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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2008**

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U.S. Department of Justice  
Office of Professional Responsibility

Fiscal Year 2008 Annual Report

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## **Annual Report for Fiscal Year 2008**

### **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 33<sup>rd</sup> annual report to the Attorney General, and it covers fiscal year 2008 (October 1, 2007 - September 30, 2008).

### **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 statements 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. 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 the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. 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 officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), 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, pursuant to Department policy, notifies the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed. The Department's 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. Consistent with Department policy, OPR does not 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, again pursuant to Department policy.

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 2008**

During fiscal year 2008, 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 2008, OPR served on a panel on legal ethics at a Department orientation session for Assistant United States Attorneys. OPR conducted presentations on legal ethics at the National Advocacy Center as part of the Center's basic criminal trial advocacy courses. OPR also participated in the Professional Responsibility Advisory Office's Conference and conducted presentations in a media relations workshop focusing on the policies and ethical issues concerning contacts with the media. OPR also participated in the Civil Chiefs' Conference, First Assistants' Conference, and the United States Attorneys' Conference.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR participated in presentations to law enforcement and government officials from Albania and Angola regarding OPR and issues associated with prosecutorial ethics.

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 discipline. OPR participated in the National Organization of Bar Counsel's program committee, which is responsible for organizing speakers and topics for presentations at the

mid-year and annual meetings. 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 42 such matters handled by OPR in fiscal year 2008, 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 2008, the Rapid Response Team was composed of 2 permanent OPR attorneys, 3 attorneys detailed to OPR from United States Attorneys' Offices, and 2 contract attorneys. The Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

In fiscal year 2008, OPR adopted a policy of tape recording non-subject witnesses who are interviewed by OPR. The policy enables OPR to obtain a more complete record for review and appeal purposes. The Deputy Attorney General also issued new procedures for responding to OPR reports that contain professional misconduct findings. The procedures provide United States Attorneys with deadlines in which to initiate formal disciplinary action, appeal OPR's findings of misconduct, or appeal OPR's disciplinary recommendations. The procedures ensure greater consistency and fairness in the way United States Attorneys' Offices respond to OPR reports, and ensure the prompt disposition of issues raised by OPR reports.

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 2008, OPR received 961 complaints and other letters and memoranda requesting assistance. OPR determined that 217 of the matters, or approximately 23%, warranted further review by OPR attorneys. OPR opened full investigations in 91 of those matters; the remaining 126, 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 744 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 2008**

*Characteristics of Investigations Opened in Fiscal Year 2008:* OPR investigations opened in fiscal year 2008 were based on complaints from a variety of sources, as reflected in Table 1.



**TABLE 1**

<b>Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2008</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Judicial opinions & referrals <sup>1</sup>	62	68.1%
Private attorneys	6	6.6%
Department components	20	22.0%
Private parties	1	1.1%
Other agencies	2	2.2%
<b>Total</b>	<b>91</b>	<b>100.0%</b>

OPR opened a total of 91 new investigations in fiscal year 2008. Four of these matters also involved non-attorney subjects. The 91 investigations involved 206 separate allegations of misconduct. The subject matter of the 206 allegations is set out in Table 2.

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

**TABLE 2**

<b>Types of Misconduct Allegations in Investigations Opened in Fiscal Year 2008</b>		
<b>Type of Misconduct Allegation</b>	<b>Number of Allegations</b>	<b>Percentage of All Allegations in Investigations</b>
Abuse of authority, including abuse of prosecutorial discretion	52	25.2%
Improper remarks to a grand jury, during trial, or in pleadings	17	8.3%
Misrepresentation to the court and/or opposing counsel	35	17.0%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	6	2.9%
Failure to competently and/or diligently represent the client's interests	18	8.7%
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	20	9.7%
Failure to comply with court orders or federal rules	7	3.4%
Conflict of interest	6	2.9%
Failure to comply with DOJ rules and regulations	8	4.0%
Interference with defendants' rights	15	7.3%
Lateness (i.e., missed filing dates)	4	1.9%
Lack of fitness to practice law	7	3.4%
Bar related	4	1.9%
Failure to comply with federal law	5	2.4%
Unauthorized practice of law	1	0.5%
Other <sup>2</sup>	1	0.5%

<sup>2</sup> One OPR investigation involved falsification of records which did not fall under any listed category type.

<b>Total</b>	<b>206</b>	<b>100.0%</b>
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*Investigations Closed in Fiscal Year 2008:* OPR closed a total of 59 investigations in fiscal year 2008. One of the investigations closed involved non-attorney subjects. Of the 59 investigations that were closed during the year, OPR found professional misconduct in 22, or approximately 37%, of the matters. Of the 22 matters in which OPR found professional misconduct, 6 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>3</sup> In 16 of the 22 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>4</sup> The number and proportion of investigations resulting in findings of professional misconduct on the part of Department attorneys was higher than in fiscal year 2007, in which OPR found professional misconduct in 23, or approximately 31% of the investigations it closed.

Disciplinary action was initiated against attorneys in 18 of the 22 matters in which OPR found professional misconduct by Department attorneys. 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. Disciplinary action was initiated but was pending at the close of Fiscal Year 2008 in 1 matter due to a grievance filed by the subject attorney or supervisors, and in 2 matters OPR's disciplinary action recommendations were not imposed by the Deputy Attorney General. With respect to the 15 matters in which disciplinary proceedings were initiated and

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<sup>3</sup> 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.

<sup>4</sup> 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.

implemented, the subject attorneys in 6 of the matters were suspended for a period of time, the attorneys in 6 of the matters received written reprimands, and the subject attorney in 3 of the matters was removed from a supervisory position and assigned other responsibilities.

OPR also closed 9 investigations, or approximately 15% of the 59 investigations, with at least 1 finding that an attorney exercised poor judgment.<sup>5</sup> Four of those 9 matters also involved findings of professional misconduct, and are included in the 22 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment, alone, 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. Twelve matters, or approximately 20%, involved at least 1 finding that an attorney made an excusable mistake.<sup>6</sup> Four of those 12 matters also included a finding of professional misconduct or poor judgment. Thus, of the 59 matters closed, OPR found professional misconduct or poor judgment in 27 matters, or approximately 46%, which is up only slightly from the 33, or approximately 44% of matters in which OPR found professional misconduct or poor judgment in fiscal year 2007. The total number of matters closed in 2007 was 75.

#### *Examples of Investigations Closed in Fiscal Year 2008<sup>7</sup>*

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<sup>5</sup> 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 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.

<sup>6</sup> 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.

<sup>7</sup> 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 only exceptions are the summaries of the joint OPR and OIG investigations in which the reports are publicly available on OPR's website.

1. *Violation of Plea Agreement.* A court of appeals found that a DOJ attorney breached a plea agreement when she asked the district court to impose a career-offender sentencing enhancement. The court of appeals found that the government was obligated by the terms of the plea agreement to ask the district court to calculate the defendant's sentence based on an offense level without a sentencing enhancement.

OPR conducted an investigation and found that the DOJ attorney did not breach the plea agreement. OPR found that although the plea agreement set an "estimated total offense level," the agreement explicitly provided that the district court would determine the defendant's Criminal History Category after reviewing the Probation Office's Presentence Report (PSR). OPR found that the DOJ attorney reasonably construed that language to mean that the government and the defendant both retained the right to challenge the finding of the PSR as to the defendant's criminal history, and to argue for a sentencing enhancement or sentencing reduction based on the criminal history established in the PSR. OPR found further that nothing in the plea agreement expressly prohibited the government from arguing for a career-offender sentencing enhancement. Because advocating for a career-offender sentencing enhancement was consistent with the plea agreement, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment.

2. *Improper Vouching in Opening Statement.* A court of appeals criticized a DOJ attorney for commenting on the truthfulness and credibility of the government's witnesses during opening statement. The court also criticized the DOJ attorney for arguing that the jury should consider the defendant's words and actions. The court noted that the defendant never took the stand. Although the court of appeals affirmed the defendant's conviction, the court found that the DOJ attorney improperly vouched for the government's witnesses during opening statement, and came close to commenting on the defendant's constitutional right not to testify.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation not to vouch for government witnesses. OPR found that the DOJ attorney vouched in his opening statement by stating that certain witnesses had chosen to come forward to tell the truth, and that two witnesses, despite their

drug-dealing pasts, would tell the truth as to what the defendant had done. OPR found that the DOJ attorney, who was an experienced prosecutor, should have known that these statements constituted vouching.

