
U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

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

Fiscal Year 2022 Annual Report

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Introduction

This 47th 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 2022 (October 1, 2021, through September 30, 2022).

A. Overview of OPR and Its Fiscal Year 2022 Work

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 attorneys working in the nation's principal law enforcement agency. Department attorneys are privileged to represent the United States, and they exercise significant power, but that power carries with it the obligation to adhere to high professional standards. OPR is an independent, nonpartisan internal entity that investigates allegations of professional misconduct against Department attorneys relating to the exercise of their authority to investigate, litigate, or provide legal advice. OPR carefully reviews and thoroughly investigates misconduct allegations against Department attorneys based solely on the facts and applicable standards, without bias or favoritism.

During the four decades since it was established, OPR has demonstrated a high level of expertise in investigating professional misconduct allegations against Department attorneys and analyzing and applying the complex legal and ethical standards governing attorney conduct. Through its staff of experienced attorneys, who have decades of prosecutorial and civil litigation experience, OPR consistently ensures that Department attorneys adhere to stringent ethical standards and maintain the trust of the American people.

This report highlights some of OPR's work during Fiscal Year 2022, including instances in which Department attorneys failed to adhere to Departmental, statutory, and other professional standards. Any instance of professional misconduct is troubling, and most Department attorneys conduct themselves with the utmost integrity and professionalism. However, maintaining trust requires that when they do not, Department attorneys are held accountable.

OPR discloses information regarding its work to the extent allowed by law. The information contained in this public report and on OPR's website is limited by the Privacy Act of 1974, which requires that personnel records be protected. During Fiscal Year 2022, OPR continued to promptly post summaries of professional misconduct investigations on its website. In addition, unlike other investigative agencies, OPR publicly discloses information about its review and investigative procedures. Information about those procedures, as well as information relating to OPR's transparency and independence, can be found on OPR's website (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.

Among its many accomplishments for Fiscal Year 2022, OPR concluded investigations into allegations of discovery violations, lack of candor, improper closing arguments, violations of the Speedy Trial Act, and grand jury abuse, among other issues. Over half of the investigations resulted in misconduct findings and were referred to the Professional Misconduct Review Unit (PMRU) for review and disciplinary action, if appropriate. Following authorization by the PMRU, cases involving violations of state attorney rules of professional conduct were referred to state attorney disciplinary authorities. OPR also opened over 50 inquiries, which enabled OPR to assess and promptly resolve matters without a full investigation.

B. Significant Management Challenges

In Fiscal Year 2022, OPR continued to work through the administrative challenges caused by the coronavirus pandemic. For the first half of the fiscal year, OPR attorneys and administrative staff remained in maximum telework status. OPR's attorneys and staff timely processed inquiries and investigations by making use of video interviews, document-sharing platforms, and other technological tools. In March 2022, in conjunction with Department guidelines, OPR attorneys and staff began returning to the OPR Main Justice offices. During the third quarter, OPR fully transitioned to a hybrid in-office and teleworking model, which meets office needs and increases use of office resources while also providing employees with flexibility and work-life balance.

OPR leadership also continued to devote extensive efforts to reviewing, analyzing, and addressing proposed changes to expand the jurisdiction of the Office of the Inspector General (OIG) into the area of attorney professional misconduct allegations. The proposed jurisdictional changes would alter the Department's long-standing and well-established system for investigating and assessing attorney misconduct by authorizing the OIG, in its discretion, to conduct attorney misconduct investigations. Throughout its 47-year history, OPR has proven to be an effective and efficient means of ensuring that Department attorneys comply with the ethical standards imposed by the constitution and the courts, Department policies, and state rules of professional conduct applicable to attorneys. OPR recognizes trends and quickly works with Department components to improve attorney training and alert managers to issues that may warrant increased supervision. OPR's decisions to initiate reviews and its findings and conclusions are free from political or other improper considerations. Unlike the OIG, OPR's unique independence from the prosecutors and prosecutorial offices that it investigates assures the public that its investigations are not influenced by bias, favoritism, or internal interests. As part of its outreach and educational efforts, during the fiscal year, OPR leadership met with external entities to provide information regarding OPR's procedures, transparency, and discipline responsibilities and to explain the negative impact of the proposed jurisdictional changes on OPR's operations and the Department's disciplinary system.

The Department, consistently in multiple administrations, has opposed similar jurisdictional changes, which add an additional layer of bureaucracy, require duplicative resources, and undermine the current system for capably and efficiently investigating attorney professional misconduct. Through its support of OPR, whose mission and resources are singularly devoted to reviewing and resolving attorney professional misconduct allegations, the Department demonstrates its unwavering commitment to ensuring that its attorneys maintain the highest ethical standards. Public trust is not obtained merely from knowing how to investigate facts. Investigative expertise is developed through the fair, impartial, and consistent application of

known legal standards to the facts. Institutions like OPR reflect the work of generations committed to a process of continuous improvement and an institutional culture developed over decades that is dedicated to the mission of overseeing the professional conduct of the Department's attorneys.

C. Overview of OPR Procedures in Misconduct Matters

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 also includes reviewing professional misconduct allegations against immigration judges and members of the Board of Immigration Appeals. In addition, OPR has jurisdiction to investigate allegations of misconduct against Department law enforcement personnel that are related to allegations of attorney misconduct within OPR's jurisdiction. OPR may also investigate other matters when requested or authorized to do so by the Attorney General or the 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. Attorney's Offices (USAOs), 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 first initiates an inquiry and assesses the information obtained prior to conducting a full investigation.

Most 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 the matter lacks merit or that further investigation is not likely to result in a misconduct finding.

When information gathered during 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 subject attorney's written response to the allegations, case files, court and other relevant records, 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 comments on the facts of OPR's conclusions. All Department employees have an obligation to cooperate with and to provide complete and candid information to OPR. Employees who fail or refuse to cooperate with OPR, 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 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.

OPR does not propose or impose discipline. In January 2011, the Department established the Professional Misconduct Review Unit (PMRU), which is responsible for reviewing OPR's findings of professional misconduct against Department attorneys and which has jurisdiction over most Department attorneys. The PMRU chief reports to the Deputy Attorney General. 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.¹ 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 the applicable rules of professional conduct. OPR does not notify disciplinary authorities when the conduct involves internal Department policies that do not implicate a rule of professional conduct.

D. OPR's Ancillary Responsibilities

In addition to reviewing and resolving Department attorney misconduct allegations, other OPR responsibilities include training and educating Department attorneys regarding issues pertaining to professional misconduct; 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; reviewing referrals by the OIG relating to its investigations of attorney misconduct and, when appropriate, recommending referral to appropriate state attorney disciplinary authorities; 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. These responsibilities are discussed in greater detail later in this Report.

Section I: Statistical Overview of Professional Misconduct Allegations and OPR Actions

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 2022, OPR received 1,414 new complaints, 203 of which, or approximately 14 percent, were from inmates. Many others related to matters that did not fall within OPR's jurisdiction and, when appropriate, were referred to other government agencies or Department components. The total number of complaints received in Fiscal Year 2022 increased by 26 percent from the prior year. Over the course of the last five years, the number of complaints has increased on average 17 percent per year.

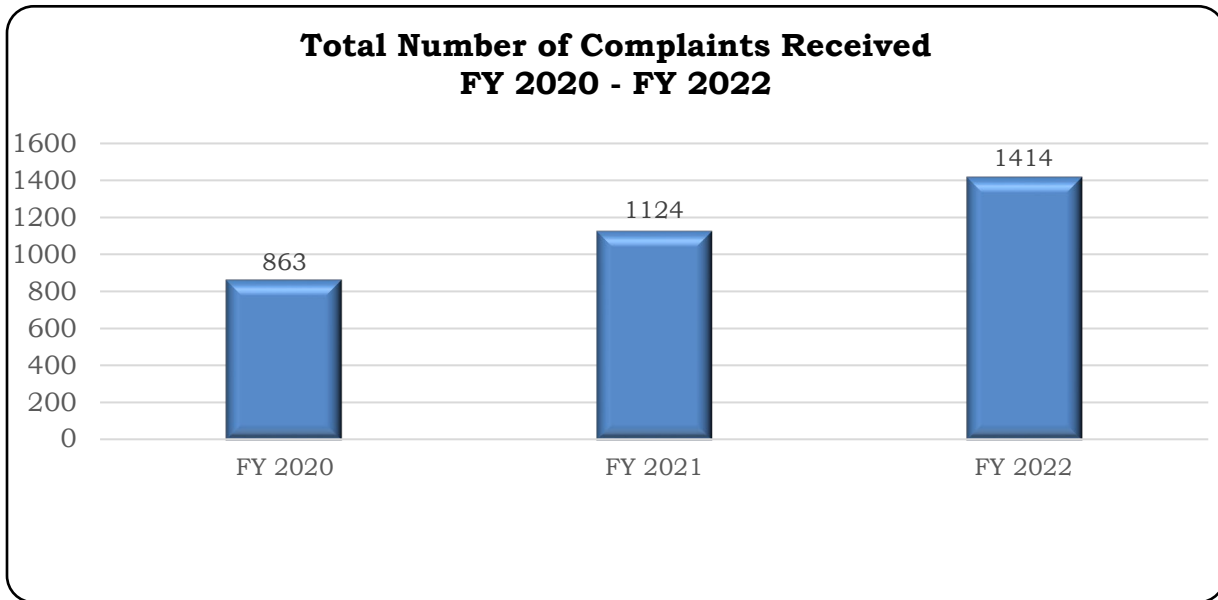
OPR determined that 56 complaints warranted further review and opened inquiries in those matters.² The remaining matters did not warrant an inquiry or investigation by OPR because, for example, they sought review of allegations that were raised or could have been raised during

¹ 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.

² Some of the complaints that were opened as inquiries may have been received by OPR prior to Fiscal Year 2022.

litigation; had been considered and rejected by a court; or were frivolous, vague, or unsupported by the evidence. Those matters were reviewed and resolved by experienced analysts working under the supervision of an OPR manager. Graph 1 compares the number of complaints received for the last three fiscal years.

