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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2018**

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

**Fiscal Year 2018 Annual Report**

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## *Message from the Director and Chief Counsel*

I proudly submit this 43rd Annual Report to the Attorney General on behalf of the U.S. Department of Justice Office of Professional Responsibility (OPR). The Report covers the activities of OPR during Fiscal Year 2018 (October 1, 2017 through September 30, 2018).

OPR is a nonpartisan internal watchdog that helps ensure accountability by investigating allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. OPR reviews and investigates allegations with competence and independence, based solely on the facts and applicable standards, without bias or favoritism.

I, along with my colleagues at OPR, firmly believe that fair, impartial, and competent accountability within the Department of Justice is critical to its mission and the Rule of Law. Department attorneys are privileged to represent the United States and wield enormous power, but that power carries the obligation to adhere to the high professional standards expected of the nation's principal law enforcement agency.

This report highlights some of OPR's work during Fiscal Year 2018, including instances in which Department attorneys failed to adhere to the high standards expected of them. Although any instance of professional misconduct is troubling, the vast majority of Department attorneys conducted themselves with the utmost integrity and professionalism throughout the year.

The information contained in this report is necessarily limited due to significant restrictions imposed by the federal Privacy Act and other legal and policy considerations. Additional information about OPR's transparency and its independence can be found on OPR's recently revamped website ([www.justice.gov/opr](http://www.justice.gov/opr)). The recent changes to the website are designed to improve accessibility and significantly increase the amount of publicly available information about OPR and its important mission. I encourage anyone having questions about OPR to visit our website, particularly its Frequently Asked Questions section.

OPR also provides training and education to Department attorneys; handles claims of whistleblower retaliation by FBI personnel; reviews allegations against non-Department attorneys and members of the judiciary and makes referrals to disciplinary authorities when appropriate; and handles special projects at the request of the Attorney General and Deputy Attorney General.

In September 2018, I became only the fourth permanent head of OPR. I am grateful for the dedicated service of my predecessor, Robin Ashton, and honored to lead an office of talented, experienced career attorneys and staff who are dedicated to the mission of the Department and to ensuring that Department attorneys adhere to the high professional standards expected of them. With little fanfare, the OPR attorneys and staff demonstrate a commitment to the ideals of the Department each and every day. Fiscal Year 2018 was no exception.

*Corey R. Amundson*  
*Director and Chief Counsel*

## *Section I: Overview of OPR*

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

OPR is primarily responsible for handling allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. Other OPR responsibilities include training and educating Department attorneys; handling claims of whistleblower retaliation by FBI personnel; reviewing allegations against non-Department attorneys and members of the judiciary and making referrals to disciplinary authorities when appropriate; representing the Department with external stakeholders; and handling special projects at the request of the Attorney General and Deputy Attorney General.

Our jurisdiction includes handling professional misconduct allegations relating to the actions of immigration judges and members of the Board of Immigration Appeals. OPR also has jurisdiction to investigate allegations of misconduct against DOJ law enforcement personnel that are related to allegations of attorney misconduct within OPR's jurisdiction. In addition, OPR may investigate other matters when requested or authorized to do so by the Attorney General or the Deputy Attorney General.

Misconduct allegations investigated by OPR include criminal and civil discovery violations; improper conduct before a grand jury; improper coercion, intimidation, or questioning of witnesses; improper introduction of evidence; lack of candor or misrepresentations to the court and/or opposing counsel; improper opening statements and closing arguments; failure to competently and diligently represent the interests of the government; failure to comply with court orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors informed of significant developments in a case; and the improper exercise of prosecutorial discretion. In addition, OPR reviews criminal cases in which courts have awarded attorney's fees to defendants based on findings that the government's conduct was frivolous, vexatious, or in bad faith.

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

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

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

In all cases where misconduct may have occurred, OPR conducts a thorough investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). Interviews of subject attorneys are conducted by OPR attorneys and are transcribed by a court reporter. The subject is given an opportunity to review the draft report, and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations and to provide complete and candid information to OPR. Employees who fail or refuse to cooperate with OPR investigations, after being given warnings concerning the use of their statements, may be subject to formal discipline, including removal from federal service.

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

OPR reports the results of its investigations to the Office of the Deputy Attorney General and, when appropriate, to other components in the Department, including the litigating divisions, U.S. Attorney's Offices, and the Executive Office for U.S. Attorneys (EOUSA). OPR also notifies management officials of any trends or policy issues that require attention.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (the PMRU), which is responsible for reviewing OPR's findings of professional misconduct against DOJ attorneys. The head of the PMRU reports to the Deputy Attorney General. Initially, the PMRU had jurisdiction over only Criminal Division attorneys and Assistant U.S. Attorneys. In Fiscal Year 2015, the PMRU's jurisdiction was expanded to include nearly all Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional

misconduct, and determines whether those findings are supported by the evidence and all applicable laws, rules, and regulations.<sup>1</sup> The PMRU also determines the appropriate level of discipline to be imposed.

Once a disciplinary action becomes final, OPR notifies the appropriate state bar disciplinary authorities of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under its jurisdiction) or the Office of the Deputy Attorney General. OPR reports findings of intentional professional misconduct, as well as findings of reckless disregard of a professional obligation or standard to state bar disciplinary authorities. OPR does not make a bar notification when the conduct involves internal Department policies that do not implicate a bar rule. In addition, OPR reviews reports issued by the Office of the Inspector General (OIG) to determine whether bar disciplinary authorities should be notified of any misconduct findings against Department attorneys.

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

## Section II: *Overview of Misconduct Allegations*

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

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

In Fiscal Year 2018, OPR received 742 complaints, 264 of which, or 36%, were from inmates. Many complaints related to matters that did not fall within OPR's jurisdiction, while others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 33 complaints warranted further review, and opened inquiries in those matters. OPR opened 26 matters as investigations.<sup>2</sup>

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

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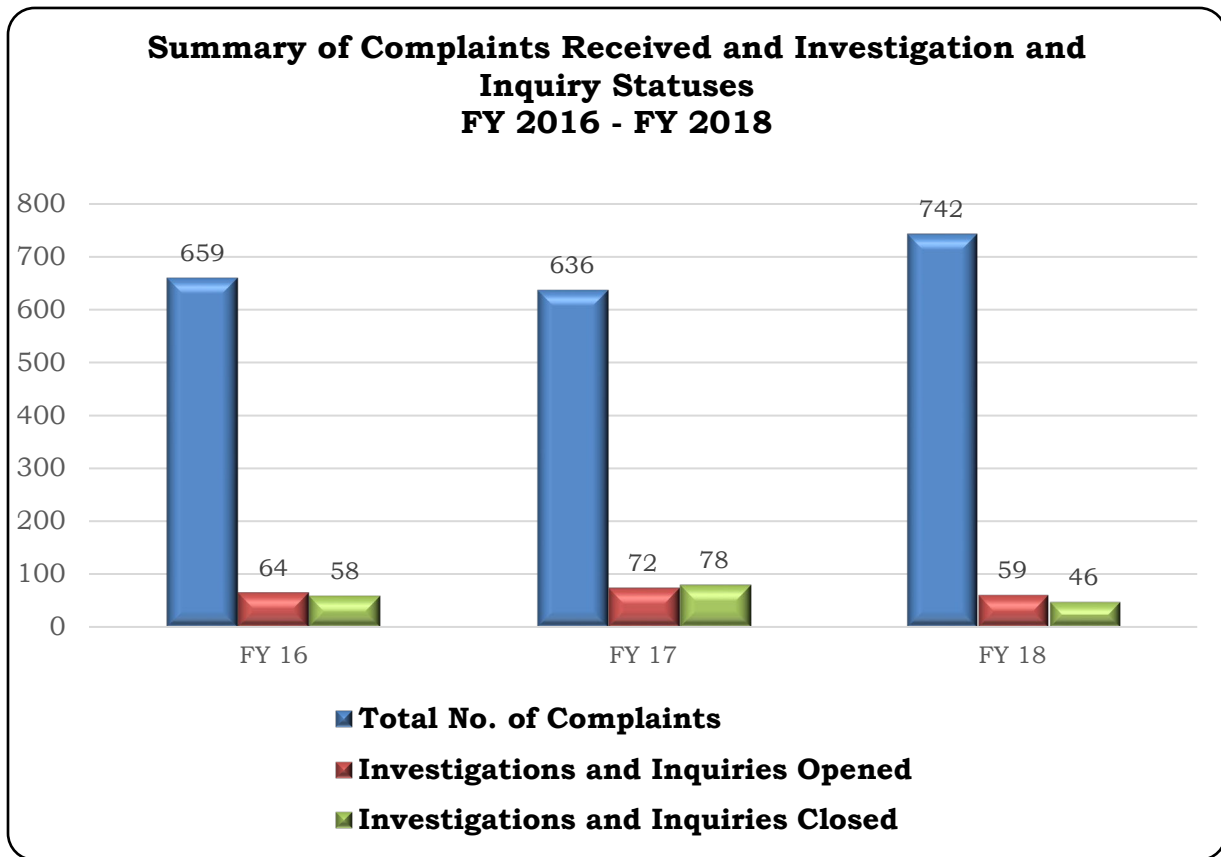
<sup>1</sup> OPR's findings of poor judgment or mistake are referred to Department component heads, EOUSA, and U.S. Attorneys, for appropriate action.