OPR also concluded that the DOJ attorney exercised poor judgment by commenting, however elliptically, on the defendant's credibility when the defendant had not taken the stand. OPR found that although the DOJ attorney's comment that the jury should consider the defendant's words and actions was a reference to statements that had been introduced through government witnesses, and not a reference to the defendant's failure to testify, the DOJ attorney exercised poor judgment by making an argument that jurors could reasonably interpret as a request to give weight to the defendant's failure to testify.

OPR recommended a range of discipline from a written reprimand to a 3-day suspension without pay. The DOJ attorney received a written reprimand. OPR also notified the appropriate state bar authorities of its finding of professional misconduct.

3. *Failure to Maintain Active Bar Membership.* A DOJ component reported to OPR that a DOJ attorney's license to practice law had been suspended for a 6-month period, in violation of the statutory requirement that Department attorneys maintain an active bar membership in at least one state at all times.

OPR conducted an investigation and found that documents provided by the state bar revealed that in addition to the reported 6-month suspension, the DOJ attorney's license had been suspended on 4 other occasions. OPR also found that during the first of 2 interviews with OPR, the DOJ attorney falsely denied recalling the 4 other instances in which the state bar had suspended the attorney's bar license.

OPR concluded that the DOJ attorney committed intentional professional misconduct by knowingly violating federal law and Department policy by failing to maintain an active membership in a state bar on 5 occasions. OPR found that the duty to maintain an active bar membership is a longstanding obligation on all Department attorneys, and it is a clear and unambiguous rule. OPR found further that the DOJ attorney knew of the obligation, and the attorney received some or

all of the communications from the state bar alerting her to the pending suspensions if she did not pay her late bar dues. OPR calculated that the DOJ attorney knowingly allowed her bar membership to lapse for a cumulative total of approximately 130 out of 230 months, or 57% of the time that the attorney had been employed by the Department.

In addition, OPR concluded that the DOJ attorney engaged in intentional professional misconduct by violating her duty of candor in an OPR investigation when she told OPR attorneys in her first interview that she was unaware of the existence and nature of prior suspensions from the state bar. The DOJ attorney admitted during her second interview with OPR that these statements were false, and she had been aware of the prior suspensions. The DOJ attorney also admitted that she made these statements in a purposeful effort to conceal the true facts from OPR. Because OPR found that the duty of candor of a witness, and especially the subject in an OPR investigation is clear and unambiguous, OPR concluded that the DOJ attorney purposely violated the professional obligation of candor.

OPR recommended a range of discipline from a 14-day to a 60-day suspension without pay. The DOJ attorney served a 50-day suspension without pay. OPR also notified the appropriate state bar authorities of its finding of professional misconduct.

4. *Violation of Civil Service Reform Act and Department Hiring Practices; False Statements.* On July 2, 2008, OPR and OIG completed a joint report stemming from a joint investigation into allegations that political or ideological affiliations were considered in hiring, transferring, and assigning cases to career attorneys in the Civil Rights Division of the Department. Career attorney positions in the Department are subject to the merit system principles of the *Civil Service Reform Act*, which prohibit discrimination in the federal work place based on, among other things, political affiliation. See 5 U.S.C. § 2301, *et seq.* Complaints that politics was affecting the attorney hiring process in the Civil Rights Division received widespread public attention in April 2007, as a result of allegations by Civil Rights Division employees that Bradley S. Schlozman, a former senior Division official, hired lawyers for career positions based on their political or ideological affiliations.

The OPR and OIG investigation examined: whether the Civil Rights Division used political or ideological affiliations in assessing applicants for career attorney positions, including the hiring processes for experienced attorneys and entry-level attorneys hired through the Attorney General's Honors Program; whether political or ideological affiliations resulted in other personnel actions affecting career attorneys in the Division, such as attorney transfers and case assignments; whether the Division's senior management failed to recognize and correct any improper consideration of political or ideological affiliations in the hiring and treatment of career attorneys; and whether Schlozman made false statements in his testimony to Congress about these matters.

The evidence in the investigation showed that Schlozman, first as a Deputy Assistant Attorney General and subsequently as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General, considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division. In doing so, Schlozman violated federal law – the *Civil Service Reform Act* – and Department policy that prohibit discrimination in federal employment based on political and ideological affiliations, and committed misconduct. The evidence also showed that Division managers failed to exercise sufficient oversight to ensure that Schlozman did not engage in inappropriate hiring and personnel practices. Moreover, Schlozman made false statements about whether he considered political and ideological affiliations when he gave sworn testimony to the Senate Judiciary Committee and in his written responses to supplemental questions from the Committee.

The OPR and OIG findings were referred for criminal prosecution, but ultimately prosecution was declined. The OPR and OIG report was released publicly on January 13, 2009. At the time the report was completed, Schlozman was no longer employed by the Department and, therefore, was not subject to disciplinary action by the Department. OPR and OIG recommended, however, that the report's findings be considered if Schlozman seeks federal employment in the future. OPR and OIG concluded that Schlozman's violations of the merit system principles set forth in the *Civil Service Reform Act*, federal regulations, and Department policy, and his subsequent false statements to Congress, rendered him unsuitable for federal service.



5. *Discovery Violation.* A district court issued an order prohibiting the government from filing a supplemental expert report after the court found that a DOJ attorney failed to file the report by the discovery deadline.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the court's order requiring the supplemental report to be filed by a date certain. OPR found that although the court was generally lenient with respect to deadlines, the leniency most often was directed toward non-governmental parties, and the DOJ attorney had been counseled by her supervisors that she should not expect the government to be similarly treated. The court previously had granted the government two extensions of time in which to file its expert report, and the date ultimately set for filing the report was one that the DOJ attorney had herself proposed. OPR found that on the day that the expert report was due, the DOJ attorney neither notified the court that the report would not be filed, nor filed a motion for an enlargement of time. Although OPR found that the DOJ attorney engaged in reckless disregard of the court's order, OPR concluded that the DOJ attorney did not engage in intentional misconduct because the DOJ attorney had a good faith belief, based on the court's historic acceptance of late reports, that the court would grant another extension in this instance.

OPR recommended a range of discipline from a written reprimand to a 2-day suspension. The DOJ attorney received a written reprimand. OPR also notified the appropriate state bar authorities of its finding of professional misconduct.

6. *Candor to the Court.* After a court of appeals remanded a civil case back to the district court, the district court criticized the legal and factual representations made by the DOJ attorney who drafted the government's appellate briefs. The district court's criticism centered on the government's representation in its appellate briefs that it had asked the district court to apply a particular state statute governing damages. On remand, the district court stated that it did not believe that the government had invoked the statute, and it felt that the government misrepresented its position to the appellate court.

OPR conducted an investigation and found that there was a misunderstanding between the court and the government with regard to the

government's request to invoke the statute. OPR found that although the government clearly invoked the statute in its pre-trial briefs, the district court's post-appellate comments indicated that the court believed that the government had abandoned its claim. However, OPR did not find evidence that the government had changed its position, and neither the district court nor plaintiff's counsel cited any oral or written statement by a DOJ attorney supporting the district court's interpretation of the government's position. OPR found further that the confusion concerning the statute's implementation was understandable because the government had not, prior to the instant matter, invoked the statute in a similar case. Given these circumstances, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in this case.

7. *Improper Examination of a Witness; Violation of Court Order.* A district court found that a DOJ attorney violated the Privacy Act and the court's pre-trial order prohibiting the intimidation and harassment of witnesses when the DOJ attorney cross-examined the plaintiff using information contained in her retirement application.

OPR conducted an investigation and found that the district court's ruling about the reach of the Privacy Act, and whether a witness' retirement application fell within its purview, reflected a minority view of the law that had not been adopted by the circuit court. Because the DOJ attorney acted consistently with the Privacy Act as established by the preexisting case law in that circuit, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment when she cross-examined the plaintiff using information from the plaintiff's retirement application.

