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**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2017**

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

**Fiscal Year 2017 Annual Report**

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## **OPR Annual Report for Fiscal Year 2017**

### **Introduction**

On December 9, 1975, Attorney General Edward H. Levi issued an order establishing the Department of Justice Office of Professional Responsibility (OPR) to ensure that Department of Justice (Department or DOJ) employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 42nd Annual Report to the Attorney General, and it covers Fiscal Year 2017 (October 1, 2016 through September 30, 2017).

### **Jurisdiction and Functions of OPR**

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

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

OPR receives allegations from a wide variety of sources, including federal judges, U.S. Attorneys' Offices, and the Department's litigating components; private individuals and attorneys; criminal defendants and civil litigants; other federal agencies; state and local government agencies; congressional referrals; media reports; and self-referrals from Department attorneys. OPR also conducts weekly searches of legal databases to identify, review, and analyze cases involving judicial criticism and judicial findings of misconduct to determine whether the criticism or findings warrant further inquiry or investigation by OPR. All 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. Department employees are required to report all judicial findings of misconduct to OPR.

Upon receipt, OPR reviews each allegation and determines whether further inquiry or investigation is warranted. If so, OPR may initiate an inquiry, during which it typically gathers

documents and obtains written submissions from subjects and components, or OPR may open an investigation, during which it also interviews subjects and other witnesses. 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. An inquiry or investigation may have more than one Department attorney as subjects.

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

In cases that are not resolved during the inquiry stage, and in all cases in which OPR believes misconduct may have occurred, OPR conducts a full investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). Interviews of subject attorneys are conducted by OPR attorneys and are transcribed by a court reporter. The subject is given an opportunity, subject to a confidentiality agreement, 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. Employees who fail or refuse to cooperate with OPR investigations, after being provided warnings concerning the further use of their statements, may be subject to formal discipline, including removal from federal service.

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

OPR reports the results of its investigations to the Office of the Deputy Attorney General and, when appropriate, to other components in the Department, including the litigating divisions, the Executive Office for U.S. Attorneys (EOUSA), and the pertinent U.S. Attorney. OPR includes in its communications with management officials a discussion of any trends or policy issues that OPR believes require management attention.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (the PMRU), which is responsible for reviewing OPR's findings of professional misconduct against DOJ attorneys. The head of the PMRU reports to the Deputy Attorney General. Initially,

the PMRU had jurisdiction over only Criminal Division attorneys and Assistant U.S. Attorneys. In Fiscal Year 2015, the PMRU's jurisdiction was expanded to include nearly all Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional misconduct, and determines whether those findings are supported by the evidence and the applicable law.<sup>1</sup> The PMRU also determines the appropriate level of discipline to be imposed.

Once a disciplinary action for a DOJ attorney is final, OPR notifies the appropriate state bar disciplinary authorities of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under its jurisdiction) or the Office of the Deputy Attorney General, once the Department's disciplinary process is completed. The Department's bar notification policy includes the reporting of findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. OPR does not make a bar notification when the conduct in question involved exclusively internal Department interests or policies that do not appear to implicate a bar rule. In addition, OPR reviews reports issued by the Office of the Inspector General (OIG) concerning Department attorneys to determine whether the appropriate bar disciplinary authorities should be notified of any misconduct findings.

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.

### **Intake and Initial Evaluation of Complaints and Correspondence**

In Fiscal Year 2017, OPR received 636 complaints, of which 213, or 33%, were from incarcerated individuals. Many of those 636 complaints related to matters that did not fall within OPR's jurisdiction. Others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 43 of the complaints warranted further review by OPR attorneys and opened inquiries on those matters. OPR opened 29 matters as investigations. When information gathered in the course of an inquiry indicates that further investigation is warranted, the matter is converted to an investigation.

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, or had been considered and rejected by a court, or because they were frivolous, vague, or unsupported by the evidence. Those matters were addressed by experienced management analysts working under the supervision of an OPR attorney through correspondence or referral to another Department component or government agency.

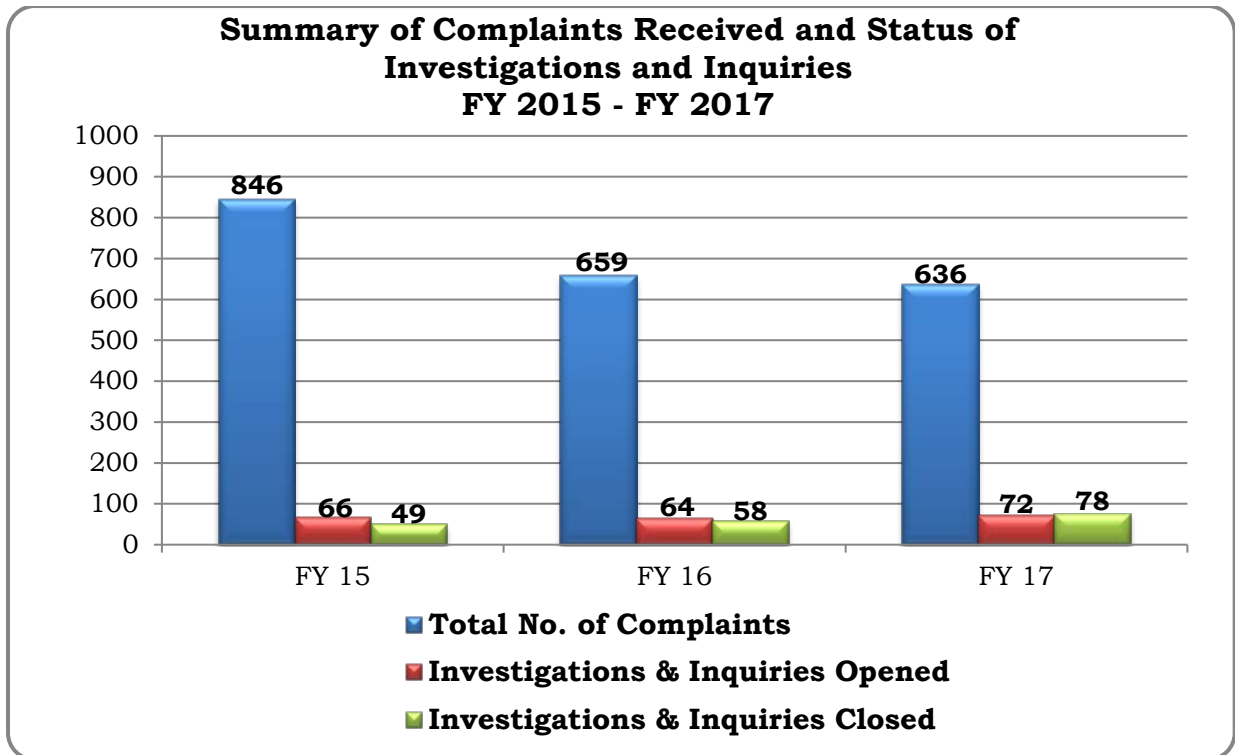
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<sup>1</sup> OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, and the pertinent U.S. Attorney, for appropriate management action.

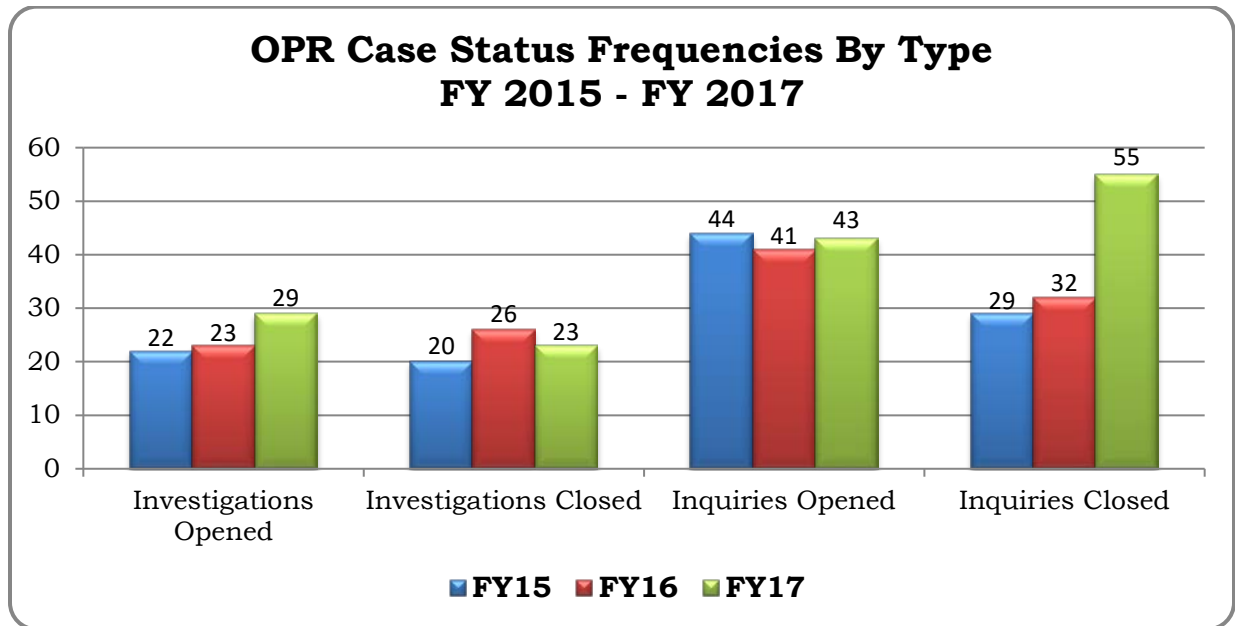
## Summary and Comparison of OPR’s Investigations and Inquiries by Fiscal Year

In Fiscal Year 2017, OPR received 636 complaints, which represents less than a four percent (4%) decrease from Fiscal Year 2016. Graphs 1 and 2 provide comparisons over the last three fiscal years of the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, of the 636 complaints OPR received, 72 were opened as investigations or inquiries. In that same time period, OPR closed 78 investigations and inquiries. As reflected in Graph 2, in Fiscal Year 2017, OPR opened 43 inquiries and closed 55, and opened 29 investigations and closed 23.

Graph 1

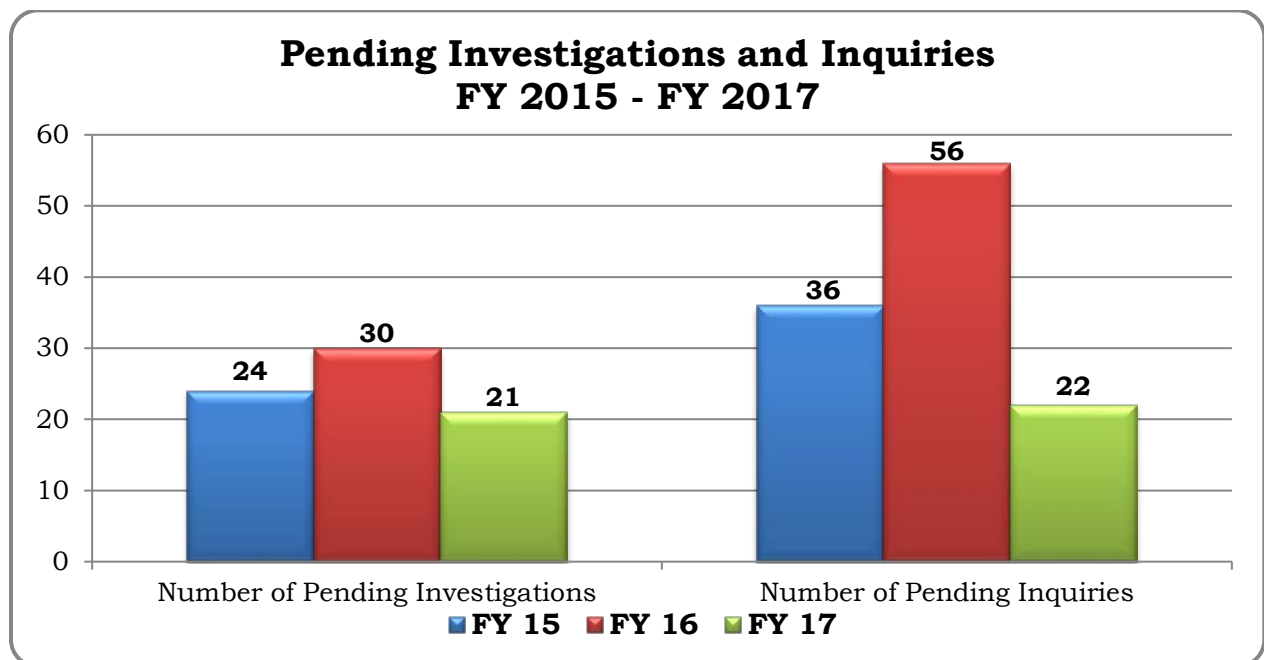


Graph 2



Because of the complexity of the allegations that OPR receives, many investigations and inquiries opened remain under review at the close of the fiscal year. OPR assigns a pending status to those cases and reports the outcome of those matters in the fiscal year in which they are closed. At the end of Fiscal Year 2017, there were 21 pending investigations and 22 pending inquiries. Graph 3 compares the number of inquiries and investigations that were pending at the end of each of the last three fiscal years.

