
U.S. DEPARTMENT OF JUSTICE



OFFICE OF PROFESSIONAL RESPONSIBILITY

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

Fiscal Year 2021 Annual Report

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Introduction

This 46th Annual Report is submitted to the Attorney General on behalf of the U.S. Department of Justice (Department) Office of Professional Responsibility (OPR). The Report covers the activities of OPR during Fiscal Year 2021 (October 1, 2020, through September 30, 2021).

A. Overview of OPR and Its Fiscal Year 2021 Work

On December 9, 1975, Attorney General Edward H. Levi issued an order establishing OPR to ensure that Department employees perform their duties in accordance with the high professional standards expected of attorneys working in the nation's principal law enforcement agency. Department attorneys are privileged to represent the United States, and they exercise significant power, but that power carries with it the obligation to adhere to those high professional standards. OPR is an independent, nonpartisan internal entity that investigates allegations of professional misconduct against Department attorneys relating to the exercise of their authority to investigate, litigate, or provide legal advice. OPR carefully reviews and thoroughly investigates misconduct allegations against Department attorneys based solely on the facts and applicable standards, without bias or favoritism.

During the four decades since it was established, OPR has demonstrated a high level of expertise in investigating professional misconduct allegations against Department attorneys and analyzing and applying the complex legal and ethical standards governing attorney conduct. Through its staff of highly experienced attorneys with decades of prosecutorial and civil litigation experience, OPR consistently ensures that Department attorneys adhere to the highest ethical standards and maintain the trust of the American people.

This report highlights some of OPR's work during Fiscal Year 2021, including instances in which Department attorneys failed to adhere to the high standards expected of them. Any instance of professional misconduct is troubling, and most Department attorneys conduct themselves with the utmost integrity and professionalism. However, maintaining trust requires that when they do not, Department attorneys are held accountable.

OPR discloses information regarding its work to the extent allowed by law. The information contained in this public report and on OPR's website is limited by the Privacy Act of 1974, which requires that personnel records be protected. During Fiscal Year 2021, OPR continued to post summaries of professional misconduct reports on its website as soon as the findings became final. In addition, unlike other investigative agencies, OPR publicly discloses information about its review and investigative procedures. Information about those procedures, as well as information relating to OPR's transparency and independence, can be found on OPR's website (www.justice.gov/opr). The website's new design has improved accessibility and has significantly increased 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.

Among its many accomplishments for Fiscal Year 2021, OPR completed its investigation into allegations related to the 2006-08 federal criminal investigation into allegations against Jeffrey Epstein. OPR's 290-page report provided an accurate and thorough accounting of the events that led to the non-prosecution agreement that ended the federal investigation into Epstein's criminal conduct. OPR also concluded investigations into allegations of discovery violations, failure to obey court orders, lack of candor, and grand jury abuse, among other issues. Over half of the investigations resulted in misconduct findings and were referred to the Professional Misconduct Review Unit (PMRU) for review and disciplinary action, if appropriate. Following authorization by the PMRU, cases involving violations of state attorney rules of professional conduct were referred to state attorney disciplinary authorities.

B. Significant Management Challenges

In Fiscal Year 2021, OPR faced substantial challenges caused by the coronavirus pandemic. Throughout the year, OPR attorneys and administrative staff remained on the maximum teleworking status begun during the prior fiscal year. OPR's attorneys and staff continued to timely process inquiries and investigations by making use of video interviews, document-sharing platforms, and other technological tools. In conjunction with Department guidance, OPR leadership began planning for the resumption of operations at the RFK Building by developing new teleworking policies to reflect the changed work environment and to provide more flexibility for employees.

OPR leadership also devoted extensive efforts to addressing proposed legislation to expand the jurisdiction of the Office of the Inspector General (OIG) into the area of attorney professional misconduct allegations. Throughout its 46-year history, OPR has proven to be an effective means of ensuring that Department attorneys comply with the ethical standards imposed by the constitution and the courts, Department policies, and state rules of professional conduct applicable to attorneys. OPR recognizes trends and quickly works with Department components to improve attorney training and alert managers to issues that may warrant increased supervision. Through its support of OPR, whose mission and resources are singularly devoted to reviewing and resolving attorney professional misconduct allegations, the Department demonstrates its unwavering commitment to ensuring that its attorneys maintain the highest ethical standards. Public trust is not obtained merely from knowing how to investigate facts. Institutions like OPR reflect the work of generations committed to a process of continuous improvement and an institutional culture developed over decades that is dedicated to the mission of overseeing the professional conduct of the Department's attorneys.

The proposed legislation would alter the Department's long-standing and well-established system for investigating and assessing attorney misconduct by authorizing the OIG, in its discretion, to conduct attorney misconduct investigations. The Department, consistently in multiple administrations, has opposed similar legislation, which adds an additional layer of bureaucracy, requires duplicative resources, and undermines the current efficient system for investigating attorney professional misconduct. Most OIGs do not investigate attorney professional misconduct—due to limitations imposed through regulation, formal agreements, or agency practice—so the proposed legislation would give the Department's OIG expansive

authority beyond that traditionally exercised in the Inspector General community.¹ Unlike the OIG, OPR's unique independence from the prosecutors and prosecutorial offices that it investigates assures the public that its investigations are not influenced by bias or favoritism. In addition, OPR's decisions to initiate reviews and its findings and conclusions are free from political or other improper considerations.

In conjunction with the legislative initiative, OPR leadership continued the office's efforts to educate external entities regarding its transparency and discipline responsibilities. OPR discloses to the public information about its investigations to the extent allowed by law and, unlike most other investigative agencies, provides information about its practices and procedures on its public website. OPR, like the OIG, produces summaries of its completed misconduct investigations, which are reviewed by the Department's privacy experts before being published on its website. Because information regarding personnel matters is restricted by the Privacy Act, the proposed legislation will not increase the public's access to information regarding investigations of attorney professional misconduct. Similarly, the proposed legislation will not change the severity of discipline imposed, as proposing and deciding discipline are the responsibilities of the PMRU, not OPR.

While opposing the legislation as drafted, the Department also proposed alternative legislation to address congressional concerns about attorney professional misconduct investigations while minimizing the substantial disruption to the system that would result from the current bill. Under current Department regulations, the OIG may request authority from the Deputy Attorney General to investigate any attorney professional misconduct allegation (28 CFR sec. 0.29e(a)(6)). The proposed alternative legislation strengthens this provision by requiring notification to Congress if the Attorney General declines an Inspector General's request to initiate an investigation, along with a statement of the reasons for the declination, thereby increasing transparency and accountability. The Department's proposed legislation allows the OIG to investigate attorney professional misconduct matters in those rare situations in which it is the more suitable investigative entity without disrupting an attorney professional discipline system that has worked well for 46 years.

C. Overview of OPR Procedures in Misconduct Matters

OPR is primarily responsible for reviewing allegations of professional misconduct against current or former Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. OPR's jurisdiction also includes reviewing professional misconduct allegations against immigration judges and members of the Board of Immigration Appeals. In addition, OPR has jurisdiction to investigate allegations of misconduct against Department law enforcement personnel that are related to allegations of attorney misconduct within OPR's jurisdiction. OPR may also investigate other matters when requested or authorized to do so by the Attorney General or the Deputy Attorney General.

OPR investigates allegations that Department attorneys have violated constitutional or statutory obligations; Department policies, rules, or regulations; or state rules of attorney

¹ See, for example, Army Regulation 20-1, "Inspector General Activities and Procedures" (Mar. 23, 2020); USDA, Office of Human Resources Management, Agency Investigations of Employee Misconduct, Ch. 751, Sec. 3-3 Scope of Agency Investigations; CFR, Title 17, Ch. II, Securities and Exchange Commission, Sec. 200.21.

professional conduct. 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 conflicts of interest. 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, United States Attorney's Offices (USAOs), 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. 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 further investigation is not likely to result in a misconduct finding or that the matter lacks merit.

When information gathered during an inquiry indicates that further investigation is warranted, the matter is converted to an investigation. Before making a finding of professional misconduct, 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 under oath 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 termination of their employment.

OPR may initiate an inquiry or investigation into allegations concerning a subject attorney's work at the Department even if the attorney is no longer employed by the Department at the time of the inquiry or investigation. 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 it is in the best interest of the Department to do so.

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, USAOs, and the Executive Office for U.S. 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.

OPR does not propose or impose discipline. During Fiscal Year 2011, the Department established the 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. The PMRU has jurisdiction over most 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 the applicable laws, rules, and regulations.² The PMRU also determines the appropriate level of discipline to be imposed.

Once a disciplinary action becomes final and after authorization by the PMRU (for matters within its jurisdiction) or the Office of the Deputy Attorney General, OPR notifies the appropriate state attorney disciplinary authorities of any intentional or reckless violations of applicable bar rules. OPR does not make a bar notification when the conduct involves internal Department policies that do not implicate a rule of professional conduct. In addition, OPR reviews reports issued by the Department's OIG containing findings against Department attorneys and makes recommendations to the PMRU, when appropriate, regarding whether state attorney disciplinary authorities should be notified of the attorney's conduct and the Department's findings.