OPR concluded further that the DOJ attorney's cross-examination did not constitute harassment and intimidation in violation of the court's pre-trial order. OPR found that, during direct examination, the plaintiff offered her lay opinion concerning the reputation for veracity of the government's key witness (a former colleague). In response to this testimony, during cross-examination the DOJ attorney attempted to impeach the plaintiff by referencing her retirement application in which she cited her lack of trust in her colleagues as a basis for her application. OPR found that although defense counsel objected to the DOJ

attorney's cross-examination on relevancy grounds and later raised a Privacy Act objection, while the examination was ongoing she did not characterize the cross-examination as harassing or intimidating in nature. OPR found further that the court twice overruled defense counsel's objections on the ground that the DOJ attorney was pursuing a fair line of questioning. Because the DOJ attorney had a legitimate reason to question the plaintiff about the disability retirement application, and the court at the time found the questioning to be reasonable, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment in cross-examining the plaintiff.

8. *Fraud Upon the Court.* A district court set aside a foreclosure judgment secured by the government because the court found that a DOJ attorney deceived the court by failing to disclose the existence of a release on the government's lien. The court also found that the DOJ attorney had not been candid in his response to the defendant's claim of a valid release.

OPR conducted an investigation and found that the DOJ attorney had fully disclosed the release on the lien to the defendant's attorney, as he was required to do under the Federal Rules of Civil Procedure. OPR found further that defense counsel had, in fact, disclosed the existence of the lien to the court. Because the DOJ attorney disclosed the information to defense counsel, who then made it a part of the record before the district court, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. OPR also found that the DOJ attorney's response to the defendant's claim of a valid release was not false or misleading. OPR concluded that the portion criticized by the court had been taken out of context, and that a full reading of the DOJ attorney's response revealed that he had not misstated or concealed any fact. Accordingly, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment with respect to his response.

9. *Violation of Regulation.* A private attorney reported to OPR that an immigration judge violated her client's right to due process when the judge granted the government's emergency motion to change venue. Specifically, the attorney alleged that the immigration judge violated 8 C.F.R. § 1003.20(b) by granting the government's motion to change venue without giving the attorney notice and an opportunity to respond, as required by the regulation. The attorney alleged that

the immigration judge noted falsely on the final order that the attorney had in fact been given notice and an opportunity to respond.

OPR conducted an investigation and concluded that the immigration judge committed intentional professional misconduct by knowingly granting the government's motion to change venue without providing opposing counsel notice and an opportunity to respond. OPR found further that the immigration judge committed intentional misconduct by knowingly misrepresenting in the order that opposing counsel had been given notice and an opportunity to respond.

OPR recommended a range of discipline from a written reprimand to a 2-day suspension. The immigration judge received a written reprimand. OPR did not notify the appropriate state bar authorities of its finding of professional misconduct because the finding did not implicate any state bar rule.

10. *Failure to Comply with DOJ Rules and Regulations.* A DOJ component informed OPR that in two different cases a DOJ attorney failed to obtain prior approval from the Office of Enforcement Operations (OEO) to seal courtroom proceedings, as required by 28 C.F.R. § 50.9 and United States Attorneys' Manual § 9-5.150.

OPR conducted an investigation and found that in the first case defense counsel contacted the DOJ attorney on a Thursday to tell him that the defendant would plead guilty. The DOJ attorney asked the court to schedule a sealed plea hearing for Monday. OPR found that the DOJ attorney contacted OEO on Tuesday, the day after the hearing, to request *nunc pro tunc* permission for the sealing of the hearing. The DOJ attorney told OPR that he believed that the need to consult with OEO would have been a weak basis for a continuance of the hearing, and that he had a press of other cases. OPR found that in the second case, the DOJ attorney filed a plea agreement and asked the court to schedule a sealed plea hearing the following day. OPR found that the court contacted the DOJ attorney and asked the parties to appear at a plea hearing that same day. OPR found that the DOJ attorney made no effort to contact OEO prior to the hearing to obtain permission to seal the proceeding. OPR found further that the DOJ attorney waited two months to contact OEO and obtain *nunc pro tunc* permission for the sealed hearing. The DOJ attorney told OPR that he did not try

to postpone the hearing because he believed that the court wanted the plea taken quickly. The DOJ attorney also told OPR that he knew that he was required to contact OEO, but simply did not have the time to do so. OPR concluded that the DOJ attorney engaged in professional misconduct by intentionally violating his duty to abide by 28 C.F.R. § 50.9 and United States Attorneys' Manual § 9-5.150.

OPR recommended a range of discipline from a 1-day to a 3-day suspension without pay. The DOJ component appealed and asked that the attorney instead receive an official reprimand because of his positive performance since the cases. OPR did not object to the request for downward departure in discipline, which was based on factors not related to the merits of OPR's finding of misconduct. As a result, the DOJ attorney was officially reprimanded. OPR will notify the appropriate state bar authorities of its finding of professional misconduct following the disposition of a related matter.

11. *Politicized Hiring.* Senators Edward Kennedy and Richard Durbin wrote to the Attorney General, stating that they had received a letter from a group of Department employees alleging that partisan politics had been considered in deciding which candidates to interview for positions in the Attorney General's Honors Program and Summer Law Intern Program (SLIP). The complaint alleged that the longstanding procedure had been changed to require a review by the Office of the Deputy Attorney General before candidates could be invited by Department components for interviews. In the 2006 hiring round, the complaint alleged, many candidates chosen by the components were rejected and some offices were unable to interview enough candidates to fill all of their vacancies. The letter alleged that many candidates who were rejected were honors graduates from top law schools, but "most of those struck from the list had interned for a Hill Democrat, clerked for a Democratic judge, worked for a 'liberal' cause or otherwise appeared to have 'liberal' leanings."

OPR and OIG conducted a joint investigation to determine whether political party or ideological affiliation was taken into consideration when hiring candidates under the Attorney General's Honors Program and the SLIP from 2002 to 2006.

In a report released publicly on June 24, 2008, OPR and OIG concluded that two members of the committee used by the Department to screen applications for these positions, Michael Elston, then Chief of Staff to the Deputy Attorney General, and Esther Slater McDonald, then Counsel to the Associate Attorney General, used political and ideological affiliations to “deselect” candidates for the Honors Program and SLIP in 2006, in violation of federal law and Department policy. OPR and OIG concluded that Elston, who was the head of the 2006 Screening Committee, failed to take appropriate action when he learned that McDonald was routinely deselecting candidates on the basis of what she perceived to be the candidates’ liberal affiliations. The evidence also showed that Elston himself deselected some candidates, and allowed the deselection of others, based on political and ideological affiliations. Accordingly, OPR and OIG concluded that Elston and McDonald both committed misconduct. OPR and OIG found that another member of the 2006 Screening Committee, Daniel Fridman, then a career Assistant United States Attorney on detail to the Office of the Deputy Attorney General, did not use improper considerations in his review of candidates for the Honors Program and SLIP. Instead, he raised concerns that political or ideological affiliations were being used by McDonald to both his immediate supervisor and to Elston.

OPR and OIG also concluded that Office of Attorney Recruitment and Management (OARM) Director Louis DeFalaise did not adequately or timely address the concerns that were brought to his attention concerning the Screening Committee’s deselections. As Director of OARM, DeFalaise played a key oversight role in the administration of the Honors Program and SLIP. During the 2006 process, he became aware that an unusually large number of candidates were deselected, that the deselections included highly qualified candidates, and that some component officials were concerned that political considerations were being taken into account. Although Elston told DeFalaise that the deselections were based on legitimate reasons, OPR and OIG found that DeFalaise had sufficient evidence, at a minimum, to raise concerns about the Screening Committee’s criteria or the deselection of particular candidates directly with Elston, or discuss those concerns with other senior Department leadership.

In addition, OPR and OIG concluded that Acting Associate Attorney General William Mercer did not adequately address the concerns that were brought to his attention by several senior Department officials that the Screening Committee’s

deselections appeared to have been politicized. In addition, one of his own staff members, McDonald, was a member of the Screening Committee. When Mercer questioned McDonald about the criteria the Screening Committee had applied, McDonald told him that the deselections were based, at times, on “a concern that [the applicants] wouldn’t be able to follow DOJ policy based upon what they had written.” Mercer relied on Elston’s assurances that the deselections were based on legitimate concerns without any further inquiry, even though he had been informed by other Department officials that academically qualified candidates had been deselected. OPR and OIG concluded that Mercer should have pursued the matter further with Elston.