Graph 3



## OPR Inquiries in Fiscal Year 2017

*Inquiries Opened in Fiscal Year 2017:* The sources of the complaints for the 43 matters designated as inquiries opened in Fiscal Year 2017 are set forth in Table 1.<sup>2</sup>

**Table 1**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2017</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>3</sup>	19	44.2%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	18	41.8%
Private attorneys	3	7.0%
Private parties	2	4.7%
Other agencies	1	2.3%
<b>Total</b>	<b>43</b>	<b>100%</b>

The nature of the allegations against Department attorneys contained in the 43 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 43.

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<sup>2</sup> OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department should make a referral to a state bar disciplinary organization. The 43 matters referred to above do not include matters involving proposed bar notifications pertaining to non-DOJ attorneys.

<sup>3</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.



**Table 2**

<b>Types of Misconduct Allegations in Inquiries Opened in FY 2017</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	18	29.5%
Misrepresentation to the court and/or opposing counsel	12	19.7%
Improper remarks to a grand jury, during trial, or in pleadings	7	11.5%
FBI Whistleblower complaints	7	11.5%
Abuse of authority, including abuse of prosecutorial discretion	5	8.1%
Failure to comply with DOJ rules and regulations	3	5.0%
Failure to maintain active bar membership	2	3.3%
Failure to comply with court orders and federal rules	2	3.3%
Failure to keep client informed	2	3.3%
Unauthorized leaks or disclosures	1	1.6%
Failure to competently or diligently represent the client's interests	1	1.6%
Missed deadlines	1	1.6%
<b>Total</b>	<b>61</b>	<b>100%</b>

*Inquiries Closed in Fiscal Year 2017:* OPR closed 55 inquiries in Fiscal Year 2017 involving allegations against Department attorneys.<sup>4</sup> These matters involved 110 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 110 allegations were resolved in Fiscal Year 2017 is set forth in Table 3.<sup>5</sup>

<sup>4</sup> OPR may designate more than one DOJ attorney as the subject of an inquiry. OPR closed an additional 65 inquiries involving proposed bar notifications pertaining to misconduct of non-DOJ attorneys.

<sup>5</sup> When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2017, 29 inquiries were converted to investigations.

**Table 3**

<b>Categories of Inquiry Allegations Resolved in FY 2017</b>		
<b>Types of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Occurrences</b>
No merit to matter based on review of allegation	45	41.0%
Inquiry closed because further investigation not likely to result in finding of misconduct	28	25.5%
FBI Whistleblower complaint	12	11.0%
Performance or management matter. Referred to employing component.	8	7.2%
Issues previously addressed. No further action warranted.	7	6.3%
No merit to allegation based on preliminary inquiry	6	5.4%
Other	4	3.6%
<b>Total</b>	<b>110</b>	<b>100%</b>

**OPR Investigations in Fiscal Year 2017**

*Investigations Opened in Fiscal Year 2017:* Table 4 lists the sources for the 29 investigations that OPR opened in Fiscal Year 2017.

**Table 4**

<b>Sources of Complaints Against Department Attorneys for Investigations Opened in FY 2017</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Department components, including self-referrals (unrelated to judicial findings of misconduct)	15	51.7%
Judicial opinions and referrals, including referrals by Department employees of judicial criticism <sup>6</sup>	7	24.1%
Private attorneys	6	20.7%
Other agencies	1	3.5%
<b>Total</b>	<b>29</b>	<b>100%</b>

Some of the 29 investigations that OPR opened involved multiple subjects. In addition, because many investigations involved multiple misconduct allegations, there were 86 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

<sup>6</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 5**

<b>Types of Misconduct Allegations in Investigations Opened in FY 2017</b>		
<b>Types of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations in Investigations</b>
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	22	25.6%
Misrepresentation to the court and/or opposing counsel	20	23.3%
Abuse of authority, including abuse of prosecutorial discretion	8	9.3%
Improper remarks to a grand jury, during trial, or in pleadings	7	8.1%
Failure to competently or diligently represent the client’s interests	6	7.0%
Failure to keep client informed	5	5.8%
Misconduct allegations involving Immigration Judges	5	5.8%
Interference with defendant’s rights	3	3.5%
Failure to comply with DOJ rules and regulations	2	2.3%
Failure to maintain an active bar membership	2	2.3%
Failure to comply with court orders and federal rules	2	2.3%
Missed deadlines	2	2.3%
Unauthorized leaks or disclosures	1	1.2%
FBI Whistleblower complaints	1	1.2%
<b>Total</b>	<b>86</b>	<b>100%</b>

*Investigations Closed in Fiscal Year 2017:* OPR closed 23 investigations in Fiscal Year 2017. Some of those investigations included multiple attorney subjects, and two included non-attorney subjects (typically, law enforcement officers). Of the 23 closed investigations, OPR found professional misconduct in 12, or 52%, of the matters it closed. Of the 12 matters in which OPR found professional misconduct, 7 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>7</sup> In 9 of the 12 matters in which OPR found professional misconduct, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>8</sup> (OPR may resolve one of several

<sup>7</sup> OPR finds intentional professional misconduct when it concludes that an attorney violated an obligation or standard by: (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and knowing that the consequence is a result that the obligation or standard unambiguously prohibits.

<sup>8</sup> OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes 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

allegations against a subject by concluding, for example, that the subject engaged in intentional misconduct, and resolve another allegation against the same subject by concluding that he acted recklessly.)

In Fiscal Year 2017, OPR made more misconduct findings as compared to Fiscal Year 2016 (52% of closed cases in Fiscal Year 2017 resulted in misconduct findings, as compared to 50% of closed cases in Fiscal Year 2016). The 12 investigations in which OPR made findings of professional misconduct in Fiscal Year 2017 included 41 sustained allegations of misconduct. (Some matters included more than one allegation of misconduct.) Table 6 below depicts the 41 allegations sustained in the 12 investigations closed in Fiscal Year 2017.

**Table 6**

<b>Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2017</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Misrepresentation to the court and/or opposing counsel	9	22.0
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	8	19.5
Failure to keep client informed	5	12.2
Failure to comply with DOJ rules and regulations	4	9.7
Failure to maintain an active bar membership	4	9.7
Unauthorized practice of law	3	7.3
Failure to comply with court orders or federal rules	2	4.9
Improper remarks to a grand jury, during trial, or in pleadings	2	4.9
Interference with defendant's rights	2	4.9
Abuse of authority, including abuse of prosecutorial discretion	2	4.9
<b>Total</b>	<b>41</b>	<b>100%</b>

OPR made misconduct findings against 13 DOJ attorneys in FY 2017. The PMRU issued final decisions with respect to each of the attorneys and sustained OPR's findings of misconduct. Six of the attorneys resigned from the Department before discipline could be imposed by the PMRU. Of the remaining 7 attorneys, 3 received suspensions and 4 received reprimands. The PMRU authorized bar referrals in 11 of the 13 cases. The other two cases did not involve violations of bar disciplinary rules. Where appropriate, OPR has referred these matters to state bar disciplinary authorities.

OPR closed 23 investigations in FY 2017 with findings of professional misconduct in 12 cases. In 4 of those 12 misconduct cases, OPR also found that an attorney had exercised poor judgment. With regard to the 11 remaining closed investigations, OPR did not make findings of professional misconduct. However, in 5 of the 11 investigations it closed without a finding of professional misconduct, OPR found that an attorney exercised poor judgment. Thus, of the 23

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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.

investigations OPR closed in FY 2017, OPR made a finding of professional misconduct and/or poor judgment in 17 cases, or 74% of the investigations it closed. OPR refers its poor judgment findings to the Department attorney's component for consideration in a management context, which may include recommendations for disciplinary action or additional training.

### **Policy and Training Activities in Fiscal Year 2017**

During Fiscal Year 2017, OPR participated in policy development and training for the Department. OPR attorneys participated in numerous educational and training activities within and outside of the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, rules and regulations. During Fiscal Year 2017, OPR attorneys made presentations to new Assistant U.S. Attorneys as part of the Department's orientation and training programs, and participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* and *Giglio* disclosure obligations.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys and managers participated in presentations to international delegations to explain OPR's role in the Department and issues associated with professional ethics.

OPR continued to serve as the Department's liaison to state bar disciplinary authorities on matters affecting the professional responsibility of Department attorneys. As part of this effort, OPR attorneys attended the annual meeting of the National Organization of Bar Counsel, in which current trends in attorney discipline were examined and discussed.

In accordance with Department policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information concerning those matters. OPR also consulted with and advised other Department components regarding referrals to state bar authorities of possible professional misconduct by non-DOJ attorneys. In 65 such matters, OPR reviewed allegations of misconduct against non-DOJ attorneys and advised components whether referrals to state bar disciplinary authorities were warranted. In some cases, OPR notified the applicable bar disciplinary authorities directly of the misconduct allegations.

In addition, OPR continued to exercise jurisdiction over Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agents when allegations of misconduct against the agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the Department's Office of the Inspector General responsibility for reviewing and investigating whistleblower complaints by FBI employees.

## Examples of Inquiries Closed in Fiscal Year 2017

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2017.<sup>9</sup>

*Breach of Plea Agreement.* An appellate court found that a DOJ attorney deliberately breached her promise in a plea agreement to recommend a downward adjustment to the defendant's offense level for acceptance of responsibility (AOR) pursuant to § 3E1.1(a) of the U.S. Sentencing Guidelines. On appeal, the government relied on an exceptions clause of the plea agreement, which excused the government from having to recommend a downward adjustment based on AOR if the defendant was found to have misrepresented facts to the government prior to entering into the plea agreement. The government argued that the clause was triggered because at a suppression hearing held in the case, the trial court found the defendant's testimony not credible. The appellate court disagreed. Observing that when the plea agreement was signed, the suppression hearing had already taken place and the DOJ attorney knew of the district court's finding, the appellate court concluded that the promise to recommend a downward adjustment based on AOR would be impermissibly illusory if the court excused the government from performance based on a misrepresentation the government knew about when it made the promise.

OPR initiated an inquiry. On appeal, the government relied upon an unpublished appellate decision from the same jurisdiction that excused the government's performance of a promise to recommend a downward adjustment based on AOR based on an identical misrepresentations exceptions clause, even though, as in this case, the DOJ attorney knew of the misrepresentation allegedly triggering the clause when the plea agreement was entered into. The unpublished appellate decision reasoned that the misrepresentations exceptions clause was broadly worded and did not depend on what the government knew or did not know when it entered into the plea agreement.

In light of the conflicting interpretations of an identical exceptions clause within the same jurisdiction, OPR closed its inquiry after concluding that further investigation was unlikely to result in a finding that the DOJ attorney engaged in professional misconduct. OPR informed the DOJ attorney's component, however, that it agreed with the published decision holding, which is binding in future cases, that the DOJ attorney breached her obligations under the plea agreement because her broad interpretation of the exceptions clause rendered the promise to recommend a downward adjustment based on AOR impermissibly illusory.

*Breach of Plea Agreement.* A component reported to OPR a court's decision to vacate a defendant's sentence based on a finding that the government breached the defendant's plea agreement by filing a sentencing memorandum that contained inflammatory references to the

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<sup>9</sup> To protect the privacy of the Department attorneys and other individuals involved in the inquiries summarized, as well as in the investigations summarized in the next section of this report, and to comply with the requirements of the Privacy Act, OPR has omitted names and identifying details from these examples. Moreover, in certain cases, information and evidence learned by OPR during the course of its inquiries and investigations is protected from disclosure by orders of the court, privileges, or grand jury secrecy rules. OPR has used female pronouns in the examples regardless of the actual gender of the individual involved. Male pronouns will be employed next year, as OPR alternates the use of gender pronouns each year.

defendant's prior criminal convictions and highlighted the prejudicial details of her prior crimes, thus giving the impression that the government was arguing for a sentence higher than that contained in the plea agreement.

OPR determined that the DOJ attorney in the underlying case created the sentencing memorandum at issue using an approved template containing the inflammatory language that was in common use at the time of the defendant's sentencing. During the pendency of the defendant's appeal, the court identified similar inflammatory language in the template of a sentencing memorandum filed in a completely unrelated case. As a result, the component revised its template to prevent similar adverse rulings in the future. Because the matter concerned a component-wide issue that had already been corrected, OPR concluded that further investigation was unlikely to result in a finding of professional misconduct. Accordingly, OPR closed its inquiry in the matter.

*Failure to Disclose Exculpatory Evidence.* A component reported to OPR judicial criticism that DOJ attorneys failed to disclose that three government witnesses in a drug distribution prosecution had previously assisted law enforcement in unrelated cases in exchange for reduced penalties or avoidance of prosecution for drug possession charges. The court also criticized the government attorneys for failing to disclose that, in the underlying case, law enforcement officials had paid a government witness for her unsuccessful attempt to initiate contact with the defendant at the law enforcement officer's direction. OPR reviewed the matter and agreed with the court that although the information was favorable to the defense, it was not sufficiently material to constitute a *Brady* or *Giglio* violation. OPR concluded that further investigation was unlikely to result in a finding of professional misconduct. Accordingly, OPR closed its inquiry in the matter.

