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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2019**

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

**Fiscal Year 2019 Annual Report**

Introduction.....	1
Section I: Overview of OPR .....	2
Section II: Overview of Professional Misconduct Allegations.....	4
A. Intake and Initial Evaluation of Professional Misconduct Complaints .....	4
B. Professional Misconduct Investigations and Inquiries by Fiscal Year .....	5
C. Professional Misconduct Inquiries Opened in Fiscal Year 2019 .....	7
D. Professional Misconduct Inquiries Closed in Fiscal Year 2019 .....	9
E. Professional Misconduct Investigations Opened in Fiscal Year 2019.....	10
F. Professional Misconduct Investigations Closed in Fiscal Year 2019.....	12
Section III: Professional Misconduct Investigations Closed in FY 2019 .....	14
Section IV: Examples of Professional Misconduct Inquiries .....	20
Closed in FY 2019 .....	20
Section V: Non-Department Attorney and Judicial Misconduct Allegations.....	30
Section VI: FBI Whistleblower Retaliation Claims.....	31
Section VII: Training and Outreach Efforts.....	32
Conclusion .....	32

## *Introduction*

This 44th Annual Report is submitted to the Attorney General on behalf of the U.S. Department of Justice Office of Professional Responsibility (OPR). The Report covers the activities of OPR during Fiscal Year 2019 (October 1, 2018, through September 30, 2019).

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

Fair, impartial, and competent accountability within the Department of Justice is critical to its mission and the rule of law. Department attorneys are privileged to represent the United States and wield enormous power, but that power also carries the obligation to adhere to the high professional standards expected of the nation's principal law enforcement agency.

This report highlights some of OPR's work during Fiscal Year 2019, including instances in which Department attorneys failed to adhere to the high standards expected of them. Although any instance of professional misconduct is troubling, the vast majority of Department attorneys conducted themselves with the utmost integrity and professionalism throughout the year.

The information contained in this public report is necessarily limited due to significant restrictions imposed by the federal Privacy Act and other legal and policy considerations. During Fiscal Year 2019, OPR began a new practice of posting summaries of professional misconduct reports on its website as soon as the decision becomes final. Additional information about OPR's transparency and its independence can be found on OPR's recently revamped website ([www.justice.gov/opr](http://www.justice.gov/opr)). The recent changes to the website are designed to improve accessibility and significantly increase the amount of publicly available information about OPR and its important mission. Individuals with questions about OPR should visit its website, particularly the Frequently Asked Questions section.

## *Section I: Overview of OPR*

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

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

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

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

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

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

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

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

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

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

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

Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and all applicable laws, rules, and regulations.<sup>1</sup> The PMRU also determines the appropriate level of discipline to be imposed.

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

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

## Section II: *Overview of Professional Misconduct Allegations*

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

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

In Fiscal Year 2019, OPR received 778 complaints, 277 of which, or approximately 36 percent, were from inmates. Of the total complaints, many related to matters that did not fall within OPR's jurisdiction, while others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 35 complaints warranted further review and opened inquiries in those matters. OPR opened 14 matters as investigations.<sup>2</sup>

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

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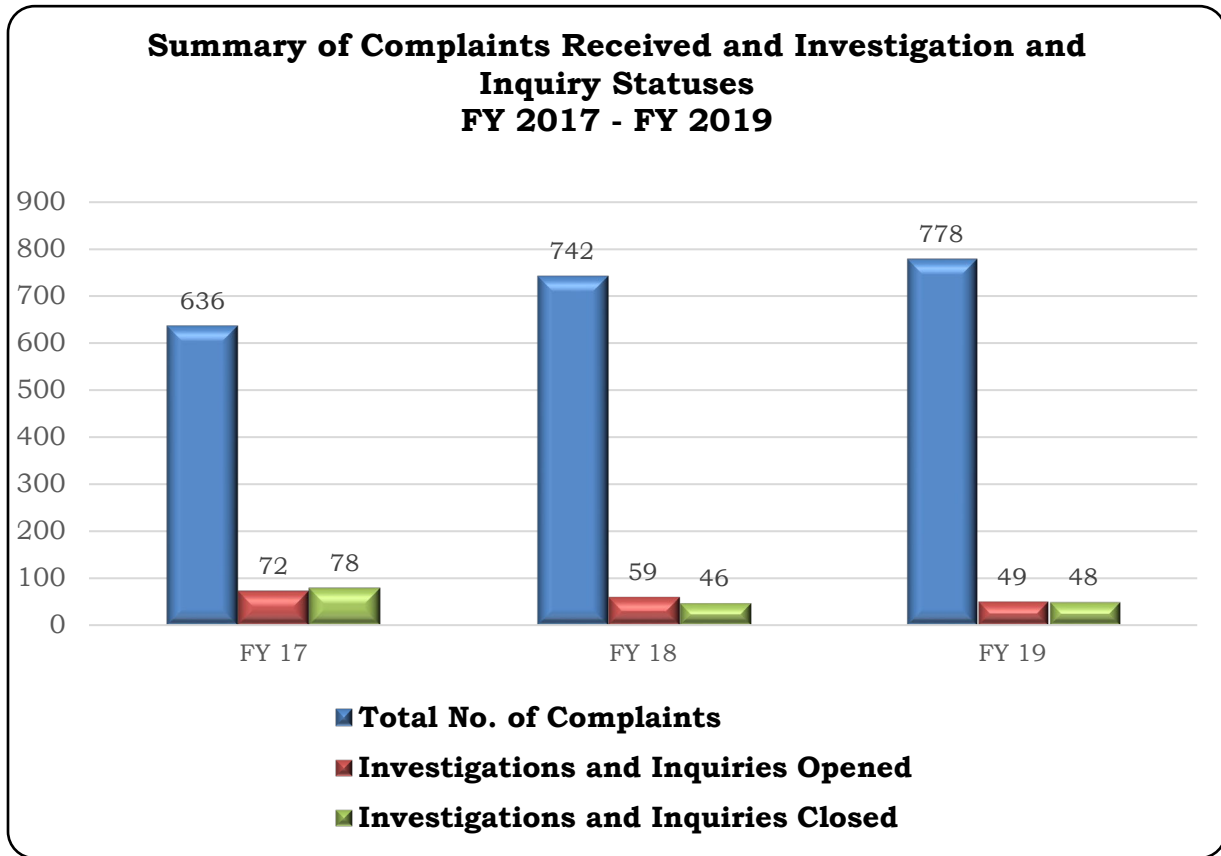
<sup>1</sup> OPR's findings of poor judgment or mistake are referred to Department component heads, EOUSA, and U.S. Attorneys, for appropriate action.

<sup>2</sup> Some of the complaints that were opened as inquiries or later were converted to an investigation may have been received by OPR prior to Fiscal Year 2019.

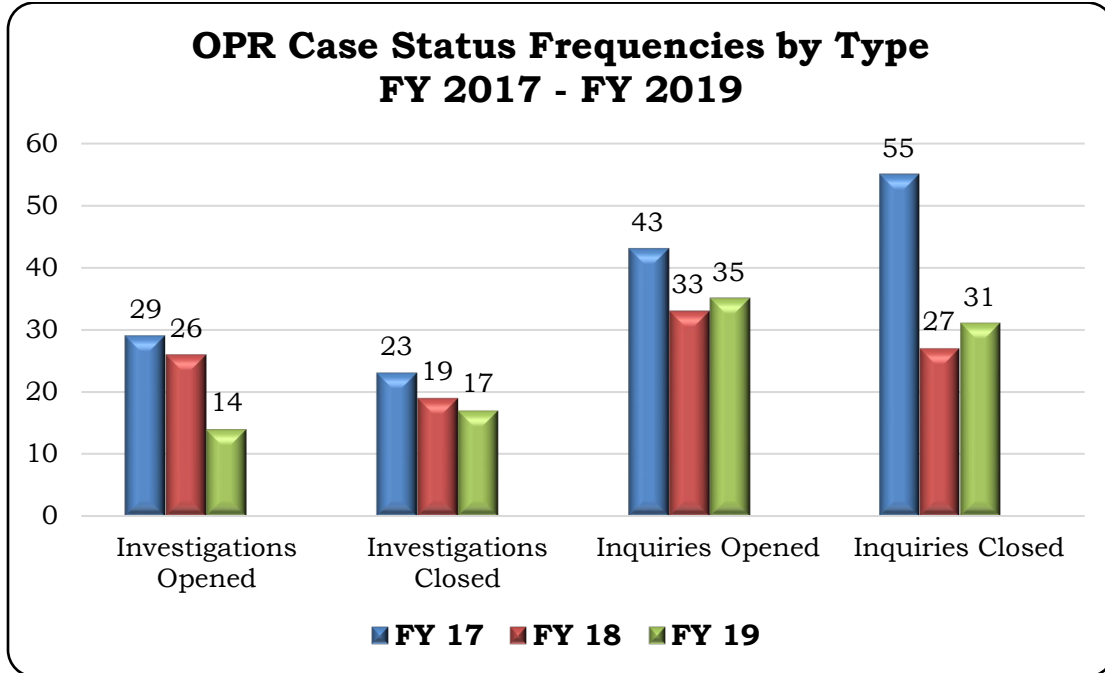
**B. Professional Misconduct Investigations and Inquiries by Fiscal Year**

