
U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

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Office of Professional Responsibility

Fiscal Year 2009 Annual Report

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Annual Report for Fiscal Year 2009

Introduction

The Office of Professional Responsibility (OPR) was established in the Department of Justice by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is the Office's 34th annual report to the Attorney General, and it covers fiscal year 2009 (October 1, 2008 - September 30, 2009).

Jurisdiction and Functions of OPR

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

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

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence or non-frivolous allegation of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to

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

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

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

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

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

OPR ordinarily completes investigations relating to the actions of attorneys who resign or retire during the course of the investigation in order to better assess

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

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

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

Significant Activities in Fiscal Year 2009

During fiscal year 2009, OPR participated in non-investigative, policy, and

project-oriented activities of the Department. OPR attorneys participated in numerous educational and training activities within and outside the Department of Justice to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During fiscal year 2009, OPR attorneys served on a panel on legal ethics at a Department orientation session for Department attorneys, and participated in presentations in media relations workshops focusing on the policies and ethical issues concerning contacts with the media, including participating in the production of a training tape on this topic for use by the Executive Office for U.S. Attorneys. OPR attorneys also conducted presentations on legal ethics at the National Advocacy Center (NAC) as part of the Center's basic criminal trial advocacy courses. In addition, OPR attorneys participated in the Criminal Case Management & Discovery Conference at the NAC. OPR attorneys also made presentations as part of the Department's Orientation for new Assistant United States Attorneys. An OPR attorney also provided a presentation to a U.S. Attorney's Office addressing the manner in which OPR conducts investigations. OPR attorneys also participated in the United States Attorneys' Conference and the Annual Disciplinary Conference for the District of Columbia Bar, and discussed legal ethics with students from American University's Washington College of Law.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR attorneys participated in presentations to Brazilian, Indonesian, Colombian, and Albanian delegations about OPR's role in the Department and issues associated with prosecutorial ethics. OPR attorneys also briefed a new Resident Legal Advisor assigned to Montenegro about issues associated with prosecutorial ethics, gave a presentation to Italian magistrate judges about OPR practices and policies, gave presentations in Azerbaijan to Azerbaijani prosecutors about the operation and functioning of OPR, and participated in a trial advocacy training program in Kampala, Uganda for Ugandan prosecutors.

OPR continued to serve as the Department's liaison to state bar counsel on matters affecting the professional responsibility of Department attorneys. OPR attorneys attended the mid-year and annual meetings of the National Organization of Bar Counsel that addressed current trends in attorney regulation and discipline. OPR attorneys participated in the National Organization of Bar Counsel's program committee, which is responsible for organizing speakers and topics for presentations at the mid-year and annual meetings. An OPR attorney made a presentation at the annual meeting on prosecutorial misconduct, focusing primarily on the scope and extent of discovery violations by federal prosecutors.

In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also advised other Department components regarding instances of possible professional misconduct by non-DOJ attorneys. In 47 such matters handled by OPR in fiscal year 2009, OPR reviewed information relating to possible misconduct by the attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly.

In fiscal year 2009, OPR adopted a new policy of allowing subjects of OPR investigations and component heads to comment on OPR draft reports when there is a proposed finding of professional misconduct. This policy ensures greater fairness to the subject and efficiency for the Department because it allows subjects and supervisors to raise new facts and arguments for OPR's consideration before the final report is issued. Previously, new facts and arguments with regard to OPR's findings could not be raised until an OPR report was issued and the misconduct finding was appealed to the Office of the Deputy Attorney General.

In fiscal year 2009, OPR also convened a team of attorneys including OPR attorneys and attorneys detailed to OPR from other DOJ components to work on the allegations of prosecutorial misconduct stemming from the prosecution of Senator Theodore Stevens. *See United States v. Theodore Stevens*, Cr. No. 08-231 (D.D.C.).

In fiscal year 2003, the Attorney General's Advisory Committee approved a plan under which OPR created a Rapid Response Team designed to enhance OPR's ability to respond quickly and effectively to misconduct allegations that arise in matters of particular importance to the Department. The work of the Rapid Response Team, like the other work at OPR, is directed and supervised by the Counsel and the Deputy Counsel. In fiscal year 2009, the Rapid Response Team was composed of 3 permanent OPR attorneys, 4 attorneys detailed to OPR from other DOJ components, and 1 contract attorney. The Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against such agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to

share with the OIG responsibility for reviewing and investigating (as appropriate) whistleblower complaints by FBI employees.

Intake and Initial Evaluation of Complaints

In fiscal year 2009, OPR received 1,254 complaints and other letters and memoranda requesting assistance. OPR determined that 245 of the matters, or approximately 20%, warranted further review by OPR attorneys. OPR opened full investigations in 100 of those matters; most of the remaining 145, which are termed “inquiries,” were resolved with no findings of professional misconduct, based on further review, additional information from the complainants, responses from the subjects, or other information. When information developed in an inquiry indicated that further investigation was warranted, the matter was converted to a full investigation.

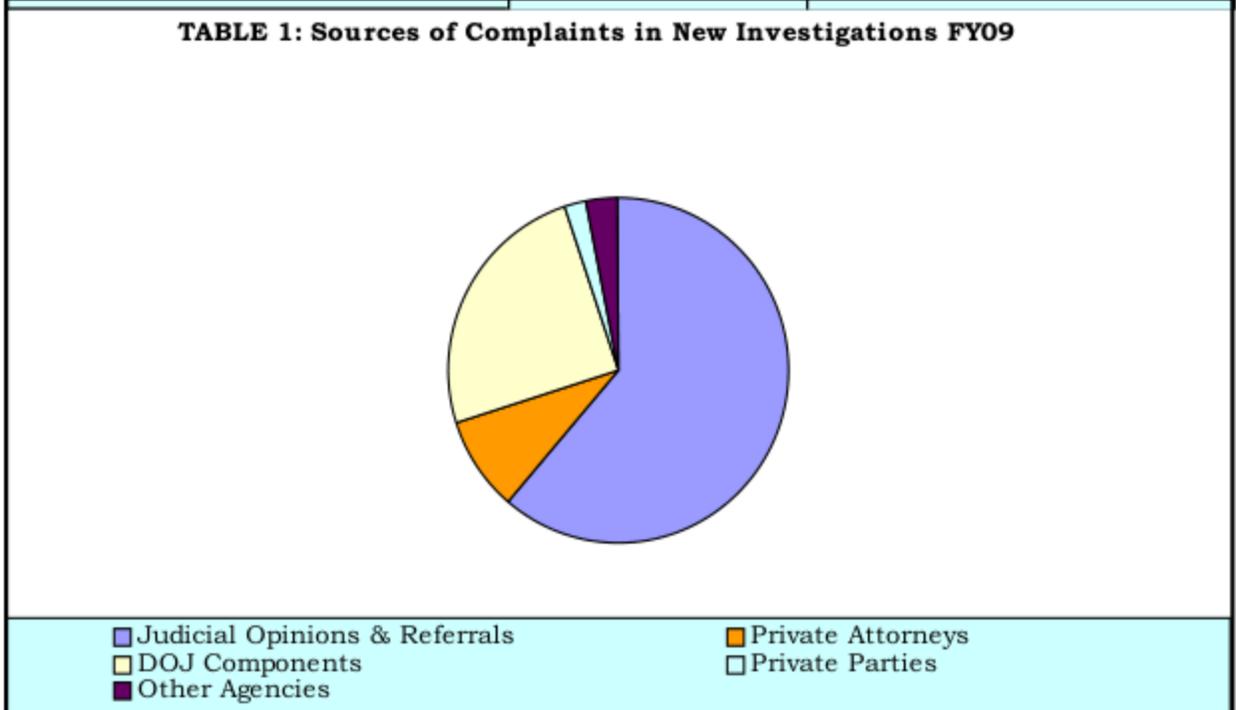
The remaining 1,009 matters were determined not to warrant an inquiry by OPR because, for example, they related to matters outside the jurisdiction of OPR; sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported by any evidence; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department of Justice component. A supervisory OPR attorney reviewed all such dispositions.

OPR Investigations in Fiscal Year 2009

Characteristics of Investigations Opened in Fiscal Year 2009: OPR investigations opened in fiscal year 2009 were based on complaints from a variety of sources, as reflected in Table 1.

TABLE 1

Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2009		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Judicial opinions & referrals ¹	61	61.0%
Private attorneys	9	9.0%
Department components	25	25.0%
Private parties	2	2.0%
Other agencies	3	3.0%
Total	100	100.0%

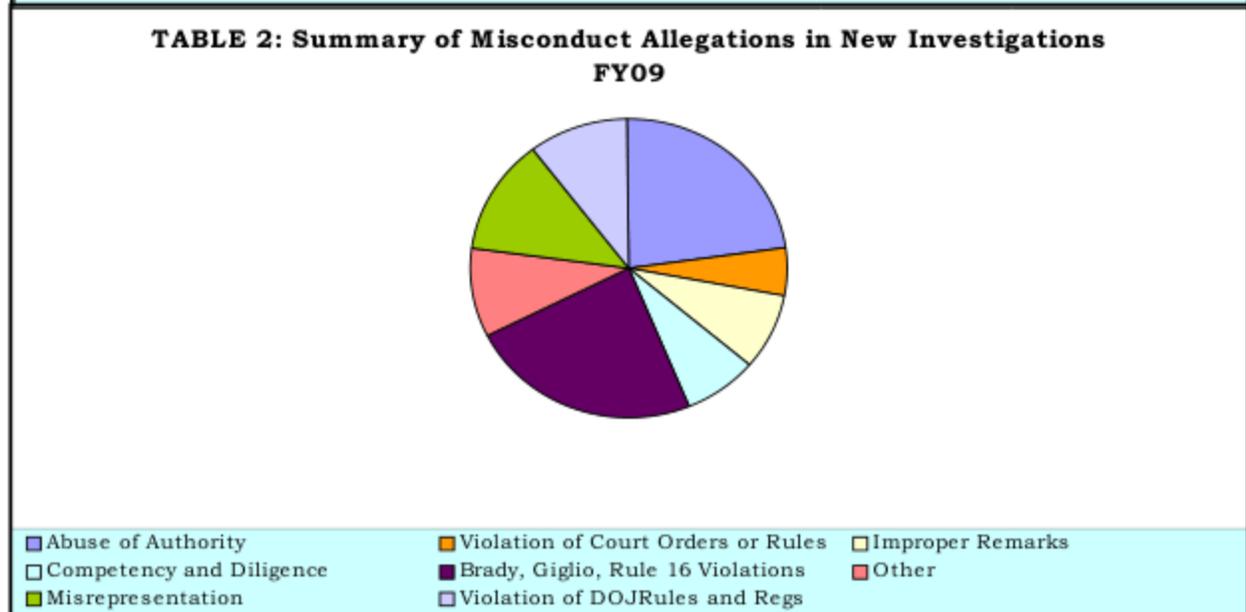
TABLE 1: Sources of Complaints in New Investigations FY09

OPR opened a total of 100 new investigations in fiscal year 2009. Six of these matters also involved non-attorney subjects. The 100 investigations involved 213 separate allegations of misconduct. The subject matter of the 213 allegations is set out in Table 2.