*Grand Jury Abuse; Improper Contact with Represented Parties.* A component reported to OPR allegations that a DOJ attorney may have tampered with a grand jury by addressing the grand jury without a court reporter present to record the proceedings and by allowing a federal agent, who was not a witness, to be present during grand jury proceedings. The component also reported to OPR that the DOJ attorney may have improperly contacted a potential defense witness who was represented by counsel. OPR reviewed grand jury logs and audio recordings of the proceedings and determined that, although not all of the DOJ attorney's interactions with the grand jury were transcribed by the court reporter, they were all appropriately recorded. OPR confirmed that a federal agent was present before the grand jury in order to take notes for the DOJ attorney. While OPR determined that such conduct violated Fed. R. Crim. P. 6(d)(1), which permits only government attorneys, the witness, interpreters, and a court reporter to be present while the grand jury is in session, OPR determined that further inquiry was not required because the violation did not implicate a state bar rule and the DOJ attorney had left the Department and was therefore no longer subject to internal discipline. Finally, OPR determined that further inquiry into the allegation that the DOJ attorney had improperly contacted a represented party was unwarranted because there was insufficient evidence supporting the allegation, and the attorney for the allegedly aggrieved individual did not report the matter to OPR.

*Violation of the Department's Social Media Policy.* A component reported to OPR that during the trial of a high-profile criminal matter, a DOJ attorney posted a news article concerning the trial on his personal page on a social media website along with a comment expressing his hope that the jury would return a guilty verdict. After the component discovered the post, it directed the DOJ attorney to remove it and report the matter to defense counsel, who ultimately decided

not to raise the matter with the court. The DOJ attorney was counseled by the component. OPR closed its inquiry in the matter after determining that further investigation was unlikely to result in a finding that the DOJ attorney violated the Department's social media policy or committed professional misconduct.

*Candor to the Court; Appearance of Impropriety.* OPR initiated an inquiry based on a court's criticism of a DOJ attorney for failing to cite controlling legal precedent in a pleading filed by the government. The court later noted that its criticism was not meant to suggest that the DOJ attorney had been unethical or intended to mislead the court. OPR also learned that the DOJ attorney's manager met with the court and defense counsel in an unsuccessful attempt to have the court retract its criticism and thus avoid a potential referral to OPR. OPR reviewed the matter and closed its inquiry after determining that further investigation was unlikely to lead to a finding of misconduct because it found no evidence that the DOJ attorney sought to mislead the court or that the component sought to conceal misconduct. OPR cautioned the DOJ attorney's manager that in the future, a written motion to reconsider would be a more appropriate means by which to seek the court's review.

*Improper Introduction of Evidence of Prior Bad Acts.* OPR initiated an inquiry based on a court's criticism of a DOJ attorney for improperly asking a cooperating witness, during her trial testimony, about a prior bad act she had committed with the defendant. The government had moved *in limine* to admit some evidence of prior bad acts, but did not specifically mention the act that was the subject of the DOJ attorney's question. OPR reviewed the matter and concluded that the DOJ attorney's conduct did not reflect bad faith, but constituted a mistake made by an attorney in her first federal trial handling a difficult witness. Therefore, OPR closed its inquiry in the matter.

*Improper Disclosure of Fed. R. Crim. P. 6(e) Information.* A component reported to OPR that a defense attorney alleged that a DOJ attorney sought to pressure her client to cooperate with the government's investigation by disclosing to the client's employer that a federal grand jury had issued a subpoena to the client. OPR reviewed the matter and determined that, while the DOJ attorney's disclosure of the subpoena information violated Fed. R. Crim. P. 6(e), the information disclosed was *de minimis* and the DOJ attorney had previously obtained her component's authorization to contact the employer to arrange for the service of the subpoena. OPR concluded that further investigation was unlikely to result in a finding of professional misconduct. Accordingly, OPR closed its inquiry in the matter.

*Failure to Disclose Impeachment Evidence.* As a result of routine research, OPR learned that in 2016, a court of appeals upheld a district court's denial of a defendant's motion for a new trial but found that the government failed to disclose evidence impeaching a cooperating witness who testified for the government. The government failed to disclose that the witness had been arrested and charged in state court with theft, and that the theft had been reported to the police by the defendant's previous business partner and the witness' employer, giving rise to an allegation that the witness' testimony was motivated by bias against the defendant. OPR initiated an inquiry, and requested that the two DOJ attorneys who prosecuted the case prepare written responses to the court's findings. Upon completion of its inquiry, OPR concluded that there was no reasonable possibility that further investigation would result in a finding that either DOJ attorney committed professional misconduct because the defendant was no longer associated with the business that was the victim of the theft when the theft occurred. In addition, OPR learned that the cooperating



witness received no benefit in his pending state case in return for testifying in the district court case. Therefore, OPR closed its inquiry without further investigation.

*Improper Disclosure of Grand Jury Testimony; Failure to Present Exculpatory Evidence to the Grand Jury; Threatening Grand Jury Witnesses; Knowingly Using False Evidence at Trial.* After the defendants were acquitted by a jury, the defense attorneys alleged to OPR that DOJ attorneys: (1) disclosed grand jury testimony to other grand jury witnesses without a court order; (2) withheld material exculpatory evidence from the grand jury; (3) improperly threatened grand jury witnesses; and (4) during trial, knowingly advanced arguments that they knew to be false. OPR initiated an inquiry, and reviewed written responses to the allegations of misconduct from the DOJ attorneys, together with hundreds of documents and grand jury and trial transcripts.

As to the first allegation, when the defense raised this issue with the court before trial, the DOJ attorneys explained that they made limited disclosure of grand jury testimony to other grand jury witnesses without first obtaining a court order, but they referred to other witnesses only by generic titles, and only disclosed a limited amount of information which the witnesses likely knew about already. Moreover, the court had previously found that the DOJ attorneys did not violate Fed. R. Crim. P. 6(e) because they did not make the disclosures to influence the witnesses' testimony, and did not disclose the identities of the witnesses. As to the second allegation, OPR found that none of the alleged exculpatory evidence directly negated the guilt of the subjects or negated the existence of probable cause. As to the third allegation, OPR concluded that the department attorneys did not improperly threaten witnesses by warning them about their potential criminal exposure for testifying falsely. As to the fourth allegation, OPR concluded that the indictment, the government's arguments at trial, and the substantial evidence that the government introduced at trial, were not false or misleading, but rather logically and scientifically supported the government's theory of the case.

Based on its review of all the materials, OPR concluded that none of the allegations was likely to lead to a finding that the DOJ attorneys had committed professional misconduct, and OPR closed its inquiry.

*Failure to Produce Exculpatory Information.* OPR initiated an inquiry into the conduct of a DOJ attorney who allegedly allowed a defendant to be detained for several weeks, even though the attorney possessed evidence that conclusively demonstrated the defendant did not commit the crime for which he was charged. In addition, the attorney allegedly did not produce to the defense all of the exculpatory material she was required to produce pursuant to *Brady*. OPR determined that the defendant was detained because of a court finding that he violated the conditions of his release, and that three days after the DOJ attorney obtained the exculpatory evidence, the defendant pled guilty to a minor charge, and was released by the court. Moreover, defense counsel praised the DOJ attorney for the breadth and timeliness of the discovery she provided. OPR's own review established that the discovery that had allegedly not been provided was, in fact, produced to the defense, and that there was no reasonable possibility that further investigation would result in a finding of professional misconduct.

*Candor to the Court:* In an August 2016 letter to the Supreme Court, the Department of Justice acknowledged that it had provided the court with erroneous data relating to a 2003 ruling by the court that upheld a policy of denying bail to thousands of immigrants detained pending their

appeals of deportation orders. In its letter, the Department said it made “several significant errors” that understated the amount of time that immigrants with criminal records spent in detention without bail. In its 2003 opinion, the Court cited the data to hold that “the very limited time of detention” such immigrants faced while their appeals were pending was inadequate to trigger a constitutional right to a bail hearing. The government’s new estimate of the average detention period was more than three times the estimate that the Supreme Court relied on in its ruling.

OPR’s review determined that the DOJ component responsible for preparing the brief relied on calculations provided by a different DOJ component, whose calculations were inaccurate due to a number of factors. An inadvertently flawed database inquiry resulted in the omission of thousands of cases from the calculations, which decreased the average and median length of removal proceedings. In addition, the component that originally performed the calculations used as an endpoint for the duration of the removal proceedings a change of venue or case transfer rather than the entire duration of an individual immigrant’s removal proceedings, thereby artificially shortening the length of removal proceedings. In addition to Department errors, certain incorrect assumptions the Supreme Court made on its own about the length of proceedings for cases were also not accurate and affected its conclusions about the removal proceedings. Despite the errors, the Department noted in its letter to the Supreme Court that the new calculations did not alter the proposition that, “in the majority of cases,” detention lasted “for less than . . . 90 days.” Given that the conduct leading to the errors occurred more than fourteen years ago and because further investigation was not likely to lead to a finding of professional misconduct, OPR closed its inquiry.

*Breach of Proffer Agreements; Candor to Third Party.* A district court dismissed certain counts of an indictment after finding that the government breached its proffer agreements with two defendants by referring in the indictment to allegedly false statements made by the defendants during their proffer sessions. After the defendants were reindicted and convicted, defense counsel alleged that the DOJ attorneys committed various acts of misconduct, and OPR initiated an inquiry into the alleged breach of the proffer agreements, as well as defense counsel’s allegations that (1) in the course of preparing a trial witness for her testimony, a DOJ attorney misrepresented to the witness that her prior attorney had waived her attorney-client privilege; and (2) in the course of arranging for the grand jury appearances and voluntary interviews of the defendants, the DOJ attorney misrepresented their status as subjects, when they were, in fact, targets of the grand jury investigation.

Based on the results of its inquiry, OPR concluded that the evidence did not support a finding that the DOJ attorney made misrepresentations to the trial witness about the waiver of her attorney-client privilege by her prior attorney. The discussion between the prosecutors and the witness’ attorney was contentious and confused, resulting in a misunderstanding. OPR also concluded that the DOJ attorney’s determination at the time of the proffer sessions that the defendants were subjects, not targets, was within the discretion afforded prosecutors to evaluate and assess the evidence.

Although the district court determined that the government breached the proffer agreements, the court did not conclude that the prosecutors committed misconduct, but that, as the drafter of the agreements, the government had to bear the consequences of any ambiguities in them. OPR concluded that the DOJ attorney’s charging decisions were made in good faith, based on a reasonable interpretation of the proffer agreements, and closed its inquiry.

*Candor to the Court.* A DOJ component reported allegations that a DOJ attorney misrepresented in a pleading filed with the court that a defense attorney's possible criminal conduct had been referred to OPR for a determination as to whether the defense attorney's conduct should be referred to the state bar. However, at the time of the DOJ attorney's representation to the court, the OPR referral had not yet been made, although it eventually was made several weeks later. OPR determined that, based on discussions with her supervisor, the DOJ attorney reasonably believed that the OPR referral would be made prior to the filing of the pleading. OPR concluded that at the time she made the representation, the DOJ attorney reasonably believed it was accurate, and OPR closed its inquiry.

*Unauthorized Disclosure of Confidential Information.* A complaint was received alleging that a senior DOJ attorney leaked privileged and confidential DOJ information in an e-mail to a senior official involved in a political campaign. OPR concluded that the e-mail contained publicly available information, not privileged and confidential information, and closed its inquiry.

*Access to Privileged Information; Candor to Third Party.* A DOJ component advised OPR of professional misconduct allegations made by a defendant during a bankruptcy fraud prosecution. In a series of motions requesting a new trial, the defendant alleged that the government had improperly induced the defendant's bankruptcy attorney to reveal client confidences; misled the bankruptcy attorney about the defendant's defense; and failed to notify the defendant that the bankruptcy attorney had revealed client confidences. As part of the resolution of the case, the defendant withdrew the misconduct allegations, and the court struck them from the record.

Although it was unclear whether the defendant's bankruptcy attorney actually revealed client confidences during a pretrial interview, because the case agent advised the bankruptcy attorney prior to the interview that the government was not seeking privileged information, OPR concluded that a prosecutor may rely on an attorney's understanding of, and presumed compliance with, her ethical obligations. With respect to a second interview of the bankruptcy attorney, OPR concluded that the DOJ attorneys reasonably relied on an apparent waiver of the attorney-client privilege by the defendant's criminal defense attorneys. OPR also determined that the DOJ attorneys did not violate their ethical obligation to notify defense counsel of inadvertently produced privileged information because they reasonably believed the information they received during the interview was not privileged. OPR concluded that further investigation would not resolve the differences between the bankruptcy attorney's and the case agent's testimony about the specific words used by the government to describe the defendant's likely defense, and OPR closed its inquiry.

*Improper Legal Argument.* A DOJ attorney reported that in a Federal Tort Claims Act (FTCA) matter, the district court awarded the plaintiffs substantial attorney's fees on the ground that the government engaged in bad faith when it continued to argue that the plaintiffs' claims were barred by the intentional tort exception under the FTCA. OPR closed its inquiry after concluding that although the district court did not agree with the government's argument, it was both legally and factually supported, and the DOJ attorneys properly exercised their discretion to make strategic decisions, develop defenses, and advance arguments during the course of the litigation.

*Abuse of Authority.* A court issued an order suggesting that a DOJ attorney and her employing component intentionally directed the course of the litigation to favor one party, by creating a *de facto* stay pending appeal, without a court order. While the government was not a party to the litigation, the DOJ component served a programmatic oversight role and a litigant took action as a consequence of advice received from the DOJ attorney. OPR initiated an inquiry into the DOJ attorney's conduct.