In Fiscal Year 2019, OPR received 778 complaints, which represents a 5 percent increase from Fiscal Year 2018. Graphs 1 and 2 compare for the last three fiscal years the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, in Fiscal Year 2019, OPR opened 49 investigations or inquiries and closed 48 investigations and inquiries. As reflected in Graph 2, in Fiscal Year 2019, OPR opened 35 inquiries and closed 31, and opened 14 investigations and closed 17.

**Graph 1**

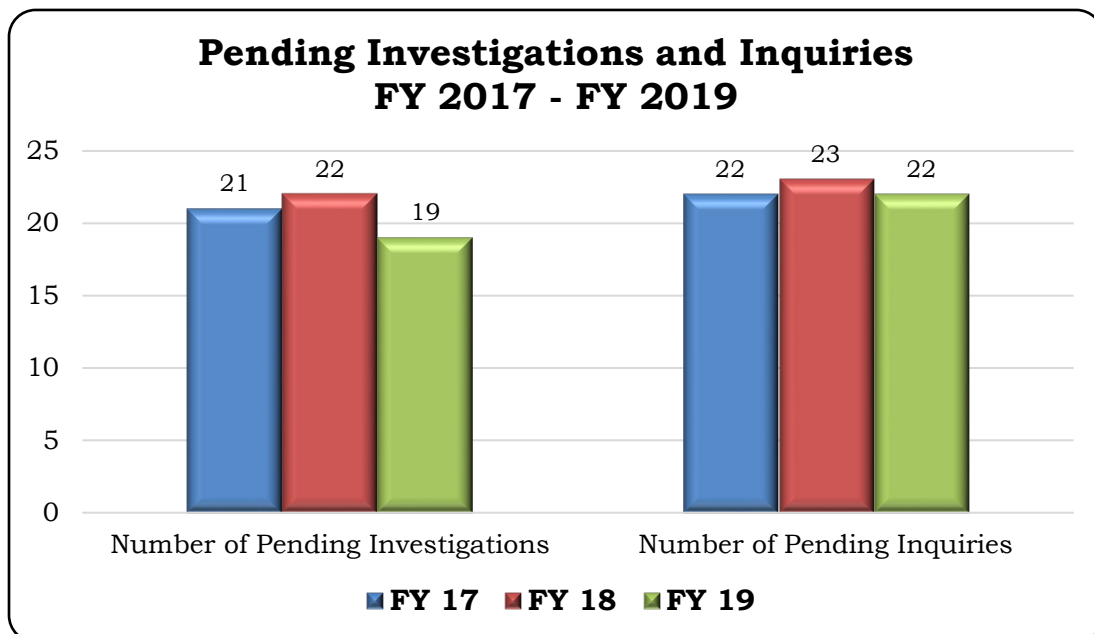


**Graph 2**



Because of the complexity of many of the matters received by OPR, many investigations and inquiries remain under review at the close of the fiscal year, and the outcome of those matters is reported in the fiscal year they are closed. At the end of Fiscal Year 2019, there were 19 pending investigations and 22 pending inquiries. Graph 3 compares the number of inquiries and investigations pending at the end of each of the last three fiscal years.

**Graph 3**





**C. Professional Misconduct Inquiries Opened in Fiscal Year 2019**

The sources of the complaints for the 35 inquiries opened in Fiscal Year 2019 are set forth in Table 1.<sup>3</sup>

**Table 1**

<b>Sources of Professional Misconduct Complaints against Department Attorneys in Inquiries Opened in FY 2019</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>4</sup>	8	22.8%
Department components, including self-reports (unrelated to judicial findings of misconduct)	25	71.4%
Private attorneys	1	2.9%
Private parties	1	2.9%
<b>Total</b>	<b>35</b>	<b>100%</b>

The types of allegations in these inquiries are set forth in Table 2. Because some inquiries included more than one allegation, the total number of allegations exceeds 35.

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<sup>3</sup> OPR evaluates all misconduct allegations against non-Department attorneys by Department employees to determine whether the Department should make a referral to a state bar disciplinary authority. The 35 matters referred to above do not include matters involving proposed bar notifications relating to non-Department attorneys.

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

**Table 2**

<b>Types of Professional Misconduct Allegations in Inquiries Opened in FY 2019</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	21	26.3%
Misrepresentation to the court or opposing counsel	21	26.3%
Improper remarks to a grand jury, during trial, or in pleadings	9	11.3%
Abuse of authority, including abuse of prosecutorial discretion	6	7.5%
Unauthorized leaks or disclosures	5	6.3%
Failure to comply with court orders and federal rules	5	6.3%
Conflict of interest	3	3.7%
Interference with defendant's rights	3	3.7%
Failure to maintain an active bar membership	3	3.7%
Failure to competently or diligently represent the client's interests	3	3.7%
Failure to comply with Department rules and regulations	1	1.2%
<b>Total</b>	<b>80</b>	<b>100%</b>

**D. Professional Misconduct Inquiries Closed in Fiscal Year 2019**

OPR closed 31 inquiries in Fiscal Year 2019 involving allegations against Department attorneys.<sup>5</sup> These matters involved 57 separate allegations of professional misconduct. OPR may designate more than one Department attorney as the subject of an inquiry, and many matters involved multiple allegations. The manner in which the 57 allegations were resolved in Fiscal Year 2019 is set forth in Table 3.<sup>6</sup>

**Table 3**

<b>Categories of Professional Misconduct Inquiry Allegations Resolved in FY 2019</b>		
<b>Types of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Occurrences</b>
No merit to matter based on review of allegation	30	52.6%
No merit to allegation based on preliminary inquiry	14	24.6%
Further investigation not likely to result in finding of professional misconduct	8	14.0%
Performance or management matter; referred to component	3	5.3%
Other	2	3.5%
<b>Total</b>	<b>57</b>	<b>100%</b>

<sup>5</sup> OPR closed an additional 51 inquiries involving the alleged misconduct of non-Department attorneys.

<sup>6</sup> When an inquiry is converted to an investigation, the initial inquiry is not closed and is not included in these statistics. In Fiscal Year 2019, 14 inquiries were converted to investigations.

**E. Professional Misconduct Investigations Opened in Fiscal Year 2019**

Table 4 identifies the sources for the 14 investigations that OPR opened in Fiscal Year 2019.