OPR and OIG also concluded that political or ideological affiliations were used to deselect candidates in 2002. Although OPR and the OIG were unable to conclude that any specific members of the 2002 Screening Committee intentionally made deselections based on these prohibited factors, and each Committee member denied doing so, the data indicated that the Committee considered political or ideological affiliations when deselecting candidates.

With regard to the processes Department components used from 2002 through 2006 for proposing candidates to the Screening Committee, OPR and OIG generally found that the processes were largely controlled by career employees and were merit based. OPR and OIG did not find evidence that components employed inappropriate criteria such as political or ideological affiliations to select candidates to be interviewed for the Honors Program or SLIP. However, OPR and OIG received allegations that inappropriate considerations were used in selecting Honors and SLIP candidates in the Civil Rights Division. OPR and OIG reported findings concerning hiring in the Civil Rights Division in a separate report.

As a result of the widespread complaints from career employees that arose following the 2006 selection process, in April 2007, the Department changed the process for selecting Honors Program and SLIP candidates by removing political officials from the Screening Committee and by providing written guidance on the criteria that should be applied. OPR and OIG concluded that these changes were appropriate and will address many of the problems that they found in the investigation. However, OPR and OIG recommended additional changes for the Department to consider that will help ensure that political or ideological affiliations

are not inappropriately used to evaluate candidates for the Honors Program and SLIP in the future. Attorney General Mukasey directed that these recommendations be implemented.

12. *Discovery Violation.* A district court delayed the trials of several defendants charged in a drug-trafficking case when the DOJ attorney handling those trials advised the court and the defendants that the government was still gathering *Giglio* material on one of its witnesses. The witness at issue was a confidential informant who had made controlled purchases of drugs from many of the defendants named in the indictment. After a complete search for *Giglio* material revealed serious problems with the confidential informant, the government moved for dismissal of the pending charges against all of the defendants who had been charged with selling drugs to the confidential informant. Some of those defendants had already pled guilty and were allowed to withdraw their pleas.

OPR conducted an investigation to determine why all of the *Giglio* material had not been discovered earlier and turned over to the defendants. OPR found that the case had been transferred multiple times to different DOJ attorneys. The DOJ attorney initially assigned to the case was transferred from the case shortly after indictment and did not gather all of the *Giglio* material on the confidential informant prior to his transfer. The second DOJ attorney assigned to the case handled the initial discovery and oversaw several guilty pleas. He mistakenly assumed that there was no *Giglio* material as to the confidential informant. The case was then transferred to a third DOJ attorney who, in preparation for upcoming trials, sought to obtain all potential *Giglio* material on the confidential informant. The third DOJ attorney began the search for all *Giglio* material approximately two weeks before the first of several trials scheduled in the case. This process proved to be difficult and time consuming, thus delaying the scheduled trials. The impeachment material that the DOJ attorney ultimately found led to the dismissals.

OPR concluded that none of the DOJ attorneys assigned to the case committed professional misconduct or exercised poor judgment. OPR reached this conclusion because the DOJ attorneys were not aware of the confidential informant's background, and did not have reason to believe that gathering the impeachment material would prove problematic and lead to trial delays. OPR



found that the critical problems with the confidential informant had occurred years prior, and were unknown to the law enforcement agents who investigated the case. OPR also found that the DOJ attorneys had repeatedly been assured by investigators that the confidential informant was a reliable witness. Because the DOJ attorneys were unaware that potentially serious problems existed with the confidential informant, each attorney determined that the gathering of impeachment material could be done closer to trial, if any of the defendants elected to go to trial. OPR concluded that under the circumstances, it was not unreasonable to defer the gathering of impeachment material until a few weeks before trial.

13. *Politicized Hiring and Personnel Practices.* OPR conducted a joint investigation with OIG into allegations that Monica Goodling, former Counsel to then Attorney General Alberto Gonzales, and others may have considered improper criteria, including political affiliation, in DOJ hiring and personnel decisions. The investigation followed admissions made by Goodling in her written statement and testimony to Congress on May 23, 2007, that she “may have gone too far in asking political questions of applicants for career positions, and may have taken inappropriate political considerations into account on some occasions.” The career positions at issue include positions as Assistant United States Attorneys, immigration judges, Board of Immigration Appeals Members, career attorney positions in Department components, and detail positions to various components.

In a report released publicly on July 28, 2008, OPR and OIG described the results of the joint investigation into allegations that Monica Goodling and other employees of the Office of the Attorney General (OAG) discriminated on the basis of political affiliation in hiring decisions for career positions at the Department. The investigation focused on Goodling’s role in the selection and hiring of candidates for Assistant United States Attorney and other career attorney positions, career attorney details to Department offices, and immigration judge and Board of Immigration Appeals positions. OPR and OIG also investigated whether witnesses to or subjects of the investigation provided false or misleading information to OPR and OIG.

In the course of the joint investigation, OPR and OIG interviewed more than 85 individuals, including former Attorney General Gonzales, former Deputy

Attorney General Paul McNulty, former Chief of Staff to the Attorney General D. Kyle Sampson, and numerous current and former employees of the OAG and of the Office of the Deputy Attorney General. OPR and OIG also interviewed many individuals who were alleged victims or beneficiaries of political discrimination in Department hiring decisions. In addition, investigators reviewed thousands of documents, and searched the computer hard drives of several former OAG employees. Monica Goodling declined to be interviewed by OPR and OIG.

Based on the results of the investigation, OPR and OIG concluded that Goodling violated federal law and Department policy, and committed misconduct, by considering political or ideological affiliations in making hiring decisions for career AUSAs, for other career positions, and for temporary detail assignments to positions that were not of a policy-making nature. OPR and OIG found that Goodling did not violate federal law or Department policy in considering political or ideological affiliations in selecting or rejecting applicants for details to positions that were arguably policy-making, but noted that Goodling's use of political considerations for such positions damaged the Department because it resulted in high-quality candidates for important details, such as a counterterrorism position, being rejected in favor of less-qualified candidates.

OPR and OIG found further that Sampson and Jan Williams, the White House liaison prior to Goodling, also violated federal law and Department policy by considering political or ideological affiliations in soliciting and selecting immigration judge candidates, and that Sampson committed misconduct by so doing.

OPR and OIG found further that Goodling committed misconduct by knowingly providing false information to a Civil Division attorney who was defending a lawsuit brought by an unsuccessful immigration judge candidate. Goodling told the attorney that she did not take political factors into consideration with immigration judge hiring, which was false. OPR and OIG did not refer Goodling's false statement to the United States Attorney's Office for the District of Columbia (USAO) because proving that her statement was false would require, as a practical matter, reference to her immunized testimony to Congress in May 2007, in which she admitted that she used political considerations in reviewing immigration judge candidates.

OPR and OIG also concluded that Williams provided false information in her sworn interview concerning her involvement in immigration judge hiring. OPR and OIG referred Williams' false statements to the USAO, where a career attorney serving as the Acting United States Attorney for purposes of the referral declined prosecution.

OPR and OIG concluded further that John Nowacki, a Deputy Director at the Department's Executive Office for United States Attorneys, committed misconduct by providing information to Department officials that he knew to be inaccurate in connection with a proposed response to a media inquiry about politicized hiring decisions in the Department.

14. *Loss of Government Records.* OIG referred to OPR allegations of professional misconduct made by a complainant against one of the Department's components. The complainant was a member of an Equal Employment Opportunity Commission (EEOC) class-action suit brought against the component for its hiring practices. The class members alleged that the component discriminated against white male applicants. During the course of discovery in the EEOC case, the Department component admitted that it could not provide the applicant files for the contested positions because those records had been destroyed. The Department agreed to pay millions of dollars to settle the class members' claims, although it denied any wrongdoing in the matter. The complainant alleged that these records were critical because they documented who had applied for the positions and how the appointments were ultimately decided, and in losing them the Department had engaged in misconduct.

