
U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

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Fiscal Year 2007 Annual Report

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Annual Report for Fiscal Year 2007

Introduction

The Office of Professional Responsibility (OPR) was established in the Department of Justice by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is the Office's thirty-second annual report to the Attorney General, and it covers fiscal year 2007 (October 1, 2006 - September 30, 2007).

Jurisdiction and Functions of OPR

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

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

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence

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

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

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

In cases that cannot be resolved based solely on the written record, OPR ordinarily conducts a full on-site investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). The interviews ordinarily are conducted by two OPR attorneys. Interviews of subject attorneys ordinarily are transcribed by a court reporter. At the end of the interview, the subject is given an opportunity, subject to a confidentiality agreement, to review the transcript and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations and to provide information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal.

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

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

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

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

Significant Activities in Fiscal Year 2007

During fiscal year 2007, OPR participated in non-investigative, policy, and project-oriented activities of the Department. OPR participated in numerous educational and training activities both within and outside the Department of Justice to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During fiscal year 2007, OPR served on a panel on legal ethics at a Department orientation session for Assistant United States Attorneys. OPR conducted presentations in media relations workshops given at the National Advocacy Center focusing on the policies and ethical issues concerning contacts with the media. OPR also participated in the Civil Chiefs' Conference and the First Assistant United States Attorneys' Conference.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR conducted a series of presentations in Malawi to Malawian prosecutors regarding the operation and functioning of OPR within the Department. OPR also participated in a presentation to law enforcement officials from Albania regarding OPR and issues associated with prosecutorial ethics. In addition, in conjunction with the American Bar Association's Central and Eastern European Law Initiative, OPR taught a class on legal ethics at a seminar in Prague, Czech Republic, attended by attorneys from several Eastern European emerging democracies.

OPR continued to serve as the Department's liaison to state bar counsel on matters affecting the professional responsibility of Department attorneys. OPR attended the mid-year and annual meetings of the National Organization of Bar Counsel that addressed current trends in attorney regulation, and participated on a panel addressing ethics issues and OPR's role in the Department. In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also advised other Department components regarding instances of possible professional misconduct by non-DOJ attorneys. In 32 such matters handled by OPR in fiscal year 2007, OPR reviewed information relating to possible misconduct by the 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.

In fiscal year 2003, the Attorney General's Advisory Committee approved a plan under which OPR created a Rapid Response Team designed to enhance OPR's ability to respond quickly and effectively to misconduct allegations that arise in matters of particular importance to the Department. The work of the Rapid Response Team, like the other work at OPR, is directed and supervised by the Counsel and the Deputy Counsel. In fiscal year 2007, the Rapid Response Team was comprised of 2 permanent OPR attorneys and 3 attorneys detailed to OPR from United States Attorneys' Offices. The Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

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

Intake and Initial Evaluation of Complaints

In fiscal year 2007, OPR received 906 complaints and other letters and memoranda requesting assistance. OPR determined that 207 of the matters, or approximately 23%, warranted further review by OPR attorneys. OPR opened full investigations in 71 of those matters; the remaining 136, which are termed "inquiries," were resolved with no findings of professional misconduct, based on further review, additional information from the complainants, responses from the subjects, or other information. When information developed in an inquiry indicated that further investigation was warranted, the matter was converted to a full investigation.

The remaining 699 matters were determined not to warrant an inquiry by OPR because, for example, they related to matters outside the jurisdiction of OPR; sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported by any evidence; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department of Justice component. A supervisory OPR attorney and the Deputy Counsel reviewed all such dispositions.

OPR Investigations in Fiscal Year 2007

Characteristics of Investigations Opened in Fiscal Year 2007: OPR investigations opened in fiscal year 2007 were based on complaints from a variety of sources, as reflected in Table 1.

TABLE 1

Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2007		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions & referrals ¹	53	75.0%
Private attorneys	1	1.0%
Department components	8	11.0%
Private parties	4	6.0%
Other agencies	5	7.0%
Total	71	100.0%

¹ This category includes self-reporting by Department employees of serious judicial criticism and judicial findings of misconduct.

OPR opened a total of 71 new investigations in fiscal year 2007. None of these matters involved non-attorney subjects. The 71 investigations involved 139 separate allegations of misconduct. The subject matter of the 139 allegations is set out in Table 2.

TABLE 2

Types of Misconduct Allegations in Investigations Opened in Fiscal Year 2007		
Type of Misconduct Allegation	New Allegations Investigated in FY 2007	Percentage of All Allegations in Investigations
Abuse of authority, including abuse of prosecutorial discretion	32	23.0%
Improper remarks to a grand jury, during trial, or in pleadings	22	16.0%
Misrepresentation to the court and/or opposing counsel	23	17.0%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	2	1.0%
Failure to competently and/or diligently represent the client's interests	10	7.0%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	16	12.0%
Failure to comply with court orders or federal rules	5	4.0%
Conflict of interest	2	1.0%
Failure to comply with DOJ rules and regulations	5	4.0%
Interference with defendants' rights	12	9.0%
Lateness (i.e., missed filing dates)	3	2.0%
Lack of fitness to practice law	3	2.0%
Whistleblower	2	1.0%
Failure to comply with federal law	2	1.0%
Unauthorized practice of law	0	0.0%
Total	139	100.0%

Investigations Closed in Fiscal Year 2007: OPR closed a total of 75 investigations in fiscal year 2007. Two of the investigations closed involved non-attorney subjects. Of the 75 investigations that were closed during the year, OPR found professional misconduct in 23, or approximately 31%, of the matters. Of

the 23 matters in which OPR found professional misconduct, 1 involved at least 1 finding of intentional professional misconduct by a Department attorney.² In 22 of the 23 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.³ The number and proportion of investigations resulting in findings of professional misconduct on the part of Department attorneys was higher than in fiscal year 2006, in which OPR found professional misconduct in 18, or approximately 20% of the investigations it closed.