**Table 4**

<b>Sources of Complaints against Department Attorneys for Professional Misconduct Investigations Opened in FY 2019</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Department components, including self-reports (unrelated to judicial findings of misconduct)	7	50%
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>7</sup>	3	21.5%
Other agencies	2	14.3%
Private attorneys	1	7.1%
Private individuals	1	7.1%
<b>Total</b>	<b>14</b>	<b>100%</b>

Some of these investigations involved multiple subjects. In addition, because many investigations involved multiple professional misconduct allegations, there were 52 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

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

**Table 5**

Types of Professional Misconduct Allegations in Investigations Opened in FY 2019		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	15.4%
Misrepresentation to the court or opposing counsel	8	15.4%
Failure to competently or diligently represent the client's interests	7	13.5%
Failure to comply with Department rules and regulations	5	9.6%
Failure to comply with federal law	5	9.6%
Abuse of authority, including abuse of prosecutorial discretion	3	5.8%
Failure to keep client informed	3	5.8%
Conflict of interest	3	5.8%
Failure to comply with court orders and federal rules	3	5.8%
Failure to maintain an active bar membership	2	3.8%
Fitness to practice law or represent the government	2	3.8%
Improper remarks to a grand jury, during trial, or in pleadings	1	1.9%
Interference with defendant's rights	1	1.9%
Unauthorized practice of law	1	1.9%
<b>Total</b>	<b>52</b>	<b>100%</b>

## **F. Professional Misconduct Investigations Closed in Fiscal Year 2019**

OPR closed 17 investigations in Fiscal Year 2019, some of which involved more than one attorney. OPR found professional misconduct in 8, or 47 percent, of the 17 investigations it closed in FY 2019. Five of the 8 investigations involved at least one finding of intentional professional misconduct by a Department attorney.<sup>8</sup> In 5 of the 8 matters in which OPR found professional misconduct, OPR found that a Department attorney, including a detailee from another government agency, engaged in professional misconduct by acting in reckless disregard of a clear and unambiguous obligation or standard.<sup>9</sup> (When several misconduct allegations have been made against a subject, OPR may resolve one allegation by concluding that the subject engaged in intentional misconduct and resolve another allegation against the same subject by concluding that he or she acted recklessly.)

In Fiscal Year 2019, OPR made fewer professional misconduct findings than Fiscal Year 2018; 47 percent of cases closed in Fiscal Year 2019 resulted in professional misconduct findings, compared to 58 percent in Fiscal Year 2018. The 8 investigations closed with professional misconduct findings in Fiscal Year 2019 included 27 sustained allegations of misconduct. (Some investigations included more than one allegation of misconduct.) Table 6 below sets forth the 27 allegations sustained in those investigations.

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<sup>8</sup> OPR finds intentional professional misconduct when an attorney violated an obligation or standard by (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and knowing that the consequence is a result that the obligation or standard unambiguously prohibits.

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

**Table 6**

<b>Types of Professional Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2019</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Misrepresentation to the court or opposing counsel	10	37.1%
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	6	22.2%
Misconduct allegations involving immigration judges	3	11.1%
Failure to comply with Department rules and regulations	2	7.4%
Failure to keep client informed	2	7.4%
Failure to maintain an active bar membership	1	3.7%
Failure to comply with court orders and federal rules	1	3.7%
Improper destruction of evidence	1	3.7%
Conflict of interest	1	3.7%
<b>Total</b>	<b>27</b>	<b>100%</b>

OPR closed 17 investigations in FY 2019 and made findings of professional misconduct in eight cases. OPR made professional misconduct findings against six Department attorneys and one Department detailee attorney. The PMRU issued final decisions with respect to four of those attorneys and, in all cases, sustained OPR’s findings of professional misconduct. One attorney resigned from the Department before discipline could be imposed by the PMRU, one received a suspension, one received a written admonishment, and one had no discipline imposed because of her status as a detailee. In those cases in which OPR found a violation of state ethical rules, the PMRU authorized OPR to refer the violations to the appropriate state bar disciplinary authorities.

In five of the nine remaining investigations closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 17 investigations OPR closed in FY 2019, OPR made a finding of professional misconduct or poor judgment in 13 cases, or 76 percent of the investigations it closed. OPR refers its poor judgment findings to the Department attorney’s component for further action, which may include disciplinary action or additional training.

### *Section III: Professional Misconduct Investigations Closed in FY 2019*

The following professional misconduct investigations were closed during Fiscal Year 2019. Findings of professional misconduct are subject to review by the Professional Misconduct Review Unit (PMRU) within the Office of the Deputy Attorney General. The PMRU also determines the appropriate sanction and whether the matter is referred to bar disciplinary authorities. This report includes actions taken by the PMRU or other entities when such action occurred in the fiscal year.

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

#### [Allegations of Failure to Comply with Court Orders and Federal Rules, Failure to Inform the Client, and Misrepresentations to the Court and to OPR](#)

Following an Assistant U.S. Attorney's (AUSA) self-report, OPR investigated an allegation that she violated a court order by eliciting testimony in a criminal case about evidence that the court had previously ordered suppressed. OPR thereafter expanded the initial scope of its investigation to consider whether, in her statements in defense of her conduct at trial, the attorney complied with her duty of candor to the court and provided truthful and complete information to her management and to OPR.

Based upon the results of its investigation, OPR concluded that the attorney committed intentional professional misconduct by eliciting testimony at trial about evidence she knew the court had previously ordered suppressed. OPR further concluded that the attorney intentionally made a succession of false and misleading statements—to the court, to her supervisory attorneys, and, ultimately, to OPR—in an attempt to excuse or mitigate her violation of the suppression order. OPR referred the matter to the PMRU, which substantiated OPR's findings, imposed a 30-day suspension without pay, and authorized notification to the state bar.

#### [Allegations of Failure to Comply with Discovery and Failure to Correct False Testimony](#)

OPR investigated a court's mid-trial ruling that the government failed to timely produce discovery material and defense allegations that the government failed to timely produce agent interview reports concerning a critical government witness and evidence attached to those reports. OPR also investigated defense allegations that a government witness has testified falsely.

After its investigation, OPR concluded that the Department attorney assigned as the lead prosecutor had failed to timely produce discoverable material in violation of the government's



discovery obligations and a court order governing the timing of discovery. However, OPR concluded that the Department attorney's failure to timely provide certain discovery material resulted from her inexperience conducting criminal discovery and analytical errors in her attempts to comply with discovery rules, which evidenced poor judgment rather than professional misconduct. Furthermore, OPR determined that the information contained in some of the belatedly produced materials was duplicative of information the government had timely provided. With respect to the conduct of another Department attorney who was co-counsel during the trial, OPR concluded that given her limited involvement in the production of discovery to the defense, she did not commit professional misconduct or exercise poor judgment. Finally, OPR concluded that neither attorney knowingly offered false testimony.

#### Allegations of Misrepresentations to the Court

In litigation over the government's seizure of property in anticipation of civil and criminal forfeiture, the court criticized an AUSA for submitting a filing that contained inaccurate statements about the status of certain forfeiture proceedings. Following an investigation, OPR concluded that the prosecutor did not commit professional misconduct in making the criticized statements. OPR found that several statements were inaccurate, as the prosecutor acknowledged, but that she did not intend to mislead either the court or the opposing party. OPR concluded, rather, that in making the inaccurate statements, the prosecutor exercised poor judgment. Her failure to be scrupulously accurate in describing forfeiture law and procedure was particularly notable because of her expertise in the subject and the court's consequent reliance on her knowledge. In this failure, the prosecutor acted in marked contrast to the action that the Department reasonably expects an attorney exercising good judgment to take.

#### Allegations of Failure to Maintain an Active Bar Membership and Lack of Candor to OPR

An AUSA self-reported that she had failed to maintain an active bar license and practiced law without a license while representing the Department. OPR's investigation determined that the attorney represented the United States for 85 days while in a delinquent status. However, because the Bar retroactively reinstated the attorney's active bar membership after she paid her dues and reinstatement fees and treated her membership as though she had been continuously active, OPR concluded that the attorney did not commit professional misconduct. OPR concluded instead that she exercised poor judgment by failing to take proper steps to ensure that she complied with her obligation to maintain an active bar membership. In addition, OPR concluded that the attorney committed intentional professional misconduct by violating her duty of candor when she knowingly misrepresented to her supervisors and OPR facts concerning her knowledge that she was in a fee delinquent status and the circumstances under which she learned she was ineligible to practice law. The attorney resigned from the Department after receiving the draft report. The matter is under review by the PMRU.

#### Allegations of Failure to Comply with Discovery, Failure to Correct False Testimony, and Improper Destruction of Documents

After a hearing on a motion to dismiss an indictment for prosecutorial misconduct, the court dismissed the indictment with prejudice, concluding that the government violated its discovery obligations when it failed to disclose exculpatory documents. The court also found that

the case agent had testified falsely regarding certain subpoenaed records and that the government improperly destroyed evidence during the pendency of a new trial motion.