<sup>2</sup> Some of the complaints that were opened as inquiries or later were converted to an investigation may have been received by OPR prior to Fiscal Year 2018.

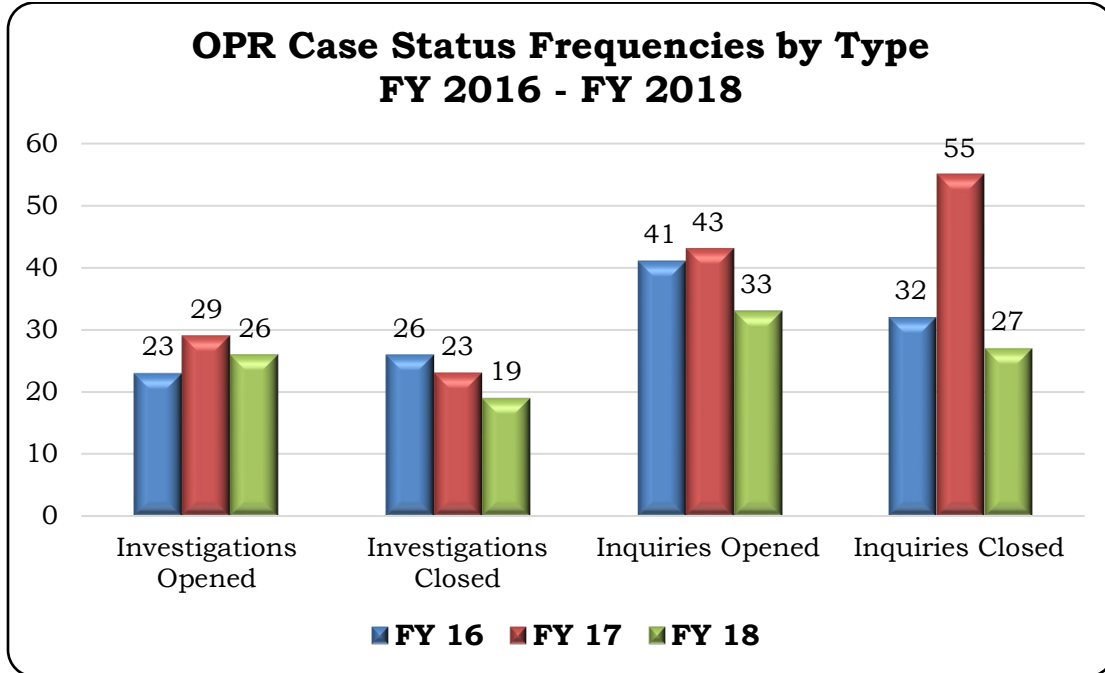
**B. Misconduct Investigations and Inquiries by Fiscal Year**

In Fiscal Year 2018, OPR received 742 complaints, which represents a 17% increase from Fiscal Year 2017. Graphs 1 and 2 provide comparisons over the last three fiscal years of the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, of the 742 complaints OPR received, 59 were opened as investigations or inquiries. In that same time period, OPR closed 46 investigations and inquiries. As reflected in Graph 2, in Fiscal Year 2018, OPR opened 33 inquiries and closed 27, and opened 26 investigations and closed 19.

**Graph 1**

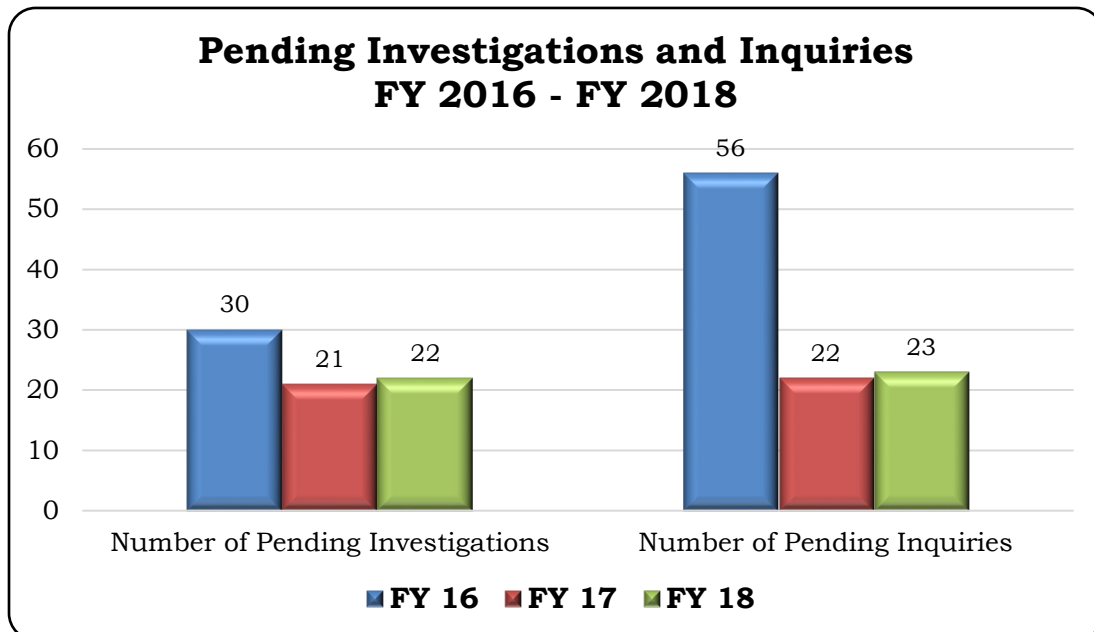


**Graph 2**



Because of the complexity of many of the matters received by OPR, many investigations and inquiries remain under review at the close of the fiscal year, and the outcome of those matters are reported in the fiscal year they are closed. At the end of Fiscal Year 2018, there were 22 pending investigations and 23 pending inquiries. Graph 3 compares the number of inquiries and investigations pending at the end of each of the last three fiscal years.

**Graph 3**





**C. Inquiries Opened in Fiscal Year 2018**

The sources of the complaints for the 33 inquiries opened in Fiscal Year 2018 are set forth in Table 1.<sup>3</sup>

**Table 1**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2018</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>4</sup>	8	24.2%
Department components, including self-reports (unrelated to judicial findings of misconduct)	15	45.5%
Private attorneys	4	12.1%
Private parties	4	12.1%
Other agencies	2	6.1%
<b>Total</b>	<b>33</b>	<b>100%</b>

The types of allegations in these inquiries are set forth in Table 2. Because some inquiries included more than one allegation, the total number of allegations exceeds 33.

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<sup>3</sup> OPR evaluates all misconduct allegations against non-DOJ attorneys by Department employees to determine whether the Department should make a referral to a state bar disciplinary authority. The 33 matters referred to above do not include matters involving proposed bar notifications relating to non-DOJ attorneys.

<sup>4</sup> This category includes self-reports by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 2**

<b>Types of Professional Misconduct Allegations in Inquiries Opened in FY 2018</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Abuse of authority, including abuse of prosecutorial discretion	13	27.0%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	16.6%
Misrepresentation to the court and/or opposing counsel	4	8.3%
Conflict of interest	4	8.3%
Interference with defendant's rights	4	8.3%
Improper remarks to a grand jury, during trial, or in pleadings	2	4.2%
Missed deadlines	2	4.2%
Failure to comply with DOJ rules and regulations	2	4.2%
Failure to comply with federal law	2	4.2%
Failure to maintain active bar membership	2	4.2%
Failure to keep client informed	1	2.1%
Unauthorized leaks or disclosures	1	2.1%
Failure to competently or diligently represent the client's interests	1	2.1%
FBI whistleblower complaints	1	2.1%
Failure to comply with court orders and federal rules	1	2.1%
<b>Total</b>	<b>48</b>	<b>100%</b>

#### D. Inquiries Closed in Fiscal Year 2018

OPR closed 27 inquiries in Fiscal Year 2018 involving allegations against Department attorneys.<sup>5</sup> These matters involved 46 separate allegations of professional misconduct. OPR may designate more than one DOJ attorney as the subject of an inquiry, and many matters involved multiple allegations. The manner in which the 46 allegations were resolved in Fiscal Year 2018 is set forth in Table 3.<sup>6</sup>

**Table 3**

<b>Categories of Inquiry Allegations Resolved in FY 2018</b>		
<b>Types of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Occurrences</b>
Further investigation not likely to result in finding of professional misconduct	20	43.5%
No merit to matter based on review of allegation	15	32.6%
Performance or management matter; referred to component	6	13.0%
No merit to allegation based on preliminary inquiry	3	6.5%
Other	2	4.4%
<b>Total</b>	<b>46</b>	<b>100%</b>

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<sup>5</sup> OPR closed an additional 88 inquiries involving the alleged misconduct of non-DOJ attorneys.

