and completely disclose everything relevant about the alleged third-party perpetrator. OPR, however, determined that the AUSA's actions did not constitute intentional or reckless professional misconduct. Rather, OPR concluded that the AUSA's failures to make timely disclosures constituted mistakes.

## Allegation of Failure to Maintain Active Bar Membership

A Department attorney self-reported to OPR that his only active bar membership had been suspended for approximately six weeks because he failed to timely pay his annual bar membership dues. OPR conducted an investigation and concluded that the attorney did not commit professional misconduct or exercise poor judgment when he failed to continuously maintain at least one active bar membership. Rather, after considering the totality of the circumstances, OPR concluded that the attorney's failure to maintain an active bar membership was the result of a mistake. OPR found that the attorney inadvertently failed to update his contact information with his state bar after he went on a temporary work detail and moved his residence, which caused him not to receive annual dues notices from the bar.

### Allegations of Misrepresentations to the Court and Failure to Correct False Testimony

Following an AUSA's self-report, OPR investigated an allegation that he failed to disclose, in both a defendant's written plea agreement and in a change-of-plea hearing, an additional agreement with the defendant pertaining to the dismissal of related pending state charges and the applicability of a federal sentencing enhancement. The allegation arose when the AUSA filed a pleading years after the defendant's guilty plea in which the AUSA characterized the dismissal of the state charges as an actual negotiated, mutually accepted agreement.

Based on the results of its investigation, OPR concluded that the parties had reached, at a minimum, an understanding that the defendant's pending state charges would be dismissed by the local prosecutor's office in exchange for the defendant stipulating to a sentencing enhancement, and that the understanding should have been disclosed to the court. OPR concluded, however, that the AUSA did not engage in professional misconduct because he did not believe the negotiations concerning the state charges were binding on the local prosecutor's office or that they differed from the USAO's customary plea practices concerning defendants with pending state charges. OPR also considered that the AUSA had no reason to conceal from the court that the defendant expected the pending state charges to be dismissed, as such an understanding would not have undermined the voluntariness of the guilty plea. Finally, OPR also took into account the fact that the AUSA only offered to contact the local prosecutor's office at the defense attorney's request, after the defense attorney reported having difficulty getting calls returned, and the AUSA thus viewed his role as just a conduit of information to the defense.

However, OPR concluded that the AUSA exercised poor judgment by not informing the court of the defendant's understanding and expectations with respect to the federal sentencing enhancement and dismissal of the pending state charges. In the period leading up to the guilty plea, those issues were continuing points of negotiation between the parties, and the AUSA should have recognized that they were important considerations for the defendant. Furthermore, it would have been easy to disclose the understanding in just a few sentences in the written plea agreement and in the oral statement of the plea provisions during the change-of-plea hearing, and there was no reason not to do so.

### Allegation of Improper Closing Argument

A USAO referred to OPR an appellate court's finding that an AUSA engaged in prosecutorial misconduct. The court of appeals found that while there was sufficient evidence to support the defendants' convictions, numerous errors by the AUSA, when considered cumulatively, deprived the defendants of a fair trial. Among other things, the appellate court found that the AUSA improperly vouched for and bolstered the credibility of government witnesses; improperly attacked the credibility of defense witnesses; and improperly commented on the defendant's religious beliefs.

OPR investigated the matter and concluded that the AUSA engaged in reckless professional misconduct when he improperly vouched for and bolstered the credibility of a government witness and improperly attacked the credibility of two defense witnesses. OPR also concluded that the AUSA engaged in reckless professional misconduct in violation of Federal Rule

of Evidence 610 by making improper references to the defendant's religious beliefs and practices during cross-examination and closing argument. OPR referred its findings to the PMRU.

#### Allegation of Removal of Spectators from the Courtroom

Following a report of judicial criticism of a senior Department attorney, OPR investigated allegations that the attorney engaged in improper conduct by setting in motion circumstances that led to the removal of a number of spectators—friends and colleagues of the defendant—from the courtroom prior to closing arguments on the final day of trial. OPR's investigation examined whether the spectators' removal implicated their First Amendment rights, the defendant's Sixth Amendment rights, or the Department's longstanding policy that Department attorneys "[have] a compelling duty to protect the societal interest in open proceedings."