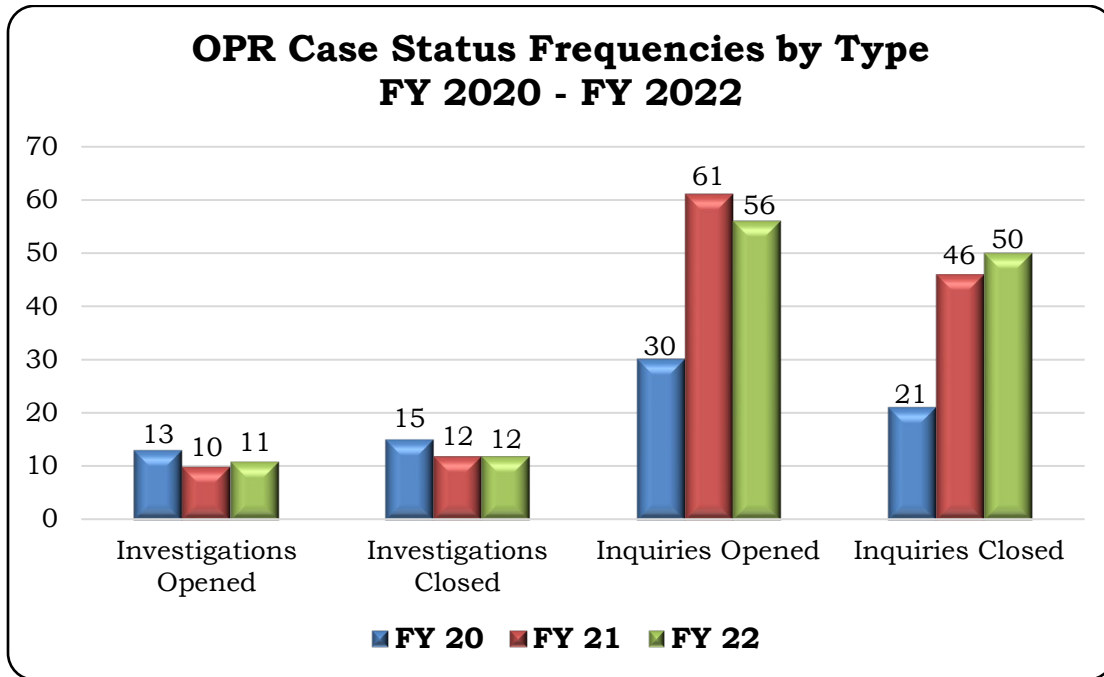
Graph 1



B. Professional Misconduct Investigations and Inquiries by Fiscal Year

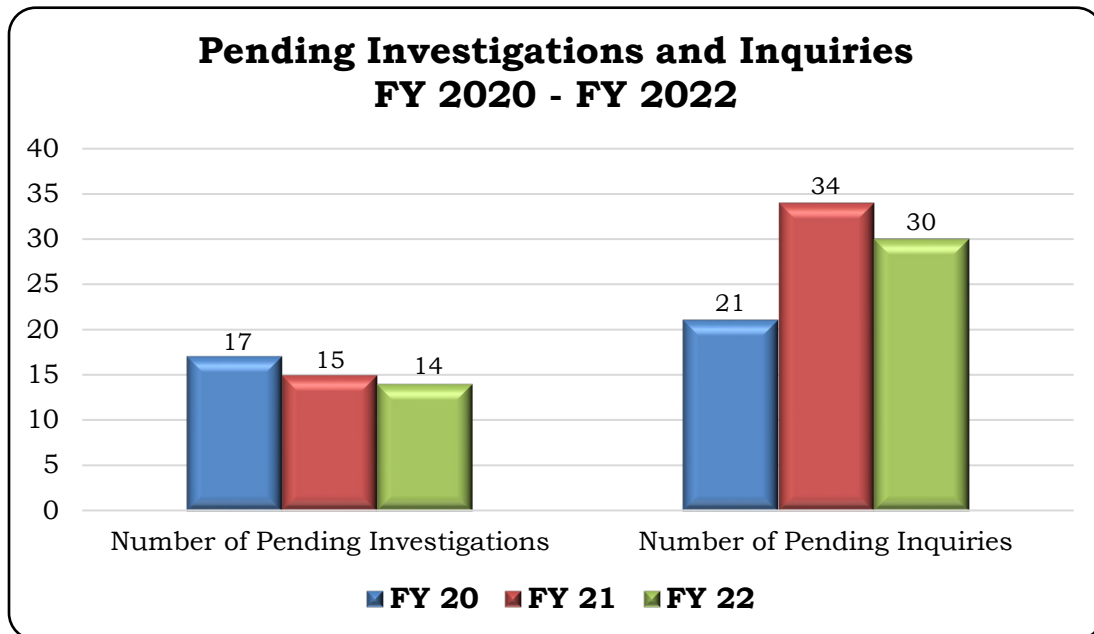
Graph 2 compares the number of investigations and inquiries OPR opened and closed for the last three fiscal years. As reflected in the graph, in Fiscal Year 2022, OPR opened 56 inquiries and closed 50, and opened 11 investigations and closed 12.

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 2022, there were 14 pending investigations and 30 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 2022

Most complaints leading to further action by OPR arise from judicial findings of misconduct by a Department attorney, from self-reports by Department employees, or from referrals by their offices. The sources of the complaints for the 56 inquiries opened in Fiscal Year 2022 are set forth in Table 1.³

Table 1

Sources of Professional Misconduct Complaints against Department Attorneys in Inquiries Opened in FY 2022		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Department components, including self-reports (unrelated to judicial findings of misconduct)	31	55%
Judicial opinions and referrals, including self-reports and referrals by Department employees of judicial criticism and findings of misconduct	17	30%
Private attorneys	5	9%
Private parties	2	4%
Other agencies	1	2%
Total	56	100%

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 56. Consistent with prior years, allegations concerning lack of candor and discovery violations were the most common.

³ OPR evaluates all misconduct allegations made by Department employees against non-Department attorneys to determine whether the Department should make a referral to a state attorney disciplinary authority. The 56 matters referred to above do not include matters involving proposed bar notifications relating to non-Department attorneys.

Table 2

Types of Professional Misconduct Allegations in Inquiries Opened in FY 2022		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	25	24%
Misrepresentation to the court or opposing counsel	17	16%
Improper remarks to a grand jury, during trial, or in pleadings	11	10%
Failure to maintain an active bar membership	10	10%
Failure to competently or diligently represent the client's interests	9	9%
Failure to comply with court orders and federal rules	7	7%
Abuse of authority, including abuse of prosecutorial discretion	6	6%
Failure to comply with federal law	5	5%
Failure to comply with Department rules and regulations	3	3%
Misconduct allegations involving immigration judges	3	3%
Interference with defendant's rights	2	2%
Unauthorized leaks or disclosures	2	2%
Fitness to practice law or represent the government	2	2%
Failure to keep the client informed	1	1%
Total	103	100%

D. Professional Misconduct Inquiries Closed in Fiscal Year 2022

In Fiscal Year 2022, OPR resolved and closed 50 inquiries involving allegations against Department attorneys. These matters involved 128 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 resolutions of the 128 allegations reviewed in Fiscal Year 2022 in inquiries that were not converted to investigations are set forth in Table 3.⁴

⁴ In Fiscal Year 2022, 11 inquiries were converted to investigations. When an inquiry is converted to an investigation, the matter thereafter is reported in the investigations statistics rather than the inquiry statistics section of OPR's annual report.

Table 3

Categories of Professional Misconduct Inquiry Allegations Resolved without Investigation in FY 2022		
Types of Resolution	Number of Occurrences	Percentage of Occurrences
Further investigation not likely to result in finding of professional misconduct	80	62.5%
Matter lacked merit	33	25.8%
Performance or management matter; referred to component	13	10.2%
Other	2	1.5%
Total	128	100%

E. Professional Misconduct Investigations Opened in Fiscal Year 2022

Table 4 identifies the sources for the 11 investigations that OPR opened in Fiscal Year 2022.

Table 4

Sources of Complaints against Department Attorneys for Professional Misconduct Investigations Opened in FY 2022		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions and referrals, including self-report and referrals by Department employees of judicial criticism and findings of misconduct	7	63.6%
Department components, including self-reports (unrelated to judicial findings of misconduct)	3	27.3%
Congressional referrals	1	9.1%
Total	11	100%

Some of these investigations involved multiple subjects. In addition, because many investigations involved multiple professional misconduct allegations, there were 41 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

Table 5

Types of Professional Misconduct Allegations in Investigations Opened in FY 2022		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Misrepresentation to the court or opposing counsel	8	20%
Unauthorized leaks or disclosures	8	20%
Failure to comply with Department rules and regulations	8	20%
Failure to competently or diligently represent the client's interests	3	7%
Abuse of authority, including abuse of prosecutorial discretion	3	7%
Improper remarks to a grand jury, during trial, or in pleadings	2	5%
Failure to comply with federal law	2	5%
Failure to comply with discovery obligations	2	5%
Failure to keep client informed	2	5%
Conflict of interest	1	2%
Failure to comply with court orders and federal rules	1	2%
Interference with defendant's rights	1	2%
Total	41	100%

F. Professional Misconduct Investigations Closed in Fiscal Year 2022

OPR closed 12 investigations in Fiscal Year 2022, some of which involved more than one attorney. OPR found professional misconduct in 7, or 58 percent, of the 12 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;⁵ or (2) recklessly disregarded his or her obligation to comply with that obligation or standard.⁶ Six of the 7 investigations involved at least one finding of intentional professional misconduct by a Department attorney. OPR found that a Department attorney acted in reckless disregard of a clear and unambiguous obligation or standard in 3 of the 7 investigations.

In Fiscal Year 2022, 58 percent of cases closed in Fiscal Year 2022 included professional misconduct findings. The 7 investigations closed in 2022 with professional misconduct findings included 34 sustained allegations of misconduct. Table 6 identifies the types of allegations sustained in those investigations.

⁵ 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 (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. 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 exercised poor judgment with respect to another allegation.

⁶ 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.

Table 6

Types of Professional Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2022	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Failure to comply with Department rules and regulations	11	32%
Misrepresentation to the court or opposing counsel	8	23%
Failure to comply with discovery obligations	4	12%
Improper remarks to a grand jury, during trial, or in pleadings	3	9%
Failure to competently or diligently represent the client’s interests	1	3%
Failure to comply with federal law	1	3%
Unauthorized leaks or disclosures	1	3%
Failure to comply with court orders and federal rules	1	3%
Failure to properly supervise another attorney	1	3%
Failure to maintain an active bar membership	1	3%
Failure to keep client informed	1	3%
Conflict of interest	1	3%
Total	34	100%

OPR made professional misconduct findings against seven Department attorneys. At the end of Fiscal Year 2022, the PMRU had issued final decisions in 6 matters and, in all cases, sustained OPR’s findings of professional misconduct. Four attorneys resigned and one retired from the Department before OPR’s reports of investigation were completed. One attorney resigned after OPR’s report was completed but before the PMRU issued a 10-day suspension. When OPR found violations 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 5 remaining investigations closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 12 investigations OPR closed in Fiscal Year 2022, OPR made a finding of professional misconduct or poor judgment in 11 cases, or 92 percent of the investigations it closed. OPR refers its poor judgment findings to the Department attorney’s component, which may impose disciplinary action or take other remedial measures.

Section II: Professional Misconduct Investigations Closed in Fiscal Year 2022

The following professional misconduct investigations were closed during Fiscal Year 2022.⁷ This report includes actions taken by the PMRU when such action occurred in the fiscal year.

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

Allegations of Making False and Misleading Statements to the Court and Two Department Components and Making Improper Statements to the Grand Jury

A USAO advised OPR that a court found that it had been misled by statements and omissions in a government pleading responding to a defense request for discovery in a high-profile criminal case. After a thorough investigation, OPR determined that the Assistant U.S. Attorney (AUSA) leading the prosecution acted in reckless disregard of his general duty of candor to the court when he denied allegations in the defense pleading that certain statements had been made to the grand jury, a denial which OPR determined was inaccurate and misleading. OPR also determined that the AUSA violated the rules of professional conduct when he intentionally made false and misleading statements about the pleading to the Professional Responsibility Advisory Office when seeking its advice and to OPR during its investigation.