Following its investigation, OPR concluded that the AUSA committed reckless professional misconduct by causing the destruction of documents prior to the conclusion of the case, without the consent of the defendant, and after the case agent requested that the documents not be destroyed. With respect to other issues raised during the post-trial litigation, OPR found that the government's errors were generally the result of mistakes, misunderstandings, and poor communication by and among the members of the prosecution team. OPR found no evidence indicating that the case agent intentionally testified falsely or that the prosecutors were aware at the time that her testimony was inaccurate. The evidence showed that the government failed to disclose several documents that contained information favorable to the defendant. However, OPR concluded that the discovery failures did not constitute professional misconduct by the prosecutor, as she disclosed other information that the defendant could have used to discover the same or similar favorable information through the exercise of reasonable diligence. The PMRU subsequently adopted OPR's findings and conclusions with respect to the destruction of the documents and issued a written admonishment.

#### Allegations of Improper Rebuttal Argument

A component reported judicial criticism by a court of appeals, which reversed a defendant's convictions after finding that Department attorneys misrepresented the evidence and made other improper arguments to the jury during their closing and rebuttal closing arguments. Based on the results of its investigation, OPR determined that the prosecutors' errors were mistakes caused by their lack of time to fully prepare for the closing and rebuttal closing arguments and that their mistakes did not rise to the level of poor judgment or professional misconduct.

#### Allegations of Failure to Comply with Discovery Obligations

A U.S. Attorney's Office notified OPR that, in a case prosecuted by two Special AUSAs, a district court found that the government violated its discovery obligations by failing to disclose until mid-trial notes of an interview of a government witness containing impeachment information, an immunity agreement for a government witness, and materials used to prepare witnesses to testify. Based on these violations, the court dismissed the case with prejudice.

Following its investigation, OPR determined that the prosecutors had failed to timely produce discoverable materials. However, given the complexity of the case, the prosecutors' inexperience, and the lack of supervision by more experienced prosecutors, OPR concluded that the prosecutors exercised poor judgment, but their conduct did not rise to the level of professional misconduct.

#### Allegations of Failure to Comply with Discovery, Failure to Inform the Client, and Conflict of Interest

A U.S. Attorney's Office reported to OPR that an AUSA allegedly failed to provide impeachment information relating to potential bias by a government witness as required by the

government's constitutional discovery obligations and the Department's discovery policies. The allegations stemmed from the AUSA's intimate, romantic relationship with a special agent, who was involved in cases that the AUSA prosecuted. While those prosecutions were pending and the relationship was ongoing, the AUSA failed to disclose the relationship to the defense, the district court, or her supervisors. After the U.S. Attorney's Office learned of the relationship, the special agent and, subsequently, the AUSA resigned from the Department.

Based on its investigation, OPR concluded that the AUSA did not commit professional misconduct when she failed to disclose to the defense in her cases her relationship with the special agent, because she had no obligation to disclose that information in cases in which the defendants pled guilty. OPR concluded, however, that the AUSA engaged in intentional professional misconduct in violation of ethical rules when she purposely failed to keep the U.S. Attorney's Office reasonably informed of significant developments by not disclosing to management that she was involved in a personal relationship with the special agent, which precluded managers from making informed decisions regarding the cases that she was handling. OPR also concluded that the AUSA engaged in intentional professional misconduct in violation of ethical rules when she purposely continued to represent the government despite a conflict of interest that arose from the relationship and without obtaining the client's consent to continue representing the government in those matters.

The PMRU subsequently concluded that OPR's findings were supported by the facts and law and authorized OPR to provide the results of its investigation to the appropriate bar disciplinary authorities.

#### [Allegations of Failure to Maintain an Active Bar Membership](#)

OPR learned that a Department attorney failed to maintain an active bar membership in at least one state bar for approximately 11 months. OPR conducted an investigation and concluded that the Department attorney exercised poor judgment when she failed to maintain an active membership in at least one state bar for the time period in issue. OPR also concluded that the Department attorney exercised poor judgment when she provided an inaccurate Department entry-on-duty bar certification, which incorrectly certified that she was an active member of a bar when she was not.

#### [Allegations of Failure to Honor Debriefing Agreement](#)

An AUSA reported to OPR that an appellate court had found that at the defendant's sentencing, she breached a pre-plea debriefing agreement by using information provided by the defendant during the debriefing session. OPR's investigation revealed that the prosecutor used the debriefing information after consultation with her supervisor and with defense counsel's acquiescence, and she did so in order to correct the record—an unusual confluence of circumstances that could have made her actions appropriate if she had made a proper record of them. Given the prosecutor's good faith consultation with her supervisor and opposing counsel, OPR concluded that the prosecutor's conduct did not constitute professional misconduct. However, the prosecutor's failure to make any record regarding her use of the debriefing information—including its source, her reason for using it, and defense counsel's acquiescence—constituted a mistake that had significant consequences, including an adverse appellate opinion.

### Allegations of Failure to Honor Plea Agreement

An AUSA reported to OPR allegations that she violated the terms of a plea agreement by contradicting the proffer of facts that was the basis for the defendant's guilty plea during sentencing. After its investigation, OPR determined that the prosecutor violated Department policy when she stipulated to a provision of the factual proffer containing an unsubstantiated assertion that the prosecutor believed was untrue. However, because she did so after good-faith consultations with her supervisor concerning particularly challenging circumstances—including the need to protect a vulnerable victim-witness—OPR concluded that the prosecutor did not commit professional misconduct. Instead, OPR concluded that the prosecutor exercised poor judgment when she failed to revise the provision to ensure its accuracy, as the Department and her supervisor would reasonably expect. OPR further concluded that she exercised poor judgment when at sentencing she disputed the provision of the factual proffer to which she had previously agreed, which was a violation of the terms of the plea agreement and resulted in the remand of the case for resentencing.

### Allegations of Failure to Maintain an Active Bar Membership, Unauthorized Practice of Law, Failure to Inform Client, and Lack of Candor to OPR

OPR initiated an investigation after receiving a report that a Special AUSA's bar membership had been suspended because of her failure to timely pay bar dues and that she was not authorized to practice law during a three-month period. Throughout the period of suspension, the attorney litigated cases in multiple district courts and failed to disclose the suspension for approximately 18 months after learning of it. After the Department learned of the suspension, the attorney's Special AUSA appointments were terminated, appropriate disclosures were made to the relevant district courts, the attorney's employing agency initiated disciplinary proceedings resulting in the attorney's removal from the federal service, and the attorney's conduct was referred to the appropriate state bar authorities for further investigation. For those reasons, OPR, in consultation with the Office of the Deputy Attorney General, closed its investigation of the attorney's alleged misconduct.

### Allegations of False Statements, Lack of Candor to OPR, and Hostile Conduct toward an Attorney

The Executive Office for Immigration Review notified OPR about a letter of complaint submitted on behalf of multiple immigration court practitioners, alleging that an Immigration Judge (IJ) had engaged in professional misconduct by disparaging them in cases in which they had appeared before her. OPR was also advised of a second letter regarding the IJ, which alleged that she had confronted one of the complaining attorneys about the initial complaint, summoned a court employee to the courtroom to testify under oath about her knowledge of the complaint, and confronted and intimidated a court security officer in an effort to obtain an affidavit from the officer disputing the allegations made in the complaint. The IJ was also alleged to have issued an order that contained derogatory and irrelevant personal commentary and false statements directed at the complainants and at the attorney representing them.

Based on its investigation, OPR concluded that the IJ engaged in intentional misconduct by making false statements to OPR in her written response and during her OPR interview. OPR

also concluded that the IJ engaged in reckless misconduct by making false and derogatory statements, in reckless disregard of the truth, about the complainant attorneys in a written order, and by engaging in hostile conduct toward one of the attorneys during a hearing in a way that raised an appearance of bias. OPR also concluded that the IJ exercised poor judgment in her treatment of the immigration court employee. OPR provided its report of investigation to the Office of the Deputy Attorney General.

#### Allegations of Misrepresentations to the Court

An AUSA self-reported to OPR that she drafted and filed a purported “joint” pleading that contained the opposing counsel’s signature block, even though opposing counsel had not consented to the filing as written. The AUSA filed the pleading after opposing counsel informed the AUSA that opposing counsel did not consent to the filing unless it included additional language provided by the counsel, which the AUSA did not include. After an investigation, OPR concluded that the AUSA committed reckless professional misconduct in violation of ethical rules and her general duty of candor to the court by falsely representing that the opposing party agreed with the content of the pleading and joined in its submission.