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

TABLE 2

Types of Misconduct Allegations in Investigations Opened in Fiscal Year 2009		
Type of Misconduct Allegation	Number of Allegations	Percentage of Allegations in Investigations
Abuse of authority, including abuse of prosecutorial discretion	49	23.0%
Improper remarks to a grand jury, during trial, or in pleadings	17	8.0%
Misrepresentation to the court and/or opposing counsel	27	12.7%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	6	2.8%
Failure to competently and/or diligently represent the client's interests	16	7.5%
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	50	23.5%
Failure to comply with court orders or federal rules	11	5.2%
Conflict of interest	2	0.9%
Failure to comply with DOJ rules and regulations	22	10.3%
Interference with defendants' rights	4	1.9%
Lateness (i.e., missed filing dates)	4	1.9%
Lack of fitness to practice law	2	0.9%
Failure to maintain active bar membership	3	1.4%
Total	213	100.0%



Investigations Closed in Fiscal Year 2009: OPR closed a total of 77 investigations in fiscal year 2009. Three of the investigations closed involved non-attorney subjects. Of the 77 investigations that were closed during the year, OPR found professional misconduct in 12, or approximately 16%, of the matters. Of the 12 matters in which OPR found professional misconduct, 7 involved at least 1 finding of intentional professional misconduct by a Department attorney.² In 8 of the 12 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.³ The number and percentage of investigations resulting in findings of professional misconduct on the part of Department attorneys was lower in fiscal year 2009 than in fiscal year 2008, in which OPR closed 59 investigations and found professional misconduct in 22, or approximately 37%, of those matters.

Disciplinary action was initiated against attorneys in 8 of the 12 matters in which OPR found professional misconduct by Department attorneys. Disciplinary action was not initiated against attorneys in 4 instances because the subject attorneys were no longer employed by the Department at the conclusion of OPR's investigation. Disciplinary action was initiated but was pending at the close of fiscal year 2009 in 4 matters, and in 1 matter OPR's disciplinary action recommendation was not imposed because the subject attorney resigned following the conclusion of OPR's investigation. With respect to the 3 matters in which disciplinary proceedings were initiated and implemented, the subject attorneys in 2 of the matters were suspended without pay for 14 and 5 days, respectively, and the subject attorney in 1 of the matters received a written reprimand.

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

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

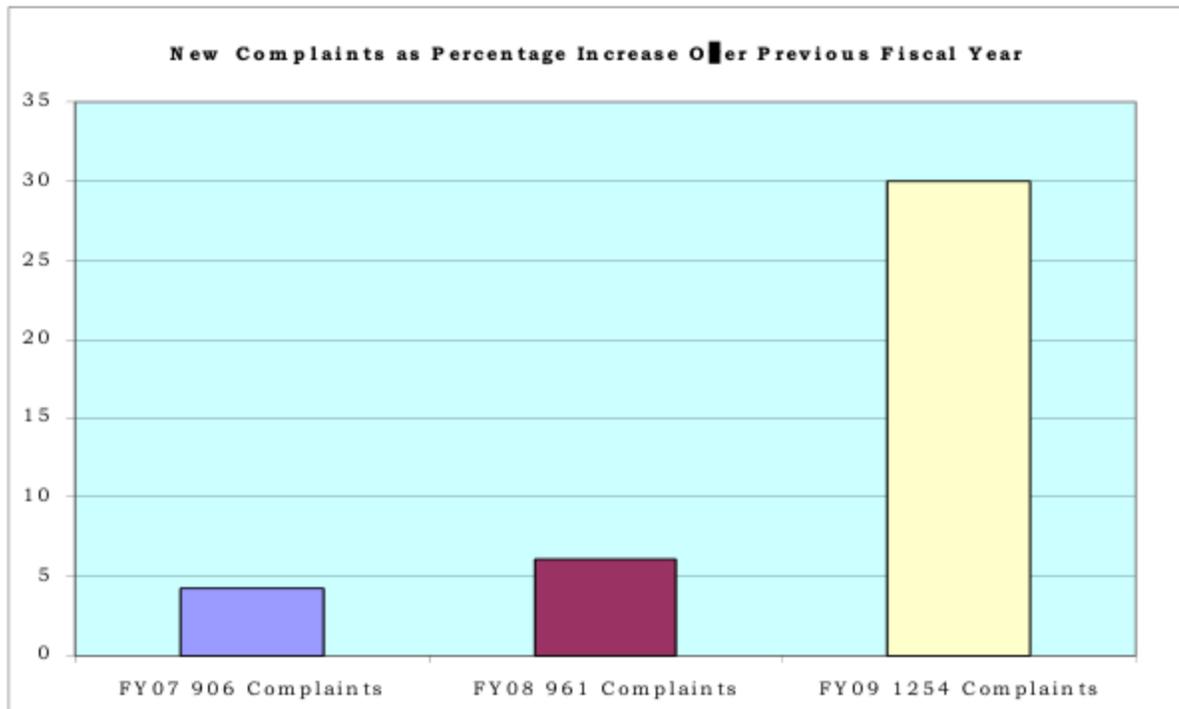
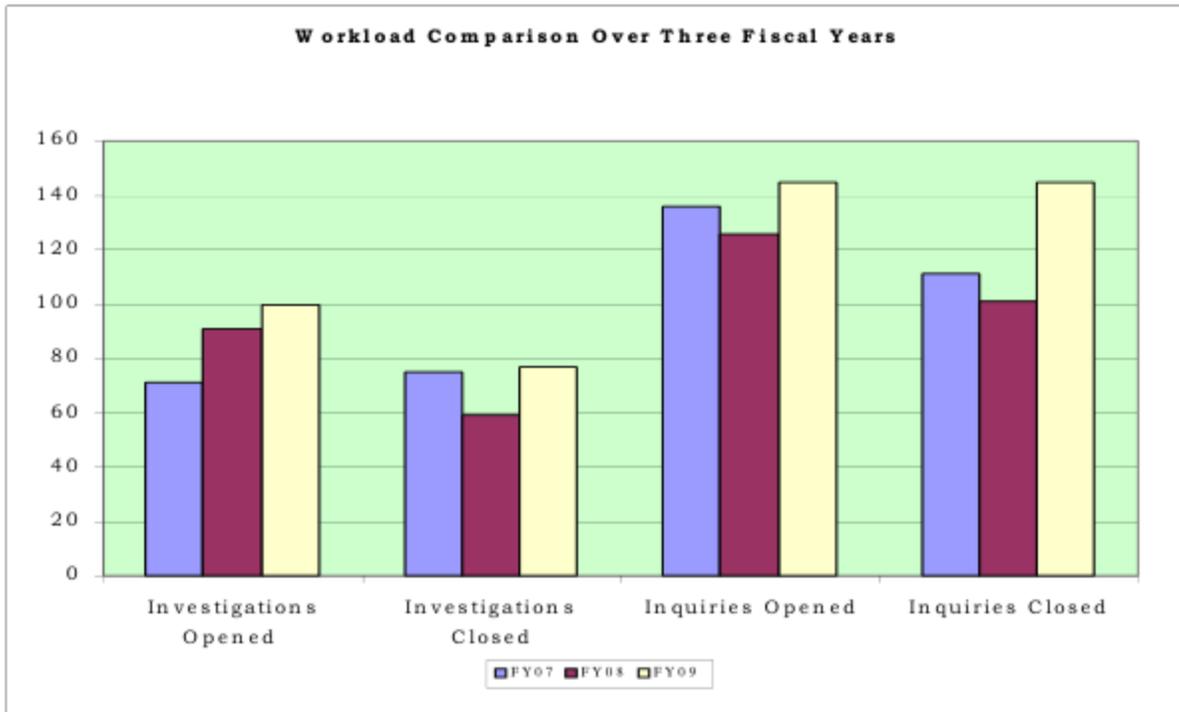
OPR also closed 11 investigations, or approximately 14% of the 77 investigations, with at least 1 finding that an attorney exercised poor judgment.⁴ One of those 11 matters also involved a finding of professional misconduct, and is included in the 12 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment, alone, but rather refers the finding to the DOJ attorney's employing component for consideration in a management context. OPR may also recommend that management consider certain actions, such as additional training. Eighteen matters, or approximately 23%, involved at least 1 finding that an attorney made an excusable mistake.⁵ Two of those 18 matters also included a finding of professional misconduct or poor judgment. Thus, of the 77 matters closed, OPR found professional misconduct or poor judgment in 22 matters, or approximately 29%, which is down from the 27, or approximately 46% of matters in which OPR found professional misconduct or poor judgment in fiscal year 2008. As noted, the total number of matters closed in 2008 was 59.

The information in Table 3 highlights the number of investigations and inquiries OPR has opened and closed in the past three fiscal years, as well as the large increase in the total number of complaints received and reviewed by OPR in FY 2009. Despite that large increase, OPR was able to close 31% more investigations than it had in FY 2008 (77 compared to 59), and 5% more than it had in FY 2007 (79 compared to 75). In addition, OPR was able to close 44 % more inquiries than it had in FY 2008 (145 compared to 101), and 31% more than it had in FY 2007 (145 compared to 111). These statistics demonstrate OPR's improved efficiency in resolving allegations of professional misconduct.

⁴ OPR finds that an attorney has exercised poor judgment when, faced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

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

TABLE 3



Examples of Investigations Closed in Fiscal Year 2009⁶

1. *Failure to Diligently Represent the Interests of the Client; Failure to Abide by Court Rules.* A DOJ component informed OPR that in two different cases a DOJ attorney failed to comply with bankruptcy court orders and with the local rules of the bankruptcy court.

OPR conducted an investigation. In the first case, the government filed a civil complaint against the debtor. In the government's status report, the DOJ attorney notified the court that the debtor had failed to file an answer or other response to the complaint. Given this failure, the court directed the DOJ attorney at a status conference to promptly file a motion for default judgment against the debtor. The court continued the status conference. Despite the court's order, OPR found that the DOJ attorney failed to promptly file a motion for default judgment, failed to file a status report prior to the status conference in accordance with the local rule, and failed to appear at the status conference. As a result, the court issued an order to show cause directing the government to state why its complaint should not be dismissed for lack of prosecution. OPR found that the DOJ attorney failed to file a response to the order to show cause, and failed to file a status report prior to the third hearing in accordance with the local rule. Instead of filing a response to the order to show cause, the DOJ attorney filed a motion for default judgment on the day before the hearing. The court denied the motion on two grounds: (1) it contained insufficient evidence and legal authority upon which to grant the motion; and (2) the government failed to comply with the court's order to show cause. Based on these two grounds, the court dismissed the complaint for lack of prosecution. Upon the government's motion for reconsideration, the court reinstated the complaint and granted the default judgment.

In the second case, the DOJ attorney filed a civil complaint against the debtor. At a status conference, the DOJ attorney told the court that she anticipated filing a motion for summary judgment within thirty days. The court did not itself set a due date for the motion for summary judgment. OPR found that after the hearing, the DOJ attorney told her supervisor that the court had ordered the government to file the motion for summary judgment by a certain date, when, in fact, it had not.

