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OFFICE OF PROFESSIONAL RESPONSIBILITY

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Fiscal Year 2014 Annual Report

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OPR Annual Report for Fiscal Year 2014

Introduction

The Office of Professional Responsibility (OPR) was established in the Department of Justice (Department or DOJ) by a December 9, 1975 order of the Attorney General to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 39th Annual Report to the Attorney General, and it covers Fiscal Year 2014 (October 1, 2013 through September 30, 2014).

Jurisdiction and Functions of OPR

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

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

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence of non-frivolous allegations of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Department employees are required to report to OPR all misconduct findings made by judges.

Upon receipt, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, during which it typically gathers documents and information and obtains written submissions from subjects and

components, or a full investigation, during which it also interviews relevant witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation. Although some matters begin as investigations, OPR typically will open a matter as an inquiry and then assess the information obtained prior to conducting an investigation. An inquiry or investigation may have more than one Department attorney as the subject.

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

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

If a Department attorney resigns or retires during the course of the investigation, OPR ordinarily completes its investigation in order to better assess the litigation impact of the alleged misconduct, and to permit the Attorney General and Deputy Attorney General to consider the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it deems such action is in the best interest of the Department. Terminated investigations may nevertheless result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. In cases involving U.S. Attorney's Offices, this includes notifying the Director of the Executive Office for U.S. Attorneys (EOUSA). OPR includes in its communications with management officials discussion of any trends or policy issues that OPR believes require attention.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which reports to the Deputy Attorney General and in Fiscal Year 2014 was responsible for all disciplinary actions relating to OPR findings of professional misconduct against DOJ attorneys employed by certain components, including the Criminal Division and

EOUSA. In Fiscal Year 2015, the PMRU's jurisdiction was extended to nearly all Department attorneys. The PMRU reviews only those cases in which OPR finds intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and the applicable law.[1] The PMRU also determines the appropriate level of discipline in those cases.

In matters in which OPR concludes that a Department attorney engaged in professional misconduct and the DOJ attorney is not employed by a component within the purview of the PMRU, pursuant to Department policy, OPR recommends a range of discipline. Although OPR's recommendation is not binding on the management officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), the management official must notify the Office of the Deputy Attorney General in advance of implementing that decision.

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

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

Intake and Initial Evaluation of Complaints and Correspondence

In Fiscal Year 2014, OPR received 831 complaints and other correspondence and memoranda, of which 386, or 46%, were from incarcerated individuals. Some of these matters did not relate to issues under the jurisdiction of OPR, or merely sought information or assistance, and were referred to the appropriate government agency or Department component. OPR determined that 58 of the matters warranted further review by OPR attorneys and they were opened as inquiries. In addition, OPR opened 21 matters as investigations. When information develops in an inquiry indicating that further investigation is warranted, the matter is converted to an investigation.

The remaining matters were determined not to warrant an inquiry or investigation by OPR because, for example, they sought review of issues that were being litigated or that had

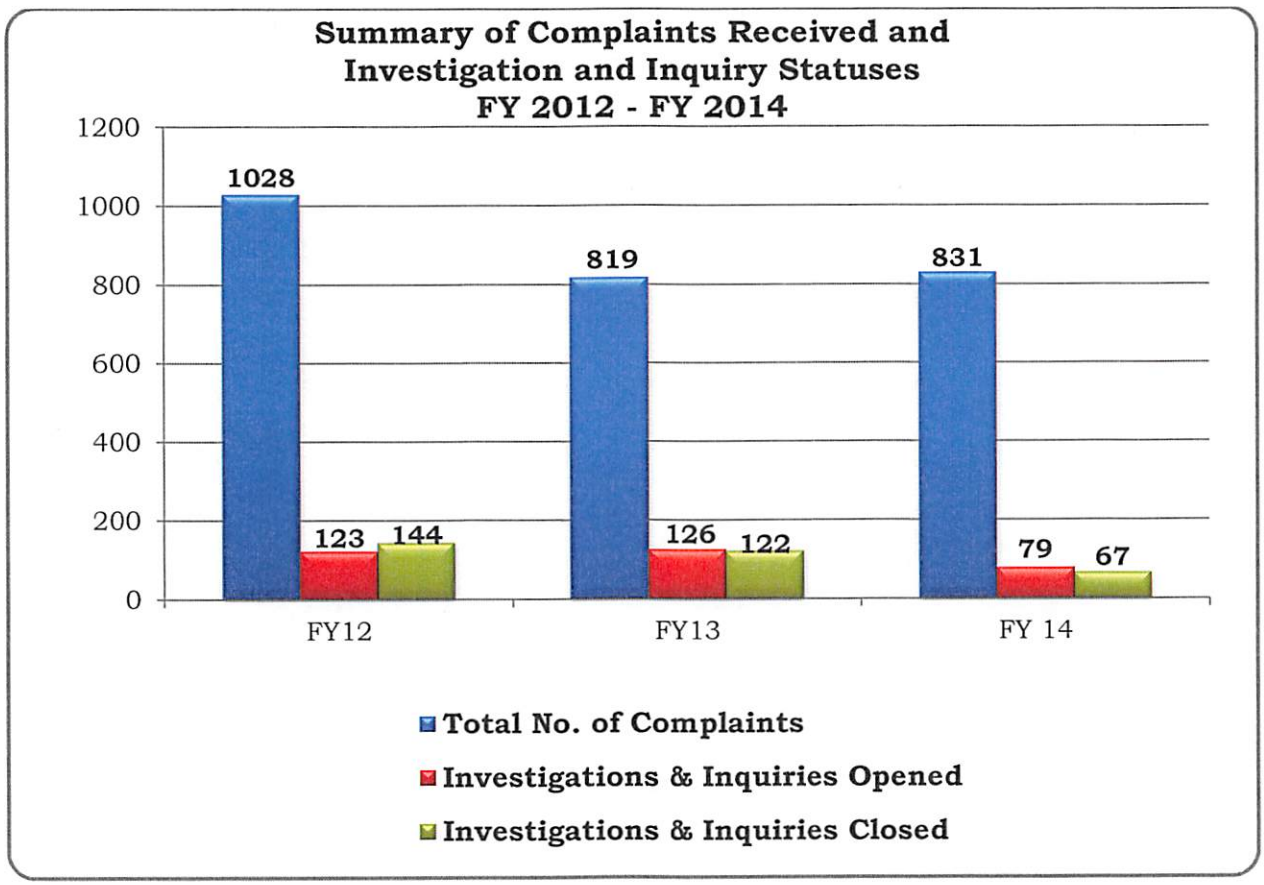
[1] OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, and to the relevant U.S. Attorney, for appropriate action.

already been considered and rejected by a court; were frivolous, vague, or unsupported; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department component. A supervisory or experienced OPR attorney also reviewed all such dispositions.

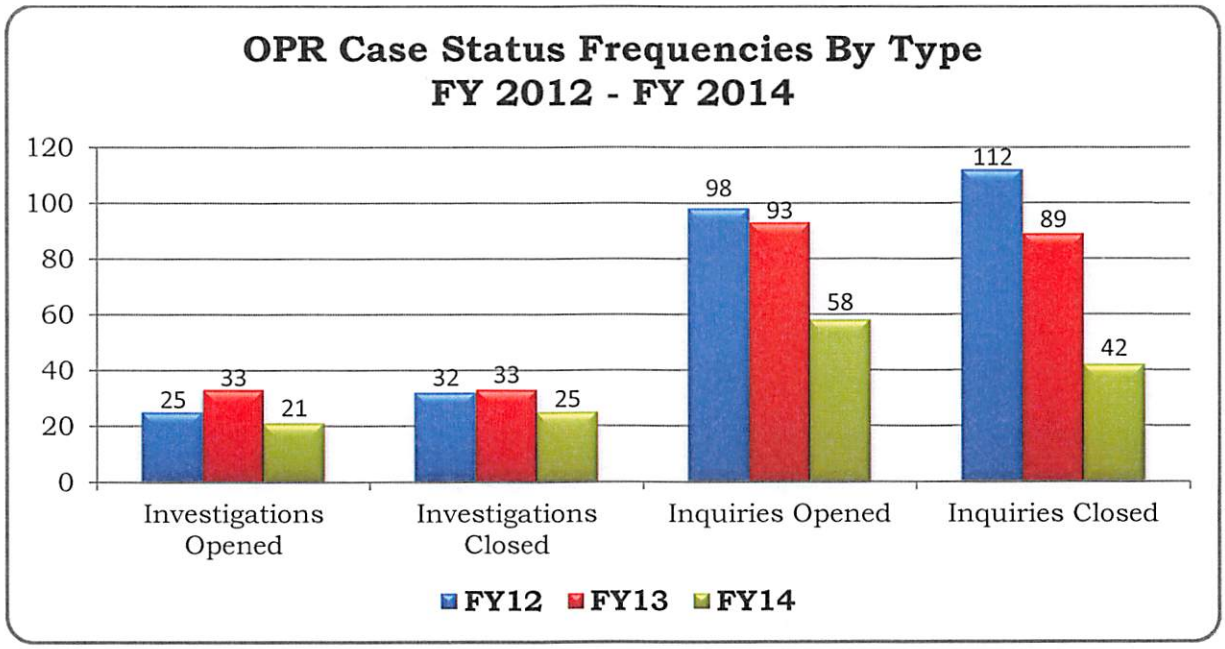
Summary and Comparison of OPR's Investigations and Inquiries by Fiscal Year

In Fiscal Year 2014, OPR received 831 complaints and correspondence matters, which represents a 1.5% increase from Fiscal Year 2013. Of the 831 complaints and correspondence matters OPR received, 79 were opened as an investigation or inquiry. In Fiscal Year 2014, OPR closed 67 investigations and inquiries. Graphs 1 and 2 provide comparisons over the last three fiscal years of the number of complaints and correspondence matters OPR received, as well as the number of investigations and inquiries OPR opened and closed. As shown below, in FY 2014, OPR opened 58 inquiries and closed 42; and opened 21 investigations while closing 25.