With respect to allegations concerning statements made to the grand jury by the lead prosecutor as well as by a second AUSA, OPR concluded that the lead AUSA engaged in reckless misconduct when he made irrelevant and potentially prejudicial comments to the grand jury in violation of Department standards and also that he exercised poor judgment with respect to several additional prejudicial statements he made to the grand jury. OPR concluded that the second AUSA exercised poor judgment and violated Department standards when he also made prejudicial comments to the grand jury. OPR referred its findings to the PMRU.

Allegations of Conflict of Interest, Failure to Advise the Client, and Failure to Comply with Discovery Obligations

A USAO advised OPR that it had discovered that to further his personal interest in a government trial witness, an AUSA assigned as the lead prosecutor in a matter had communicated with the witness shortly before trial using a social media platform and failed to disclose his personal communications with the witness to the defense or anyone at the USAO. During its investigation, OPR also determined that potentially discoverable information provided by the same

⁷ One investigation involved a matter under seal by the court and is not summarized.

witness at a pretrial witness conference attended by the lead prosecutor and his co-counsel was not disclosed to the defense.

Based on the results of its investigation, OPR concluded that the lead AUSA committed intentional professional misconduct in violation of his obligations under the rules of professional conduct when he knowingly continued to represent the government in the case despite a conflict of interest that arose from his personal interest in the government witness and without obtaining his client's consent to his continued prosecution of the case, and by knowingly failing to inform his client of his personal interest in the witness and of his pretrial communications with the witness to further that interest. OPR also concluded that the lead AUSA committed intentional professional misconduct in violation of his discovery obligations when he knowingly failed to disclose to the defense his pretrial communications with the witness.

OPR further concluded that the lead prosecutor and his co-counsel did not commit professional misconduct when they failed to disclose to the defense other potentially discoverable information obtained from the witness during the pretrial conference because the information was not required to be disclosed pursuant to the applicable discovery obligations. However, OPR found that the AUSAs exercised poor judgment in failing to consider whether to disclose the information obtained from the witness during the conference and ultimately by failing to disclose it.

OPR referred the matter concerning the lead AUSA's communications with the witness to the PMRU. The lead AUSA resigned from the Department during OPR's investigation. The PMRU authorized OPR to refer its findings regarding the lead AUSA's communications with the witness to the appropriate state attorney disciplinary authorities, which OPR has done.

[Allegations of Failure to Timely Provide Discovery and Misrepresentations to the Court](#)

A federal judge forwarded to OPR numerous allegations of professional misconduct raised to the court in a letter from defense counsel in a capital case prosecuted by a USAO and Department attorneys. Among the many allegations OPR investigated were claims that prosecutors (1) knowingly made false material representations to defense counsel; (2) violated their discovery obligations by failing to timely disclose to the defense favorable information relating to the defendant's mental health care while incarcerated; and (3) knowingly provided false or misleading information in the government's court filings.

Based on the results of its investigation, OPR concluded that a senior Department attorney committed intentional professional misconduct in violation of his obligations under the rules of professional conduct by knowingly making a false statement to defense counsel. OPR also concluded that two prosecutors exercised poor judgment by filing a pleading containing misleading information. Finally, OPR concluded that one prosecutor exercised poor judgment by failing to follow a supervisor's direction to disclose attorney notes to the defense and by his general inattention to the case. OPR determined that the evidence was insufficient to support other allegations. Although the prosecution team should have disclosed certain exculpatory evidence sooner, the defense was able to make effective use of the information because no trial date had been set, and the defense received the information prior to deciding to enter a guilty plea.

OPR referred the matter concerning the senior Department attorney's false statement to defense counsel to the PMRU. Unrelated to OPR's investigation, the senior Department attorney resigned from the Department.

[Allegations of Misrepresentations to the Court and Others](#)

An AUSA submitted a written request to a United States magistrate judge for an extension of time to conduct a preliminary hearing in a criminal case, citing as a basis for that request the government's inability to indict the case before the preliminary hearing date due to the lack of a grand jury quorum. The magistrate judge granted the government's request for extension. However, on appeal to the district judge assigned to the case, the court learned that the AUSA's representation about the lack of a grand jury quorum had been inaccurate. The district judge criticized the AUSA's failure to verify information about grand jury availability and found that the AUSA's misstatements had led the magistrate judge to errantly grant the extension. Moreover, the district judge concluded that the government's inability to indict within the statutory timeframe for conducting a preliminary hearing was not a valid legal basis for postponing the preliminary hearing, regardless of the grand jury's availability. The district judge therefore dismissed the indictment without prejudice and ordered the immediate release of the defendant.

Based on its investigation, OPR found that the AUSA did not commit professional misconduct. OPR concluded that the AUSA neither intentionally nor recklessly misrepresented the grand jury's status to the magistrate judge, but the AUSA exhibited poor judgment by negligently disregarding information that grand jury quorums were available during the relevant time frame. The AUSA also exhibited poor judgment by failing to take reasonable steps to ensure proper supervisory oversight of the request for a postponement and by failing to conduct the necessary research relevant to the request. OPR further concluded that although the AUSA's request for a postponement of the preliminary hearing was premised on an improper legal basis, the claim was not frivolous and was made in good faith. However, the AUSA exhibited poor judgment by making factual assertions to the court about the need for a postponement that did not provide the court with a clear and accurate understanding of the basis for that request. Finally, OPR found that the AUSA again exhibited poor judgment by failing to review readily available documentary evidence before making factual assertions to USAO supervisors and to OPR, and by carelessly articulating the facts in a way that resulted in a misleading understanding of the AUSA's conduct.

[Allegations of Violations of Department Policy regarding Recusal](#)

OPR received a report that a senior Department official had been actively involved in cases from which he had been officially recused. The senior Department official allegedly required attorneys handling matters on which he had been recused to brief him on the status of those matters, made comments to the attorneys about his desired handling of such matters, and listened to telephone conferences regarding recusal matters. The senior Department official allegedly acted through other senior managers, who purportedly secretly shared information with the senior Department official about recusal cases and acted on his behalf in those cases to maintain the appearance of a recusal.

Based on the results of its investigation, OPR concluded that the senior Department official engaged in intentional and reckless misconduct by requesting and receiving briefings about recusal cases. The senior Department official believed he was prohibited only from making decisions about recusal cases and that to function properly as the office's senior leadership official, he was entitled to limited information about recusal cases necessary to maintain situational awareness. However, Department policy, as articulated in various documents the senior Department official had received at the outset of his tenure, made clear that he was prohibited from receiving any briefings or information about recusal matters, and this policy had again been brought to his attention by one of his senior managers. In addition, on several occasions, the senior Department official communicated his opinion about recusal matters to the attorneys handling those matters, in violation of Department policy and of the ethics pledge that he had signed upon his appointment. OPR did not find that any of the senior managers engaged in misconduct but concluded that one of the managers exhibited poor judgment when he failed to take available steps to address his supervisor's misconduct. OPR concluded that another senior manager exhibited poor judgment by failing to timely read Department policy documents to ensure that he understood, and that the office complied with, the recusal policy. OPR referred its findings to the PMRU.

[Allegation of Misconduct during a Rebuttal Closing Argument](#)

A USAO advised OPR that a district court had granted a defendant's motion for a mistrial with prejudice after an AUSA allegedly misstated the evidence during his rebuttal closing argument and argued to the jury that he knew beyond a reasonable doubt that the defendant was guilty and that defense counsel knew their client was guilty. The court concluded that the AUSA's conduct was intentional because the AUSA must have known that his rebuttal arguments were improper and were likely to cause the defense to request a mistrial. OPR initiated an inquiry, which it later converted to an investigation. OPR concluded that the AUSA violated the rules of professional conduct in reckless disregard of his obligations. OPR concluded that the AUSA, as an experienced prosecutor, knew that it was improper to make the rebuttal arguments at issue, and he should have asked his co-counsel to deliver the government's rebuttal argument once he recognized that he was not capable of doing so in a professional and appropriate manner. After receiving the PMRU's authorization, OPR referred the AUSA to the appropriate state attorney disciplinary authorities. The AUSA subsequently resigned from the Department.

[Allegations of Failure to Comply with Department Press Guidelines and Unauthorized Disclosure to the Media](#)

In March 2021, OPR initiated an investigation into whether a former AUSA had violated local court rules, bar rules, or Department regulations or policies in connection with statements made to the media during a televised interview about the Department's pending prosecutions of individuals involved in a matter of national interest. As a result of the information it learned during its investigation, which included conducting multiple interviews and reviewing court filings, transcripts, and Department records, OPR concluded that the former AUSA intentionally violated the rules of professional conduct and the Justice Manual, by participating in a media interview without consultation with or authorization from the Department's Office of Public Affairs or Department leadership. OPR referred the matter to the PMRU.

Allegations of Failure to Comply with Discovery Obligations and Failure to Correct Misleading Testimony

An AUSA informed OPR about a court order declaring a mistrial because the government failed to timely disclose plea and cooperation agreements for a cooperating trial witness and failed to correct the witness's testimony regarding benefits the witness expected to receive for the witness's testimony.

OPR concluded that the AUSA violated his discovery obligations when he failed to disclose to the defense the plea and cooperation agreements. However, OPR concluded that under the unique circumstances of the case, the AUSA demonstrated poor judgment but did not engage in professional misconduct by failing to timely disclose the agreements or correct the witness's testimony. Rather, OPR's investigation determined that the AUSA's failures resulted from his significant misunderstanding of the applicable law and policies due to his litigation inexperience and lack of adequate assistance from an experienced AUSA, who served as co-counsel on the case.

OPR further concluded that the experienced co-counsel in the case did not adequately assist the AUSA in accordance with USAO management's expectations and did not adequately prepare for the trial, but that the co-counsel's obligations as a second-chair attorney were not sufficiently clear and unambiguous to support a misconduct finding based on standards applied to supervisors. OPR concluded that the co-counsel exercised poor judgment when failing to adequately assist the AUSA in accordance with USAO management's expectations. The co-counsel resigned from the Department for reasons unrelated to OPR's investigation.

Allegation of Failure to Maintain an Active Bar Membership

An AUSA reported to OPR that his only active bar membership had been suspended for approximately three weeks because he failed to timely pay his annual bar membership dues. The AUSA acknowledged in his report that he did not disclose the suspension to his supervisors or OPR until approximately four months after he discovered it. OPR investigated and concluded that the AUSA exercised poor judgment but that his conduct did not rise to the level of professional misconduct, in part due to problems with attorneys receiving hard-copy mail caused by the pandemic. OPR found that the AUSA maintained an email address with the bar that had fallen into disuse and paid insufficient attention to his yearly obligation to pay bar membership dues, which caused him to miss his dues payment and become suspended. Additionally, OPR found that after the AUSA resolved his suspension with the bar, he did not appropriately consider the ramifications of his lapse of active bar membership, which caused him not to timely report his suspension to his supervisors or OPR.