<sup>6</sup> When an inquiry is converted to an investigation, the initial inquiry is not closed and is not included in these statistics. In Fiscal Year 2018, 19 inquiries were converted to investigations.

**E. Investigations Opened in Fiscal Year 2018**

Table 4 identifies the sources for the 26 investigations that OPR opened in Fiscal Year 2018.

**Table 4**

<b>Sources of Complaints Against Department Attorneys for Investigations Opened in FY 2018</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>7</sup>	10	38.5%
Department components, including self-reports (unrelated to judicial findings of misconduct)	9	34.6%
Other agencies	4	15.4%
Private attorneys	3	11.5%
<b>Total</b>	<b>26</b>	<b>100%</b>

Some of these investigations involved multiple subjects. In addition, because many investigations involved multiple professional misconduct allegations, there were 61 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

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<sup>7</sup> This category includes self-reports by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 5**

Types of Professional Misconduct Allegations in Investigations Opened in FY 2018		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	14	23.0%
Improper remarks to a grand jury, during trial, or in pleadings	13	21.3%
Misrepresentation to the court and/or opposing counsel	9	14.8%
Abuse of authority, including abuse of prosecutorial discretion	8	13.1%
Misconduct allegations involving Immigration Judges	4	6.5%
Interference with defendant’s rights	3	4.9%
Failure to maintain an active bar membership	3	4.9%
Failure to keep client informed	2	3.3%
Conflict of interest	2	3.3%
Failure to comply with court orders and federal rules	2	3.3%
Failure to comply with DOJ rules and regulations	1	1.6%
<b>Total</b>	<b>61</b>	<b>100%</b>

**F. Investigations Closed in Fiscal Year 2018**

OPR closed 19 investigations in Fiscal Year 2018, some of which involved more than one attorney. OPR found professional misconduct in 11, or 58%, of the 19 investigations it closed in FY 2018. Four of these 11 investigations involved at least one finding of intentional professional misconduct by a Department attorney.<sup>8</sup> In 8 of the 11 matters in which OPR found professional

<sup>8</sup> OPR finds intentional professional misconduct when an attorney violated an obligation or standard by: (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (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.

misconduct, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>9</sup> (When several misconduct allegations have been made against a subject, OPR may resolve one allegation by concluding that the subject engaged in intentional misconduct, and resolve another allegation against the same subject by concluding that he acted recklessly.)

In Fiscal Year 2018, OPR made more professional misconduct findings than Fiscal Year 2017; 58% of cases closed in Fiscal Year 2018 resulted in professional misconduct findings, compared to 52% in Fiscal Year 2017. The 11 investigations closed with professional misconduct findings in Fiscal Year 2018 included 39 sustained allegations of misconduct. (Some investigations included more than one allegation of misconduct.) Table 6 below sets forth the 39 allegations sustained in those investigations.

**Table 6**

<b>Types of Professional Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2018</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Misrepresentation to the court and/or opposing counsel	11	28.2%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	20.5%
Failure to comply with DOJ rules and regulations	5	12.8%
Failure to keep client informed	4	10.3%
Failure to competently or diligently represent the client's interests	3	7.7%
Misconduct allegations involving immigration judges	3	7.7%
Improper remarks to a grand jury, during trial, or in pleadings	2	5.1%
Interference with defendant's rights	2	5.1%
Abuse of authority, including abuse of prosecutorial discretion	1	2.6%
<b>Total</b>	<b>39</b>	<b>100%</b>

<sup>9</sup> OPR finds that an attorney acted in reckless disregard of a professional obligation or standard when it concludes that the attorney: (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

OPR made professional misconduct findings against 14 DOJ attorneys in FY 2018. The PMRU issued final decisions with respect to 12 of those attorneys and sustained OPR's findings of professional misconduct against all but one attorney. Four of the attorneys resigned from the Department before discipline could be imposed by the PMRU. Of the remaining eight attorneys, three received suspensions, four received reprimands, and one had no discipline imposed. The PMRU authorized OPR to refer 5 of the 11 attorneys to state bar disciplinary authorities. OPR's misconduct findings against the other six attorneys either did not involve violations of bar disciplinary rules, or the PMRU determined that no bar referral was warranted.

OPR closed 19 investigations in FY 2018 with findings of professional misconduct in 11 cases. In five of the eight remaining investigations closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 19 investigations OPR closed in FY 2018, OPR made a finding of professional misconduct and/or poor judgment in 16 cases, or 84% of the investigations it closed. OPR refers its poor judgment findings to the Department attorney's component for further action, which may include disciplinary action or additional training.

### *Section III: Examples of Professional Misconduct Investigations Closed in FY 2018*

The following are examples of investigations OPR closed during Fiscal Year 2018. Findings of professional misconduct are subject to review by the Professional Misconduct Review Unit (PMRU) within the Office of the Deputy Attorney General. The PMRU also determines the appropriate sanction and whether the matter is referred to bar disciplinary authorities.<sup>10</sup> This report is limited to the actions taken by OPR. It does not include PMRU determinations concerning OPR findings, the appropriate sanctions, and bar referrals.

#### [Failure to Comply with Discovery, Failure to Inform Client, and Misrepresentations to the Court, Opposing Counsel, and OPR](#)

The investigation — which found intentional professional misconduct — focused on allegations that two Department attorneys may have been aware of, and failed to timely disclose to the defense, impeaching information concerning a former law enforcement officer who testified for the prosecution at trial in a criminal case. The component reported the allegation.

OPR expanded the initial scope of its investigation to consider whether the Department attorneys provided complete and truthful information to Department supervisory attorneys; whether the post-trial disclosures to the defense were adequate; whether the attorneys complied

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

with their duty of candor in pleadings filed in both the trial court and the court of appeals; and whether they attempted to obstruct OPR's investigation.

OPR concluded that the Department attorneys committed intentional professional misconduct: (1) by failing to inquire further about damaging information concerning a prosecution witness, and by failing to disclose the information, in violation of Department policy; (2) by falsely asserting to DOJ supervisory attorneys and to OPR that they were unaware of the information before trial; (3) by failing to disclose in post-trial disclosure letters and in a pleading filed in district court that they were aware before trial of the information regarding the witness; and (4) by knowingly allowing the government's brief containing false statements to be filed with a court of appeals, in violation of their duty of candor to the court. Moreover, OPR found insufficient evidence that the undisclosed evidence was material to the defendants' convictions and that the Department attorneys did not violate their obligation to disclose impeachment evidence to the defense.

#### [Failure to Inform Client, and Making Misrepresentations](#)

This investigation — which found intentional professional misconduct — focused on allegations that a Department attorney demonstrated a lack of candor in representations made to his supervisors and to the court regarding the status of discovery. OPR found that the attorney submitted multiple status reports to the court representing that a research project necessary to develop information significant to the litigation was underway, and that the project would be completed by a date certain, when the attorney knew, or should have known, that the project had not even begun. The attorney made similar misrepresentations to his supervisors. OPR concluded that the Department attorney engaged in intentional professional misconduct by repeatedly and purposefully misrepresenting the status of discovery to the court, the plaintiffs, and his supervisors.

#### [Immigration Judge Made Improper Remarks, Exhibited Bias, Appeared Partial, Failed to Follow Proper Procedures, and Displayed an Inappropriate Demeanor](#)

This investigation — which found intentional and reckless professional misconduct — focused on allegations that an Immigration Judge (IJ) engaged in misconduct during a hearing concerning a respondent's request for deferral of removal under the Convention against Torture. The Executive Office for Immigration Review (EOIR) reported the allegations.