D. OPR's Ancillary Responsibilities

In addition to reviewing and resolving Department attorney misconduct allegations, other OPR responsibilities include training and educating Department attorneys; evaluating claims of whistleblower retaliation by Federal Bureau of Investigation (FBI) personnel; reviewing misconduct allegations against non-Department attorneys and members of the judiciary and making referrals to disciplinary authorities when appropriate; representing the Department with

² OPR's findings of poor judgment or mistake are referred to Department component heads, the Executive Office for U.S. Attorneys, and U.S. Attorneys, for appropriate action.

external stakeholders on matters relating to attorney professional misconduct; and handling special projects at the request of the Attorney General and Deputy Attorney General.

Throughout its 46-year history, OPR has proven to be an effective means of ensuring that Department attorneys comply with the ethical standards imposed by the constitution and the courts, Department policies, and state rules of professional conduct. Through its inquiries and investigations, OPR identifies trends and works with Department components to improve attorney training and supervision. OPR worked closely this year with the Department's discovery coordinator and other components to train Department attorneys on the discovery obligations required by the Constitution, Department policies, and state attorney rules of professional conduct. In response to an increase in bar lapse allegations, OPR also worked with the Office of Attorney Recruitment and Management to improve the Department's attorney license certification process.

Section I: Statistical Overview of Professional Misconduct Allegations

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

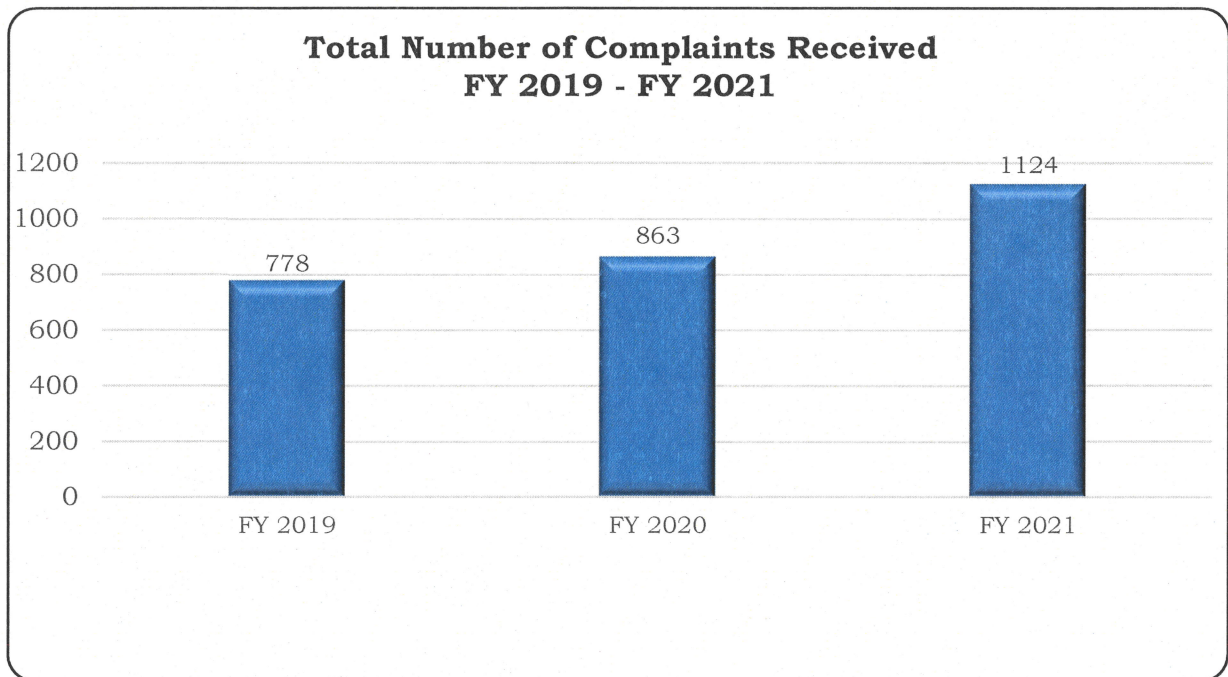
A. Intake and Initial Evaluation of Professional Misconduct Complaints

In Fiscal Year 2021, OPR received 1,124 new complaints, 232 of which, or approximately 21 percent, were from inmates. Many others related to matters that did not fall within OPR's jurisdiction and, when appropriate, were referred to other government agencies or Department components. The total number of complaints received increased by 30 percent from the prior year.

OPR determined that 61 complaints warranted further review and opened inquiries in those matters.³ OPR opened 10 matters as investigations. 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 reviewed and resolved by experienced analysts working under the supervision of an OPR manager. Graph 1 compares the number of complaints received for the last three fiscal years.

³ Some of the complaints that were opened as inquiries may have been received by OPR prior to Fiscal Year 2021.

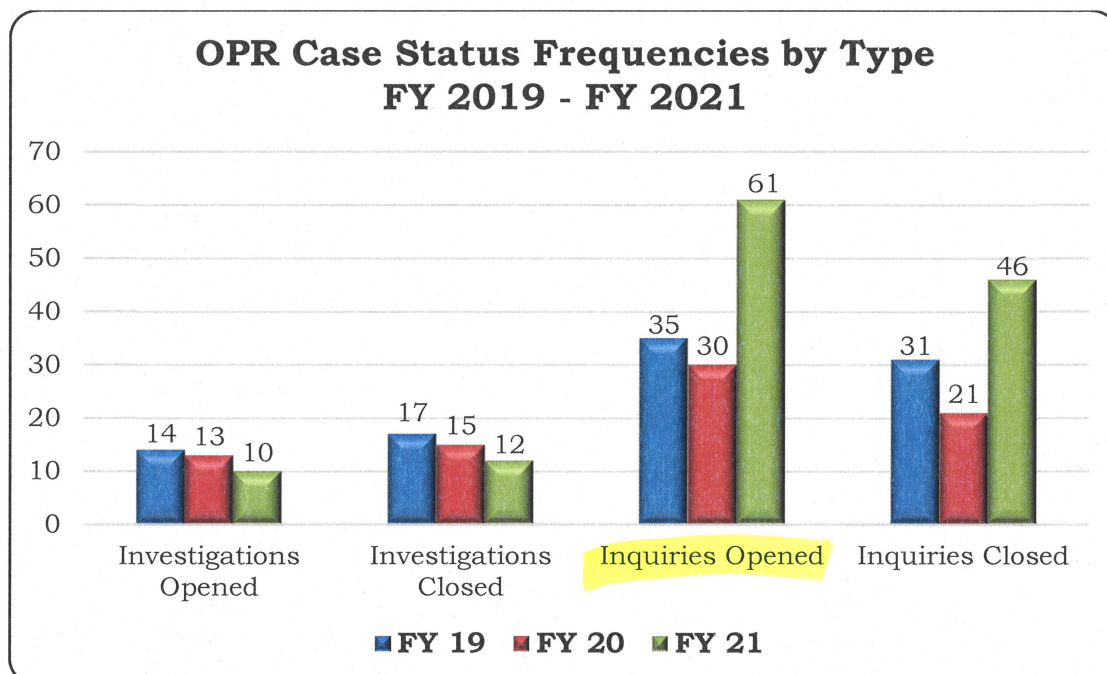
Graph 1



B. Professional Misconduct Investigations and Inquiries by Fiscal Year

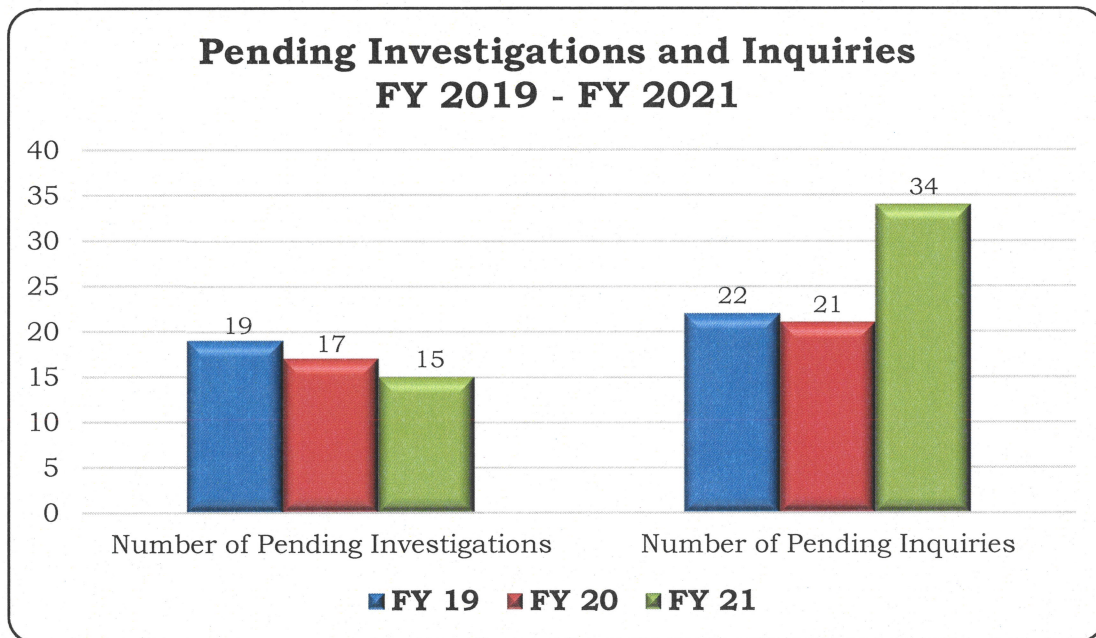
Graph 2 compares the number of investigations and inquiries OPR opened and closed for the last three fiscal years. As reflected in the graph, in Fiscal Year 2021, OPR opened 61 inquiries and closed 46, and opened 10 investigations and closed 12.