Allegations of Misrepresentations to the Court and Failure to Obey Court Orders

A USAO reported that a court issued several orders as the result of an AUSA's inconsistent responses in multiple hearings to questions from the court relating to the courthouse's COVID-19 protocol. The court ordered the AUSA to explain the inconsistencies and address why he should not be sanctioned for making misrepresentations to the court. During its investigation, OPR also examined whether the AUSA complied with a series of court orders requiring certain safety precautions to be taken in the courthouse.

As a result of its investigation, OPR determined that the AUSA committed intentional professional misconduct by repeatedly violating his duty of candor to the court. OPR also concluded that the AUSA committed intentional professional misconduct by routinely and intentionally violating the orders relating to the courthouse safety precautions. OPR concluded that these intentional actions by the AUSA violated his obligations under multiple state rules of professional conduct.

OPR referred its findings to the PMRU. OPR's misconduct findings were upheld by the PMRU and the Office of the Deputy Attorney General. The AUSA resigned following the PMRU's proposal to remove him from his position. As authorized, OPR referred the AUSA's conduct to the appropriate state attorney disciplinary authorities.

[Allegation of Violation of the Speedy Trial Act](#)

An AUSA self-reported to OPR a judicial finding dismissing the charges against criminal defendants with prejudice based on its determination that the government violated the Speedy Trial Act (STA) and intentionally made charging decisions designed to give the United States a strategic advantage.

Based on its investigation, OPR concluded that although the AUSA violated a clear and unambiguous duty imposed by the STA and Department policy, his conduct did not rise to the level of intentional or reckless professional misconduct because OPR did not find evidence that the AUSA intentionally manipulated the STA clock to gain a prosecutorial advantage, the AUSA's error was the result of his misunderstanding of the ramifications of adding new charges, and the actions of other individuals involved in the case contributed to causing the violation. Nevertheless, the AUSA, who was a highly experienced prosecutor, had a duty to carefully track and ensure compliance with the STA. The AUSA's failure to do so demonstrated an exercise of poor judgment that substantially contributed to causing the violation, which resulted in dismissal of the case with prejudice.

Section III: Examples of Professional Misconduct Inquiries Closed in Fiscal Year 2022

The following summaries are a representative sample of the professional misconduct inquiries closed by OPR in Fiscal Year 2022.

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

A USAO informed OPR that a district court judge found that the government failed to timely disclose favorable evidence relating to the credibility of an anticipated government witness. Although the court denied the defendant's motion to dismiss, it imposed a sanction upon the government. After reviewing the AUSAs' written responses and the extensive record, OPR concluded that the evidence did not establish that the prosecutors' failure to immediately disclose the discovery to the defense violated constitutional or statutory discovery obligations, local rules, or Department policy. Although it may have been a better course of action to immediately disclose the information to the defense, and at a minimum to the court, OPR concluded that there was no requirement to provide the information to the court or the defense earlier than the following

morning, when the prosecutors planned to further investigate the evidence. In evaluating the prosecutors' conduct, OPR also considered that defense counsel learned of the information the same evening as the prosecutors, even if not informed of it by the government; the prosecutors consulted with a supervisor regarding the appropriate course of action; and the witness ultimately did not testify. OPR further considered whether the AUSAs engaged in misconduct by failing to disclose benefits allegedly provided to the witness and the witness's partner. OPR determined that the evidence was insufficient to establish that the witness had received or been promised benefits that the government was obligated to disclose. Even if the government had made such promises and failed to disclose them, because the witness did not testify, there would have been no violation of the government's discovery obligations. Accordingly, OPR concluded that further investigation was unlikely to establish by a preponderance of the evidence that the AUSAs violated a clear and unambiguous standard of conduct and closed its inquiry.

Allegation of Improper Comments by Prosecutor

OPR received a complaint alleging that, at the conclusion of a hearing, an AUSA made an improper comment to a defendant in the courtroom but outside the hearing of his attorney. The defendant's counsel did not learn of the alleged improper comment until months after the hearing. Thereafter, the attorney gathered numerous affidavits from the defendant's family members and friends who claimed to have heard the AUSA's statement, which they described as an expression of the government's intent to bankrupt the defendant through its criminal prosecution. Approximately one year later, during a change of plea hearing, defense counsel informed the court of the allegations; however, the court did not make findings regarding the alleged misconduct.

OPR opened an inquiry and obtained and reviewed copies of the affidavits and official transcripts from the relevant court proceedings. OPR interviewed the defendant's attorney and other witnesses who were present at the initial hearing.

When the issue was raised at the change of plea hearing, both AUSAs denied that they threatened the defendant or spoke to the defendant outside of counsel's presence. The official transcript of the initial hearing did not contain the comment nor did a recording of the hearing maintained by the court reporter. Defense counsel and other witnesses told OPR that they did not hear the alleged statement or notice anything out of the ordinary occurring in court following the hearing. OPR also considered that the allegations were made many months after the purported incident, and several affidavits were identical in content and format. After determining that further investigation would not likely result in corroboration of the allegations, OPR closed its inquiry.

Allegation of Failure to Comply with Discovery Obligations

Two AUSAs self-reported to OPR a judicial opinion granting a defendant's motion to dismiss on grounds that the government engaged in flagrant, reckless misconduct by its late disclosure to the defense of material exculpatory evidence in violation of the government's obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). OPR initiated an inquiry and requested and reviewed the AUSAs' detailed written responses regarding the court's findings and criticism. Additionally, OPR reviewed the extensive record, including pleadings, transcripts, discovery letters, law enforcement and expert reports, and internal communications and memoranda.

OPR concluded that the government did not have an obligation to disclose the medical records at issue, which were possessed by a third party. Although the government acknowledged that it had a practice of assisting the defense in obtaining certain types of discovery, that practice did not create a duty to obtain the specific discovery without a request from the defense. In this case, the government followed its normal practice and located and disclosed the records after the defense made a specific request for them.

OPR also considered whether the government violated any discovery obligations when it belatedly produced a law enforcement report. Although there was no trial, which made it difficult to ascertain how material the evidence would have been to the defense, OPR determined that the defense could have used information contained in the report to discover other information that could have called into question the victim's and witnesses' credibility and the victim's ability to perceive events. Accordingly, as the report could have led to material impeachment evidence, OPR concluded that the government likely violated its discovery obligations when the prosecutors failed to obtain and timely disclose the report to the defense.

However, with respect to the prosecutors' culpability for the violation, OPR concluded that their actions did not rise to the level of professional misconduct. OPR's inquiry revealed that the prosecutors were unaware of the law enforcement reports, which resulted from the involvement of more than one law enforcement agency in the investigation; the AUSAs' misunderstanding regarding the role of one of the investigating agencies; the failure of the lead agency to obtain reports written by the second agency; and the lead agency's inaccurate representation to the prosecutors that all law enforcement reports had been provided to the prosecutors. Further, the evidence showed that the lead prosecutor had made diligent efforts to obtain and provide discovery. OPR concluded that further investigation was unlikely to lead to a finding that the prosecutors engaged in professional misconduct for failing to comply with their discovery obligations and closed its inquiry.

[Allegation of Discovery Violation](#)

Following a routine database search, OPR learned that in a long-pending civil matter, the government produced some documents in discovery many years after the plaintiff's initial request for the information, and, as a result, the court sanctioned the government for failing to timely supplement its discovery production. After reviewing the court's decision, filed pleadings, and additional information provided by the component, OPR concluded that the production request at issue was ambiguous and the government's interpretation was not unreasonable under the circumstances. Accordingly, OPR determined that further investigation was unlikely to result in a finding that the Department attorneys violated an unambiguous duty to disclose the specific material in question and closed its inquiry.

[Allegation of Violation of Court Order](#)

A Department component reported to OPR that a court sanctioned a Department attorney for violating a settlement conference order, denied the government's motion to reconsider the sanction, and concluded that the Department attorney had engaged in bad faith settlement negotiations. OPR reviewed the court pleadings in the matter and concluded that the attorney's failure to follow the specifics of the court's order resulted from the attorney's inadvertent failure

to notice a few lines of new language the court had added to a lengthy order that otherwise was identical to a previous order in the case. Because of this oversight, the Department attorney did not realize that as a result of the new language, the government's prior settlement offer in the case was in violation of the order. OPR closed the matter because further investigation was unlikely to result in a conclusion that the attorney's conduct was the result of intentional or reckless professional misconduct.

Allegation of STA Violation

A USAO reported a court's order dismissing an indictment based on the government's undisputed failure to bring the case to trial within the 70-day period prescribed by the STA. The court held that although the lapse of speedy trial time was brief, dismissal with prejudice was warranted because it found that the government had acted in a careless and neglectful manner in handling the case, which involved a defendant with disabilities who was prejudiced by the delay. Based upon OPR's review of the case record and relevant internal communications, OPR concluded that the violation arose from the failure of successive prosecutors to adequately record and track the elapse of speedy trial time as the case was transferred among them and to timely obtain an order excluding speedy trial time. However, OPR concluded that the actions of the individual prosecutors did not rise to a level warranting a finding of professional misconduct and closed its inquiry.

Allegation of Discovery Violation

A Department attorney reported to OPR that the government moved to dismiss charges against a defendant following the government's mid-trial disclosure of records that should have been provided prior to trial. OPR reviewed relevant pleadings, Department emails, and narrative statements from the attorney and component management. OPR's review of emails confirmed the Department attorney's contention that he had accidentally overlooked an email from a case agent containing the information at issue. Subsequent emails authored by the Department attorney confirmed that the attorney had not seen the email containing the information and was unaware of it until after the trial began. In addition, statements from defense counsel and the court reflected their belief that the Department attorney acted in good faith and did not commit professional misconduct. Because the Department attorney provided the material in time for the defense to make effective use of it at trial, and OPR found no indication of deceptive or reckless conduct, OPR closed its inquiry as further investigation was unlikely to lead to a finding of professional misconduct.

Allegations of Overzealous and Selective Prosecution and Civil Rights Violations

A trial court declared a mistrial after a jury was unable to reach a verdict in a fraud case charging the defendant with concealing his affiliation with an entity associated with a foreign government to obtain funding from a federal agency to support his research, when the agency did not permit funding under the circumstances. The court subsequently entered a judgment of acquittal, based upon its conclusion that there was insufficient evidence that the defendant intended to deceive the funding agency, that his nondisclosure of his foreign affiliation defrauded the agency, or that he personally understood the agency's funding restriction to apply to his foreign affiliation. Although the court did not allege professional misconduct by the government, the

prosecution was publicly criticized for purportedly overzealously and selectively targeting the defendant based upon his ethnicity and foreign origin, in possible violation of his civil rights.

Following a thorough and careful review of the record in the case, as well as materials submitted to OPR by the prosecutors, OPR concluded that there was no evidence indicating that the investigation and prosecution were motivated by improper factors such as ethnicity or national origin; rather, the evidence showed the existence of factual predication and a good-faith basis to investigate and charge the defendant. OPR considered that the government's charging strategy and decisions were reviewed and approved by career prosecutors at multiple levels within the USAO and the Department. OPR also considered that at trial the government did not make more than incidental and fact-based references to the defendant's national origin. OPR determined that further investigation was unlikely to result in a finding of professional misconduct and closed its inquiry.

