
U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

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

Fiscal Year 2016 Annual Report

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OPR Annual Report for Fiscal Year 2016

Introduction

On December 9, 1975, Attorney General Edward H. Levi issued an order establishing the Department of Justice Office of Professional Responsibility (OPR) to ensure that Department of Justice (Department or DOJ) employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 41st Annual Report to the Attorney General, and it covers Fiscal Year 2016 (October 1, 2015 through September 30, 2016).

Jurisdiction and Functions of OPR

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

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

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

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

documents and obtains written submissions from subjects and components, or OPR may open an investigation, during which it also interviews subjects and other witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and its source. Although some matters begin as investigations, OPR typically will first initiate an inquiry and assess the information obtained prior to conducting a full investigation. An inquiry or investigation may have more than one Department attorney as subjects.

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

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

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

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

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

Year 2015, the PMRU's jurisdiction was expanded to include nearly all Department attorneys. The PMRU reviews matters in which OPR finds intentional or reckless professional misconduct, and determines whether those findings are supported by the evidence and the applicable law.¹ The PMRU also determines the appropriate level of discipline to be imposed.

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

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

Intake and Initial Evaluation of Complaints and Correspondence

In Fiscal Year 2016, OPR received 659 complaints, of which 216, or 33%, were from incarcerated individuals. Many of those 659 complaints related to matters that did not fall within OPR's jurisdiction. Others sought information or assistance and were referred to the appropriate government agency or Department component. OPR determined that 41 of the complaints warranted further review by OPR attorneys and opened inquiries on those matters. OPR opened 23 matters as investigations. When information gathered in the course of an inquiry indicates that further investigation is warranted, the matter is converted to an investigation.

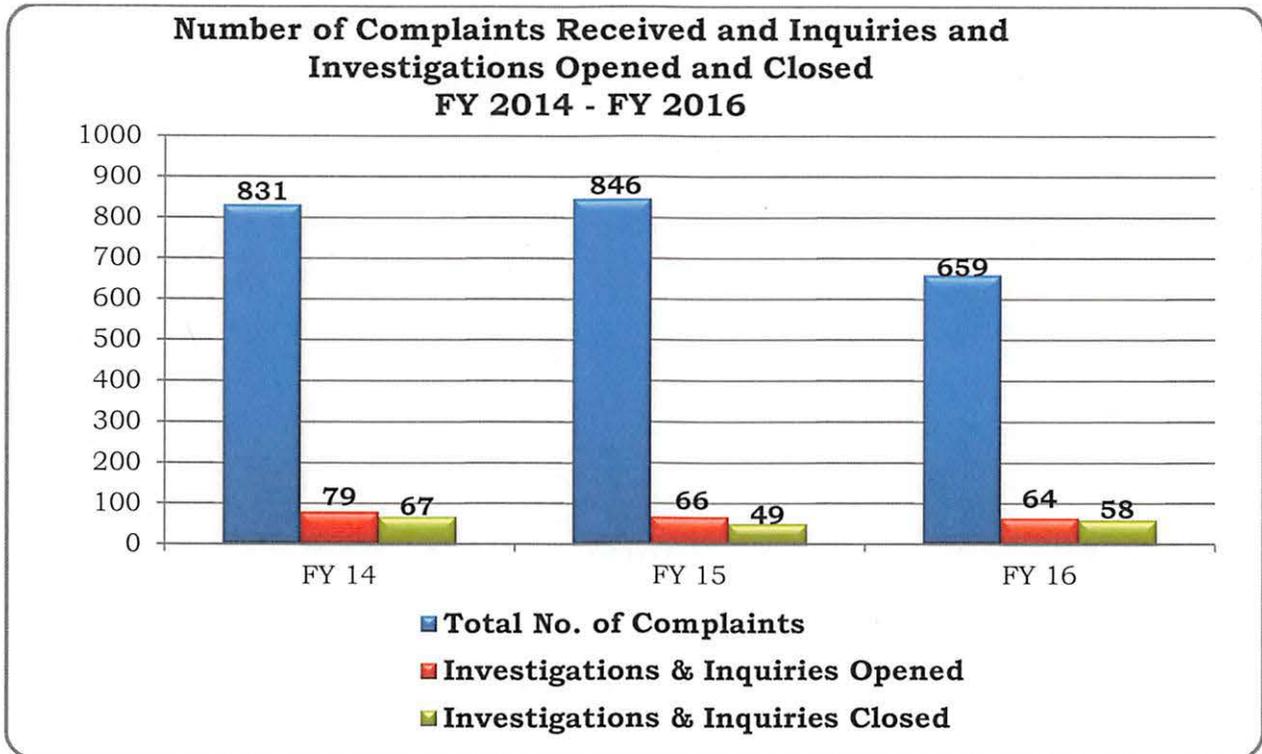
The remaining matters did not warrant further inquiry or investigation by OPR because, for example, they sought review of allegations that were under consideration by a court, or had been considered and rejected by a court, or because they were frivolous, vague, or unsupported by the evidence. Those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

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

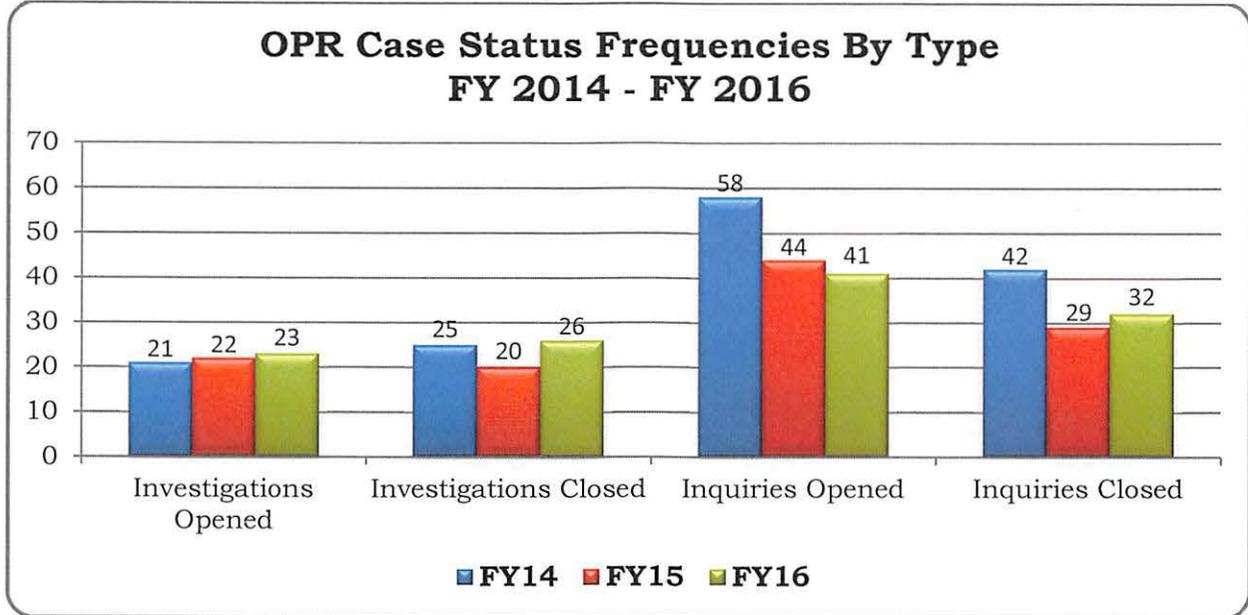
Summary and Comparison of OPR's Investigations and Inquiries by Fiscal Year