Graph 1

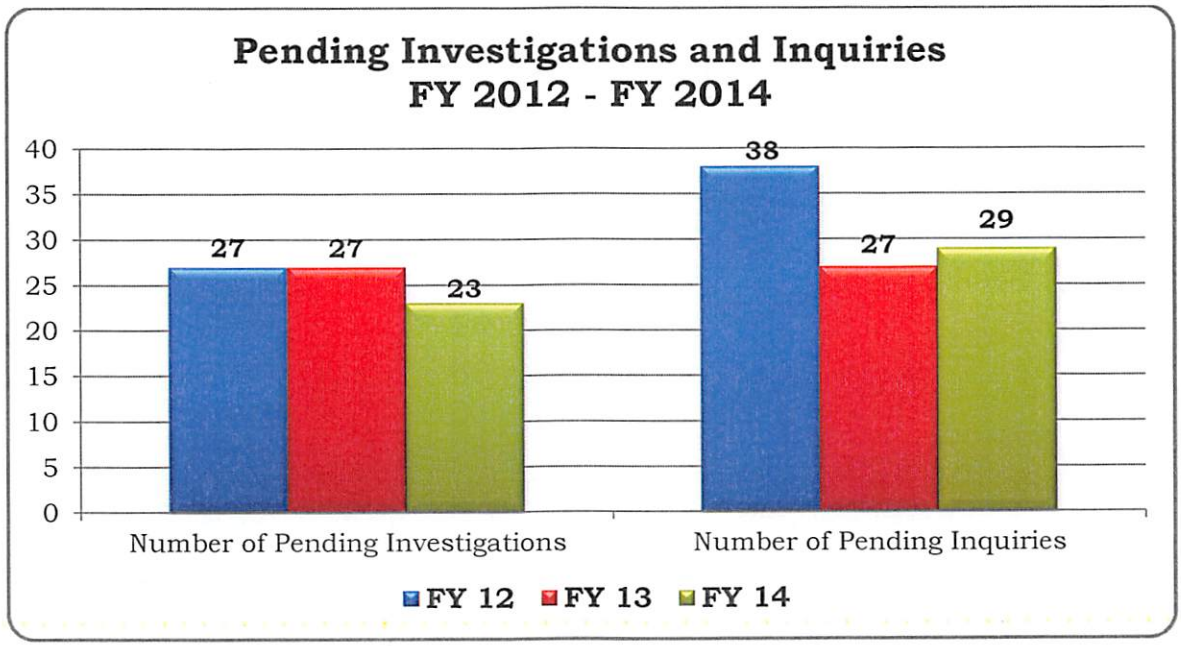


Graph 2



Because of the complexity of the allegations that OPR receives, many of the investigations and inquiries opened remain under review at the close of the fiscal year. OPR assigns a pending status to these cases and reports their outcome in the fiscal year during which the case is closed. At the end of Fiscal Year 2014, there were 23 investigations and 29 inquiries pending. Graph 3 compares the number of inquiries and investigations that were pending at the end of the last three fiscal years.

Graph 3



OPR Inquiries in Fiscal Year 2014

Inquiries Opened in Fiscal Year 2014: The sources of the complaints for the 58 matters designated as inquiries opened in Fiscal Year 2014 are set forth in Table 1.[2]

Table 1

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2014		
Source	**Complaints Leading to Inquiries**	**Percentage of All Inquiries**
Judicial opinions & referrals, including referrals by Department employees of judicial criticism[3]	27	46.6%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	22	37.9%
Private attorneys	5	8.6%
Private parties	3	5.2%
Other agencies	1	1.7%
Total	**58**	**100%**

The nature of the allegations against Department attorneys contained in the 58 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 58.

[2] OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department will make a referral to a state bar disciplinary organization. The 58 matters referred to above do not include matters involving proposed bar notifications of non-DOJ attorneys.

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

Table 2

Types of Misconduct Allegations in Inquiries Opened in FY 2014		
Type of Misconduct Allegations	**Number of Allegations**	**Percentage of Allegations**
Failure to comply with *Brady*, *Giglio*, or Fed. R. Crim. P. 16 discovery	27	27.8%
Abuse of authority, including abuse of prosecutorial discretion	11	11.3%
Misrepresentation to the court and/or opposing counsel	11	11.3%
FBI Whistleblower complaints	11	11.3%
Interference with defendants' rights	9	9.3%
Improper remarks to a grand jury, during trial, or in pleadings	8	8.2%
Failure to comply with court orders or federal rules	4	4.1%
Failure to comply with DOJ rules and regulations	3	3.1%
Lateness (*i.e.*, missed filing deadlines)	3	3.1%
Failure to maintain active bar membership	3	3.1%
Lack of fitness to practice law	2	2.1%
Failure to competently or diligently represent the client's interests	2	2.1%
Conduct of Immigration Judges	1	1.0%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	1	1.0%
Conflict of interest	1	1.0%
Total	**97**	**100%**

Inquiries Closed in Fiscal Year 2014: OPR closed a total of 42 inquiries in Fiscal Year 2014 involving allegations against Department attorneys.[4] The matters involved 59 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 59 allegations were resolved in Fiscal Year 2014 is set forth in Table 3.[5]

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[4] OPR may designate more than one DOJ attorney as the subject of an inquiry. OPR closed an additional 66 inquiries involving proposed bar notifications for misconduct of non-DOJ attorneys.

[5] When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2014, 21 inquiries were converted to investigations.

Table 3

Categories of Inquiry Allegations Resolved in FY 2014		
Types of Resolution	**Number of Occurrences**	**Percentage of Occurrences**
No merit to matter based on review of allegation	22	37.3%
No merit to allegation based on preliminary inquiry	10	16.9%
Inquiry closed because further investigation not likely to result in finding of misconduct	6	10.2%
Performance or management matter. Referred to employing component	5	8.5%
More appropriately handled by another component or agency	5	8.5%
FBI Whistleblower complaint	5	8.5%
Matter being monitored	4	6.7%
Issues previously addressed. No further action required by OPR	2	3.4%
Total	**59**	**100%**

OPR Investigations in Fiscal Year 2014

Investigations Opened in Fiscal Year 2014: Table 4 lists the sources for the 21 investigations that OPR opened in Fiscal Year 2014.

Table 4

Sources of Complaints Against Department Attorneys for Investigations Opened in FY 2014		
Source	**Complaints Leading to Investigations**	**Percentage of All Investigations**
Judicial opinions & referrals, including referrals by Department employees of judicial criticism[6]	10	47.6%
Department components, including self referrals (unrelated to judicial findings of misconduct)	7	33.3
Private attorneys	3	14.3%
Private parties	1	4.8%
Total	**21**	**100%**

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

Some of the 21 investigations that OPR opened involved multiple attorney subjects. There were 53 separate allegations of misconduct (many investigations involved multiple misconduct allegations). The subject matter of the 53 allegations is set forth in Table 5.

Table 5

Types of Misconduct Allegations in Investigations Opened in FY 2014		
Types of Misconduct Allegations	**Number of Allegations**	**Percentage of Allegations in Investigations**
Failure to comply with *Brady*, *Giglio*, or Fed. R. Crim. P. 16 discovery	20	37.7%
Abuse of authority, including abuse of prosecutorial discretion	10	18.9%
Failure to competently or diligently represent the client's interests	5	9.4%
Misrepresentation to the court and/or opposing counsel	3	5.6%
Conduct of Immigration Judges	3	5.6%
Failure to comply with DOJ rules and regulations	2	3.8%
Failure to comply with court orders or federal rules	2	3.8%
Lack of fitness to practice law	2	3.8%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	2	3.8%
Improper remarks to a grand jury, during trial, or in pleadings	1	1.9%
Failure to maintain an active bar membership	1	1.9%
Conflict of interest	1	1.9%
Failure to comply with federal law	1	1.9%
Total	**53**	**100%**

Investigations Closed in Fiscal Year 2014: OPR closed 25 investigations in Fiscal Year 2014. Some of these investigations included multiple attorney subjects, and four included non-attorney subjects (typically, these are law enforcement officers). Of the 25 investigations, OPR found professional misconduct in 10, or approximately 40% of the matters it closed. Of the 10 matters in which OPR found professional misconduct, 8 involved at least 1 finding of intentional professional misconduct by a Department attorney.[7] In 5 of the 10 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless

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

disregard of an applicable obligation or standard.[8] OPR may resolve one allegation by concluding, for example, that the attorney engaged in intentional misconduct, but resolve another allegation in the same matter by concluding that the attorney acted recklessly.

In Fiscal Year 2014, OPR made fewer misconduct findings as compared to Fiscal Year 2013, both in terms of total numbers (10 in 2014 as compared to 18 in 2013), as well as in percentage of closed cases (40% of closed cases in Fiscal Year 2014 resulted in misconduct findings, as compared to 55% in Fiscal Year 2013).

The 10 misconduct findings in Fiscal Year 2014 related to 30 allegations of misconduct (some matters included more than one allegation of misconduct). Table 6 below depicts the 30 allegations sustained in the 10 misconduct cases closed during Fiscal Year 2014.

Table 6

Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2014	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Misrepresentation to the court and/or opposing counsel	7	23.4%
Failure to comply with DOJ rules and regulations	5	16.7%
Failure to comply with *Brady*, *Giglio*, or Fed. R. Crim. P. 16 discovery	3	10.0%
Failure to maintain an active bar membership	3	10.0%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	3	10.0%
Other	3	10.0%
Failure to competently or diligently represent the client's interests	2	6.7%
Conflict of Interest	1	3.3%
Abuse of authority, including abuse of prosecutorial discretion	1	3.3%
Failure to keep client informed	1	3.3%
Lack of fitness to practice law	1	3.3%
Total	**30**	**100%**

Disciplinary action was initiated and implemented against attorneys in 3 of the matters in which OPR found professional misconduct. Disciplinary action was not initiated against attorneys in 7 instances because the subject attorney was no longer employed by the Department at the conclusion of OPR's investigation or review by the PMRU. OPR, however, referred the

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

matters to state bar disciplinary authorities, where appropriate. With respect to the 3 matters in which disciplinary proceedings were initiated and implemented, the subject attorneys received suspensions.

Five, or approximately 20% of the investigations OPR closed in Fiscal Year 2014, had at least one finding that an attorney exercised poor judgment.[9] None of those 5 matters involved a finding of professional misconduct. OPR refers poor judgment findings to the Department attorney's employing component for consideration in a management context. OPR also may recommend that management consider certain actions, such as additional training. Three closed investigations, or approximately 12%, involved at least 1 finding that an attorney made an excusable mistake. One of those 3 matters also included a finding of professional misconduct or poor judgment. Thus, of the 25 investigations closed, OPR found professional misconduct or poor judgment in 15 matters, or approximately 60%, which is fewer than in Fiscal Year 2013, in which OPR found professional misconduct or poor judgment in 22 matters, or approximately 66% of the matters investigated that year.

Policy and Training Activities in Fiscal Year 2014

During Fiscal Year 2014, OPR participated in policy development and training for the Department. OPR attorneys participated in numerous educational and training activities within and outside of the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During Fiscal Year 2014, OPR attorneys participated in presentations focusing on the Department's social media policies and ethical issues concerning contacts with the media. OPR attorneys also made presentations to attorneys in other components, as well as to a conference of First Assistant United States Attorneys and Executive Officers. OPR attorneys also made presentations to new Assistant U.S. Attorneys as part of the Department's orientation and training programs, and participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* disclosure obligations.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys participated in presentations to international delegations about OPR's role in the Department and issues associated with professional ethics. An OPR attorney also served on a detail through OPDAT to Bosnia to assist criminal justice officials in developing their criminal justice system.

OPR continued to serve as the Department's liaison to state bar counsels on matters affecting the professional responsibility of Department attorneys. As part of this effort, OPR

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

attorneys regularly attend the annual meeting of the National Organization of Bar Counsel, in which current trends in attorney regulation and discipline are examined and discussed.

In accordance with Department policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also consulted with and advised other Department components regarding requests for notification to a state bar of instances of possible professional misconduct by non-DOJ attorneys. In 69 such matters that OPR opened during Fiscal Year 2014, OPR reviewed information relating to possible misconduct by non-DOJ attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly of the allegations of misconduct.