#### Allegations of Misrepresentations to the Court and Insubordination

A U.S. Attorney’s Office reported that two AUSAs may have committed professional misconduct by asserting in response to a defendant’s motion to suppress that law enforcement agents had not made any specific promises to the defendant when they questioned him, despite the agents having informed the defendant that the government did not intend to use any statements he made against him. During the course of its investigation, OPR learned that the U.S. Attorney’s Office also believed that one of the prosecutors had been insubordinate to her supervisor by delaying the filing of a subsequent pleading to correct the allegedly misleading statement in the government’s initial response. OPR expanded its investigation to include that allegation as well.

Based on the results of its investigation, OPR concluded that both prosecutors made a mistake in the way they characterized the agents’ assurances to the defendant in the government’s response to the defendant’s motion to suppress. Although the prosecutors inartfully denied that the agents made a promise to the defendant, the government nonetheless acknowledged in its pleading that the defendant had been told his statements would not be used against him. OPR also concluded that there was insufficient evidence that one of the prosecutors was insubordinate towards her supervisors.

#### Allegations of Failure to Comply with Discovery Obligations and Misrepresentations to the Court

A Special AUSA allegedly failed to disclose information prior to a criminal trial that the defense might have used to support its contention that agents coerced civilian witnesses to falsely identify the defendant. The Special AUSA also allegedly failed to disclose prior to trial that photo spreads, which had been provided to the defense in pretrial discovery, were defective because they misidentified the agents who administered them to the civilian witnesses. The Special AUSA allegedly failed to disclose the defects in the photo spreads based on advice from a supervising

attorney. At trial, the Special AUSA allegedly presented misleading testimony by a civilian witness and an agent regarding the identity of the agent who administered the photo spread to the civilian witness and the agent who allegedly coerced the civilian witness. In addition, the Special AUSA allegedly committed several violations of her duty of candor to the court relating to the photo spread defects.

Based on the results of its investigation, OPR concluded that the Special AUSA engaged in professional misconduct in reckless disregard of her discovery obligations and that the supervising attorney exercised poor judgment. OPR also concluded that the Special AUSA engaged in professional misconduct in violation of her duty to correct and not to present false testimony and her duty of candor to the court.

#### Allegations of Misrepresentations to the Court

A Special AUSA allegedly approved and filed a search warrant affidavit that omitted material facts known to her and relied upon evidence that she knew had been suppressed. Based on the results of its investigation, OPR concluded that the Special AUSA committed reckless professional misconduct in violation of her general duty of candor and ethics rules, which both generally require disclosure of material facts in *ex parte* proceedings.

### *Section IV: Examples of Professional Misconduct Inquiries Closed in FY 2019*

The following summaries are a representative sample of the professional misconduct inquiries closed by OPR in Fiscal Year 2019.

#### Allegations of Misrepresentations to the Court and Opposing Counsel, and Abuse of Prosecutive Authority

An organization complained that Department attorneys committed fraud and obstructed justice during the course of litigation. The organization alleged that the government retained a renowned expert to testify about the cause of the plaintiffs' injuries and used the expert's opinion that was favorable to the government in one case, but subsequently suppressed the fact that the expert had provided an opinion unfavorable to the government in a different and subsequent case. The organization also alleged that the Department attorneys improperly used the expert's favorable opinion in other cases, without plaintiffs' counsel being able to question the expert about the differing opinion, and that the Department attorneys' allegedly deceptive and fraudulent misconduct caused the plaintiffs to be denied compensation.

OPR determined that the Department attorneys did not suppress the expert's unfavorable opinion, which the expert published, and which was known by the plaintiffs' attorneys, who used the publication as an exhibit. In addition, the expert testified regarding that opinion in other cases on behalf of other plaintiffs. OPR also found that the Department attorneys did not wrongfully use the expert's opinion from one case in later cases and that the expert's opinion, in fact, had minimal influence on the decisions in those cases. As a result, OPR closed its inquiry.



### Allegations of Misrepresentations to the Court and Opposing Counsel

During a hearing, the court found that an AUSA had misled the plaintiffs and the court about the timing of the government's ability to collect certain information in the event the court ruled in the plaintiffs' favor on the parties' cross-motions for summary judgment. In discussing an extension of time for the filing of a motion, the AUSA advised plaintiffs' counsel that one client agency told her it could comply promptly with a court ruling favoring the plaintiffs. The plaintiffs' attorney consented to the requested extension, but shortly thereafter, a different client agency told the AUSA it might take years to comply with a ruling in the plaintiffs' favor, information that she did not share with plaintiffs' counsel or the court. Several months later, the court granted the plaintiffs' motion for summary judgment and learned that the second agency was estimating that it could take six months to collect the data (the agency's revised estimate), which led the court to make its critical comments regarding the AUSA's conduct.

OPR's inquiry determined that while it would have been prudent for the AUSA to advise both plaintiffs' counsel and the court as soon as she learned that the collection of the data could potentially take far longer than she had initially represented, the evidence did not show that the AUSA intended to deceive the court or counsel as she did not believe that the agency's initial estimates regarding compliance were accurate, and there was no indication that the attorney used the misunderstanding to gain an advantage in the litigation. Accordingly, OPR determined that further investigation was unlikely to lead to a finding of professional misconduct and closed the matter.

### Allegations of Failure to Comply with Discovery Obligations

This matter came before OPR as a result of a district court's order, identified through a routine database search, that dismissed an indictment with prejudice due to the government's failure to produce discovery in a timely manner. A month before the defendant's trial was to commence, defense counsel requested that the government search for and produce extensive documents concerning unrelated informant misconduct involving local law enforcement agencies. The prosecutors promptly filed a motion with the court seeking an order precluding such discovery. The court ruled that the materials potentially could be relevant for impeachment purposes and ordered the government to search for and produce any material documents related to the informant misconduct. The prosecution team promptly sought documents from various federal and state agencies and obtained thousands of documents a few weeks later, which were reviewed and produced on the eve of the rescheduled trial, after the court indicated that it would not grant any further continuances.

OPR initiated an inquiry and reviewed relevant pleadings and transcripts. OPR concluded that under the circumstances, the prosecutors' failure to obtain the discovery prior to the defendant's request was not unreasonable, and the prosecution team acted diligently to procure the discovery upon being ordered by the court after the defendant requested it.

### Allegations of Failure to Comply with Court Orders

An AUSA self-reported an order finding that the government had violated a court order limiting the scope of an examination of the defendant. The court permitted the government to conduct an examination of the defendant, but only to refute the evaluations made by the defense's expert. The AUSA instructed the government's expert to conduct those examinations the expert deemed appropriate. After the government's expert made findings in her report concerning issues that the defendant's expert had not raised, the court concluded that the government had violated its order and imposed sanctions. OPR found that the court's order did not clearly and unambiguously prohibit the examination conducted by the government's expert, and the defense expert's report could be reasonably viewed as raising issues addressed by the government expert's examination. While the AUSA should have explicitly instructed the expert not to make findings beyond those raised by the defense expert's report, the failure to do so did not rise to the level of professional misconduct. Accordingly, OPR closed its inquiry.

### Allegations of Failure to Comply with Discovery Obligations

An AUSA self-reported a district court's criticism of the government's compliance with discovery obligations. Prior to trial, the prosecutor instructed law enforcement agents to provide her with all discoverable materials and had been assured that they had done so, but the agents located additional discoverable materials in the middle of trial. In sworn testimony before the court, the agent accepted responsibility for the oversight and confirmed that the prosecutor previously had requested all such materials to comply with the government's discovery obligations. As a result of the untimely disclosure of those materials, the court declared a mistrial.

Following the mistrial, the agents located additional materials that the government provided to the defendants, which the defendants argued should result in a dismissal with prejudice. After considering the evidence adduced at a hearing, the court concluded that the prosecutor had not intentionally withheld discovery and the government had not goaded the defendants into requesting a mistrial, but the government was at least negligent in failing to produce certain materials in a timely manner. As a consequence, the court dismissed one count of the indictment with prejudice.

OPR initiated an inquiry and reviewed relevant pleadings and transcripts. OPR concluded that the prosecutor was not responsible for the belated production of the discovery and had properly instructed the agents on the government's discovery obligations in the case.