Disciplinary action was initiated against attorneys in 14 of the 23 matters in which OPR found professional misconduct by Department attorneys. In 5 matters, the subject attorneys who were found to have engaged in professional misconduct resigned following OPR's recommendation of disciplinary action. Disciplinary action was not initiated against attorneys in 4 instances because the subject attorneys were no longer employed by the Department at the conclusion of OPR's investigation. With respect to the 14 matters in which disciplinary proceedings were initiated, the subject attorneys in 6 of the matters were suspended for a period of time, the attorneys in 2 of the matters received reprimands, and the subject attorney in 6 of the matters was removed from his position and assigned other responsibilities.

OPR also closed 13 investigations, or approximately 17% of the 75 investigations, with at least 1 finding that an attorney exercised poor judgment.⁴

² 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 that consequence is a result that the obligation or standard unambiguously prohibits.

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

⁴ OPR finds that an attorney has exercised poor judgment when, faced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and

Three of those 13 matters also involved findings of professional misconduct, and are included in the 23 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment, but rather refers the finding to the DOJ attorney's employing component for consideration in a management context. OPR may also recommend that management consider certain actions, such as additional training. Nineteen matters, or approximately 25%, involved at least 1 finding that an attorney made an excusable mistake.⁵ Four of those 19 matters also included a finding of professional misconduct. Thus, of the 75 matters closed, OPR found professional misconduct or poor judgment in 33 matters, or approximately 44%, which is up from the 29, or approximately 33% of matters in which OPR found professional misconduct or poor judgment in fiscal year 2006.

Examples of Investigations Closed in Fiscal Year 2007⁶

1. *Unauthorized Plea Agreement.* A litigating component reported to OPR that a DOJ attorney may have violated Attorney General Ashcroft's Memorandum on charging and sentencing criminal offenses by offering a plea agreement that did not fully reflect the relevant conduct that was readily provable by the government for purposes of sentencing. Specifically, the DOJ attorney agreed to omit some of the drugs seized at what was believed to be the defendant's home from the factual basis of the plea agreement.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. OPR found that the DOJ attorney's decision to omit some of the drugs seized at the defendant's alleged home from the factual basis of the plea agreement was justified because

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.

⁵ OPR finds that an attorney made a mistake when the attorney's conduct constituted excusable human error despite the exercise of reasonable care under the circumstances.

⁶ To protect the privacy of the Department attorneys and other individuals involved in the investigations summarized, OPR has omitted names and identifying details from these examples. In addition, OPR has used female pronouns in odd numbered examples and male pronouns in even numbered examples regardless of the actual gender of the individual involved.

the evidence linking the defendant to the drugs was weak. In particular, the agents were unable to recover any personal papers or other indicia of occupancy linking the defendant to the house where the drugs were seized, and inconsistencies in two agent reports raised questions about the defendant's inculpatory statements. Given the evidentiary concerns, OPR determined the DOJ attorney's actions did not violate the Attorney General's Memorandum mandating sentencing recommendations that honestly reflect the totality of the circumstances and seriousness of the defendant's conduct. Rather, OPR found that the plea agreement adhered to the Attorney General's Memorandum.

2. *Failure to Diligently Represent the Interests of the Client; Brady Violation; Misrepresentation to the Court.* A court of appeals criticized a DOJ attorney for suppressing information about a confidential source in violation of *Brady* and *Giglio* by failing to disclose to the defense that the confidential source was an illegal alien who had received a benefit from the Immigration and Naturalization Service (INS) as a result of his assistance to the government.

OPR conducted an investigation and found that, in response to a discovery request, the DOJ attorney reviewed a file that contained information that the confidential source had received a benefit from the INS because of previous cooperation with the government, but the DOJ attorney failed to disclose that fact. OPR found further that the DOJ attorney learned that another file that contained information on the confidential source was at a different location, but he failed to review the file. It was later learned that the file contained additional exculpatory and impeachment information. OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligations under *Brady*, *Giglio*, and his state rules of professional conduct. OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his duty of candor to the court when he denied knowing about the information that should have been disclosed.

Because the DOJ attorney resigned from the Department prior to the completion of the OPR report, OPR did not make a recommendation regarding discipline. OPR has not yet notified the appropriate state bar authorities of its finding of professional misconduct because the attorney is challenging OPR's finding with the Office of the Deputy Attorney General.

3. *Failure to Comply with DOJ Rules and Regulations.* A litigating component reported to OPR that a DOJ attorney negotiated a \$4 million settlement in a large tort case brought against the government. The DOJ attorney, however, executed a stipulation that provided for a settlement of \$5 million. Based on the stipulation, the legal technician prepared forms for payment by the Department of Treasury for \$5 million, which was approved by the attorney's supervisor, and \$5 million was disbursed to the plaintiff's counsel. Plaintiff's counsel paid her client her portion of the \$4 million and placed the \$1 million overpayment in the firm's non-interest bearing trust account. The Department ultimately negotiated an agreement with plaintiff's counsel for repayment of the \$1 million.

OPR conducted an investigation and found that the stipulation was modified from a stipulation in another case in which the settlement amount was \$5 million. OPR found that the DOJ attorney did not notice the discrepancy in the settlement amount and she followed office procedure by forwarding the stipulation to the office paralegal who prepared the forms, and then forwarded the stipulation and forms to a supervisor for review. OPR found that, before the DOJ attorney sent the stipulation to opposing counsel, it was again reviewed by a supervisor. Because the DOJ attorney obtained supervisory and administrative review of the settlement documents, OPR concluded that the DOJ attorney did not intentionally or recklessly modify the stipulation and did not commit professional misconduct. However, because the DOJ attorney failed to review the stipulation for accuracy before it was executed, OPR concluded that the DOJ attorney violated her obligation to settle the case within the amount authorized and, in doing so, exercised poor judgment.

OPR further concluded that, in signing the judgment fund papers authorizing the overpayment of \$1 million to the plaintiff, the attorney's supervisor did not commit professional misconduct or exercise poor judgment, but rather, made a mistake. OPR found that the supervisor followed her usual practice of reviewing the letters, stipulation, and forms for payment to ensure that the amounts in each were consistent. Neither the release nor the compromise memorandum were included in the package, and thus, the supervisor could not have known from the documents provided that the stipulation amount was incorrect. OPR concluded that the supervisor had a good faith belief that she was authorizing the correct settlement amount for payment. Thus, OPR found that the supervisor's authorization of the incorrect amount was an inadvertent oversight and constituted a mistake.