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

As to the first case, OPR concluded that the DOJ attorney made a mistake when she failed to mark the date of the continued status conference in her calendar, which resulted in her failure to file a motion for default judgment, failure to file a status report, and caused her to miss the hearing. However, OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligations to diligently represent her client and to comply with court orders and local rules when she failed to respond to the court's order to show cause and failed to file a status report prior to the third hearing.

As to the second case, OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligations to diligently represent her client and to comply with court orders and local rules when she failed to timely file a status report prior to the status hearing. OPR concluded further that the DOJ attorney committed professional misconduct by intentionally violating her obligation to keep the client reasonably informed when she misled her supervisor about the filing date for the motion for summary judgment.

OPR did not recommend a range of discipline because the DOJ attorney retired before the investigation was completed. However, OPR notified the appropriate state bar authorities of its findings of professional misconduct in both cases.

2. *Abuse of Prosecutive or Investigative Authority.* A court of appeals reversed a criminal conviction of a state government official on the ground that the government had not proven every element of the statute. The decision prompted congressional and media allegations that the case had been brought for improper partisan political reasons.

OPR conducted an investigation. OPR examined the legal authority as it existed at the time of the criminal investigation and concluded that there was sufficient legal precedent to support the government's theory of the prosecution; namely, that the defendant, in an effort to advance his career, steered a state contract to a firm whose principals donated significant amounts of cash to a state office candidate. OPR found no evidence that the decision to prosecute was influenced by improper partisan political considerations. OPR found that the case was initiated following a public outcry over the defendant's conduct. The case thus emanated from external factors. OPR found no evidence that the DOJ attorneys who prosecuted the case sought to gain personal or political advantage by bringing the case, and no evidence that political appointees at the Department influenced decisions relating to the investigation and prosecution. Accordingly,

OPR concluded that the DOJ attorneys who handled the case did not commit professional misconduct or exercise poor judgment in this matter.

3. *Failure to Diligently Represent the Interest of the Client.* A DOJ component reported to OPR that a Department attorney had failed to timely respond to defense motions, had failed to timely indict cases, had failed to notify supervisors of untimely filed appellate briefs, and had failed to comply with internal deadlines and directions from supervisors.

OPR initiated an investigation and reviewed a written response from the Department attorney and conducted interviews of the Department attorney and law enforcement agents. OPR also reviewed the relevant case files. During the course of OPR's investigation, supervisors at the DOJ component found additional matters that appeared to have been mishandled by the Department attorney. The Department attorney resigned from the Department prior to the completion of the OPR investigation.

OPR recommended to the Office of the Deputy Attorney General that the investigation be closed without further investigation, on the grounds that (1) the matter lacked institutional significance to the Department, in that the attorney's conduct had not prejudiced the government in any of the cases; (2) the attorney had resigned, and thus could not face any disciplinary proceedings; and (3) continuing the investigation was not warranted given OPR's scarce resources. The Office of the Deputy Attorney General concurred and the matter was closed.

4. *Duty of Competent Representation.* A district court issued an order denying restitution to the government because the plea agreement prepared by the DOJ attorneys, and entered into by the government and the defendant, identified the wrong statute as authority for restitution. The district court's order was later overturned by the appellate court.

OPR conducted an investigation. OPR found that by failing to draft the plea agreement in a manner that ensured that the government obtained restitution, the DOJ attorneys violated the fundamental duty to provide the client (the United States) with competent representation. Despite this violation, OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment because the error in the plea agreement represented an aberration from the high level of professional conduct exhibited by the attorneys throughout the rest of their work on the long and complex case. OPR found that the attorneys worked diligently for several years on the prosecution of the case, successfully

preparing hundreds of exemplary pleadings. Because the inaccurate citation in the plea agreement represented a marked departure from the DOJ attorneys' normal course of conduct, OPR found that this one-time error constituted an excusable mistake.

5. *Duty of Competence.* A court of appeals granted a petitioner's motion for costs and fees as the prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), finding that the government's position in an immigration case was not substantially justified. The court found that in contesting the petitioner's motion, the DOJ attorney made a legal argument that had been rejected by governing circuit law. Although the court did not sanction the attorney, it criticized her for making an argument that had been rejected.

OPR conducted an investigation and found that the DOJ attorney violated her duty of competence when she presented a legal argument to the court that previously had been rejected by that circuit. OPR concluded, however, that the DOJ attorney did not intentionally commit professional misconduct because she did not know that the argument had been rejected. OPR also concluded that the DOJ attorney did not act in reckless disregard of her obligation of competence because the argument made in her brief was based on past briefs of recent vintage that had been filed in the same court on the same subject matter and reviewed by supervisors. OPR noted that the court, when ruling on the two prior briefs, did not mention that the argument had been rejected by the circuit. In fact, in one of the cases the court granted the government's motion. OPR also concluded that the DOJ attorney did not exercise poor judgment. OPR found that the attorney conducted a Westlaw search for recent, pertinent cases before she filed the government's response to the petitioner's motion. Although the DOJ attorney missed the new governing case, OPR determined that the parameters of the search were not unreasonable given the attorney's extremely heavy caseload.

6. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for making inflammatory and emotionally provocative remarks during closing argument in a murder case. The DOJ attorney stated that the victim had been tortured and ended up in a cold grave, and described the shooting as horrific. Although the court found that the DOJ attorney's remarks were improper, the court affirmed the defendant's conviction because it found that the government's evidence against the defendant was overwhelming.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR found that

the comments did not clearly and unambiguously violate the prohibition against making inflammatory appeals to the jury because governing case law recognized that evidence of deadly attacks did not have to be sanitized for the jury, and that such cases had an inherently emotional element. OPR found that several witnesses described the victim's slow and painful death in detail and, as such, there was abundant evidence at trial about the circumstances of the murder. Because the DOJ attorney's characterizations of the defendant's actions were based on the underlying facts, there was little likelihood that the attorney's remarks raised a risk of inflaming the jury. OPR found further that the DOJ attorney's comment about the victim having ended up in a cold grave was made in rebuttal argument in response to defense counsel's comments, and the attorney had little time to consider the appropriateness of the statement. Under these circumstances, OPR found that the DOJ attorney's comments did not reflect poor judgment because they were within the range of what the Department may reasonably expect an attorney exercising good judgment to make.

7. *Discovery Violation.* A district court found that a DOJ attorney failed to disclose exculpatory information during the death penalty phase of a Federal Death Penalty Act proceeding. The defendant pleaded guilty to killing a cell mate in a federal correctional facility. The investigation of the murder, which was conducted by the FBI, resulted in the preparation of several reports that suggested that the death of the inmate was accidental. The FBI reports were not produced to the defense during the guilt or penalty phases of trial. The reports first became known to the defense during cross-examination of the FBI agent during a post-conviction proceeding to set aside the death penalty conviction. The district court found that the reports contained exculpatory information that should have been disclosed during the penalty phase of the case and granted the defendant's post-conviction relief to set aside the death penalty conviction.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct, but exercised poor judgment when she failed to disclose the FBI reports to the defendant during the penalty phase of the case. OPR found that the information contained in the FBI reports was exculpatory because it went to the issue of whether the killing was a result of substantial planning and premeditation, an aggravating factor that must be established in death penalty verdicts under the Federal Death Penalty Act. Despite the exculpatory nature of the reports, OPR found that the DOJ attorney did not engage in professional misconduct because governing case law at the time of the penalty proceeding did not require the government to disclose exculpatory information that was either known to the defense or could readily be obtained by

the defense. Because the defense had access to the witnesses who were the subjects of the FBI reports, OPR found that the DOJ attorney did not violate a clear and unambiguous rule. Although OPR found that the DOJ attorney did not engage in professional misconduct, OPR concluded that the DOJ attorney exercised poor judgment. OPR found that in a death penalty proceeding where the defendant's life is at issue, a DOJ attorney exercising good judgment would, at a minimum, have disclosed the reports to the court for *in camera* review to determine whether the reports had to be produced. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

8. *Violation of a Plea Agreement.* A court of appeals found that a DOJ attorney violated a plea agreement by attacking the defendant's credibility during sentencing.

OPR conducted an investigation and concluded that the DOJ attorney made an excusable mistake by responding to questions from the district court judge at sentencing regarding certain statements made by the defendant during sentencing. During sentencing the court asked the defendant about certain facts relating to the reason why the defendant traveled a long distance to the location of the drug transaction for which the defendant was charged and to which he pled guilty. The plea agreement contained a factual statement that varied from the statement made by the defendant during sentencing and, in response to questions from the court about the discrepancy, the DOJ attorney made comments that challenged the defendant's responses to the court. OPR noted that the defendant's attorney did not object to the comments made by the DOJ attorney at the time they were made at the sentencing.

Because the language of the plea agreement was subject to several reasonable interpretations, OPR found that the DOJ attorney's conduct did not violate a clear and unambiguous obligation. OPR also noted that the DOJ attorney's comments about the defendant's credibility were made in direct response to the court's questions. For these reasons, OPR concluded that the DOJ attorney did not commit professional misconduct but made an excusable mistake.

9. *Failure to Maintain Active Bar Membership.* A DOJ component reported to OPR that a DOJ attorney had been practicing law without a license, in violation of the statutory requirement that Department attorneys maintain an active bar membership in at least one state at all times.

OPR conducted an investigation and found that the DOJ attorney had been practicing law without a license since 2003, following the suspension of her membership in the state bar for failing to comply with continuing legal education requirements. OPR found that the DOJ attorney had learned in 2004 that her bar license had been suspended, but took no steps to reinstate herself until her office learned in 2009 about the lapsed membership. OPR also found that between 2005 and 2008, the DOJ attorney certified to the Department on her annual Attorney Bar Re-Certification Forms, in which Department attorneys attest that they are active members of at least one state bar, that she was an active member of a state when she knew that she was not.

OPR concluded that the DOJ attorney committed intentional professional misconduct by knowingly failing to maintain an active bar membership in any state bar, in violation of her statutory obligation and Department policy, for more than five years. OPR also concluded that the DOJ attorney committed intentional professional misconduct by knowingly certifying that she was an active member of a state bar, when she was not, in violation of the Department's bar certification requirement.

The DOJ attorney was terminated from employment with the Department, and the appropriate state bar was notified of the results of OPR's investigation. OPR is cooperating with the state bar's investigation of the attorney.

10. *Constitutional Violation.* A district court dismissed the indictment of a foreign national who had been indicted on several counts of immigration fraud, including making false statements in his citizenship application. In dismissing the indictment, the court stated that the government engaged in deception by improperly using the defendant's naturalization interview to further a criminal case against the defendant. The court found that the naturalization interview had been a pretext for the government's criminal investigation. The government appealed the dismissal, and an appellate court later overturned the district court's findings.

OPR conducted an investigation and concluded that the DOJ attorneys who were involved in the case did not engage in professional misconduct or exercise poor judgment. OPR found that during the course of parallel civil and criminal proceedings, the government may not: (1) affirmatively misrepresent the nature of the civil investigation, and (2) may not use the civil investigation solely as a pretext for a criminal investigation. OPR found that the DOJ attorneys did not make any affirmative misrepresentations to the defendant. OPR noted that the

defendant knew when he filed his naturalization application that any false statements made during the process exposed him to potential criminal charges. Specifically, the naturalization application cautions applicants that information they provide is furnished under penalty of perjury. In addition, after filing the form, an applicant must review the information with an adjudications officer and attest to the veracity of the information under penalty of perjury. As a result, the defendant swore twice to the accuracy of the information in his application.