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

Examples of Inquiries Closed in Fiscal Year 2014

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2014.[10]

Improper Contact with a Represented Party. Counsel for the plaintiff in a civil action challenging the denial of the plaintiff's naturalization application alleged in a motion for sanctions that a DOJ attorney purposefully violated the bar rule prohibiting contact with a represented party in order to gain an advantage in the ongoing litigation. During the pendency of the case, when the plaintiff appeared for a routine immigration services appointment, an immigration official persuaded him to waive the presence of his attorney, and deposed him under oath about his naturalization application. Information obtained from the plaintiff during his deposition was later used by the DOJ attorney in support of a motion to dismiss the plaintiff's civil action. The DOJ attorney, however, had not authorized the improper contact with the plaintiff and was unaware of the circumstances surrounding the plaintiff's deposition. Moreover, counsel for the plaintiff subsequently withdrew the motion for sanctions. OPR closed its inquiry because further investigation was unlikely to result in a professional misconduct finding.

Failure to Maintain an Active Bar Membership. A state bar administratively suspended a DOJ attorney for three weeks for failing to pay his annual bar dues. Upon learning that he had been suspended, the attorney immediately paid his dues and was reinstated. Pursuant to the bar rules of that state, he was reinstated to the inception of his suspension, and there was no lapse in

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

his active membership. OPR closed its inquiry because further investigation was unlikely to result in a finding of professional misconduct.

Unauthorized Disclosure of Sensitive Criminal Investigative Information. A DOJ attorney sought and obtained authorization from his component to appear as a guest speaker at an event. The attorney's request was approved with the explicit understanding that he would not discuss any ongoing cases and that he would make clear to the audience that he was appearing in his personal capacity, not on behalf of the Justice Department. The attorney's remarks were recorded without his knowledge and subsequently released to the public. The attorney's remarks did not include a disclaimer that that he was not speaking on behalf of the Department. In addition, his discussion of the investigation and prosecution of federal criminal cases included a discussion of a pending case to which he was assigned.

OPR determined that the remarks contained very little sensitive information, and were not intended to prejudice the defense. Indeed, although defense counsel in the case mentioned by the DOJ attorney became aware of his remarks, the defense attorney did not object to the comments or lodge a complaint with OPR. OPR closed its inquiry because the attorney's remarks were made to a limited audience and were not intended for publication. OPR found, however, that the attorney's unauthorized remarks about an ongoing investigation and prosecution were wholly inappropriate and constituted the exercise of extremely poor judgment. OPR referred the matter to the attorney's component to handle as a management or personnel matter.

Failure to Comply with Brady Obligations. The district court granted the defendant's oral motion for a mistrial on the third day of trial based on a finding that the government violated its *Brady* obligations by failing to disclose prior statements made by the defendant. Although the court declared a mistrial, it found that the government's failure to disclose the statements was inadvertent. OPR initiated an inquiry and concluded that the government's inadvertent failure to disclose the defendant's prior statements constituted a single, isolated discovery violation, not a *Brady* violation. OPR closed its inquiry because, consistent with the trial court's ruling, further investigation was unlikely to result in a finding of professional misconduct

Improper Remarks in Closing Argument. OPR learned that a defendant filed a post-trial motion for a new trial alleging that a remark by a DOJ attorney during his closing argument violated the defendant's right against self-incrimination. In response to defense counsel's suggestion during closing argument that another unnamed individual may have committed the crime for which the defendant was charged, the DOJ attorney told the jury in rebuttal that the only person who could answer that question was the defendant. The trial court sustained defense counsel's objection and gave the jury a curative instruction. The court, however, denied the defendant's motion for a new trial, in view of the curative instruction directing the jury to disregard the prosecutor's remark and the overwhelming evidence against the defendant, including his confession. Although the remark was clearly improper, OPR determined that the attorney's single, isolated comment, made in rebuttal closing argument, did not warrant further investigation because it was unlikely to result in a finding of professional misconduct.

Failure to Comply with Brady Obligations. The district court granted the defendant's motion to vacate his sentence and withdraw his guilty plea on the ground that the prosecution

suppressed evidence favorable to the defendant in violation of *Brady*. The court ruled that the defendant's guilty plea was not knowing or voluntary because the defendant pled guilty not knowing about exculpatory evidence. The government admittedly failed to disclose an allegedly exculpatory communication between the defendant and an undercover agent, and mistakenly represented that it had disclosed all such communications. OPR determined, however, that the defendant was aware of the communication and had a copy of it in his possession at the time he pled guilty.

OPR makes findings of professional misconduct only upon a showing that a DOJ attorney has violated a clear and unambiguous standard of conduct. While the Supreme Court has ruled that prosecutors need not disclose impeachment information prior to a guilty plea, there is a split in the circuits as to whether a prosecutor must disclose other exculpatory information prior to entry of a guilty plea. There was no controlling precedent in the district in which this case arose holding that the government was obligated to disclose exculpatory information during the guilty plea stage of the proceedings. As a result, there was no clear and unambiguous obligation on the part of the prosecutors to disclose the information to the defendant in connection with his guilty plea. Moreover, OPR determined that the defendant had access to the allegedly exculpatory communication prior to entering his guilty plea. Under these circumstances, OPR concluded that although the government may have mistakenly or inadvertently violated its discovery obligations by providing the defense with incomplete discovery information, and by representing during discovery that the information was complete, further investigation was unlikely to result in a finding of professional misconduct, and OPR closed its inquiry.

Improper Commenting on a Defendant's Post-Miranda Silence. A court of appeals held that a DOJ attorney during cross-examination of the defendant and in the attorney's closing and rebuttal arguments violated the prohibition against commenting on a defendant's post-*Miranda* silence. The court affirmed the defendant's conviction, however, because the violations did not rise to the level of error requiring a new trial. OPR conducted an inquiry and determined that the defendant did not object at trial, and as a result, the record on appeal regarding the alleged violations was incomplete. In addition, defense counsel's opening statement at trial at least partially "opened the door" to the DOJ attorney's cross-examination of the defendant and his comments during closing and rebuttal argument. In light of these facts and the court of appeals' ruling that the error was not sufficiently prejudicial to require a new trial, OPR concluded that further investigation was unwarranted because it was unlikely to result in a finding of professional misconduct, and closed its inquiry.

Vindictive Prosecution. OPR initiated an inquiry as a result of a court of appeals opinion upholding a district court's dismissal of a superseding indictment on the basis that the government had not rebutted the presumption of vindictive prosecution when the defendant was charged with a more serious offense in retaliation for filing a successful suppression motion. OPR's inquiry found that the defendant did not allege that any specific DOJ attorney had a prosecutorial stake in the defendant's exercise of a protected right, and a review of the defendant's filings and the judicial opinions confirmed that no Department attorney was alleged to have committed misconduct by seeking the superseding indictment. In addition, the government asserted that the penalties for the offenses charged in the superseding indictment played no role whatsoever in crafting the superseding indictment, and that the charges in the

superseding indictment were based on readily provable evidence. Because there was no allegation that any Department attorney acted vindictively or committed misconduct, OPR closed its inquiry because further investigation was unlikely to result in a finding of professional misconduct against any Department attorney.

Failure to Comply with Discovery Obligations. A district court granted the plaintiff's motion to compel discovery and ordered the government to pay the plaintiff's attorneys' fees and expenses, based on what the court characterized as government counsel's egregious misconduct in responding to the plaintiff's discovery requests. Based on a review of the court docket and various filings in the case, OPR requested the DOJ attorney to submit a written response to the court's findings. The attorney's response established that a second DOJ attorney, who had retired from the Department, was responsible for responding to the plaintiff's discovery requests and for the discovery violations that led to the court's misconduct finding. The government was able to comply with the discovery requirements without further sanction and represented to the court that the government would manage compliance with its discovery obligations more closely. OPR uncovered no evidence that the failure to provide timely discovery was the product of a purposeful attempt to avoid discovery obligations. In light of all of these factors, OPR concluded that the court's findings did not warrant further investigation, and OPR's inquiry was closed.

Failure to Disclose Exculpatory Evidence; Misrepresentation. OPR received information concerning a matter in which a state bar disciplinary committee elected to take no action on the matter. The matter concerned allegations that in a case prosecuted more than ten years before, a DOJ attorney suppressed evidence and made material misrepresentations at trial based on the suppressed evidence. The complainants previously raised the issue with the appellate court, which upheld the trial court's determination that the evidence at issue was not material to guilt or innocence and therefore the government did not violate its obligations under *Brady.* OPR reviewed the matter, which included a review of documents relevant to the case, and determined that based on that review, and in light of the court's findings and the determination by the state bar disciplinary committee, no further investigation by OPR was warranted.

Conflict -- General, Including Appearance of Conflict; Discovery – Brady/Exculpatory Information. OPR received an anonymous complaint alleging that a DOJ attorney was engaged in a romantic relationship with a law enforcement officer while prosecuting cases on behalf of a DOJ component. According to the complaint, during the prosecution of some cases, the officer testified during suppression hearings and at trials, and the DOJ attorney was the prosecutor who questioned the officer. The complaint alleged that the DOJ attorney failed to disclose the relationship to the defense attorneys in the cases, the district court judges, and the DOJ attorney's supervisors.

OPR opened an inquiry and learned that the DOJ attorney's component previously was aware of the allegation. The DOJ attorney's supervisor directed the DOJ attorney not to work on any cases in which the officer was involved, not to discuss any of his cases with the officer, and not to discuss with the officer any cases on which the officer was working. The DOJ attorney understood these conditions and agreed to abide by them.

OPR learned that after receiving the directive from his supervisor, the DOJ attorney did not sponsor the law enforcement officer as a witness at hearings or trials, and the prosecutor did not work with the law enforcement officer on any of his cases. In assisting colleagues who were unavailable at the time, however, the DOJ attorney had revised an affidavit for the officer's signature, oversaw a decision to delay the defendant's arrest in a case, and appeared at an initial appearance hearing (in which no law enforcement officers testified). The DOJ attorney explained to OPR that his involvement in the cases occurred after he became the supervisor of the section and while he was supervising other DOJ attorneys. In addition, the DOJ component did not preclude him from overseeing cases involving the officer.

OPR found that while the DOJ attorney may have violated his supervisor's directive by working with the officer in a very limited role in the three cases, further investigation was not likely to result in a finding of professional misconduct. Significantly, the DOJ attorney had not questioned the law enforcement officer at any hearings or trials, nor had they worked together on any cases to which the DOJ attorney was assigned. OPR concluded that to the extent the DOJ attorney violated the directive not to handle cases involving the officer, that issue could be dealt with best as a management matter by the DOJ component.

Conflict -- General, Including Appearance of Conflict. A DOJ component advised OPR of proceedings related to a criminal prosecution and a DOJ attorney's involvement in the case, resulting in the DOJ component's recusal from the case. In the prosecution, a defendant was indicted for conspiracy to defraud the United States, tax evasion, and filing false tax returns. The DOJ attorney, a recently-hired prosecutor with the DOJ component, filed an appearance in the case on behalf of the government. Thereafter, the defendant filed a motion to disqualify the DOJ component from prosecuting the case, alleging that when the DOJ attorney was in private practice, the defendant had met with him and a partner in the DOJ attorney's law firm when the defendant was securing legal representation to defend the criminal charges against him. The defendant ultimately did not retain the law firm, and the attorney left the firm and was hired by the DOJ component nearly two years later.