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 outcomes of those matters are reported in the fiscal year they are closed. At the end of Fiscal Year 2021, there were 15 pending investigations and 34 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 2021

The sources of the complaints for the 61 inquiries opened in Fiscal Year 2021 are set forth in Table 1.⁴

Table 1

Sources of Professional Misconduct Complaints against Department Attorneys in Inquiries Opened in FY 2021		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Department components, including self-reports (unrelated to judicial findings of misconduct)	31	50.8%
Judicial opinions and referrals, including self- reports and referrals by Department employees of judicial criticism and findings of misconduct	20	32.8%
Congressional referrals	3	4.9%
Private attorneys	3	4.9%
Private parties	2	3.3%
Other agencies	2	3.3%
Total	61	100%

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 61. Consistent with prior years, allegations concerning lack of candor and discovery violations were the most common.

⁴ OPR evaluates all misconduct allegations made by Department employees against non-Department attorneys to determine whether the Department should make a referral to a state attorney disciplinary authority. The 61 matters referred to above do not include matters involving proposed bar notifications relating to non-Department attorneys.

Table 2

Types of Professional Misconduct Allegations in Inquiries Opened in FY 2021		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	29	25%
Abuse of authority, including abuse of prosecutorial discretion	20	17.2%
Misrepresentation to the court or opposing counsel	15	12.9%
Failure to maintain an active bar membership	15	12.9%
Unauthorized leaks or disclosures	10	8.6%
Improper remarks to a grand jury, during trial, or in pleadings	8	6.9%
Failure to comply with court orders and federal rules	8	6.9%
Failure to comply with Department rules and regulations	6	5.2%
Failure to keep the client informed	2	1.7%
Failure to comply with federal law	1	0.9%
Missed deadlines	1	0.9%
Failure to competently or diligently represent the client's interests	1	0.9%
Total	116	100%

D. Professional Misconduct Inquiries Closed in Fiscal Year 2021

In Fiscal Year 2021, OPR resolved and closed 46 inquiries involving allegations against Department attorneys. These matters involved 98 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 resolutions of the 98 allegations reviewed in Fiscal Year 2021 in inquiries that were not converted to investigations are set forth in Table 3.⁵

⁵ In Fiscal Year 2021, 9 inquiries were converted to investigations. When an inquiry is converted to an investigation, the matter thereafter is reported in the investigations statistics rather than the inquiry statistics section of OPR's annual report.

Table 3

Categories of Professional Misconduct Inquiry Allegations Resolved in FY 2021		
Types of Resolution	Number of Occurrences	Percentage of Occurrences
Further investigation not likely to result in finding of professional misconduct	42	42.9%
Matter lacked merit	36	36.7%
Other	17	17.3%
Performance or management matter; referred to component	3	3.1%
Total	98	100%

E. Professional Misconduct Investigations Opened in Fiscal Year 2021

Table 4 identifies the sources for the 10 investigations that OPR opened in Fiscal Year 2021.

Table 4

Sources of Complaints against Department Attorneys for Professional Misconduct Investigations Opened in FY 2021		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions and referrals, including self-report and referrals by Department employees of judicial criticism and findings of misconduct	7	70%
Department components, including self-reports (unrelated to judicial findings of misconduct)	2	20%
Private parties	1	10%
Total	10	100%

Some of these investigations involved multiple subjects. In addition, because many investigations involved multiple professional misconduct allegations, there were 44 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

Table 5

Types of Professional Misconduct Allegations in Investigations Opened in FY 2021		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Misrepresentation to the court or opposing counsel	15	34%
Failure to comply with discovery obligations	11	25%
Failure to comply with Department rules and regulations	7	16%
Failure to competently or diligently represent the client's interests	4	9%
Interference with defendant's rights	2	4.5%
Abuse of authority, including abuse of prosecutorial discretion	1	2.3%
Failure to comply with federal law	1	2.3%
Improper remarks to a grand jury, during trial, or in pleadings	1	2.3%
Failure to maintain an active bar membership	1	2.3%
Unauthorized leaks or disclosures	1	2.3%
Total	44	100%

F. Professional Misconduct Investigations Closed in Fiscal Year 2021

OPR closed 12 investigations in Fiscal Year 2021, some of which involved more than one attorney. OPR found professional misconduct in 7, or 58 percent, of the 12 investigations it closed. OPR finds the subject attorney committed professional misconduct when the subject attorney (1) intentionally violated a clear and unambiguous obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy;⁶ or (2) recklessly

⁶ 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

disregarded his or her obligation to comply with that obligation or standard.⁷ Three of the 7 investigations involved at least one finding of intentional professional misconduct by a Department attorney. OPR found that a Department attorney acted in reckless disregard of a clear and unambiguous obligation or standard in 5 of the 7 investigations.

In Fiscal Year 2021, OPR made more professional misconduct findings than Fiscal Year 2020; 58 percent of cases closed in Fiscal Year 2021 included professional misconduct findings, compared to 53 percent in Fiscal Year 2020. The 7 investigations closed in 2021 with professional misconduct findings included 30 sustained allegations of misconduct. Table 6 sets forth the 30 allegations sustained in those investigations.

Table 6

Types of Professional Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2021	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Failure to comply with Department rules and regulations	10	33.4%
Failure to competently or diligently represent the client's interests	4	13.3%
Misrepresentation to the court or opposing counsel	4	13.3%
Failure to keep the client informed	3	10%
Conflict of interest	2	6.7%
Failure to comply with discovery obligations	2	6.7%
Failure to comply with federal law	2	6.7%
Improper remarks to a grand jury, during trial, or in pleadings	1	3.3%
Unauthorized leaks or disclosures	1	3.3%
Failure to comply with court orders and federal rules	1	3.3%
Total	30	100%

that the obligation or standard unambiguously prohibits. When several misconduct allegations have been made against a subject, each allegation is resolved separately. Therefore, OPR may conclude that the subject engaged in intentional misconduct with respect to one allegation but find that the subject acted recklessly or made a mistake with respect to another allegation.

⁷ OPR finds that an attorney acted in reckless disregard of a professional obligation or standard when it concludes that the attorney (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

OPR made professional misconduct findings against 10 Department attorneys. At the end of Fiscal Year 2021, the PMRU had issued final decisions in three matters and, in all cases, sustained OPR's findings of professional misconduct. Three attorneys resigned and one retired from the Department before OPR's report of investigation was completed. When OPR found a violation of state rules of professional conduct, the PMRU authorized OPR to refer the violations to the appropriate state attorney disciplinary authorities.

In 3 of the 5 remaining investigations closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 12 investigations OPR closed in Fiscal Year 2021, OPR made a finding of professional misconduct or poor judgment in 10 cases, or 83 percent of the investigations it closed. OPR refers its poor judgment findings to the Department attorney's component, which may impose disciplinary action.

Section II: Professional Misconduct Investigations Closed in Fiscal Year 2021

The following professional misconduct investigations were closed during Fiscal Year 2021. This report includes actions taken by the PMRU when such action occurred in the fiscal year.

As required by the Privacy Act, to protect the privacy interests of the Department attorneys and other individuals involved in the investigations and inquiries summarized in this report, OPR has omitted the names and identifying details from the summaries. Moreover, in certain cases, information and evidence obtained by OPR is protected from disclosure by court orders, evidentiary privileges, and grand jury secrecy rules. OPR alternates the use of gender pronouns each year, regardless of the actual gender of the individual involved; female pronouns are used this year.

Allegations of Abuse of Authority in Resolving a Federal Criminal Investigation and Failure to Comply with the Crime Victims' Rights Act (Investigation relating to Jeffrey Epstein)

OPR initiated an investigation into whether prosecutors in the USAO for the Southern District of Florida committed professional misconduct in 2007, by entering into a non-prosecution agreement (NPA) with Jeffrey Epstein, who was accused of soliciting underage teenage girls for massages or sexual activity in exchange for money. The NPA provided that, in lieu of federal prosecution, Epstein would plead guilty in Florida state court to two state felony charges, serve an 18-month jail term, register as a sex offender, and waive his right to contest liability if specified victims pursued certain civil remedies for personal injuries. OPR subsequently expanded the investigation to include a February 2019 judicial finding that the government violated the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, when it entered into the NPA without first providing the victims with notice and an opportunity to confer with the government.

OPR obtained and reviewed voluminous documents, including USAO and FBI investigative files, state investigative and prosecution records, pleadings and transcripts in the CVRA litigation, and relevant emails. OPR also examined public materials such as media reports, podcasts, and books. OPR interviewed or otherwise obtained information from more than 60 witnesses. OPR identified former U.S. Attorney Alexander Acosta, three former USAO supervisors, and an Assistant U.S. Attorney (AUSA) as subjects of its investigation based on

preliminary information indicating that each of them was involved in the decision to resolve the case through the NPA or in the negotiations leading to the agreement. OPR received written submissions from all five subjects and conducted extensive interviews of each, including a follow-up interview of one subject.

In its 290-page final report, OPR concluded that the conduct of former U.S. Attorney Acosta and the other four prosecutors did not constitute professional misconduct, as there was no clear and unambiguous standard prohibiting the resolution of the Epstein matter through an NPA. As the U.S. Attorney, Acosta acted within his authority to resolve the federal investigation as he did, and OPR found no evidence that his decisions, or the actions of the subordinates who implemented his decisions, were based on corrupt or other impermissible considerations, such as Epstein's wealth, status, or associations. However, OPR criticized Acosta's decision to conclude the investigation through the NPA, finding that he exercised poor judgment in resolving the matter as he did. OPR found that Acosta failed to consider the difficulties inherent in a resolution that relied heavily on action by numerous state officials over whom he had no authority; he resolved the federal investigation before significant investigative steps were completed; and he agreed to several unusual and problematic terms in the NPA without fully considering the issues and problems that were likely to occur.