The respondent's counsel alleged that the IJ called a recess after the respondent's testimony, and convened an off-the-record chambers conference, during which he referred to the respondent disparagingly and made other improper remarks indicating that he had already decided to reject the respondent's claim before hearing all the evidence. The IJ then reconvened the hearing and allegedly exhibited an "intemperate demeanor" during the testimony of the next two witness.

Finally, near the end of the hearing, the IJ allegedly violated the attorney work-product doctrine and attorney-client privilege when he instructed courtroom security officers to seize the notes of respondent's co-counsel. The IJ instructed government counsel to read them, and then labeled them as an exhibit. According to the respondent's counsel, the notes, which pertained to the ongoing proceedings, were privileged and confidential. Both parties objected to admitting the



notes in to evidence, but the IJ overruled them. Then, sometime after the hearing concluded, the IJ removed the notes from the record and returned them to the respondent's counsel.

OPR completed its investigation and made two findings of professional misconduct. OPR concluded that the IJ acted in reckless disregard of his obligations to comply with immigration court procedures, and to avoid actions creating an appearance of impropriety, when he conducted an off-the-record conference for the purpose of pressuring the respondent's counsel to dismiss the respondent's sole claim for relief. OPR also concluded that the IJ committed intentional professional misconduct when he reviewed and disclosed to opposing counsel the attorney work product of the respondent's two co-counsel.

#### [Failing to Comply with Discovery, Making Misrepresentations, and Failing to Comply with Department Policies, Rules, and Regulations](#)

This investigation — which found intentional professional misconduct — focused on allegations that a Department attorney failed to disclose that he had agreed with the attorney for a cooperating witness to file a downward departure motion pursuant to the Sentencing Guidelines in exchange for the witness' testimony against the defendant.

Based on the results of its investigation, OPR concluded that the attorney engaged in intentional professional misconduct by not producing the information to the defense prior to the trial. OPR also concluded that the Department attorney engaged in intentional professional misconduct in violation of his obligations of candor to the court by knowingly failing to correct the cooperating witness's testimony on cross-examination at trial that he had not been offered "anything," and by falsely representing in a court filing that all promises made to informants had been disclosed to the defense.

OPR concluded further that the attorney engaged in intentional professional misconduct when the attorney sent an e-mail to defense counsel representing that there was no cooperation agreement to disclose. Finally, OPR concluded that the attorney engaged in intentional professional misconduct in violation of his disclosure obligations by failing to inform the court at the cooperating witness' change of plea hearing of his e-mail to the cooperating witness' attorney, and by stating at the change of plea hearing that the cooperating witness did not have a cooperation agreement.

#### [Abuse of the Grand Jury and Indictment Process, and Making Prejudicial Statement to the Grand Jury](#)

This investigation — which found reckless professional misconduct — focused on allegations that a Department attorney engaged in professional misconduct before the grand jury by: (1) commenting improperly on the credibility of witnesses; (2) expressing his personal opinion about inferences and conclusions that should be drawn from the evidence; (3) asserting facts that had not been introduced in evidence; (4) threatening witnesses in order to coerce testimony that was favorable to the prosecution; and (5) eliciting testimony about irrelevant, inflammatory matters for the purpose of prejudicing the defense.

Based on the results of its investigation, OPR concluded that the Department attorney acted in reckless disregard of his professional obligations in violation of Department policy by engaging

in a pattern of improper conduct in the grand jury that included asking improper questions and making improper statements while examining witnesses. OPR found that the Department attorney's conduct before the grand jury created a substantial risk that he would infringe on the grand jury's independence; inflame the grand jury; or otherwise improperly influence the grand jurors in their evaluation of the case.

#### Failure to Comply with Discovery and Department Rules and Regulations

This investigation — which found reckless professional misconduct — focused on a district court ruling that the government violated its obligations under *Brady* by failing to timely disclose that the government's sole eyewitness lied under oath during the first trial.

At the first trial, the defense sought to undermine the eyewitness' credibility by cross-examining him about his alleged theft from his former employer, which allegedly led to his termination. The eyewitness denied the theft, and the defense was not permitted to present extrinsic evidence of the alleged theft.

Months later, on the eve of the eyewitness' testimony at the re-trial, the Department attorney disclosed to the defense that the eyewitness had admitted ten days earlier that he did, in fact, steal from his former employer. The defense sought a mistrial on the ground that the untimely disclosure violated *Brady* and irreparably prejudiced the defense. Rather than declare a mistrial, the court gave curative instructions that, among other things, informed the jury of the government's delayed disclosure and advised the jury that it could consider the government's failure to timely disclose favorable information during its deliberations. The eyewitness then testified, and the defense cross-examined him about the theft and perjury.

OPR concluded that the Department attorney's late disclosure of the eyewitness' admission did not violate the requirement to disclose exculpatory or impeaching information under *Brady* and *Giglio*. Because the court intervened and issued curative jury instructions, and the defense cross-examined the eyewitness using the admission, the Department attorney's untimely disclosure did not cause sufficient prejudice to the defense to constitute a *Brady/Giglio* violation.

Similarly, OPR concluded that the late disclosure did not violate the applicable rule of professional conduct, because it did not deprive the defense of the use of the eyewitness' admission. However, OPR concluded that the Department attorney's late disclosure showed a reckless disregard for his disclosure obligations under Department policy. The Department attorney was well aware of his disclosure obligations, and he knew or should have known that the eyewitness' admission was information favorable to the defense that should be promptly disclosed.

#### Failure to Comply with Discovery, Failure to Keep Client Informed, Failure to Competently Represent Client, and Failure to Diligently Represent Client

This investigation — which found reckless professional misconduct — focused on allegations that a Department attorney failed to disclose exculpatory information, which caused his office to move to dismiss the robbery convictions of two defendants. The component self-reported the matter.

In connection with a robbery trial, the Department attorney failed to disclose potentially exculpatory grand jury testimony that contradicted an eyewitnesses' account of the robbers' flight from the scene as well as the government's theory that an article of clothing, recovered at the scene of the arrest belonged to one of the robbers. During its investigation, OPR learned that the Department attorney's supervisors specifically directed him to disclose the testimony to the defense prior to the trial, and that the Department attorney did not inform his supervisors of two adverse *Brady* rulings that occurred during the trial.

OPR concluded that the Department attorney's repeated failure to follow his supervisors' direction to timely disclose exculpatory information comprised a pattern of neglect of his obligation to competently and diligently represent his client, the United States. OPR also concluded that by failing to follow his supervisors' direction to produce exculpatory information to the defense, the Department attorney acted in reckless disregard of his obligations under *Brady*, *Giglio*, Department policy, and the applicable rules of professional conduct.

#### Improper Rebuttal Argument

This investigation — which found reckless professional misconduct — focused on a district court's criticism of a rebuttal argument made by a Department attorney. During the rebuttal argument, the Department attorney made burden-shifting comments; gave his personal opinion on the merits of the case; and vouched for the credibility of a government witness. OPR concluded that the Department attorney acted in reckless disregard of his obligations not to offer his personal opinion on the credibility of the witnesses and the merits of the case. OPR also concluded that the Department attorney acted in reckless disregard of his obligations when he improperly invoked the integrity of the United States in arguing that the jury should find the defendants guilty of the charged crimes.

#### Failure to Competently Represent Client, and Lack of Candor to OPR

The investigation — which found reckless professional misconduct — focused on allegations that a Department attorney released attorney-client privileged information to a third party during the course of litigation, and attempted to conceal his actions from the client agency's attorneys.

OPR concluded that the attorney did not commit professional misconduct by disclosing the attorney-client privileged information, but that he exercised poor judgment by disclosing the information to a third party. However, OPR further concluded that by failing to timely inform the client agency that he had disclosed the information, he acted in reckless disregard of his duty to keep his client informed of the status of the matter. Finally, OPR concluded that the attorney acted in reckless disregard of his obligation to cooperate with OPR's investigation when he presented OPR with a factually incorrect account of the facts that, by a diligent review of his own records, he should have known was incorrect.

#### Failure to Comply with Discovery, and Interference with Defendant's Rights

The investigation — which found reckless professional misconduct — focused on allegations that eyewitness identifications elicited at trial by Department attorneys were tainted by impermissibly suggestive pretrial identification procedures.

The defendant, charged with armed bank robbery, was identified in a bank surveillance video by a relative, and his fingerprint was found on the demand note. At trial, two Department attorneys elicited in-court identifications of the defendant from two bank tellers who had been unable to identify the defendant from a photo array on the day after the robbery. On cross-examination, one teller testified that during a pretrial preparation meeting with the prosecutors, the tellers were shown still photographs of the robber from the bank surveillance video, and that the Department attorneys told them the defendant's name and advised them that he had been charged with the robbery. The other teller testified that she was taken into the courtroom during a pretrial hearing at which the defendant was present.