OPR's inquiry revealed that after the DOJ attorney joined the DOJ component, he was assigned to the prosecution team. The DOJ attorney advised the component that the defendant had previously explored the possibility of having his former law firm represent him and discussed the matter with the DOJ component's ethics officer. Because the DOJ attorney recalled having only minimal, non-substantive contact with the defendant, the ethics officer advised that the prior contact did not require his recusal from the prosecution. After the DOJ attorney filed an appearance, his former partner contacted the DOJ attorney and advised him that his recollection of the extent of his prior contact with the defendant was possibly erroneous. The DOJ attorney immediately brought this information to the DOJ component's attention, and he was removed from the prosecution.

OPR concluded that the DOJ attorney did not violate state bar rules because he did not use or reveal information that might have been significantly harmful to the defendant. In addition, OPR found that the DOJ attorney provided the DOJ component with his best recollection of the prior meeting with the defendant, so that an informed decision could be made with regard to his joining the prosecution team. OPR concluded, however, that the DOJ component failed to fully analyze whether an appearance of a conflict of interest existed under

these facts. OPR closed its inquiry and referred the component's ethics officer's performance to the component for whatever management action it deemed appropriate.

Immigration Judge – Bias, Appearance of Partiality. A Department component advised OPR that an appellate panel had remanded a removal case for consideration of the allegation that an Immigration Judge (IJ) allowed the government to determine the case's outcome when, prior to ruling, the IJ allegedly told counsel for both parties that he would rule for petitioner if the government agreed not to appeal an adverse decision. The appellate panel did not make a finding that the IJ breached a rule of professional conduct. OPR initiated an inquiry to determine whether the IJ made the statement and, if so, whether he had done so in violation of his obligation to decide cases based upon the evidence presented.

The IJ had denied the petition, ruling that the petitioner failed to establish that an exceptional or extremely unusual hardship would result if the petitioner were removed. On appeal, the petitioner challenged the IJ's off-the-record statement to counsel for both parties that he would grant the petition if the government waived its appeal rights, but if not, the petition would be denied. During OPR's inquiry, the IJ explained that while the petitioner failed to meet the exceptional and extremely unusual hardship standard, the evidence presented was of a sympathetic nature. Therefore, before ruling, the IJ wanted to determine whether the government was willing to exercise its prosecutorial discretion not to seek an appeal if the petition were granted. The IJ explained to OPR that he employed the type of shorthand communication that occurs routinely among experienced immigration counsel, but that the shorthand nature of his comments allowed for the misinterpretation that he was abdicating his responsibility to decide the case.

OPR found no evidence that the IJ purposefully, knowingly, or recklessly violated any rule of professional conduct in this case. OPR likewise found no evidence that the IJ abdicated his judicial responsibility to decide the case. Instead, OPR concluded that the IJ's off-the-record communication with the parties represented a performance issue that should be addressed in a management context. OPR closed its inquiry and referred its findings to the Department's Executive Office for Immigration Review.

Whistleblower – Retaliation for Protected Disclosure. An FBI employee alleged that three supervisors retaliated against him for calling first responders to report an issue. The employee alleged that the supervisors threatened to transfer him to a different duty station and report him to FBI-OPR. OPR conducted an inquiry and concluded that the employee had not made a protected disclosure within the meaning of the Department's regulations because he had not presented his allegations to one of the nine entities designated under the regulations to receive protected disclosures. Accordingly, OPR lacked jurisdiction to investigate the claim of reprisal.

Failure to Comply with Court Order or Federal Rule; Lateness – Missed Deadlines. A DOJ attorney notified OPR that he had missed two filing deadlines in a case, leading the court to enter two show cause orders directing the government to explain why it had failed to meet the court's deadlines. OPR conducted an inquiry and determined that the DOJ attorney failed to timely file a response to the defendant's post-conviction petition because the DOJ attorney required information from the defendant's previous defense attorney and encountered delays in

obtaining the information. Although the DOJ attorney exhibited poor performance by failing to act more diligently to obtain the required information, or to request an extension of time before the deadline for responding to the petition, the DOJ attorney did request an extension of time after the deadline to respond, which the court ultimately granted. OPR found no evidence that the DOJ attorney purposefully or recklessly ignored the deadline, and found that the DOJ attorney's component should address the missed deadline in a management context.

The DOJ attorney also failed to file proposed findings of fact and conclusions of law following an evidentiary hearing in the case. Although a written order of the court originally set the deadline for various filings, including the proposed findings, the court amended that order during the hearing and in a subsequent written order. Based on the newly-issued orders, the DOJ attorney believed he was to consult with defense counsel and the court before filing the proposed findings, but the court disagreed, holding that the court's original scheduling still governed and that the DOJ attorney had missed the filing deadline. Upon its review of the record, OPR found that the DOJ attorney's interpretation of the court's rulings, while mistaken, was not unreasonable under the circumstances, and that the DOJ attorney had made a good faith effort to comply with the court's orders as he understood them. Accordingly, OPR closed its inquiry.

Whistleblower – Retaliation for Protected Disclosure. An FBI employee alleged that he suffered retaliation after complaining to his supervisor, another employee, and his Unit Chief that a co-worker who was promoted to a higher-level position (for which he had also applied) did not meet the minimum qualifications for the position based on the job announcement. The employee alleged that his supervisor reported him to FBI-OPR for unprofessional conduct in retaliation for his complaint. While being investigated by FBI-OPR, the employee raised his concerns about the allegedly unfair promotion with FBI-OPR.

OPR conducted an inquiry and found that none of the individuals to whom the employee originally complained were among the nine entities designated by the Department's regulations to receive protected disclosures. Although FBI-OPR is one of the nine entities for receiving protected disclosures, the employee had already suffered the alleged retaliation at the time he made his disclosure to FBI-OPR. FBI-OPR found the supervisor's claim to be unsubstantiated, and the employee did not allege that he suffered any retaliation as a result of his protected disclosure to FBI-OPR. Accordingly, OPR lacked jurisdiction to investigate the claim of reprisal.

Improper Contact with Represented Party; Violation of DOJ Policy; Failure to Keep Client Reasonably Informed. A DOJ supervisor referred to OPR a criminal defense attorney's allegation that a DOJ attorney improperly authorized a cooperating witness to engage in a consensually recorded meeting with the defense attorney's client without the defense attorney's knowledge or consent. OPR conducted an inquiry into the allegation, and also considered the circumstances under which the DOJ attorney conferred transactional immunity on the cooperating witness.

OPR concluded that the consensually recorded meeting was not an improper contact with a represented party. No unambiguous obligation prohibits a prosecutor from arranging for a cooperating witness to engage in a consensually monitored meeting with a represented target,

when no charges are pending against the target and the target is not in custody. To the contrary, the weight of authority indicates that such investigative efforts are permissible.

With respect to the DOJ attorney's grant of transactional immunity to the cooperating witness, OPR determined that the DOJ attorney granted the immunity only after fully informing his supervisor and obtaining express approval. Moreover, OPR found that no then-existing Department or office policy contained any specific, conflicting provision regarding the circumstances under which transactional immunity could be conferred on a subject in a criminal investigation.

Finally, OPR considered whether the DOJ attorney complied with his duty to communicate with his supervisors when he changed the wording of the transactional immunity letter without seeking supervisory approval. OPR concluded that the changed wording was immaterial under the circumstances known to the DOJ attorney at the time, and that the DOJ attorney's conduct was therefore not objectively unreasonable. Accordingly, OPR closed its inquiry as there was no reasonable likelihood of a professional misconduct finding.

Failure to Make Witnesses Available. A magistrate judge recommended dismissing an indictment on the ground that the government failed to make four witnesses available to the defense before deporting them or allowing them to leave the country voluntarily. According to the defense, the witnesses possessed information material and favorable to the defendant.

OPR initiated an inquiry and determined that the DOJ attorneys' conduct did not warrant further investigation. Governing law dictated that before deporting a witness, the government had to make a good faith determination that the witness subject to deportation did not have material, favorable evidence that was not cumulative of evidence available to the defendant from other sources. Because OPR found that the DOJ attorneys assigned to the case reasonably considered the information given by the four witnesses to be favorable to the government, not the defense, and that the information provided by the four witnesses was cumulative of the information available from multiple other witnesses who possessed the same knowledge and whose contact information was provided to the defense in discovery, OPR determined that the DOJ attorneys' actions in permitting the deportation or voluntary departure of the four witnesses was unlikely to result in a finding that the DOJ attorneys engaged in professional misconduct. Accordingly, OPR closed its inquiry.

Failure to disclose impeachment information. Several DOJ attorneys self-reported to OPR that a federal judge had ordered a new trial on the ground that the government had failed to timely disclose to the defendants adverse information about a government witness. OPR initiated an inquiry.

After extensive factual and legal analysis, OPR concluded that further investigation was not likely to lead to a finding of professional misconduct against the DOJ attorneys. OPR found that the trial attorneys were not aware of the adverse information, and that DOJ attorney supervisors, who were aware of the adverse information, were not aware that the witness was going to testify at trial. After OPR closed its inquiry, the court of appeals reversed the trial court's order granting a new trial, finding that the adverse information was not material.

Extrajudicial comments. OPR received an allegation that a DOJ attorney had attempted to influence the outcome of a local election by making extrajudicial statements to the press and by manipulating the timing of certain actions taken by a DOJ component. OPR initiated an inquiry.

The DOJ component filed a criminal information against a defendant who agreed to cooperate in an ongoing public corruption investigation. The plea documents filed and read in court included information about the investigation, including other possible targets of the investigation. At a press conference, the DOJ attorney made reference to the pleadings and statements made in open court, and made statements indicating the investigation was ongoing. After extensive factual and legal research, OPR concluded that the DOJ attorney's statements and the timing of his actions were not intended to influence the outcome of the election, but were instead intended to, and did, serve important Department and public interests. His statements were based on the proceedings that had occurred in open court. Accordingly, OPR closed its inquiry as there was no reasonable likelihood of a professional misconduct finding.

Summaries of Investigations Closed in Fiscal Year 2014

The following are examples of investigations OPR closed during Fiscal Year 2014.

Failure to Honor Use Immunity Agreements. A district court held that in three successive grand jury presentations, the government improperly disclosed information obtained from two defendants during interviews with law enforcement officers that were protected from disclosure by use immunity agreements. The first two grand jury presentations were handled by a DOJ attorney who was substituting for the DOJ attorney who was assigned to the case. The third grand jury presentation was handled by the assigned DOJ attorney. The court dismissed the indictment against one defendant and prohibited the introduction of certain evidence at the trial of the other defendant.

OPR conducted an investigation and found that the substitute DOJ attorney did not engage in professional misconduct or exercise poor judgment at the first two grand jury presentations, but rather made excusable mistakes. The substitute DOJ attorney presented immunized information that was not identified as immunized information in the prosecution memorandum provided to him by the assigned DOJ attorney. OPR also found that the assigned DOJ attorney did not engage in professional misconduct or exercise poor judgment, but rather made excusable mistakes by failing to alert the substitute DOJ attorney to the existence of the immunized statements and by inadvertently eliciting immunized information at the third grand jury presentation. In addition, OPR found that an investigative agent employed by a DOJ component did not engage in professional misconduct or exercise poor judgment, but rather made excusable mistakes by including immunized information in the testimony he provided at the three grand jury presentations.

OPR referred its findings to the litigating component and to the law enforcement agency to handle in a management context.