In addition, OPR thoroughly investigated the USAO's and the FBI's written and in-person interactions with victims between 2006 and 2008. OPR concluded that the victims were not treated with the forthrightness and sensitivity that the Department expects, but that the prosecutors did not engage in professional misconduct when they failed to consult with victims prior to the signing of the NPA. No federal charges were filed against Epstein, and in 2007, when the NPA was signed, there was no clear and unambiguous standard requiring notice to or consultation with victims prior to the filing of federal charges. At the time, the Department's position was that the CVRA did not apply prior to the filing of federal charges, and many federal courts had issued opinions consistent with that position. Although OPR did not find that any of the subjects engaged in misconduct, OPR determined that Acosta exercised poor judgment in deferring to the State Attorney the decision whether to notify victims about Epstein's state plea hearing, without taking steps to ensure that such notification would be made. Finally, after considering all of the circumstances and the many interactions between the government and the victims, OPR concluded that the government's lack of transparency and its inconsistent messages to victims left victims feeling confused and ill-treated by the government; gave victims and the public the misimpression that the government had colluded with Epstein's counsel to keep the NPA secret from the victims; and undercut public confidence in the legitimacy of the resulting agreement.

Because of the high degree of public interest in the matter and ongoing litigation related to issues discussed in the report, OPR worked with the Office of the Deputy Attorney General and other Department components to publicly release a detailed executive summary of the report and provided the full report to Congress. Through OPR's extensive investigative work and detailed report of the facts and its legal analysis, the Department was able to provide accurate information to the public regarding the resolution of a criminal investigation that had received extraordinary media attention and to correct misinformation concerning the conduct of current and former Department attorneys.

Allegations of Failure to Comply with Discovery Obligations and Improper Authorization of Witness Attendance Fees

Following a report by a USAO of judicial criticism that led to the mid-trial dismissal of criminal charges, OPR investigated whether two AUSAs failed to timely comply with the government's discovery obligations. As a result of its investigation, OPR concluded that the AUSAs committed professional misconduct in reckless violation of Department discovery policies when they did not timely disclose to the defense that certain financial and non-financial benefits had been provided to a government witness. The AUSAs produced the benefits information only after the witness's testimony on re-direct examination revealed information that led defense counsel to pursue further questioning, which ultimately led to the disclosure of information about the benefits. With respect to numerous other alleged discovery violations, OPR's investigation determined that the evidence was insufficient to establish that either AUSA committed professional misconduct. OPR instead concluded that as to some discovery issues, the AUSAs exercised poor judgment by not adequately managing certain aspects of pretrial discovery involving the extensive digital evidence. Regarding the AUSAs' alleged failure to comply with a court order requiring the disclosure of records associated with a victim, OPR found that the AUSAs acted appropriately.

During its investigation, OPR discovered that the AUSAs had signed certifications authorizing a witness to be paid pretrial attendance fees for several days during which the witness did not in fact attend pretrial proceedings or meetings. OPR concluded that the AUSAs committed professional misconduct in reckless violation of their obligation under 5 C.F.R. § 2635.101(b)(9) to "protect and conserve Federal property and . . . not use it for other than authorized activities," when they each certified that the witness was entitled to pretrial attendance fees for several days when the witness did not meet with the government. OPR referred the matter to the PMRU.

Allegations of Misrepresentations Made to Defense Counsel and the Court and Violations of Grand Jury Practice Standards

A USAO reported that a court criticized AUSAs for making prejudicial comments to the grand jury and knowingly providing defense counsel with an inaccurate grand jury transcript. After obtaining and reviewing case records, OPR identified additional potential violations of Department and USAO grand jury practice standards and expanded the scope of its investigation.

OPR's investigation determined that an AUSA, at the direction of the AUSA's supervisor, knowingly provided defense counsel with an inaccurate grand jury transcript that was material to the potential outcome of matters pending before the court but failed to inform defense counsel of the inaccuracies in the transcript. OPR concluded that the AUSA and the AUSA's supervisor committed professional misconduct in violation of state rules of professional conduct relating to truthfulness in statements to others.

OPR's investigation also revealed that the AUSA knowingly failed to inform the court that the grand jury transcript was not accurate when the accuracy of the transcript was discussed during a pretrial conference. OPR concluded that the AUSA committed professional misconduct in violation of an attorney's general duty of candor to the court and state rules of professional conduct relating to candor. OPR also determined that the AUSA exercised poor judgment by failing to comply with multiple grand jury practice standards.

OPR also concluded that another member of the prosecution team committed professional misconduct in reckless disregard of multiple grand jury practice standards during the grand jury investigation and presentation, including presenting improperly prejudicial evidence, failing to present exculpatory evidence, and failing to present evidence sufficient to establish certain counts in the indictment. OPR concluded that the AUSA's reckless disregard of multiple grand jury practice standards violated state rules of professional conduct by failing to competently represent the client. OPR referred the matter to the PMRU.

Allegations of Failure to Comply with Discovery Obligations and Department Policies Governing Disclosure of Exculpatory and Impeachment Information

A USAO notified OPR of a judicial opinion granting in part the defendant's motion for a new trial on grounds that the government failed to disclose to the defense material exculpatory and impeachment evidence in violation of the government's obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The court found that the government failed to disclose a law enforcement memorandum memorializing an interview of a government witness that corroborated the defense's theory of the case, called into question the victim's credibility on a material issue, and, as to some charges, was exculpatory.

After conducting a thorough investigation, OPR concluded that although the undisclosed witness statements should have been disclosed to the defense prior to trial, the prosecutors did not act intentionally or in reckless disregard of their disclosure obligations under *Brady* or Department policy. Rather, OPR concluded that the prosecutors' failure to timely disclose the statements primarily resulted from an unanticipated failure in the prosecution team's record-keeping process for meeting the government's disclosure obligations to the defense. OPR also did not find preponderant evidence that prosecutors violated applicable rules of professional conduct.

Allegations of Judicial Criticism for Failure to Disclose Exculpatory Evidence, Failure to Act with Reasonable Diligence and Promptness in Representing the United States, Failure to Communicate with the Client, Failure to Obey a Court Order, and Conduct Prejudicial to the Orderly Administration of Justice

A USAO notified OPR of a district court order dismissing an indictment with prejudice on the grounds that the government violated its *Brady* obligations; made false representations in its response to the defendant's post-trial motion to dismiss the indictment; failed to meaningfully respond to the defendant's allegations that the government engaged in willful misconduct, in contravention of the court's order specifically directing the government to address the misconduct allegations; and instead, assigned responsibility for responding to the defendant's misconduct allegations to attorneys who lacked sufficient knowledge of the facts to address them, without any meaningful review of the government's pleadings by the only person who possessed the requisite knowledge.

OPR conducted an investigation and concluded that an AUSA did not violate her ethical obligations under the Constitution or the applicable rule of professional conduct in failing to disclose favorable evidence to the defense. OPR nonetheless concluded that in failing to disclose the evidence, or preserve it for disclosure, the AUSA committed professional misconduct by acting in reckless disregard of a prosecutor's obligations under Department policies governing the disclosure of exculpatory evidence. OPR also concluded that the AUSA committed professional

misconduct by acting in reckless disregard of her obligations to act with reasonable diligence and promptness in representing the United States; engaging in conduct that is prejudicial to the orderly administration of justice; knowingly engaging in conduct that resulted in a violation of a court order; and by failing to keep her client reasonably informed about the status of the case and apprised of facts that were reasonably necessary for the client to make informed decisions about the representation.

In addition, OPR concluded that in filing a pleading that failed to specifically address the defendant's willful misconduct allegations, as ordered by the court, another member of the prosecution team did not commit professional misconduct, but rather exercised poor judgment.

Finally, OPR concluded that a supervisor who was involved in the litigation committed professional misconduct by acting in reckless disregard of her obligation to act with reasonable diligence and promptness in representing the United States. OPR referred the matter to the PMRU.

Allegations of Failure to Comply with Discovery Obligations,
Failure to Keep the Client Reasonably Informed, and Lack of Candor to the Court

Following a report from a USAO, OPR investigated allegations that an AUSA entered into an oral cooperation agreement without supervisory approval and failed to timely inform the court, defense counsel, and USAO supervisors about the oral agreement. The AUSA also failed to timely and fully disclose to the defense the terms of a supplemental written cooperation agreement with the witness, even though the supplemental agreement contained impeachment information. During OPR's investigation, a district court issued an order criticizing the AUSA's conduct during the trial.

OPR's investigation revealed that the AUSA entered into a supplemental written cooperation agreement with a codefendant who later testified as a prosecution witness at the defendant's trial. At or about the same time, the AUSA entered into a separate oral cooperation agreement with the codefendant, which modified the written cooperation agreement by limiting the scope of the codefendant's obligation to cooperate. Although the AUSA informed the defense about the supplemental written cooperation agreement, she did not provide a copy of the agreement or disclose all its terms to the defense. During the codefendant's change of plea hearing, the court was informed about the supplemental written cooperation agreement but not about the oral cooperation agreement. Furthermore, when the codefendant testified as a prosecution witness at the defendant's trial, the trial court and the defense were not informed about the oral cooperation agreement until the codefendant's cross-examination.