4. *Misrepresentation to Court.* A court of appeals found that DOJ attorneys violated Federal Rule of Criminal Procedure 16(a)(1)(G) because the notice of expert testimony provided by the DOJ attorneys did not contain sufficient detail of the expected expert testimony or of the expert's qualifications.

OPR conducted an investigation and found that the DOJ attorneys were following longstanding office practice regarding the information provided in a notice of expert testimony. Because one of the DOJ attorneys had previously used the Rule 16(a)(1)(G) letter several times, the DOJ attorneys reasonably believed that the level of detail in the letter complied with the Rule's requirements. OPR noted that the Rule 16(a)(1)(G) letter employed by the DOJ attorneys provided general notice to the defendant regarding the expert witness and his qualifications. Under these circumstances, OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment.

5. *Failure to Maintain the Obligation to be Fair and Impartial, and to Maintain the Appearance of Fairness and Impartiality in the Administration of Justice.* A court of appeals issued several opinions criticizing an immigration judge for engaging in inappropriate behavior. The court found that the immigration judge engaged in hostile and abusive treatment, interjected intemperate and biased remarks in derogation of the judge's responsibility to appear neutral and impartial, selectively considered evidence, ignored evidence supporting an alien's claims, and violated an alien's due process rights by verbally abusing her and refusing to consider relevant evidence.

OPR conducted an investigation to determine whether the immigration judge violated her obligations to be fair and impartial and to maintain the appearance of fairness and impartiality in the administration of justice. Those obligations are violated when an immigration judge exhibits belligerence, hostility, or bias to a party through her questioning or commentary, or through a distorted or otherwise improper treatment of the record. OPR found that these obligations were violated and the immigration judge should have known that her belligerent and hostile conduct and selective consideration of the evidence undermined the fairness of the hearing and created an appearance of partiality in the immigration court. OPR concluded that the immigration judge engaged in professional misconduct by acting in reckless disregard of her professional obligations.

OPR recommended a range of discipline from a seven-day to a fourteen-day suspension without pay. The immigration judge retired from the Department before discipline was imposed. OPR did not notify the appropriate state bar authorities of its finding of professional misconduct because the finding did not implicate any bar rules.

6. *Violation of the Duty of Confidentiality.* OPR received information from a DOJ component that a DOJ attorney allowed a non-DOJ attorney to assist the DOJ attorney with his work.

OPR conducted an investigation and found that the DOJ attorney allowed the non-DOJ attorney to access his office, computer, and some of his internal files for the purpose of assisting him in his work. OPR learned that the non-DOJ attorney was present at meetings between the DOJ attorney and law enforcement officers, and reviewed documents that may have been obtained through grand jury subpoenas. OPR concluded that the DOJ attorney committed intentional professional misconduct by allowing the non-DOJ attorney to work on Department matters. In doing so, the DOJ attorney violated his duty of maintaining client confidences and secrets. OPR also concluded that the DOJ attorney exercised poor judgment when he failed to take steps to ensure that the non-DOJ attorney did not have access to information subpoenaed by the grand jury.

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

7. *Failure to Provide Exculpatory Evidence.* A district court vacated a defendant's conviction for illegal reentry into the United States on the ground that she was actually a United States citizen at the time she entered the United States and, as such, could not be convicted of illegal reentry. The court reasoned that a government record must have existed showing that the defendant had become a citizen derivative to her mother's naturalization, and that the government's failure to provide the defendant with that information during her prosecution violated her right to due process. The court also criticized the government's decision to assert a statute of limitations argument in opposition to the defendant's motion to vacate her conviction, finding that it was improper and a waste of prosecutorial and judicial resources.

OPR conducted an investigation and concluded that the DOJ attorney did not violate her obligation to provide exculpatory evidence to the defense in the underlying conviction. OPR found that, despite the court's belief that there must have been a government record at the time of the defendant's conviction showing she was a citizen, the government does not create documents memorializing the derivative citizenship of a naturalized citizen's minor children unless and until a minor child asks the government to issue a Certificate of Citizenship. The evidence showed that the defendant did not request a Certificate of Citizenship until four years after her conviction for illegal reentry. Consequently, at the time of the underlying prosecution, the government did not have documentation of the defendant's derivative citizenship. OPR also found no evidence that the DOJ attorney was or should have been aware that the defendant was a citizen at the time of her conviction. As a result, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment.

In addition, OPR concluded that the DOJ attorney's decision to oppose the defendant's motion to vacate her conviction based on timeliness did not constitute professional misconduct or the exercise of poor judgment. OPR found that the DOJ attorney had a reasonable basis to suspect that the defendant had been dilatory in applying for her Certificate of Citizenship because she wanted to wait for the statute of limitations to run on criminal offenses which she could have been charged with upon her reentry. The DOJ attorney also believed the defendant had benefitted years earlier from not asserting her United States citizenship when she was deported to a Caribbean country because, had the defendant's citizenship been known at that time, she would have faced a lengthy prison sentence. Under these facts and circumstances, OPR concluded that the DOJ attorney had a reasonable basis for opposing the defendant's motion to vacate.

8. *Vouching for Witnesses.* A court of appeals found that a DOJ attorney vouched for government witnesses when he introduced into evidence witness plea agreements containing truthfulness provisions, Federal Rule of Criminal Procedure 35(b) motions, and the court's sentence reduction orders.

OPR conducted an investigation and found that the DOJ attorney introduced the documents to preempt the defense from challenging the witnesses' truthfulness and credibility, and to address the argument that the government had made secret deals with the witnesses in exchange for their testimony. OPR

found further that the documents were admitted into evidence without objection and, in placing the documents into evidence, it was not obvious that the DOJ attorney was indicating a personal belief in the witnesses' credibility. The DOJ attorney also had successfully introduced similar types of documents in previous cases. Under these circumstances, OPR determined the DOJ attorney did not engage in professional misconduct or exercise poor judgment, but rather made an excusable mistake when he introduced documents into evidence that could amount to prosecutorial vouching.