OPR found no evidence that the DOJ attorney made any decision related to this case with the intent of favoring either party, or caused any litigant to take action as a result of threats, intimidation, or an improper motive on the DOJ attorney's part. OPR found that the DOJ attorney's advice was based on the DOJ attorney's years of experience and was consistent with the usual steps regularly taken with respect to similar matters. OPR concluded that the DOJ attorney, who consulted frequently with her supervisors, acted out of an abundance of caution with respect to programmatic concerns and not with any intent to favor either litigant in the case. Accordingly, OPR closed its inquiry because further investigation would be unlikely to result in a finding of professional misconduct.

*Failure to Maintain Active Bar Membership.* A DOJ attorney self-reported that although she had continuously maintained "member in good standing" status with her state bar, she had recently learned that she was not eligible to practice law in her home state, but was eligible to practice in the state where she works as a DOJ attorney. The home state bar provides an exemption from continuing legal education (CLE) requirements for nonresident attorneys who do not provide legal services or advice on matters governed by state law.

OPR conducted an inquiry and determined that in September 2012, Office of Attorney Recruitment and Management issued a memorandum providing that if a DOJ attorney is a member of a state bar that exempts from CLE requirements active members who do not practice in the state, the DOJ attorney satisfies the Department's active bar membership requirement if they utilize this exemption so long as their employing component does not otherwise require them to meet the state bar's CLE requirements. OPR found that the DOJ attorney's employing component does not prohibit Department attorneys from utilizing this CLE exemption. Accordingly, OPR closed this matter because further investigation was unlikely to result in a finding of professional misconduct.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee disclosed to the Director of the FBI concerns about her component's high rate of management turnover; lack of communication by component leadership; a hostile work environment; her supervisor's alleged lack of interest in certain FBI crime-prevention programs; and the sharing of FBI resources with other law enforcement agencies. The FBI employee alleged that she suffered reprisal for her disclosures when, subsequent to the disclosures, she received a mid-year Performance Summary Assessment (PSA) that was lower than prior performance assessments she had received.

OPR opened an inquiry into the employee's claim of whistleblower retaliation. The FBI whistleblower regulations prohibit Department employees from taking adverse personnel actions against an FBI employee who has made protected disclosures. OPR determined that a mid-year PSA is only an interim evaluation and does not qualify as an adverse personnel action within the meaning of the FBI whistleblower regulations. OPR also concluded that the FBI employee's

disagreements with her supervisor's management decisions were not protected disclosures because a difference of opinion between an employee and her supervisor about the proper approach to a particular problem does not, by itself, constitute a disclosure of gross mismanagement. OPR therefore concluded that the FBI employee's statements did not qualify as protected disclosures within the meaning of the applicable regulations. Accordingly, OPR did not have jurisdiction to investigate the allegations under the FBI whistleblower regulations.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee alleged that as a consequence of her past responses to an FBI employee survey, her supervisor threatened her with physical harm if she responded to the new employee survey in the same manner as she had in the past.

OPR opened an inquiry into the matter and determined that a response to an FBI employee survey was not a disclosure to one of the entities designated by the FBI whistleblower regulations to receive protected disclosures. In addition, OPR noted that the exchange of harsh words between two employees does not qualify as an adverse personnel action to support a claim of whistleblower retaliation. Accordingly, OPR terminated its inquiry for lack of jurisdiction under the FBI whistleblower regulations. The alleged threat is being investigated by the FBI.

*Failure to Correct False Testimony.* A DOJ attorney reported to OPR judicial criticism of the government's failure to correct the inaccurate testimony of investigating agents who testified before the grand jury that the defendant's seized bank accounts contained assets traceable to her illegal conduct. The court did not find that any DOJ attorney knowingly elicited false testimony, or that the agents knew that their testimony was incorrect. Rather, based on an e-mail drafted by a contract auditor to another non-attorney member of the investigation team stating that two accounts did not appear to contain funds traceable to the defendant's criminal acts, the court held that the government was aware that the bank accounts did not contain traceable property. The e-mail was one of hundreds of pages of e-mails the government produced to the defense.

OPR conducted an inquiry and learned that the assets for which the government sought forfeiture included funds which were "substitute assets," *i.e.*, assets belonging to a defendant equal in value to unlawfully obtained assets but that are unrelated to the criminal conduct. Agents incorrectly testified before the grand jury that the seized assets were all traceable to the illegal conduct, and neither agent characterized any of the seized funds as substitute assets. OPR found that the DOJ attorney who presented the grand jury testimony was not the DOJ attorney who had primary responsibility for the investigation and was unaware that the agent's testimony was inaccurate. Shortly after the first indictment was returned, the case was reassigned to a different DOJ attorney, the government adopted a different litigation strategy, and a new indictment was sought and obtained from the grand jury. Because the newly-assigned DOJ attorney had no reason to doubt the accuracy of the prior grand jury testimony, she relied upon it in preparing an agent, also newly assigned to the case, to testify before the grand jury. The newly-assigned agent also failed to identify the seized funds as substitute assets. Shortly before the trial, the newly-assigned DOJ attorney discovered that the seized funds were not directly traceable to the defendant's illegal activity. The DOJ attorney, however, did not remember that the agent had testified to the contrary before the grand jury, as the agent's testimony had been lengthy and the agent had answered only one question pertaining to the traceability of the funds. In light of the complexities of the forfeiture issues presented by this case, and the lack of evidence that the AUSAs knew or should have known

that the agents' grand jury testimony was inaccurate, OPR concluded that further investigation was unlikely to lead to a finding that any DOJ attorney engaged in misconduct by presenting, or failing to correct, false testimony before the grand jury.

*Failure to Maintain Active Bar Membership.* A DOJ attorney self-reported to OPR that a DOJ component questioned whether she had maintained an active membership in at least one state bar. OPR opened an inquiry and obtained the DOJ attorney's membership records from the relevant state bars. OPR found that although the DOJ attorney was a member of at least one state bar, she had been registered in the wrong membership class in that state bar for approximately 14 months. The DOJ attorney acknowledged that she was in the wrong membership class, explaining that it was a mistake. OPR noted that the DOJ attorney's lack of diligence regarding her bar membership class created uncertainty over whether she was authorized to practice law while in the wrong membership class. However, state bar officials told OPR that notwithstanding her improper membership class, the DOJ attorney had an active membership in the bar and was authorized to practice law at all times. Accordingly, OPR concluded that further investigation was unlikely to result in a finding of professional misconduct, and closed its inquiry.

*Misrepresentation to the Court.* A DOJ component notified OPR that a DOJ attorney made misrepresentations of fact to both trial and appellate courts. In defending the dismissal of the plaintiff's breach of contract case on appeal, the DOJ attorney did not dispute opposing counsel's factual representation to the appellate court during oral argument that the plaintiff had not attempted alternative dispute resolution with the defendant government agency before filing suit. Relatedly, the DOJ attorney argued to both the trial and appellate courts that the case should be dismissed because all disputes arising under the contract had to be submitted to alternative dispute resolution pursuant to the terms of the contract. However, after the appellate oral argument, the DOJ attorney and opposing counsel both discovered that the plaintiff had actually attempted alternative dispute resolution with the agency before filing suit. The DOJ attorney and opposing counsel signed a joint letter correcting their factual misrepresentations, and the DOJ attorney filed the letter with both the trial and appellate courts. The appellate court relied on the joint letter when it issued its opinion in the case.

OPR opened an inquiry into the matter. The DOJ attorney acknowledged that when she was assigned to the case, she must have read, but later forgot about, a letter from the plaintiff contained in the agency's file in which the plaintiff sought alternative dispute resolution with the agency. That fact was not relevant to the legal arguments that the DOJ attorney made before the trial and appellate courts, and an attorney representative from the agency who reviewed the DOJ attorney's arguments never brought to the DOJ attorney's attention the plaintiff's attempt at alternative dispute resolution. The factual issue of whether the plaintiff had attempted alternative dispute resolution arose for the first time during the appellate oral argument, and both the DOJ attorney and opposing counsel were mistaken as to whether it had occurred. Once the DOJ attorney became aware of her factual misrepresentation, she immediately involved her supervisors, comprehensively investigated the matter, and contacted the tribunals to correct her misrepresentation. Accordingly, OPR closed its inquiry into this matter because further investigation was unlikely to result in a finding of professional misconduct.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee alleged that her supervisors retaliated against her in a variety of ways because she contacted the FBI Director on

three separate occasions to disclose that her supervisors allegedly engaged in discriminatory behavior against her. OPR opened an inquiry pursuant to the FBI whistleblower regulations and found that almost all of the FBI employee's disclosures were allegations of race and national origin discrimination or retaliation based on earlier equal employment opportunity (EEO) complaints. Therefore, none of those allegations were protected disclosures under the Department's whistleblower regulations because allegations of race and national origin discrimination, and retaliation for raising such claims, must be addressed through the EEO process. OPR also found that the FBI employee made a single isolated protected disclosure within the meaning of the Department's whistleblower regulations. However, OPR further found that there were no reasonable grounds to believe that this disclosure was a factor that contributed to her supervisors taking the disciplinary action at issue, the placement of the FBI employee onto a performance improvement plan (PIP), because the factual basis of the PIP was well-established before the FBI employee made the protected disclosure. Accordingly, OPR closed its inquiry.

*Whistleblower - Retaliation for Protected Disclosure.* The Department's Office of the Inspector General forwarded to OPR a complaint from an FBI employee regarding alleged workplace harassment for review as a possible claim of whistleblower retaliation. The FBI employee alleged that shortly after joining an FBI component, multiple co-workers began harassing her based on her sex and race, and subjected her to a hostile work environment. Upon reviewing the complaint for allegations that the FBI employee had made protected disclosures, OPR found that nearly all of the disclosures were allegations of race and national origin discrimination or retaliation based on an earlier EEO complaint. OPR concluded that none of those allegations were protected disclosures under the Department's FBI whistleblower regulations because allegations of race and national origin discrimination, and retaliation for raising such claims, must be addressed through the EEO process. OPR further found that although the remainder of her allegations were not based on her sex, race, or prior EEO complaint, none of those allegations constituted a protected disclosure under the Department's whistleblower regulations because none of the allegations 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. Accordingly, OPR closed this matter for lack of jurisdiction under the FBI whistleblower regulations.

*Failure to Comply with Federal Law.* The Department's Office of the Inspector General forwarded to OPR a complaint from members of Congress regarding the Department's compliance with Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 (Section 538), and the Anti-Deficiency Act, 31 U.S.C. § 1341, *et seq.* The complaint asserted that the Department had violated those provisions by prosecuting individuals and businesses for involvement with medical marijuana in states where their conduct was legal under state law. OPR opened an inquiry and analyzed whether the Department attorneys responsible for interpreting and applying Section 538 committed professional misconduct in the performance of their official duties. OPR found that the Department's interpretation and application of Section 538 was reasonable, and therefore OPR concluded that the Department attorneys did not commit professional misconduct or otherwise act inappropriately in advancing the Department's interpretation of Section 538 while litigating cases on behalf of the United States. Accordingly, OPR closed its inquiry.

*Misrepresentation – Failure to Correct False Testimony; Improper Closing Argument.* A DOJ component reported to OPR that an appellate court issued an opinion criticizing the government for failing to correct false or misleading testimony of a law enforcement agent who testified as a defense witness. The defendant had claimed that the government violated *Napue* by failing to correct the record and alert the jury that testimony given by the agent during a *voir dire* conducted outside of the jury's presence conflicted with the agent's testimony in open court. In its opinion, the appellate court concluded that the government knew or should have known during trial that the agent's testimony was suspect, even if not patently false. Nevertheless, the court concluded that the agent's testimony had not been material, and upheld the conviction. OPR opened an inquiry.

OPR concluded that the DOJ attorneys who prosecuted the case had an overly restrictive view of the reach of *Napue*. Both in the trial court and on appeal, the DOJ attorneys argued that the agent's testimony was not demonstrably false, and therefore the government was not required to correct it. However, the *Napue* principle applies to testimony that is misleading, even if not false. The agent's testimony had left the jury with a misimpression that he explicitly recalled having conducted an identification procedure with a civilian witness, when in fact the agent did not have a specific memory of the event but believed he had done so because he had shown the same photo array to other witnesses. Nevertheless, case law supported the government's argument that it was not required to correct the record in the unique circumstances presented by this case. In particular, the witness was called by the defense, defense counsel was aware of the facts that called into question the accuracy of the agent's testimony, and defense counsel therefore could have taken action to correct the testimony before the jury, but failed to do so. Moreover, the district court denied a mid-trial motion to dismiss the case on *Napue* grounds, thus signaling that the government was not obligated to correct the record.

Given the unique factual circumstances of the case, OPR concluded that it was unlikely that further investigation would result in a finding of professional misconduct. Similarly, further investigation of the allegations of misconduct during closing argument was unlikely to result in a finding of professional misconduct. Although the court suggested that aspects of the closing argument could in some circumstances be viewed as improper, the court did not explicitly find error. Moreover, OPR's independent review of the closing argument supported the conclusion that none of the challenged remarks evidenced an intentional or reckless disregard of an applicable standard of conduct. Accordingly, OPR closed its inquiry.