Based on the results of its investigation, OPR concluded that the AUSA engaged in reckless professional misconduct by entering into the oral cooperation agreement and by failing to inform her USAO supervisors about it in violation of rule of professional conduct 1.4(a) and Department and USAO policy. OPR also concluded that the AUSA engaged in reckless professional misconduct during the codefendant's change of plea hearing when she failed to correct a misleading statement and failed to inform the court about the oral cooperation agreement in violation of rules of professional conduct 8.4(c) and (d); an attorney's obligations under *Napue v. Illinois*, 360 U.S. 264 (1959); and an attorney's duty of candor to the court. Likewise, OPR concluded that the AUSA engaged in reckless professional misconduct by failing to disclose the oral cooperation agreement to the defendant before trial in violation of Department and USAO

policies. Finally, OPR concluded that the AUSA did not engage in professional misconduct but demonstrated poor judgment by failing to timely disclose all the necessary terms of the supplemental written cooperation agreement to the defense. In evaluating the AUSA's conduct, OPR considered that although not disclosing all the relevant terms of the agreement, the AUSA did inform the defense, before trial, that the witness had entered into a written cooperation agreement. OPR referred the matter to the PMRU.

Allegations of Interference with the Defendant's Rights and Exhibiting a Lack of Competence and Diligence

A district court concluded that an AUSA repeatedly elicited hearsay testimony from a trial witness in violation of the defendant's Sixth Amendment rights. OPR conducted an investigation and concluded that although the AUSA elicited improper hearsay testimony, the AUSA relied on prior legal research and her use of similar evidence in another case. OPR concluded that the AUSA misunderstood a nuanced area of the law and that the conduct did not rise to the level of professional misconduct. Instead, OPR concluded that the AUSA exercised poor judgment for failing to raise the issue via a motion in limine to ensure that the introduction of the hearsay testimony was approved by the court prior to trial and that the admission of the evidence did not violate the defendant's rights.

Allegations of Failure to Timely Provide Discovery and Misrepresentations to the Court and Defense Counsel

An AUSA self-reported to OPR a judicial finding that she violated the government's disclosure obligations; misrepresented her compliance with those obligations; and misled the court regarding the admissibility of hearsay information from a cooperating defendant during the sentencing phase of the case. The court determined that the government failed to disclose documents showing that the government and a testifying agent doubted the reliability of the cooperating defendant, whose information the agent relied on during her testimony in support of a sentencing enhancement for another defendant.

Based on its investigation, OPR concluded that the AUSA was obligated to disclose to the defense a sealed document that was filed with the court, as well as another document expressing the agent's negative view of the cooperator's credibility and the reasons for that opinion. OPR concluded, however, that the AUSA's failure to timely produce the materials to the defense did not rise to the level of professional misconduct because the court was aware of one of the documents, as well as the government's general negative view of the cooperator's credibility, and because the AUSA had disclosed to the defense the negative factual information that served as the basis for the government's negative view of the cooperator's credibility. Furthermore, OPR did not find evidence that the AUSA intentionally suppressed the materials relating to the cooperator or that the AUSA made any knowing misrepresentations or misleading statements to the court or defense counsel.

Nevertheless, OPR's investigation revealed that if the AUSA had utilized the discovery practices she normally employed, she would have located and produced the documents to the defense. Moreover, before the sentencing hearings, the AUSA failed to conduct a search for additional discoverable material, despite receiving repeated reminders from the defense and the court to do so. The AUSA's failure to utilize appropriate discovery practices and search for

discoverable material was an exercise of poor judgment that resulted in the court sanctioning the government and excluding witness testimony at the sentencing hearings.

Allegations of Conflict of Interest and Failure to Advise the Client

A USAO advised OPR that it had received a complaint from a federal law enforcement agency that an AUSA was involved in an intimate romantic relationship with a special agent who had assisted the AUSA in the investigation and prosecution of a number of the AUSA's cases, including a case that ultimately went to trial. As a result of the information it learned during its investigation, which included conducting multiple interviews and reviewing court filings, transcripts, and Department training records, OPR concluded that the AUSA committed professional misconduct, when in reckless disregard of her obligations under rules of professional conduct 1.4 and 1.7, she failed to keep her client reasonably informed by not disclosing to USAO management that she was involved in an intimate romantic relationship with the agent, and by continuing to represent the government despite a conflict of interest that arose from her relationship with the agent, without having obtained her client's consent to her continued representation of the government. OPR referred the matter to the PMRU, which imposed a 14-day suspension. Following the PMRU's authorization, OPR referred the matter to the appropriate state attorney disciplinary authority.

Allegations of Misrepresentations to the Court, Failure to Competently Represent the Client, Failure to Obey Court Orders, Failure to Comply with Discovery Obligations, and Unauthorized Public Disclosure of Confidential Information

A USAO reported that a court made multiple findings that an AUSA was not candid with the court and failed to comply with the court's orders concerning two confidential sources who provided exculpatory information to the government. The court determined that the government, which did not want to disclose the identities of the sources, misrepresented its knowledge of their whereabouts, failed to correct the misrepresentations, and ignored the court's order to inform it immediately if certain events occurred.

During its investigation, OPR identified several additional issues, including the AUSA's disclosure of confidential identifying information about the sources on the public docket, which violated a court order sealing such information that the AUSA herself had requested. In addition, OPR examined the defense's allegations that the AUSA failed to disclose impeachment information with respect to a government witness.

OPR's investigation determined that the evidence was insufficient to establish that the AUSA committed professional misconduct by making misrepresentations to the court. The evidence regarding the AUSA's knowledge of the facts at the time she made the inaccurate statements did not establish to a preponderance that she knew her statements to the court were false. Instead, OPR concluded that the AUSA exercised poor judgment when she made factual representations about the sources without having obtained current information from law enforcement.

However, OPR's investigation revealed that the AUSA committed professional misconduct by violating client confidences and by displaying a lack of competence when she intentionally disclosed identifying information about the confidential sources on the public docket.

Her improper disclosure of the information violated both the court's order not to put the identifying information in a public filing and the court's order that the AUSA inform the court if certain events happened. OPR concluded that the AUSA's intentional actions violated her obligations under multiple state rules of professional conduct.

OPR was unable to determine by a preponderance of the evidence that the AUSA failed to disclose impeachment information with respect to a government witness, and OPR's investigation did not establish that she committed professional misconduct with respect to this issue.

Before OPR completed its investigation, the AUSA retired from the Department. OPR referred the matter to the PMRU and pursuant to the PMRU's subsequent authorization, OPR referred the matter to the appropriate state attorney disciplinary authority.

Allegations of Prosecutorial Vindictiveness and Failure to Obey a Court Order

A district court entered an order in a criminal case finding that the government engaged in vindictive prosecution by adding a new charge against a defendant after the court ordered a mistrial sua sponte; made misrepresentations during the grand jury proceedings to obtain the new charge as well as in its response to the defendant's motion to dismiss the new charge; and failed to fully comply with a court order requiring the disclosure of certain information to the defense. Two AUSAs prosecuted the case, one of whom retired during OPR's investigation.

Based on the results of its investigation, OPR concluded that the AUSAs did not commit professional misconduct by prosecuting the new charge against the defendant after the mistrial. OPR's investigation did not establish by preponderant evidence that the AUSAs engaged in vindictive prosecution. Instead, the evidence developed by OPR showed that, following the mistrial, the AUSAs and their supervisors evaluated the relevant legal and factual issues concerning the propriety of the new charge and concluded that the evidence was sufficient to obtain and sustain a conviction on the new charge and that the post-mistrial pursuit of the charge would not constitute vindictive prosecution. OPR found that the decision to bring the new charge was an appropriate exercise of prosecutorial discretion.

In its order, the court criticized the government's response to the defendant's motion to dismiss the new charge and its failure to fully comply with an order requiring production of certain information to the defense. The evidence developed by OPR showed that the lead AUSA was responsible for handling those aspects of the case. Although the response to the defendant's motion and the presentation to the grand jury did not fully develop the government's factual and legal arguments, OPR concluded that the preponderant evidence did not establish that the lead AUSA knowingly made a misrepresentation in the response to the motion or in the presentation to the grand jury. However, OPR found that the lead AUSA committed intentional professional misconduct in violation of rules of professional conduct 3.4(c) and 8.4(d) because the prosecutor knowingly failed to fully comply with the court's order requiring production of certain information. Before OPR completed its investigation, the AUSA retired from the Department. OPR referred the matter to the PMRU and pursuant to the PMRU's subsequent authorization, OPR referred the matter to the appropriate state attorney disciplinary authority.

Allegations of Improper Access to Attorney-Client Communications and Failure to Cooperate with a Special Master Investigation

OPR opened an investigation following judicial criticism that AUSAs may have improperly accessed audio recordings of attorney-client privileged telephone calls between inmates and their counsel and video recordings of attorney-client privileged meetings between inmates and their counsel. The court was also critical of AUSAs who allegedly failed to take appropriate steps to preserve evidence and who allegedly interfered with an investigation conducted by a special master appointed by the court.