Failure to Maintain Active Bar Membership; Unauthorized Practice of Law; Failure to Accurately Certify Bar Membership Status; Failure to Keep the Client Informed; Failure to Comply with DOJ Rules and Regulations; Misrepresentations to the Court. While verifying component attorney re-certifications, a DOJ component learned that for most of a calendar year, a DOJ attorney had been removed as a member of his state Bar, and was not authorized to practice law, because he failed to re-register and pay his annual registration fee. The component also learned that during the period the DOJ attorney was removed, while he was not authorized to practice law, the DOJ attorney filed pleadings in three district courts and signed a Department bar re-certification form inaccurately stating that he was an active member of the Bar and authorized to practice law when he was not. After being informed by his component of his removal from the Bar, the DOJ attorney re-registered with his Bar, paid the registration fee, and was reinstated.

OPR conducted an investigation and found that the DOJ attorney received two notices at his residence from the Bar about his failure to register, yet the DOJ attorney took no action. OPR found that after the Bar sent him a third notice, which informed him that he had been removed as an active lawyer and was not authorized to practice law, he logged on to the Bar's website but logged off without re-registering or paying his delinquent registration fee. OPR found that the DOJ attorney took no action to rectify the removal from the Bar until ten months later, when his component informed him that he had been removed and was not an active member of the Bar. OPR found that prior to executing the Department's bar re-certification form, an annual Department requirement certifying that he was an active member of at least one state bar, the DOJ attorney took no steps to verify that he was an active member of the Bar.

OPR concluded that because the DOJ attorney was removed from the Bar for most of a calendar year and did nothing to rectify his removal for ten months after the Bar notified him of the removal, he engaged in professional misconduct in intentional violation of his obligation pursuant to law and Department policy to at all times be authorized to practice law by maintaining an active bar membership in at least one state bar. OPR also concluded that the DOJ attorney engaged in professional misconduct in intentional violation of his obligation not to engage in the unauthorized practice of law. OPR also concluded that by inaccurately certifying on the Department's bar re-certification form that he was an active member of the Bar, the DOJ attorney engaged in professional misconduct in intentional violation of the obligation imposed by the Department to accurately certify his bar membership status. In addition, OPR concluded that the DOJ attorney engaged in professional misconduct in intentional violation of bar rules relating to candor to the court by sending letters to three district judges in which the DOJ attorney filed pleadings, disclosing the fact that his bar membership had lapsed but misrepresenting the reasons for the lapse.

Upon completion of its investigation, OPR referred the results of its investigation to the DOJ attorney's component for consideration of appropriate discipline. The component proposed discipline, which was referred to the Office of Attorney Recruitment and Management (OARM) for a discipline decision. OARM imposed a 30-day suspension without pay and authorized OPR to refer its findings to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

Failure to Comply with Discovery Obligations. OPR learned of an order in a civil case in which the district court found for the plaintiffs and awarded them compensatory damages. The plaintiffs filed a motion for attorneys' fees and costs, which was granted after the court found that DOJ attorneys had litigated in bad faith and had filed motions making baseless procedural arguments or specious privilege claims to delay or impede discovery. OPR initiated an investigation.

OPR was unable to conclude by a preponderance of the evidence that the DOJ attorneys committed professional misconduct or exercised poor judgment. In filing motions for protective orders seeking to prevent the disclosure of information and to contest the production of documents in discovery, the attorneys acted with the knowledge and at the direction of the federal agency who was speaking for the client. OPR found that Department attorneys historically had relied on the agency to process documents in complex civil cases such as this, and no one had challenged that reliance until after this case was concluded. Moreover, the DOJ attorneys provided agency counsel with guidance about compliance with the plaintiffs' document requests, and agency counsel supervised the production of documents. While not finding professional misconduct, OPR concluded that many of the court's criticisms of the government's conduct were warranted, and OPR suggested alternative courses of action Department attorneys should consider in the future when faced with similar circumstances.

Violations of the Jencks Act and Fed. R. Crim. P. 16. OPR investigated the alleged professional misconduct of a DOJ attorney who, as he prepared for trial, learned from an agent that: (1) a recording of the agent's undercover conversation with a cooperating witness either had been destroyed or had been given to another investigative agency; and (2) the agent participated in a previously unreported conversation with the defendant. Upon learning of these conversations and the recording, the DOJ attorney sent a letter to defense counsel disclosing the agent's previously unreported conversation with the defendant, but did not disclose until the agent testified at trial that a conversation was recorded or that the missing recording may have been destroyed. During the agent's cross-examination at trial, his testimony revealed that the recording was missing, and the government subsequently moved to voluntarily dismiss the charges against the defendant based in part on the DOJ attorney's failure to disclose that the recording was missing.

OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligations under the Jencks Act, 18 U.S.C. § 3500, Federal Rule of Criminal Procedure 16, and the district court's local rule, by failing to disclose to the defense that the agent had recorded a telephone conversation with the cooperating witness and that the recording was missing. Rather than making an immediate disclosure, the Department attorney sought additional information about what had happened to the missing recordings, but failed to make any further disclosures to the defense.

OPR referred its findings to the PMRU for consideration of possible discipline. The DOJ attorney retired soon after OPR issued its report, and the PMRU did not have the opportunity to consider or impose discipline. The Department did not refer the matter to bar disciplinary authorities because OPR did not find a violation of a state bar rule.

Failure to Honor Use Immunity Agreement; Misrepresentations to the Court. OPR investigated a DOJ attorney for eliciting testimony at trial about statements made by the defendant during a pretrial interview "proffer session," in violation of a letter agreement between the government and the defendant prohibiting the government from using the statements at trial during its case-in-chief. After the trial, the defense filed motions for a new trial and for judgment of acquittal, asserting in both motions that the government's use of the defendant's immunized statements violated the terms of the letter agreement. The court granted the motion for a new trial, and the defendant later pleaded guilty.

OPR concluded that the DOJ attorney violated the terms of the letter agreement by eliciting testimony about immunized statements made by the defendant during the proffer session, and that he acted in reckless disregard of his obligations under the Due Process Clause and state bar rules prohibiting an attorney from alluding at trial to matters not supported by admissible evidence. In addition, in responding to the defendant's post-trial motions, the DOJ attorney made baseless and unfounded factual and legal arguments in an attempt to persuade the court to sustain the conviction. OPR determined that the attorney committed intentional professional misconduct by violating his duty of candor to the court, by making false statements to a tribunal, and by engaging in conduct involving misrepresentation.

OPR referred its findings to the PMRU for consideration of possible discipline. The PMRU upheld OPR's findings of professional misconduct, suspended the DOJ attorney without pay for seven days, and authorized OPR to refer its findings to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

Lack of Candor to the Court. In an order, the district court suggested that a DOJ attorney had been less than candid with the court relating to the attorney's effort to qualify a law enforcement officer as an expert witness. The defense moved *in limine* for an order precluding the agent's purported expert testimony. At a hearing, the agent gave ambiguous testimony as to whether he previously testified as an expert in another case handled by the DOJ attorney. In response to questions by the court, the agent testified that although he believed he had been qualified as an expert previously, he deferred to the DOJ attorney, who offered no additional information to the court. In a subsequent order, the court noted that the agent had not, in fact, been qualified as an expert in the other case and that the DOJ attorney had made no attempt to correct the agent's testimony at the hearing.

During OPR's investigation, the DOJ attorney plausibly explained that during the hearing, his attention drifted to another issue, and he did not respond to the agent's testimony because he did not hear the testimony. OPR concluded that the attorney failed to clarify the agent's testimony because he did not hear the colloquy between the judge and the agent, and that he did not disregard his duty of candor to the court. Although the DOJ attorney did not engage in professional misconduct in violation of his duty of candor to the court, OPR found that he exercised poor judgment by failing to listen to the court's questions of his own purported expert witness at the hearing. OPR referred its findings to the DOJ attorney's litigating component for consideration in a management context.

Unauthorized Disclosure of Sensitive Criminal Investigative Information; Lack of Candor to an Investigating Agency. OPR initiated an investigation into allegations that a DOJ attorney may have disclosed information concerning the existence of an ongoing federal criminal investigation and a court-authorized wiretap to his spouse, who in turn provided the information to a target of the investigation. The DOJ attorney left federal service prior to the completion of OPR's investigation.

OPR concluded that the former DOJ attorney was the source of the confidential information that his spouse disclosed to a target of the investigation. OPR concluded that in disclosing the information, the DOJ attorney committed intentional professional misconduct by purposely revealing confidential information relating to his client, the United States, without approval or consultation, in violation of a state bar rule. OPR also concluded that the former DOJ attorney committed professional misconduct by using client information that damaged his client's interests, in reckless disregard of his obligation under a state bar rule. In addition, OPR concluded that the former DOJ attorney committed intentional professional misconduct by not providing truthful answers in a sworn affidavit that he submitted to an investigating agency, and by dissembling about what he did, in violation of a state bar rule. Finally, OPR concluded that by disclosing confidential information to his spouse, the DOJ attorney engaged in conduct prejudicial to the administration of justice, in reckless disregard of his duty under a state bar rule, because his disclosure compromised court-approved wiretaps and led to the premature conclusion of a federal criminal investigation.

OPR referred its findings to the PMRU for a determination as to whether OPR's findings should be referred to state bar disciplinary authorities. The PMRU upheld OPR's findings of professional misconduct and authorized OPR to refer the conduct of the former DOJ attorney to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

Failure to Disclose Exculpatory Evidence; Candor to the Court; Misrepresentation; Conflict of Interest; Vindictive Prosecution; Failure to Diligently and Competently Represent the Interests of the Client. A DOJ component informed OPR that a DOJ attorney may have: (1) failed to disclose to the defense the death of a government witness (despite a court order requiring the production of all exculpatory material); (2) filed an unauthorized motion to continue a sentencing hearing; (3) misrepresented (in a motion to continue) that an individual was an essential witness in another pending case; and (4) failed to charge an essential government witness with additional drug charges.

Thereafter, the DOJ component provided OPR with additional allegations of alleged misconduct by the DOJ attorney. Upon review of material provided by the component, OPR determined that the additional allegations were either administrative in nature or lacked sufficient detail to warrant an OPR investigation. OPR referred those allegations back to the DOJ component for resolution in a management context.

Following a review of internal memoranda concerning each of the original allegations of misconduct, court documents, law enforcement reports, and the DOJ attorney's written response to the allegations, OPR closed its investigation because the conduct at issue, in the unique circumstances presented, did not warrant a professional misconduct finding. OPR determined

that the DOJ attorney did not violate the court's order or engage in misconduct by failing to disclose the death of a potential government witness. OPR concluded that the DOJ attorney was authorized to file the continuance motion, and the evidence OPR uncovered did not sufficiently establish that he: (1) purposefully failed to charge the individual with additional drug violations; (2) was solely responsible for the probation office's failure to include such information in its presentence report; or (3) lacked candor when describing an individual as an essential witness.

Failure to Maintain Active Membership in a State Bar; Failure to Accurately Certify Bar Membership Status; Unauthorized Practice of Law. A DOJ component informed OPR that a DOJ attorney had not been an active member of any state bar during his service to the Department and that the attorney signed the Department Attorney's Bar Re-Certification forms stating that he was an active bar member, when he was not.

OPR conducted an investigation and found that until 2006, the DOJ attorney was in compliance with state bar rules that allowed inactive bar members to practice law in other jurisdictions. The state bar rules, however, changed in 2006.