OPR also found no evidence that affirmative misrepresentations were made during the course of the naturalization interview. OPR determined that the defendant clearly understood that he faced possible criminal exposure for false statements made during the interview. The defendant was placed under oath and informed that he could exercise his right against self-incrimination if a truthful answer would tend to incriminate him. The defendant was instructed that lying could subject him to criminal penalties, and any statement he gave could be used against him in a legal or administrative proceeding. The fact that the defendant elected to assert his right against self-incrimination several times during the course of the interview evidenced his understanding of the potential criminal implications of the interview. Further, OPR found no evidence that DOJ attorneys took measures to hide the existence of an ongoing criminal investigation. OPR also found the naturalization interview was conducted for valid reasons and, under these circumstances, was not improperly used as a pretext to further a criminal investigation. Accordingly, OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment.

11. *Batson Violation.* Following a defendant's trial and conviction for embezzlement, the district court found, *sua sponte*, that the DOJ attorneys who prosecuted the case used racial and ethnic criteria in the exercise of the government's peremptory challenges during jury selection, in violation of *Batson* ■. *Kentucky*. The court based its finding on the government's use of peremptory challenges to strike minority jurors.

OPR conducted an investigation. During the course of the investigation, the court of appeals reversed the decision of the district court, finding there was no discriminatory intent in the exercise of the government's peremptory challenges and thus no *Batson* violation. Consistent with the court of appeals decision, OPR found that during jury selection the DOJ attorneys did not commit a *Batson* violation or take any action based on an improper discriminatory motive. OPR came to this conclusion because, as the court of appeals found, the DOJ attorneys provided non-discriminatory reasons for the peremptory challenges, and

documentation to support those reasons. Given these findings, OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment in this case.

12. *Misrepresentation/Misleading the Court.* A district court criticized a DOJ attorney for failing to disclose that a government witness had retired from government service before designating the witness as a party representative under Federal Rule of Evidence 615. In addition, the court found that the DOJ attorney misrepresented facts when he briefed the court about the retired witness's right to serve as a party representative.

OPR conducted an investigation and found that shortly after the trial began, plaintiff's counsel objected to the fact that the government's party representative had retired from government service. Plaintiff's counsel argued that due to the witness's retired status, the witness should be excluded from the courtroom prior to his testimony. The parties had invoked the rule on witnesses, prohibiting witnesses in the case from being present in the courtroom prior to their testimony. The party representative was allowed to be present prior to his testimony to assist the government. Plaintiffs argued that his retired status precluded him from serving as a representative of the government. The judge excluded the witness from the courtroom, but afforded the government an opportunity to submit a brief on whether the retired witness could serve as a party representative. The DOJ attorney filed a brief arguing that the plaintiff had waived the right to object to the witness because the government disclosed that the witness was retired when it designated him as its party representative. In fact, however, the government had not done so.

OPR conducted interviews and determined that the DOJ attorney (mistakenly) believed that he had informed the plaintiff about the witness's retiree status either in pretrial submissions or at the pretrial conference. OPR found, however, that before filing the court-ordered brief, the DOJ attorney did not review the witness list or his notes, or order a transcript of the pretrial conference. OPR found that upon reviewing the draft brief, the DOJ attorney's supervisor asked the attorney whether he was certain that the government had informed the plaintiff about the witness's retired status, and the attorney responded affirmatively. Accordingly, the supervisor instructed the DOJ attorney to emphasize the waiver issue in the government's brief. The plaintiff responded to the brief by denying that the government had identified the witness's retired status, and attached an excerpt from the pretrial conference showing that there was no mention about the witness's status. The DOJ attorney's supervisor, upon reading plaintiff's

response, again asked the DOJ attorney if he had identified the witness's retired status. The DOJ attorney conceded that he must not have done so. The supervisor subsequently directed the DOJ attorney to withdraw the waiver argument.

In addressing the status of the witness at trial, the DOJ attorney advised the court that, to move the debate along, the government would withdraw the waiver argument. The DOJ attorney did not advise the court that the factual representations in the government's brief supporting the waiver argument had been inaccurate. The court subsequently entered an order to show cause why the DOJ attorney should not be sanctioned under a local rule which provided that allegations and facts contained in a brief must have evidentiary support. In a brief responding to the order to show cause, the government finally disclosed the fact that it withdrew the waiver argument because the DOJ attorney had been mistaken as to whether he had advised the plaintiff about the witness's status. The court held that the DOJ attorney misled the court and the plaintiff by not identifying the party representative as retired. The court awarded the plaintiff almost \$20,000 in attorney's fees and costs.

As a result of its investigation, OPR concluded that the DOJ attorney did not purposely or knowingly mislead the court and, thus, did not intentionally commit professional misconduct. OPR concluded, however, that the DOJ attorney committed professional misconduct by acting in reckless disregard of his duty of candor when he told the court that he had identified to the plaintiff the witness' status as a retiree when, in fact, he had not done so. OPR came to this conclusion because it found that before filing the brief, the DOJ attorney had a duty under local court rules and applicable bar rules to take reasonable measures to ensure that all factual assertions were correct. The DOJ attorney, however, made no attempt to obtain or consult a transcript of the pretrial conference, and he did not search for and review his notes. OPR observed that even after being pressed on the point by his supervisor, the DOJ attorney did not take any of these precautionary measures. OPR also found that the DOJ attorney exhibited a reckless disregard toward his duty of candor in the manner in which he withdrew the waiver argument. The DOJ attorney did not tell the court that his previous assertions had been incorrect, and he did not explain that the error was the basis for the government's withdrawal of the waiver argument. Rather, the DOJ attorney implied that the government was withdrawing its waiver argument simply to move things along so the issue could be resolved more expeditiously.

OPR recommended a range of discipline from a written reprimand to a one-day suspension.

13. *Negligence/Dereliction of Duty.* A district court criticized a DOJ attorney for missing a court-ordered deadline for filing a brief. The court also criticized the brief on substantive grounds, stating that the brief failed to adequately address the issues before the court. The court found that the DOJ attorney did not cite to the factual record or any legal authority in the brief, but instead relied on her memory and a general review of the transcript.

OPR conducted an investigation and found that the DOJ attorney was directed by court order to file a brief on a sentencing guideline issue by a certain date, and he failed to do so. After the court's clerk left a message for the attorney and contacted her supervisor, the DOJ attorney filed the brief a week late. OPR found that the DOJ attorney's practice was to record filing deadlines on her electronic calendar. When OPR asked the attorney to search her calendar for an entry for the sentencing brief, the attorney found a notation about the brief on the date that it was actually filed, not the original due date. Based on this information, OPR concluded that the attorney either failed to enter the deadline on her calendar, and later noted it on the date she actually filed the brief, or made the notation on the wrong date. Because the investigation showed that the DOJ attorney's more normal practice was to record court-ordered deadlines in her calendar, OPR found that her failure to record it correctly on her electronic calendar in this particular case did not constitute professional misconduct. OPR found, however, that the DOJ attorney exercised poor judgment by failing to properly record and adhere to the court's briefing deadline. The attorney's supervisor previously had counseled her about the importance of meeting deadlines. Given this history, OPR found that the attorney's failure to have a consistently reliable system for recording and adhering to deadlines was in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.

OPR also concluded that the DOJ attorney did not engage in professional misconduct by submitting a short, cursory brief. Although the brief was not a model pleading, OPR found that the brief cited to pertinent sentencing guideline provisions and explained why the court should adhere to those provisions. OPR found that this did not amount to professional misconduct, but that the DOJ attorney's failure to more fully research and discuss the relevant facts and law in the brief constituted the exercise of poor judgment. The brief was overdue and the DOJ attorney was in a rush to file something with the court, but the DOJ attorney

should have taken the necessary time to provide the court with a more useful explanation of the applicable facts and law. OPR referred its findings of poor judgment to the DOJ attorney's employing component for consideration in a management context.

14. *Improper Closing Argument.* In a post-trial proceeding, a district court entered a judgment of acquittal on three counts of the indictment, criticizing the DOJ attorney for misstating the legal standard during closing argument, and for using derogatory terms to refer to the defendant and to a defense expert.

OPR conducted an investigation and found that the DOJ attorney's formulation of the legal standard was substantially similar to the court's instruction to the jury. OPR noted that the DOJ attorney recited his understanding of the legal standard frequently during closing argument, and neither the defendant nor the court objected. Significantly, the defendant did not raise this as an issue in his post-trial motions. Rather, the court, *sua sponte*, raised this as an issue to support its decision to grant a new trial despite the untimeliness of the defendant's motion. Because the DOJ attorney's recitation of the legal standard was almost identical to the court's instruction on the issue, and neither the defendant nor the court objected to the instructions during closing argument, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in the manner in which he characterized the legal standard.

OPR also concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment by allegedly using derogatory terms in closing argument to refer to the defendant and a defense expert. OPR found that where, as here, a nexus existed between the prosecutor's comment and the evidence produced at trial, there was no clear prohibition against the use of disparaging language in a closing argument. OPR also found that the comment referring to the defense expert was blunt, but that it accurately reflected the fact that the defense expert had been paid for his opinion and trial appearance. OPR also noted that the reference to the defendant was made in the context of describing the nature of the crime with which the defendant was charged, which was fraud. OPR found further that the DOJ attorney did not dwell on these two characterizations, and the remarks constituted a small portion of the DOJ attorney's hour-long closing and rebuttal arguments.

15. *Engaging in a Pattern of Conduct that Violated Travel Regulations.* A former DOJ attorney reported to OPR and OIG that a DOJ attorney with whom she

previously worked initiated litigation in a jurisdiction where the DOJ attorney had a vacation home, in order for the attorney to collect government per diem while vacationing there. The former DOJ attorney alleged that the litigation was baseless and that a DOJ supervisor knowingly approved the scheme. After consulting with OIG, OPR initiated an investigation because the travel fraud allegations were related to the litigation.

OPR conducted an investigation and found that the litigation was not baseless because it advanced legitimate governmental interests. As such, it was not brought solely so the DOJ attorney could claim per diem while at her vacation home. OPR concluded, however, that the DOJ attorney committed misconduct because her presence at the vacation home was not related to work. OPR also found that the DOJ attorney committed misconduct by submitting false travel vouchers. In addition, OPR concluded that the supervisor, who authorized the travel, committed misconduct by allowing the DOJ attorney to violate Department travel regulations.

OPR recommended a range of discipline from a 14-day suspension without pay to termination for the DOJ attorney. The DOJ attorney served a 14-day suspension without pay, made restitution, was demoted with no change in grade or pay, and was transferred to a different section within the component. OPR recommended a range of discipline for the supervisor from a 14-day suspension to termination. The supervisor retired from the Department before discipline could be imposed.

OPR notified the appropriate state bar authorities of its findings of misconduct with respect to the DOJ attorney. OPR has not yet notified the appropriate state bar authorities of its findings of misconduct with respect to the supervisor because she is challenging OPR's findings and consequent bar notification with the Office of the Deputy Attorney General.