9. *Misuse of the Indictment Process.* A district court granted a defendant's motion for attorney's fees and costs on the ground that the indictment was frivolous. Upon reconsideration, the court vacated its order.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment in seeking and obtaining an indictment against the defendant. OPR found that based on the information known at the time of indictment, the DOJ attorney had good reason to believe that the defendant was involved in the crime because the illegal activity had been conducted on the defendant's computer. It was only in post-arrest interviews that the DOJ attorney learned that the defendant's colleagues might be culpable because they routinely logged on to the defendant's computer. OPR found that as soon as the defendant provided a handwriting exemplar, which made it clear that the defendant had not been involved in the illegal activities, the DOJ attorney filed a motion to dismiss the indictment against the defendant.

10. *Violation of the Duty of Confidentiality.* OPR received an allegation that a DOJ attorney revealed confidential information during a telephone conversation with a defense attorney about the status of a pre-indictment criminal investigation of the attorney's client.

OPR conducted an investigation and found that during the conversation the defense attorney told the DOJ attorney that a news story was about to be published regarding a criminal investigation, and that information in the story caused him to believe that his client was a target of the investigation. The defense attorney also stated that the reporter's information appeared to be well-sourced, implying that a law enforcement official leaked the information. The DOJ attorney told defense counsel that he could not comment on the investigation. The DOJ attorney, however, then proceeded to express his personal frustration with recent

leaks occurring in unrelated criminal matters that he believed had been perpetrated by unidentified Department employees. The defense attorney interpreted the official's expression of frustration with the leaks in these unrelated matters as tacitly confirming the reporter's information that his client was under investigation.

OPR concluded that, although the DOJ attorney did not mean to disclose confidential information, he exercised poor judgment in commenting on and discussing matters with the defense attorney that permitted the attorney to infer information about the existence and status of an ongoing Department criminal investigation. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

11. *Discovery Violations.* A district court found that DOJ attorneys violated their duty to disclose exculpatory documents under *Brady* by failing to provide defense counsel with documents showing that the government filed downward departure motions on behalf of witnesses who testified against the defendant.

OPR conducted an investigation and found that the district court's ruling expanded the government's *Brady* obligation beyond the rule established by the preexisting case law in that circuit, under which the government was not required to point the defense toward potentially exculpatory evidence when that evidence was either in the possession of the defendant or could be discovered by exercising due diligence. OPR found that the DOJ attorneys had produced the plea agreements for all of the cooperating witnesses, and the agreements put defense counsel on notice of the possibility of a downward departure motion. OPR found further that the plea agreements included the case names and numbers for the witnesses, thus providing defense counsel with the ability to easily locate the downward departure motions. Because the DOJ attorneys acted consistently with their *Brady* obligations as established by the preexisting case law in that circuit, OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment.

12. *Conflict of Interest.* A DOJ component informed OPR of a possible conflict of interest involving a DOJ attorney. The potential conflict arose as a consequence of the DOJ attorney's participation in the settlement of a case in which the opposing party was represented by a multi-city law firm that employed the DOJ attorney's spouse on a part-time basis as an attorney in a practice area unrelated

to the litigation. The DOJ attorney had not sought a conflicts waiver pursuant to 5 C.F.R. § 2635.50, *et seq.*

OPR conducted an investigation and found that the DOJ attorney did not violate 5 C.F.R. § 2635.501 by failing to seek a conflicts waiver because there was no evidence that the law firm's representation in the matter had any direct and predictable effects on the DOJ attorney's financial interests. Although the DOJ attorney did not violate 5 C.F.R. § 2635.501, OPR found that the attorney exercised poor judgment by failing to seek a conflicts waiver to ensure that there was no apparent conflict of interest. In reaching this conclusion, OPR considered that 5 C.F.R. § 2635.501 obligates the attorney to make the initial determination whether the circumstances are such that a reasonable person with knowledge of the relevant facts would question the attorney's impartiality. OPR found that the prudent course of action would have been to pursue a waiver even in an instance such as this where the attorney did not believe that there was any reason to question impartiality.

OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context. The component amended its ethics training program to address similar conflict of interest issues.

13. *Discovery Violation.* A district court declared a mistrial in a large, document-intensive securities fraud case when it discovered that the DOJ attorney did not produce impeachment documents to the defense. The court subsequently dismissed the indictment with prejudice because it found the DOJ attorney intentionally failed to produce the impeachment material in pretrial discovery, and misled the court about what documents had been produced.

OPR conducted an investigation and found that the case involved complex issues of law and fact, and that more than 400,000 documents had been produced in discovery. In order to marshal the large volume of documents, the case agent used computerized document tracking software to number and index all of the documents in the case. OPR found that prior to trial the DOJ attorney told the agent to "produce everything" in the database to defense counsel. OPR found, however, that an honest misunderstanding occurred between the DOJ attorney and the agent, as the former (wrongly) believed that impeachment material had been entered into the computerized database. Conversely, the agent thought that the DOJ attorney was producing the impeachment material herself.

The DOJ attorney, mistakenly believing that the agent had entered the impeachment material into the database, represented to the court that all impeachment documents had been produced.

OPR determined that the DOJ attorney, who had been brought into the case late in the investigation and after the computerized document tracking software had been established, reasonably relied upon the case agent to produce discovery by electronic means in this document intensive case. Consequently, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment.

14. *Failure to Comply with Court Scheduling Order.* A district court criticized a DOJ attorney for violating the court's pre-trial scheduling order by producing scientific evidence after the discovery cut-off date. The court excluded the scientific evidence and related expert witness testimony because the information was disclosed so close to trial that it prevented meaningful efforts by defense counsel to test the technical merit of the new expert testimony.

OPR conducted an investigation and concluded that the DOJ attorney exercised poor judgment when he initiated new scientific testing in violation of the scheduling order. OPR found that, although it was common practice in that district to informally revise pre-trial scheduling orders to accommodate changed circumstances, and defense counsel also initiated scientific testing after the formal discovery cut-off date, the DOJ attorney exercised poor judgment when he failed to alert the court and defense counsel about the new testing. OPR noted that the DOJ attorney's decision to initiate new scientific testing after the discovery cut-off date was exacerbated by his decision to wait to inform the defense of the test results.

OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

15. *Abuse of Authority.* A court of appeals issued several opinions criticizing an immigration judge for manifesting bias and hostility toward aliens seeking asylum, being verbally abusive toward aliens, and making adverse credibility findings that lacked substantial evidence.

OPR conducted an investigation and concluded that the immigration judge engaged in professional misconduct in several cases by engaging in a course of conduct in reckless disregard of her obligation to be fair and impartial in the administration of justice. In those cases, OPR found that the immigration judge acted in an adversarial manner; made belittling remarks to the aliens; made inappropriate comments that created an appearance of cultural or ethnic bias; and made unsupported credibility findings that created an appearance of bias. OPR concluded that the immigration judge did not engage in intentional misconduct, crediting the immigration judge's claim that she was not biased against any nationality or individual. OPR also credited the immigration judge's assertion of profound remorse. In another case, OPR found that the immigration judge exercised poor judgment when she made sarcastic comments about the alien's use of a non-attorney in the preparation of her application for relief. Although the comments were inappropriate, OPR found that they did not constitute professional misconduct because they did not create an appearance of partiality.

OPR recommended a range of discipline from a fourteen-day suspension to termination. The immigration judge was removed from the bench and was assigned a different position within the Executive Office for Immigration Review. OPR did not notify the appropriate state bar authorities of its finding of professional misconduct because the finding did not implicate any bar rules.

16. *FBI Whistleblower Claim of Reprisal.* The OIG referred to OPR an FBI whistleblower claim of reprisal. A former FBI employee claimed that he had been subject to retaliation for making protected disclosures to an FBI supervisor concerning allegations of misconduct by another FBI supervisor. The employee alleged that, after making his protected disclosures, he suffered the following reprisals: (1) refusal of a transfer or reassignment; (2) creation of a hostile work environment; (3) denial of within-grade increase; (4) a Warning Performance Appraisal Report and a poor performance review; (5) four FBI OPR investigations into his conduct; (6) failure to approve Family Friendly Sick Leave; (7) suspension from duty; and (8) termination.

OPR conducted an investigation and determined that the employee made a protected disclosure within the meaning of the FBI Whistleblower regulations. OPR found that two of the employee's claims of reprisal (creation of a hostile work environment and the FBI OPR investigations), were not decisions that agencies are

prohibited to take in reprisal for a protected disclosure. With regard to the remaining personnel actions, OPR did not find sufficient evidence to establish reasonable cause to believe that the personnel actions were taken in retaliation for the employee's protected disclosures. OPR based its finding on the facts that the personnel actions occurred eight or more months after the protected disclosures; the personnel actions were supported by stated agency justifications that were reasonable and based upon conduct by the employee that occurred independent of and remote in time from his protected disclosures; and the personnel actions were based on the employee's work performance and not out of a motive to retaliate against him for making his protected disclosures.

17. *Overzealous Representation and Improper Conduct.* A litigant alleged that a district court characterized the conduct of a DOJ attorney as disrespectful, abhorrent, and vicious, and indicated that other judges in the district held similar views.

OPR conducted an investigation and found that the comments were made off-the-record and at the end of a long and contentious trial. OPR also found that the court did not cite any examples of misconduct or cite a rule of conduct that the DOJ attorney violated. OPR discovered that a day after the court made these comments, the court, having had time to reflect on the matter, distanced itself from its earlier comments and stated that the DOJ attorney was merely zealously representing her client. OPR also found that the court subsequently denied the litigant's motion for sanctions, finding the allegations against the DOJ attorney lacked merit. Consequently, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in this case.

18. *Improper Examination of a Witness.* A district court ordered a mistrial after a DOJ attorney questioned a defendant on cross-examination about two prior drug convictions. The court dismissed the indictment on double jeopardy grounds, finding the DOJ attorney intentionally caused the mistrial. The government appealed and the court of appeals reversed the district court's dismissal.

OPR conducted an investigation and found that the DOJ attorney told defense counsel that he would not ask about the defendant's prior drug convictions in the government's case-in-chief, but reserved the right to do so in rebuttal if the defendant opened the door during direct examination. The

defendant testified and insisted that he did not have drugs in his pocket at the time of his arrest and that he would never sell drugs to an undercover officer. The DOJ attorney believed that the defendant's testimony was inconsistent with his prior drug convictions. As a result, the DOJ attorney advised defense counsel that he intended to cross-examine the defendant about his prior drug convictions and impeach him with that evidence. The DOJ attorney subsequently asked the defendant on rebuttal whether he had two prior convictions for selling drugs. Defense counsel objected and the court, believing that the DOJ attorney was asking about evidence that had previously been suppressed by the court, directed the government not to ask about it again. The DOJ attorney asked the court for a side-bar to explain that his questions did not involve the evidence that had been suppressed by the court (which evidence was different from the prior two drug convictions), and to ask the court to clarify its ruling. The court declined the request for clarification and the DOJ attorney resumed his rebuttal, asking about one of the defendant's prior convictions. The court, based on this line of questioning, dismissed the indictment.

OPR found that the DOJ attorney did not engage in professional misconduct or exercise poor judgment when he asked the defendant a question about one of his prior drug convictions. OPR found that the court's ruling from the bench about whether the government could continue to question the defendant about the prior convictions was unclear and that the DOJ attorney sought clarification from the court, but the request was denied. Although OPR found that the DOJ attorney reasonably believed that his question was appropriate under the circumstances, OPR determined that the better practice would have been for the DOJ attorney to inform the court in advance of his intent to impeach the defendant on the basis of prior convictions.

19. *Improper Closing Argument.* A court of appeals reversed a defendant's conviction because the court found that during closing argument the DOJ attorney improperly vouched for the credibility of witnesses when she stated that the witnesses were believable and had testified truthfully. The court also criticized the DOJ attorney for asking the jury to convict the defendant in order to alleviate social problems. The DOJ attorney stated in closing argument that a guilty verdict would protect the community by taking a convicted felon off the street.