Allegation of Breach of a Plea Agreement

OPR received a complaint that an AUSA breached a plea agreement with the defendant when the prosecutor advised the court of the defendant's misconduct that occurred after the entry of the guilty plea and objected to the defendant receiving an acceptance of responsibility (AOR) reduction at the time of sentencing and resentencing. After the defendant filed a post-conviction motion, the government conceded that the prosecutor's objection breached the plea agreement in which the government had agreed not to object to the defendant receiving an AOR reduction. As a result, the court vacated the defendant's sentence and set the case for resentencing.

OPR initiated an inquiry and requested and received a written response from the AUSA. OPR reviewed the extensive record in the case, the AUSA's written response, reports and documentation of the defendant's post-plea conduct, and case law. After reviewing the relevant records, OPR concurred that the AUSA's objection to the AOR reduction breached the plea agreement. However, OPR found no indication that the AUSA acted intentionally or recklessly. Rather, the prosecutor's error was caused by his misunderstanding of the plea agreement's terms, which permitted the government to advise the court of the defendant's relevant conduct; his reasonable belief that the court was entitled to know about the defendant's recent misconduct; his desire to uphold his duties as an officer of the court; the U.S. Probation Office's refusal to provide the court with the relevant facts based solely on the timing of the sentencing hearing; and the absence of any indication by defense counsel, the probation officer, or the court that they viewed his actions as breaching the plea agreement.

OPR also considered whether the AUSA violated the plea agreement during the defendant's resentencing. At the resentencing, the plea agreement continued to expressly reserve the government's right to advise the court of the defendant's relevant conduct. Although the AUSA did not object to the AOR reduction, he informed the court of the relevant conduct and how it could be used in determining the defendant's sentence. OPR concluded that the AUSA's conduct was permitted by the plea agreement and that the AUSA was obligated to disclose to the court all information that was relevant to the defendant's background, character, and conduct, thereby enabling the court to determine an appropriate sentence. Thus, OPR concluded that the AUSA did not violate the plea agreement by informing the court about the defendant's misconduct and its use as a factor in the court's sentencing determination.

While the better course of action would have been to not object to the AOR reduction and to have asked the court for an upward variance instead, because the evidence did not show that the AUSA intended to breach the plea agreement or that his actions constituted a gross deviation from the conduct expected of a Department attorney, OPR concluded that further investigation was not likely to establish that the AUSA committed intentional or reckless professional misconduct and closed its inquiry.

[Allegations of Fraud upon the Court, Failure to Comply with the Principles of Federal Prosecution, Improper Introduction of Evidence, Abuse of Prosecutive Authority, Grand Jury Abuse, and Failure to Comply with Discovery Obligations](#)

OPR received a complaint that an AUSA, a Department component trial attorney, and agents engaged in misconduct during the investigation and prosecution of a criminal case that concluded with a not guilty jury verdict on one count and a hung jury on the remaining counts. The complaint alleged that the prosecution team committed fraud on the court and did not observe the required ethical standards of integrity; the evidence was false, fabricated, and misleading; the evidence presented to the grand jury was manipulated to present a false narrative; the indictment lacked probable cause, was obtained wrongfully, and made false allegations; and material exculpatory information was not disclosed to the defense.

OPR reviewed the complainant's extensive complaint, relevant pleadings, and pertinent trial transcripts. OPR determined that the complainant's allegations that the evidence was false, fabricated, and misleading reflected the sharp differences between the government's and the defense's interpretations of the evidence. OPR further determined that there was insufficient evidence to establish that the prosecution team knowingly presented false testimony or purposefully engaged in conduct constituting abuse of the grand jury or that material exculpatory evidence was purposefully withheld from the defense. The review of the allegations revealed a heavily litigated case in which the defense and prosecution differed on the meaning of the evidence and argued the different interpretations at trial. While the prosecution was not successful, the evidence did not establish that the prosecutors' actions constituted professional misconduct. Accordingly, OPR concluded that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

[Allegations of Failure to Comply with Discovery Obligations, Failure to Obey a Court Order, and Misrepresentations to the Court](#)

Following a routine database search, OPR learned of a court order dismissing one count of an indictment with prejudice due to the government's failure to timely produce discovery. The court's standard discovery order required the government to disclose discovery to the defense well in advance of trial. The government's initial disclosures included some, but not all, of the materials that should have been provided to the defense. The defense also alleged that the prosecutor made a misrepresentation to the court regarding when the prosecutor knew that certain discovery had not been provided. The prosecutor provided the missing discovery two weeks before the defendant's trial was to commence, but the court nonetheless dismissed one count of the indictment with prejudice due to the government's failure to timely produce discovery.

OPR initiated an inquiry, received a written response from the subject, and reviewed relevant pleadings, transcripts, and communications. Although OPR concluded that a full investigation would likely establish that the prosecutor violated the court's standard discovery order, the evidence showed that the prosecutor reasonably believed that the government had timely disclosed the missing discovery. Accordingly, OPR concluded that the prosecutor's failure to timely disclose discovery was not intentional or reckless. Regarding the alleged misrepresentation to the court, OPR determined that given the context of the prosecutor's statement to the court and the prosecutor's explanation as to his intent, the evidence did not support a finding that the prosecutor knowingly or recklessly misrepresented when he learned that discovery had not been provided to the defense. Because further investigation was unlikely to lead to a finding of professional misconduct, OPR closed its inquiry.

[Allegations of Immigration Judge Making Improper Remarks, Abusing Authority, and Displaying an Inappropriate Demeanor](#)

The Executive Office for Immigration Review (EOIR) advised OPR of allegations that an immigration judge had engaged in misconduct in three cases. EOIR's referral included allegations potentially implicating the rules of professional conduct concerning the compelled disclosure of confidential information and the improper review of privileged attorney work product. The complaints also contained allegations that during a hearing, the immigration judge appeared angry and used an aggressive tone when questioning a respondent and appeared agitated by an interpreter's requests for clarification. In addition, the complaint contained allegations by a respondent's attorney that the immigration judge acted improperly towards the respondent's attorney during an individual merits hearing.

OPR initiated an inquiry, reviewed relevant pleadings and records, and conducted witness interviews. OPR determined that the evidence did not establish to a preponderance that the immigration judge reviewed privileged information or knowingly or recklessly violated the rights of a third person. Regarding the complaints concerning the immigration judge's demeanor and related conduct, because the ethics rules provide immigration judges some latitude to regulate the course of hearings and maintain proper control of proceedings in matters pending before them, OPR determined that EOIR was in the best position to determine whether the immigration judge's demeanor, tone, questioning of a respondent, and conduct toward an attorney was appropriate under the circumstances and in conformity with EOIR's expectations for an immigration judge's conduct. OPR found that the allegations reflected on the immigration judge's performance and referred the matter to EOIR.

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

While reviewing a court order in an unrelated case, OPR found a reference to a case criticized by the same court, and after reviewing various filings and transcripts, initiated an inquiry. In this matter, the court twice continued a trial date due to the government's untimely disclosure of potentially favorable information to the defense. The first untimely disclosure involved a report memorializing a confidential source's claim that a drug trafficker had confessed to a murder. During the postponement caused by the disclosure of the alleged confession, the government also disclosed third-hand information from an inmate concerning different potential alternative suspects. The district court denied defense motions to dismiss the indictment based on

the delayed disclosure of the alternative perpetrator information but found that the government was obligated to disclose the information and continued the trial for several months. OPR's inquiry considered the district court's findings against the government; the voluminous record in the case, which included docket materials and pretrial and trial transcripts; and multiple written responses from each of the subjects.

Based on the results of its inquiry, OPR concluded that further investigation would be unlikely to result in a finding that any of the prosecutors either intentionally or with reckless disregard violated a clear and unambiguous standard and therefore engaged in professional misconduct. OPR considered that although the trial team made a number of significant errors, they did produce the alternative perpetrator evidence to the defense in time for its use at trial. The alternative perpetrator information should have been disclosed promptly pursuant to Department policy, not on the eve of trial. Nonetheless, OPR considered that the errors in the case arose largely from the unique challenges caused by multiple intersecting investigations and the trial team's legitimate attempts to protect the identity of a cooperating witness. Importantly, some information about the purported confession by the drug trafficker had been disclosed months before the trial date. OPR also considered the USAO's acknowledgment that at least some of the trial team's failures were due to deficiencies in the office's electronic management systems and training. Because further investigation was unlikely to lead to evidence establishing professional misconduct, OPR closed its inquiry.

[Allegation of Failure to Disclose Receipt of Defense Evidence](#)

A complaint was filed with OPR alleging that two Department trial attorneys failed to notify the defense or the court that they had received a document intended for the defense, which allegedly delayed the defendant's release from custody. OPR initiated an inquiry into the matter and reviewed the court docket, numerous court filings, transcripts, correspondence, relevant emails, and documents from another U.S. government agency. OPR also obtained and reviewed written responses from the Department attorneys.

OPR found no evidence that either Department attorney intentionally or recklessly delayed providing the document to the defense or lacked candor by failing to advise defense counsel or the court of their office's receipt of it. OPR determined that the document, written in a foreign language, was mistakenly sent to the Department attorneys' office. OPR found that neither attorney read the document, and unbeknownst to one of the attorneys, the other attorney arranged for the document to be sent to defense counsel through another government agency with jurisdiction over the transmittal of such documents. OPR further determined that although the other government agency inadvertently delayed sending the document to the defense for several months, neither Department attorney knew of the delay. Further, given the representations made by defense counsel to the government and to the court, the Department attorneys had no reason to conclude that anything was amiss regarding the document, and there was nothing else in the record that would have alerted them that the defense had not received it.

OPR, therefore, determined that further investigation was not likely to result in a finding of professional misconduct and closed its inquiry.

Allegation of Failure to Comply with Discovery Obligations

OPR learned that a court criticized a prosecutor's failure to timely disclose to the defense text messages and emails between a witness and the lead case agent, supplemental case reports that the case agent's supervisor had written, and information on the reverse side of several law enforcement reports. Prior to the trial, the prosecutor met with the case agent, reviewed his file with him, and asked the agent if the file contained everything relating to the case. The case agent assured the prosecutor that the file was complete, and the prosecutor disclosed its contents to the defense.

The agent, however, had deleted the text messages and emails with the witness, and, because the agent did not believe that the communications were substantive, he did not inform the prosecutor about the communications or that he had deleted them. The agent also had neglected to update his file with the supplemental reports that his supervisor had written. In addition, in copying the agent's file for discovery, a legal assistant overlooked the reverse side of the law enforcement reports. The defense and the prosecutor did not learn of the electronic communications until the defense began its cross-examination of the witness at the trial. A forensic examination of the agent's electronic devices revealed that the witness and the agent had exchanged numerous electronic communications, but, due to the passage of time, it was not possible to recover the content of those communications. In addition, the results of the forensic examination led to the discovery of the supplemental reports that the agent had neglected to include in his file. During a follow-up discovery conference, the defense and the prosecutor learned that the legal assistant had overlooked copying the reverse side of the law enforcement reports. Finally, the witness's attorney informed the prosecutor of an email the witness had saved that was relevant to impeachment of the witness. The prosecutor obtained the email from the witness's attorney and disclosed it.