Defense counsel moved for a mistrial on the grounds that the in-court identifications were influenced by impermissibly suggestive pretrial identification procedures. The court, however, declined to grant a mistrial. In their closing arguments, the Department attorneys emphasized the fact that both bank tellers had identified the defendant as the robber. On appeal, the government conceded the pretrial identification procedures were improper, but argued that the error was harmless in light of the evidence against the defendant.

OPR found that the Department attorneys committed reckless professional misconduct when they engaged in a series of suggestive pretrial identification procedures that denied the defendant's right to a fair trial. OPR also found that the Department attorneys committed reckless professional misconduct when they elicited identification testimony during their direct examinations of the witnesses at trial, without disclosing to the defense the circumstances that led the witnesses to make their in-court identifications. The Department attorneys compounded the problem by emphasizing in their closing and rebuttal arguments the reliability of the witnesses' in-court identifications.

#### [Improper Closing and Rebuttal Arguments, and Improper Examination of a Witness](#)

This investigation — which found poor judgment — focused on allegations that two Department attorneys committed misconduct during closing and rebuttal argument. The component reported the allegation.

The district court found that the Department attorneys commented on the defendant's decision not to testify; vouched for the credibility of government witnesses; and mischaracterized the defense theory of the case. It also found that the government had improperly elicited testimony from the victim's therapist about the victim's credibility.

OPR concluded that both Department attorneys exhibited poor judgment by embellishing their closing and rebuttal arguments with hyperbolic comments that could have been understood as a mischaracterization of the defense case. OPR also concluded that one of the Department attorneys exercised poor judgment when he elicited opinion testimony from the victim's therapist based on his misunderstanding of a trial court ruling.

OPR found further that the Department attorney who delivered the rebuttal argument did not comment impermissibly on the defendant's right not to testify by telling the jury that there was no evidence or testimony that contradicted the victim's testimony. Considered in context, the Department attorney's remarks would not lead the jury to naturally and necessarily interpret them

to be a comment on the defendant's failure to testify. Finally, OPR concluded that neither Department attorney improperly vouched for the testimony of the government witnesses during closing or rebuttal argument by characterizing the government's evidence as "the truth," but found that their characterization of the evidence as "the truth" reflected poor judgment.

### Improper Introduction of Evidence

This investigation — which found poor judgment — focused on allegations that a Department attorney improperly elicited testimony from a law enforcement agent that he believed the defendant's initial denial of guilt when he interviewed him incident to his arrest was a "lie"; elicited testimony from a second law enforcement agent that he also did not believe the defendant's initial denial of guilt; and asked the defendant on cross-examination whether the first agent lied when he stated in his interview report that the defendant had admitted his guilt.

The Department attorney had not received any training regarding the prohibition against asking one witness to comment on another witness' credibility. In addition, the attorney did not have the benefit of meaningful guidance from the court, or from his more experienced co-counsel. The government confessed error on appeal, and the case was remanded to the district court and dismissed on the government's motion.

Based on the results of its investigation, OPR concluded that the Department attorney exercised poor judgment by having the first agent characterize the defendant's initial denials of guilt as "lies," and exercised poor judgment when he asked the defendant on cross-examination whether the first agent lied when he stated in his interview report that the defendant had admitted his guilt.

### Failure to Comply with Discovery, Making Misrepresentations, and Unauthorized Disclosure

This investigation — which found poor judgment — focused on allegations that Department attorneys failed to comply with discovery, misrepresented information, and made an unauthorized disclosure to a third party, all in connection with a violent crime prosecution.

Department attorneys prosecuted a case in which a defendant was convicted of murder and other crimes. At trial, a government witness testified that the defendant admitted to killing the victim. More than one year after the trial, the government obtained from law enforcement agencies not involved in the prosecution new information about the witness that was arguably inconsistent with his trial testimony. The government informed the court of the new information, and the court ordered the government to disclose the information to the defense.

The defense then moved for a new trial. The defense argued that the government either knew or should have known about the newly disclosed information before trial; that the prosecutors violated their discovery obligations by failing to timely disclose the information to the defense; and that the information demonstrated that certain aspects of the witness' trial testimony were false or misleading. The government initially opposed the new trial motion, but later withdrew its opposition, and the court granted the motion. Subsequently, the government moved to dismiss the charges against the defendant without prejudice, due in part to the newly discovered information. The court granted the motion.

OPR initiated an inquiry, which it later converted to an investigation. As OPR was gathering relevant investigative materials, a component of the Department informed OPR that a government witness who testified at a pretrial suppression hearing had previously informed the prosecutors he had provided false inculpatory information about the defendant to a reporter. The prosecutors allegedly failed to disclose that information to the defense prior to the suppression hearing and redacted the discovery material that they provided to the defense prior to the hearing to avoid making that disclosure. Additionally, while reviewing the relevant investigative materials, OPR discovered that a prosecutor had apparently made an unauthorized disclosure of confidential information to a third party.

Based on the results of its investigation, OPR concluded that the Department attorneys did not commit professional misconduct, and that the defense's allegations were unsubstantiated. OPR found that the law enforcement agencies that possessed the newly disclosed information were not part of the prosecution team, and the prosecutors were therefore not obligated to search for and disclose that information. OPR found that although the Department attorneys made a mistake by not disclosing impeachment material about a testifying government witness prior to a pretrial suppression hearing, at the time of the hearing, they had no clear and unambiguous obligation to make such disclosures. Finally, OPR found that a prosecutor demonstrated poor judgment by making an unauthorized disclosure of confidential information to a third party.

#### Improper Rebuttal Argument

This investigation — which found mistake — focused on an appellate court's criticism of a closing argument made by a Department attorney in a multi-defendant racketeering and narcotics trial.

Following a lengthy jury trial, the Department attorney gave an extended rebuttal closing argument, and referred to letters written by a defense witness that had been introduced into evidence and used in the government's cross-examination of the witness. The letters discussed various ways to intimidate witnesses and obstruct justice, and the Department attorney used the letters in his rebuttal closing argument to show that the defendants presented a false defense at the trial. The court of appeals criticized his argument, stating that there was no evidentiary basis for inferring that the defendants knew about the writings and that the argument cast aspersions on the defense attorneys.

OPR initiated an inquiry, which it later converted to an investigation. OPR concluded that the Department attorney did not knowingly or recklessly disregard his obligation not to make improper comments during his rebuttal closing argument. Rather, he explicitly advised the court and defense counsel that he intended to use the letters in his rebuttal, and the court indicated his use of the letters was not improper. OPR found, however, that the Department attorney made a mistake when he made extemporaneous comments about the defendants' attorneys that could be interpreted as disparaging defense counsel.

### Failure to Comply with Discovery

This investigation — which found mistake — focused on an appellate court’s decision to reverse the convictions of multiple defendants because of a failure to disclose certain discovery. OPR independently identified this matter as meriting examination.

The court of appeals found that the government failed to timely inform the defense of an agent’s conversation with a cooperating witness during the trial about the ongoing criminal activity of a second cooperating witness who had already testified. Although the agent told a Department attorney about the conversation shortly before the trial concluded, the Department attorney did not disclose the information to the defense. The court of appeals found that the information was improperly suppressed and that if it had been timely disclosed, it could have been used by the defense in cross-examining the second cooperator.

OPR initiated an inquiry, which it later converted to an investigation. OPR determined that the defense was aware of the information and had used it to attack the second cooperating witness’ credibility in closing argument. OPR concluded, however, that the Department attorney’s failure to immediately disclose to the defense the agent’s hallway conversation with the cooperating witness was a mistake. Finally, OPR determined that there was insufficient evidence to conclude that the Department attorney violated Department policy by failing to ask the cooperating witnesses, before the trial, about additional *Giglio* information.

### Failure to Comply with Discovery, Improper Rebuttal Argument, and Failure to Comply with Department Policy

This investigation — which found appropriate conduct — focused on an appellate court finding that a Department attorney violated its discovery obligations under *Brady*.

Approximately six weeks prior to trial, the Department attorney disclosed information to the defense that arguably could be used to suggest that a third party committed the charged crime. The defense sought to introduce the evidence at trial, but the district court found that the evidence did not satisfy the test for admissibility of third-party perpetrator evidence. The appellate court disagreed, finding that the evidence should have been admitted and reversed the conviction. The appellate court also held that, because the Department attorney learned about the favorable information several months prior to disclosing it to the defense, the delay in disclosing the information violated the government’s *Brady* obligations.