In Fiscal Year 2016, OPR received 659 complaints, which represents a twenty-two percent (22%) decrease from Fiscal Year 2015. Graphs 1 and 2 provide comparisons over the last three fiscal years of the number of complaints OPR received, as well as the number of investigations and inquiries OPR opened and closed. As reflected in Graph 1, of the 659 complaints OPR received, 64 were opened as investigations or inquiries. As reflected in Graph 2, in Fiscal Year 2016, OPR closed 58 investigations and inquiries. In the same period, OPR opened 41 inquiries and closed 32, and opened 23 investigations and closed 26.

Graph 1

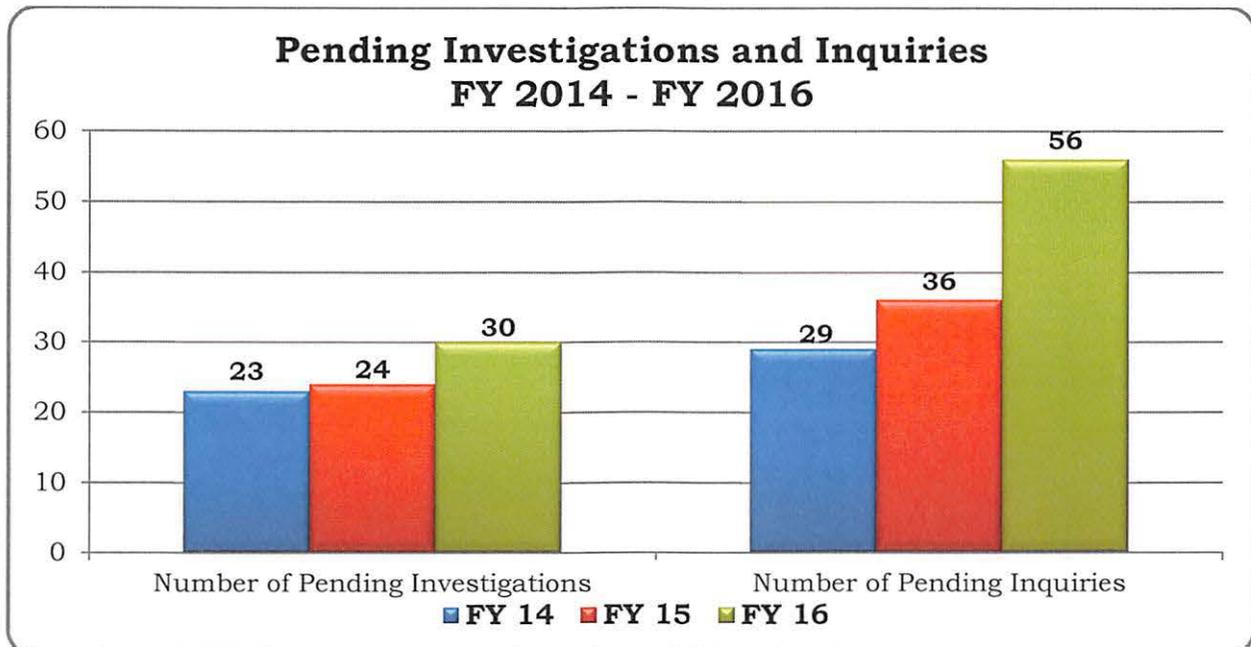


Graph 2



Because of the complexity of the allegations that OPR receives, many investigations and inquiries opened remain under review at the close of the fiscal year. OPR assigns a pending status to those cases and reports the outcome of those matters in the fiscal year in which they are closed. At the end of Fiscal Year 2016, there were 30 pending investigations and 56 pending inquiries. Graph 3 compares the number of inquiries and investigations that were pending at the end of each of the last three fiscal years.

Graph 3



OPR Inquiries in Fiscal Year 2016

Inquiries Opened in Fiscal Year 2016: The sources of the complaints for the 41 matters designated as inquiries opened in Fiscal Year 2016 are set forth in Table 1.²

Table 1

Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2016		
Source	Complaints Leading to Inquiries	Percentage of All Inquiries
Judicial opinions and referrals, including referrals by Department employees of judicial criticism ³	10	24.4%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	23	56.0%
Private attorneys	1	2.4%
Private parties	5	12.2%
Other agencies	2	5.0%
Total	41	100%

The nature of the allegations against Department attorneys contained in the 41 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 41.

² OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department should make a referral to a state bar disciplinary organization. The 41 matters referred to above do not include matters involving proposed bar notifications of non-DOJ attorneys.

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

Table 2

Types of Misconduct Allegations in Inquiries Opened in FY 2016		
Type of Misconduct Allegations	Number of Allegations	Percentage of Allegations
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	20	32.8%
Abuse of authority, including abuse of prosecutorial discretion	11	18.0%
FBI Whistleblower complaints	8	13.1%
Misrepresentation to the court and/or opposing counsel	4	6.6%
Improper remarks to a grand jury, during trial, or in pleadings	4	6.6%
Failure to perform	4	6.6%
Unauthorized Leak or Disclosure	3	4.9%
Failure to competently or diligently represent the client's interests	2	3.3%
Failure to comply with DOJ rules and regulations	2	3.3%
Failure to maintain active bar membership	1	1.6%
Conflict of interest	1	1.6%
Failure to comply with court order and federal rules	1	1.6%
Total	61	100%

Inquiries Closed in Fiscal Year 2016: OPR closed a total of 32 inquiries in Fiscal Year 2016 involving allegations against Department attorneys.⁴ These matters involved 56 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 56 allegations were resolved in Fiscal Year 2016 is set forth in Table 3.⁵

⁴ OPR may designate more than one DOJ attorney as the subject of an inquiry. OPR closed an additional 87 inquiries involving proposed bar notifications for misconduct of non-DOJ attorneys.

⁵ When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2016, 14 inquiries were converted to investigations.

Table 3

Categories of Inquiry Allegations Resolved in FY 2016		
Types of Resolution	Number of Occurrences	Percentage of Occurrences
No merit to matter based on review of allegation	18	32.1%
Inquiry closed because further investigation not likely to result in finding of misconduct	13	23.2%
No merit to allegation based on preliminary inquiry	11	19.6%
Performance or management matter. Referred to employing component.	7	12.5%
FBI Whistleblower complaint	3	5.4%
Consolidated with another matter	2	3.6%
Issues previously addressed. No further action warranted.	2	3.6%
Total	56	100%

OPR Investigations in Fiscal Year 2016

Investigations Opened in Fiscal Year 2016: Table 4 lists the sources for the 23 investigations that OPR opened in Fiscal Year 2016.