OPR conducted an investigation and found that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligations under

case law and applicable state bar rules not to vouch for the credibility of witnesses. OPR found that the DOJ attorney did not engage in intentional misconduct because she did not intend to provide personal assurances to the jury, but instead attempted to respond to attacks made by defense counsel. OPR found further that the DOJ attorney exercised poor judgment by improperly appealing to the jury to convict in order to protect the community. OPR found that although appealing to the jury was improper, it did not constitute misconduct because the appeal was made during the rebuttal portion of closing argument and in response to an impassioned argument by defense counsel. OPR also found that defense counsel's objection to the DOJ attorney's appeal to the jury was overruled by the court. In addition, OPR concluded that the DOJ attorney made a mistake by arguing that government witnesses risked their livelihoods if they did not testify truthfully. OPR found that the statement was a mistake because it was made in response to defense counsel's attacks on the witnesses' credibility, and it did not violate a clear and unambiguous standard.

The DOJ attorney resigned from the Department during OPR's investigation. OPR notified the appropriate state bar authorities of its finding of professional misconduct.

20. *Misrepresentation/Misleading the Court.* A court of appeals disagreed with a DOJ attorney's argument that the district court properly considered the fact that a gun had an obliterated serial number in sentencing a defendant. The court vacated the sentence and remanded the case to the district court for re-sentencing. One of the judges on the panel found that the DOJ attorney's argument was unreasonable.

OPR conducted an investigation and found that defense counsel argued on appeal that the district court improperly considered the fact that the defendant's gun had an obliterated serial number, a fact which resulted in an enhanced sentence, because the defendant did not plead guilty to the obliterated serial number. The DOJ attorney argued on appeal that the district court properly considered the fact that the defendant's gun had an obliterated serial number because there was evidence in the record that supported such a finding. Although a majority of the panel disagreed with the DOJ attorney's argument, they found that it was reasonable in nature. A third member of the appeals panel found that the DOJ attorney's argument was unreasonable because the judge did not believe

the district court's remarks that the gun had an obliterated serial number could reasonably be interpreted as a "finding."

OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR reviewed the record on appeal and found that the DOJ attorney acted appropriately under the circumstances because his argument was supported by the record. OPR found that the record showed that, at sentencing, the district court specifically considered whether the gun had an obliterated serial number and used that evidence to support an enhanced sentence. OPR also found that the district court overruled defense counsel's objection that the defendant had not pled guilty to the obliterated serial number. When defense counsel objected by stating the defendant did not admit that the gun had an obliterated serial number and it was not an element of the offense to which he pled guilty, the district court noted it was a fact recited in the indictment and therefore appropriate for the court to consider. Under these circumstances, OPR determined that the DOJ attorney reasonably viewed the court's mention of, and reliance on, the obliterated serial number in reaching its sentence as a factual finding that the gun had an obliterated serial number.

OPR Inquiries in Fiscal Year 2007

Characteristics of Inquiries Opened in Fiscal Year 2007: The sources of the 136 matters designated as inquiries are set forth in Table 3. Thirteen of these matters were later converted to full investigations. The 136 matters do not include an additional 32 matters involving proposed bar notifications on non-Department attorneys.

TABLE 3

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2007		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Judicial opinions & referrals ⁷	34	25.0%
Private attorneys	31	22.8%
Department components	47	34.5%
Private parties	19	14.0%
Other agencies	3	2.2%
Other sources	2	1.5%
Total	136	100.0%

The nature of the 143 allegations against Department attorneys contained in the 136 inquiries is set forth in Table 4.

⁷ This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

TABLE 4

Types of Misconduct Allegations in Inquiries Opened in Fiscal Year 2007		
Type of Misconduct Allegations	Allegations in Inquiries	Percentage of All Allegations in Inquiries
Abuse of authority, including abuse of prosecutorial discretion	44	30.7%
Improper remarks to a grand jury, during trial, or in pleadings	12	8.4%
Misrepresentation to the court and/or opposing counsel	20	14.0%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	11	7.7%
Failure to competently and/or diligently represent the client's interests	6	4.2%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	16	11.2%
Failure to comply with court orders or federal rules	5	3.5%
Conflict of interest	4	2.8%
Failure to comply with DOJ rules and regulations	7	4.9%
Interference with defendants' rights	2	1.4%
Lateness (i.e., missed filing dates)	2	1.4%
Lack of fitness to practice law	1	0.7%
Unauthorized practice of law	1	0.7%
Bar-related	5	3.5%
Whistleblower	3	2.1%
Failure to comply with federal law	4	2.8%
Total	143	100.0%

The matters opened as inquiries during fiscal year 2007 were remarkably diverse. Many of those matters did not involve a complaint against a Department attorney. For example, some inquiries were based on allegations of whistleblower retaliation made by FBI employees. Others involved abuse of prosecutive or investigative authority by agents or unauthorized leaks to the media. Thus, only limited comparisons may be made between this data and information regarding OPR investigations.

Inquiries Closed in Fiscal Year 2007: OPR closed a total of 124 inquiries in fiscal year 2007 involving allegations against Department attorneys, and an additional 30 inquiries involving proposed bar notifications on private attorneys. Thirteen of the 124 inquiries were converted to full investigations after evidence was developed that further investigation was required. The remaining 111 matters involved 166 separate allegations of professional misconduct. The manner in which the 166 allegations were resolved as inquiries in fiscal year 2007 is set forth in Table 5.