Based on the results of its investigation, OPR concluded that the Department attorney did not engage in professional misconduct. OPR found no evidence that the attorney intentionally withheld the information or acted in reckless disregard of his obligation to disclose it. The attorney took steps to compensate for the late disclosure, and the defense used the information that the attorney disclosed to develop a viable third-party perpetrator defense. The defense proffered the evidence to the trial court in support of its defense theory, and as the court of appeals observed, but for the trial court’s error in rejecting the proffer as insufficient, the defendant would have been able to present his third-party perpetrator evidence at the trial.

## *Section IV: Examples of Misconduct Inquiries Closed in FY 2018*

The following summaries are a representative sample of the inquiries closed by OPR in Fiscal Year 2018.

### Improper Contacts with Represented Party and Witness Intimidation

This matter came before OPR based on allegations made during a criminal prosecution that Department attorneys (1) offered to pay defense witnesses, who were physicians, for expert medical testimony on behalf of the government, and (2) caused the issuance of an administrative subpoena for call records related to a cell phone used by defense counsel. The component self-reported the allegations, prompting OPR to conduct an inquiry.

In connection with the litigation, the district court held a hearing to address the allegations. An attorney for the Department testified that he offered to pay the witnesses for legitimate expert testimony, not fact testimony, and that he did not intend to alter the witnesses' testimony about the facts. The evidence established that the Department attorney's offer to pay the witnesses to testify as experts for the government would not have changed the substance of their testimony. The district court concluded that the Department attorney's actions did not amount to misconduct, and that the defendant suffered no prejudice. Similarly, OPR found that the Department attorney did not appear to have violated any applicable statute or rule by proposing to retain the witnesses as government expert witnesses.

OPR also found that a law enforcement agency issued the administrative subpoena for the call records related to defense counsel's cell phone after learning from a grand jury witness that someone was attempting to encourage another grand jury witness to avoid testifying. The government had a legitimate concern that someone was attempting to tamper with grand jury witnesses, and the subpoena did not seek, and the agents did not receive, any information about the substance of any calls or texts. Once alerted to the issue, the DOJ component sequestered the phone records and took steps to ensure that no members of the prosecution team had access to them. The district court held that the government did not engage in misconduct, and that the defendant suffered no prejudice. OPR likewise concluded that the DOJ attorney did not violate any applicable statute or rule arising from the issuance of the subpoena for the production of the records.

### Failure to Comply with Discovery and Incompetently Represent Client

This matter came before OPR based on a district judge holding Department attorneys in contempt and ordering the government to pay the plaintiffs' attorneys' fees. The component self-reported the matter.

OPR learned during its inquiry that the DOJ attorneys involved in the litigation faced challenges in dealing with difficult client agencies that repeatedly resisted DOJ's recommendations regarding discovery. In addition, the DOJ attorneys were in the difficult position of trying to reconcile the client agencies' conflicting positions in the protracted litigation, and



staffing issues contributed to the manner in which the government responded to the plaintiffs' motion to compel. The court awarded attorneys' fees against the government but did not find that the government's acted in bad faith, and the court ordered the client agencies, not the DOJ attorneys, to pay plaintiffs' attorneys' fees.

#### Failure to Comply with Discovery

This matter came before OPR based on a district judge's reprimand of a Department attorney for improperly introducing into evidence at trial a document that had been suppressed by the court. Defense counsel also alleged that the Department attorney: (1) made misrepresentations to the court regarding the execution of a search warrant; (2) suppressed *Brady* material and chain-of-custody information; (3) suborned perjured testimony; and (4) falsely maintained that classified information was at issue in the case.

OPR determined that there was insufficient evidence to conclude that the Department attorney knew or should have known that the document introduced into evidence at trial was derived from evidence suppressed by the court. OPR also determined that the court considered, or had the opportunity to consider, defense counsel's other allegations against the Department attorney, and that the record revealed no evidence of professional misconduct.

#### Failure to Comply with Speedy Trial Act

This matter came before OPR after it learned of judicial opinions dismissing charges with prejudice in three unrelated cases in the same district on the ground that the defendants' Sixth Amendment right to a speedy trial was violated. In each case, although the trial courts and the defendants were responsible for some of the delay, the government was also responsible for some delay. OPR determined that the issue implicated broader management issues rather than issues of individual misconduct. Accordingly, OPR recommended, through the Executive Office of U.S. Attorneys, that the U.S. Attorney's Office in that district review and evaluate its adherence to speedy trial requirements.

#### Failure to Comply with Discovery and Improper Introduction of Evidence

This matter came before OPR based on allegations by a defense attorney that a Department attorney (1) introduced and relied on improper evidence at the defendant's trial; (2) presented evidence at the trial in a manner that was misleading; and (3) failed to disclose *Brady*, *Giglio*, and *Jencks* material that the defense obtained independently from a third party.

OPR found that the same, or substantially similar, allegations were considered and rejected by the court at the trial. The court found no evidence that the prosecutor engaged in misconduct, and the court's rulings were supported by the evidence adduced at trial. Accordingly, OPR closed the inquiry.

#### Improper Access to Privileged Information and Failure to Comply with Local Bar Rule

This matter came before OPR based on allegations made by a defense attorney that Department attorneys (1) improperly used information from an email inadvertently sent by the defense attorney's paralegal to correct an error in the indictment; (2) failed to promptly inform the

defense attorney of their receipt of the e-mail; and (3) improperly moved to disqualify the defense attorney from the case on the ground that he had a conflict of interest.

OPR initiated an inquiry and reviewed the indictment, relevant e-mails and other correspondence concerning the error in the indictment. In addition, OPR reviewed relevant pleadings and transcripts of proceedings concerning the government's motions to disqualify the defense attorney, and the trial court's rulings on the motions.

Based on the results of its inquiry, OPR determined that the Department attorneys did not use the e-mail from the defense attorney's paralegal to correct the citation error in the indictment.

The prosecutors themselves discovered the error months before their receipt of the paralegal's e-mail. In addition, OPR determined that there was nothing in the e-mail indicating that it had been inadvertently sent to the prosecutors or that it contained privileged or confidential information. Furthermore, OPR's inquiry established that, after the paralegal transmitted the e-mail, neither the defense attorney nor his paralegal attempted to retract it or notify the prosecutors that it had been inadvertently sent.

Finally, OPR found that the prosecutors did not improperly move to disqualify the defense attorney from the case. The defense attorney's conflict of interest was litigated extensively before the trial court. During a hearing on the matter, the defense attorney acknowledged that he had a conflict, and the trial court expressly found that he had a conflict. In denying the defense attorney's motion for reconsideration of its order disqualifying him from the case, the court rejected the defense attorney's argument that the prosecutors acted improperly in moving to disqualify him. Moreover, the court specifically found that there was no bad faith or prosecutorial misconduct on the part of the prosecutors.

#### [Failure to Comply with Legal and Policy Requirements Regarding Search Warrants](#)

This matter came before OPR after it learned of a district court order suppressing all evidence obtained pursuant to two search warrants issued in connection with the investigation of a complex white-collar fraud scheme. In a lengthy opinion, the court criticized both the drafting and execution of the search warrants, concluding that the warrants were overly broad. The court also found that the Department attorney who prepared the warrants did not provide adequate guidance about the items to be seized, and that the agents executing the warrants were indiscriminate in seizing items during the search.

The underlying conduct, drafting and executing the warrants, and then searching seized electronic data, occurred several years earlier, and because of the passage of so much time, the witness' recollection of critical details had dimmed, as was reflected by the testimony of the Department attorney and the agents involved in drafting and executing the search warrants at the suppression hearing, which took place five years after the execution of the warrants.

Moreover, although the court found that there were significant errors in drafting and executing the search warrants, it did not find that the errors constituted a violation of the Department attorney's professional obligations. Finally, the Department attorney resigned from the Department several years prior to the issuance of the court's lengthy opinion.

### Failure to Comply with Court Order and Federal Rule

This matter came before OPR based on a district judge imposing sanctions against Department attorneys in a civil enforcement action arising out of the violation of telemarketing rules regarding calls to numbers on the Do Not Call Registry and false and misleading representations to consumers.

The court levied the sanctions based on its finding that the government engaged in a pattern of conduct evidencing a lack of good faith during settlement discussions. The court awarded the defendants the attorneys' fees and costs associated with the defendants' participation in the discussions.