OPR's investigation determined that the spectators' presence was the most recent in a series of episodes throughout the case that created escalating tension in the courtroom that day, and the combination of those mounting tensions, lack of adequate time to reflect on alternative courses of action given the spectators' arrival just minutes before the court proceedings began, and other factors likely contributed to the attorney's actions. Nevertheless, the attorney's actions raised serious questions about possible constitutional violations and caused unnecessary and time-consuming litigation in an otherwise successful criminal prosecution. Accordingly, based upon the results of its investigation, OPR concluded that the attorney exercised poor judgment in obtaining the spectators' removal from an otherwise open, public proceeding. OPR's finding was affirmed upon further review by the Department.

#### Allegation of Misrepresentations to the Court and Opposing Party

Following a report from a Department component, OPR investigated allegations that a Department attorney prepared a document that contained inaccurate statements of fact that was filed with the court in support of the government's dispositive motion. Based on the results of its investigation, OPR concluded that although the Department attorney in fact prepared a document containing material factual inaccuracies, the attorney did not commit professional misconduct because OPR found no evidence that the attorney knowingly or purposefully prepared an inaccurate document, nor did OPR find any evidence that the attorney prepared the document with a reckless disregard for the truth. Rather, OPR concluded that the inaccurate statements of fact in the document likely resulted from the attorney making a series of mistakes when drafting the document. OPR further concluded that the Department attorney exercised poor judgment during the preparation of the document because he failed to review the document for factual accuracy after drafting it. OPR referred the matter to the attorney's component head for handling as a performance matter.

#### Allegation of Lack of Candor

OPR received a referral from another Department component regarding allegations that a senior Department attorney failed to apprise his supervisor of his interactions with a law enforcement agency and a source concerning the subject matter of an ongoing, significant investigation. Although the attorney eventually recognized the need to inform his supervisor, who

was overseeing the investigation, of his involvement and provided some information about the general topic, the senior Department attorney failed to provide a complete disclosure of his role as a conduit of information between the source and the law enforcement agency. As a result, the supervisor was unaware of the attorney's activities related to the investigation until learning of them through other means.

OPR's investigation focused on the attorney's incomplete disclosures to his supervisor about his ongoing activities related to the source and the law enforcement agency. Following its investigation, OPR concluded that the attorney committed reckless professional misconduct by providing materially incomplete information to his supervisor, which constituted a misrepresentation. OPR referred its findings to the PMRU.

#### Allegation of Improper Closing Argument

A USAO notified OPR that the government conceded error in an appeal due to improper rebuttal comments made by the government at trial. The appellate court subsequently remanded the defendant's conviction for a new trial after concluding that comments the government made during rebuttal argument constituted prosecutorial misconduct.

OPR investigated the matter and concluded that the former AUSA who presented the government's rebuttal argument engaged in reckless professional misconduct by improperly arguing that the defense was suggesting that the government agents framed the defendant, in violation of the rule against mischaracterizing evidence. In addition, OPR also concluded that the AUSA engaged in intentional professional misconduct by suggesting that the Federal Rules of Evidence prevented the government from introducing additional evidence of guilt, when no such additional evidence existed. OPR referred its findings to the PMRU.

#### Allegations of Failure to Comply with Discovery Obligations and Misrepresentations to the Court

An AUSA self-reported to OPR that a court was critical of the AUSA's handling of discovery and expert witness disclosures and had excluded the testimony of one expert witness and limited the testimony of another expert witness because the government failed to timely disclose its expert witnesses to the defense.

Based on its investigation, OPR concluded that the AUSA did not commit professional misconduct when (1) the defendant's medical records were not timely produced to the defense because the AUSA reasonably believed, based on past practice, that the records had been produced and because there was an error in electronically transmitting the records from an agent to the AUSA using a new system for exporting documents; (2) the government failed to timely make its expert witness disclosures, because the AUSA's understanding of the court's orders and Rule 16 of the Federal Rules of Criminal Procedure regarding disclosures, while different from the court's perspective, was not unreasonable under the circumstances and did not constitute bad faith; (3) the government failed to timely produce a forensic examination report to the defense because the AUSA had not yet received the report from the case agent; (4) the government failed to timely produce another report to the defense because the AUSA had not yet received the report and, when

the AUSA did receive it, mistakenly believed, based on past practice, that it had been produced to the defense; and (5) the AUSA made inaccurate remarks to the court at a hearing regarding when the government received a report and produced it to the defense, because the remarks were not made with the intent to mislead the court, although they were abbreviated and poorly worded. Rather, the AUSA made mistakes in the handling of those items of discovery and in his remarks to the court.