16. *Unauthorized Disclosure of Non-Public Law Enforcement Information.* The FBI referred to OPR allegations that a DOJ attorney improperly disclosed non-public law enforcement information regarding two pending criminal matters to persons who were not authorized to receive such information. According to the FBI, a meeting was held between FBI and Department representatives to discuss pending public corruption investigations. One of the matters discussed was an investigation of a political figure. The DOJ attorney allegedly stated that he was aware of the sensitivity of the political figure case and had discussed it with two United States Senators. In the second matter, the FBI alleged that the same DOJ

attorney attended a meeting concerning a fraud scheme whose victims were affiliated with a particular religious organization. During the meeting, the DOJ attorney allegedly stated that he and a high-ranking state official had been pressured by officials from the religious organization to bring charges, and the DOJ attorney directed another DOJ attorney to pursue the case expeditiously. The FBI thought the DOJ attorneys might be improperly influenced by his affiliation with the religious organization.

OPR conducted an investigation. During the course of scheduling interviews, the FBI told OPR that the DOJ attorney may have been involved in a third incident involving the possible disclosure of non-public law enforcement information. The FBI reported that a highly placed confidential source within the state legislature told the FBI that the DOJ attorney and a state official briefed certain members of the state legislature about the status of a fraud investigation. According to the source, either the DOJ official or the state official disclosed at the briefing the fact that unnamed state legislators were under investigation. OPR included this third alleged statement in its investigation.

After interviewing the DOJ attorney, state officials, FBI agents, and others who attended the meetings in question, OPR found insufficient evidence that the DOJ attorney disclosed non-public, law enforcement information to persons who were not authorized to receive it. With respect to the first alleged statement, the DOJ attorney adamantly denied saying at the meeting that he had spoken with, or would need to speak with the Senators about the public corruption investigation. The DOJ attorney also categorically denied that he had spoken with, or would speak with, the Senators on the subject. OPR found no independent evidence to confirm or suggest that the DOJ attorney spoke with or consulted the Senators about the investigation. With respect to the second alleged statement, OPR concluded that the DOJ attorney's comments, on their face, were not improper. There was nothing improper about a DOJ attorney urging a colleague to resolve the case as expeditiously as the circumstances warrant. There was no allegation that the DOJ attorney disclosed any non-public information pertaining to the fraud investigation of the religious organizations, and OPR did not find any evidence of such a disclosure. With respect to the third alleged statement, OPR found insufficient evidence to conclude that the DOJ attorney told state legislators that unnamed legislators were under investigation. The DOJ official denied making any such statement, and OPR found no evidence to the contrary.

Under these circumstances, OPR concluded that the DOJ official did not commit professional misconduct with respect to any of the three alleged

disclosures. However – as to the third meeting – although OPR found insufficient evidence that the DOJ official made an unauthorized disclosure to state legislators, OPR concluded that the DOJ attorney exercised poor judgment by agreeing to attend, and by attending, the meeting with the state legislators without consulting first with the Executive Office for U.S. Attorneys, and without informing the DOJ attorneys who were directly working on the case of his plans to attend. OPR referred its finding of poor judgment to the DOJ attorney’s employing component for consideration in a management context.

17. *Improper Outside Practice of Law.* A DOJ attorney (complainant) reported to OPR that another DOJ attorney improperly engaged in the practice of law. The complainant, who was prosecuting the DOJ attorney’s sister on federal charges, stated that this concern arose after she listened to taped telephone conversations between the DOJ attorney and the DOJ attorney’s sister. Based on the conversations, the complainant believed that the DOJ attorney might have improperly engaged in the defense of her sister, in violation of Department regulations and contrary to Ethics Office advice.

OPR conducted an investigation and reviewed the taped telephone conversations between the DOJ attorney and her sister. OPR found that the telephone calls did not contain any evidence of the improper practice of law. OPR found that the two sisters discussed the need to obtain counsel, the need to obtain money to pay for counsel, and personal matters. None of these issues involved the practice of law. Rather, OPR found that the conversations were of the type that would occur between a non-lawyer sibling who had been contacted by her sister from jail.

OPR found further that the DOJ attorney discussed her sister’s situation with her component’s ethics advisor shortly after the arrest. The DOJ attorney asked the ethics advisor whether the attorney could appear at the detention hearing as a character witness. The ethics advisor, in turn, contacted the Department Ethics Office to ascertain what actions were permissible. The Director of the Ethics Office told the ethics advisor that the attorney could testify with certain caveats, *e.g.*, the attorney could say where she works, but she could not flaunt her position at the Department. OPR found that although permitted to do so, the DOJ attorney did not appear at a hearing on behalf of her sister. Rather, the sister’s counsel proffered at a detention hearing that the DOJ attorney was employed by the Department of Justice, that her testimony would be supportive of her sister, and that she did not believe her sister was a flight risk or a danger to the community. Because the DOJ attorney sought advice and acted

within the scope of that advice, OPR concluded that the DOJ attorney did not exceed the permissible boundaries set by the Department and did not commit professional misconduct or exercise poor judgment.

18. *Improper Handling of Classified Material.* A DOJ component reported to OPR that a DOJ attorney mishandled classified information when he shipped home boxes of files from his detail in a foreign country (Country X) that contained classified material. The DOJ component learned of the shipment when a large plastic container sent via First Class mail from Country X to the DOJ attorney's home shattered in transit, and postal workers discovered 800 to 1000 pages of documents, some of which were stamped "SECRET" and "U.S. Embassy in [capital of Country X]."

OPR conducted an investigation and found that, upon the completion of a two-year detail in Country X, the DOJ attorney requested that several boxes of documents be sent to him at his home address. During his detail, the DOJ attorney received a large number of documents every day, some of which were classified. Because the office had no system for maintaining records, and inadequate facilities for storing classified materials, which the DOJ attorney had brought to the attention of his supervisors, to no avail, when the DOJ attorney was finished with a document his normal practice was to place it in a pile on his desk. After the documents in the pile became dated, he moved the piles into boxes that were stored in the hall outside of his office. These boxes, which contained both classified and unclassified documents, subsequently were shipped to the DOJ attorney's home.

OPR found that the DOJ attorney did not intend to ship classified materials. He did not consider that the boxes might contain some classified information when he decided to have them shipped to his home; he was exhausted from trying to complete his assignment under arduous circumstances, and his principal concern at the time was not to leave the documents in Country X. OPR found that the DOJ attorney sent the documents to his home because there was no secure place to store them in the embassy, he wanted to have the documents in case he was required to testify before Congress about the programs that he worked on in Country X, and he had been asked by the State Department to provide a historical narrative of what took place during his time in Country X and needed the documents to comply with that request. Under the unique circumstances presented in this case, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. Given the lack of a formal system for maintaining documents and the chaos of a war zone, OPR found that

the DOJ attorney's conduct in sending documents without complying with the requirements for shipping classified materials constituted an excusable mistake.

19. *Breach of Plea Agreement.* A district court criticized a DOJ attorney for failing to adhere to the terms of a plea agreement. The court found that the DOJ attorney acted in bad faith when she filed a motion for a downward departure from the United States Sentencing Guidelines (Guidelines) for a cooperating defendant on Count 1 of the indictment, but refused to file a motion for a downward departure from a mandatory minimum sentence on Count 2 of the indictment. At sentencing, the court departed downward from the statutory mandatory minimum sentence on Count 2. The court departed because it found that the plea agreement was ambiguous as to whether the government had to file a motion for a downward departure on Count 2 and, as such, the agreement must be construed against the government. The government moved for reconsideration, and the court issued a written order affirming its downward departure on Count 2, but deleting the finding of bad faith.

OPR conducted an investigation and found that the parties had agreed in a written plea agreement that the advisory guideline range for imprisonment on Count 1 was 135-168 months imprisonment. The parties acknowledged in the agreement that the guideline range for Count 2 was a consecutive five-year mandatory term of imprisonment, pursuant to statute. The agreement specified that the aggregate sentencing range for both counts was 195 to 228 months' imprisonment. The plea agreement also specified that the defendant would cooperate with the government and, if the government determined that he had provided substantial assistance, the government would move at sentencing for a downward departure from the Guidelines as provided for in U.S.S.G. § 5K1.1 and/or the statutory mandatory minimum term of imprisonment pursuant to 18 U.S.C. § 3553(e).

At sentencing, the DOJ attorney filed a motion for a downward reduction of 12 levels, but limited its motion to Count 1 of the indictment. Thus, the defendant was still subject to the consecutive five-year mandatory minimum term of imprisonment under Count 2. Defense counsel argued that the government's attempt to limit the motion to Count 1 violated the plea agreement. The court found that the language of the plea agreement was ambiguous concerning the government's right to limit its downward departure motion to Count 1, and thus departed downward from the statutory mandatory minimum sentence on Count 2.

OPR found that the DOJ attorney did not breach the plea agreement. OPR determined, pursuant to the terms of the plea agreement, that the government had the sole discretion to decide whether to move for a downward departure under the guidelines and/or the mandatory minimum term of imprisonment. The disjunctive “and/or” language in the plea agreement made clear that the government could file a motion for a downward departure from the Guidelines, or the government could file a motion for a downward departure from both the Guidelines and the mandatory minimum. OPR also found no evidence of bad faith. OPR determined that the DOJ attorney reasonably believed that the defendant’s cooperation, although substantial, did not merit a departure below the five-year mandatory sentence. Given these circumstances, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in this matter.

20. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for making improper statements during closing argument. The defendant was arrested and charged with two counts of conspiring to distribute five or more kilograms of cocaine. The court of appeals criticized the DOJ attorney for injecting his personal beliefs into the closing argument by stating that he (“I”) felt comfortable that the government had proven its case beyond a reasonable doubt, and he (“I”) had proven the conspiracy to distribute cocaine. The court also criticized the DOJ attorney for telling the jurors at the close of summation that they should uphold the law, their duty, and find the defendant guilty. Although the court found the statements to be improper, the court concluded that the evidence of the defendant’s guilt was overwhelming and affirmed the defendant’s conviction.

OPR conducted an investigation. The DOJ attorney told OPR, as to the interjection of his personal beliefs, that he was merely trying to emphasize the evidence that the government had introduced in support of the drug charges against the defendant. In the heat of closing argument, and without prior planning, he inadvertently added his personal views. The DOJ attorney told OPR, as to the remark that the jurors should uphold their duty and find the defendant guilty, that he was not even aware that he had made this statement. The DOJ attorney also told OPR that he believed that he had repeatedly emphasized the evidence supporting the defendant’s guilt during his closing argument.

OPR credited the DOJ attorney’s explanations and found that the improper statements were inadvertent in nature. Of pertinence to this finding was the fact that this was the DOJ attorney’s first trial in federal court, and the DOJ attorney

had extensively prepared for trial. OPR found that the DOJ attorney had prepared a detailed outline of his summation prior to trial to ensure that he clearly communicated the evidence to the jurors. He also had prepared a power point presentation for the jurors and asked a supervisor to review his summation prior to trial. The statements that the court of appeals criticized had been spontaneous and were not a part of his prepared remarks and presentation. Because of the DOJ attorney's inexperience, his attempt to properly prepare for closing argument, and the impromptu and inadvertent nature of the improper statements, OPR concluded that the DOJ attorney made an excusable mistake.