Based upon its investigation, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligations imposed by Department policy, statute, and bar rules when he: (1) failed to be authorized to practice law by maintaining an active bar membership in at least one state bar from 2007 to 2012; (2) repeatedly and inaccurately certified on the Department's bar certification forms that he was an active member of the state bar; and (3) engaged in the unauthorized practice of law from 2007 to 2012. OPR referred its misconduct findings to the PMRU, which concluded that the DOJ attorney did not engage in misconduct. Rather, the PMRU concluded that although the facts in the matter presented a "razor-close question" as to the attorney's culpability, the DOJ attorney exercised extremely poor judgment by failing to maintain an active state bar license from 2007 to 2012. The DOJ attorney retired prior to the completion of OPR's investigation.

Whistleblower – Retaliation for Protected Disclosure. An FBI employee alleged that his performance appraisal was downgraded, and that he was removed from his position and transferred to a different duty station in retaliation for his protected disclosures concerning two separate issues. OPR opened an inquiry, which was subsequently converted to an investigation.

Based upon its investigation, OPR concluded that the FBI employee's allegation concerning a possible violation of Department regulations was a protected disclosure. OPR found that the employee's disclosure concerning a second issue was not a protected disclosure because his allegations reflected a policy disagreement, rather than the FBI employee's reasonable belief that his supervisors violated a law, rule, or regulation, or had engaged in mismanagement or an abuse of authority. With respect to the employee's claims of retaliation, OPR concluded that the supervisors' criticisms of the FBI employee's work contained in the performance appraisal, and on which the removal and transfer were based, pre-dated his disclosures and that there was no evidence that the employee's supervisors were aware of his disclosures when his performance appraisal was drafted or when the supervisors made the decision to conduct an in-depth review of the office that the FBI employee managed. OPR further concluded that there was clear and convincing evidence that even in the absence of the employee's disclosures, the employee would have been removed from his position and

transferred to another duty station. Accordingly, OPR closed its investigation concluding that while the FBI employee made a protected disclosure, there was insufficient evidence to establish that the FBI retaliated against him as a result of the protected disclosure.

Prejudicial Statements to Grand Jury; Unprofessional Statements or Conduct. Prior to trial, a district court, in denying a motion to dismiss, found that a DOJ attorney had: (1) improperly questioned two witnesses before the grand jury; (2) given the grand jury his personal opinions about the witnesses' grand jury testimony rather than allowing the grand jurors to reach their own conclusions; and (3) threatened defense counsel. Given these findings, the court stated that after the trial's conclusion, it would consider whether sanctions should be imposed. No sanctions were imposed by the court. OPR was informed of the court's ruling by the DOJ component and conducted an investigation.

Based upon its investigation, OPR concluded that there was no evidence that the DOJ attorney's comments affected the grand jury, as neither of the grand jury witnesses who were the subjects of the court's findings testified before the grand jury that returned the indictment. Rather, their testimony had been provided to a previous grand jury. OPR further concluded that a number of the DOJ attorney's comments had been taken out of context. To the extent the DOJ attorney admonished grand jury witnesses about the consequences of lying to a federal grand jury, his comments were brief and addressed the witnesses' admitted misrepresentations during their testimony before the grand jury. Accordingly, OPR concluded that the DOJ attorney did not intentionally violate or act in reckless disregard of any established rule concerning the questioning of grand jury witnesses.

OPR also found no evidence that the DOJ attorney intended to threaten defense counsel. The first incident arose when the DOJ attorney informed defense counsel that his client had filed a falsified affidavit in a civil case in which defense counsel had acted as the defendant's lawyer. The second incident occurred several years later, was very brief, and took place very late in the evening after the DOJ attorney had been traveling for two days. Because the two incidents occurred over a span of several years, and were isolated in nature, OPR concluded that these incidents did not reflect a pervasive pattern of misconduct that gave rise to a violation of the rules of professional conduct. OPR referred its findings to the DOJ attorney's component to address in a management context.

Constitutional or Civil Rights Violations; Improper Coercion/Intimidation of a Witness. A district court dismissed with prejudice an indictment, finding that the government violated the defendant's Fifth Amendment right to conduct a defense and Sixth Amendment right to compulsory process of witnesses. The court's decision was predicated, in part, on two post-indictment communications issued by a DOJ component prohibiting its employees from speaking with the defendant or defense counsel without obtaining prior management approval. The court found that while the first communication could be viewed as a mistake, the second communication, which threatened disciplinary action if an employee failed to comply, adversely affected the defense and violated the defendant's constitutional rights.

OPR investigated the matter and concluded that neither of the DOJ attorneys who participated in sending the communications engaged in professional misconduct or exercised poor judgment. OPR's investigation revealed that the second communication, about which the

court was especially critical, was issued by the DOJ component's non-attorney supervisory personnel without the prior knowledge or approval of either of the DOJ attorneys involved in drafting the first communication. OPR concluded that the component's first communication to its employees did not unequivocally instruct employees not to cooperate with the defense, but rather it provided a way for employees to cooperate with defense counsel while at the same time ensuring that the component's sensitive law enforcement information was protected. Moreover, the DOJ attorneys subsequently notified component employees that the limitations on contact with defense counsel applied only during the employees' duty hours. Finally, OPR found no evidence that the DOJ attorneys intended to limit the defendant's ability to investigate the charges against him, or to obtain witnesses to testify on his behalf. Accordingly, OPR closed its investigation concluding that the DOJ attorneys had acted appropriately.

Failure to Honor Plea Agreement. A DOJ attorney reported to OPR that an appellate court found that the DOJ attorney had breached a plea agreement when he advocated for a particular sentence when the plea agreement specified that the government would take no position concerning the specific sentence within the applicable U.S. Sentencing Guidelines range the court should impose. The court of appeals also criticized the government for not unequivocally admitting its breach of the plea agreement in its appellate brief. The court of appeals, however, upheld the sentence, finding that the defendant's rights were not compromised.

OPR conducted an investigation and determined that the DOJ attorney's advocacy for a particular sentence was consistent with the stipulation, understanding, and expectations of the parties when they entered into the plea agreement and was not objected to by the defense at the time of sentencing. Instead, the Guidelines calculation agreed upon by the parties differed from that determined by the probation office, and the DOJ attorney's advocacy would have been appropriate had this change not occurred. Furthermore, the "take no position" provision in the plea agreement was a standard provision, and not one negotiated by the parties. OPR concluded that while a violation of the plea agreement was a serious mistake, the DOJ attorney's breach of the plea agreement was not intentional or reckless professional misconduct.

On appeal, the government argued that the defendant was unable to demonstrate "plain error" even were there a violation of the plea agreement. OPR found that this was not an incorrect or unreasonable position, and the government's brief contained no misstatement of law or facts. Indeed, the court agreed with the government's analysis and upheld the defendant's sentence. OPR noted that it would have been better for the government to acknowledge in its brief the breach of the plea agreement; however, OPR determined that this did not warrant a finding of professional misconduct or poor judgment.

Failure to Maintain Active Membership in a State Bar; Lack of Candor to OPR; Unauthorized Practice of Law. In November 2012, a DOJ attorney notified OPR that his state bar membership had been suspended for failure to pay bar dues. The attorney subsequently paid his dues and completed continuing legal education (CLE) requirements and regained active bar membership status.

OPR conducted an investigation and learned that the DOJ attorney's bar membership had been suspended in April 2012 and remained suspended until December 2012. OPR also learned

that the DOJ attorney's bar membership had been suspended on two prior occasions while he was employed by the Department. The DOJ attorney continued to handle litigation in federal and state courts on behalf of the United States during the periods when his bar license was suspended.

During its investigation, OPR also became aware of the DOJ attorney's lack of candor with the Department regarding the circumstances of his 2012 suspension from the Bar. The DOJ attorney needed to obtain a certificate of good standing from the Bar in order to apply for admission to a federal court so he could handle a particular case. OPR learned that the DOJ attorney told his supervisor that he had requested a certificate of good standing from the Bar, when he had not. The DOJ attorney knew at the time he made this representation that his license had been suspended, but failed to apprise his supervisor of that fact and misled his supervisor into believing that he was waiting for the Bar to issue him a certificate of good standing. The DOJ attorney also provided inaccurate information to his supervisor, as well as to the Professional Responsibility Advisory Office (PRAO) and OPR, regarding the timing of his 2012 suspension and when he became aware of it.

Based on the results of its investigation, OPR concluded that the DOJ attorney: (1) committed intentional professional misconduct by violating his Department and statutory obligations to be authorized to practice law by maintaining an active membership in at least one state bar; (2) committed intentional professional misconduct by violating his Department and statutory obligations to be authorized to practice law by maintaining an active membership in at least one state bar when he knowingly failed to comply with his CLE requirements; (3) committed intentional professional misconduct when he knowingly engaged in the unauthorized practice of law while his license was suspended from April 2012 until November 2012; and (4) committed intentional professional misconduct by engaging in conduct that was dishonest and deceitful when he purposely misrepresented to his supervisor in April 2012 that he was waiting for a certificate of good standing from the Bar; failed to apprise his supervisor that his license had been suspended; and was not candid and forthright in his communications with his supervisors, PRAO, and OPR regarding the circumstances of his Bar suspension.

OPR referred its misconduct findings to the DOJ attorney's component, which issued a proposal for discipline and referred the matter to OARM. OARM imposed a suspension of 60 days without pay, which the DOJ attorney has appealed to the Merit Systems Protection Board.

Misrepresentation/Misleading the Court; Discovery – Civil. A DOJ component reported to OPR that a U.S. Magistrate Judge had imposed a monetary sanction on the government because a DOJ attorney failed to timely and adequately respond to discovery requests. The court noted that the DOJ attorney had not sought a protective order or an extension of time to respond to the discovery requests, but found no evidence of bad faith.

OPR conducted an investigation and concluded that the DOJ attorney committed intentional professional misconduct when he failed to comply with his clear and unambiguous obligation to produce discovery in a timely fashion. Specifically, the DOJ attorney knowingly failed to timely respond to a request for production of documents under Federal Rule of Civil Procedure 34; purposefully failed to timely answer three sets of interrogatories served on the

government pursuant to Federal Rule of Civil Procedure 33; and knowingly failed to comply with the court's order directing him to respond to the interrogatories within 30 days. OPR further concluded that the DOJ attorney committed intentional professional misconduct by violating his duty of candor to the court, and by engaging in conduct that involved dishonesty, deceit or misrepresentation when he falsely told the court that he had not stalled civil discovery and attempted to convince the court that the discovery delays were due to the complexity of the case, the volume of evidence, and the technical difficulties accessing electronic files. Instead, OPR found that none of these claimed justifications had merit or were credible. Instead, OPR found by a preponderance of the evidence that the DOJ attorney's true purpose was to obtain a better settlement for the government and to avoid his civil discovery obligations.

OPR referred its misconduct findings to the PMRU. The PMRU adopted OPR's findings and conclusions. Although the DOJ attorney retired during the pendency of OPR's investigation, the PMRU directed OPR to notify the DOJ attorney's state bar disciplinary authority of its misconduct findings, and OPR has done so.