OPR initiated an inquiry and concluded that the discovery lapses were not attributable to misconduct by the prosecutor. The case agent acted unilaterally in deleting the electronic communications and failed to inform the prosecutor of his actions. The case agent also neglected to update his file with the supplemental reports that his supervisor had written. In addition, the contents of the supplemental reports concerned information that the government had timely disclosed prior to the trial, and, because the information on the reverse side of the law enforcement reports concerned internal administrative matters, the government had no obligation to disclose it. The email that was relevant to impeachment of the witness was not in the government's possession, custody, or control, and the court remedied any prejudice from the late disclosure of the email by affording the defense additional time to utilize it effectively at the trial. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

Allegation of Failure to Comply with a Court Order

A Department attorney notified OPR that defense counsel had filed a motion for sanctions, alleging that the Department attorney intentionally misled the court and willfully failed to comply with a discovery order. In the discovery order at issue, the court had directed the Department attorney to disclose to the court and the defense any information relating to alleged misconduct by the attorney in the case before the court or in connection with any other case during the attorney's employment with the Department. In responding to the order, the Department attorney did not

disclose a private reprimand that his state attorney disciplinary authority had issued after the attorney began working at the Department but concerning a matter that occurred prior to the attorney's employment with the Department. Defense counsel learned of the private reprimand from a third party who had an interest in the previous matter.

OPR initiated an inquiry and reviewed the pleadings filed in the discovery and sanctions litigation, the transcripts of the hearings held in the discovery litigation, the discovery order, and the private reprimand. After reviewing the relevant materials, OPR concluded that the evidence did not support a finding of professional misconduct. OPR's inquiry revealed no evidence that the discovery litigation concerned matters outside the attorney's employment with the Department or that the discovery order encompassed matters that predated the attorney's employment with the Department. In addition, OPR's inquiry established that, in determining whether he had an obligation to disclose the private reprimand, the Department attorney consulted his state bar's disciplinary authority and appropriate Departmental authorities. Because the attorney's decision to not disclose the private reprimand was consistent with the guidance he received from these authorities, and because there was no evidence that the attorney had a clear, unambiguous obligation to disclose the private reprimand, OPR closed its inquiry.

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

A USAO notified OPR of a district court's order removing an AUSA from a case as a sanction for the government's failure to comply with its discovery obligations. The order stemmed from the AUSA's failure to timely disclose the entire contents of the defendant's recorded interview with the case agent and an email provided by a cooperator that concerned the defendant's alleged crimes. OPR initiated an inquiry, obtained a written statement from the AUSA, reviewed the record in the case, and obtained additional information from the USAO. Based on its review of the relevant materials, OPR concluded that the untimely disclosures were not attributable to misconduct by the AUSA. Rather, OPR's inquiry established that the AUSA genuinely, but mistakenly, believed that he had disclosed all the defendant's statements relating to the charged offenses and that the withheld statements only concerned alleged crimes that were unrelated to the defendant's charges and that were the subject of a separate law enforcement investigation. In addition, OPR determined that the AUSA's delayed disclosure of the email was not unreasonable because it was based on the AUSA's legitimate concern for the cooperator's safety. Furthermore, it was questionable whether the email was material to the preparation of the defense because the contents of the email concerned subject matter that the AUSA had previously and timely disclosed to the defendant. There was no trial date in the case, and, because all trials in the district had been suspended due to the pandemic, OPR determined that the defense suffered no prejudice due to the delayed disclosure of the email. OPR closed its inquiry after determining that further investigation was unlikely to result in a finding of professional misconduct.

[Allegation of Failure to Comply with Local Rule in Issuing Subpoenas](#)

A court sanctioned the government for issuing improper subpoenas in violation of a local rule, because, although required by the rule, the government did not request or receive prior approval from the court before issuing the subpoenas or specify on the subpoenas that the documents must be delivered to the court. The court also criticized the government for adding language to the subpoena form. As a result, the court ordered that the government destroy all

documents received in response to the subpoenas and prohibited the government from using them for any reason in connection with the prosecution. This sanction was in addition to several remedial measures taken by the USAO.

OPR initiated an inquiry. OPR reviewed the relevant pleadings from the case, trial team emails, and a written response from the AUSA responsible for issuing the subpoenas. OPR's inquiry revealed that the issuance of the subpoenas stemmed from the office's practice to issue Federal Rule of Criminal Procedure (FRCP) 17 subpoenas for scheduled hearings without court authorization. In evaluating the AUSA's conduct, OPR considered that the team leader instructed the AUSA to issue the subpoenas; a supervisor approved a pleading filed by the government, arguing that the subpoenas were valid under FRCP 17(a); and other AUSAs in the same office acknowledged in an office-wide survey to not always complying with the local rule in question. While office practices did not include altering the subpoena form, the AUSA who made the alteration was new to federal practice and had received no training regarding FRCP 17 or the local rule, and, by adding the language, he was trying to effectuate the trial team's evidentiary needs. The AUSA lacked the knowledge and experience to understand that the alteration violated the local rules regarding subpoenas.

The court found no bad faith on behalf of the prosecution team and noted that the events did not prejudice the defense. Furthermore, the USAO took multiple steps to correct any non-compliance with FRCP 17 and the local rule, including training for both its current staff and new hires. Accordingly, OPR concluded that further investigation was unlikely to lead to a finding that the AUSA or the prosecution team engaged in professional misconduct for issuing the unauthorized subpoenas and closed its inquiry.

Section IV: Non-Department Attorney and Judicial Misconduct Allegations

OPR is responsible for determining whether the Department should refer allegations of possible professional misconduct by non-Department attorneys and members of the judiciary to state attorney and judicial disciplinary authorities. In this role, OPR assists Department attorneys in fulfilling their state bar obligations to report rule violations that raise a substantial question as to a lawyer's honesty, trustworthiness, or fitness as an attorney.

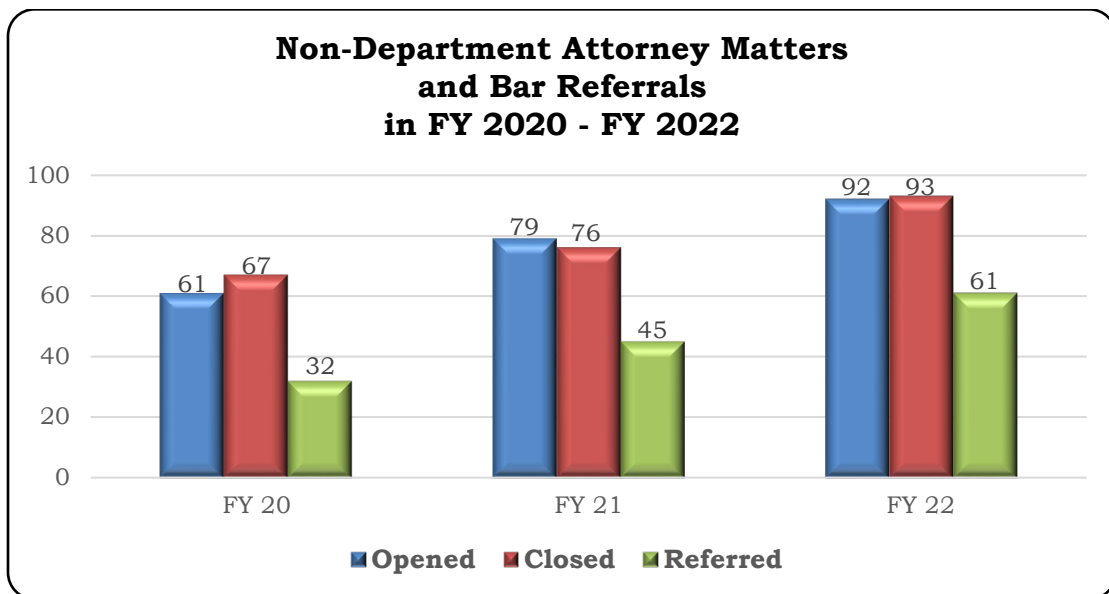
During Fiscal Year 2022, OPR received 92 submissions from components of the Department concerning possible professional misconduct by non-Department attorneys. OPR evaluated and closed 93 submissions and referred 61 matters to state attorney disciplinary authorities. OPR initiated a new system of tracking media reports concerning indictments and convictions of non-Department attorneys and proactively contacting Department components about the matters. As a result, the number of submissions and referrals to disciplinary authorities increased during Fiscal Year 2022. OPR did not refer allegations it determined to be uncorroborated or based on mere suspicion, or which did not constitute a violation of a rule of professional conduct.

Many of the referrals OPR sent to state disciplinary authorities concerned an indictment, guilty plea, or conviction of a non-Department attorney for a federal criminal offense. For example, in Fiscal Year 2022, OPR referred a variety of criminal conduct by non-Department

attorneys, such as fraud, money laundering, bribery, obstruction of justice, and possession of child pornography. In some cases, OPR referred evidence of uncharged criminal conduct by non-Department attorneys that came to light incidentally during a government investigation or litigation. For example, during investigation of a drug case, the Department learned that a non-Department attorney had arranged for a client to participate in a sham marriage in order to help another client gain legal status. Similarly, during an unrelated investigation, the Department learned that a non-Department attorney had submitted fraudulent information in a loan forgiveness application. Regarding non-criminal conduct, OPR referred several allegations concerning false statements, misrepresentations, and other instances of serious misconduct by non-Department attorneys. Among its referrals, OPR notified disciplinary authorities of matters in which evidence revealed that an attorney improperly disclosed grand jury information to a third party who published the information on the internet; an attorney had an undisclosed sexual affair with his client’s wife while representing the client at trial; an attorney issued false subpoenas in a litigation matter; an attorney had inappropriate contact with represented parties; and an attorney made racist and threatening remarks in court filings.

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

Graph 4



During Fiscal Year 2022, OPR also received and evaluated two submissions from Department components, concerning possible professional misconduct by members of the judiciary. OPR referred one case in which a judge was indicted on tax fraud charges and did not refer a second case concerning the criminal conviction of a judge for obstruction because OPR learned that the disciplinary authority was already aware of the matter and investigating it.