OPR conducted an investigation and determined that the applications at issue were destroyed after the formal equal employment opportunity complaint had been filed, in violation of the component's duty to preserve the documents. However, OPR concluded that the head of the component did not engage in professional misconduct or exercise poor judgment with respect to the destruction of the job applications because he had not been advised that they had to be preserved. OPR also found that the head of the component had sought advice from the component's personnel office, and had been told that applications could be destroyed if they were more than three years old (which they were). OPR also found that the general counsel of the component did not engage in professional

misconduct or exercise poor judgment because he had no involvement in the destruction of the documents, and he had assigned an attorney who had an extensive background in equal employment opportunity matters to handle this situation. OPR concluded that the attorney assigned to this matter committed professional misconduct by failing to give written or oral notice to the relevant offices within the component to preserve documents relating to the formal equal employment opportunity complaint. In failing to provide such notice, the attorney engaged in a course of conduct that was in reckless disregard of the component's obligation to preserve the applications.

Because the attorney resigned from the Department prior to the completion of the OPR report, OPR did not make a recommendation regarding discipline. OPR did not notify the appropriate state bar authorities of its professional misconduct finding because the attorney resigned from his bar membership prior to the completion of the OPR report.

15. *Unprofessional Statements or Comments.* A court of appeals criticized an immigration judge for acting in an unprofessional manner, stating that the immigration judge attacked the alien's moral character rather than conducting a fair and impartial inquiry into her asylum claims.

While OPR was conducting its investigation, it learned of another opinion by the court of appeals in which the court criticized the conduct of the same immigration judge. The court of appeals stated that on numerous occasions the immigration judge verbally attacked the alien in a manner unbecoming of a neutral and detached arbiter. In addition, the court found that the immigration judge displayed a callousness toward the alien's situation that was unwarranted.

OPR conducted an investigation to determine whether the immigration judge violated her duties 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 the immigration judge committed professional misconduct by engaging in a course of conduct in the two cases that was in reckless disregard of her obligation to appear to be fair and

impartial in the administration of justice. OPR concluded that the immigration judge engaged in inappropriate questioning and commentary during the cases, and exhibited hostility towards the aliens. In doing so, the immigration judge's conduct created the appearance of partiality and bias, and undermined her role as a neutral and objective arbiter.

OPR recommended a range of discipline from a 2-day to a 5-day suspension without pay. The immigration judge served a 4-day suspension without pay. OPR did not notify the appropriate state bar authorities of its finding of professional misconduct because the finding did not implicate any state bar rule.

16. *Failure to Comply with Court Orders.* A DOJ attorney assigned to a case failed to respond to two orders issued by the district court. Specifically, the defendant wrote a letter to the district court alleging ineffective assistance of counsel by his court-appointed attorney. The district court treated the letter as a 28 U.S.C. § 2255 motion, and ordered the government to respond. The DOJ attorney failed to do so. Thereafter, the district court issued an order to show cause directing the government to state why it did not respond to the 28 U.S.C. § 2255 motion. The government failed to respond to the order to show cause. As a result, the court issued a third order deeming the defendant's motion unopposed and stating that an evidentiary hearing would be scheduled. After conducting an evidentiary hearing, the district court denied the defendant's motion.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment regarding the first order because the DOJ attorney was working on several substantial matters at the time, and his failure to respond represented an inadvertent and atypical oversight. OPR concluded that the DOJ attorney did not engage in professional misconduct with respect to the second order (order to show cause), because his failure to respond was based on the fact that he had not received a hard copy of the order. OPR found that it was common practice in that office for staff members to print and distribute hard copies of the electronic filings on a daily basis, and the DOJ attorney apparently did not receive a hard copy of the electronic filing with respect to the order to show cause. Although OPR found that the DOJ attorney did not engage in professional misconduct, OPR found that he exercised poor judgment by relying on his staff to distribute copies of the electronic filings, rather

than carefully reviewing the electronic notifications that he received directly from the court. Because of the DOJ attorney's poor judgment, the government was not aware of the court's orders until the evidentiary hearing. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

17. *Political and Retaliatory Removals; False Statements.* At the request of then-Attorney General Alberto Gonzales, OPR initiated an investigation into whether the removal of nine United States Attorneys, including seven who were told to resign on December 7, 2006, was intended to interfere with, or was in retaliation for, either pursuing or failing to pursue certain politically sensitive prosecutions or investigations. OPR subsequently agreed to conduct the investigation jointly with OIG.

In a report released publicly on September 29, 2008, OPR and OIG described how 9 United States Attorneys (David Iglesias, Daniel Bogden, Paul Charlton, John McKay, Carol Lam, Margaret Chiara, Kevin Ryan, Todd Graves and Bud Cummins) were selected for removal and the process used to remove them. OPR and OIG focused on the reasons for the removal of each of the United States Attorneys, and whether they were removed for partisan political considerations, such as to influence an investigation or prosecution or to retaliate for their actions in any specific investigation or prosecution. In addition, OPR and OIG investigated whether Department officials made false or misleading statements to Congress, to the public, or to OPR and OIG concerning the removals.

The subjects of the joint OPR and OIG investigation were: Attorney General Alberto Gonzales; Deputy Attorney General Paul McNulty; D. Kyle Sampson, Chief of Staff to the Attorney General; Monica Goodling, White House Liaison and Senior Counsel to the Attorney General; Michael Elston, Chief of Staff and Counselor to the Deputy Attorney General; William Moschella, Principal Associate Deputy Attorney General; David Margolis, Associate Deputy Attorney General; and United States Attorney David Iglesias. All of the foregoing officials, with the exception of Margolis, have since resigned from the Department.

Based on the results of the investigation, OPR and OIG concluded that the process that Department officials used to identify the United States Attorneys for

removal was fundamentally flawed. In particular, the report concluded that former Attorney General Alberto Gonzales and former Deputy Attorney General Paul McNulty failed to adequately supervise or oversee the removal process. Instead, Kyle Sampson designed and implemented the process with virtually no oversight. OPR and OIG found no evidence that Gonzales, McNulty, Sampson, or anyone else in the Department carefully evaluated the basis for each United States Attorney's removal or attempted to ensure that there were no improper political reasons for the removals. Moreover, after the removals became public, the statements provided by Gonzales, McNulty, Sampson, and other Department officials about the reasons for the removals were inconsistent, misleading, or inaccurate in many respects.

In analyzing the conduct of senior Department officials in the removal of the United States Attorneys and its aftermath, OPR and OIG found that Attorney General Gonzales abdicated his responsibility to safeguard the integrity and independence of the Department by failing to ensure that the removal of the United States Attorneys was not based on improper political considerations. In addition, Gonzales made a series of statements after the removals that were inaccurate and misleading, including his remarks at a March 13, 2007 press conference. Finally, after Congress had indicated that it proposed to subpoena Monica Goodling and others to testify about the removals, Gonzales had a conversation with Goodling about the removals even though he later testified before Congress that he had not discussed the facts of the removals with anyone in the Department. OPR and OIG found that Gonzales was, in fact, trying to console Goodling, who was distraught because she might have to testify about the removals. However, even if he was trying to console her, Gonzales should not have discussed the substantive facts with Goodling, whom he knew to be a prospective witness. OPR and OIG also questioned why he stated to Congress that he had never discussed the facts of the removals with anyone in the Department.

The report found that, as with Attorney General Gonzales, Deputy Attorney General McNulty abdicated his responsibility to safeguard the integrity and independence of the Department by failing to ensure that the removal of the United States Attorneys was not based on improper political considerations. OPR and OIG found that McNulty had little involvement in the removal process and was not even informed about the removal plan until the fall of 2006. He was surprised by the plan when he learned of it, but he did not object to the plan and did not

question the methodology used to identify United States Attorneys for removal. Instead, he distanced himself from the removals, both before and after they occurred, and treated them as a personnel matter outside of his bailiwick. OPR and OIG determined that the Deputy Attorney General, the second in command of the Department and the immediate supervisor of the United States Attorneys, should have raised his objections more forcefully about the removal plan and should not have been so deferential about such a significant personnel action involving United States Attorneys under his supervision.

OPR and OIG found that Sampson, who was the person most responsible for developing and implementing the removal of the United States Attorneys, mishandled the removal plan from the outset. In addition, he inappropriately advocated bypassing the Senate confirmation process for replacing United States Attorneys by using the Attorney General's authority to appoint interim United States Attorneys. Finally, OPR and OIG found that Sampson engaged in misconduct by making misleading statements and failing to disclose important information to the White House, Members of Congress, congressional staff, and Department officials concerning the reasons for the removals of the United States Attorneys and the extent of White House involvement in the removal process.