## *Section IV: Examples of Professional Misconduct Inquiries Closed in FY 2020*

The following summaries are a representative sample of the professional misconduct inquiries closed by OPR in Fiscal Year 2020.

### [Allegation of Failure to Maintain Active Bar Membership](#)

A senior Department attorney self-reported to OPR that he failed to maintain an active bar membership with at least one state bar for approximately nine weeks because he did not pay his bar dues. During that period of time, the Department attorney was not an active member of any bar. OPR opened an inquiry, received a written response, and reviewed relevant emails, bar records, and other documents in the matter.

The evidence showed that the attorney had been an active member of a bar for over 20 years, when his license was administratively suspended as a result of his failure to pay his bar dues. The attorney was in private practice for many years before joining the Department. According to the attorney, he sent a letter to the bar providing his new mailing address, but apparently did not update his email address. The bar's records did not reflect such a letter, and his account was not updated to reflect his new mailing address. In addition, because his prior email address was no longer accurate, the attorney did not receive any emails from the bar.

Based on its inquiry into the matter, OPR concluded that further investigation was not warranted because the attorney made a mistake by not keeping his contact information with the bar current. None of the materials that were reviewed in this matter reflected that the attorney intentionally or recklessly failed to maintain an active bar license with the bar. Once he was advised that he was not active, the attorney took the necessary steps to change his membership status and notify the appropriate officials of his bar lapse.

### [Allegation of Failure to Maintain Active Bar Membership](#)

A USAO notified OPR that an AUSA failed to maintain an active bar membership with at least one state bar for a 10-month period, when he paid inactive annual bar dues instead of active dues. During that period of time, the AUSA was not an active member of any bar. OPR opened an inquiry into the AUSA's failure to maintain an active bar membership, received a written response, and reviewed relevant emails, bar records, and other documents in the matter.

Based on its inquiry, OPR concluded that further investigation was not warranted because it was unlikely to result in a finding of professional misconduct. The AUSA was an experienced prosecutor, knew he was required to maintain an active membership in at least one state bar, and had done so for over 20 years, until he electronically submitted his 2019-2020 annual bar registration. The evidence reflected that the AUSA mistakenly selected inactive instead of active on the bar's online registration form when completing his annual registration. None of the bar records that were reviewed in the matter reflected that the AUSA intentionally or recklessly failed to maintain an active bar license. Once he realized that he was not active, the AUSA took the necessary steps to change his membership status and notify the appropriate officials of his bar lapse.

#### Allegation of Misrepresentations to the Court

After a defendant was sentenced, a federal agent who participated in the underlying investigation provided to the sentencing court confidential investigative documents and a typewritten note alleging that the AUSAs had misrepresented the defendant as less culpable than he actually was. The judge provided the note and investigative documents to the AUSAs' supervisor, and the office referred the matter to OPR for review. After a thorough review, OPR determined that the AUSAs did not violate their obligations of candor to the court because the investigative documents did not contradict the AUSAs' assertions about the defendant's culpability, nor did they contain information credibly or competently proving greater culpability. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

#### Allegation of Failure to Comply with the Department's Social Media Policy

A USAO notified OPR that an AUSA posted to his personal social media account information concerning a defendant's sentence. Responding to social media remarks made by an individual who commented on the length of the defendant's sentence, the AUSA made various remarks about the defendant. OPR opened an inquiry into the AUSA's use of social media to respond to the individual's comments, obtained a written response, and reviewed pleadings, transcripts, and other documents in the case.

Based on its inquiry, OPR concluded that further investigation was not warranted because it was unlikely to result in a finding of professional misconduct. A careful review of the materials that the AUSA provided to OPR demonstrated that his remarks about the defendant and the underlying facts of the prosecution were based on matters that were in the public record and did not violate the Department's social media policy. Although OPR concluded that the AUSA's comments did not violate Department policy, OPR referred the matter to the USAO to handle in a management context to the extent necessary to minimize the use of social media in matters involving the USAO.