TABLE 5

Categories of Inquiry Allegations Resolved in Fiscal Year 2007		
Type of Resolution	Number of Occurrences	Percentage of Total
Performance or management matter. Refer to employing component.	3	1.8%
Referred. More appropriately handled by another component or agency.	7	4.2%
Issues previously addressed. No further action required by OPR at this time.	4	2.4%
No merit to matter based on preliminary inquiry.	30	18.1%
No merit to allegation based on review of matter.	38	23.0%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	0	0.0%
Converted to an investigation.	13	7.8%
FBI or DEA matter - resolved administratively.	0	0.0%
Inquiry completed; further inquiry not likely to result in finding of misconduct.	46	27.7%
Matter being monitored.	5	3.0%
FBI Whistleblower Claim.	4	2.4%
Other	16	9.6%
Total	166	100.0%

Examples of Inquiries Closed in Fiscal Year 2007

1. *Allegation of Misuse of Prosecutorial Discretion.* A relative of a homicide victim wrote to OIG requesting an investigation of a DOJ attorney for not prosecuting the person the relative believed was responsible for the murder. The relative alleged that the DOJ attorney did not act on information provided by law enforcement agents because the DOJ attorney personally disliked the agents. The OIG referred the matter to OPR because the allegations implicated a DOJ attorney's authority to investigate, litigate, or provide legal advice. OPR conducted an inquiry and invited the relative to provide any information she had to support the allegation against the DOJ attorney. The relative did not provide any such information. OPR determined that there was no factual basis upon which to predicate an inquiry and closed the matter because further investigation was not likely to result in a professional misconduct finding.

2. *Subornation of Perjury.* An agent alleged that a DOJ attorney instructed him, in the presence of the attorney's supervisor, to sign sworn affidavits despite his concern that the affidavits were inaccurate, and threatened to ruin his career if he did not sign them. OPR initiated an inquiry and found that the DOJ attorney denied the allegations made by the agent and the attorney's supervisor corroborated the denial. OPR found further that there was no evidence that inaccurate affidavits were submitted to the court, and the agent never contended so. OPR also learned that the agent did not raise his allegations against the DOJ attorney until the Department initiated an internal investigation into the agent's actions vis-a-vis another incident involving the DOJ attorney. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

3. *Abuse of Investigative Authority.* OPR received an allegation from a private citizen that a DOJ attorney engaged in misconduct in connection with the investigation of information leaked by government officials. The citizen alleged that the DOJ attorney was aware from the outset of the investigation of who had leaked the information, but nonetheless pursued the prosecution of other government officials. The citizen's complaint was based on her analysis of public documents. OPR initiated an inquiry and reviewed the information provided by the citizen. OPR concluded that there was no merit to the citizen's allegation. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

4. *Abuse of Investigative Authority.* OPR received an allegation from defense attorneys that their client, who had entered into a cooperation agreement with the Department, had not proceeded through the cooperation process in the normal fashion. The defense attorneys alleged that this was the result of the sensitive information their client had provided concerning the government's key witness in the prosecution of a former state political figure. The defense attorneys complained that DOJ attorneys had not followed up on that information. OPR initiated an inquiry. OPR found that there was no evidence that the DOJ attorneys ignored or failed to follow-up on the information provided by the defense attorneys' client. Rather, evidence showed the DOJ attorneys reviewed the allegations and determined that the information provided did not fall within the statute of limitations for the crime. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

5. *Declination Decision.* OPR received an allegation from a private citizen that a DOJ attorney committed professional misconduct by declining to pursue international kidnapping charges against the mother of a child who absconded with the child back to her home country. OPR initiated an inquiry and determined that the DOJ attorney considered several legitimate factors before declining to press kidnapping charges, including the lack of an extradition treaty between the United States and the mother's home country. OPR found further that the DOJ attorney's declination decision was reviewed and approved by her supervisors. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

6. *Failure to Maintain Active Bar Membership.* OPR learned that a DOJ attorney failed to maintain an active bar membership in at least one state because he was late in paying his annual bar fees. OPR initiated an inquiry and reviewed a written response from the DOJ attorney. OPR found that the DOJ attorney had not received any delinquency notices and, upon learning of the suspension, immediately paid his annual dues. OPR found further that under the rules of that state bar, an attorney who pays his annual fees late may be "retroactively reinstated." After the attorney is retroactively reinstated, the state bar views the attorney as having never been suspended. Because the DOJ attorney had been retroactively reinstated, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

7. *Dissemination of an Inaccurate Press Release.* A litigating component reported to OPR that a DOJ attorney misidentified the name of one of the defendants in a press release announcing the sentencing of several defendants. OPR initiated an inquiry and reviewed a written response from the DOJ attorney. OPR found that before issuing the press release, the DOJ attorney sought and obtained approval from her supervisors. OPR found further that the DOJ attorney corrected the press release immediately after learning about the mistake the next day. Because evidence showed the DOJ attorney made a mistake, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Discovery Violations.* A district court criticized a DOJ attorney for failing to comply with early discovery obligations as mandated by the Federal Rules of Civil Procedure, and failing to respond to document requests and interrogatories in a timely fashion. OPR initiated an inquiry and reviewed the relevant documents in the case file. Based on the results of its inquiry, OPR determined that further investigation was warranted. Accordingly, OPR converted this inquiry to an investigation.

9. *Abuse of Authority.* OPR received an allegation from an attorney who represented an alien seeking asylum that an immigration judge's ruling lacked sufficient evidence and that the immigration judge should have recused herself because she was biased against the alien. OPR initiated an inquiry and found that the defense attorney had raised these issues during litigation and the Board of Immigration Appeals dismissed them because they lacked merit. OPR further learned that some of the evidence in the record directly contradicted the arguments the attorney made in her appeal. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

10. *Investigative Misconduct.* OPR received an allegation from an attorney whose client was later indicted that DOJ OIG agents engaged in misconduct during the criminal investigation of the attorney's client. OPR initiated an inquiry and found that the allegations did not fall within OPR's jurisdiction because the alleged misconduct did not implicate a DOJ attorney. OPR referred the matter to the OIG's Office of Oversight and Review, which has jurisdiction to review allegations of misconduct against OIG agents. Accordingly, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

11. *Brady Violation; Misrepresentation to Court.* OPR received an allegation from a prisoner that a DOJ attorney and special agent suppressed information during her trial for possession of LSD and conspiracy to manufacture and distribute LSD. OPR initiated an inquiry and reviewed the materials provided by the prisoner as well as court documents. OPR found that the prisoner provided no support for her allegations and her arguments had been raised and rejected by the district court and the court of appeals. OPR also found no improper suppression of materials. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