Table 4

Sources of Complaints Against Department Attorneys for Investigations Opened in FY 2016		
Source	Complaints Leading to Investigations	Percentage of All Investigations
Department components, including self-referrals (unrelated to judicial findings of misconduct)	12	52.2%
Private attorneys	5	21.7%
Judicial opinions and referrals, including referrals by Department employees of judicial criticism ⁶	4	17.4%
Other agencies	2	8.7%
Total	23	100%

Some of the 23 investigations that OPR opened involved multiple subjects. In addition, because many investigations involved multiple misconduct allegations, there were 40 separate allegations of misconduct. The nature of each allegation is set forth in Table 5.

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

Table 5

Types of Misconduct Allegations in Investigations Opened in FY 2016		
Types of Misconduct Allegations	Number of Allegations	Percentage of Allegations in Investigations
Misrepresentation to the court and/or opposing counsel	17	42.5%
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	12	30.0%
Failure to maintain an active bar membership	3	7.5%
Failure to perform	3	7.5%
FBI Whistleblower complaints	2	5.0%
Abuse of authority, including abuse of prosecutorial discretion	1	2.5%
Failure to comply with DOJ rules and regulations	1	2.5%
Improper remarks to a grand jury, during trial, or in pleadings	1	2.5%
Total	40	100%

Investigations Closed in Fiscal Year 2016: OPR closed 26 investigations in Fiscal Year 2016. Some of these investigations included multiple attorney subjects, and two included non-attorney subjects (typically, law enforcement officers). One attorney was the subject of two OPR investigations. Of the 26 investigations, OPR found professional misconduct in 13, or 50%, of the matters it closed. Of the 13 matters in which OPR found professional misconduct, 6 involved at least 1 finding of intentional professional misconduct by a Department attorney.⁷ In 10 of these 13 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.⁸ (OPR may resolve one of several allegations against a subject by concluding, for example, that the subject engaged in intentional misconduct, and resolve another allegation against the same subject by concluding that he acted recklessly.)

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

⁸ OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes that the attorney: (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

In Fiscal Year 2016, OPR made more misconduct findings as compared to Fiscal Year 2015, both in terms of total numbers (13 in 2016 as compared to 8 in 2015), as well as in percentage of closed cases (50% of closed cases in Fiscal Year 2016 resulted in misconduct findings, as compared to 40% in Fiscal Year 2015). The 13 investigations in which OPR made findings of professional misconduct in Fiscal Year 2016 included a total of 35 sustained allegations of misconduct. (Some matters included more than one allegation of misconduct.) Table 6 below depicts the 35 allegations sustained in the 13 investigations closed in Fiscal Year 2016.

Table 6

Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2016	Number of Misconduct Allegations	Percentage of Misconduct Allegations
Failure to comply with <i>Brady, Giglio</i> , or Fed. R. Crim. P. 16 discovery	11	31.4%
Failure to comply with DOJ rules and regulations	9	25.7%
Misrepresentation to the court and/or opposing counsel	6	17.0%
Failure to comply with court orders or federal rules	2	5.7%
Improper remarks to a grand jury, during trial, or in pleadings	2	5.7%
Failure to keep client informed	1	2.9%
Failure to competently or diligently represent the client's interests	1	2.9%
Lack of fitness to practice law	1	2.9%
Failure to maintain an active bar membership	1	2.9%
Unauthorized leak or disclosure	1	2.9%
Total	35	100%

OPR made misconduct findings against 13 DOJ attorneys in FY 2016. The PMRU has issued decisions with respect to 12 of the 13 attorneys and one decision is pending. Of the 12 matters decided by the PMRU, the PMRU sustained OPR's findings against 11 attorneys and reduced one misconduct finding to a finding of poor judgment. Of the 11 attorneys against whom OPR's misconduct findings were sustained, 6 resigned from the Department before discipline could be imposed by the PMRU. The remaining 5 attorneys were disciplined by the PMRU: 3 attorneys received suspensions and 2 received written reprimands. Where appropriate, OPR referred these matters to state bar disciplinary authorities.

Twelve, or 46%, of the investigations OPR closed in Fiscal Year 2016 had at least one finding that an attorney exercised poor judgment.⁹ Three of those 12 matters also involved a

⁹ OPR finds that an attorney has exercised poor judgment when, faced with alternative 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 may be found when an attorney acts inappropriately, even though he or she may not have violated or acted in reckless disregard of a clear and unambiguous 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.

finding of professional misconduct. OPR refers poor judgment findings to the Department attorney's component for consideration in a management context, which may include recommendations for discipline and additional training. Three closed investigations, or 12%, involved at least one finding that an attorney made an excusable mistake. All three matters also included a finding of professional misconduct or poor judgment. Thus, of the 26 investigations closed, OPR found professional misconduct or poor judgment in 22, or 85%, of the investigations it closed in FY 2016.

Policy and Training Activities in Fiscal Year 2016

During Fiscal Year 2016, OPR participated in policy development and training for the Department. OPR attorneys participated in numerous educational and training activities within and outside of the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, rules and regulations. During Fiscal Year 2016, OPR attorneys participated in presentations that focused on, among other things, the Department's social media policies and ethical issues concerning inappropriate relationships. OPR attorneys also made presentations to new Assistant U.S. Attorneys as part of the Department's orientation and training programs, and participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* and *Giglio* disclosure obligations.

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

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

In accordance with Department policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information concerning those matters. OPR also consulted with and advised other Department components regarding referrals to state bar authorities of possible professional misconduct by non-DOJ attorneys. In 89 such matters, OPR reviewed allegations of misconduct against non-DOJ attorneys and advised components whether referrals to state bar disciplinary authorities were warranted. In some cases, OPR notified the applicable bar disciplinary authorities directly of the misconduct allegations.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against the agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the Department's Office of the Inspector General responsibility for reviewing and investigating whistleblower complaints by FBI employees.

Examples of Inquiries Closed in Fiscal Year 2016

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2016.¹⁰

Discovery Violations; Subornation of Perjury/Sponsoring of False Testimony; Abuse of Process; Misrepresentations to Court. Lawyers for a party who had settled a civil matter complained to OPR of multiple acts of professional misconduct by the DOJ attorneys who handled the case. OPR initiated a preliminary inquiry, but held its preliminary inquiry in abeyance while the court considered the defendants' motion for relief from judgment, which contained many of the same allegations made to OPR. After the court denied the defendants' motion, finding it without basis, OPR declined to initiate any further inquiry into the allegations. The court specifically determined that, during the pendency of the case, defense counsel knew of the alleged misconduct by the DOJ attorneys, and that although the defendants had a full and fair opportunity to litigate those issues before the jury, they chose not to do so, and chose to settle the case instead. As to the misconduct allegations of which the defendants claimed to become aware only after the settlement, the court determined that all of those allegations were baseless. The defense claimed, for example, that the deposition testimony of two witnesses was false and that the government knew their testimony was false. The court specifically found that the testimony of the witnesses was not false, and that the DOJ attorneys did not encourage or suborn perjury. It is the longstanding policy of OPR to refrain from investigating allegations of misconduct against DOJ attorneys that have been submitted or could have been submitted to the court for its consideration, absent a finding or suggestion by the court of government misconduct. Because the court found that the allegations of misconduct lacked merit or could have been raised with the court during the litigation, and because there were no extraordinary circumstances warranting an OPR investigation, OPR concluded that no further action was appropriate. Accordingly, OPR closed its preliminary inquiry.