OPR undertook a comprehensive review of the extensive record in the case and issued a questionnaire to current and former AUSAs to obtain further information about the USAO's practices. After reviewing the questionnaire responses and sworn testimony, OPR concluded that it was unlikely to find that any current AUSAs engaged in professional misconduct by improperly viewing or listening to protected attorney-client communications. Although there was evidence that two former AUSAs listened to recordings of attorney-client telephone conversations, they both had left the Department and had already been referred to the state bar. Therefore, OPR closed the portion of its investigation related to the alleged improper access to video and telephone recordings of attorney-client communications.

OPR pursued its investigation into other aspects of the district court's criticism of the government, including the alleged failure of AUSAs to cooperate with the special master and the alleged failure to implement adequate measures to preserve data potentially relevant to the special master's investigation. OPR received and reviewed written responses from six subjects who were implicated in those aspects of OPR's investigation. OPR also reviewed extensive testimony, expert witness disclosures, pleadings, and emails related to the remaining issues. Based on an exhaustive review of the court record, as well as its own investigation, OPR determined that the evidence did not support a finding that any relevant evidence had been destroyed.

OPR also reviewed the evidence related to the AUSAs' alleged lack of cooperation with the special master and concluded that the allegations were unfounded. OPR found no evidence to support a conclusion that any AUSA thwarted or attempted to thwart the special master's efforts to interview USAO employees. In addition, OPR concluded that the evidence did not establish that any AUSA intentionally or recklessly delayed the implementation of a litigation hold requested by the special master. Finding that the evidence did not support a professional misconduct finding, OPR closed the matter.

Section III: Examples of Professional Misconduct Inquiries Closed in Fiscal Year 2021

The following summaries are a representative sample of the professional misconduct inquiries closed by OPR in Fiscal Year 2021.

Allegations of Improper Closing Argument and Failure to Comply with Discovery Obligations

Two AUSAs self-reported judicial criticism of the government's closing arguments and of the government's late disclosure of certain purportedly exculpatory evidence. After reviewing the extensive record, OPR concluded that although the prosecutors should have erred on the side of disclosing the evidence "reasonably promptly," as required by the Department's broad discovery policy, rather than nearly two years after the evidence was generated, there was no indication that their failure to do so was more than a mistake. Moreover, the late-disclosed information was not clearly exculpatory, and as required by law and Department policy, it was produced sufficiently in advance of trial for the defense to make effective use of it. OPR scrutinized the AUSA's closing arguments and determined that none of the statements criticized by the court violated case law or any court order and that the statements did not rise to the level of professional misconduct, particularly considering the complexity of the charges and the evidence. OPR found that both the judge and the parties repeatedly admonished the jury to not rely upon counsel's arguments regarding either the law—for which the jury was to rely only upon the judge's instructions—or the facts—which was the jury's exclusive province. Accordingly, OPR concluded that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

Allegation of Misuse of a Grand Jury Subpoena

During a routine review of news articles, OPR discovered an article criticizing a USAO's use of a grand jury subpoena to identify a social media account user. According to the article, after the social media company filed a motion to quash the grand jury subpoena, it was withdrawn. OPR opened an inquiry, reviewed court records, emails, voicemails, and the evidence that served as the basis for the subpoena request. OPR also interviewed the law enforcement agent who requested the subpoena.

The evidence showed that while investigating a threat made on social media, the agent requested a grand jury subpoena from the USAO to identify the user of the social media account. However, the law enforcement analyst who had identified the threatening statement forwarded it to the agent using a standard form describing the threat but identified the wrong social media account. Because the threatening comment itself was no longer available on social media, the agent was unable to review the threat as it appeared on social media and relied instead upon the erroneous account information provided by the analyst. OPR's investigation determined that the agent's error in requesting a subpoena for the wrong social media account was caused by law enforcement's inability to review the threatening comment as it appeared on social media and a lack of training as to how investigative records should be interpreted. OPR did not uncover any evidence that law enforcement personnel intentionally abused the grand jury subpoena process or were improperly influenced to abuse the grand jury process to uncover the identity of the social media account user.

OPR also determined that the AUSA who approved the agent's grand jury subpoena request did not commit professional misconduct in obtaining the subpoena. OPR's investigation revealed that the agent who requested the subpoena submitted only the standard form required by the USAO to obtain the subpoena, without submitting any other supporting documentation or evidence as the basis for the subpoena. Unbeknownst to the AUSA, the form incorrectly identified the social media account that made the threatening post. Only after the social media company filed the motion to quash the subpoena did the agent and the AUSA discover that the law enforcement analyst and agent had incorrectly identified the wrong social media account.

Based on its inquiry, OPR concluded that further investigation was not warranted because the AUSA handling the matter reasonably relied on the information provided by the agent. Thus, OPR concluded that further investigation was not likely to lead to a finding of misconduct and closed its inquiry.

Allegation of Improper Destruction of Records

A USAO informed OPR that a bankruptcy judge issued an order finding the United States in contempt for prematurely destroying hundreds of boxes of a debtor's documents, which the bankruptcy court had ordered to be preserved for an additional year. The USAO informed OPR that a current AUSA and a former AUSA, who both handled separate federal prosecutions of the debtor, had authorized the destruction of the records. The government argued to the bankruptcy court that the AUSAs concluded that the court's order did not require the government to preserve the records because they were instrumentalities of the debtor's crimes and posed a threat to the public because they could be used to commit further criminal acts.

OPR reviewed relevant pleadings, emails, and a written response from the current AUSA. OPR determined that the AUSAs were both unaware of the bankruptcy court's preservation order until shortly before the documents were destroyed. OPR concluded that there was no basis for finding that the current AUSA committed professional misconduct because she had taken the position that the records should be preserved until the expiration of the time specified in the bankruptcy court's order and that the former AUSA was primarily responsible for determining whether and when the documents could be destroyed.

As to the former AUSA, her emails to the agency storing the records made clear that, although she believed that immediate destruction of the records was supported by various legal arguments, she also acknowledged that the destruction could be deferred for an additional year, as specified in the bankruptcy court's order. The former AUSA recommended that the agency seek guidance from agency counsel as to whether the documents could be destroyed. It was unclear whether the agency followed the former AUSA's advice, and, if so, what role agency counsel played in determining that the records could be destroyed. OPR concluded that although the premature destruction of the records could have been avoided by requesting clarification of the order from the bankruptcy court, the former AUSA's role in authorizing the destruction of the records would not likely result in a finding of professional misconduct and closed the matter.

Allegations of Lack of Judicial Impartiality and Improper Ex Parte Contacts

OPR received a complaint alleging that an immigration judge engaged in professional misconduct by failing to act with impartiality in connection with a removal case. The complaint

alleged that the immigration judge employed a procedurally improper method to return the case to the Board of Immigration Appeals (BIA) to avoid implementing the BIA's remand order, which required the immigration judge to adjudicate the removal case in the immigrant's favor. The complaint also alleged that the immigration judge had improper ex parte communications about the case with a supervisor in the Executive Office for Immigration Review (EOIR).

OPR reviewed relevant pleadings, emails, and a written response from the immigration judge. OPR determined that the immigration judge's actions were based on the judge's interpretation of an intervening court decision that changed the law that served as the basis for the BIA's remand order. In addition, the immigration judge's decision ultimately was upheld by the BIA based on the intervening change in law. OPR concluded that the immigration judge's attempt to achieve what she reasonably believed to be the correct result through a flawed procedural mechanism did not constitute misconduct.

OPR also determined that the immigration judge's brief, non-substantive communications about the case with an EOIR supervisor were not improper. The BIA reviewed the propriety of the immigration judge's communications and held that they were not improper. In addition, the immigration judge's communications were with her supervisor and occurred after she had rendered a decision in the case. Because EOIR's ethics rules specifically permit immigration judges to consult with supervisors and other court staff about their cases, OPR concluded that it was not improper for the immigration judge to alert a supervisor about her decision in the case.

[Allegation of Improper Communication with a Represented Person](#)

A USAO reported to OPR that a district court suppressed a statement obtained during a preindictment investigative interview of a defendant while he was in custody on factually related state charges. The court found that an AUSA who attended the interview violated rule of professional conduct 4.2 because the interview involved the same matter as the pending state case; the AUSA knew the defendant was represented by counsel in the state matter; the AUSA did not have the defense attorney's permission to meet with the defendant; and the interview was not otherwise authorized by law. OPR concluded that although the AUSA should have sought guidance before meeting with the defendant, the evidence did not establish that the AUSA improperly communicated with a party whom she knew to be represented in the matter because the charges and the facts in the state matter were distinct from those in the uncharged matter that was the subject of the preindictment investigative interview. Then existing case law and Department guidance did not clearly indicate that the defendant was represented in the matter that was discussed during the interview or that the authorized by law exception to rule 4.2 did not apply to the preindictment investigative interview with the defendant. OPR determined that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

[Allegation of Failure to Comply with a Search Warrant's Notice Provision](#)

Two district courts in related cases granted a petitioner's motion to return property seized pursuant to a search warrant, ruling that the warrant was invalid because it failed to identify the property to be seized or incorporate by reference an attachment identifying the property. A court also concluded that the government intentionally withheld from the petitioner the search warrant application's attachments in violation of the notice provisions applicable to search warrants. After reviewing relevant materials, OPR concurred with the courts' conclusions that the search warrant

was an unconstitutional general warrant. However, OPR found no indication that the flawed warrant was attributable to purposeful misconduct by the AUSA who obtained the warrant. In reaching its conclusion, OPR determined that the AUSA had no apparent motive to intentionally draft a deficient warrant, as the government gained nothing from doing so; the warrant was generated by support personnel using a flawed format that had been used for numerous other search warrants; the flaw was not identified either by the issuing magistrate or by the USAO supervisors who reviewed the warrant; and given the significance of the investigation in which the warrant was issued, the AUSA would reasonably expect the warrant to be closely scrutinized by opposing counsel and any errors discovered and challenged. Accordingly, OPR concluded that further investigation was unlikely to lead to a finding of professional misconduct and closed its inquiry.