OPR and OIG found that White House Liaison and Senior Counsel Goodling failed to fully disclose to Department officials what she knew about the White House's involvement in the removals and that her failure to do so contributed to Department officials making inaccurate statements to Congress. Moreover, she engaged in misconduct by failing to correct Department officials who were providing what she knew to be misleading information to Congress and the public concerning the extent and timing of White House involvement in the United States Attorney removal process.

The report also examined an allegation that Elston, as Deputy Attorney General McNulty's Chief of Staff, attempted to threaten and intimidate three of the fired United States Attorneys in order to keep them from publicly discussing their removals. OPR and OIG found insufficient evidence to conclude that Elston did, in fact, intend to threaten them.



OPR and OIG found that Moschella, the Principal Associate Deputy Attorney General, in congressional testimony concerning the United States Attorney removals, misstated both the timing and the nature of White House involvement in the removal of the United States Attorneys. OPR and OIG concluded, however, that Moschella was not directly involved in the removal process and did not know that his testimony was inaccurate. The report found that Moschella reiterated publicly what he had been told and what McNulty had previously told Congress. The report concluded that Moschella did not commit misconduct.

The report also concluded that Associate Deputy Attorney General Margolis, a highly respected senior career attorney in the Department, had significant knowledge about United States Attorneys and their performance and was aware of Sampson's efforts to identify United States Attorneys for possible removal. Under the circumstances, OPR and OIG found that he should have raised questions about the process used to identify the United States Attorneys on the removal list to ensure there were no improper reasons for the removals. Margolis acknowledged that he failed to ask about the removal process. Given his experience, position and stature, OPR and OIG concluded that he was too deferential to others in connection with this unprecedented dismissal of a group of United States Attorneys.

Finally, with respect to United States Attorney David Iglesias, the report noted that Department policy requires that any requests from members of Congress or congressional staff (including telephone requests) to United States Attorneys' Offices for non-public information must be promptly reported to the Counsel to the Director of the Executive Office for United States Attorneys. *See* United States Attorneys' Manual § 1-8.010. Both Representative Heather Wilson and Senator Pete Domenici called Iglesias seeking non-public information about a pending public corruption investigation. OPR and OIG concluded that Iglesias committed misconduct both in answering Domenici's question and in failing to report the contacts from Wilson and Domenici pursuant to Department policy.

The report recommended that then Attorney General Michael Mukasey specially appoint a counsel to assess the facts uncovered in the investigation and to determine whether the evidence demonstrated that any criminal offense was committed with regard to the removal of any United States Attorney, or with

regard to the testimony of any witness related to the United States Attorney removals. Attorney General Mukasey selected Nora Dannehy, acting United States Attorney for the District of Connecticut, to serve as a Special Attorney for the purpose of determining whether the evidence demonstrated that any criminal offense was committed with regard to the removal of Iglesias, and whether the evidence demonstrated that any criminal false statements were made by witnesses to Congress or to investigators.

18. *Judicial Finding of Prosecutorial Vindictiveness.* A district court found that a DOJ attorney engaged in vindictive prosecution. Based on assurances from defense counsel that the defendant would plead guilty, the DOJ attorney filed a complaint against the defendant for one count of being a felon in possession of a firearm. The defendant subsequently retained new counsel and filed a motion to withdraw his guilty plea, claiming that his former attorney forced him to plead guilty. The district court granted the motion. The DOJ attorney then obtained a superseding indictment, which included the original count as well as four additional counts. The district court granted the defendant's motion to dismiss three of the four new counts in the superseding indictment, finding that the defendant had raised a presumption of prosecutorial vindictiveness. The district court denied the government's motion for reconsideration.

OPR conducted an investigation. The Department appealed the district court's order dismissing the counts, arguing that the district court erred in applying the presumption of prosecutorial vindictiveness. The court of appeals issued an opinion concluding that the district court's application of the presumption of prosecutorial vindictiveness was erroneous, and that there was no evidence of actual vindictiveness. The court of appeals reversed and remanded the case to the district court. Based on the results of the investigation, OPR concluded that the DOJ attorney did not engage in conduct that raised a presumption of prosecutorial vindictiveness. OPR found that governing case law supported the filing of a superseding indictment with additional charges after the defendant withdrew his guilty plea. OPR also found that the DOJ attorney had sufficient evidence to support the additional charges against the defendant, and there was no evidence that he acted vindictively. Under these circumstances, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment.

19. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for vouching for the credibility of government witnesses in a criminal case. During rebuttal closing argument, the DOJ attorney responded to defense counsel's attacks on the credibility of the government witnesses by stating that the government witnesses would not risk their families, lives, and income to lie about the defendant. The court of appeals found that the DOJ attorney engaged in misconduct when she referred to possible professional repercussions if the witnesses lied on the stand because such statements constituted impermissible vouching.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR found that at the time of the trial, the DOJ attorney had been with the Department for only six months, and this was her first trial. Although the DOJ attorney had attended training courses, she did not recall learning that it was improper to discuss possible repercussions if a government witness lied on the stand. OPR also found that the statements were made during rebuttal closing argument, when the DOJ attorney had little time to consider the appropriateness of the statements. Moreover, the statements were made in direct response to defense counsel's attacks on the veracity of the agents' testimony. Because of the DOJ attorney's inexperience, as well as the lack of time to reflect and plan her rebuttal argument, OPR found that the DOJ attorney made an excusable mistake.

### **OPR Inquiries in Fiscal Year 2008**

*Characteristics of Inquiries Opened in Fiscal Year 2008:* The sources of the 126 matters designated as inquiries are set forth in Table 3. Twenty-one of these matters were later converted to full investigations. The 126 matters do not include an additional 42 matters involving proposed bar notifications on non-Department attorneys.

**TABLE 3**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2008</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions & referrals <sup>8</sup>	16	12.7%
Private attorneys	30	23.8%
Department components	41	32.5%
Private parties	34	27.0%
Other agencies	2	1.6%
Other sources	3	2.4%
<b>Total</b>	<b>126</b>	<b>100.0%</b>

The nature of the 208 allegations against Department attorneys contained in the 126 inquiries is set forth in Table 4.

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<sup>8</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**TABLE 4**

<b>Types of Misconduct Allegations in Inquiries Opened in Fiscal Year 2008</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of All Allegations in Inquiries</b>
Abuse of authority, including abuse of prosecutorial discretion	76	36.5%
Improper remarks to a grand jury, during trial, or in pleadings	4	1.9%
Misrepresentation to the court and/or opposing counsel	32	15.4%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	11	5.3%
Failure to competently and/or diligently represent the client's interests	27	12.9%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	15	7.2%
Failure to comply with court orders or federal rules	6	2.9%
Conflict of interest	6	2.9%
Failure to comply with DOJ rules and regulations	15	7.2%
Interference with defendants' rights	4	1.9%
Lateness (i.e., missed filing dates)	1	0.5%
Lack of fitness to practice law	2	1.0%
Bar-related	6	2.9%
Whistleblower	2	1.0%

Failure to comply with federal law	1	0.5%
<b>Total</b>	<b>208</b>	<b>100.0%</b>

The matters opened as inquiries during fiscal year 2008 were remarkably diverse. Many of those matters did not involve a complaint against a Department attorney. For example, one inquiry was based on allegations of *Brady* violations by an FBI agent. Other inquiries involved allegations of fraud or misconduct 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 2008:* OPR closed a total of 122 inquiries in fiscal year 2008 involving allegations against Department attorneys, and an additional 36 inquiries involving proposed bar notifications on non-Department attorneys. Twenty-one of the 122 inquiries were converted to full investigations after evidence gathered in the inquiry indicated that further investigation was required. The remaining 101 matters involved 189 separate allegations of professional misconduct. The manner in which the 189 allegations were resolved as inquiries in fiscal year 2008 is set forth in Table 5.