Improper Interference with Defense Investigation. A DOJ attorney referred to OPR a pre-trial motion to dismiss alleging that he engaged in misconduct by instructing a witness not to speak with defense investigators who sought to interview him. The DOJ attorney had informed defense counsel that defense investigators should not contact government witnesses without the DOJ attorney's prior authorization. The DOJ attorney wrote two e-mails stating that any inquiries about witnesses or requests to interview witnesses should be directed to him, and not to the witness, effectively depriving defense attorneys of the right to discuss the case with any government witness, either directly or through their investigators, without the DOJ attorney's authorization. OPR initiated an inquiry. When the DOJ attorney's conduct came to the attention of the district judge, who recognized that the DOJ attorney had exceeded his authority, the court noted that given the violent crime in the case, the defense investigators might have appeared to be

¹⁰ To protect the privacy of the Department attorneys and other individuals involved in the inquiries summarized, as well as in the investigations summarized in the next section of this report, and to comply with the requirements of the Privacy Act, OPR has omitted names and identifying details from these examples. Moreover, in certain cases, information and evidence learned by OPR during the course of its inquiries and investigations is protected from disclosure by orders of the court, privileges, or grand jury secrecy rules. OPR has used male pronouns in the examples regardless of the actual gender of the individual involved. Female pronouns will be employed next year, as OPR alternates the use of gender pronouns each year.

threatening or intimidating the witnesses. The court found that the DOJ attorney had not committed professional misconduct. In light of the court's finding, and the DOJ attorney's explanation to OPR that he did not intend to suggest that the defense did not have a right to interview witnesses, OPR closed its inquiry because it was unlikely that a further investigation would result in a misconduct finding. OPR referred the matter to the DOJ component to handle as a management matter to ensure that the DOJ attorney does not engage in similar conduct in the future.

Abuse of Authority or Misuse of Official Position; Failure to Comply with Principles of Federal Prosecution; Unprofessional or Unethical Behavior; and Failure to Comply with DOJ Rules and Regulations. A supervisory DOJ attorney reported to OPR that a subordinate DOJ attorney who had been serving for multiple years as lead counsel in an investigation that resulted in the indictment, prosecution and conviction of multiple defendants, was engaged in an extramarital affair with the lead law enforcement case agent of a DOJ component during the investigation and prosecution of the cases. OPR initiated an inquiry, gathered and analyzed documents, and requested written responses from both the DOJ attorney and the lead case agent. The DOJ attorney retained legal representation and declined to submit a written response to OPR due to allegations being investigated by another DOJ component that the DOJ attorney and the lead case agent may have violated criminal statutes in connection with the multi-year investigation and prosecution. The lead case agent submitted a written response to OPR in which he denied any wrongdoing. In consultation with the DOJ component investigating the criminal allegations, OPR determined that the matter was more appropriately handled by a referral to that DOJ component, and OPR suspended its inquiry pending completion of the criminal investigation.

Thereafter, OPR was informed by the DOJ component investigating the criminal allegations that the DOJ attorney's employment with the Department was terminated pursuant to a settlement agreement, and the professional misconduct allegations against the DOJ attorney were referred to the appropriate state bar officials. Because the DOJ attorney was no longer employed by the Department, and the professional misconduct allegations against him had already been referred to the appropriate state bar officials, OPR closed its inquiry. Further, because OPR's jurisdiction to investigate allegations of misconduct against DOJ law enforcement personnel relates to OPR's jurisdiction to investigate attorney misconduct, once OPR closed its inquiry into the DOJ attorney's alleged professional misconduct, OPR no longer had jurisdiction to investigate the lead case agent, and the matter was referred to the lead case agent's DOJ component for disposition of the allegations against him.

Failure to Authorize Indictment for Political Reasons. A DOJ attorney alleged that a DOJ official declined to authorize the indictment of state political officials because of impermissible personal or political considerations. The proposed indictment alleged that the political officials arranged with a bank for business loans and then re-loaned the funds to an electoral campaign. The DOJ attorney alleged that the DOJ official declined to approve the proposed indictment because he would have been embarrassed by revelations during the ensuing litigation that he had made campaign contributions himself. OPR initiated a preliminary inquiry. OPR determined that the

DOJ official's decision not to approve the proposed indictment was made after he consulted senior Department officials about the matter. The bank was aware of the purpose of the loans and suffered no loss; the proposed indictment did not charge a violation of state or federal campaign finance law; and the allegations in the proposed indictment had received wide publicity before the election, allowing voters to weigh their importance in the political process. OPR also determined that the political contributions the DOJ official made to candidates were known prior to his confirmation. OPR closed its inquiry because further investigation of the allegations was unlikely to result in a finding of professional misconduct.

Speedy Trial Act Violation. OPR initiated an inquiry into a DOJ attorney's conduct after the court issued an order granting the defendant's motion to vacate his conviction for ineffective assistance of counsel based, in part, on the failure of his trial counsel to seek dismissal of the superseding indictment for violation of the Speedy Trial Act. In granting the motion, the court found that the DOJ attorney knew that the time to obtain an indictment was about to expire but failed to bring the speedy trial issue to the attention of the court. OPR found, however, that the DOJ attorney twice brought the Speedy Trial Act issue to the attention of the court, first in connection with a motion to dismiss the indictment and then in a motion after a superseding indictment was returned. Inexplicably, the court rescheduled the trial on the superseding indictment for a date after the speedy trial deadline would expire. The DOJ attorney also notified the defense attorney of the speedy trial deadline, and the defense attorney elected not to demand a speedy trial. Under these circumstances, OPR concluded that it was not unreasonable for the DOJ attorney to presume that the defendant had knowingly waived his right to a speedy trial. Accordingly, OPR closed its inquiry because further investigation would be unlikely to result in a finding of professional misconduct.