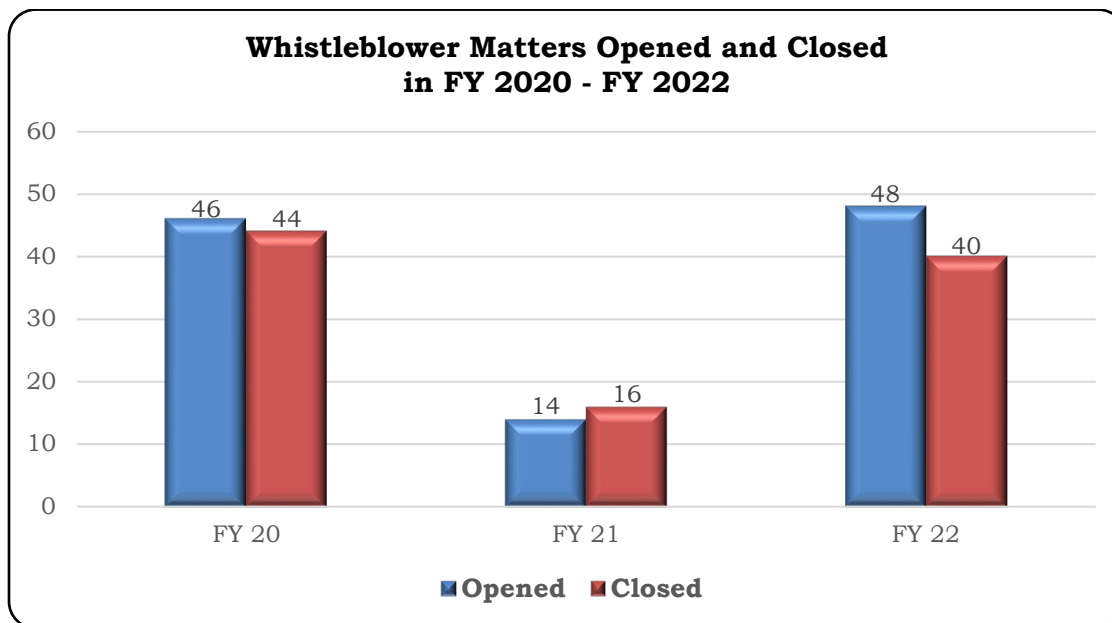
Complaints against Members of the Judiciary		
	Complaints	Referrals
FY 20	4	1
FY 21	2	0
FY 22	2	1

Section V: FBI Whistleblower Retaliation Claims

The FBI, like certain other federal agencies with intelligence-related duties, is expressly excluded from the statutory whistleblower protection scheme that covers most federal employees. Instead, FBI personnel and applicants for FBI employment are governed by the requirements set forth in 5 U.S.C. § 2302 and 28 C.F.R. Part 27, which generally prohibit FBI personnel from taking retaliatory action against whistleblowers. Pursuant to the regulation, OPR and the OIG share responsibility for reviewing and investigating whistleblower retaliation complaints made by FBI personnel and applicants for FBI employment. OPR evaluates complaints based on the statutory and regulatory provisions, which require evidence that the complainant made a protected disclosure to one of the designated officials or offices; the complainant reasonably believed the disclosure evidenced certain identified types of wrongdoing; and an FBI employee took or failed to take, or threatened to take or fail to take, a personnel action with respect to the complainant. 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 the failure to meet the jurisdictional elements of the regulation, 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.

After experiencing a decrease during Fiscal Year 2021 in the number of retaliation complaints received, OPR saw a return in Fiscal Year 2022 to pre-pandemic levels. During Fiscal Year 2022, OPR received 48 complaints and resolved 40, some of which were received in the preceding fiscal year. At the end of the fiscal year, OPR had 20 pending whistleblower retaliation matters, including 4 investigations. Below is a graph depicting the number of complaints received and resolved during the previous three fiscal years.

Graph 5



To increase efficiency and effectiveness, during Fiscal Year 2022, OPR developed an extensive and detailed five-part training course on handling FBI whistleblower retaliation complaints. All OPR attorneys attended or viewed the sessions, and it is a part of the mandatory training for new OPR attorneys. OPR continues to revise and update its reference materials to assist attorneys handling such complaints.

The following are examples of whistleblower retaliation allegations closed by OPR this fiscal year.

[Allegation of Whistleblower Retaliation](#)

An FBI employee alleged that after he reported a supervisor's creation of a hostile work environment, he was subject to disparate and unequal treatment; was intimidated, bullied, harassed, and undermined; was not transferred to a requested unit and duty location; and feared future disciplinary action. The employee additionally alleged that, in retaliation for his disclosure, he received negative performance feedback and ratings on his annual and mid-year performance evaluations. The employee also reported misconduct by other supervisors and co-workers and alleged that he was retaliated against for those reports by receiving negative and false performance feedback and ratings, discrimination, having ancillary duties changed, and the creation of a hostile working environment.

OPR opened an inquiry and, after carefully reviewing the allegations in the complaint, OPR concluded that the whistleblower had alleged a claim that is cognizable under the FBI whistleblower regulations and converted its inquiry to an investigation. Based on information learned during its investigation, OPR concluded that although the whistleblower made a disclosure that was protected under the FBI whistleblower regulations, OPR found no reasonable grounds to

believe that an FBI employee had taken, failed to take, or threatened to take or fail to take a personnel action against the whistleblower as retaliation for his disclosure. OPR concluded that a negative annual performance evaluation rating was a personnel action under the whistleblower regulations but found insufficient evidence to support a determination that the employee's disclosures were a contributing factor to the employee's annual performance evaluation rating. OPR found that the other alleged retaliatory actions were not personnel actions as defined by the whistleblower regulations. As to the employee's allegations of discrimination, OPR concluded that such claims were best addressed through the Equal Employment Opportunity (EEO) process. Accordingly, OPR concluded that there were no reasonable grounds to believe that whistleblower retaliation had occurred and closed its investigation.

Allegation of Whistleblower Retaliation

An FBI employee alleged that, because he reported overhearing coworkers expressing support for law enforcement with regard to news reports concerning allegations of the use of excessive force, his requests to change his location within the workspace were repeatedly denied. The FBI employee further alleged that because of his disclosure, he was subjected to sexual harassment and employment discrimination. OPR opened an inquiry, carefully reviewed multiple submissions from the FBI employee, and concluded that the employee had not alleged a cognizable claim for relief under 28 C.F.R. § 27.1(a) because although the FBI employee disagreed with the overheard remarks, it is well settled that disclosures concerning disagreements with colleagues, without more, are not protected under the whistleblower regulations. OPR also concluded that the denial of a change of workspace did not constitute a personnel action within the meaning of 28 C.F.R. § 27.2(b). Rather, OPR found that the decision regarding the FBI employee's work assignment location was a legitimate exercise of managerial authority that balanced the needs of the office with employees' preferences. As to the FBI employee's allegations of discrimination based on his ethnicity, race, and age, OPR concluded that the employee failed to allege a cognizable claim under the whistleblower regulations and that such claims are best addressed through the EEO process.

Allegation of Whistleblower Retaliation

An FBI employee who reported his coworker's time and attendance fraud and security violations complained that, as a result of his disclosures, he was tasked with supervising the coworker, denied a transfer, and threatened with an unspecified personnel action. OPR investigated the matter and determined that while the FBI employee made protected disclosures within the meaning of 28 C.F.R. § 27.1(a), there was insufficient evidence to conclude that an FBI employee had taken, failed to take, or threatened to take or fail to take a personnel action as defined by the FBI whistleblower regulations in retaliation for those disclosures.

Allegation of Whistleblower Retaliation

An FBI employee complained that FBI management transferred him to a less prestigious FBI unit in retaliation for disclosing to his supervisor information pertaining to alleged case tampering and unauthorized disclosure of sensitive case information by high-ranking officials. OPR opened an investigation into the matter. Based on its investigation, OPR found that the subject matter of the employee's disclosures to his supervisor did not constitute protected disclosures within the meaning of 28 C.F.R. § 27.1. OPR also found that the employee did not allege facts upon which OPR could conclude that he had a reasonable belief that his disclosures evidenced a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial or specific danger to public health or safety. Finally, OPR found that even if the employee had made a protected disclosure that was a contributing factor to his transfer, the FBI could show by clear, convincing evidence that it would have transferred the employee notwithstanding the disclosure. Accordingly, OPR concluded that the employee's whistleblower retaliation complaint was not cognizable under the FBI whistleblower regulations.

Allegation of Whistleblower Retaliation

An FBI employee alleged that he received a negative performance rating at an interim performance review and his supervisor threatened a similar rating for his annual review in retaliation for his disclosures of gross mismanagement and substantial and specific dangers to public health and safety based on FBI management decisions that impacted the employee's division. OPR opened an inquiry into the matter and after carefully reviewing the allegations in the FBI employee's complaint, OPR concluded that the employee had not alleged a cognizable claim for relief. OPR found that the employee's allegations reflected disagreements with FBI management's allocation of resources and other policy decisions and were not based on a reasonable belief that they evidenced a violation of law, rule, or regulation, or other abuses, as required by 28 C.F.R. § 27.1(a). OPR further found that the employee's disclosures were not a contributing factor to any personnel action taken against him and that any actions taken against him, such as the interim performance review, did not qualify as personnel actions under 28 C.F.R. § 27.2(b).

Allegation of Whistleblower Retaliation

An FBI employee alleged that he suffered retaliation after contacting a member of Congress regarding the FBI's COVID-19 testing requirements that were promulgated to accommodate employees who did not attest to their compliance with the government-wide COVID-19 vaccination requirement. OPR opened an inquiry into the matter and reviewed the extensive documentation submitted by the employee, including an EEO complaint that he had previously filed. In both his pending EEO complaint and his whistleblower retaliation claim, the employee alleged that because of his failure to comply with the vaccination or testing requirements based upon his religious beliefs, he was discriminated against, subjected to a hostile work environment, reassigned, and ultimately suspended from his duties. As both filings arose from the same nucleus of operative facts, OPR concluded that they were best addressed through the EEO process, rather than through a whistleblower retaliation claim.

Allegation of Whistleblower Retaliation

An FBI employee complained that he was retaliated against for sending an internal FBI email and attachment to the office of a member of Congress. OPR opened an inquiry into the matter and carefully reviewed the employee's complaint and concluded that he did not make a protected disclosure. Although the employee forwarded the email to an entity designated to receive protected disclosures, there was insufficient evidence that the subject matter of the employee's email constituted a protected disclosure. Specifically, the employee failed to allege facts upon which OPR could conclude that he had a reasonable belief that his statement or disclosure to Congress evidenced a violation of law, rule, or regulation, or other abuses, as required by 28 C.F.R. § 27.1(a). Accordingly, OPR concluded that the employee did not make a protected disclosure that OPR had jurisdiction to investigate under the whistleblower regulations.

Allegation of Whistleblower Retaliation

A former probationary FBI employee claimed that he received a negative performance evaluation after raising concerns with his supervisor about the constitutionality of certain FBI operations and procedures in search and seizure cases. The complainant provided two specific examples of cases in which he believed he was asked to perform investigative steps that he believed were improper. After raising these concerns, the complainant was informed by his supervisor that the supervisor would not recommend that he pass his probationary period. The complainant alleged that his supervisor gave him the choice of resigning from the FBI or being fired.

OPR opened an investigation and reviewed the employee's performance reviews and interviewed the supervisor. Regarding the first matter, OPR reviewed the case law cited by the complainant and the tasks he was asked to perform and found no clear legal impediment to the proposed investigative activity. Instead, OPR construed the claimant's concerns as mere disagreement over legitimate investigative tactics. OPR therefore concluded that the claimant did not have a reasonable belief that his alleged statements to his supervisor constituted a protected disclosure.