OPR's thorough review of the correspondence between the parties and the hearing transcripts revealed that, contrary to the court's ruling, the Department attorneys assigned to the case repeatedly made clear that, for any settlement to receive approval, the defendants had to provide additional financial information. Despite repeated assurances that the financial information would be forthcoming, it was never produced. OPR did not find any evidence that the government's decision to proceed with settlement discussions was made in bad faith, and concluded that the Department attorneys did not seek unrealistic monetary penalties from the defendants during the discussions.

### Failure to Comply with Discovery and Department Policies, Rules and Regulations

This matter came before OPR after a district judge granted a mistrial based on the failure of a Department attorney to timely produce impeachment evidence concerning a cooperating witness. The component self-reported the matter.

In his grand jury testimony, the cooperating witness, who implicated two defendants in a conspiracy to steal tax refund checks, stated that one of the defendants directed him to retrieve checks from various mailboxes. During his trial testimony, the cooperating witness testified that the other defendant directed him to retrieve the checks. During cross examination, the cooperating witness claimed that his grand jury testimony had been incorrectly transcribed and that he had informed the government of the error prior to the trial. The court granted a mistrial after a government agent testified that the cooperating witness had, in fact, claimed prior to trial that his transcript was incorrect. OPR concluded that the impeachment evidence was not material to the outcome of the trial under *Brady* and *Giglio*, but that the information should have been disclosed pursuant to the Department's disclosure policies.

### Failure to Maintain an Active Bar Membership

This matter came before OPR after it learned that a Department attorney's bar membership had been administratively suspended for failure to pay his annual registration fee. The attorney immediately paid the annual registration fee and the late fees, and the state bar reinstated him. OPR obtained documentation from the state bar establishing that the Department attorney did not receive notice of the annual registration fee or his administrative suspension. The Department attorney failed to update his mailing address when he relocated to begin his employment with the Department, and because a data-entry error resulted in the state bar not having a valid e-mail address for him, he did not receive any of the reminders the state bar sent by e-mail.

OPR found no evidence that the Department attorney was aware that his bar membership had been administratively suspended. OPR concluded that although the Department attorney did not adhere to the requirement that he maintain an active bar membership, he was a newly licensed attorney, and he received no written or electronic notice from the state bar regarding the annual registration fee. In addition, immediately upon learning of his suspension, he paid the annual registration fee, and he was reinstated. OPR concluded that further investigation was not likely to result in a finding of professional misconduct.

#### [Failure to Comply with Discovery, Court Orders, and Federal Rules](#)

This matter came before OPR based on a district judge holding the government in contempt and imposing sanctions based on a failure to preserve potentially relevant evidence. The component self-reported the matter.

In a class action brought against the government based on allegations of the mistreatment of immigrant detainees along the southern border of the United States, a district court held the government in contempt and imposed sanctions for failing to preserve surveillance videos, and for failing to diligently monitor compliance with the court's discovery orders and promptly identify technical problems with recording and archiving the videos.

Following a review of the extensive record in the case, as well as the materials submitted to OPR by the government's lead trial attorney, OPR concluded that the failures were not attributable to the Department attorneys representing the agency, and that further investigation was not likely to result in a finding that they committed professional misconduct.

#### [Failure to Comply with Discovery, Court Orders, and Federal Rules](#)

This matter came before OPR based on a district judge ordering a new trial on the grounds that the prosecution failed to disclose exculpatory evidence, and failed to comply with an order regarding the introduction of an incriminating photograph from the defendant's social media account. The component self-reported the matter.

The exculpatory evidence was a statement in the presentence investigation report of a co-defendant who entered a guilty plea after his case was severed. OPR determined that the defense learned of the co-defendant's statement at the same time the prosecution did, in time to use it at trial, but that defense counsel opted not to do so. Moreover, OPR determined that the co-defendant was closely associated with the defense, and the Department attorney's assumption that the defense was aware of the information was not unreasonable under the circumstances. With respect to the incriminating photograph, OPR disagreed with the court's determination that the Department attorneys introduced it into evidence in violation of the court's order. OPR determined that the evidence complied with the substance of the court's order, and that the defense was able to question the government witnesses about it on cross-examination.

OPR concluded that further investigation would not lead to a finding of professional misconduct. However, OPR recommended that the Department component counsel the Department attorneys to disclose favorable information to the defense under such circumstances, and not to assume that the information was available to the defense.

### Abuse of Grand Jury and Indictment Process and Failure to Comply with Department Policies

This matter came before OPR based on a district court ruling that Department attorneys attempted to coerce a defendant into waiving his right to be tried in the proper venue by obtaining an indictment that included counts over which the court lacked venue. While the district court initially found that Department attorneys acted in bad faith, it subsequently withdrew that finding.

OPR concluded that the inquiry should be closed without further investigation. Neither the Constitution nor the Federal Rules of Criminal Procedure clearly prohibit the government from seeking an indictment containing counts over which the court lacks venue. Moreover, due to circumstances relating to the defendant's travel, citizenship, and residence, charging decisions had to be made quickly, before all the facts regarding venue could be ascertained.

Finally, OPR concluded that a Justice Manual provision stating that "a case should not be presented to a grand jury in a district unless venue for the offense lies in that district," did not preclude the government from obtaining an indictment containing some counts over which the court lacks venue, when venue for the remaining counts in the indictment lie in the district where the indictment is obtained, particularly when considerations of trial efficiency weigh in favor of one trial in a single jurisdiction.

### Improper Closing Argument

This matter came before OPR after an appellate court criticized a Department attorney for urging a criminal trial jury to convict the defendant in order to deter future lawbreaking and not based on the evidence.

OPR found that the prosecution's remarks were ambiguous and that he repeatedly urged the jury to focus on the crimes with which the defendants were charged. In *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974), the Supreme Court declared that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning, or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." In addition, although the defense objected to the remarks, the trial court overruled the objection.

Finally, because the trial was lengthy and difficult, with numerous witnesses and exhibits, there was little opportunity for the Department attorney to prepare his closing argument. His remarks were unscripted and essentially contemporaneous, and as the court itself observed, the vast majority of his remarks properly focused on the evidence admitted at trial.

### Abuse of Legal System

This matter came before OPR after a district court assessed attorneys' fees against the government, finding that the government acted in bad faith by raising frivolous arguments in opposition to a summary judgment motion, and by refusing to stipulate to an allegedly uncontested issue. The component self-reported the allegations.

OPR determined that given the discretion afforded attorneys to develop arguments in defense of a lawsuit, the arguments in opposition to the summary judgment motion were not

frivolous. OPR also concluded that the Department attorneys did not act in bad faith when they declined to agree to a request by opposing counsel for an admission at the outset of discovery because the information then available suggested that facts were in dispute. As discovery progressed and it became apparent that the facts were not disputed, the Department attorneys notified opposing counsel that they would seek supervisory approval to make the requested admission, and upon receiving approval, they promptly informed opposing counsel that they agreed to make the admission.

#### [Failure to Comply with Discovery](#)

This matter came before OPR based on allegations that a former Department attorney had engaged in a long-term romantic relationship with a law enforcement officer who was involved in the investigation of a case that was assigned to the Department attorney. The component self-reported the matter.

The underlying matter resulted in a conviction, but that conviction was overturned on other grounds, and the government dismissed the indictment with prejudice. OPR initiated an inquiry to determine whether the Department attorney handled any other cases with the same law enforcement officer and, if so, whether appropriate disclosures had been made to the defense. OPR determined that the law enforcement officer had limited involvement in other matters assigned to the Department attorney.

#### [Making Misrepresentations and Failing to Comply with Department Rules and Regulations](#)

This matter came before OPR based on a complaint made on behalf of a prisoner awaiting extradition to the United States from another country. The complaint claimed that Department attorneys engaged in gross misconduct, made misrepresentations, and were indifferent to the allegedly inhumane conditions under which the prisoner was being held in the foreign country. The complaint also asserted that the government had engineered the prisoner's detention in that country with knowledge of its inhumane prison system; that the government refused to intervene to protect the prisoner from imminent harm; and that the government failed to respond appropriately after the prisoner was assaulted in prison.

OPR determined that the prisoner had twice sought to have a federal court intervene, and that the court denied relief on both occasions. Based on its review of the extensive record in the case, OPR concluded that the DOJ attorneys did not engage in misconduct by arranging for the prisoner's arrest in the foreign country; in dealing with the foreign government about the circumstances of the prisoner's detention; or in making representations to the court.

#### [Abuse of Authority, Misuse of Official Position, and Unauthorized Disclosure](#)

This matter came before OPR based on allegations that a Department attorney forwarded an official e-mail to the attorney's spouse using the DOJ attorney's private e-mail account, in violation of Department policy. The component self-reported the matter. The e-mail contained information about an enforcement action that the DOJ component was about to take.