### Allegations of Improper Examination of a Witness

An AUSA self-reported that an appellate court issued an opinion containing findings that she improperly elicited certain testimony from the case agent and improperly bolstered the credibility of two cooperating witnesses during trial. After careful review of the documentary record and information provided by the prosecutor and her office, OPR determined that the prosecutor's examinations of the case agent and cooperators were flawed, which the prosecutor acknowledged, but there was no evidence that she was aware her questioning was improper or that she purposefully sought to elicit improper evidence from the witnesses. Instead, the record



indicated that the prosecutor's errors were the result of inexperience and a lack of close supervision. OPR, therefore, concluded that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

#### Allegations of Misrepresentations to the Court and Opposing Counsel

OPR learned of a district court's findings that before charging the defendant, an AUSA misled defense counsel about the defendant's status as a potential defendant and subsequently misled the court about the same issue. OPR initiated an inquiry and examined the extensive documentary evidence, as well as information provided by the AUSA. After a thorough review, OPR determined that the evidence supported the government's assertion that at the time of the events at issue, the government did not consider the defendant to be a potential defendant, and, therefore, the AUSA did not violate her obligations of candor to defense counsel or the court. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

#### Allegations of Improper Rebuttal Argument

An AUSA self-reported to OPR that defense counsel alleged that the AUSA improperly cross-examined the defendant about omissions in a statement the defendant gave to law enforcement agents before invoking his *Miranda* rights, and committed misconduct during her closing and rebuttal arguments by expressing to the jury her personal opinion about the strength of the evidence against the defendant. The government subsequently filed an unopposed motion to vacate the defendant's conviction, conceding that the prosecutor should not have made a particular remark about an omission in the defendant's pre-*Miranda* statement during her closing argument. OPR opened an inquiry into the matter.

Following a careful review of the record in the case, as well as the materials submitted to OPR by the prosecutor, OPR concluded that further investigation was not likely to result in a finding of professional misconduct. The district court permitted the prosecutor to cross-examine the defendant about omissions in his pre-*Miranda* statement, and the defense counsel at trial did not object to the particular remark made by the prosecutor during her closing argument that the government later conceded was error. Although the prosecutor made arguably questionable comments about the strength of the government's evidence against the defendant during her closing and rebuttal arguments, further investigation of the comments was not likely to result in a finding that the prosecutor committed professional misconduct.

#### Allegations of Misrepresentations to the Court and Failure to Comply with Discovery Obligations

A district court judge referred to OPR concerns related to the trial conduct of two AUSAs. The court alleged that based on law enforcement's records analysis, the government knew shortly after the crime that the defendant had not been at the scene of the crime to surveil the area, despite her admissions to law enforcement immediately after the crime that she had done so. The court also expressed concern that the AUSAs may have violated their discovery

obligations when they disclosed information about a potential witness after the government rested its case-in-chief.

OPR reviewed substantial documentary evidence, which revealed that the government produced to the defense the underlying records associated with the analysis conducted by law enforcement. OPR concluded that the AUSAs had no obligation to correct the defendant's repeated assertions regarding her earlier presence at the crime scene because they did not know the assertions were inaccurate. In preliminary stages in the litigation, the defense proffered that the defendant had been near the scene of the crime, representations that could only have come from the defendant, and, in addition, the defendant publicly acknowledged the same facts. In their representations to the court, the AUSAs were careful to attribute the facts to the defendant's own representations, which were not directly contradicted by the government's records analysis. As to the government's disclosure of information about the witness, when the defense raised this matter during trial, the court rejected the defendant's argument that the government had violated its discovery obligations, noting that the government had not called the witness to testify at trial, and in any case, the information was highly attenuated and not exculpatory. OPR concluded that the information was not favorable to the defendant and that further investigation was unlikely to lead to a finding that the prosecutors violated their discovery obligations. Accordingly, OPR closed its inquiry.

#### [Allegations of Failure to Inform the Client and Conflict of Interest](#)

A Department component reported to OPR that for a period of five weeks, a trial attorney handling a bankruptcy matter was involved in a social relationship with a friend of the bankruptcy debtor's ex-spouse that at a certain point became intimate and romantic. OPR was advised that during the bankruptcy case, the trial attorney was representing the government and had sought and obtained a dismissal of the debtor's bankruptcy case on the ground that it was filed in bad faith. The trial attorney subsequently ended the romantic relationship.

The evidence gathered during the inquiry showed that the trial attorney's relationship with the friend began after the bankruptcy court granted the government's motion to dismiss. Once the bankruptcy court granted the government's motion to dismiss and the debtor appealed, the trial attorney was no longer involved in the case because it was assigned to an appellate attorney. In addition, the motion to dismiss did not rely on information provided by the debtor's ex-spouse or the friend, and neither would have been a witness at a hearing on the motion. As a result, the trial attorney reasonably believed that the trial attorney's involvement in the bankruptcy had ended following the dismissal and the debtor's appeal, and that the romantic relationship with the friend had not created an attorney-client relationship that potentially violated the state bar rules. Because the relationship did not exist until after the bankruptcy had been dismissed, no discovery obligations under the civil discovery rules were potentially implicated. Accordingly, further investigation was not warranted, and OPR closed the matter.

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

A district court found that an AUSA in a civil forfeiture action omitted material facts from her motion for summary judgment, which concerned the validity of a traffic stop that resulted in

the seizure of currency. Based on the results of its inquiry, OPR concluded that at the time the motion was filed, the AUSA's framing of the issues and arguments were consistent with the positions taken in similar cases in other districts. Given the state of the then-controlling law, the omitted facts were not so plainly relevant that failing to include them in the motion constituted a clear and unambiguous violation of the AUSA's duty of candor to the court. Nonetheless, OPR cautioned that given the facts known to the government about the traffic stop, omitting the facts at issue could have been construed as misleading and, therefore, was poor practice.

#### [Allegations of Failure to Comply with Discovery Obligations and Improper Opening Statement](#)

A U.S. Attorney's Office reported allegations that an AUSA violated her discovery obligations by disclosing impeachment information on the eve of trial and that the attorney alluded to certain facts during her opening statement that she had no reasonable expectation of proving at the trial. OPR initiated an inquiry and determined that the attorney did not have a clear, unambiguous obligation under the circumstances to disclose the impeachment information at an earlier date. Moreover, the record supported the trial court's determination that the timing of the disclosure did not prejudice the defense. In addition, although there was no direct evidence at the trial of certain facts to which the attorney alluded during her opening statement, OPR found that the record supported the attorney's belief that she could prove the facts through circumstantial evidence. Accordingly, OPR closed its inquiry because further investigation was unlikely to result in a finding of professional misconduct.

#### [Allegations of Failure to Maintain an Active Bar Membership](#)

An AUSA reported to OPR that she had not been in good standing with her state bar for a period of time because she had inadvertently failed to register with a grievance committee according to the state bar's rules. OPR contacted the state bar and learned that the AUSA had been an active member of the bar since her admission without any lapses in her membership status. In addition, the state bar website provided that an attorney was still an active member of the bar even though the attorney had failed to register with the grievance committee, although certain state court activities were limited by the failure. OPR concluded that further investigation was not warranted because the AUSA was an active member of the state bar and authorized to practice law despite not being in good standing, and any limitation on her ability to practice related only to state court matters. Accordingly, further investigation was not warranted, and OPR closed the matter.

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

An AUSA self-reported to OPR that a district court had dismissed a multi-defendant criminal case with prejudice. During the cross-examination of the government's cooperating witness, defense counsel questioned the witness's motivation for testifying and asked about a provision in her plea agreement that provided that the government may file a motion for a sentencing guidelines reduction in the witness's case, if the witness provided substantial assistance in the investigation or prosecution of another person who had committed an offense. The prosecutor objected before the jury that defense counsel's line of inquiry was improper because a sentencing reduction motion was not available for the witness. Defense counsel moved to dismiss the case on grounds that the prosecutor's objection irreparably prejudiced the jury and the

defendants' respective defenses. The court granted the motion and dismissed the case with prejudice. The court ruled that the prosecutor failed to specifically notify defense counsel that the cooperating witness would not receive the benefit of the plea agreement's provision permitting a sentencing reduction motion, which prejudiced the defendants' preparation of their defense and violated the government's discovery obligations. OPR opened an inquiry into the matter.