Brady Violation. A defendant alleged that the government violated its *Brady* obligations by not producing the presentence reports (PSRs) of certain cooperating witnesses who testified for the government at trial. After he was convicted, the defendant obtained the PSRs of two witnesses, which demonstrated, he claimed, that they testified falsely at trial. He asserted that the PSRs should have been provided to defense counsel for use at trial, regardless of whether a specific request had been made for them. OPR initiated an inquiry. OPR learned that in a post-trial motion, the defendant sought the disclosure of the PSR of one of the witnesses, but that the court denied his motion. The court determined that the defendant was not entitled to the PSR. Later, the court denied a subsequent motion for a new trial, rejecting the defendant's claim that the witness had committed perjury during his testimony at trial. In addition, OPR determined that Rule 32(e) of the Federal Rules of Criminal Procedure governs the disclosure of PSRs, and the rule authorizes the disclosure of a cooperating witness' PSR only to the cooperator, his attorney, and the attorney for the government. The rule is silent about disclosure to third parties, such as the defendant. However, there is abundant precedent establishing that courts require a showing of special need before a PSR of a witness can be disclosed to a third party. The court reviewed and rejected the defendant's claim that he was entitled to the disclosure of the PSRs of the cooperating witnesses in his case. Because the court had addressed and resolved the issue, and because the government is not required to produce impeaching information in a cooperating witness' PSR in the absence of a showing of special need, OPR determined that the defendant's allegations did not warrant further inquiry.

Speedy Trial Act Violation. A DOJ component notified OPR that a district court issued an order granting the defendants' motion to dismiss the superseding indictment, with prejudice, for violation of the Speedy Trial Act. In its order, the court noted that the indictment had been returned more than ten years before, and there had been no court finding of excludable time for several years. OPR initiated an inquiry, and learned that there were multiple defendants charged in the indictment, and that several other related cases were charged separately. With the agreement of all of the parties, the DOJ attorney tried the most serious cases first, and the trial of the defendants in this case, who were charged with relatively minor offenses, was repeatedly postponed. Several years earlier, the court had granted a defense request that the trial be postponed for an indeterminate length of time. At that time, the DOJ attorney agreed to file a stipulation with proposed trial dates and findings of excludable time, but failed to do so. The defense was aware that the DOJ attorney had not filed the stipulation, but did not bring the matter to either the government's or the court's attention until it filed the motion to dismiss the indictment. At a hearing, the court recognized its own responsibility for agreeing to an indeterminate postponement of the trial. Following internal discussions, the USAO decided not to pursue the charges against the remaining defendants, and the DOJ attorney received authorization to dismiss the case against the remaining defendants if they made restitution. When they refused to do so, the court nevertheless dismissed the case with prejudice. Due to the unique factual circumstances of this case, OPR declined to investigate this matter further, and referred it back to the DOJ component to address as a management matter.

Franks v. Delaware Violation. OPR initiated an inquiry into the judicial findings and criticism against DOJ attorneys following a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), in which the court determined that a lengthy affidavit filed by a law enforcement agent in support of an application for a search warrant contained inaccurate and misleading statements. Because the court found that the affidavit had essentially been drafted by the DOJ attorneys, OPR initiated an inquiry. OPR determined that the agent believed the affidavit was accurate, and that he made a good faith effort to verify facts about which he was uncertain. Although the agent reviewed the affidavit, he failed to correct certain errors before signing it. In addition, he misquoted or misinterpreted some of the evidence upon which he relied in making certain factual representations in the affidavit. However, OPR found no evidence that the agent, or the DOJ attorneys who drafted the affidavit, intentionally misled the court or recklessly disregarded their professional obligation of truthfulness. Furthermore, OPR found no evidence that in drafting the affidavit as they did, the DOJ attorneys violated their duty of candor to the court. Because further investigation of the DOJ attorneys' conduct was unlikely to lead to a finding of professional misconduct, OPR closed its inquiry.

Brady/Giglio/Rule 16 Violation. A decade after his conviction, the defendant in a criminal case alleged that DOJ attorneys violated Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963), when they failed to produce to the defense thousands of pages of documents prior to the trial. In response to a Freedom of Information Act request several years after the defendant's conviction, a federal law enforcement agency produced voluminous documents, including documents that had not been produced before his trial, and which contained exculpatory material that would have supported one of his defenses. OPR initiated an inquiry. The DOJ attorneys maintained that they had never seen the documents, and that they would have produced them in discovery had they known about them. Nearly a decade after the trial, OPR

concluded that a definitive explanation for the government's failure to produce the materials to the defense before trial was difficult, if not impossible, to ascertain. One possibility was that the documents were in the agency's file all along but were never identified or filed as evidence. Because the documents were likely stored either in the administrative, non-evidentiary part of the agency's file, or in a separate file containing only administrative materials, the DOJ attorneys would not have seen the materials when they reviewed the agency's evidentiary file prior to trial. Because OPR had no reason to doubt the veracity of the DOJ attorneys, OPR closed its inquiry into the conduct of the DOJ attorneys and referred the conduct of the case agent to his law enforcement agency for whatever action it deemed appropriate.

Whistleblower -- Retaliation for Protected Disclosure. An FBI employee reported to his team coordinator's supervisor that he had concerns related to directions the FBI employee received from his team coordinator. Following the report, the team coordinator and another supervisory employee allegedly retaliated against the FBI employee by issuing a poor performance appraisal, and by making inaccurate statements to investigators who were investigating an automobile accident involving the FBI employee. OPR dismissed the FBI employee's complaint of whistleblower retaliation for lack of jurisdiction, finding that the employee's report to his team coordinator's supervisor was not a protected disclosure because it was not made to one of the nine officials or components designated by 28 C.F.R. § 27.1(a) to receive disclosures of a violation of a law, rule or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Discovery -- Rule 16 Violation. In an order granting the government's motion to dismiss the indictment, the court criticized the government for failing to recognize the evidentiary flaws in its case until weeks after the original trial date; making belated discovery disclosures; and for demonstrating a lack of candor to the court. The government moved to dismiss the indictment after the prosecutors obtained evidence indicating that the defendant had not committed the charged crime, despite his confession to having done so.

Based on the results of its inquiry, after reviewing substantial documentary evidence, OPR concluded that the government had probable cause to bring charges against the defendant and that the investigative steps the DOJ attorneys pursued were reasonable and appropriate. The evidence also showed that the prosecutors advised the defendant of the evidentiary weaknesses in the government's case through prompt disclosure of exculpatory information; timely informed their supervisors of evidentiary weaknesses in the case and their concerns about the viability of the prosecution; and properly followed the procedures of the DOJ component to obtain authorization to dismiss the indictment. Although certain records were not produced by the court-ordered discovery deadline, the evidence showed that the delay was caused by the failure of certain law enforcement agencies to properly provide the records despite the DOJ attorney's diligent efforts to obtain the discovery. OPR did not find evidence establishing that the DOJ attorneys had made misrepresentations to the court. OPR concluded that further investigation was unlikely to result in a finding of professional misconduct and closed its inquiry.