21. *Contact with a Represented Person.* A district court ruled that a DOJ attorney violated Rule 4.2 of the Rules of Professional Conduct by allowing the defendant to testify before a grand jury without first obtaining the defendant's counsel's consent. Interpreting Rule 4.2, the court held that the government should not engage in pre-indictment contact with a represented person, but the court denied the defendant's motion to dismiss the indictment because the contact did not violate the defendant's Sixth Amendment rights.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. The DOJ attorney reasonably believed the case agent's representations that opposing counsel was aware of and had consented to his client's grand jury appearance. The DOJ attorney's reliance on the case agent was based upon more than a decade of working with the agent, who had previously proven to be careful and accurate in his representations. However, unbeknownst to the government, the agent had entered into a personal relationship with the defendant and thereafter aligned himself with the defendant's cause. The case agent subsequently resigned. In addition, OPR found that opposing counsel was aware that his client was going to testify before the grand jury, and had not objected. Under the circumstances, OPR found no professional misconduct or poor judgment.

22. *Improper Cross-Examination.* A court of appeals criticized a DOJ attorney's use of findings in a related civil case to impeach the defendant in a criminal prosecution. The defendant was charged with mail fraud involving a pyramid investment scheme, and the jury rejected his good-faith defense that he too was a victim of the scheme, and that he had filed civil lawsuits to recover the losses. At the time of the criminal trial, the judge in one of the defendant's civil lawsuits had made findings in preliminary proceedings that rejected the defendant's factual claims, enjoined his recovery efforts, held him in contempt, and found his litigation claims deceitful. The DOJ attorney in the criminal case used those

findings from the civil litigation in his cross-examination of defense witnesses, including the defendant, to undermine the good-faith defense.

The appellate court ruled that the use of the adverse civil findings to impeach the defendant in the criminal case violated Federal Rules of Evidence 403 (Exclusion of Relevant Evidence on Grounds of Prejudice) and 802 (Hearsay Rule), and that the government's use of judicial findings from the civil case to undermine the defendant's theory of the case could unfairly prejudice the jury against the defendant. The court upheld the conviction, however, because other evidence against the defendant was overwhelming.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. He did not use the adverse findings from the civil litigation in his case-in-chief, and he advised the court and the defense that he would use the findings in cross-examination if the defendant raised the civil litigation as a defense. Neither the court nor the defendant objected to the DOJ attorney's proposed course of action. The defendant then placed the civil litigation directly at issue by testifying that he had filed the civil lawsuits to recover losses victims sustained in the fraud scheme for which he was indicted. The DOJ attorney used the adverse civil findings in cross-examination, defense counsel did not object, and the court did not rule *sua sponte* that the civil findings were more prejudicial than probative under Rule 403. In addition, defense counsel used the findings himself on redirect examination of the defendant.

Under these circumstances, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment, but rather made an excusable mistake when he quoted the judge's findings in the civil litigation to cross-examine the defendant and other defense witnesses, instead of restricting the number and focus of his questions to his non-hearsay objective, which was to show that the defendant's expectation of a favorable outcome in the civil suits was unlikely.

23. *Immigration Judge, Abuse of Authority.* A court of appeals criticized a DOJ immigration judge (IJ) for basing a decision on speculation and conjecture concerning conditions in the respondent's country. The court also found that the IJ erred by relying on the best evidence rule to exclude certain documents offered by the respondent. The court found that the IJ should not have rejected documentary evidence on the ground that the records were not authenticated,

because the pertinent regulation concerning authentication did not present an absolute bar to the introduction of nonconforming documents.

OPR conducted an investigation and concluded that the IJ did not engage in professional misconduct or exercise poor judgment. In reaching this conclusion, OPR found that the IJ did not impermissibly speculate about the availability of certain evidence in the respondent's country. OPR concluded that the IJ's rejection of certain documentary evidence was consistent with the requirements set forth by case law and the BIA. OPR noted that the IJ identified the missing evidence; showed that the evidence was reasonably available; and assessed the respondent's reasons for not furnishing it. The IJ also pointed out that the respondent's testimony concerning his own evidence was not credible. OPR concluded that the IJ did not act improperly by rejecting the respondent's evidence. Similarly, the IJ did not err in citing to the best evidence rule. OPR also noted that the IJ made her concerns about the reliability of certain documents and the need to supplement the record known to the respondent long before the merits hearing.

OPR reviewed the tapes of the proceedings and found that the IJ was stern but was not unprofessional in how she treated the respondent. Nevertheless, because the IJ acknowledged that she had certain shortcomings in this area, OPR referred that issue to the Executive Office for Immigration Review as a management matter.

24. *Failure to Diligently Represent the Interests of the Client.* A DOJ component reported to OPR that a district court dismissed a complaint on the grounds that the government failed to timely effectuate service of process on the defendant; failed to respond to the court's order to show cause; and failed to respond to the court's follow-up inquiries concerning whether service of process had been effectuated on the defendant.

The government filed a civil complaint against the defendant seeking to recover a federal income tax refund that was erroneously sent to him. Upon filing the civil complaint just prior to the expiration of the governing statute of limitations, the government had 120 days to serve the defendant with a summons and complaint. Despite reasonable efforts by the DOJ attorney to locate the defendant and serve him within the 120-day period, the time for service of process lapsed and the DOJ attorney did not file a motion for enlargement of time to serve him. Thereafter, the district court issued an order to show cause directing the government to state why the complaint should not be dismissed without prejudice

for failure to timely serve the defendant. The DOJ attorney failed to respond to the order.

When the district court did not receive a response, court staff telephoned the DOJ attorney and left a message. The DOJ attorney returned the telephone call and, at the attorney's request, the court gave him additional time to respond. When the court did not receive a response on the new due date, court staff called the DOJ attorney two more times and left messages for him. The DOJ attorney did not return the telephone calls. Thereafter, the court dismissed the complaint without prejudice. However, because the statute of limitations for filing the suit had run, the government could not refile the complaint and collect the erroneous refund from the defendant, even if it could have located and served him.

OPR conducted an investigation, and concluded that the DOJ attorney committed professional misconduct by engaging in a course of conduct in reckless disregard of his obligations to diligently represent his client, the government, and to permit the client to make informed decisions regarding the representation, when he failed to file a motion for enlargement of time to serve the defendant prior to the expiration of the 120-day period; failed to comply with the district court's order to show cause; and failed to respond to the court's follow-up telephonic inquiries. OPR made no recommendation on discipline because the DOJ attorney retired during the investigation.

OPR notified the appropriate state bar authorities of its finding of professional misconduct.

25. *Civil Discovery Violations.* A district court ordered a DOJ attorney to share with plaintiff's counsel the cost of the out-of-state plaintiff's travel to the court on the day of trial, when trial had to be postponed because significant discovery issues had not been resolved. The court found that the case was not ready for trial because there had not been formal requests for documents, neither party had raised with the court pending disputes about subpoenas, and the parties had failed to timely address discovery issues relating to the defendant's expert. The court imposed on each party an equal share in the plaintiff's travel costs. The court blamed both the DOJ attorney and the plaintiff's counsel for the delay and criticized both parties for a lack of civility.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR found that the DOJ attorney raised objections to the plaintiff's subpoena in a manner

consistent with the Federal Rules of Civil Procedure, and that the court was given timely notice of the issues related to the subpoena. In addition, we concluded that the delay in identifying and producing certain documents to the defense was attributable to computer problems at the client agency, not to any action of the DOJ attorney.

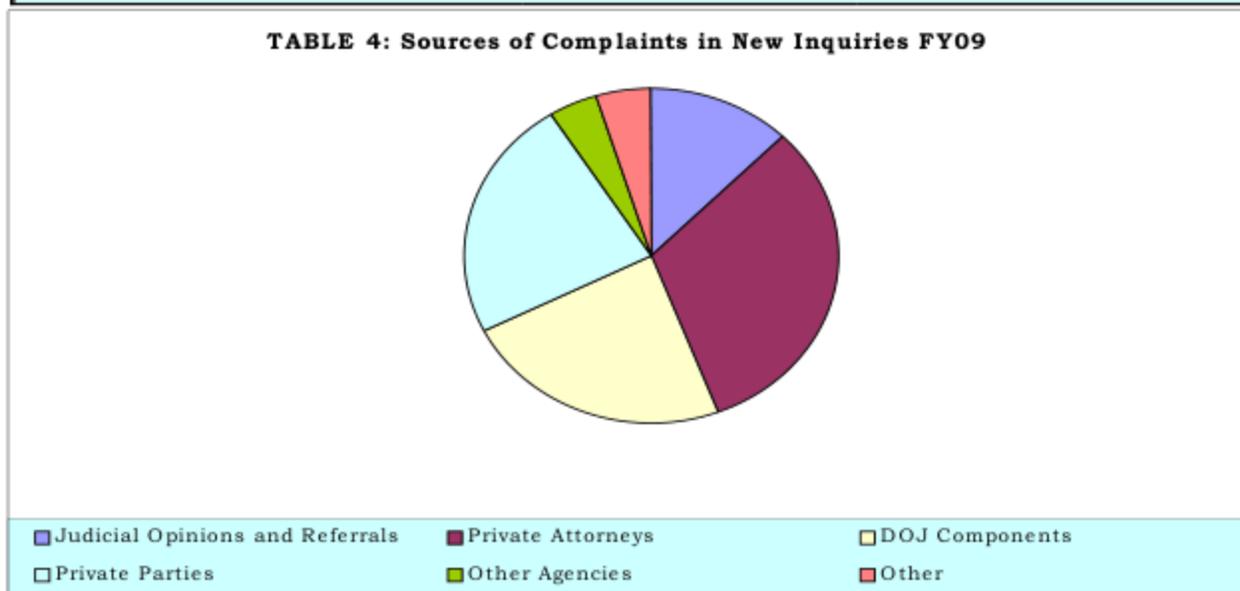
OPR Inquiries in Fiscal Year 2009

Characteristics of Inquiries Opened in Fiscal Year 2009: The sources of the 145 matters designated as inquiries are set forth in Table 4. Two of these matters were later converted to full investigations. The 145 matters do not include an additional 47 matters involving proposed bar notifications on non-Department attorneys.

TABLE 4

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2009		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Judicial opinions & referrals ⁷	18	12.4%
Private attorneys	46	31.7%
Department components	34	23.5%
Private parties	34	23.5%
Other agencies	6	4.1%
Other sources	7	4.8%
Total	145	100.0%

TABLE 4: Sources of Complaints in New Inquiries FY09



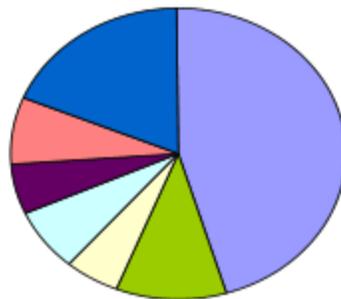
⁷ This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

The nature of the 201 allegations against Department attorneys contained in the 145 inquiries is set forth in Table 5.