**TABLE 5**

<b>Categories of Inquiry Allegations Resolved in Fiscal Year 2008</b>		
<b>Type of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Total</b>
Performance or management matter. Refer to employing component.	5	2.6%
More appropriately handled by another component or agency. Referred.	8	4.2%
Issues previously addressed. No further action required by OPR at this time.	10	5.3%
No merit to matter based on preliminary inquiry.	23	12.2%
No merit to allegation based on review of matter.	24	12.7%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	1	0.5%
Converted to an investigation.	37	19.6%
Inquiry closed because further investigation not likely to result in finding of misconduct.	48	25.4%
Matter being monitored.	3	1.6%
FBI Whistleblower Claim.	4	2.1%
Other	26	13.8%
<b>Total</b>	<b>189</b>	<b>100.0%</b>

*Examples of Inquiries Closed in Fiscal Year 2008*

1. *Misleading the Court.* OPR received an allegation from defense counsel that a DOJ attorney committed professional misconduct by lying in a motion filed with the district court in order to get an extension of the discovery cut-off date. OPR initiated an inquiry and reviewed the case docket and materials sent by defense counsel. OPR found that defense counsel raised this issue with the court during litigation, and the court did not find that the DOJ attorney committed misconduct or misled the court. Because the allegation had been raised to and rejected by the court, and there were no other extraordinary circumstances present, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

2. *Improper Closing Argument.* A district court found that a DOJ attorney made an improper remark in closing argument. Prior to trial, the DOJ attorney raised concerns about defense counsel because the latter was present at a meeting where the defendant was interviewed by internal investigators. Near the end of the government's closing argument, the DOJ attorney pointed out that defense counsel was present when the defendant lied to the internal investigators. He added that the defense attorney would soon address the jurors and tell them a different story. The court found that it was proper for the government to point out that counsel was present when the defendant lied to internal investigators, but improper to suggest that a witness to a lie was going to address the jury.

OPR initiated an investigation and found that although the law prohibits attacks on defense counsel that may damage a defendant's opportunity to present his case to a jury, the present case was complicated by the fact that defense counsel had inserted himself into the trial as a witness. OPR found further that the DOJ attorney's remark during closing argument was meant as an invitation to the jurors to listen to defense counsel's closing argument and note the contrast in the version of events. The remark thus was not an unwarranted attack on defense counsel or the defendant. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.



3. *Contact with Represented Parties.* OPR received allegations from two defense attorneys that a DOJ attorney engaged in unethical conduct when she authorized *ex parte* communications with their client despite the fact that the government knew or should have known that the defendant was represented by the attorneys in a state case based on similar conduct. OPR initiated an inquiry and discovered that the defense attorneys made these same arguments in a motion filed with the district court, and the court concluded that although the defendant may have been represented by counsel at the time of the *ex parte* communication, the elements of the state and federal offenses were different and, thus, the defendant's Sixth Amendment right to counsel had not been violated. The court also found that the DOJ attorney had not violated Rule 4.2, the state bar rule prohibiting contact with represented parties, because, like the Sixth Amendment, Rule 4.2 was offense specific. Because the *ex parte* communications allegations had already been examined and dismissed by the court, and there were no other extraordinary circumstances present, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

4. *Suborning Perjury; Prosecutorial Misconduct.* OPR received an allegation from a prisoner that a DOJ attorney conspired against him to convict him of criminal extortion. The prisoner alleged that the DOJ attorney allowed government witnesses to lie under oath, sought a conviction unsupported by the evidence, engaged in overzealous prosecution, and obtained a wrongful conviction. OPR initiated an inquiry and found that the prisoner had raised these same issues in a motion filed with the district court to vacate his sentence, and the court dismissed the motion. OPR found further that the prisoner raised these issues again in a brief filed with the appeals court, and the court denied the prisoner relief. OPR also found that the DOJ attorney's state bar concluded that, because neither the district nor the appeals court found prosecutorial misconduct, the prosecutor's conduct was presumed to have been proper and the complaint would not be further investigated. Because the allegations had been raised to and rejected by the district and appellate courts, and there were no other extraordinary circumstances present, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

5. *Security Violation.* A litigating component reported to OPR that a DOJ attorney mishandled classified information when she shipped home several boxes of files from her detail in Iraq that contained classified material. The component explained that it had declined prosecution and was referring the matter to OPR for consideration as an administrative action. OPR initiated an inquiry and reviewed the materials in the boxes shipped from Iraq. Based on the results of its inquiry, OPR determined that further investigation was warranted. Accordingly, OPR converted this inquiry to an investigation.

6. *Contact with Represented Parties.* OPR received an allegation from an attorney representing a corporation under investigation that DOJ attorneys had improperly contacted a represented party, an employee of the corporation. OPR initiated an inquiry and found that the complaining attorney had not been retained until after the meeting between the employee and the DOJ attorneys took place. OPR found further that prior corporate counsel had been aware of the meeting, did not claim that he represented the employee, and placed no restrictions on the nature or scope of the meeting. OPR also discovered that the employee represented to the DOJ attorneys that he was not represented by counsel. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

7. *Prosecutorial Abuse.* OPR received an allegation from a defendant that a DOJ attorney continued to bring a case against her despite the production of information proving the defendant was not guilty. OPR initiated an inquiry and reviewed materials provided by the defendant in support of her prosecutorial abuse claim. OPR found that the majority of the defendant's complaints centered around the conduct of her own counsel as well as an attorney employed by the Department of Homeland Security. OPR has no authority over Department of Homeland Security attorneys. OPR also found that, to the extent that specific examples of the DOJ attorney's alleged misconduct were provided, the allegations concerned procedural, rather than substantive, matters, and did not go to the guilt or innocence of the defendant. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Unprofessional Statements or Comments.* An attorney acting as counsel to a campaign to elect a candidate for office reported to OPR that a DOJ attorney made unprofessional statements about the candidate at a public luncheon featuring the candidate as a speaker. During a question and answer period that took place at the end of the luncheon, the DOJ attorney reportedly questioned the candidate about issues that appeared to be based, at least in part, on confidential information obtained through federal investigations of the candidate. During this exchange, the candidate also accused the DOJ attorney of improperly interceding with local authorities by requesting that an individual with whom the DOJ attorney purportedly did business not be re-indicted by local authorities. OPR initiated an inquiry and found that all of the DOJ attorney's comments at the luncheon were based on public information and that the DOJ attorney did not reveal grand jury or confidential information. OPR found further that the individual alleged to be the DOJ attorney's business partner had no financial ties to the DOJ attorney, and the individual denied that the DOJ attorney had ever tried to intercede on his behalf with local authorities. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

9. *Discovery Violation.* A court of appeals reversed a bank robbery conviction on the ground that exculpatory evidence had been suppressed. Specifically, the court found that evidence of robberies at nearby banks committed after the defendant's arrest by a suspect matching the defendant's description had been suppressed. The court found that the FBI agent investigating the robberies never told the prosecutor about the evidence of the other robberies, and that there was no indication the prosecutor acted in bad faith. OPR initiated an inquiry and reviewed documents showing that, as the court found, the FBI agent did not inform the prosecutor of the subsequent robberies. Accordingly, OPR closed this matter as to the DOJ attorney because further investigation was not likely to result in a professional misconduct finding. OPR, however, referred the matter to the FBI for further investigation into the agent's conduct.

10. *Unauthorized Disclosure to Media.* An attorney who represented the subject of a DOJ investigation alleged that the media was reporting that the subject was under investigation in connection with a grand jury public corruption probe. Later, a newspaper correctly forecast that an indictment would be returned against

the target of that investigation the next day. The attorney complained that DOJ attorneys were leaking grand jury information to the media. OPR initiated an inquiry and determined that the information reported about the subject could have come from a wide range of non-DOJ sources. OPR also found that the universe of persons with access to the information relating to the timing of the indictment was large, as the case was being investigated by numerous FBI and Internal Revenue Service agents. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

11. *Conflict of Interest.* OPR received a letter from a private attorney stating that a litigating component had embarked on an extensive campaign finance investigation against several notable Democrats within the district. The attorney alleged that the head of the litigating component had not complied with United States Attorneys' Manual § 3-2.170, which sets forth the procedures for the head of the litigating component to obtain approval for recusal. OPR initiated an inquiry into this matter. OPR discovered that the Executive Office for United States Attorneys had records demonstrating that the head of the litigating component had complied with all of the appropriate steps in connection with her recusal. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Abuse of Authority/Misuse of Official Position.* OPR received allegations from a private attorney that an immigration judge committed professional misconduct. The attorney alleged that the immigration judge engaged in inappropriate and unprofessional conduct in handling asylum hearings for two of his clients. In the first matter, the respondent requested asylum and protection under the Convention Against Torture, claiming that while living in the country of his citizenship he had been arrested, jailed, and beaten by the police because of his homosexuality. The attorney alleged that the immigration judge urged counsel, off-the-record, to have the respondent withdraw his asylum application and accept a grant of withholding of removal. According to the attorney, when his client declined to withdraw his asylum application, the immigration judge displayed irritation and impatience and denied all of the respondent's applications except for voluntary departure. The attorney also alleged that during the merits hearing, the immigration judge exhibited impatience and irritation with the respondent by frequently sighing and suggesting that the uncontested declaration of a witness

be admitted in lieu of live testimony. The attorney alleged that the immigration judge suggested that to avoid persecution for his sexual orientation, the respondent could simply stop seeing his same-sex partner. The attorney alleged further that all of the immigration judge's actions and rulings were done in retaliation for the respondent's refusal to withdraw his application for asylum.