Abuse of Prosecutive or Investigative Authority. A district judge criticized a DOJ attorney for allegedly attempting to unfairly alter an audio recording transcript that had been offered as a demonstrative exhibit at a hearing. The court found that the DOJ attorney attempted to take

advantage of the poor quality of the recording by having the government's witnesses make changes to the transcript that were favorable to the government's case. The DOJ attorney's component failed to promptly notify OPR of the district court's findings. Instead, the DOJ component asked the court to amend its order on the ground that the record did not support the conclusion that the government had purposefully attempted to present a transcript or testimony that failed to accurately reflect the events that had occurred. After receiving the government's motion to amend, the district court entered a substitute order, which no longer asserted that the DOJ attorney had attempted to unfairly alter the transcript or to take advantage of the poor quality of the recording. Based on a careful review of the record, OPR concluded that the DOJ attorney did not engage in professional misconduct in handling the revisions to the transcript of the audio recording. Furthermore, although the DOJ component had failed to promptly report the court's order to OPR as it was required to do by the U.S. Attorneys' Manual (USAM), the district court's decision to remove the misconduct allegations from the amended order indicated that the court was satisfied with the government's explanation about how and why the transcript was revised. OPR concluded that further investigation was therefore unlikely to result in a finding of professional misconduct and closed its inquiry into the matter.

Abuse of Authority or Misuse of Official Position; Failure to Comply with Federal Rules of Civil Procedure. A federal agency reported to OPR that a DOJ attorney had asked the agency to delete all communications in its possession regarding a proposed settlement agreement with a state in connection with the state's failure to comply with federal law. In response to OPR's inquiry, the DOJ attorney explained that he understood that the federal agency was the unauthorized recipient of a confidential, proposed settlement agreement relating to litigation between the United States and the state. The DOJ attorney was concerned that possession by the federal agency of the proposed settlement agreement constituted a breach of the confidentiality agreement between the federal government and the state. The DOJ attorney intended only to curtail the continued unauthorized dissemination of the proposed settlement agreement, and did not intend to request that the federal agency destroy records and documents relevant to the litigation. Based on the DOJ attorney's credible explanation, which was supported by the surrounding circumstances, OPR concluded that a misunderstanding arose due to miscommunication between the DOJ attorney and the federal agency. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry in the matter.

Failure to Maintain Active Bar Membership. A DOJ attorney self-reported to OPR that his bar membership had lapsed for nine days because he had failed to certify his compliance with the bar's continuing legal education (CLE) requirement. The DOJ attorney told OPR that he did not recall receiving in the mail two notices from the state bar regarding the CLE requirement. OPR learned that the second notice was returned to the state bar undelivered. However, the DOJ attorney did receive in the mail a notice from the state bar that his bar license had been suspended for failure to certify compliance with the CLE requirement. The DOJ attorney took immediate steps to rectify the situation and was reinstated nine days after the effective date of the suspension. During the time his license was suspended, the DOJ attorney did not file any pleadings or appear in court. Given the circumstances and the limited time period of the suspension, and because the DOJ attorney's bar license had not previously been suspended, OPR concluded that further investigation was unlikely to result in a finding of professional misconduct. Accordingly, OPR closed its inquiry in the matter.

Failure to Honor Plea Agreement; Misrepresentation/Misleading the Court. A DOJ attorney self-reported a district court order criticizing the DOJ attorney for his handling of plea negotiations and for what the court considered to be inappropriate reliance on a particular case. The court's order directed the government to accept the defendant's plea pursuant to a plea agreement that the court found had earlier been agreed to by the parties. The court's order was based on its understanding that the DOJ attorney was attempting to add false language to a previously-agreed upon statement of facts in the plea agreement. The court's order also criticized the DOJ attorney for reliance on a particular case, suggesting that the DOJ attorney had misled the court regarding the current state of the law.

OPR conducted an inquiry and found that the parties had not reached an agreement on the statement of facts in the plea agreement. The DOJ attorney, based on the advice of his supervisor, properly refused to enter into a plea agreement unless it contained facts sufficient to support the plea. The district judge had not read either parties' proposed statement of facts at the time he entered his order. Later, after reviewing the defense's proposed statement of facts, the court agreed with the government that the defense version was not sufficient to support the plea, although the court did not revise its order to fully reflect that understanding. The case subsequently was tried and the defendants convicted. OPR concluded that the DOJ attorney, at the direction of his supervisors, properly insisted that the defendants admit facts that the government believed were accurate, that it could prove at trial, and were necessary to support the plea. OPR also concluded that the DOJ attorney's reliance on the case was not unreasonable or misleading. Because further investigation was unlikely to result in a misconduct finding, OPR closed its inquiry in the matter.

Unauthorized Disclosure to the Media. A court notified OPR that a local newspaper had published information contained in a confidential transcript that was provided to a DOJ component and two other entities on the condition that the transcript was to be used solely for purposes of conducting appropriate investigations, and was not to be made publicly available. The court asked OPR and the two other entities to investigate the source of the leak.

OPR investigated whether any DOJ attorney had provided the transcript or information contained therein to any media outlet. During the course of its investigation, OPR learned that the transcript had been provided to the defense in a criminal prosecution, but that such use was consistent with the court's initial instructions and limitations on the distribution of the transcript. When the transcript was produced to defense counsel, however, the universe of individuals who had access to this information increased significantly to include the defendants, defense counsel, and other members of the defense team, including staff and experts, all of whom were beyond the DOJ attorneys' control. In addition, each of the DOJ attorneys was interviewed and denied disclosing the transcript to the newspaper. OPR found no evidence that any DOJ attorney had provided information contained in the transcript to the media in violation of the court's order. OPR therefore closed its inquiry because further investigation was unlikely to result in a misconduct finding against any DOJ attorney.

Failure to Comply with Discovery Obligations – Brady/Exculpatory Information; Violation of the Defendant’s Constitutional Rights. As a result of a routine Westlaw search, OPR learned of a criminal case in which DOJ attorneys made multiple post-trial disclosures of information that were at least arguably favorable to the defense. The information included a witness’ claims that he had surreptitiously copied corporate documents at the behest of law enforcement, e-mails that could have been used to impeach a witness who testified for the government at trial, and two witnesses’ claims that they had been promised immunity by the government in exchange for their cooperation in the case. Following the DOJ attorneys’ disclosures, the court of appeals remanded the case for additional discovery, and the trial court held an evidentiary hearing. The trial court determined that the DOJ attorneys’ belated disclosure of this information did not violate their obligations pursuant to the Fourth Amendment or *Brady v. Maryland*. The court found insufficient evidence to establish that an unconstitutional search had occurred and, with respect to the impeachment information, there was no reasonable probability that the outcome of the trial would have been different if the information had been timely disclosed. The trial court therefore denied the defendants’ motions for a new trial.