Allegation of Misrepresentations to the Court

A district court referred to OPR its concerns that an AUSA falsely represented that a defendant had waived his right to collaterally attack his sentence on the grounds of ineffective assistance of counsel. In its opposition to the defendant's post-conviction motion, the government quoted language, purportedly taken from the defendant's plea agreement, waiving all rights to collaterally attack the defendant's sentence on any ground, including ineffective assistance of counsel. In fact, the defendant's plea agreement expressly reserved the right to challenge his sentence on the ground of ineffective assistance of counsel.

OPR obtained a detailed written response from the AUSA, interviewed the AUSA's supervisors, and reviewed substantial documentary evidence. Based on the results of its inquiry, OPR determined that the AUSA did not act purposefully with the intent to deceive or mislead the court. Rather, OPR found that the government's response to the defendant's motion was drafted by a paralegal contractor who used an office template in preparing the draft but did not recognize that, because the template was used for responding to post-conviction claims other than ineffective assistance of counsel, it was unsuitable for responding to the defendant's motion. Because the quotation consisted of standard language commonly used in all USAO plea agreements, and because the AUSA was unaware of the paralegal's mistake, the AUSA did not carefully read the quotation in reviewing and editing the draft. Instead, the AUSA focused on the substantive arguments addressing the alleged ineffectiveness of defense counsel.

The AUSA's supervisors admonished and counseled her for her negligence in reviewing and editing the draft response, and directed her to review the provision of the Justice Manual prohibiting federal prosecutors from obtaining in plea agreements waivers of ineffective assistance of counsel claims and from enforcing previously executed waivers except under limited circumstances. The paralegal's supervisors also counseled her about her mistake and assigned a mentor to work with her and assist her with any questions regarding the USAO's post-conviction motions practice. Although the AUSA should have exercised greater care in reviewing the paralegal's written work, the evidence revealed an error, rather than purposeful misconduct. Accordingly, OPR closed its inquiry.

Allegation of Supervisory Failure to Ensure Compliance with the Statute of Limitations

A Department supervisory attorney informed OPR that after requesting and receiving a report on the status of civil cases assigned to her unit, she discovered that the statute of limitations had expired in six cases, with a cumulative, ostensible value of approximately \$1 million. The

supervisory attorney was solely responsible for oversight of the unit, which received and handled a large number of cases. After initiating an inquiry into the matter, OPR requested and reviewed a written submission that contained detailed information about the cases in which the statute of limitations had run. OPR's inquiry revealed that the unit had no system to track cases and relied instead on the diligence of a single Department employee. As the head of the unit, the supervisory attorney bore responsibility for failing to systemically monitor the cases, allowing the statute of limitations to run in several cases and barring the government from recovering the monies it was owed. On the other hand, the unit had a long history of successfully handling cases without a tracking system, and there is no evidence that the supervisory attorney had actual knowledge that the statute of limitations was about to run in the cases. OPR concluded that her failure to adequately monitor all the cases she supervised could be attributed, in part, to the organizational and technological difficulties caused by the onset of the COVID-19 pandemic. During the weeks before the statute of limitations ran, she confronted difficulties supervising the personnel in the unit and had to deal not only with system-wide technological issues but also with problems stemming from working remotely on her laptop, for which she had little prior experience. OPR found no evidence of a pattern of lack of diligence with respect to her work, and concluded that under the circumstances, her failure to ensure that the unit filed complaints before the statutes of limitations ran did not rise to the level of professional misconduct.

Allegation of Failure to Comply with Discovery Obligations

OPR learned that a court permitted a defendant to withdraw her guilty plea after the defense alleged that the government failed to produce discovery prior to the plea. The government made extensive additional discovery disclosures after the defendant pled guilty. After reviewing the voluminous disclosures, the defense moved for sanctions, arguing, in part, that the newly disclosed information, which included information relating to a cooperating codefendant's misconduct, undermined the defendant's role in the offense and should have been disclosed prior to the defendant's guilty plea pursuant to the government's obligation to provide exculpatory and impeachment information to the defense.

OPR initiated an inquiry, received additional information from the USAO, and reviewed the extensive record in the case, in which the government provided a detailed explanation for its failure to produce the discovery earlier. OPR's inquiry revealed that the prosecutors were unaware of the cooperating codefendant's misconduct before the defendant pled guilty and that, when they learned of the misconduct, they acted diligently to disclose it. In addition, most of the additional discovery disclosures related to records that were not in the government's possession when the defendant originally pled guilty and were disclosed to the defendant prior to her sentencing. Although the court permitted the defendant to withdraw her guilty plea, it made no findings of misconduct by the prosecutors, the defendant ultimately pled guilty, and the court rejected the defendant's argument that the post-plea disclosures undermined the defendant's role in the offense. OPR concluded that further investigation was unlikely to lead to a finding that the prosecutors engaged in professional misconduct for failing to comply with their discovery obligations and closed its inquiry.

Allegations of Failure to Continuously Maintain an Active Bar License

In Fiscal Year 2021, OPR experienced a significant increase in the number of matters in which Department attorneys failed to continuously maintain an active bar membership. The

COVID-19 pandemic played some role in the increase as attorneys who were absent from the office did not receive mailings sent to them by the bar. Other reasons for the failures included attorneys not maintaining current contact information with the bar, attorneys not receiving or not carefully reading written or electronic communications from the bar regarding deadlines for submitting their membership dues or completing their continuing legal education requirements, and bars using electronic communications rather than mailing renewal notices by U.S. mail. OPR also learned of issues with two components' certification processes, which failed to identify attorneys who were not in an active status with their bars.

Given the changes resulting from the pandemic and the changes to bars' notification procedures, OPR concluded that these matters did not rise to the level of professional misconduct. However, after identifying numerous recurring issues in bar lapse matters, OPR determined that changes to the Department's entry-on-duty bar certification form and its annual bar certification form could potentially increase compliance with the Department's bar membership policy. OPR consulted the Office of Attorney Recruitment and Management (OARM), which oversees the Department's annual attorney bar certification process, and OPR and OARM worked closely to develop new certification language to be included in bar certification forms. As a result, the Department issued a revised entry-on-duty bar certification form (DOJ-54) and a revised annual bar certification form (DOJ-54A) designed to address the recurring issues that OPR identified. Among other updates, the revised forms make clear that Department attorneys have an ongoing obligation to keep their contact information current with their bar. OPR also advised OARM of issues with the component certification process and recommended that it consider whether additional training or other remedial measures are needed to improve the components' certification procedures. OPR also advised the Office of the Deputy Attorney General that a component that had inaccurately certified that all of its attorneys were in compliance with the requirement to maintain an active bar license did not provide information concerning its certification process as requested by OPR, and OPR was unable to investigate its past practices or confirm that appropriate changes had been made.

OPR also worked closely with OARM, the Professional Responsibility Advisory Office, and a state bar to resolve questions concerning immigration judges' licensing classification.

Section IV: Non-Department Attorney and Judicial Misconduct Allegations

OPR is 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. In this role, OPR assists Department attorneys in fulfilling their state bar obligations to report rule violations that raise a substantial question as to a lawyer's honesty, trustworthiness, or fitness as an attorney.

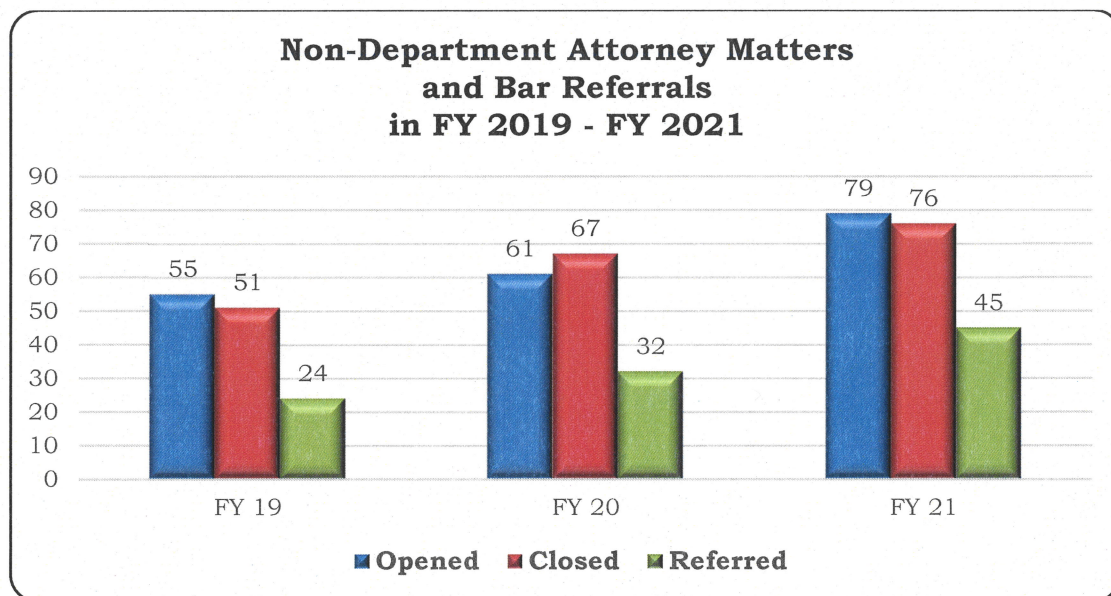
During Fiscal Year 2021, OPR received 79 submissions from components of the Department concerning possible professional misconduct by non-Department attorneys. OPR evaluated and closed 76 submissions and referred 45 matters to state attorney disciplinary authorities. OPR did not refer allegations it determined to be uncorroborated or based on mere suspicion, or which did not constitute a violation of a rule of professional conduct.