Misrepresentation/Misleading the Court; Failure to Comply with Plea Agreement Policies. A federal law enforcement agency notified OPR that a DOJ attorney filed a pleading accusing a law enforcement agent of committing serious misconduct during the prosecution of a series of cases. The DOJ attorney subsequently self-reported allegations that the pleading he filed was false and misleading. OPR opened an investigation, which it conducted jointly with the internal affairs office of the law enforcement agency.

OPR conducted an extensive investigation, reviewing voluminous documents and e-mails and conducting more than 25 interviews. Based on its investigation, OPR concluded that the DOJ attorney committed intentional professional misconduct in violation of his duty of candor to the court when he: (1) stated falsely that a defendant was not present at an assault because the defendant had an alibi based on credible witnesses; (2) knowingly failed to inform the court about the government's evidence implicating the defendant in the assault, information that the court specifically requested and needed in order to determine the defendant's sentence; and (3) falsely informed the court that a co-defendant had represented that the defendant was not present at the assault. OPR further concluded that the DOJ attorney violated his duty of candor to the court when he alleged at a sentencing hearing and in his sentencing memorandum that the law enforcement agent had committed misconduct during the prosecution and had been sanctioned for the misconduct. OPR concluded that none of the allegations the DOJ attorney made about the law enforcement agent had merit and that the agent acted appropriately during the prosecution.

In addition, OPR concluded that the DOJ attorney engaged in reckless professional misconduct when he modified the defendant's plea agreement without supervisory approval, misrepresented the agreement to the court, and misled defense counsel regarding the government's sentencing recommendation.

OPR referred its professional misconduct findings to the PMRU; however, the DOJ attorney retired after receiving OPR's draft report. The PMRU adopted OPR's findings and conclusions, and directed OPR to notify the DOJ attorney's state bar disciplinary authority of OPR's misconduct findings, and OPR has done so.

Extrajudicial comments. A DOJ attorney reported to OPR that he had posted comments on a newspaper's website related to an ongoing federal trial. The DOJ attorney was not a member of the prosecution team, but had assisted in reviewing documents related to the case. In his online comments, the DOJ attorney encouraged other online commenters to post their observations about the proceedings and provided factual information about the case that had previously been made public.

OPR conducted an investigation and concluded that the DOJ attorney violated Department and federal rules prohibiting Department attorneys from making extrajudicial statements about a pending matter. OPR found that the DOJ attorney did not act intentionally or recklessly and therefore did not commit professional misconduct, but that he exercised poor judgment in posting the inappropriate and ill-advised online comments about a pending case in which he had some involvement. OPR further concluded that the DOJ attorney did not violate rules that prohibit extrajudicial statements reasonably or substantially likely to influence or materially prejudice an adjudicative proceeding, or which disparage the defendants, opine on their guilt, or are substantially likely to heighten public condemnation of the accused. Instead, OPR concluded that the DOJ attorney exercised poor judgment.

OPR referred its poor judgment finding to the DOJ attorney's component for possible discipline and to address in a management context.

Misrepresentation/Misleading the Court; Discovery – Impeachment/Jencks; Improper Closing or Rebuttal Argument; Subornation of Perjury/Failure to Correct False Testimony. OPR received allegations that a U.S. District Judge had criticized the conduct of three DOJ attorneys and two case agents. The court vacated the convictions of two individuals and a corporation, and dismissed with prejudice the indictment in which they were charged. Specifically, the court found that the DOJ attorneys: (1) permitted a case agent to testify untruthfully before the grand jury; (2) inserted materially false statements into affidavits supporting search and seizure warrants; (3) violated the attorney-client privilege by reviewing protected e-mails; (4) failed to comply with the government's discovery obligations; (5) violated the court's rulings during the questioning of trial witnesses; (6) made inappropriate remarks during closing argument; and (7) made misrepresentations to the court. In addition to its misconduct findings against the DOJ attorneys, the court also concluded that one of the case agents repeatedly testified falsely before the grand jury and that two agents signed affidavits containing false statements.

OPR conducted an investigation and concluded that the DOJ attorneys and law enforcement agents did not commit professional misconduct by intentionally or recklessly violating Department, ethical, or statutory rules or regulations. OPR found no evidence that the DOJ attorneys or agents purposefully or knowingly violated court orders, concealed evidence, or presented false testimony, or otherwise intentionally or recklessly violated the defendants' right to a fair trial. OPR's investigation did reveal instances of poor judgment, as well as numerous mistakes by most members of the trial team. OPR observed that one DOJ attorney in particular repeatedly failed to exercise appropriate care in discharging his responsibilities, which undermined the government's credibility with the court.

In particular, OPR found no evidence that a case agent knowingly or recklessly testified falsely before the grand jury or that the DOJ attorneys knowingly or recklessly allowed him to do so. OPR concluded that the agent made mistakes during his testimony because he did not understand some of the evidence on which his testimony was based. With respect to other instances identified by the court as the agent's false testimony, OPR concluded that the testimony, while not sufficiently precise, was not false or misleading.

OPR also concluded that a DOJ attorney made a mistake when he added inaccurate language to an affidavit that had been drafted by, and was subsequently reviewed by, the case agents. OPR also concluded that two other DOJ attorneys and one case agent made mistakes by failing to thoroughly review the affidavit after the first DOJ attorney requested that they do so. OPR found that the two case agents exercised poor judgment when, after they each identified and corrected inaccurate statements in an affidavit, they failed to ensure that subsequent affidavits did not contain, or incorporate by reference, those inaccurate statements.

OPR also concluded that the government did not violate the attorney-client or marital communications privilege by reviewing a defendant's prison communications because those communications were not privileged. Moreover, even if the defendant's communications with his attorney were privileged, OPR found no evidence that anyone on the prosecution's trial team actually read them.

OPR found that the DOJ attorneys did not violate their *Brady* obligations, but did violate the court's orders to produce particular transcripts, as well as their obligations pursuant to the Jencks Act and Federal Rules of Criminal Procedure, when they failed to produce all four transcripts of a case agent's grand jury testimony during trial. The DOJ attorney responsible for producing grand jury transcripts initially produced two transcripts because he believed the third transcript contained only attorneys' comments and not witness testimony, and he had misplaced and forgotten about the fourth transcript. When the DOJ attorney later realized that the third grand jury transcript did contain the case agent's testimony (before the agent testified at trial), the DOJ attorney produced it. The DOJ attorney discovered the fourth transcript after the trial ended, and produced it at that time. OPR found that the DOJ attorneys did not violate their *Brady* obligations because the fourth grand jury transcript did not contain exculpatory information and, even if it had, the same information was contained in the other transcripts that were provided to the defense during trial. OPR concluded that the DOJ attorney who was responsible for producing grand jury transcripts did not purposefully or intentionally withhold those materials, but he did exercise poor judgment when he failed to verify that the third transcript did not contain witness testimony and failed to check available records to confirm that his productions were complete.

OPR referred its findings to the appropriate DOJ components for possible discipline and to address in a management context.

Abuse of Prosecutive or Investigative Authority; Abuse of Authority or Misuse of Official Position; Violation of DOJ Policy. A DOJ supervisor referred to OPR allegations that a DOJ attorney: (1) abused his official position by initiating and pursuing a grand jury investigation against a private citizen who had filed a civil suit against a purported friend of his, a federal law enforcement agent; (2) abused his official position by disparaging the honesty and competence of

a police detective who provided testimony favorable to the same private citizen in state criminal and federal civil proceedings, and by stating that future cases involving the detective would not be accepted for federal prosecution; (3) coerced drug defendants into waiving their rights to a detention hearing by threatening to file a notice of sentencing enhancement against any defendant with a prior qualifying conviction who contested the prosecution's detention request; and (4) may have violated the Department's "*Petite* Policy" by obtaining the federal indictment of a defendant who had been previously acquitted of a related state offense, without first seeking a waiver as required by U.S. Attorneys' Manual § 9-2.031.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct. OPR found that, during the pendency of the grand jury investigation, the DOJ attorney and the federal law enforcement agent had no relationship, let alone one close enough to create a conflict of interest. On the contrary, the evidence indicated that the two had not even met one another at the time. OPR further found that the grand jury investigation was presented and assigned to the DOJ attorney in the ordinary course of business, that there were substantial facts to support the charges contemplated, that the DOJ attorney pursued the investigation in the same manner he pursued his other investigations, and that the federal law enforcement agent had no direct influence or significant input into the decision to open the investigation. OPR further concluded that the DOJ attorney's comments regarding a police detective's credibility and competence had a legitimate purpose directly related to the DOJ attorney's specific duties; and his comments were not inaccurate, unfair, or improperly disparaging.

With respect to the allegation that the DOJ attorney had coerced defendants into waving their right to pretrial release, OPR concluded that the DOJ attorney did not engage in professional misconduct by using 21 U.S.C. § 851 notices of sentencing enhancement as an inducement for recidivist drug defendants to waive their right to seek pretrial release. OPR's investigation determined that the DOJ attorney made no secret of his use of the enhancement notices, and that his supervisors were fully aware of the practice and either expressly or tacitly approved it. Under such circumstances, OPR concluded that the DOJ attorney did not violate a clear and unambiguous policy or rule prohibiting the practice.

Finally, although OPR concluded that the DOJ attorney appeared to violate the *Petite* Policy, he informed two of his supervisors of the defendant's prior acquittal on factually-related state charges, and neither supervisor raised the potential *Petite* Policy issue as a bar to federal prosecution. In any event, because a retroactive waiver was later obtained, which is expressly contemplated and allowed by the *Petite* Policy, there was no violation of Department policy.

Accordingly, OPR closed its investigation concluding that the allegations of professional misconduct were unsubstantiated.

Misrepresentation to the Court and Opposing Counsel. A court of appeals reversed the defendant's drug trafficking convictions and criticized a DOJ attorney who prosecuted the case for misleading the trial court and defense counsel. At a pretrial suppression hearing, the DOJ attorney told the court and defense counsel that he did not intend to rely at trial on any statement made by the defendant. At the time the DOJ attorney made that representation, he was referring to the specific statement that was the subject of the suppression hearing. Two weeks after the

hearing, however, on the eve of trial, the DOJ attorney learned for the first time of a different statement made by the defendant that was not recorded. Because it was his understanding that the defendant made that statement spontaneously and not in response to questioning, the DOJ attorney did not disclose it to the defense.

At the trial, the DOJ attorney referred to the undisclosed statement during his opening statement and elicited testimony, over objection, about the undisclosed statement during the government's case-in-chief. In reversing the defendant's convictions, the court of appeals held that, in light of the DOJ attorney's representations to the trial court and defense counsel, his use of the statement was improper and undermined the defendant's due process rights. OPR conducted an investigation.

Based on its investigation, OPR concluded that the DOJ attorney did not intentionally mislead the court or defense counsel, or act in reckless disregard of his professional obligation not to make misleading statements. OPR found that the attorney's representation at the suppression hearing only concerned the statement that was the subject of the hearing and could not have encompassed the defendant's other statement, because the DOJ attorney was unaware of the other statement at the time of the suppression hearing.

In addition, OPR was unable to find by a preponderance of the evidence that the DOJ attorney intended for the representation he made at the trial to apply to the defendant's undisclosed statement. OPR's investigation revealed that the DOJ attorney genuinely believed, albeit wrongly, that the undisclosed remark did not constitute a "statement" for disclosure purposes because the defendant made the remark spontaneously and not in response to questioning, and that, in any event, Rule 16 did not mandate disclosure of the remark. Although the attorney was plainly confused in his understanding of the term "statement" and, as a result, failed to recognize that the undisclosed remark was in fact a statement as that term is used and understood in common parlance, OPR was unable to find by a preponderance of the evidence that the attorney intended to be deceitful at the trial.