Based upon OPR's review of the relevant documentary evidence, OPR determined that further investigation was not likely to result in a finding of professional misconduct. The prosecutor's objection reflected her attempt to insure that the testimony accurately represented the plea deal with the witness. Because the witness elected not to proactively cooperate in an ongoing investigation, she would not receive the benefit of the plea agreement's sentencing reduction provision; that provision, therefore, had no discernible impeachment value because it was unlikely that the absence of a potential benefit provided the witness with motivation to testify. OPR found no clear and unambiguous obligation requiring the disclosure of this type of information under the specific circumstances of the case.

#### Allegations of Subornation of Perjury and Failure to Correct False Testimony

An AUSA self-reported to OPR that a district court dismissed an indictment with prejudice and granted the defendant's motion for an award of attorney's fees and expenses under the Hyde Amendment, after concluding that the government's prosecution was frivolous and in bad faith. The prosecution at issue was an illegal reentry case, following the defendant's administrative removal several years before. The court held that the defendant's administrative removal had been contrary to law, because the documents purportedly showing that she waived her right to a pre-removal hearing were internally inconsistent and possibly falsified by government agents. After a hearing at which the agents involved in completing the waiver forms testified, the court found the agents' testimony about the process under which the defendant completed the forms unconvincing and concluded that the agents might have lied in an attempt to explain the inconsistencies on the forms. The government later informed the court that it would not rely upon the agents' testimony and would no longer argue that the defendant's waiver of a hearing during the prior removal proceeding was valid. The court dismissed the indictment with prejudice, holding that the prior removal proceeding was legally flawed. In addition to criticisms of the agents, the court criticized the prosecutor for not affirmatively disavowing the agents' testimony, but also concluded that the prosecutor was not made aware by the agents, prior to indictment, of the inconsistencies and irregularities that occurred during the prior removal.

OPR initiated an inquiry and reviewed extensive documentary evidence, as well as information provided by the prosecutor. With respect to the court's criticism of the prosecutor for not affirmatively disavowing the agents' testimony, the evidence showed that the prosecutor represented to the court that the government would no longer rely upon that testimony, which was consistent with the court's own request to the government. Moreover, the inexperienced prosecutor consulted regularly with her supervisors about the matter and pursued the litigation in the manner recommended by her supervisors. Because the court's criticism was primarily directed toward the agents and related to actions taken during the prior administrative removal, for which the prosecutor was not responsible, OPR concluded that further investigation was not likely to result in a finding of misconduct and closed the inquiry.

### Allegations of Improper Rebuttal Argument, Improper Examination of a Witness, and Failure to Comply with a Court Order

This matter came before OPR as a result of a district court's order granting a judgment of acquittal based on insufficient evidence that the defendant intentionally made a false statement in connection with claims for federal disability benefits. In the alternative, the court held that prosecutorial error created opportunity for confusion, warranting a new trial. At trial, an agency witness testified about the history of the agency's benefits programs and the manner in which claims were analyzed and adjudicated. The court later criticized that testimony as improper vouching. In addition, during the prosecutor's rebuttal argument, she argued that the defendant had lied in the benefits claims and was capable of engaging in daily recreation. The court concluded that the government violated its order granting the defendant's motion *in limine*, which it construed as prohibiting the government from taking the position at trial, either directly or by implication, that the defendant was undeserving of disability benefits.

OPR initiated an inquiry and reviewed relevant documentary evidence. OPR concluded that the agency witness's testimony did not amount to improper vouching. OPR also concluded that the court's *in limine* order was limited and did not specifically prohibit the government from arguing in general that the defendant was undeserving of compensation; therefore, the prosecutor's rebuttal closing argument did not violate the express terms of the court's order. While the prosecutor's rebuttal may have strayed from the central issue in the case, the court instructed the jury that the lawyers' arguments were not evidence, which likely eliminated any serious risk of prejudice. Considering the latitude afforded to prosecutors for unprepared remarks made in rebuttal arguments, OPR concluded that the prosecutor's rebuttal argument did not constitute professional misconduct.

### Allegations of Misrepresentations to the Court

Following a report from a U.S. Attorney's Office, OPR initiated an inquiry into judicial criticism by a trial court that in the government's brief appealing the court's order, the government made factual misrepresentations and presented the court's remarks out of context. OPR examined the record on appeal and determined that the government did not misstate or mischaracterize the facts underlying the appeal and that the representations in the government's brief were supported by the record. Therefore, OPR closed the inquiry because further investigation was unlikely to result in a finding of professional misconduct.

### Allegations of Abuse of the Grand Jury or Indictment Process

OPR learned of the settlement of a Hyde Amendment claim in a case in which the government dismissed a superseding indictment after the jury was sworn but before opening statements were made. The grand jury charged the defendant with numerous counts relating to alleged bankruptcy fraud, tax evasion, and other charges. Most of the charges were dismissed following various pretrial rulings by the court or after additional investigation by the government. OPR's inquiry revealed that the government had ample evidence to determine the defendant engaged in bankruptcy fraud and related crimes. At the outset, the government's case was objectively reasonable, and although the prosecutors made mistakes, the case ultimately collapsed

as a result of the court's unanticipated, adverse evidentiary rulings. Furthermore, U.S. Attorney's Office managers were aware of and approved the actions of the prosecutors. OPR determined that further investigation would be unlikely to result in a finding that the prosecutors committed professional misconduct, and OPR closed its inquiry.

### Allegations of Abuse of the Grand Jury or Indictment Process

The government charged a company with violations of the Controlled Substances Act based on its assistance to other companies that allegedly illegally dispensed medications. During the defense opening statement at trial, counsel outlined evidence that demonstrated its lack of criminal intent, including a claim that government officials had authorized the company's activities. After the company's opening statement, the government re-interviewed the former government officials about their contacts with the defendant. When the former officials affirmed that they would testify as defense counsel had proffered, the government moved to dismiss the prosecution. In granting the motion to dismiss, the district court expressed its view that the defendant may have been innocent of the charges set forth in the indictment.

OPR examined extensive documentation relating to the case, as well as information provided by the subjects. The evidence showed that the prosecutors provided factual information and legal analysis, including information provided by the defendant about its defenses, to their U.S. Attorney's Office supervisors, some of which was also provided to other Department officials. That analysis included most of the factual information defense counsel later proffered to the court during opening statement. Accordingly, OPR concluded that the prosecution team made a reasonable, good-faith effort, as evidenced by the consultations with supervisors and other officials, to comply with the obligation to ensure that the prosecution of the defendant was supported by probable cause. Moreover, the prosecution team could not have anticipated that the former officials, who had previously been interviewed by the government, would testify as proffered by the defendant. OPR determined that it was unlikely that a further investigation of this matter would result in a finding of professional misconduct and closed its inquiry.

### Allegations of Failure to Comply with Discovery Obligations

A U.S. Attorney's Office forwarded to OPR a court order granting a defendant's motion for a new trial, based on a finding that the prosecuting AUSA had failed to disclose information that could have been used to impeach a government witness. The order was later affirmed by a divided circuit court panel. The impeachment information at issue was a recording of the witness, made years earlier by a different defendant in a separate case, in an unsuccessful attempt to cooperate and obtain a lower sentence.

OPR initiated an inquiry and reviewed extensive documentary evidence, including information provided by the AUSA. The district court's order expressly noted that there was no evidence to warrant a finding that the AUSA or agent acted intentionally. The evidence indicated that the AUSA was unaware of the recorded conversation; the case agent either forgot about the recording of the witness, which occurred several years before trial, or possibly also never knew about it; and the recording was not in the case agent's investigation file and therefore was not in a



position to be found by the AUSA or the agent. OPR determined that further investigation was unlikely to lead to a finding of professional misconduct and closed the inquiry.

#### Allegations of Conflict of Interest

This matter came before OPR based on a complaint by a defendant that AUSAs engaged in misconduct in the course of a prosecution because the attorneys had a conflict arising from their interests in stock issued by the corporate victim of the defendants' financial fraud. OPR initiated an inquiry and reviewed relevant documentary evidence. Based on the information reviewed, the prosecutors promptly informed their supervisors of the potential financial conflict when they became aware of the issue, and they complied with instructions to recuse themselves from the matter while the conflicts were analyzed and addressed. The prosecutors thereafter divested their interests in the corporate stock, which eliminated the potential financial conflict of interest. Because the prosecutors promptly disclosed the issue to their supervisors and complied with instructions to refrain from substantively working on the prosecution until they divested their financial interests, OPR concluded that the allegations of professional misconduct were unfounded.