In the second matter, the 15-year-old respondent claimed that his membership in the social group of "youths who do not belong to organized gangs" entitled him to asylum in the United States. The respondent claimed that in the country of his citizenship he had been asked repeatedly to join two different gangs. The respondent stated that he feared harm if he returned to his country and refused to join a gang. The attorney alleged that the immigration judge was disrespectful and unprofessional in his handling of this matter, calling the respondent's claim "preposterous" and "ridiculous."

OPR initiated an inquiry into these allegations. With regard to the first matter, OPR found that the parties all agreed that the respondent's application for asylum was untimely. Although the respondent's attorney disagreed with the immigration judge's ruling that his client did not meet the exceptions to the filing deadline, OPR found no evidence that the immigration judge's adverse ruling was in retaliation for the respondent's failure to withdraw his asylum application. Instead, it was based on the immigration judge's reasonable interpretation of the facts and law. OPR found that the immigration judge did not express undue irritation or excessively sigh during the hearing. With respect to the second matter, OPR found that the immigration judge did not ridicule or belittle the witness during his testimony, and instead found that his testimony was sincere and credible. OPR found that the immigration judge's strongly worded statements about a claim being "ridiculous" and "preposterous" were aimed not at the respondent, but the respondent's attorney, who had made a seemingly baseless legal argument. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

13. *Failure to Inform the Court.* DOJ attorneys self reported that a court of appeals issued an order to show cause in an immigration case. Specifically, the court ordered the government and the petitioner to show cause why both parties

should not be sanctioned for failing to inform the court that the Board of Immigration Appeals had granted a motion to reopen the case eight months before the court issued its opinion in the case. OPR initiated an inquiry and found that the failure to inform the court was not due to negligence by the DOJ attorneys. OPR found that the DOJ attorneys did not learn that respondent's attorney had filed a motion to reopen, and that the Board of Immigration Appeals had granted the motion, because opposing counsel did not serve them with a copy of the motion, as required. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

14. *Violation of Court Rules.* A DOJ attorney self reported that a district court issued an order sanctioning the government for violating a local court rule by filing an oversized brief and a late motion for leave to file the brief. OPR initiated an inquiry and found that the violation of the local rule was due to an inadvertent oversight, and the DOJ attorney had never been sanctioned in the past for violating a local rule. OPR found further that the DOJ attorney accepted full responsibility for the violation and apologized to the court for the error. OPR also found that the court did not make any adverse findings concerning the DOJ attorney, and granted the late motion to file the oversized brief. Because the evidence showed that the DOJ attorney who filed the brief and motion made a mistake, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

15. *Contacts with Represented Parties.* A DOJ attorney self reported that defense counsel alleged in a pre-trial motion to dismiss the indictment that the DOJ attorney committed professional misconduct by directing a government agent to surreptitiously record conversations with the defendants, knowing that the defendants were represented by counsel. OPR initiated an inquiry. OPR found that the contact occurred prior to indictment. OPR found further that pertinent case law held that pre-indictment, non-custodial, undercover contacts with represented persons during the course of a criminal investigation are deemed communications authorized by law under the applicable Rules of Professional Conduct. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

16. *Discovery Violation.* A court of appeals criticized a DOJ attorney for presenting inconsistent theories of events in separate trials of two defendants. The court also criticized the DOJ attorney for failing to disclose to one of the defendants the names of some witnesses who claimed to have seen events relevant to the crime. The court's decision was issued during a review of one of the defendants' petition for habeas corpus, and came almost ten years after the conduct at issue occurred. OPR initiated an inquiry and reviewed the court's opinion, relevant case law, a submission from the DOJ attorney, and documents relating to the prosecution. OPR found that the changed theory of events in the second trial was based on a newly discovered witness, and that the events were not central to the government's theory of guilt. OPR found further that the failure to disclose several witnesses was based on the DOJ attorney's good faith belief as to the materiality of the witnesses and witness safety. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Negligence and Improper Performance of Duties; Violation of Court Order.* A litigating component reported to OPR that during a meeting with the head of the component, a district court judge reported that a DOJ attorney's performance at a hearing on a motion to dismiss was sloppy, in that she failed to provide a written response to the motion as required by court order. The judge also stated that during oral argument the DOJ attorney failed to cite relevant case law. OPR initiated an inquiry and found that at the time of the hearing, the DOJ attorney had taken considerable sick leave because of the serious illnesses in her family. In addition, the DOJ attorney herself had several surgeries in the immediate time frame before the hearing and had been absent from work. OPR found further that the DOJ attorney reasonably believed that she was prepared for the oral hearing. During the hearing, however, the DOJ attorney realized that she could not respond to the judge's question about a specific case. The DOJ attorney reported this incident to her supervisors, who implemented close supervision of her work. Because the DOJ attorney retired before the conclusion of the OPR inquiry, as well as the extenuating sickness-related circumstances surrounding the hearing, OPR closed its inquiry without further investigation.

18. *Improper Use of Official Information.* OPR received an allegation from a defendant that a DOJ attorney improperly disclosed information that the

defendant provided during a proffer meeting. The defendant alleged that according to the terms of the proffer agreement, any information that the defendant disclosed about a relative, who was a target of the investigation, would be kept confidential. The defendant also alleged that the government's disclosure of this information jeopardized his safety. OPR initiated an inquiry and received a written response and relevant documents from the DOJ attorney who allegedly disclosed the information. OPR found that there was no confidentiality provision in the proffer agreement, and the government had never promised confidentiality. OPR found further that a complaint filed against the defendant's relative, which was supported by an affidavit containing information obtained from the defendant, was based on information that the defendant disclosed in a post-*Miranda* interview; not his proffer meeting. OPR also found no identifiable threats had been made against the defendant and, in a precautionary move, the Department provided the defendant with witness protection. Because the defendant's allegations were not supported by the evidence, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

19. *Late Appearance; Judicial Reprimand.* A DOJ attorney self reported an order by a magistrate judge publicly reprimanding her for failing to appear on time for a scheduled hearing. OPR initiated an inquiry and found that the DOJ attorney had attended an earlier hearing and then returned to her office before the second hearing scheduled later that afternoon before the magistrate judge. OPR found that during that time, the DOJ attorney became occupied with another matter and was reminded of the hearing only when the court called asking for her whereabouts. Although the DOJ attorney apologized to the magistrate judge for her late arrival, the court issued an order publicly reprimanding the DOJ attorney for her failure to appear on time for the scheduled hearing. The DOJ attorney filed a motion for reconsideration to set aside the public reprimand, and the court granted the motion and vacated the prior order. Because the incident appeared to be isolated and unintentional, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

20. *Outside Unauthorized Practice of Law.* OIG referred to OPR an allegation of misconduct made against a DOJ attorney relating to the DOJ attorney's apparent representation of his first cousin in an insurance claim investigation being conducted by the insurance company. OPR initiated an inquiry and reviewed



documents relating to the allegation. OPR found that the DOJ attorney initially considered his role to be that of a family representative or observer in an attempt to ensure that the interview between his cousin and the insurance company proceeded fairly. OPR found that the DOJ attorney never intended to get involved in the outside unauthorized practice of law. OPR also found that once the interview ended, the DOJ attorney told his cousin that he needed to hire an attorney to represent him in the insurance dispute. At that time, the DOJ attorney ended his involvement in the matter and did not respond to the insurance company's further inquires for information. Although OPR concluded that the DOJ attorney should have consulted with his supervisor or ethics officer before becoming involved in his cousin's insurance dispute, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

## **Conclusion**

During fiscal year 2008, 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 of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in fiscal year 2008 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.