*Misrepresentation/Misleading the Court.* OPR received an anonymous letter from a DOJ employee alleging that two DOJ attorneys had engaged in misconduct in connection with a settlement conference with the court in a civil case. The complaint alleged that during a settlement conference in the judge's chambers attended by both a senior and junior DOJ attorney, the senior DOJ attorney misrepresented the extent of the government's settlement authority to the court. The complaint alleged that when the judge asked to speak with the senior DOJ attorney's supervisor about the settlement authority, the senior DOJ attorney called her supervisor and told her to also misrepresent the government's settlement authority to the court, which the supervisor did. The anonymous complainant claimed to have learned of these events by overhearing the junior DOJ attorney complaining about the settlement conference. OPR opened an inquiry.



In separate written responses, both the senior DOJ attorney and her supervisor denied communicating with each other about misrepresenting the government's settlement authority to the court. In an interview with OPR, the junior DOJ attorney stated that she did not recall the judge asking about the extent of the government's settlement authority, and did not recall the senior DOJ attorney or her supervisor misrepresenting the government's authority to the court. The junior DOJ attorney told OPR that she believed the senior DOJ attorney and her supervisor accurately represented the government's position during the settlement conference and did nothing improper with regard to the settlement negotiations. Based on the similar, consistent accounts by the three DOJ attorneys involved, and the sparse detail provided in the anonymous complaint, OPR concluded that further investigation was unlikely to lead to a finding of misconduct and closed the matter.

*Whistleblower – Retaliation for Protected Disclosure.* An FBI employee complained about subpoenas for medical records, which two DOJ attorneys caused to be served in connection with a civil suit against the federal government that the FBI employee had filed. The FBI employee alleged that the subpoenas were issued in retaliation for the Equal Employment Opportunity (EEO) complaint she had filed against FBI management years earlier and sought relief under the FBI whistleblower regulations. OPR opened an inquiry pursuant to the FBI whistleblower regulations, but concluded that the FBI employee's allegations of retaliation for filing an EEO claim had to be redressed through the EEO process and not through the FBI whistleblower regulations. In addition, to the extent that the FBI employee complained about the DOJ attorneys' use of subpoenas to obtain records, OPR noted that DOJ attorneys are vested with broad discretionary authority to determine whether and how to defend against litigation involving the United States and the FBI employee had presented no specific information indicating that the discretion was corruptly, or otherwise inappropriately, exercised.

*Whistleblower – Retaliation for Protected Disclosure.* An FBI employee alleged that she suffered retaliation for making protected disclosures. The FBI employee alleged that she made the following protected disclosures: (1) during an after action meeting attended by the head of the FBI field office, the FBI employee expressed concerns about the lawfulness of an individual's arrest and the FBI's search of the telephones of individuals taken into custody; (2) during a meeting with the head of the FBI field office, the FBI employee expressed concerns that her transfer to a different squad violated the FBI component's policy, as well as concerns that a DOJ component failed to review evidence and declined to prosecute a case without appropriately documenting the reasons for declination, in violation of DOJ policy; and (3) in a complaint to the FBI Inspection Division, the FBI employee alleged possible violations of law, an FBI employee's alleged breach of confidentiality and false statements in an ongoing FBI OPR investigation, and an FBI employee's abuse of authority by making allegedly slanderous comments about the complaining FBI employee. The FBI employee alleged that, in retaliation for these protected disclosures, she was transferred to another squad and was removed from a supervisory role. The FBI employee's allegations were referred for alternative dispute resolution under the FBI's whistleblower mediation program. As a result of the mediation, a resolution was reached and OPR closed its inquiry.

*Brady/Giglio/Rule 16 Violation.* A DOJ component notified OPR of a district court's decision denying the defendant's motion for a new trial, but criticizing the government's failure to disclose prior to the defendant's trial impeachment information concerning a witness. At the trial,

the defendant was convicted of fraud, money laundering, and conspiracy to commit money laundering. The government's evidence at trial included testimony from a witness who was a subject in an unrelated criminal investigation conducted by a different DOJ attorney. At the time the witness testified at the defendant's trial, neither the witness nor any member of the prosecution team was aware of the unrelated investigation. After the defendant's trial, the witness pled guilty to charges arising from the unrelated investigation.

When the government notified the defendant's attorney that the investigation involving the witness was pending at the time the witness testified at the defendant's trial, the attorney filed a motion for a new trial alleging that the government violated its *Giglio* obligations in failing to disclose the information prior to the witness' testimony at the defendant's trial. The court denied the motion on the grounds that: (1) there was overwhelming evidence of the defendant's guilt; (2) the witness' testimony was not material to the outcome of the defendant's trial; and (3) the relevant portions of the witness' testimony were corroborated by other evidence. The court, however, criticized the government for belatedly disclosing the information concerning the witness.

OPR initiated an inquiry. OPR determined that the government did not have a clear, unambiguous obligation to inform the defendant's attorney of the unrelated investigation at the time the witness testified at the defendant's trial, because the allegations concerning the witness were unsubstantiated at the time. In addition, OPR determined that the belated disclosure of the information concerning the witness did not violate the defendant's due process rights, because the information was not material to the defendant's convictions. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

*Brady/Giglio/Rule 16 Violation.* A DOJ attorney notified OPR of a district court's order dismissing an indictment with prejudice on the ground that the government's belated disclosure of police reports constituted a *Brady* violation and unreasonably delayed the defendant's trial. The defendant, who was charged with fraud, moved four times to continue her trial, without opposition from the government. The defense did not allege in any of its motions for continuances that the government had failed to comply with its disclosure obligations, and the court granted each of the defendant's motions without attributing any delay caused by the continuances to the government. After granting the defendant's fourth motion for a continuance, the court imposed a deadline for all pretrial discovery and motions.

Four days before the trial, the DOJ attorney learned for the first time that the defendant made statements to local police officers who were not involved in the prosecution of the defendant's case, alleging that she had been defrauded by an unindicted co-conspirator. The DOJ attorney also learned at that time that certain victims of the defendant's alleged fraud had made statements to the local police about the defendant's alleged fraudulent conduct. The victims' statements to the local police were substantially the same as their statements to federal law enforcement agents. Although the DOJ attorney had previously disclosed the victims' statements to the federal agents, she had not disclosed the victims' statements to the local police officers. The DOJ attorney obtained copies of all the statements in the possession of the local police department and disclosed them to the defense. Thereafter, the defendant moved to dismiss the case alleging that the government had violated *Brady* and the court's discovery deadline order. The court granted the motion and dismissed the case with prejudice because of the government's belated disclosures.

OPR initiated an inquiry. OPR determined that no *Brady* violation occurred because: (1) the defendant was aware of her own statements to the police and had access to them; (2) the defense had not been prejudiced by the belated disclosure of the defendant's statements because she knew about them and, therefore, was not surprised; (3) the defendant's allegation that she had been defrauded by the unindicted co-conspirator was not exculpatory of the crimes charged in the indictment against her; and (4) the victims' statements to the police were cumulative of their statements to the federal law enforcement agents. In addition, OPR determined that the reports had been disclosed to the defense in time for their effective use at the trial, and that the reports had been disclosed belatedly due to inadvertence. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

*Abuse of Authority or Misuse of Official Position.* Members of a congressional subcommittee expressed concern to OPR that a DOJ attorney may have inappropriately threatened the claimant in a civil asset forfeiture action after facts of the claimant's case were discussed publicly during a subcommittee hearing. Following an inquiry, OPR concluded that the DOJ attorney's e-mailed comments to an attorney for the claimant did not constitute an inappropriate threat. The e-mail expressed the DOJ attorney's strong displeasure that someone apparently acting on behalf of the claimant had disclosed a sealed seizure warrant and affidavit without court authorization. However, the DOJ attorney's language was not inflammatory; she did not suggest that she intended to take any punitive action in retaliation for the disclosure; and the e-mail did not otherwise suggest that the DOJ attorney harbored a bias or animus against the claimant because of the disclosure and resulting publicity. To the contrary, after the DOJ attorney stated her concern, she immediately returned to a discussion of the government's settlement proposal. In addition, the DOJ attorney subsequently participated in the resolution of the case on terms favorable to the claimant. Nevertheless, the DOJ attorney indicated to OPR that she recognized that the subcommittee members had raised legitimate concerns about her comments; she expressed regret; and she told OPR that she intends to avoid making similar comments in the future. Accordingly, OPR determined that further investigation was not warranted and closed the matter.

*Discovery – Brady/Exculpatory Information; Impeachment/Jencks.* A DOJ attorney self-reported that while she was preparing for an appeal in a drug and gun possession case, she discovered that she had failed to disclose certain potentially exculpatory or impeachment information before the district court's denial of the defendant's suppression motion and the defendant's subsequent conditional guilty plea. The DOJ attorney reported that before the suppression hearing, she did not disclose that a confidential informant (CI) might have received a benefit for the information the CI provided to support the search warrant, which led to the discovery of heroin and a handgun in the defendant's residence. The DOJ attorney also reported that she did not disclose certain potentially exculpatory or impeaching statements made by the defendant's girlfriend and cousin during plea negotiations. After reporting these disclosure errors to OPR, the DOJ attorney promptly disclosed the information about the CI and two witnesses to the defense and the information about the CI to the appellate court. The appellate court thereafter upheld the defendant's conviction. The court concluded that *Brady's* application to pretrial suppression hearings was an unsettled question but that favorable evidence was not withheld in any event; the defense was not prejudiced; and the purported benefit to the CI was of no consequence because the warrant-issuing judge likely assumed the CI received some benefit even if the judge did not know the details.

Based on the results of its inquiry, OPR determined, consistent with the appellate court's conclusion, that *Brady* and *Giglio* did not clearly and unambiguously require disclosure of the information about the CI before the suppression hearing. OPR also concluded, in light of Supreme Court precedent, that disclosure of the witness' statements was not clearly and unambiguously required during plea negotiations. Although OPR did not make a professional misconduct finding, it did conclude that the DOJ attorney should have exercised greater care and attention to detail in her handling of discovery, which would have resulted in a more complete record and likely avoided otherwise unnecessary controversy and litigation. Because the matter did not warrant further investigation, however, OPR closed its inquiry.

*Misrepresentations to Opposing Counsel.* Following a routine review of public news sources, OPR learned that the claimant in a civil forfeiture action sought dismissal on the ground that a DOJ attorney knowingly produced a fabricated document in discovery. The court did not rule on the professional misconduct allegations, instead resolving the case on other grounds. Following an inquiry, OPR concluded that there was no merit to the allegation that the DOJ attorney assisted in the falsification of evidence or that she otherwise concealed or obstructed the claimant's access to evidence during discovery in the case. In fact, the evidence showed that the claimant obtained all the material facts during the normal course of discovery, including information about the true origin and authenticity of the document in question. Moreover, the evidence did not support the claimant's allegation that the DOJ attorney knowingly made misrepresentations or that she knowingly failed to disclose information in an effort to mislead the claimant about the document. Thus, OPR determined that further investigation was not warranted and closed the matter.

*Misrepresentation/Misleading the Court.* A DOJ attorney self-reported judicial criticism that she had made a false statement of material fact in her response to the defendant's motion to suppress evidence, and failed to correct the false statement even after the defense identified the misstatement in a subsequent pleading. During the suppression hearing before a magistrate judge challenging the basis for a warrantless search, the DOJ attorney presented the testimony of a police officer who testified that the police entered the home based on a 9-1-1 dispatch call that two men had entered a house with guns. However, the DOJ attorney did not elicit further identifying testimony from the officer that would have shown that the caller was a female and that two gunmen were inside her home. In the government's response to the motion to suppress, the DOJ attorney errantly summarized the suppression hearing testimony by stating that the police officer had testified that the complainant was a woman and the house was "her" house. In reply, defense counsel did not point out the inconsistency between that representation and the testimony actually presented in the hearing, nor did the magistrate judge rely on the complainant's gender or the caller's relationship to the property in recommending to the trial court that suppression of the evidence be denied. In responding to the defense objection to the magistrate judge's recommendation, the DOJ attorney again misstated the officer's suppression hearing testimony. In reply, the defense for the first time complained that in misstating the police officer's testimony, the government was effectively rewriting it. The DOJ attorney did not respond to the defendant's reply motion or seek to correct the misstatements. In an initial unpublished order suppressing the evidence, the district court criticized the DOJ attorney for inaccurately summarizing the police officer's suppression hearing testimony, but later *sua sponte* withdrew that order and filed a replacement opinion omitting the language critical of the attorney.

OPR opened an inquiry into the matter. The DOJ attorney told OPR that she had mistakenly believed the defense counsel was wrong about the record, and had erroneously relied on her recollection of the 9-1-1 recording and the suppression hearing transcript rather than checking the transcript. Although OPR concluded that further investigation of the DOJ attorney was unlikely to result in a finding of professional misconduct, it found that she was extraordinarily careless in litigating the suppression motion, first by failing to fully elicit accurate testimony from the police officer, and then by failing to correctly cite the hearing transcript in her responsive pleadings and instead relying on her inaccurate memory of the record. OPR concluded that such careless inattention to the performance of her duties failed to meet even the minimum standard of diligence and competence of a DOJ attorney with her experience. OPR closed the inquiry, and referred the matter to the DOJ attorney's component for appropriate handling as an administrative, personnel, or management matter.