OPR found no evidence to contradict the court’s conclusions that the government’s conduct did not violate the Fourth Amendment, *Brady*, or the applicable rules of professional conduct. OPR noted, however, that Department policy requires prosecutors to go beyond the requirements of *Brady* and *Giglio*, to view materiality broadly, and to disclose impeaching information “at a reasonable time before trial to allow the trial to proceed efficiently.” Although a very close question, OPR concluded that the DOJ attorney’s failure to timely disclose his informal promise of immunity to a witness who testified at trial was not likely to lead to a finding of misconduct. Of critical importance in OPR’s analysis was the fact that when the DOJ attorney made the statement at issue, neither the DOJ attorney nor the witnesses who were present understood the DOJ attorney’s comment to be a promise of immunity. OPR also noted that the Department policies that require prosecutors to exceed their obligations pursuant to *Brady* did not exist at the time the statement was made. Moreover, the DOJ attorney who made the statement at issue subsequently disclosed it without any prompting to do so. In light of these unique circumstances, OPR concluded that further investigation was unlikely to lead to a misconduct finding, and therefore closed its inquiry.

Misrepresentation/Misleading the Court; Misrepresentation to Opposing Counsel; Subornation of Perjury/Failure to Correct False Testimony. In a letter to OPR, a defense attorney alleged that a DOJ attorney knowingly presented misleading testimony at a pretrial hearing; made false and misleading representations to the court; knowingly failed to inform the court that the witness had given misleading testimony; and made a material, false representation of fact to the defense attorney.

During a pretrial suppression hearing in a narcotics conspiracy case, a law enforcement officer testified that he stopped the defendant’s vehicle because he observed what he believed to be a traffic violation. A subsequent search of the vehicle led to the discovery of a large quantity

of narcotics, and the defendant's arrest. The officer also testified that he had been on the lookout for this particular vehicle because of information he had received earlier from other law enforcement agents. Approximately a month after the hearing, the DOJ attorney produced additional discovery to the defense, and revealed that law enforcement agents had learned of the defendant's identity and the likelihood that he would be transporting narcotics in the area on the date of the traffic stop from an ongoing wiretap investigation. The DOJ attorney explained that he was unable to reveal the existence of the wiretap investigation earlier because the lead target had not yet been apprehended.

Following the hearing, the court requested supplemental briefing on the traffic code provision on which the officer based his traffic stop, and invited the parties to present additional evidence at a subsequent hearing. After receiving the court's order, the DOJ attorney asked the court to consider evidence gathered in the wiretap investigation as additional probable cause supporting the traffic stop.

In the second hearing, the law enforcement officer testified that hours before he stopped the defendant, another law enforcement agency instructed him to stop the defendant's vehicle, but to do so based upon the officer's own observations of the commission of an offense unrelated to the wiretap investigation. The officer explained that he did not mention this instruction during the first hearing because he believed he had been asked only to state the legal basis for the traffic stop, which he understood to be the suspected traffic code violation.

OPR concluded that although the DOJ attorney did not elicit testimony or produce evidence regarding the wiretap investigation until after the initial hearing, he had no obligation to do so earlier. OPR found that the DOJ attorney's strategic decisions to litigate the suppression motion based only on the traffic violation, and later, to reveal the investigation (once the target was in custody) and argue that it provided an alternative justification for the traffic stop, were the product of multiple discussions with his colleagues and supervisors. OPR concluded that the DOJ attorney was entitled to rely on the advice of his supervisors, as that advice was not objectively unreasonable.

OPR also concluded that the officer's testimony at the first hearing regarding his reason for stopping the defendant's vehicle was not false in light of the questions he was asked. To the extent that the officer's testimony either led the court to believe that the traffic stop was unrelated to any other information known to law enforcement, the DOJ attorney corrected this misimpression by presenting additional testimony at the second hearing. OPR therefore concluded that the DOJ attorney did not knowingly sponsor or fail to correct false testimony. OPR also found insufficient evidence to conclude that the DOJ attorney misrepresented the reason for the traffic stop during a telephone conversation with defense counsel. Because further investigation was unlikely to result in a misconduct finding, OPR closed its inquiry.

Selective Prosecution. Members of Congress informed OPR of allegations by an individual who testified before a congressional oversight subcommittee that a DOJ attorney imposed harsher settlement terms in his civil asset forfeiture case than in other similar cases in retaliation for the individual's participation in a media interview about the case. Based on the results of its inquiry, OPR determined that the evidence did not support a conclusion that the DOJ attorney actually imposed punitive settlement terms against the claimant, even though the DOJ attorney sent the claimant's counsel an ill-advised e-mail suggesting otherwise.

OPR reviewed the settlement terms in the claimant's case and compared them to other civil asset forfeiture settlements handled by the DOJ attorney during the preceding two years. OPR's analysis identified no significant disparity. The settlement figure in the claimant's case was in the middle of the range of settlements. Although the DOJ attorney's phrasing of certain terms of the agreement varied slightly among the agreements, those variations did not result in material differences. Moreover, in the claimant's case, the DOJ attorney agreed to include a specific term favorable to the claimant that was not included in other settlement agreements. OPR identified no information indicating that the DOJ attorney took other government action against the claimant based on animus, retribution, or any other improper purpose or motive.

OPR found, however, that the DOJ attorney did create an appearance to the contrary when he suggested in an e-mail to the claimant's counsel during settlement negotiations that the claimant was being treated differently because he had spoken to the media about his case. By inappropriately and inaccurately suggesting that the DOJ attorney would not agree to certain settlement language proposed by the claimant's counsel because the claimant participated in a media interview, the DOJ attorney's e-mail invited suspicion and cast unnecessary doubt on the fairness of the government's handling of the case. For that reason, the e-mail represented a lapse of good judgment for which the DOJ attorney expressed regret. Nevertheless, because the DOJ attorney did not in fact impose punitive or retaliatory settlement terms in response to the claimant's media interview, the evidence did not support a finding of misconduct. Accordingly, OPR closed its inquiry.

Abuse of Authority or Misuse of Official Position. Members of Congress informed OPR of allegations by an individual who testified before a congressional oversight subcommittee that a DOJ attorney threatened to convert a civil asset forfeiture action into a criminal prosecution to coerce the individual into agreeing to a settlement before trial. Based on the results of its inquiry, however, OPR determined that the evidence indicated that the DOJ attorney acted appropriately.

First, the government made a determination at the outset of the claimant's case that it would pursue only a civil asset forfeiture action even though the relevant statute authorized a criminal prosecution in cases like the claimant's. The government's decision was never revisited, and the DOJ attorney consistently communicated to the claimant and his attorney that the government intended to pursue only a civil forfeiture action. The DOJ attorney also followed through on the

government's representations by filing a civil forfeiture complaint after the claimant declined the government's initial settlement proposal.

Second, the timing and circumstances leading to the final settlement agreement contradicted the claimant's assertion that the DOJ attorney threatened to convert the proceedings to a criminal prosecution based on evidence that might be uncovered during civil discovery. The final settlement was proposed on the eve of trial after the claimant's deposition had been taken and discovery closed. Because civil discovery was closed before the final settlement offer was made, the decision to settle for that amount could not have been affected by a threat that further discovery might reveal new evidence leading to a criminal prosecution.