Many of the referrals OPR sent to state disciplinary authorities concerned an indictment, guilty plea, or conviction of a non-Department attorney for a federal criminal offense. For example, in Fiscal Year 2021, OPR referred a variety of criminal conduct by non-Department attorneys, such as embezzlement, extortion, fraud, identity theft, drug distribution, receiving child pornography, and sex trafficking of minors. In some cases, OPR referred evidence of uncharged criminal conduct by non-Department attorneys that came to light incidentally during a government investigation or litigation. For example, during a drug conspiracy investigation, the Department obtained evidence that a non-Department attorney had engaged in a prescription fraud scheme that could not be prosecuted because the statute of limitations had run. Similarly, during the litigation of a bankruptcy case, the Department learned that non-Department attorneys had embezzled client funds.

Regarding non-criminal conduct, OPR referred several allegations concerning false statements and misrepresentations made by non-Department attorneys. For example, OPR referred evidence indicating that an attorney misled jail authorities concerning her professional relationship with a detainee in order to obtain contact visits for a romantic relationship; an attorney misled bankruptcy creditors by using an IOLTA account to hide personal assets; and an attorney misrepresented the terms of a client fee agreement to a bankruptcy court judge.

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

Graph 4



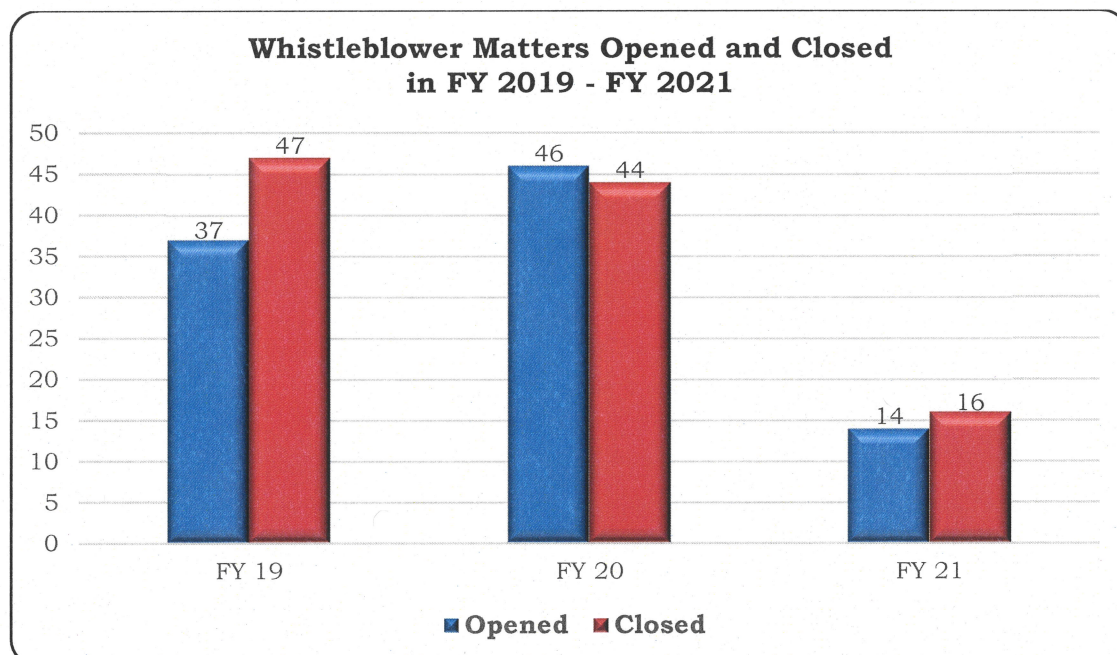
During Fiscal Year 2021, OPR also received and evaluated two submissions from Department components concerning possible professional misconduct by members of the judiciary and determined that neither should be referred to the appropriate judicial disciplinary authority.

Complaints against Members of the Judiciary		
	Complaints	Referrals
FY 19	3	3
FY 20	4	1
FY 21	2	0

Section V: FBI Whistleblower Retaliation Claims

OPR and the OIG share responsibility for reviewing and investigating whistleblower retaliation complaints by FBI personnel. During Fiscal Year 2021, OPR received 14 complaints and resolved 16 complaints, some of which were received in the preceding fiscal year. Below is a graph depicting the number of complaints received and resolved during the previous three fiscal years. In some instances, OPR conducts a full investigation into the allegations made by the complainant. In other cases, OPR closes the matter for a variety of reasons, including failure of the complaint to meet the jurisdictional elements of the statute, lack of sufficient evidence to support a finding that agency action was taken due to retaliation, or a decision by the complainant to withdraw the complaint. At the end of the fiscal year, OPR had five ongoing whistleblower investigations.

Graph 5



The following are examples of whistleblower retaliation allegations closed by OPR this fiscal year.

Allegation of Whistleblower Retaliation

An FBI employee complained that she was entitled to whistleblower relief based on her allegation that she was transferred in retaliation for reporting a supervisor's misconduct relating to the supervisor's management style, professionalism, judgment, temperament, and interpersonal skills. OPR opened an inquiry into the matter and after reviewing the complaint and relevant records, OPR determined that the complaint did not state a cognizable claim for relief under the FBI whistleblower regulations because the FBI employee did not reasonably believe that her allegations disclosed a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, as required by 28 C.F.R. § 27.1(a). The employee's complaints addressing her personal grievances about her job, dissatisfaction with assignments, and working relationship with superiors failed to allege real wrongdoing and were not covered by whistleblower protection laws. Further, the evidence was not sufficient to support a finding that the employee's reassignment constituted a significant change in duties, responsibilities, and working conditions. As to the whistleblower's allegations of discrimination based on her ethnicity, race, and age, OPR concluded that the employee failed to allege a cognizable claim under the whistleblower regulations and that such claims are best addressed through the Equal Employment Opportunity process.

Allegation of Whistleblower Retaliation

An FBI employee complained that she was entitled to whistleblower relief after she alleged harassment, discrimination, retaliation, intimidation, and personal bias by her supervisor. In a supplemental complaint, the FBI employee alleged additional examples of intimidation and a hostile work environment over a three-year period. OPR opened an inquiry into the matter and carefully reviewed the numerous allegations in the FBI employee's complaints and concluded that the employee had not alleged a cognizable claim for relief under the FBI whistleblower regulations. As an initial matter, OPR concluded that most of the employee's disclosures did not meet the jurisdictional requirements of making disclosures to officials or components specifically designated to receive protected disclosures. After carefully considering the remaining disclosures, OPR concluded that most of the allegations were not based on a reasonable belief that they evidenced a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, as required by 28 C.F.R. § 27.1(a). Regarding the supervisor's alleged derogatory comments about sexual orientation, parental status, and medical disability, OPR concluded that although the complaints qualified as protected disclosures, the employee's retaliation claim nevertheless failed because her reassignment to a different unit was undertaken by an official other than her immediate supervisor, and the official acted within management's discretion to allocate work and was not motivated by retaliation. Accordingly, the move did not constitute a prohibited personnel action for purposes of the FBI whistleblower regulations.

Section VI: OPR Review of OIG Attorney Investigations

OPR reviews referrals from the OIG following its investigations of Department attorneys to determine whether the subject's conduct may implicate the rules of attorney professional misconduct and whether to seek authorization from the PMRU to refer the subject attorney's conduct to the appropriate state attorney disciplinary authority. In this fiscal year, OPR reviewed the conduct of eight Department attorneys found by the OIG to have violated regulations or Department policies. In four matters, which included allegations concerning lack of candor, failure to cooperate with a Department investigation, sexual harassment, and conflict of interest, OPR recommended that the PMRU authorize bar referrals. In three matters, OPR concluded that the attorneys' conduct did not implicate the rules of professional conduct and did not seek authorization for bar referrals. One matter remained pending at the end of the fiscal year.

Section VII: Training and Outreach Efforts

OPR participates in training and outreach events to improve ethical compliance within the Department, as well as to educate external stakeholders about the Department's commitment to accountability. During Fiscal Year 2021, OPR management worked with the Department's discovery coordinator to film a segment for the mandatory criminal discovery training video focusing on recurring discovery issues investigated by OPR. Topics discussed included issues with cooperation agreements and personal relationships with witnesses, among other subjects. Also, at the request of a USAO, OPR managers provided training to USAO attorneys on OPR procedures and significant professional responsibility issues.

OPR also routinely engages with various state attorney disciplinary authorities. 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. OPR attorneys also attended two conferences held by the National Organization of Bar Counsel, where current trends in attorney discipline were examined and discussed.

Conclusion

During Fiscal Year 2021, 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's managers and staff overcame challenges caused by the COVID-19 pandemic and continued to efficiently process and timely resolve allegations of attorney professional misconduct. OPR's activities in Fiscal Year 2021 have increased awareness of ethical standards and responsibilities throughout the Department 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.