*Selective Prosecution.* OPR received letters from elected officials and civic leaders expressing concern that members of a specified profession who shared a common ethnic origin had been improperly singled out for prosecution. The concerns were based, in part, on the fact that in three separate highly publicized federal prosecutions, after the individuals were charged and arrested, the cases were ultimately dismissed by the government. OPR opened an inquiry and, after a careful assessment of each of the three cases, concluded that each case was based upon a sufficient factual basis, brought in conformance with DOJ prosecution policies, and appropriately reviewed and approved. OPR further concluded that the subsequent dismissals were appropriate in light of post-charge developments, following appropriate Department review and approval. OPR also found no evidence that the prosecutions were motivated by race, ethnicity, or national origin, or that the prosecutions reflected a practice of improperly targeting a class of persons. OPR informed the complainants of its conclusions and closed the inquiry.

*Selective Prosecution.* A member of Congress expressed concern that certain individuals belonging to a particular race had been targeted for selective or vindictive prosecution by a DOJ component because the individuals had supported a candidate for local elective office who was of the same race. OPR opened an inquiry, and examined the bases for the two prosecutions at issue, which involved fraud, embezzlement, and tax violations. OPR found that both cases, which had been pending at the time the member of Congress brought the concern to DOJ's attention, were tried before racially diverse juries that returned unanimous guilty verdicts. OPR found no basis to conclude that DOJ attorneys, or law enforcement officials acting at their direction, had engaged in professional misconduct, including selective or vindictive prosecution. OPR informed the member of Congress of its conclusions and closed the inquiry.

### **Examples of Investigations Closed in Fiscal Year 2017**

The following are examples of investigations OPR closed during Fiscal Year 2017.

*Improper Closing or Rebuttal Argument.* A DOJ attorney reported to OPR judicial criticism of her closing argument, during which she vouched for the credibility of government witnesses and bolstered the government's case by arguing the appropriateness of the government's prosecution. OPR conducted an investigation and concluded that the attorney acted in reckless disregard of her obligations not to state a personal opinion as to the credibility of a witness or the justness of a case by impermissibly arguing that the government's witnesses had testified

truthfully, the defendant's witnesses had an incentive to lie, and that the government had no motive to prosecute an innocent man. OPR referred its findings to the PMRU, which upheld OPR's findings and issued a formal reprimand. At the direction of the PMRU, OPR notified the state bar of its findings.

*Failure to Disclose Exculpatory Evidence; Candor to the Court.* A component notified OPR that a court criticized a DOJ attorney for failing to produce to the defense a document containing government promises made to a cooperating witness and failing to correct that witness' trial testimony that the government had made her no promises in exchange for her testimony. OPR conducted an investigation and concluded that the attorney acted in reckless disregard of her obligations under *Brady, Giglio, Napue*, and applicable state bar rules. OPR referred its findings to the PMRU, which concluded that the DOJ attorney exercised poor judgment in failing to disclose the document in question and acted with reckless disregard of her duty of candor to the court by failing to correct the witness' misleading trial testimony. Because the DOJ attorney had resigned from the Department before the PMRU completed its review, no discipline could be imposed. At the direction of the PMRU, OPR notified the former DOJ attorney's state bar of OPR's finding.

*Failure to Correct False Testimony.* The Executive Office for United States Attorneys (EOUSA) notified OPR of a court's order dismissing an indictment. OPR opened an inquiry, which it later converted to an investigation. Based on the results of its investigation, OPR found that one of the subject DOJ attorneys elicited erroneous testimony from a government witness, and that she and her co-counsel, the other subject DOJ attorney, failed to correct the witness' testimony. OPR concluded, however, that the evidence did not support a finding that either DOJ attorney intentionally or recklessly violated applicable rules of professional conduct, or their general duty not to elicit false testimony. OPR also concluded that the evidence did not support a finding that either DOJ attorney intentionally or recklessly failed to correct the witness' testimony. Further, OPR concluded that the DOJ attorneys did not exercise poor judgment. Instead, OPR found that one DOJ attorney made a mistake in the midst of trial when the witness surprised her with an erroneous answer that she did not expect, and that in the resulting confusion, she failed to correct the witness' testimony. OPR found that the DOJ attorney's unsuccessful attempts to correct the testimony resulted from her lack of training and experience. In addition, OPR took into consideration the fact that the trial court did not believe that the DOJ attorney had intentionally elicited false testimony.

OPR further concluded that the DOJ attorney's inadequate pretrial preparation, including her trial preparation interviews of the witness; her demonstrably deficient direct examination of the witness; and her subsequent unsuccessful attempts to correct the witness' testimony, were below the standards that the Department reasonably expects of an attorney representing the United States. OPR referred these performance issues to the component for appropriate action.

*Failure to Disclose Exculpatory Evidence; Failure to Disclose Impeachment Evidence; Failure to Comply with Discovery Rules; Lack of Candor to the Court; Misrepresentations to the Court; Failure to Comply with United States Attorneys' Manual Provisions; Failure to Correct False Testimony.* A DOJ component notified OPR of a court of appeals decision reversing two defendants' convictions because the government suppressed impeachment evidence related to a key government witness. The court of appeals also found that two DOJ attorneys made

misrepresentations to the trial court regarding the evidence and either sponsored false testimony at trial or failed to correct the false testimony. The court further found that “the trial court was misled” by the government’s “late production and continued misrepresentation or nondisclosure of the information in its possession” and that “[t]he government did not seek to qualify or correct” incomplete testimony at trial. OPR opened an inquiry, which it later converted to an investigation.

OPR concluded in its final report that both DOJ attorneys: (1) committed professional misconduct, when in reckless disregard of their *Brady/Giglio* obligations, they failed to disclose impeachment information related to a key government witness; (2) committed professional misconduct in violation of Department policy set forth in USAM § 9-5.001, when in reckless disregard of their discovery obligations, they failed to disclose impeachment evidence related to a key government witness; (3) committed professional misconduct in violation of the rules of professional conduct when in reckless disregard of their duty to make diligent efforts to comply with a legally proper discovery request by an opposing party, they failed to disclose impeachment evidence related to a key government witness until after trial, when the court ordered the production of the evidence; (4) committed professional misconduct in violation of the rules of professional conduct when in reckless disregard of their *Brady/Giglio* obligations, they failed to disclose impeachment evidence related to a key government witness until after trial, when the court ordered the production of the impeachment evidence, conduct that seriously interfered with the administration of justice; (5) committed intentional professional misconduct in violation of the rules of professional conduct when they knowingly made misrepresentations to the court; and (6) committed intentional professional misconduct in violation of their general duty of candor to the court, when they knowingly failed to correct false or misleading testimony of a key government witness, conduct that violated the defendants’ due process rights to a fair trial. OPR referred its findings to the PMRU which sustained each of OPR’s findings of misconduct and imposed periods of suspension for both DOJ attorneys, and also authorized OPR to refer its findings to the appropriate state bars.

*Improper Cross-Examination; Improper Closing Argument.* A DOJ component notified OPR of a court of appeals decision reversing the defendant’s conviction because of the DOJ attorney’s prosecutorial misconduct during her cross-examination of the defendant, and her closing argument. The defendant elected to testify on his own behalf during the trial and the trial court permitted him to invoke his Fifth Amendment right against self-incrimination with respect to certain subject matters that the DOJ attorney sought to cross-examine him about. However, the DOJ attorney continued to ask multiple questions during her cross-examination that highlighted that the defendant was unwilling to answer questions regarding certain subject matters. Thereafter, during her closing argument, the DOJ attorney suggested to the jury that they should not believe the defendant because he had relied on the Fifth Amendment.

OPR initiated an inquiry, which it later converted to an investigation. In its report of investigation, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to refrain from commenting on the defendant’s valid invocation of this Fifth Amendment privilege and by repeatedly arguing during her closing argument that the defendant’s invocation was evidence that his testimony was not credible. OPR referred the matter to the PMRU, which adopted OPR’s findings, and issued a letter of reprimand.

*Unauthorized Sentencing Recommendation; Failure to Keep Client Informed; Violation of Duty of Loyalty.* OPR learned that without first obtaining supervisory approval, a DOJ attorney agreed to a U.S. Sentencing Guidelines downward departure, which resulted in a sentence of probation and home confinement. In another case, the same DOJ attorney allegedly failed to seek a statutory enhancement despite her supervisors' direction to do so. OPR initiated an inquiry, which it later converted to an investigation. In its report of investigation, OPR concluded that in the first case, the DOJ attorney committed intentional professional misconduct in violation of her obligation under state bar rules, and Department and USAO policies, to keep her client reasonably informed of developments in the case. In addition, OPR concluded that the DOJ attorney violated the duty of loyalty she owed to her client, the United States, by assuming a position adverse or antagonistic to her client. In the second case, OPR concluded that the DOJ attorney made a mistake by failing to make the necessary filing for a sentencing enhancement, as her supervisors had directed her to do. OPR referred its findings to the PMRU, which sustained OPR's finding regarding the first case and recommended a period of suspension and authorized OPR to refer its finding to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

*Unauthorized Sentencing Reduction Offer; Failure to Inform Defense of Impeachment Information; Failure to Correct Misleading Testimony.* During a trial preparation session, a DOJ attorney told a cooperating witness who was hesitant to testify that he could do better than the stipulated term of imprisonment set forth in his written plea agreement, and emphasized that he should understand what she was telling him. The DOJ attorney made these inducements without first obtaining her supervisors' approval, and did not disclose the inducements to defense counsel. At trial, the DOJ attorney elicited testimony from the cooperating witness about the terms of his written plea agreement, but he testified that the government had not made any additional promises to him, and that the stipulated term of imprisonment was the sentence he expected to receive. The DOJ attorney failed to disclose the oral inducements she had made to the cooperating witness at the trial preparation session, and she failed to correct his testimony at trial. OPR initiated an inquiry, which it later converted to an investigation. In its report of investigation, OPR concluded that the DOJ attorney: (1) committed professional misconduct in reckless disregard of her obligation to obtain authorization from her supervisors before suggesting to a cooperating defendant that a further downward departure was possible; (2) committed professional misconduct in reckless disregard of her obligation under *Giglio*, to inform the defense prior to trial about her oral inducements to the cooperating witness; and (3) committed professional misconduct in reckless disregard of her obligation under *Napue*, to correct the cooperating witness' misleading testimony at trial. OPR referred the matter to the PMRU, which adopted OPR's findings, and issued a letter of reprimand.

*Failure to Disclose Exculpatory Evidence; Candor to the Court.* A district court concluded that the government violated its discovery obligations and the court's *ex parte* order when it suppressed material impeachment evidence about a law enforcement witness who testified at the defendant's trial. In addition, the court criticized a DOJ attorney for lack of candor with the court when, in an *ex parte* motion and an *ex parte* hearing, the DOJ attorney minimized and mischaracterized the witness' misconduct. The district court granted the defendant's motion for a new trial and ordered the government to remove the DOJ attorney from the case. OPR initiated an inquiry, which it subsequently converted to an investigation. Because the DOJ attorney alleged



that she followed the guidance of her supervisors and an office ethics advisor in determining what information to disclose, OPR investigated their conduct as well.

Based upon its investigation, OPR concluded that the DOJ attorney violated her discovery obligations, Department policies, Rule of Professional Conduct 3.8, and the court's *ex parte* order by failing to disclose material impeachment information to the defendant. OPR also concluded that the DOJ attorney demonstrated a lack of candor with the court in the *ex parte* motion and the *ex parte* hearing when she failed to disclose to the court the full extent of the witness' misconduct. Although the DOJ attorney's conduct would normally have warranted a finding that she acted in reckless disregard of her discovery and candor obligations, it is OPR's longstanding policy not to find professional misconduct when a DOJ attorney has consulted with and followed the advice of supervisors or ethics officers. Because the DOJ attorney complied with her supervisor's instructions to consult the ethics advisor and followed the ethics advisor's erroneous advice, OPR concluded that the DOJ attorney did not commit professional misconduct, but that she instead exercised extremely poor judgment when she failed to disclose to the defendant and the court the full scope of the law enforcement officer's misconduct. OPR also concluded that the DOJ attorney failed to perform at a level of competency expected of an experienced prosecutor.

OPR concluded that the ethics advisor failed to competently perform her duties and responsibilities and exercised poor judgment by giving unreasonable and legally unsound advice to the DOJ attorney. OPR concluded that the DOJ attorney's supervisor did not commit professional misconduct but should have been significantly more involved in the matter, by providing guidance to the DOJ attorney and monitoring her compliance with her disclosure obligations. OPR found that a senior DOJ manager did not commit professional misconduct in connection with the government's violation of its disclosure obligations, but that she erred when she expressed her views, which were not accurate, about the law enforcement witness' conduct without first becoming fully informed of all of the facts.

Following the court's criticism, the DOJ attorney's management assigned a mentor to provide her with additional training and monitor her performance. After its investigation, OPR referred its poor judgment findings to the component, and the DOJ attorney's management suspended her.

*Unauthorized Disclosure of Confidential Information.* A DOJ component referred to OPR and the Office of the Inspector General (OIG) allegations that information relating to a non-public investigation of a state government official was disclosed to the media without authorization. The media indicated that the sources of the information were government officials.

OPR and the OIG initiated a joint investigation into the allegations. The joint investigation took steps to identify the source of the unauthorized disclosures, including conducting interviews, reviewing an internal database, and obtaining sworn declarations from DOJ personnel. However, the investigation was closed because the joint investigation was unable to identify the individual or individuals responsible for the unauthorized disclosure.