#### Allegation of Improper Closing Argument

In a prosecution for willful failure to pay taxes, the defendant claimed that his charged failure to pay a business-related tax was unintentional, and the district court admitted evidence at

trial of the defendant's prior failures to pay other types of taxes for the purpose of rebutting the defendant's claimed lack of intent. In the government's closing argument, the AUSA argued that the defendant's prior failures to pay the other types of taxes showed that the defendant also failed to pay the taxes at issue in the trial. The court of appeals criticized the argument as urging the jury to make a propensity inference in violation of Federal Rule of Evidence 404(b). OPR initiated an inquiry into the matter.

Following a careful review of the record in the case, as well as materials submitted to OPR by the prosecutor, OPR concluded that further investigation was not likely to result in a finding of professional misconduct. OPR considered that the defense did not object either at trial or in its motion for a new trial to the prosecutor's reference in closing argument to the defendant's prior failures to pay taxes. OPR also considered that immediately after referring to the prior failures, the prosecutor urged the jury to infer the requisite intent. Although the prosecutor's statement was inartfully worded, in the context of the entire closing argument, the reference permissibly rebutted the defense of lack of intent.

#### [Allegation of Failure to Comply with Discovery Obligations](#)

This matter came before OPR as a result of a court of appeals' decision reversing defendants' convictions for mortgage fraud-related offenses and remanding the case for further proceedings due to the government's failure to disclose an immunity agreement that a trial witness had entered into with the government in an unrelated case.

OPR initiated an inquiry and reviewed extensive documentary evidence. After holding a hearing in which the prosecutors testified under oath, the district court expressly found that there was no evidence that the prosecutors or agents engaged in flagrant misbehavior, which would encompass both intentional and reckless conduct. The evidence indicated that the trial matter and the unrelated case in which the trial witness had entered into the immunity agreement originated in two different USAO offices and involved different prosecutors and agents. The evidence also revealed that neither the prosecutors nor the case agents knew about the witness's immunity agreement, that the prosecutors had no reason to know about the immunity agreement, and that the prosecutors had made substantial efforts to comply with their discovery obligations. OPR, therefore, determined that further investigation was unlikely to lead to a finding of professional misconduct and closed the inquiry.

#### [Allegations of Misrepresentations to the Court, Misrepresentations to Opposing Counsel, and Failure to Correct False Testimony](#)

An AUSA self-reported to OPR his conduct in a supervised release revocation hearing, advising OPR that he had inaccurately described a co-conspirator's statement in a preliminary motion and that the district court had relied on his representations when deciding to permit the statement's admission as hearsay. The government moved on appeal for a partial summary reversal and resentencing, and in its motion the government also asserted that an agent-witness's testimony regarding the hearsay statement at the hearing was incomplete, which the prosecutor failed to correct. The court of appeals granted the government's motion for summary reversal, partially vacated the judgment, and remanded for resentencing.

OPR initiated an inquiry and reviewed extensive documentary evidence, as well as information provided by the prosecutor. OPR found no evidence that the prosecutor intentionally withheld information or acted purposefully to deceive the court or defense counsel. Rather, the prosecutor's inaccurate description of the co-conspirator's statement to the court in the pleading and failure to correct an agent-witness's inaccurate testimony regarding the statement resulted from his failure to listen to an audio recording of the statement, and his reliance on a summary of the statement prepared by the agent. The prosecutor's admittedly mistaken reliance on the statement summary was based on the prosecutor's experience interacting with the agent, his assessment of the accuracy of other reports prepared by the agent, and his perception that the statement was not a primary issue at the hearing. OPR, therefore, determined that further investigation was not likely to result in a finding of professional misconduct and closed its inquiry.

#### Allegations of Improper Examination of a Witness and Improper Rebuttal Argument

This matter came before OPR as a result of a court of appeals' decision vacating a judgment of conviction and remanding the case for a new trial because the government published an unadmitted exhibit to the jury and referred to the unadmitted exhibit during rebuttal arguments. OPR initiated an inquiry and reviewed extensive documentary evidence, including evidence provided by the AUSAs who litigated the trial. OPR determined that the inexperienced AUSA who published the exhibit to the jury was not aware that his use of the exhibit was improper and that he had relied on the court's approval of his use of the exhibit to question the defendant. OPR also reviewed the rebuttal closing argument presented by a second AUSA, which referred to the unadmitted exhibit. Although the AUSA's rebuttal argument overstepped the bounds of proper argument, his reference was brief and made soon after the court had permitted the government to publish the exhibit to the jury. OPR concluded that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