Although OPR concluded that the DOJ attorney did not engage in professional misconduct in this matter, OPR nevertheless concluded that he exercised poor judgment by failing to promptly disclose the statement in question once he learned of it and decided to use the statement at the trial. OPR found that the attorney should have been cognizant that use of the undisclosed statement at the trial would be objectionable in light of the representation he made at the suppression hearing, and he should have realized that it would have been prudent to disclose the statement as soon as he decided to use it, irrespective of whether disclosure was mandated by Rule 16. Under the circumstances, OPR concluded that the attorney's failure to inform the defense of the statement before trial was in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. OPR's poor judgment finding was referred to the DOJ attorney's component to address in a management context.

Failure to Disclose Exculpatory Evidence. A court of appeals vacated the defendants' convictions, finding that the government committed a *Brady* violation in connection with both the first trial, which resulted in a mistrial, and the second trial, which resulted in a conviction, by failing to disclose to the defense transcripts of depositions taken during a parallel investigation by a federal agency. OPR conducted an investigation.

Based on the results of its investigation, OPR concluded that none of the DOJ attorneys on the first or second trial teams engaged in professional misconduct or exercised poor judgment. OPR found that neither the first nor the second trial team knew that the transcripts had not been disclosed. OPR's investigation revealed that the first trial team intended to disclose the transcripts in accordance with the component's broad discovery policy and believed that the transcripts had been disclosed along with all of the other investigative materials prior to the first trial. OPR found several indications that the DOJ attorneys believed that the transcripts had been disclosed: the government presented testimony about the depositions and introduced excerpts from the deposition transcripts as exhibits at trial; the government made explicit references to the transcripts in a pretrial discovery letter; and electronic copies of the transcripts had been saved on the component's shared computer drive used for discovery. With regard to the second trial team, OPR found that the DOJ attorneys reasonably believed that the transcripts had been disclosed based on the first team's representations that discovery had been completed and that nothing had been withheld, except for privileged and work product materials. OPR found that there was no reason for the second trial team to question the voluminous and extensive discovery produced by the first trial team, and the second trial team had no reason to believe that the transcripts had not in fact been previously produced.

Accordingly, OPR closed its investigation concluding that the DOJ attorneys had not engaged in professional misconduct.

Extrajudicial Comments. A DOJ attorney (DOJ Attorney #1) self-reported to OPR that he had made anonymous comments on a website about pending investigations and federal judges. The matter arose when a civil lawsuit was filed to determine who had made the comments. The DOJ attorney resigned shortly thereafter. OPR distributed a survey to all attorneys in the component inquiring about their general knowledge of the postings, as well as their knowledge or suspicions about the DOJ attorneys' online activities. Based on information obtained from the surveys and other sources, OPR conducted numerous interviews of current and former DOJ attorneys.

Some months later, a second civil lawsuit was filed to determine who had made other anonymous comments on a website about pending matters. Another DOJ attorney (DOJ Attorney #2) acknowledged making those comments and resigned shortly thereafter.

OPR expanded its investigation to include those allegations, as well as allegations that DOJ Attorney #2 had a conflict of interest when he continued to participate in litigation concerning DOJ Attorney #1's online comments, and that he violated his duty of candor to the court and to OPR.

Based on the results of its investigation, OPR concluded that:

(1) DOJ Attorneys #1 and #2 committed intentional professional misconduct by publicly disseminating extrajudicial statements regarding active investigations and pending cases in violation of their obligations as set forth in 28 C.F.R. § 50.2, *et seq.*; the U.S. Attorneys' Manual § 1-7.000, *et seq.*; the Local Criminal Rules of the U.S. District Court; and office policies;

(2) DOJ Attorneys #1 and #2 committed professional misconduct in violation of the rules of professional conduct by making statements regarding the integrity or qualifications of judges or candidates for judicial office that they knew were false, or with reckless disregard as to the truth or falsity of the statements;

(3) DOJ Attorney #2 committed intentional professional misconduct in violation of the rules of professional conduct by failing to fully inform his supervisors about his Internet postings so that the Department could make informed decisions about whether and to what extent he should be involved in matters relating to DOJ Attorney #1's online postings;

(4) DOJ Attorney #2 committed intentional professional misconduct in violation of the rules of professional conduct by continuing to represent his client, the United States, in matters in which he had a direct, personal conflict of interest without obtaining the written consent of his client;

(5) DOJ Attorney #2 committed intentional professional misconduct in violation of the rules of professional conduct when he made misrepresentations to, or withheld material information from, federal district judges and senior Department officials. That conduct was prejudicial to the administration of justice;

(6) DOJ Attorneys #1 and #2 engaged in conduct that was detrimental to the interests of the Department by making inappropriate and offensive comments on the Internet;

(7) The evidence was insufficient to establish by a preponderance of the evidence that any supervisors of DOJ Attorneys #1 or #2 were aware contemporaneously of their anonymous postings;

(8) The evidence was insufficient to establish by a preponderance of the evidence that DOJ attorneys who may have suspected that DOJ Attorney #1 might be engaged in online posting activity intentionally or recklessly violated a clear and unambiguous duty to report that information to supervisors or to the state bar authorities; and

(9) OPR found no evidence establishing that any DOJ employee besides DOJ Attorneys #1 and #2 violated Department, court, or ethical rules prohibiting the posting of online comments concerning active Department investigations or pending cases.

The Office of the Deputy Attorney General upheld OPR's findings and conclusions concerning DOJ Attorneys #1 and 2, and OPR notified the appropriate state bar disciplinary authorities of its findings.

Extrajudicial comments. A DOJ attorney self-reported to OPR that he had made anonymous comments on a website about local (non-federal) judges. OPR initiated an investigation.

Based upon its investigation, OPR concluded that the DOJ attorney violated the rules of professional conduct by posting one disparaging comment about a local judge that he made with reckless disregard for its truth or falsity. OPR also concluded, however, that the single violation was a *de minimis* violation, as it was an isolated occurrence that resulted in little or no harm and

did not concern or affect pending cases. Therefore, OPR concluded that the DOJ attorney's conduct did not constitute professional misconduct requiring a referral to the applicable bar disciplinary authority. OPR concluded, however, that the DOJ attorney exercised poor judgment when he criticized state court judges, using overbroad and exaggerated language, in an online forum without consideration of his ethical obligations as an attorney or his responsibilities as a Department employee. OPR referred its poor judgment finding to the component for possible disciplinary action and to consider in a management context.

Failure to Comply with a Court Order; Failure to Comply with Discovery Obligations. In a death penalty eligible case, a district court criticized a DOJ attorney for failing to comply with the court's order to produce discovery relating to a key government witness so that the defendants could make use of that information in a mitigation presentation to the Attorney General's Review Committee on Capital Cases. As a sanction for the DOJ attorney's failure, the court granted the defense's motion to bar the government from seeking the death penalty. OPR initiated an investigation.

The defendants sought to obtain extensive discovery concerning a cooperating witness. Following a series of motions and hearings on the issue, the court ordered the government to produce "the materials sought" by the defendants, without specifying those materials. The DOJ attorney interpreted the court's order narrowly and produced the witness' statements related to the commission of the offense but withheld a report summarizing the witness' first proffer session, in which the witness did not discuss the crime but explained his reasons for cooperating. The DOJ attorney also produced to the defense redacted transcripts of the witness' grand jury testimony. At a hearing held five days after the deadline set by the court's order, the court ordered the DOJ attorney to immediately produce the unredacted materials and the withheld report, and he did so. The court reviewed these materials at the hearing and shared them with the defendants. The court thereafter issued an order barring the government from seeking the death penalty.

Based on the results of its investigation, OPR concluded that the DOJ attorney did not knowingly disobey the court's discovery order or improperly withhold from the defense *Brady* or other discoverable information relating to the cooperating witness. OPR found that the order did not clearly and unambiguously require the government to produce each and every statement that the witness had made to investigators. The court's order was at least arguably unclear, and the DOJ attorney apparently made a good faith effort to comply with his own narrow interpretation of the court's order. OPR was unable to conclude by a preponderance of the evidence that the DOJ attorney engaged in intentional or reckless professional misconduct.

Nevertheless, OPR concluded that the DOJ attorney failed to exercise good judgment when he adopted a narrow interpretation of the court's discovery order without seeking advice from his supervisors or clarification from the court, particularly in light of the court's earlier warnings that failure to comply with court orders would result in sanctions. OPR referred its findings to the DOJ attorney's component to address in a management context.

Failure to Communicate with the Client; Failure to Keep the Client Reasonably Informed. A DOJ component reported to OPR that a DOJ attorney had developed a personal relationship with, and knowingly withheld potentially discoverable information about, a former

confidential source who was likely to testify in a case that the DOJ attorney's colleagues were preparing for trial. OPR initiated an investigation.

Years earlier, the DOJ attorney prosecuted a complex multi-defendant case in which the confidential source testified for the government. One of the defendants in that case disappeared before trial. By the time the fugitive defendant was apprehended and returned to the jurisdiction, the DOJ attorney had been re-assigned, and a new team began to prepare the case for trial. In the following months, the DOJ attorney transferred his files to the new trial team, and he responded to their occasional inquiries about witnesses and evidence. The DOJ attorney also continued to receive electronic notices from the court regarding developments in the case.

Approximately one year after the fugitive's arrest, the new trial team interviewed the confidential source for the first time. During the course of that interview, the source revealed that he had remained in regular contact with the DOJ attorney and had sent him audio tapes that discussed the confidential source's role in the case. In addition, the confidential source advised the trial team that the DOJ attorney had made a phone call on his behalf to law enforcement officers in another jurisdiction after the confidential source was arrested there. Although the confidential source believed that the judge was informed of his cooperation, he did not think that he received a reduced sentence as a result.

Prior to the trial team's interview of the confidential source, the DOJ attorney had not revealed to his colleagues anything about the confidential source's audio recordings. When confronted by his supervisors, the DOJ attorney admitted that he had remained in regular contact with the confidential source, and that he had made phone calls on his behalf. The DOJ attorney also acknowledged that he knew about the confidential source's audio tapes, stored them in his office, and never mentioned the tapes or his efforts on the confidential source's behalf until he was confronted by his supervisors about the issue.

Based on the results of its investigation, OPR concluded that the DOJ attorney committed intentional professional misconduct by deliberately withholding information and potentially discoverable material from the trial team, in violation of his obligations to communicate with his client, the United States, and to keep his client reasonably informed, and thereby impeded the trial team's ability to make informed and timely decisions in the case on behalf of the United States.

OPR referred its findings to the PMRU and the DOJ attorney's component. Because the DOJ attorney retired from the Department before the conclusion of OPR's investigation, the Department was unable to take any disciplinary action in this matter. The PMRU, however, upheld OPR's findings and authorized OPR to refer this matter to the state bar disciplinary authorities, and OPR subsequently did so.

Conclusion

During Fiscal Year 2014, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in

numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of several foreign countries to discuss issues of prosecutorial ethics. OPR's activities in Fiscal Year 2014 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.