OPR initiated an inquiry; obtained a written response from the Department attorney; and obtained and reviewed relevant e-mails from his e-mail account. OPR determined that the Department attorney forwarded the e-mail to his spouse by mistake. OPR found no evidence that the Department attorney alerted the company or its attorney about the enforcement action.

### Making Misrepresentations

This matter came before OPR after a trial court found that a Department attorney allegedly made misrepresentations to the court regarding the status of a government contract during the pendency of a civil action filed by a contractor who had not been awarded the contract. The component self-reported the matter.

The trial court found that the Department attorney violated his duty of candor to the tribunal when he failed to inform the court of developments that might have affected the outcome of the bid protest litigation. The government and the Department attorney appealed, and the court of appeals reversed the sanctions order and found that while the Department attorney should have provided the trial court with additional information about the performance of the contract, the Department attorney did not knowingly make any misrepresentations to the court.

OPR initiated an inquiry and obtained a written response from the Department attorney. OPR also obtained pleadings from the trial court proceedings, as well as the briefs on appeal. OPR concluded that although the Department attorney's representations to the court regarding the status of the contract were imprecise, none of his representations were factually incorrect.

Moreover, although the court of appeals stated that the Department attorney should have informed the trial court that the contract had been partially completed, OPR found that the Department attorney advised the court that work on the contract was underway, and that if he had known that he should have provided any additional information to the court, he would have done so. Based on the totality of the circumstances, OPR concluded that the Department attorney did not intentionally or recklessly mislead the court when he did not inform the court that the contract had been partially completed.

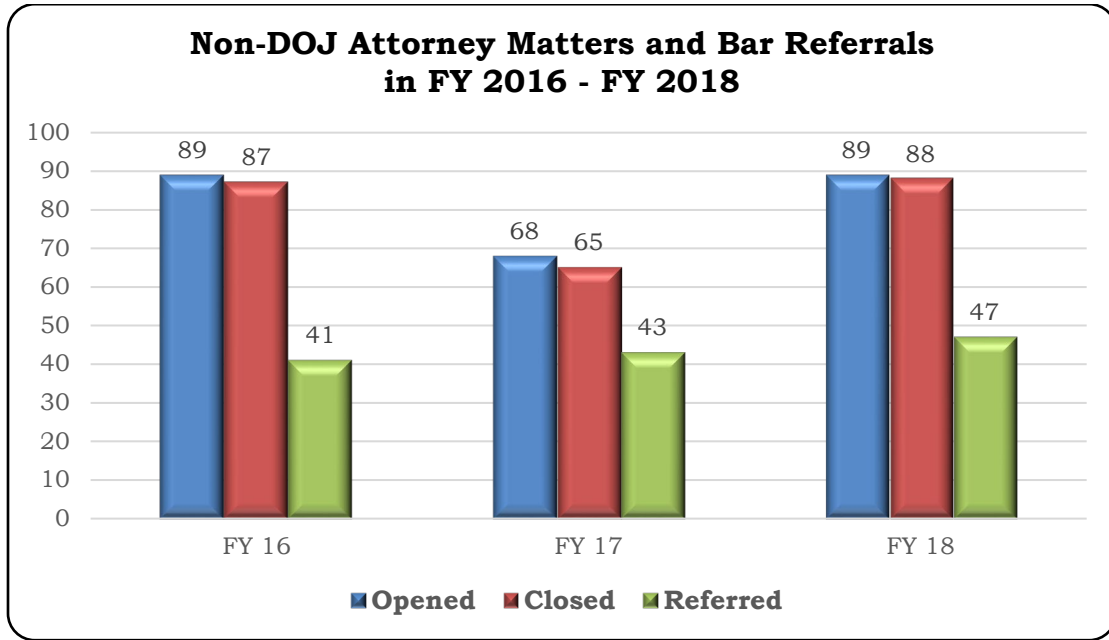
## *Section V: Handling Non-Department Attorney and Judicial Misconduct Allegations*

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

During Fiscal Year 2018, OPR received 89 submissions from various components of the Department concerning possible professional misconduct by non-Department attorneys. OPR evaluated and closed 88 open submissions in the Fiscal Year 2018 and determined that 47 matters should be referred to state bar authorities.

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

**Graph 4**





During Fiscal Year 2018, OPR also received and evaluated one submission from a Department component concerning possible professional misconduct by members of the judiciary and determined that it should not be referred to judicial disciplinary authorities.

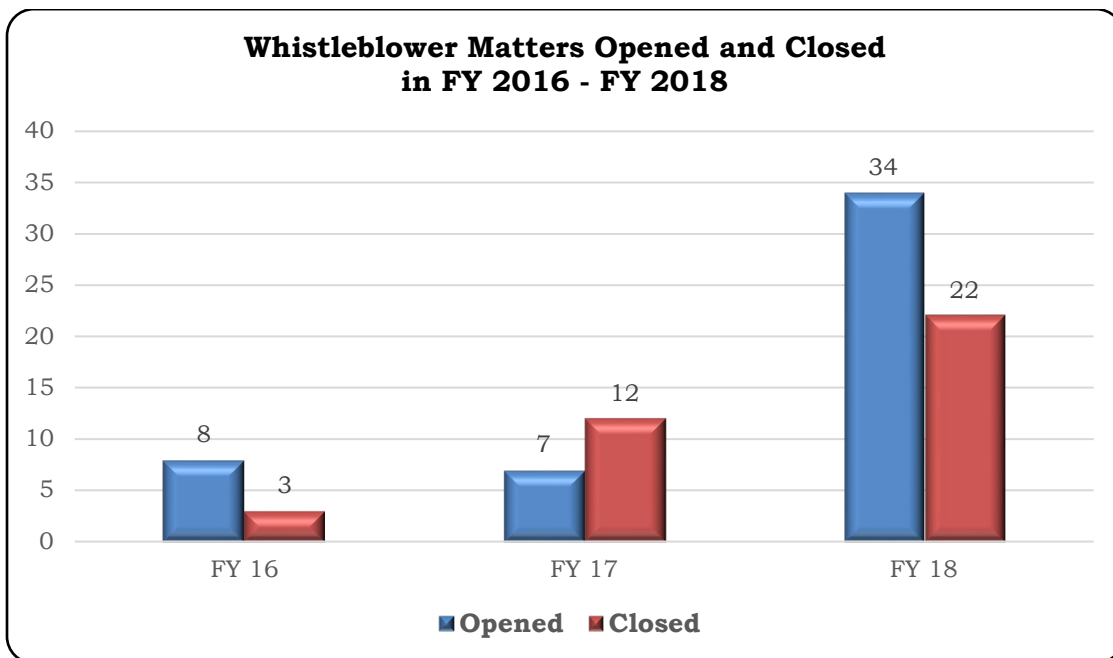
<b>Complaints against members of the Judiciary</b>		
	Complaints	Referrals
FY 16	3	1
FY 17	2	0
FY 18	1	0

## *Section VI: Handling FBI Whistleblower Retaliation Complaints*

OPR and the Office of the Inspector General (OIG) share responsibility for reviewing and investigating whistleblower retaliation complaints by Federal Bureau of Investigation personnel. OPR recently reorganized its process for handling such complaints in an effort to enhance our efficiency and effectiveness in anticipation of an increased workload stemming from recent changes to the law pertaining to FBI whistleblower complaints.

During Fiscal Year 2018, OPR received 34 complaints and resolved 22 complaints. Below is a graph depicting the number of complaints received and resolved during the previous three fiscal years.

**Graph 5**



## *Section VII: Training and Outreach Efforts*

OPR increasingly participates in training and outreach events to improve ethical compliance within the Department, as well as educate external stakeholders about the Department's commitment to accountability. During Fiscal Year 2018, OPR attorneys 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, including training on discovery, *Brady*, and *Giglio* disclosure obligations.

In conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR participated in presentations to international delegations to explain OPR's role in ensuring that Department attorneys perform their duties in accordance with their ethical obligations. OPR also attended the annual meeting of the National Organization of Bar Counsel, where current trends in attorney discipline were examined and discussed.

OPR also routinely engaged with various state bar disciplinary entities. As an example, in accordance with Department policy, OPR notified state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information concerning those matters.

## *Conclusion*

During Fiscal Year 2018, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both inside and outside the Department, and continued to serve as the Department's liaison with state bar counsel. OPR also met with delegations from several foreign countries to discuss issues pertaining to legal ethics. OPR's activities in Fiscal Year 2018 have increased awareness of ethical standards and responsibilities throughout the Department of Justice, 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.