#### Allegations of Failure to Obey a Court Order and Lack of Candor

A USAO informed OPR that a district judge had criticized an AUSA for allegedly misrepresenting the circumstances under which he had presented trial testimony from a government witness concerning an issue that the court previously had excluded from evidence and for failing to abide by the court's order to instruct that witness in advance to avoid testifying about the excluded evidence. The court concluded that, although the AUSA violated the court's in limine order, the error was the result of an unintentional mistake. However, the court also found that the AUSA had offered numerous inconsistent explanations for why he failed to recognize that the witness might testify about the excluded evidence and failed to admonish the witness accordingly. According to the court, because the AUSA's explanations were inconsistent, all but one were misrepresentations.

OPR requested and received a written response from the AUSA, along with exhibits and supporting materials. OPR also reviewed pertinent transcripts and pleadings from the case. Given the difficult circumstances in which the AUSA was operating in the frenetic lead up to the witness's testimony, OPR concluded that the AUSA's failure to admonish the witness as required



by the court's in limine order, while an avoidable error, would not likely result in a finding of professional misconduct.

Regarding the court's criticism that the AUSA offered conflicting explanations for the witness's testimony, OPR determined that the AUSA actually offered only two different explanations: one based on an initial misapprehension of the witness's testimony at a prior trial, and a second that identified the initial misstatement and corrected the record. OPR concluded that, while this error could have been avoided by a diligent review of the witness's prior testimony in advance of the trial, the AUSA's initial misrepresentation to the court would not likely result in a finding of professional misconduct under the circumstances of the case.

### Allegation of Improper Ex Parte Communications with the Court

OPR received allegations that, over a period of years, staff members from a Department office had engaged in inappropriate ex parte email communications with a federal court judge. After learning that some ex parte email communications existed, the office collected and reviewed all staff email correspondence with the court. Thereafter, the office provided the ex parte communications it recovered to defense counsel in all related cases and provided all recovered communications (ex parte and non-ex parte) to a special committee that investigated the judge's conduct.

OPR reviewed all email communications between the office and the court, totaling over one thousand emails. OPR concluded that the vast majority of the communications were not ex parte in nature, but rather were congenial conversations between the judge and former colleagues unrelated to pending matters. The majority of the subset of email communications that were ex parte in nature concerned scheduling and other non-substantive contacts that resulted from the court's informal administrative practices, which are no longer in place.

In a few instances, the judge sent ex parte emails to office staff in regards to pending criminal cases. Although such communications were improper, OPR found no indication that the office staff sought to improperly influence the court in a pending matter. OPR further noted that local bar counsel retrained the office staff concerning their obligations with regard to ex parte communications. Accordingly, OPR determined that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

## *Section V: Non-Department Attorney and Judicial Misconduct Allegations*

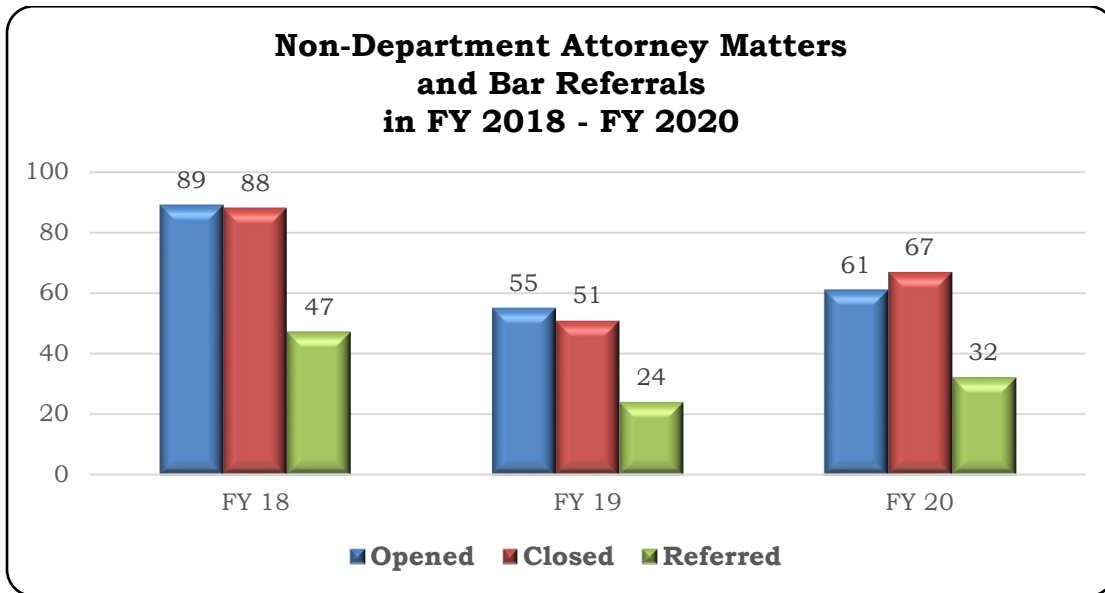
OPR is also responsible for determining whether the Department should refer allegations of possible professional misconduct by non-Department attorneys and members of the judiciary to state bar and judicial disciplinary authorities. By requiring that such referrals be approved and made by OPR, the Department seeks to ensure that referrals are made only when appropriate.