*Presentation of False Evidence; Candor to the Court; Witness Coaching.* A district court criticized several DOJ attorneys for conduct during the course of multiple trials that, in the court's view, suggested a pattern of prosecutorial misconduct: (1) the government allegedly presented

false testimony, and then attempted to suppress information contained in a document that would have disclosed that the testimony was false; (2) the government allegedly filed a misleading pleading and affidavit that failed to inform the court of all the relevant facts; (3) during a critical witness' testimony, one of the prosecutors allegedly made head movements that may have signaled to the witness how to answer questions; and (4) through repeated use of improper leading questions, the DOJ attorneys allegedly "fed facts" to government witnesses. OPR initiated an inquiry, which it subsequently converted to an investigation.

OPR concluded that although certain testimony presented by the government was false, the DOJ attorney who questioned the witness at trial was not aware of the falsity, and therefore did not commit professional misconduct. OPR concluded instead that the DOJ attorney exercised poor judgment by questioning the witness at trial about a document, when she had neither personally reviewed the document nor had a sufficient reason to believe the witness had reviewed it. OPR also found that during a hearing, the DOJ attorney's statement regarding certain facts was inaccurate, but the statement, although poorly worded, did not constitute professional misconduct.

OPR concluded that a second DOJ attorney exercised poor judgment by instructing the first DOJ attorney to object to the disclosure of a document that would have shown that a government witness testified falsely, when the second DOJ attorney knew the document could be used to impeach the witness. OPR also concluded that the second attorney exercised poor judgment when she provided inaccurate information to the witness, which caused the witness to testify inaccurately. OPR also found that the second attorney drafted pleadings that were poorly worded and potentially misleading, but that her conduct did not rise to the level of professional misconduct.

OPR concluded that the evidence established that a third DOJ attorney repeatedly made head movements during the testimony of government witnesses in multiple trials that resulted in numerous warnings and criticism from the court. OPR did not find that the third DOJ attorney made the movements for the purpose of influencing the testimony of the witnesses. Nonetheless, OPR concluded that the movements, which related to and signaled displeasure with events occurring in the courtroom, were unprofessional and inappropriate; and that the movements that occurred during a fourth trial, and after warnings by the court, constituted exceedingly poor judgment.

Although the DOJ attorneys asked leading questions during the examination of government witnesses, OPR concluded that they did not do so in order to suggest answers to witnesses. However, because the court had expressed, both orally and in writing, its concern about the prosecutors' use of leading questions, all of the prosecutors should have made greater efforts to ensure that their questions on direct examination were not leading.

OPR referred its poor judgment findings to the components for appropriate administrative action, and advised the district court of its findings.

*Failure to Keep Client Informed.* A DOJ component referred to OPR allegations that a DOJ attorney withheld information and misled her supervisors about evidence that arguably weakened or undermined the government's theory in a large government contract fraud investigation. The DOJ attorney's supervisors alleged that they would not have authorized the filing of a criminal complaint or the indictment if they had known of the relevant information. In

addition, the DOJ attorney allegedly failed to present significant exculpatory evidence to the grand jury and acted unprofessionally in her dealings with defense counsel.

OPR initiated an inquiry, which it subsequently converted to an investigation. Based on the results of its investigation, OPR concluded that the DOJ attorney did not engage in professional misconduct. Although her prosecution memoranda, which discussed the potential defense, could have been more detailed, OPR concluded that the evidence did not establish that the DOJ attorney intended to mislead her supervisors concerning the extent or significance of potential exculpatory evidence. Because the prosecutors intended to present the exculpatory information to the grand jury prior to seeking the indictment, the DOJ attorney did not violate any obligation to present exculpatory evidence to the grand jury, which had not concluded its investigation at the time of the complaint to OPR. OPR also concluded that to the extent the DOJ attorney's dealings with defense counsel did not meet the expectations of her supervisors, her shortcomings were matters of performance that did not rise to the level of professional misconduct.

*Failure to Maintain Active Bar Membership.* A DOJ component reported to OPR that a DOJ attorney had failed to maintain an active bar membership in good standing with her state bar. At that time, the DOJ attorney was on detail outside of the United States. During the DOJ attorney's detail, she failed to provide her component with an annual bar certification, and the DOJ component later learned that she had failed to maintain an active bar membership in good standing with the state bar. Thereafter, prior to the completion of her detail, the DOJ attorney resigned from the Department.

OPR initiated an inquiry into the matter that it later converted into an investigation. The DOJ attorney did not respond to OPR's requests for information regarding the bar lapse allegations. As part of OPR's investigation, it contacted the state bar and obtained copies of the DOJ attorney's membership records. According to the bar's records, the DOJ attorney had been suspended numerous times for her failure to pay her annual bar dues or comply with the bar's mandatory continuing legal education requirements.

OPR concluded that the DOJ attorney committed intentional professional misconduct when she knowingly failed to timely pay her bar dues or complete her mandatory continuing legal education requirements on numerous occasions, because she engaged in conduct knowing its natural or probable consequence, and that consequence was a result that violated her statutory and Department obligations to maintain an active membership in good standing in at least one state bar. OPR also concluded that the DOJ attorney committed intentional professional misconduct when she practiced law knowing that she was not an active member in good standing with the bar of at least one state, because she engaged in conduct knowing its natural or probable consequence, and that consequence was a result that violated the rules prohibiting the unauthorized practice of law. Finally, OPR concluded that the DOJ attorney did not falsely certify that she was an active member of the bar, because she did not sign any bar certifications at a time when she was suspended by the bar.

OPR referred its findings to the PMRU. The PMRU found that OPR's findings of professional misconduct were supported by the evidence, and directed OPR to refer its findings of professional misconduct to the appropriate state bar disciplinary authority.

*Failure to Maintain Active Bar Membership.* OPR learned that a DOJ attorney had failed to maintain an active bar membership with her state bar. The DOJ attorney had been administratively suspended because she failed to timely pay her annual bar dues.

OPR initiated an inquiry into the DOJ attorney's failure to maintain an active bar membership while she was a Department employee. In addition, OPR examined a prior inquiry that it had conducted regarding the fact that the DOJ attorney had been previously transferred to inactive status by her state bar because she failed to timely pay her annual bar dues. OPR converted the current inquiry into an investigation. During OPR's investigation, the DOJ attorney retired from the Department.

OPR concluded by a preponderance of the evidence that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her statutory and Department obligations to maintain an active membership in at least one state bar when she failed to timely pay her annual bar dues. OPR also concluded by a preponderance of the evidence that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the rules prohibiting the unauthorized practice of law when she practiced law during the time that she was not an active member of the bar. OPR further concluded by a preponderance of the evidence that the DOJ attorney committed intentional professional misconduct when she knowingly failed to advise her supervisors that her bar membership had been administratively suspended. Finally, OPR concluded that the DOJ attorney did not falsely certify that she was an active member of the bar because she did not sign a bar certification during the time that she was suspended by the bar.

OPR referred its findings to the PMRU. The PMRU found that OPR's findings of professional misconduct were supported by the evidence, and directed OPR to refer its findings of professional misconduct to the appropriate state bar disciplinary authority.

*Failure to Comply With Discovery; Failure to Keep the Client Informed.* A DOJ component advised OPR that for approximately three years, a DOJ attorney was dating a law enforcement officer who was involved in cases that were prosecuted by the DOJ attorney and the DOJ component.

In one prosecution in which the officer testified at trial, the DOJ attorney failed to disclose the relationship to the defense, the court, and her supervisors. In a second prosecution, prior to trial, the DOJ attorney first spoke to a supervisor, and then advised the DOJ supervisor of her relationship with the officer. The DOJ component decided that the officer should not testify at the trial and that an *ex parte* sealed disclosure should be made to the court. The court concluded that disclosure of the relationship to the defense was not required. The officer was also the affiant on a wiretap application that resulted in the prosecution of several other cases involving multiple defendants, and the DOJ attorney represented the government during plea hearings in a number of those cases. OPR initiated an inquiry into the DOJ attorney's conduct, and into the handling of the matter by the attorney's supervisor. OPR later converted the matter into an investigation.

OPR concluded that, although a close question, the DOJ attorney did not commit professional misconduct when she failed to disclose to the defense in the first prosecution her relationship with the officer. Rather, OPR concluded that the DOJ attorney exercised extremely poor judgment when she failed to disclose the relationship to the court *in camera* to afford it an

opportunity to determine whether the relationship should be disclosed to the defense. OPR further concluded that the DOJ attorney engaged in professional misconduct, by acting in reckless disregard of her obligation to keep her client reasonably informed, when she failed to disclose to the component's management before the trial in the first prosecution that she was involved in a relationship with the officer. Her failure to disclose the relationship precluded the DOJ component from making informed decisions regarding the cases that she was handling.

In addition, the recollections of the DOJ attorney and her supervisor regarding certain communications they engaged in about the DOJ attorney's relationship with the officer were starkly different and, because of the passage of time, OPR could not reconcile them or determine which version was more accurate. Nevertheless, OPR concluded that the DOJ attorney should have taken greater efforts to ensure that her supervisors clearly understood the parameters of her relationship with the officer as it evolved before, during, and after the first and second trials. OPR further concluded that the supervisor should have directly and clearly communicated with the DOJ supervisor when the supervisor first learned of the disclosure issues after the first trial. The supervisor also should have directly and clearly communicated with the DOJ supervisor in relation to the second trial, so that the DOJ component's management could have at all pertinent times addressed the issues with the court in a timely manner.

OPR referred its findings to the PMRU. OPR referred its criticism of the supervisor to the DOJ component to handle in a management context as a performance issue. The PMRU upheld OPR's findings of professional misconduct and concluded that a letter of reprimand was the appropriate discipline, and directed OPR to refer its finding of professional misconduct to the appropriate state bar disciplinary authority.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee alleged that her removal from a supervisory position was a retaliatory action taken as a consequence of a disclosure she made to the FBI Inspection Division concerning actions of her immediate supervisor. The FBI employee told the Inspection Division that during a performance review meeting, her immediate supervisor inappropriately sniffed her person, searched her portfolio, and accused her of being intoxicated. She also alleged that the supervisor engaged in conduct unbecoming FBI senior management and spread false rumors to destroy her credibility. In response to the Inspection Division's request for a response, her supervisor requested that the Inspection Division initiate an investigation concerning the FBI employee's conduct, and requested that the Human Resources Division remove the FBI employee from her supervisory position. The FBI employee was subsequently transferred to a non-supervisory position.

OPR initially recommended that this matter be referred for mediation. Mediation was attempted but not successful, and the matter was returned to OPR for investigation.

OPR conducted an investigation and found reasonable grounds to conclude that the FBI employee had suffered reprisal for her protected disclosure. First, OPR concluded that the FBI employee's disclosure to the Inspection Division was a "protected disclosure" within the meaning of the FBI whistleblower regulations. OPR also concluded that the FBI employee's protected disclosure to the Inspection Division was a contributing factor in the FBI's subsequent decision to transfer the FBI employee to a non-supervisory position, and to initiate an investigation relating to the FBI employee's conduct.

OPR did not find by clear and convincing evidence that, in the absence of the FBI employee's protected disclosures, the FBI would have transferred the employee to a non-supervisory position. Rather, OPR found little or no evidentiary support for many of the allegations concerning the FBI employee's alleged performance deficiencies cited by the component head when she requested that the FBI employee be transferred. OPR found particularly troubling the fact that the supervisor ignored contradictory evidence concerning an allegation that the FBI employee was impaired while on duty, and repeated the allegation to the Human Resources Division, the FBI Health Unit, and the Inspection Division without making any reference to the existence of the contradictory evidence. Accordingly, OPR found reasonable grounds to conclude that the FBI's decision to transfer the FBI employee to a non-supervisory position was in retaliation for her protected disclosure, and OPR referred the matter to the Director of the Office of Attorney Recruitment and Management (OARM) for corrective action.

Additionally, with respect to the disciplinary investigation undertaken at the supervisor's request, OPR did not find by clear and convincing evidence that the FBI would have investigated the employee's conduct or imposed a suspension in the absence of her protected disclosure. Accordingly, OPR found reasonable grounds to conclude that the investigation and subsequent disciplinary action were taken in retaliation for the FBI employee's protected disclosure, and OPR also referred those actions to the Director of OARM for corrective action.

*Ex Parte Communication.* A DOJ component notified OPR that a trial court had found that DOJ attorneys had improper *ex parte* contact with an opposing party's expert witness. OPR initiated an inquiry, which it later converted into an investigation. OPR found during its investigation that the DOJ attorneys who were engaged in defensive litigation in the trial court had learned that the plaintiffs had retained an expert witness that the DOJ component had previously retained as a consulting expert in an earlier, related matter. The DOJ attorneys involved in the defensive litigation, and the DOJ attorneys who retained the expert in the earlier matter, were both concerned that the expert's work for the plaintiffs in the later case might have constituted a violation of the confidentiality agreement that the expert signed in connection with her earlier work for the DOJ component. To address that concern, the DOJ attorney who retained the expert in the previous matter, at the direction of two supervisory DOJ attorneys, placed a telephone call to the plaintiffs' expert witness and had an *ex parte* conversation with the expert about the confidentiality agreement. The DOJ attorney who contacted the expert was not an attorney of record in the trial, nor was she in any way working on the litigation pending before the trial court.