TABLE 5

Types of Misconduct Allegations in Inquiries Opened in Fiscal Year 2009		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Abuse of authority, including abuse of prosecutorial discretion	91	45.2%
Improper remarks to a grand jury, during trial, or in pleadings	8	4.0%
Misrepresentation to the court and/or opposing counsel	11	5.5%
Unauthorized disclosure, including Fed. R. Crim. P. 6(e)	15	7.4%
Failure to competently or diligently represent client's interests	1	0.5%
Failure to comply with <i>Brady, Giglio</i> , or Rule 16 discovery	21	10.4%
Failure to comply with court orders or federal rules	6	3.0%
Conflict of interest	5	2.5%
Failure to comply with DOJ rules and regulations	11	5.5%
Interference with defendants' rights	14	7.0%
Lateness (i.e., missed filing dates)	3	1.5%
Lack of fitness to practice law	5	2.5%
Failure to maintain active bar membership	3	1.5%
Whistleblower	4	2.0%
Other	3	1.5%
Total	201	100.0%

TABLE 5: Summary of Misconduct Allegations in New Inquiries FY09



- Abuse of Authority
- Violation of DOJ Rules and Regs
- Misrepresentation
- Other
- Brady, Giglio, Rule 16 Violations
- Interference with Defendants' Rights
- Unauthorized Disclosure

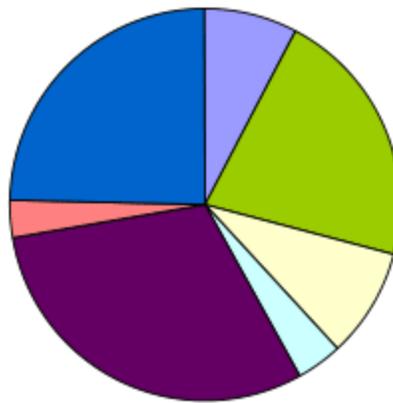
The matters opened as inquiries during fiscal year 2009 were remarkably diverse. At least one of the matters did not involve a complaint against a Department attorney. For example, the inquiry was based on allegations of illegal activity by FBI employees. Other inquiries involved allegations of unauthorized leaks to the media by DOJ attorneys and FBI agents. Thus, only limited comparisons may be made between this data and information regarding OPR investigations.

Inquiries Closed in Fiscal Year 2009: OPR closed a total of 148 inquiries in fiscal year 2009 involving allegations against Department attorneys, and an additional 37 inquiries involving proposed bar notifications on non-Department attorneys. Three of the 148 inquiries were converted to full investigations after evidence gathered in the inquiry indicated that further investigation was required. The remaining 146 matters involved 215 separate allegations of professional misconduct. The manner in which the 215 allegations were resolved as inquiries in fiscal year 2009 is set forth in Table 6.

TABLE 6

Categories of Inquiry Allegations Resolved in Fiscal Year 2009		
Type of Resolution	Number of Occurrences	Percentage of Total
Performance or management matter. Refer to employing component.	2	0.9%
More appropriately handled by another component or agency. Referred.	17	7.9%
Issues previously addressed. No further action required by OPR at this time.	3	1.4%
No merit to matter based on initial review .	46	21.4%
No merit to allegation based on preliminary inquiry.	19	8.8%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	8	3.7%
Converted to an investigation.	3	1.4%
Inquiry closed because further investigation not likely to result in finding of misconduct.	65	30.2%
Matter being monitored.	7	3.4%
Other	45	20.9%
Total	215	100.0%

TABLE 6: Summary of Misconduct Allegations in Resolved Inquiries FY09



Referred Out of OPR
 No Merit Initial Review
 No Merit Preliminary Inquiry

Consolidated with Open Matter
 Inquiry Resolved
 Monitoring

Other

Examples of Inquiries Closed or Converted in Fiscal Year 2009

1. *Unauthorized Disclosure of Law Enforcement Information.* OPR was notified by the Office of the Deputy Attorney General that a media outlet reported that two senior law enforcement officials confirmed that the FBI was investigating a community activist group in connection with allegations of fraud. OPR initiated an inquiry and contacted the FBI to determine who leaked this confidential information to the media. OPR collected information from the FBI and found that the investigation was extremely broad in nature and involved both federal and non-federal law enforcement components in multiple jurisdictions. OPR found further that a search warrant had been executed in one of the jurisdictions, and state officials had made public comments about the warrant. Because OPR determined that the universe of potential subjects was so large, and public statements about the case had been made, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

2. *Bar Notification of OIG Finding of Misconduct.* OPR was notified by OIG that it had completed an investigation of allegations that a Department attorney used his government computer to download pornography off the internet, in violation of DOJ policy. OPR reviewed the facts of the Report in order to determine whether the finding of misconduct should be reported to the Department attorney's state bar. OPR determined that it should, because it represented a possible violation of the applicable rule of professional conduct that prohibits deceitful conduct by attorneys, even if not committed in connection with legal proceedings.

The Department attorney's component imposed discipline on the attorney prior to completion of the OIG Report. After OPR reported the OIG finding to the Department attorney's state bar, the bar closed the matter based on the fact that the Department had already imposed discipline.

3. *Overzealous Prosecution.* OPR received an allegation from a defense attorney that a DOJ attorney engaged in vindictive prosecution against the defense attorney's client, a defendant in a fraud case. The defense attorney alleged that the DOJ attorney instructed agents to interview several of the defendant's acquaintances in an effort to negatively impact the defendant's business reputation. The defense attorney also alleged that the DOJ attorney named his client as an unindicted co-conspirator in a plea agreement in order to damage his client's reputation prior to indictment. Lastly, the defense attorney alleged that

after he complained about the DOJ attorney's conduct to a supervisor, the DOJ attorney engaged in vindictive behavior by demanding a harsh plea and sentence.

OPR initiated an inquiry and requested a written response from the DOJ attorney. The DOJ attorney stated that she instructed agents to interview some of the defendant's acquaintances because the acquaintances were potential victims and fact witnesses in the case. The DOJ attorney admitted that the inclusion of the defendant's name in a plea agreement was a mistake, but stated that she immediately removed the defendant's name from the agreement after learning about the error. The DOJ attorney denied that any of her actions in the case were motivated by animus, and maintained that the sentence she sought was based on the facts of the case and was unrelated to defense attorney's complaint. OPR attempted to contact the defense attorney to arrange an interview to obtain additional information, but despite repeated attempts, the defense attorney did not respond. OPR closed this matter because, in the absence of cooperation by defense counsel, further investigation was not likely to result in a professional misconduct finding.

4. *Duty of Candor.* A DOJ component reported to OPR that during the course of a civil suit filed against the government, the plaintiff complained that DOJ attorneys had not been candid with the court and opposing counsel. OPR initiated an inquiry and found that the DOJ attorneys had moved to dismiss the complaint by asserting the state secrets privilege, and the court granted the government's motion on this basis. After moving to dismiss, the DOJ attorneys learned that information believed to be covered by the privilege had previously been disclosed and, as such, the DOJ attorneys had not been entitled to invoke the privilege. OPR found that immediately upon discovering the disclosure, the DOJ attorneys informed the court about this development and the court reinstated the case. OPR found further that the DOJ attorneys had asserted the state secrets privilege because no one at the government agency they were defending had informed them that the information had been disclosed. Because the DOJ attorneys did not know about the disclosure, and they reasonably relied upon the client agency to alert them to such important developments, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

5. *Unprofessional Behavior.* OPR received an allegation from an attorney representing a law enforcement officer that a DOJ attorney committed professional misconduct by reporting certain conduct by the officer to the officer's agency. The reported conduct resulted in a suspension of the officer's police powers. OPR

initiated an inquiry and found that the DOJ attorney shared information about the officer's actions in direct response to a request for such information by the law enforcement agency for which the officer worked. The agency was investigating the officer for his role in orchestrating the surrender of a defendant with whom the officer had had a prior relationship, and the DOJ attorney possessed relevant knowledge. OPR found that the DOJ attorney had a responsibility to cooperate with the law enforcement agency in its review of the officer's actions, and the DOJ attorney accurately reported what the officer had done. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

6. *Failure to Maintain Active Bar Membership.* A DOJ attorney reported to OPR that his license to practice law had been suspended for a 7-day period, in violation of the statutory requirement that Department attorneys maintain an active bar membership in at least one state at all times. OPR initiated an inquiry and found that the attorney's license was suspended after the state bar did not receive records certifying that the DOJ attorney had fulfilled his yearly continuing legal education (CLE) requirements. The DOJ attorney maintained that he had sent the requisite records to the state bar, but the records got lost in the mail or misplaced by the state bar. OPR found that the DOJ attorney, upon learning about the suspension, immediately informed the bar that he had mailed the report several weeks earlier and provided them with hand-delivered copies of his records. Because the DOJ attorney possessed records showing that he had sent or tried to send his CLE credits as required by the state bar, he was inactive from the bar only for one week, and he made immediate and vigorous efforts to return to active bar membership status once the bar notified him of his suspension, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

7. *Prosecutorial Misconduct.* OPR received an allegation from a member of the public that DOJ attorneys engaged in misconduct in the prosecution and conviction of a defendant. The complainant alleged that the prosecution was unfair because the defendant, an African-American, was prosecuted while white people, having committed equally serious violations, were diverted through the state system. The complainant ascribed the prosecution to the politicization of the litigating component and its alleged policy of targeting influential African-Americans for prosecution. OPR initiated an inquiry and reviewed the pleadings and other materials from the case. OPR found that the defendant pled guilty to the felony charge of conspiracy to obtain a controlled substance for which he knew, based on the negotiated plea agreement, that he faced imprisonment and a fine. OPR also found that there was no evidence that the defendant received

ineffective assistance of counsel or that his plea was entered into unknowingly or involuntarily. There also was no evidence that the defendant believed that the case against him was flawed due to prosecutorial misconduct, and the defendant did not raise any of the issues alleged by the complainant with the court. Because the allegations could have been addressed in the course of litigation, and the court never made a finding of misconduct against the DOJ attorneys, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

8. *Unauthorized Disclosure to Media - 6(e) Material.* A district court entered an order finding that unidentified government officials knowingly violated Federal Rule of Criminal Procedure 6(e) by leaking grand jury information to a local newspaper. The leaked information subsequently appeared as an article in the newspaper. OPR initiated an inquiry and determined that neither the court nor the litigating component could identify any DOJ attorney or employee who may have violated the secrecy requirements of Rule 6(e). OPR also found that a letter from the newspaper's counsel stated that the source of the story which precipitated the court's order was not a person bound by the strictures of Rule 6(e). Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

9. *Improper Coercion/Intimidation of a Witness.* A DOJ attorney reported that a defense attorney alleged that the DOJ attorney and case agents committed prosecutorial misconduct by attempting to intimidate a defense witness. According to the defense attorney, the DOJ attorney and case agents intimidated and threatened the defendant's only witness with arrest, imprisonment, deportation, and other legal consequences if the witness testified on the defendant's behalf at trial. OPR initiated an inquiry and found that the defendant had raised these same issues in his post-trial motions. OPR also found that the court had held a hearing on the matter and rejected the defendant's claims of prosecutorial misconduct. The court also ruled against the defendant's motion for a new trial or dismissal of the charges. Because the allegations had been raised to and rejected by the district court, and there were no other extraordinary circumstances present, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

10. *Abuse of Authority.* OPR received an allegation from the Department of Homeland Security (DHS) that an immigration judge engaged in professional misconduct by demonstrating favoritism toward aliens. As evidence of the alleged favoritism, DHS cited two cases in which the immigration judge purportedly made

telephone calls to state law enforcement authorities in an effort to assist the aliens in challenging their state criminal convictions. OPR initiated an inquiry into this matter and reviewed the tapes from the two proceedings. OPR found that the immigration judge called state law enforcement authorities in an effort to determine the status of the aliens' ongoing state matters, not to help the aliens prevail in those local matters. OPR found further that the status of the state matters was relevant because if the convictions were vacated it would effect the aliens' immigration status. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

11. *Abuse of Prosecutive Authority.* A district court criticized a DOJ attorney for failing to file a motion to reduce the defendant's sentence based on cooperation prior to sentencing, and for seeking an enhancement to the defendant's sentence under 21 U.S.C. § 851 based on a prior drug conviction.