During Fiscal Year 2020, OPR received 61 submissions from various components of the Department concerning possible professional misconduct by non-Department attorneys. OPR

evaluated and closed 67 open submissions in Fiscal Year 2020 and determined that 32 matters should be referred to state attorney disciplinary authorities.

Graph 4 depicts the number of non-Department attorney complaints received and resolved during the previous three fiscal years.

**Graph 4**



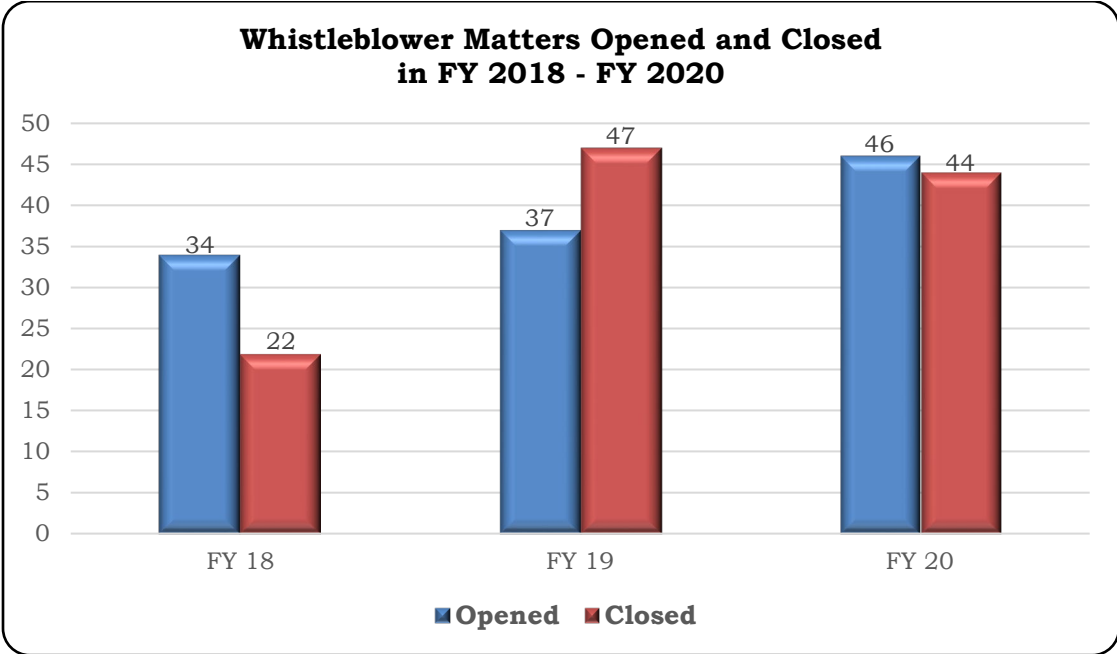
During Fiscal Year 2020, OPR also received and evaluated four submissions from Department components concerning possible professional misconduct by members of the judiciary and determined that one should be referred to the appropriate judicial disciplinary authority.