As to the second matter, OPR similarly found no evidence that the complainant was asked to do anything illegal. In addition, the complainant did not allege that he reported the incident to his supervisor. Rather, he alleged that he discussed his concerns with a training agent who was not in his chain of command and who was not one of the specified individuals designated by statute to receive a protected disclosure.

In addition, based upon its review of the complainant's performance evaluations, OPR determined that the FBI would have made the same recommendation regarding his probationary status even in the absence of the alleged protected disclosures. The performance evaluations indicated that there were deficiencies in his performance, unrelated to his alleged protected disclosures, that resulted in his supervisor's recommendation to terminate his probation. OPR therefore found that the agency could demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the alleged protected disclosures.

Section VI: OPR Review of OIG Attorney Investigations

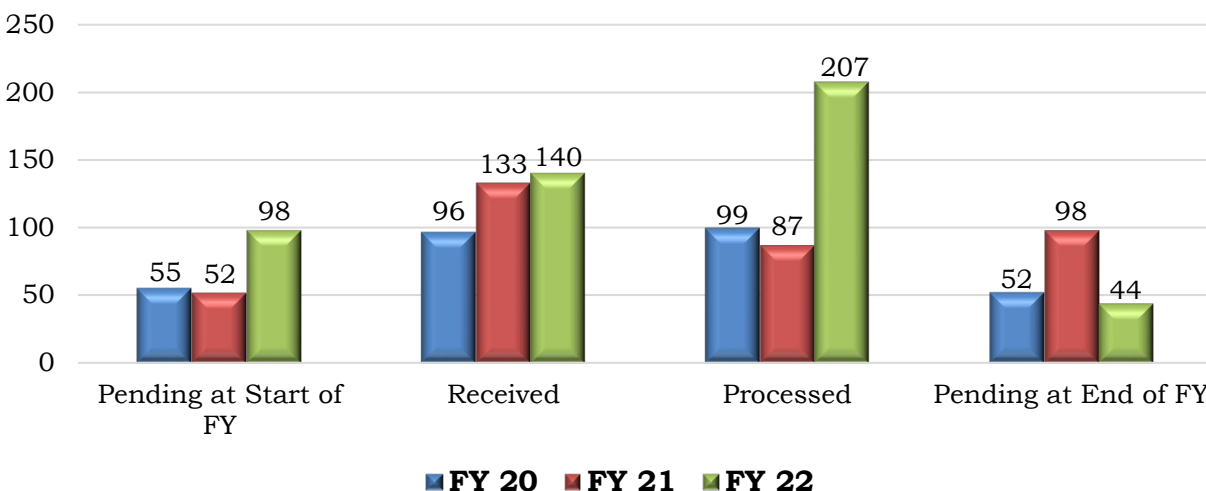
The OIG investigates allegations concerning waste, fraud, abuse, and misconduct in Department programs and by Department personnel, including allegations relating to the conduct of Department attorneys, when the allegations are outside of OPR's jurisdiction. OPR reviews referrals from the OIG following its investigations of Department attorneys to determine whether the subject's conduct may implicate the rules of attorney professional misconduct and whether to seek authorization from the PMRU to refer the subject attorney's conduct to the appropriate state attorney disciplinary authority. In Fiscal Year 2022, OPR reviewed the conduct of 10 Department attorneys found by the OIG to have violated regulations or Department policies. In four matters, OPR recommended that the PMRU authorize bar referrals. The referred matters concerned attorneys' improper conduct after traffic stops, lack of candor, and improper disclosure of confidential information. In this reporting period, the PMRU authorized OPR to refer one of the matters, and three remained pending. In six matters, OPR concluded that the attorneys' conduct did not implicate the rules of professional conduct and did not seek authorization for bar referrals.

Section VII: OPR Activities in Response to Freedom of Information Act Requests and Litigation

The Freedom of Information Act (FOIA) gives persons the right to request access to government records. Under the FOIA, federal agencies are required to disclose requested information unless the information falls under one of nine exemptions that protect certain sensitive interests, such as personal privacy, national security, and law enforcement. The FOIA works in tandem with the Privacy Act, which gives persons the right to request access to government records about themselves. Agencies respond to individuals' requests for access to their own records by processing those requests under both statutes. Each year, OPR devotes significant resources to the processing of and timely response to FOIA and Privacy Act requests, while also defending its actions in FOIA lawsuits.

Despite its small staff and an increase in cases in litigation, as shown by the chart below, OPR made significant progress in processing FOIA requests and responding to litigation during the fiscal year. In addition to a significant decrease in OPR's backlog of FOIA requests, OPR closed a majority of its 10 oldest FOIA requests during the fiscal year.

**Number of OPR FOIA Requests Received,
Processed, and Pending
FY 2020 - FY 2022**



The following are summaries of selected FOIA matters in litigation to which OPR was a party during the fiscal year.

In *Akel v. U.S. Department of Justice*, the plaintiff sought certain records from OPR. OPR searched for and processed all responsive records, producing to the complainant 103 pages with redactions pursuant to FOIA exemptions 6 and 7(C). The plaintiff advised the court and OPR that he intended to challenge the adequacy of OPR’s search for responsive records. After OPR moved for summary judgment, detailing the steps it had taken to identify all responsive records, the plaintiff moved to withdraw his complaint. The court subsequently dismissed the case as moot.

Leopold v. U.S. Department of Justice involved three separate FOIA requests submitted to multiple Department components and agencies seeking records related to the events that took place at the U.S. Capitol on January 6, 2021. After learning that OPR likely had no records responsive to the request, the plaintiff agreed to exclude OPR from the case, which remains ongoing.

In *American Oversight v. U.S. Department of Justice*, the plaintiff sought from OPR and the OIG complaints concerning the conduct of then Attorney General William Barr. OPR processed a total of 567 pages, releasing to the plaintiff 306 pages of responsive records with redactions pursuant to FOIA exemption 6, withholding 192 pages in full, and sending 69 pages for consult to other components or agencies. After reviewing the responses it received from OPR and the OIG, the plaintiff entered into a joint stipulation to dismiss the case.

In *Butowsky v. U.S. Department of Justice*, the plaintiff seeks records from multiple Department of Justice and Department of Homeland Security agencies and components. After the suit was filed, OPR responded to the FOIA request, explaining that the records requested were not maintained by OPR. The case remains ongoing.

The plaintiff in *Cabezas v. Federal Bureau of Prisons and the Office of Professional Responsibility* seeks from OPR records related to misconduct or ethical violations by two FBI special agents and an Assistant U.S. Attorney. OPR refused to confirm or deny the existence of any responsive records, pursuant to FOIA exemptions 6 and 7(C), to protect the privacy of the agents and attorney. The parties are currently briefing motions for summary judgment.

In *Plunkett v. U.S. Department of Justice*, the plaintiff seeks from OPR records pertaining to a complaint he filed with the OIG that alleged misconduct by an Assistant U.S. Attorney. OPR processed all responsive records and produced three pages to the plaintiff, with redactions pursuant to FOIA exemptions 6 and 7(C). The case remains ongoing while the other Department components from whom the plaintiff seeks records continue to process their responsive records.

Section VIII: Training and Outreach Efforts

Bar Lapse Issues

By statute, the Department is prohibited from paying compensation to an attorney who is not “duly licensed and authorized to practice in a State, territory, or the District of Columbia.” Consistent with the statutory requirements, all individuals employed as Department attorneys, who provide legal advice regardless of position title or who are otherwise engaged in the practice of law, must maintain an active bar license in at least one state or territory, or the District of Columbia. Attorneys must complete an annual certification confirming that at all times during the year they maintained an active license. Attorneys must immediately self-report to OPR any lapse in active bar membership during Department employment.

In Fiscal Year 2022, OPR experienced a decrease in the number of matters in which Department attorneys failed to continuously maintain an active bar membership from the previous fiscal year. However, the number of instances in which a Department attorney failed to continuously maintain an active bar membership remained higher than in the fiscal years before the COVID-19 pandemic. The pandemic continued to play some role as attorneys who were absent from the office did not receive mailings sent to their offices by the bar, and attorneys’ efforts to maintain active bar memberships were affected by unforeseen changes to personal circumstances caused by the pandemic. Other reasons for the failures included attorneys not maintaining current physical and electronic contact information with the bar after moving residences or changing positions within the Department, attorneys making administrative errors when reporting continuing legal education hours to the bar, and attorneys failing to ensure that emails from the bar were routed to the appropriate inbox in their Department email account. OPR also reviewed instances in which attorneys were onboarded by the Department without having active bar memberships.

Building upon its work last fiscal year with the Office of Attorney Recruitment and Management (OARM) that resulted in revisions to the Department’s entry-on-duty bar certification form (DOJ-54) and the annual bar certification form (DOJ-54A), OPR and OARM continued efforts to increase compliance with the Department’s bar membership policy by producing a revised memorandum to Department components that described best practices to ensure accurate component certifications. OPR also consulted with OARM and the Professional

Responsibility Advisory Office as to whether the Department's bar membership policy should apply to the Department's administrative law judges and contract attorneys hired by Department components. Additionally, OPR consulted with the Executive Office for U.S. Attorneys (EOUSA) and provided input regarding EOUSA's new initiative to provide quarterly reminders to AUSAs to pay their bar dues in a timely manner.

Department Training on Professional Misconduct Issues

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 2022, OPR leadership provided training for new U.S. Attorneys as part of EOUSA's training program. In addition to providing information about the Department's disciplinary system and OPR's processes for handling misconduct allegations, OPR leadership discussed frequent problems and issues that result in OPR investigations and misconduct findings. OPR leadership also worked with the Department's Discovery Coordinator and the Criminal Chief's Working Group to provide additional training to prosecutors regarding discovery issues relating to cooperating witnesses. OPR assisted in developing a checklist for use by USAOs in conjunction with their office training alerting AUSAs to professional responsibility issues with respect to cooperating witnesses and advising them about best practices in handling such witnesses.

External Outreach

OPR 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.

In its capacity as the Department's liaison to state bar disciplinary authorities, OPR representatives attend biannual conferences of the National Organization of Bar Counsel. At the conferences, OPR provides updates on the Department's efforts to investigate allegations of misconduct, consults with bar counsel on ways to streamline the Department's reporting of allegations of misconduct, collects information on best practices for investigating and analyzing professional misconduct allegations, and keeps informed of current trends regarding the application and interpretation of the rules of professional conduct in jurisdictions across the country. In Fiscal Year 2022, conference topics of particular relevance to OPR concerned the interpretation of rule of professional conduct 3.8, which concerns the special responsibilities of prosecutors, and investigation techniques involving electronic evidence.

Conclusion

During Fiscal Year 2022, 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 reviewed and resolved hundreds of complaints and fully investigated allegations when appropriate. 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's managers and staff overcame challenges caused by the COVID-19 pandemic and transitioned to a hybrid in-office and teleworking model. OPR's activities in Fiscal Year 2022 have increased awareness of professional standards and responsibilities throughout the Department and have helped the Department's attorneys meet the challenge of enforcing the laws and defending the interests of the United States while maintaining the highest ethical standards.