#### Allegations of Misrepresentations to Opposing Counsel and Failure to Inform the Client

This matter came before OPR based on allegations that an AUSA might have agreed to an extension of a foreclosure sale without obtaining the consent of the client agency and was unresponsive to the client agency throughout the matter. Shortly before leaving on approved annual leave, the AUSA sent an e-mail to counsel for the property owner, her supervisor, and the client that referenced an incorrect date for the impending sale and suggested that the agency had agreed to postpone the sale. After the foreclosure sale was completed on the correct date, the property owner argued that the attorney had been misleading.

OPR initiated an inquiry and reviewed extensive documentary evidence and information provided by the AUSA. OPR determined that the AUSA's reference to an erroneous date in her e-mail was a mistake, which neither her supervisor nor the client agency immediately corrected. Moreover, because the agency completed the sale and the prior owner decided not to challenge the sale, the agency suffered no prejudice as a result of the attorney's mistake. OPR also determined that the attorney kept the client agency adequately informed throughout the course of the representation. Finally, OPR observed that the attorney's communications regarding her leave were unclear and potentially confusing, both to her supervisors and to clients attempting to reach her, and referred the matter to management.

#### Allegations of Abuse of Prosecutive Authority

A U.S. Attorney's Office brought criminal charges against individuals involved in a melee involving protestors but after further consideration of the evidence, the government dismissed charges against most of the defendants. OPR opened an inquiry and obtained and reviewed extensive documentary evidence reflecting the decisions to bring the charges, and then to either dismiss or maintain charges against the various defendants. OPR concluded that in deciding to charge the defendants, the prosecutors reasonably relied on the identification evidence compiled

by law enforcement and, accordingly, the charges were properly brought pursuant to Department standards for bringing charges. OPR found, however, that the prosecutors should have more closely scrutinized the identification evidence, as when that evidence was reexamined, it became clear that some of the evidence was flawed. OPR also concluded that the government’s decision to dismiss charges against some of the defendants, after the U.S. Attorney’s Office’s further analysis and investigation, was reasonable. Because additional investigation of the matter by OPR was unlikely to result in findings of prosecutorial misconduct, OPR closed its inquiry.

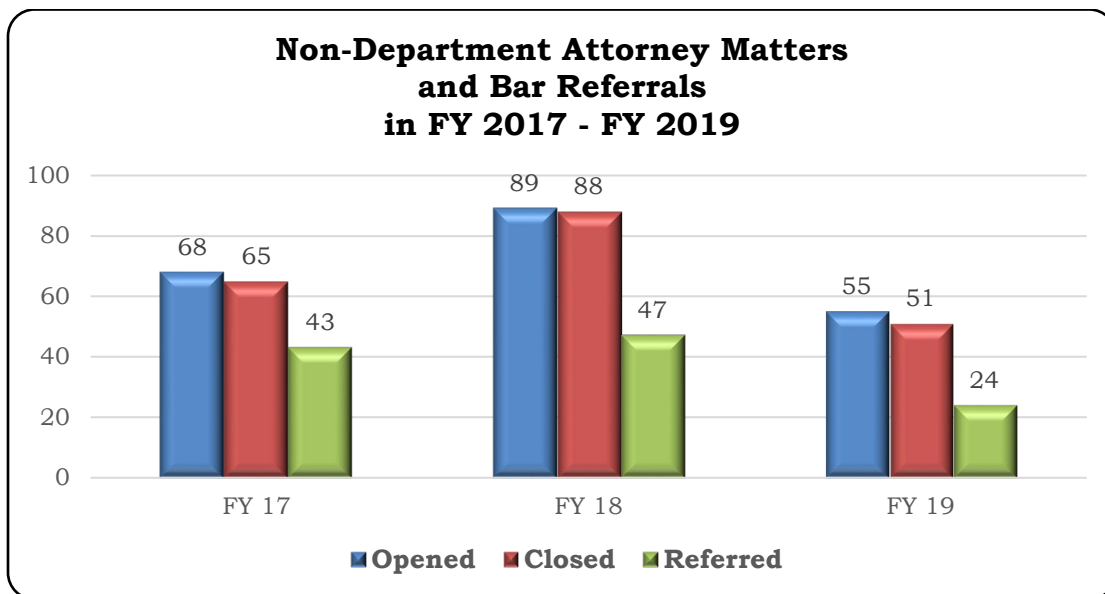
*Section V: Non-Department Attorney and  
Judicial Misconduct Allegations*

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

During Fiscal Year 2019, OPR received 55 submissions from various components of the Department concerning possible professional misconduct by non-Department attorneys. OPR evaluated and closed 51 open submissions in Fiscal Year 2019 and determined that 24 matters should be referred to state attorney disciplinary authorities.

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

**Graph 4**





During Fiscal Year 2019, OPR also received and evaluated three submissions from Department components concerning possible professional misconduct by members of the judiciary and determined that they should be referred to judicial disciplinary authorities.

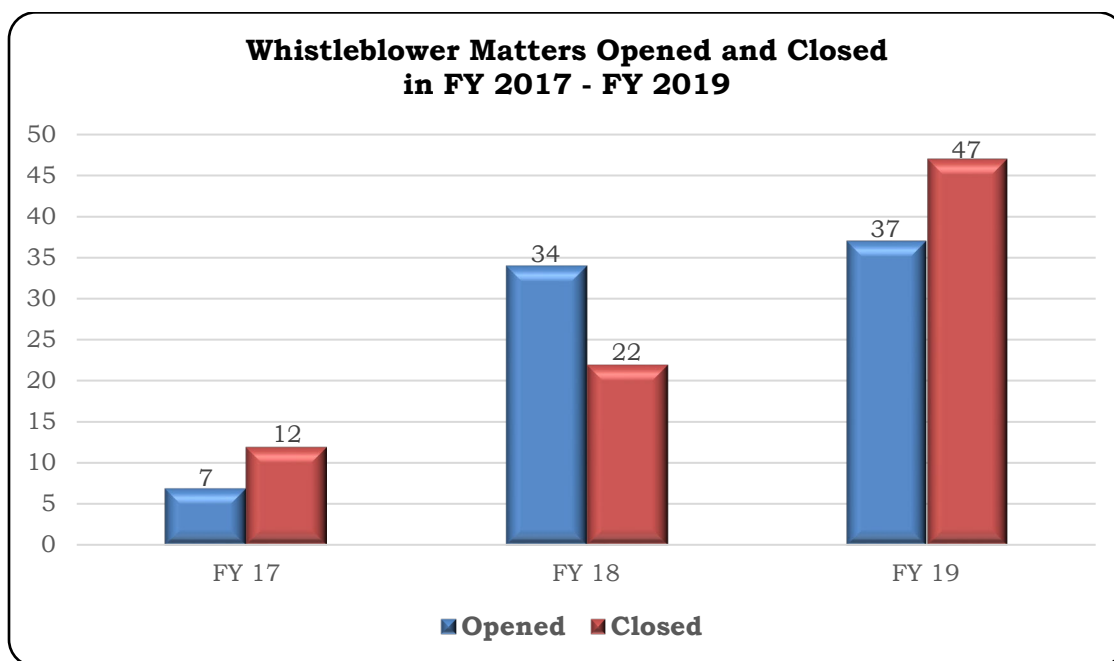
<b>Complaints against Members of the Judiciary</b>		
	Complaints	Referrals
FY 17	2	0
FY 18	1	0
FY 19	3	3

## Section VI: FBI Whistleblower Retaliation Claims

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

During Fiscal Year 2019, OPR received 37 complaints and resolved 47 complaints. Below is a graph depicting the number of complaints received and resolved during the previous three fiscal years.

**Graph 5**



## *Section VII: Training and Outreach Efforts*

OPR increasingly participates in training and outreach events to improve ethical compliance within the Department, as well as educate external stakeholders about the Department's commitment to accountability. During Fiscal Year 2019, OPR attorneys made presentations to new AUSAs as part of the Department's orientation and training programs, and participated in training for other Department components, including training on prosecutors' discovery obligations.

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

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

## *Conclusion*

During Fiscal Year 2019, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both inside and outside the Department, and continued to serve as the Department's liaison with state attorney disciplinary authorities. OPR also met with delegations from several foreign countries to discuss issues pertaining to legal ethics. OPR's activities in Fiscal Year 2019 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.