12. *Improper Comment Made During Trial.* A DOJ attorney self-reported a court of appeals opinion which found that a comment he made to a U.S. Marshal during trial was improper. During trial, the defendant left his seat and approached the jury box. The U.S. Marshal near the attorney appeared to be sleeping, and the DOJ attorney swore and told the U.S. Marshal to get the defendant away from the jury. The DOJ attorney did not believe the jury heard his comment, but defense counsel moved for a new trial, which was denied. The defendant was convicted and sentenced to two life sentences. Defense counsel raised the incident on appeal. The court of appeals affirmed the conviction but found the comment improper. OPR initiated an inquiry and found that the DOJ attorney made the remark under quick, surprising circumstances. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

13. *Unauthorized Disclosure (non-media).* OPR received information from a DOJ component that a former DOJ attorney may have disclosed, without authorization, privileged Department e-mails relating to litigation that the attorney handled while employed with the Department. After leaving the Department, the attorney joined a private organization which sued the Department under the Freedom of Information Act for documents related to litigation that the former Department attorney had previously handled. At a deposition, lawyers for the private organization produced internal Department e-mails received and sent by the former Department attorney. The Department objected to the use of the e-mails on the ground that they had been improperly disclosed. OPR initiated an inquiry and found that the private organization's attorney provided a sworn declaration stating the organization had obtained the e-mails from a source who was not the former Department attorney and who had no current or former connection to the Department. The organization further stated that the former Department attorney had no involvement in the Freedom of Information Act litigation. OPR found

further that although the Department had not authorized release of the e-mails, they were in the possession of a Senate Committee. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Misrepresentation/Misleading the Court.* A district court criticized a DOJ attorney and defense counsel for filing a motion with the court of appeals that contained an inaccurate statement. OPR initiated an inquiry and found that a DOJ attorney filed a motion for a downward departure with the district court while a defendant's appeal was pending. In its motion, the DOJ attorney informed the district court that it did not have jurisdiction to rule on the motion while the defendant's appeal was pending. Given the jurisdictional issue, the district court ordered the government to inform it when it would be appropriate for the court to rule. The DOJ attorney and defense counsel subsequently filed a joint motion with the court of appeals, asking it to remand the case so that the district court could rule on the downward departure motion. The joint motion stated that the district court had found that it did not have jurisdiction to rule on the motion while the appeal was pending. On remand, the district court stated that the DOJ attorney and defense counsel falsely told the court of appeals that the district court had found that it did not have jurisdiction to rule on the downward departure motion while the appeal was pending. OPR concluded that although the DOJ attorney's characterization of the district court's order was technically incorrect, the mistake was understandable, because the wording of the district court's order could give the reader the impression that the court agreed that it did not have jurisdiction. The clerk's office so read the order when it stated in the docket entry that the court had entered an order holding that it lacked jurisdiction to rule on the motion for reduction of sentence. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

15. *Failure to Honor Plea Agreement.* A DOJ attorney reported to OPR that a prisoner whom she prosecuted filed a complaint against her with the state bar. The prisoner alleged that the DOJ attorney committed professional misconduct in regard to the prisoner's unsuccessful attempts to obtain a further reduction in her prison sentence, in violation of the plea agreement. OPR initiated an inquiry and reviewed case materials. OPR found that the prisoner presented no evidence in support of her allegations. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

However, OPR asked the DOJ component to advise it if the state bar made any adverse findings against the DOJ attorney.

16. *Unauthorized Disclosure to Media.* A newspaper article reported that a former DOJ attorney stated that he knew based on his work in the Department that terrorists were training and raising money in a particular state. OPR initiated an inquiry to determine if the DOJ attorney breached his ethical duties not to reveal “information relating to the representation” of his former client, see American Bar Association Model Rule 1.6, and not to use client information to the “disadvantage” of his former client, see American Bar Association Model Rule 1.9(c)(1). OPR found that the former DOJ attorney did not directly reveal sensitive or confidential client information. OPR also found that the former DOJ attorney did not use the information knowingly to the disadvantage of the Department. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Improper Offer of Legal Advice to Non-Client.* OPR received information that the government dismissed a case in the middle of trial after a key government witness invoked her Fifth Amendment privilege against self-incrimination, allegedly on the advice of the DOJ attorneys who were trying the case. OPR initiated an inquiry and reviewed the trial transcript to determine whether the DOJ attorneys improperly offered legal advice to the government witness, who was not their client. OPR concluded that the DOJ attorneys did not advise the government witness to invoke her Fifth Amendment privilege. Based on its review of the trial transcript, OPR found that the DOJ attorneys properly advised the government witness that she had the right to invoke her Fifth Amendment privilege, but that they did not counsel her to do so. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Failure to Disclose Exculpatory Material.* OPR received an allegation from a prisoner that DOJ attorneys failed to produce exculpatory material relating to an IRS agent who had testified at the prisoner’s trial. OPR initiated an inquiry. OPR found that the DOJ attorneys did not learn about the exculpatory material until several years after the trial when a probation officer discovered that the IRS agent secretly provided financial assistance to one of the cooperating witnesses. OPR further learned that the DOJ attorneys disclosed the material as soon as they learned about it, even though they did not regard the information to be material

to the prisoner's defense, and the prisoner subsequently sought post-trial relief which had been denied by the district court and court of appeals. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

19. *Unprofessional Statements or Comments.* OPR received an allegation from a local law enforcement officer that a DOJ attorney made inappropriate comments about the local police department at a meeting with local law enforcement officials. OPR initiated an inquiry and reviewed a written response from the DOJ attorney accused of making the remarks. OPR found that the DOJ attorney told local law enforcement officials that she believed that someone at the police department was making unauthorized disclosures about a joint Department/local law enforcement criminal investigation. The DOJ attorney said that the disclosures were having a negative effect on the public's trust of the police department. OPR determined that there was nothing inappropriate about the remarks. Accordingly, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

Conclusion

During fiscal year 2007, Department attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations or representatives of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in fiscal year 2007 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department to meet the challenge of enforcing the law and defending the interests of the United States in an increasingly complex environment.