Based on the results of its investigation, OPR determined that the DOJ attorneys did not commit professional misconduct. OPR did not find any applicable, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy that prohibited the Department attorneys from having or directing a subordinate to have *ex parte* communications with an opposing party's expert in litigation to discuss the expert's obligations under a preexisting confidentiality agreement. However, OPR further concluded that the Department attorney who contacted the expert, and the supervisory Department attorneys who directed that contact, exercised poor judgment when they took action that could have affected—and did in fact affect—pending litigation without sufficiently researching the issue or considering the views of other stakeholders in the Department. OPR referred its findings to the DOJ component to address as a management matter.

*Failure to Comply with Discovery Obligations – Brady/Giglio Violation; Misrepresentation/Misleading the Court.* A DOJ component notified OPR that, in ruling on a post-conviction motion, a court found that a DOJ attorney had suppressed evidence that the government had filed a motion to reduce the sentence of a key government witness in exchange for her testimony against the defendant, and that this evidence was material to the verdict. The court granted the defendant a new trial, but the government thereafter moved to dismiss the indictment with prejudice, and the court granted the government's motion. OPR initiated an inquiry, which it later converted to an investigation.

OPR concluded that the DOJ attorney had recklessly disregarded the constitutional due process obligation imposed by *Brady* and *Giglio*, and the parallel disclosure obligations imposed by the state's professional responsibility rule, by failing to disclose material impeachment and exculpatory information to the defense. Moreover, OPR learned that the DOJ attorney had intentionally misrepresented to the court, both in writing and orally during allocution at the witness' sentencing hearing, that the witness had testified against the defendant in the grand jury, and this misrepresentation was material to the outcome of the witness' sentencing. OPR concluded that the misrepresentation amounted to a violation of the general common-law duty of candor and the duty of candor imposed by the state's applicable professional responsibility rule. Finally, OPR concluded that the DOJ attorney had also exercised poor judgment in eliciting testimony that the witness for whom the government had filed a motion to reduce sentence had no expectation of a future sentencing benefit, without clarifying that the witness had already received a significant sentencing concession from the government in exchange for her testimony. OPR referred the matter to the PMRU. The DOJ attorney had previously resigned from the Department, and the PMRU directed OPR to refer its findings to the DOJ attorney's state bar.

*Failure to Comply with Federal Law – Speedy Trial Act; Interference with Defendant's Rights – Improper Contact with Represented Person, Interference with Attorney-Client Relationship; Failure to Comply with Discovery Obligations.* A DOJ component notified OPR that a district court had dismissed an indictment with prejudice because of the government's violation of the Speedy Trial Act (STA). In its opinion, the court criticized the government for failing to properly exclude time under the STA, and also criticized the government's discovery practices, its use of attorney-client privileged information in obtaining an indictment, and the fact that it interviewed the defendant without her counsel present. OPR initiated an investigation.

OPR concluded that the DOJ attorney responsible for prosecuting the case did not engage in professional misconduct by failing to ensure the proper exclusion of time under the STA. The DOJ attorney did not engage in any delay tactics, and made efforts to ensure that time was excluded properly from the STA clock. The deficient content of proposed orders relating to the STA issue resulted from a systemic evolution in the local court's practices relating to the STA, rather than from a failure to understand or to attempt to comply with clear and unambiguous standards. Nevertheless, OPR found that the DOJ attorney demonstrated poor judgment by failing to establish adequate oversight for the preparation, submission, and entry of orders excluding time under the STA.

OPR also concluded that the DOJ attorney did not violate a clear and unambiguous standard by authorizing investigating agents to conduct a pre-indictment, uncounseled interview of the defendant. The district court originally concluded that the interview was a violation of the

applicable professional responsibility rule, but a different court on remand concluded that the interview was not improper, indicating the lack of a clear understanding of the reach of the applicable professional responsibility rule. In addition, in the unique circumstances of this case, OPR could not find by a preponderance of the evidence that the DOJ attorney had actual knowledge that the defendant was represented by counsel at the time of the interviews. Finally, the DOJ attorney had sought advice from the Department's Professional Responsibility Advisory Office (PRAO), which opined that the interview would be appropriate, although PRAO cautioned against asking questions that invaded the attorney-client privilege or sought information about the defense strategy. However, OPR concluded that the DOJ attorney exercised extremely poor judgment by failing to carefully read and follow the advice contained in PRAO's opinion.

OPR also concluded that the DOJ attorney properly handled privileged material inadvertently produced to the government by the defense, and that the DOJ attorney's discovery practices were consistent with governing law and policy. OPR's poor judgment findings were referred to the DOJ component to address as a management matter.

*Whistleblower – Retaliation for Protected Disclosure.* An FBI employee alleged that, as a consequence of making disclosures to the highest-ranking official in an FBI field office questioning the decision to outsource to contractors certain tasks related to a classified program, an FBI supervisor attempted to retaliate against her by preventing her transfer to another position within the FBI. OPR opened an inquiry, which it later converted to an investigation. OPR concluded that the FBI employee had made a protected disclosure within the meaning of the FBI whistleblower regulations and that she reasonably believed that her disclosure evidenced a violation of law, policy, regulation and/or an abuse of authority. OPR also concluded that the FBI employee's protected disclosure was a contributing factor in the FBI supervisor's decision to offer a contract position to the retiring employee whom the FBI employee had been selected to replace.

Although the FBI supervisor's efforts to prevent the FBI employee's transfer ultimately were unsuccessful, OPR nevertheless concluded that the FBI supervisor's actions constituted a threatened personnel action in retaliation for a protected disclosure. Furthermore, OPR did not find clear and convincing evidence that the FBI supervisor would have taken action to prevent the FBI employee's transfer in the absence of her protected disclosure. Accordingly, OPR referred the matter to the Office of Attorney Recruitment and Management for whatever corrective action, if any, it deemed appropriate.

*Abuse of Grand Jury Process; Misrepresentation/Misleading the Court; Failure to Keep Client Informed; Lack of Candor to OPR; Failure to Comply with Court Order.* A DOJ component informed OPR of a state judge's finding that a DOJ attorney had issued a federal grand jury subpoena *duces tecum* not for a proper investigative purpose, but instead to improperly thwart a state court order.

OPR conducted an investigation into the circumstances under which the DOJ attorney issued the grand jury subpoena *duces tecum*. The subpoenaed documents at issue were state agency records that had been the subject of lengthy litigation in state court by a third party seeking disclosure pursuant to state public records law. After a contested hearing, the state court issued an order requiring that the documents be disclosed to the third party. Immediately thereafter, the DOJ attorney caused the federal subpoena *duces tecum* to be issued, which resulted in the documents



being taken into the exclusive possession of the DOJ component, rendering them unavailable to the state court and the third party. Based on the results of its investigation, OPR concluded that there was no valid investigative purpose for the federal grand jury subpoena, and further concluded that the DOJ attorney intentionally issued it solely to prevent the documents from being disclosed to the third party pursuant to the state court order. OPR further found that the DOJ attorney intentionally made multiple false and misleading statements—to the federal judge supervising the grand jury, to her office’s management, to OPR, and to other persons and entities—regarding the federal subpoena. Finally, OPR found that the DOJ component’s management, having been affirmatively misled, did not commit professional misconduct in its supervision of the attorney, but that one manager exercised poor judgment by not asking more probing questions of the DOJ attorney, given the unusual circumstances under which the federal subpoena *duces tecum* was issued.

OPR referred its findings to the PRMU, which upheld OPR’s findings of professional misconduct. Because the DOJ attorney resigned from the Department before the PMRU issued its decision, no Department discipline could be imposed. The PMRU, however, authorized OPR to refer its findings to the state bar. OPR thereafter referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

*Misrepresentation/Misleading the Court; Improper Closing or Rebuttal Argument.* Following the issuance of an order vacating a defendant’s second-degree murder conviction based on the ineffective assistance of counsel, OPR became aware of two allegations of professional misconduct against the DOJ attorney who prosecuted the case. First, the DOJ attorney allegedly misled the trial court concerning the admissibility of the decedent’s prior acts of violence by arguing, contrary to the law of the jurisdiction, that such evidence was admissible only if the defendant testified that she was aware of the prior acts. When opposing counsel agreed, the court relied on the DOJ attorney’s legal argument, thereby erroneously limiting the evidence that the defense could present concerning the decedent’s prior acts of violence to show that the decedent was the first aggressor.

Second, the DOJ attorney allegedly made false or misleading statements during her closing argument. During trial, the DOJ attorney successfully sought to exclude the defendant’s statements to responding police officers in which she claimed that she acted in self-defense. The defendant later testified at trial that she acted in self-defense. During the closing argument, the DOJ attorney argued that although the defendant testified that she acted in self-defense, she did not claim self-defense when she called 9-1-1. This allegedly gave the jury the false impression that the defendant had claimed self-defense for the first time at trial, and that her testimony was a recent fabrication.

Following an investigation, OPR concluded that the DOJ attorney did not commit professional misconduct by knowingly or recklessly violating her duty of candor to the tribunal. OPR found that the DOJ attorney did not affirmatively misstate the relevant legal principles during the argument concerning the admissibility of evidence of the decedent’s prior violence, and that the evidence was insufficient to establish that the DOJ attorney knew or should have known that opposing counsel and the court were unaware of or mistaken about the applicable law. Thus, OPR could not conclude that the DOJ attorney acted with the requisite intent to mislead the court. However, OPR concluded that the DOJ attorney exercised poor judgment by failing to set forth

the pertinent legal principles and present the legal argument with sufficient clarity to aid the parties and the court in reaching the appropriate resolution of the issue.

OPR also concluded that the DOJ attorney neither committed professional misconduct nor exercised poor judgment during her closing argument discussion of the defendant's 9-1-1 call. Although the DOJ attorney made a confusing reference to the defendant's trial testimony, OPR found that the DOJ attorney did not state or imply that the defendant raised the self-defense claim for the first time at trial. Instead, because the DOJ attorney's argument narrowly focused on the circumstances of the 9-1-1 call itself, OPR found that the evidence was insufficient to support the allegation.

OPR referred its poor judgment finding to the component to address in a management context.

*Lateness – Missed Deadlines; Failure to Comply with Speedy Trial Act.* A DOJ attorney self-reported that she failed to bring charges within the applicable five-year statute of limitations period. Three other attorneys had been assigned to the case before the subject attorney received it. The subject attorney continued to investigate the case and negotiated a plea agreement. After the attorney filed the information, it was determined that the statute of limitations had expired as to the fraudulent conduct that was alleged in the information. However, because the investigation established that the defendant had continued to engage in fraudulent activity well after the time period alleged in the original information, the attorney was able to file a second information that included conduct that was not barred by the statute of limitations.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. As of the time of the self-report, the statute of limitations had only expired on some, but not all, of the criminal conduct involved in the fraud scheme. In addition, while OPR was conducting its investigation, the defendant entered a guilty plea to the second information that charged fraudulent conduct that was not barred by the statute of limitations. Although OPR did not find that the DOJ attorney committed professional misconduct or exercised poor judgment, OPR did conclude that the DOJ attorney had made a mistake in failing to timely revise the initial criminal information and plea agreement to include the additional charges that were not barred by the statute of limitations.

*Failure to Maintain Active Bar Membership; Unauthorized Practice of Law; Failure to Keep Client Informed.* A DOJ component reported to OPR that for seven months a DOJ attorney failed to maintain an active membership status in the only state bar of which she was a member. When the attorney paid her annual bar registration fee, she requested that her status be changed to "inactive" and she remained in that status until the time she had to submit her annual DOJ certification of active bar status, when she had her status restored to "active." OPR initiated an inquiry, which it converted to an investigation. During the investigation, OPR discovered that the DOJ attorney had previously been suspended by her state bar for a four-month period because of her failure to comply with CLE requirements. The DOJ attorney claimed that she had converted her status to inactive because she reasoned that she was not practicing law in the state where she was a bar member, and that lower registration fees for inactive attorneys could save her money. She asserted that she only realized her mistake when she had to certify her active bar status, despite the fact that she had regularly certified her active bar status throughout the course of her more than

25 years of DOJ employment. The DOJ attorney claimed to not have been aware of the prior suspension, although the state bar authority had sent numerous notices to her.

OPR concluded that the DOJ attorney engaged in intentional professional misconduct by consciously and deliberately changing her bar membership from active to inactive, knowing that the natural and probable consequence of doing so would be for her to violate the DOJ requirement that she maintain an active membership in at least one state bar. OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her DOJ obligation to maintain an active membership in at least one state bar, when she failed to meet her CLE obligations and consequently was temporarily suspended from the practice of law. OPR further concluded that, in each of the two instances when she did not have an active bar membership, the DOJ attorney engaged in intentional professional misconduct when, in violation of the rules prohibiting the unauthorized practice of law, she continued to practice law when she was not an active member of a bar, and when she knowingly failed to advise her supervisors that she was not an active member of at least one state bar.

OPR referred its findings to the PMRU, which upheld OPR's findings of professional misconduct. The attorney resigned from government service. The PMRU directed OPR to refer its findings to the state bar, which OPR did.

## **Conclusion**

During Fiscal Year 2017, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both inside and outside the Department, and continued to serve as the Department's liaison with state bar counsel. OPR also met with delegations from several foreign countries to discuss issues pertaining to legal ethics. OPR's activities in Fiscal Year 2017 have increased awareness of ethical standards and responsibilities throughout the Department of Justice, and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.