<b>Complaints against Members of the Judiciary</b>		
	Complaints	Referrals
FY 18	1	0
FY 19	3	3
FY 20	4	1

## Section VI: FBI Whistleblower Retaliation Claims

OPR and the OIG share responsibility for reviewing and investigating whistleblower retaliation complaints by FBI personnel. During Fiscal Year 2020, OPR received 46 complaints and resolved 44 complaints. Below is a graph depicting the number of complaints received and resolved during the previous three fiscal years. In some instances, OPR conducts a full investigation into the allegations made by the complainant. In other cases, OPR closes the matter for a variety of reasons, including failure of the complaint to meet the jurisdictional elements of the statute, lack of sufficient evidence to support a finding that agency action was taken due to retaliation, or a decision by the complainant to withdraw the complaint.

Graph 5



## Section VII: Examples of FBI Whistleblower Retaliation Claims Closed in FY 2020

### Allegation of Whistleblower Retaliation

An FBI employee complained that his spouse, also an FBI employee, was entitled to whistleblower relief. The spouse, concerned about the risks of contracting coronavirus in the office, applied for an alternative work schedule or telework, which a supervisor denied. OPR opened an inquiry into the matter and determined that the complaint did not state a cognizable claim for relief under the FBI whistleblower regulations because the FBI employee who filed the complaint lacked standing to bring such a claim on behalf of another person (his spouse).

### Allegation of Whistleblower Retaliation

An FBI employee complained that he was entitled to whistleblower relief based on his allegation that he received a lower annual performance rating in retaliation for refusing a supervisor's directive to move an object containing religious statements to a less conspicuous location. OPR opened an inquiry into the matter and determined that the complaint did not state a cognizable claim for relief under the FBI whistleblower regulations because the FBI employee did not reasonably believe that his refusal to move the object disclosed a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, as defined in 28 C.F.R. § 27.1(a).

### Allegation of Whistleblower Retaliation

An FBI employee alleged whistleblower retaliation for expressing opposition to his office's COVID-19 staffing. Because the employee resisted implementation of the staffing plan, he was criticized in his interim progress review and received an unfavorable interim evaluation. OPR opened an inquiry and concluded that the employee had not alleged a cognizable claim for relief under the FBI whistleblower regulations because the employee did not reasonably believe that his objections to the staffing plan disclosed a violation of a law, rule, or regulation; gross mismanagement; an abuse of authority; or a substantial and specific danger to public health or safety, as defined in 28 C.F.R. § 27.1(a), and because the employee's interim evaluation did not qualify as a personnel action, as defined by 28 C.F.R. § 27.2(b).

### Allegation of Whistleblower Retaliation

An FBI probationary employee alleged whistleblower retaliation after his employment was terminated following his complaint about an administrative oversight during the application process. OPR conducted an investigation and concluded that the probationary employee was not entitled to relief under the FBI whistleblower regulations because he could not have reasonably believed that his complaint about the administrative oversight disclosed a violation of a law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, as defined in 28 C.F.R. § 27.1(a). In addition, OPR found no evidence indicating that the employee's supervisors had been informed of his complaint and, therefore, found that the complaint was not a contributing factor to the FBI's decision to terminate his employment. Finally, OPR determined that the FBI could demonstrate by clear and convincing evidence that it would have terminated the probationary employee irrespective of his complaint. The evidence revealed that the probationary employee had failed to master skills that were necessary for the performance of his job and essential to the FBI's law enforcement mission. OPR's investigation established that the FBI's suitability assessment respecting the probationary employee was consistent with its suitability assessments of similarly situated probationary employees with substantially similar performance deficits.

## *Section VIII: Training and Outreach Efforts*

OPR participates in training and outreach events to improve ethical compliance within the Department, as well as to educate external stakeholders about the Department's commitment to accountability. During Fiscal Year 2020, OPR attorneys made presentations to new AUSAs as part of the Department's orientation and training programs, and participated in training for other Department components, including training on prosecutors' discovery obligations. In conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR participated in presentations to international delegations to explain OPR's role in ensuring that Department attorneys perform their duties in accordance with their ethical obligations.

OPR also routinely engages with various state attorney disciplinary authorities. In accordance with Department policy, OPR notified state attorney disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information concerning those matters. OPR also attended the annual meeting of the National Organization of Bar Counsel, where current trends in attorney discipline were examined and discussed.

## *Conclusion*

During Fiscal Year 2020, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both inside and outside the Department, and continued to serve as the Department's liaison with state attorney disciplinary authorities. OPR also met with delegations from several foreign countries to discuss issues pertaining to legal ethics. OPR's activities in Fiscal Year 2020 have increased awareness of ethical standards and responsibilities throughout the Department and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.