OPR initiated an inquiry and discovered that it was standard practice in that office for DOJ attorneys to file a motion to reduce a defendant's sentence only after the defendant's assistance to the government had been completed. In the case before the court, the defendant had not completed his assistance to the government prior to sentencing. The court, displeased with this practice, ordered the DOJ attorney to respond to interrogatories about the process by which the government determined whether and when to file a motion to reduce a defendant's sentence. Rather than respond to the interrogatories, the government sought a writ of mandamus. The court of appeals granted the government's motion for a writ of mandamus, ruling that the district court's effort to inject itself into the government's process of deciding whether to file a motion to reduce a defendant's sentence impermissibly intruded into the activities and authority of the Executive Branch. On remand, the district court continued to express its disagreement with the government's policy and criticized the DOJ attorney handling the case.

OPR found that the DOJ attorney was following office policy when she refrained from filing a motion to reduce the defendant's sentence because the defendant had not yet provided substantial assistance to the government by testifying in a pending case. OPR also found that the DOJ attorney's decision to seek an enhancement to the defendant's sentence based on a previous conviction was in accordance with office practice and sentencing guidelines. OPR also found that the court's criticism of the DOJ attorney was really a criticism of the office's policies. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Failure to Comply with Federal Rules of Civil Procedure.* A district court ordered the United States to pay \$500 in attorney's fees to the plaintiff in a medical malpractice suit for failing to consult and attempt to resolve a discovery dispute, as required by Federal Rule of Civil Procedure 37, before bringing the issue before the court.

OPR initiated an inquiry and found that the government requested a hearing before the court because plaintiff's expert disclosures failed to clearly identify what documents the experts had reviewed and relied upon in forming their opinions. The court found that the DOJ attorney did not consult with and ask plaintiff's counsel which documents had been reviewed prior to the hearing, and if the attorney had done so he would have learned that plaintiff's experts had reviewed and relied upon all of the documents.

OPR reviewed plaintiff's expert disclosures and found that they did not, as required by Federal Rule of Civil Procedure 26, identify what materials plaintiff's expert witnesses had reviewed prior to forming their opinions. OPR found that upon receiving plaintiff's disclosures, the DOJ attorney objected in writing to the missing information. The DOJ attorney also told plaintiff's counsel on numerous occasions that the disclosures did not identify which documents had been reviewed by the experts in forming their opinions and, as such, did not meet the requirements of Rule 26. Despite these entreaties, plaintiff's counsel would not respond to the government. Given this history, OPR concluded that the DOJ attorney turned to the court only after numerous discussions with plaintiff's counsel failed to produce the information required by the Federal Rules of Civil Procedure. Because the DOJ attorney made several attempts to resolve the discovery dispute before turning to the court, and plaintiff's counsel would not provide the information until pressed to do so by the court, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

13. *Negligence/Dereliction/Improper Performance of Duties.* OIG referred to OPR an allegation of misconduct made by a private litigant against DOJ attorneys relating to the litigant's suit against a government contractor. The private litigant alleged that DOJ attorneys improperly failed to pursue his claims of fraudulent conduct by a government contractor, and that the Department wrongfully declined to intervene on the private litigant's behalf in his civil False Claims Act lawsuit against the government contractor. OPR initiated an inquiry and found that the OIG had conducted an investigation of the litigant's allegations of fraudulent behavior by the government contractor and, based on its investigation,

recommended that the Department decline to intervene in the litigant's False Claims Act lawsuit. OPR also found that the litigating component responsible for reviewing False Claims Act lawsuits reviewed the OIG's investigation and concluded that insufficient evidence of wrongdoing existed to warrant government intervention in the case. As a result, OPR concluded that the litigant's allegation that the Department wrongfully declined to intervene in his lawsuit was without merit. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Discovery - Brady/Exculpatory Information.* A DOJ component reported to OPR that a state bar opened an investigation into whether a DOJ attorney violated *Brady* by withholding exculpatory information about a government witness who could no longer be located to testify at trial. The witness at issue viewed a photo array containing the defendant's picture as well as pictures of non-suspects, and identified a non-suspect as the individual responsible for committing the crime. OPR initiated an inquiry and found that the DOJ attorney provided the information about the witness three months prior to trial, thus providing the defense with a reasonable opportunity to locate the witness. OPR also found that the DOJ attorney had been diligent with regard to his general discovery obligations. OPR also noted that a court of appeals ruled on this issue, finding the government did not violate *Brady* with respect to the timing of its disclosures. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

15. *Improper Examination of a Witness/Failure to Comply with Court Order or Federal Rule.* A court of appeals found that a DOJ attorney violated a local court rule prohibiting attorneys from conferring, during breaks in testimony, with witnesses who are on the stand. The court criticized the DOJ attorney for speaking with a police officer during a break in the officer's re-direct examination, but affirmed the conviction because it found that the trial court appropriately handled the violation by permitting the defendant to address the violation on re-cross examination and at closing argument.

OPR initiated an inquiry and found that the interaction between the DOJ attorney and witness consisted of the DOJ attorney instructing the police officer to organize and review documentary evidence for re-direct and re-cross examination. OPR found that prior to trial, the DOJ attorney had asked the police officer to organize and arrange a myriad of documents so that the officer would be able to access them quickly should he be cross-examined. The officer, however, failed to do so and when he testified on cross-examination he was unfamiliar with

many of the documents. Given the officer's unfamiliarity with the documents, when the trial ended for the day during the police officer's re-direct testimony, the DOJ attorney instructed the officer to organize and review the documentary evidence. Although this interaction represented a technical violation of the local rule, OPR concluded that the violation was unintentional and extremely limited in scope. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

16. *Improper conduct.* OPR received an allegation from a private citizen that two DOJ attorneys engaged in misconduct. The first DOJ attorney represented the interests of the United States in a bankruptcy case involving a business owned by the complainant's family. The complainant alleged that during the bankruptcy proceedings, the DOJ attorney failed to take action to halt a secured creditor's efforts to collect debts by foreclosing on the family business. The second DOJ attorney prosecuted the complainant's husband for bankruptcy fraud. The complainant did not allege specific impropriety by the DOJ attorney, but instead objected in general terms to her husband's prosecution. OPR initiated an inquiry and reviewed the pleadings from the two cases.

As to the bankruptcy case, OPR found that the DOJ attorney did not represent the interests of the debtor's family, and that the complainant had been afforded an opportunity to respond to the secured creditor's claims, but chose not to do so. With respect to the criminal proceeding, OPR found no evidence that the DOJ attorney withheld evidence from the criminal defendant, or otherwise acted improperly. Because the complainant's allegations of improper conduct by the DOJ attorneys were vague and unsupported, the complainant could have raised these allegations in court but chose not to do so, and there were no other extraordinary circumstances present, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

17. *Unauthorized Disclosure of Grand Jury Information.* OPR received an allegation from defense counsel that a DOJ attorney violated Federal Rule of Criminal Procedure 6(e) by failing to file under seal an affidavit in support of a search warrant that contained grand jury information. OPR initiated an inquiry and found that defense counsel filed a motion to dismiss the indictment on the grounds that the government violated Rule 6(e). In response, the government asserted that it was permissible to disclose grand jury information in search warrant affidavits. The government stated that it filed the affidavit under the normal court procedures because there was no compelling reason to do otherwise. The district court denied the defendant's motion to dismiss the indictment. In

doing so, the court held that Rule 6(e) permitted the disclosure of grand jury material in a search warrant affidavit. The court also stated that, unless a party moves to seal the file, a warrant and affidavit are filed unsealed with the clerk of court pursuant to Federal Rule of Criminal Procedure 41. OPR reviewed the court's opinion and found that the DOJ attorney's decision to file the affidavit without a seal was in accordance with established procedures. OPR also found that the Department's Grand Jury Manual did not specifically require sealing because disclosures of grand jury material in a search warrant or in other public filings may be permissible under Rule 6(e)(3)(A)(i). Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Failure to Comply with DOJ Rules and Regulations.* OIG referred to OPR a complaint from a private citizen that alleged that a DOJ attorney made derogatory comments to the press about a civil rights complaint that was filed by a civil rights organization. The private citizen alleged that the DOJ attorney made fun of the complaint and made rude statements about the complaint to the press. OPR initiated an inquiry and reviewed a copy of the newspaper article provided by the private citizen. In the article, the DOJ attorney stated that the complaint would be investigated, but that he had some concerns because the incident had occurred over a year and a half ago. The DOJ attorney also stated that he was surprised that the civil rights group had held a demonstration before he had been given a chance to read the complaint. OPR concluded that nothing that the DOJ attorney said in the newspaper article could be construed as belittling or rude, and in violation of Department rules and regulations. Because there was no other evidence against the DOJ attorney, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

19. *Brady Violation.* A DOJ attorney reported allegations that she failed to disclose exculpatory information in the prosecution of a drug case. At the same time that the allegations appeared in the press, the DOJ attorney's litigating component asked a court to dismiss drug charges against people who had been convicted in cases involving an informant and a law enforcement agent who were found to be not credible. The DOJ attorney was the prosecutor assigned to the cases. OPR initiated an inquiry and reviewed underlying documents from the dismissed cases. Based on the results of its inquiry, OPR determined that further investigation was warranted. Accordingly, OPR converted this inquiry to an investigation.

20. *Failure to Comply with Court Order or Federal Rule.* A lawyer claimed that DOJ attorneys failed to acknowledge circuit court precedent and the law of the case, inappropriately briefed several legal issues, elicited allegedly inconsistent statements from certain witnesses, and erred in several discovery issues. OPR conducted an inquiry and determined that the lawyer had also raised these issues with the district court in various motions seeking sanctions or other relief. The district court denied the motions, and did not make a finding of misconduct or otherwise criticize the DOJ attorneys. OPR concluded that there was no support for the allegations and closed the matter because further investigation was not likely to result in a professional misconduct finding.

Conclusion

During fiscal year 2009, Department attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in fiscal year 2009 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department to meet the challenge of enforcing the law and defending the interests of the United States in an increasingly complex environment.