Finally, the claimant was represented by counsel throughout the case, and OPR uncovered no information that the claimant's attorney believed the DOJ attorney acted inappropriately. To the contrary, after the settlement was finalized the claimant's attorney complimented the DOJ attorney on his professionalism. Thus, OPR concluded that further investigation was not warranted and closed its inquiry in the matter.

Whistleblower – Retaliation for Protected Disclosure. A former FBI employee alleged that he was targeted for a professional misconduct investigation and removed from his detail assignment because he voiced concerns about the FBI's compliance with certain policies, workplace discrimination, and violations of the Privacy Act. OPR conducted an inquiry and concluded that the employee had not made a protected disclosure within the meaning of the Department's regulations because he had not presented his allegations to one of the nine entities designated to receive protected disclosures before the allegedly retaliatory actions occurred. Accordingly, OPR lacked jurisdiction to investigate the claim of reprisal.

Abuse of Prosecutive or Investigative Authority; Failure to Comply with DOJ Policy. In a sealed ruling denying, on technical grounds, a defense motion to recover attorney's fees pursuant to the Hyde Amendment to the Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (the so-called "Hyde Amendment," codified as a note to 18 U.S.C. § 3006A), a court nevertheless made the factual finding that the prosecution had been vexatious, frivolous, and brought in bad faith.

OPR conducted an inquiry into the circumstances under which the prosecution was brought and later dismissed by DOJ attorneys. In the course of its inquiry, OPR reviewed pleadings filed in the case, including the indictment, a co-defendant's plea agreement and its factual basis, the defendant's Hyde Amendment motion, the government's response, and the judge's ruling. OPR also reviewed pleadings from and news reports about four factually-related cases. Finally, OPR reviewed a contemporaneous, internal memorandum in which the DOJ attorneys assigned to the prosecution documented their concerns with continuing to pursue the case against the defendant given post-indictment delays and evidentiary developments.

Based on the results of its inquiry, OPR determined that further investigation was unlikely to result in a professional misconduct finding. At the time of indictment, the DOJ prosecutors had ample evidence to believe that the defendant's "conduct constitut[ed] a Federal offense and that the admissible evidence [would] probably be sufficient to obtain and sustain a conviction," as required by U.S. Attorneys' Manual (USAM) § 9-27.220. Indeed, a co-defendant entered a guilty plea, which was accepted as sufficient by the same judge who issued the Hyde Amendment ruling. The factual basis for the guilty plea plainly implicated the defendant in the charges alleged in the indictment. Moreover, a guilty plea accepted as valid by another judge in a related prosecution similarly implicated the defendant in the charges alleged in the indictment. OPR further concluded that the evidentiary weaknesses that ultimately led to the dismissal of the charges against the defendant arose only post-indictment. Finally, OPR noted that the court's Hyde Amendment ruling was issued without the benefit of an evidentiary hearing, taking as true multiple factual allegations in the defense motion that were in material dispute by the prosecution. Because further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry.

Misrepresentation to Defense Counsel. An attorney representing a defendant in a civil matter complained to OPR that a DOJ attorney had reneged on his promise to write a letter in support of a sentence reduction with regard to the defendant's criminal conviction in another district. The complainant provided OPR with correspondence he exchanged with the DOJ attorney concerning the defendant's willingness to cooperate with the government and the government's alleged agreement to provide a letter in support of a sentence reduction. The complainant further alleged that after an initial exchange of information, the DOJ attorney refused to speak with him concerning the matter. OPR reviewed e-mails, notes, and other relevant documents and found no support for the complainant's allegations. OPR concluded that the DOJ attorney ceased communication with the complainant after learning that the complainant was not the attorney of record in the criminal case but rather had a personal relationship with the defendant. Thereafter, the DOJ attorney communicated directly with the defendant's criminal counsel and informed him that his client's cooperation was not needed by the government because the case at issue had already been resolved by a guilty plea. Accordingly, OPR closed its inquiry in the matter.

Failure to Comply with Discovery Rules; Failure to Comply with Department Policy. A district judge sanctioned the government for violating Fed. R. Crim. P. 16 by failing to provide discovery in a timely manner. The government's case involved numerous witnesses who saw only portions of the crime, many hours of close circuit television (CCTV) footage, and witness-security issues.

Approximately one year after the indictment, two new DOJ attorneys were assigned to prosecute two defendants accused of shooting and killing the victim in an alleyway. Prior to the DOJ attorneys' assignment, extensive discovery disclosures had already been made, including the production of five compact discs containing many hours of CCTV footage from multiple cameras. In preparation for trial, a newly-assigned DOJ attorney reviewed the CCTV footage and learned that the government was missing a portion of footage from one CCTV camera that the police had

failed to provide to the prosecutors and a portion of footage from a second CCTV camera that the police indicated was missing. The defense attorneys had not discovered that the CCTV footage they had received was incomplete. The DOJ attorneys obtained the available CCTV footage and provided it to the defense just prior to trial. The DOJ attorneys also disclosed that a portion of the CCTV footage was missing. Following the disclosures, the court ordered the DOJ attorneys to identify any other potentially exculpatory information that had not been disclosed.

The DOJ attorneys conducted an extensive review of the entire case file and all prior discovery productions made by previously-assigned counsel and thereafter provided the defense with previously-undisclosed evidence that the DOJ attorneys had discovered was missing from the government's files and had to be obtained from other sources. The court concluded that the government's late disclosures pursuant to Fed. R. Crim. P. 16 were the result of gross negligence and sanctioned the government for providing late discovery by prohibiting the prosecution from introducing at trial some of the evidence, which was largely duplicative of material that had been previously produced. Nevertheless, the court allowed the government to use the previously-undisclosed CCTV footage at trial.

OPR reviewed each late disclosure and determined that the DOJ attorneys did not violate *Giglio* or Department policy because the material was provided promptly after the DOJ attorneys discovered it and in time for the defense to make use of it at trial. OPR concluded that the DOJ attorneys followed Department policy by immediately disclosing the missing CCTV footage and that the DOJ attorneys went beyond Department policy by reviewing all discovery productions made by the DOJ attorney previously assigned to the matter. OPR closed the matter after concluding that each late disclosure was an excusable mistake in the discovery process that did not merit further investigation.

Misrepresentation; Failure to Comply with Discovery. A DOJ attorney self-reported to OPR judicial criticism regarding his late disclosure of documents to the defense in violation of Fed. R. Crim. P. 16. The court criticized the DOJ attorney for failing to follow DOJ policy to establish a methodical approach to discovery and for drafting a letter, purportedly to notify the defense of the late disclosure, with reckless disregard for its accuracy. The court did not hold contempt proceedings or move the trial date as a result of the late production.

OPR reviewed the late-disclosed material and determined that, as result of a clerical error, a portion of a large pool of documents was inadvertently omitted from the government's otherwise timely discovery production. The DOJ attorney had instructed his administrative staff to copy onto computer discs and provide to the defense all documents received from the agents assigned to the case. Due to a formatting error, the entirety of the material received from the agents was not copied onto the computer discs. The DOJ attorney was unaware of the error because he reviewed the manifest listing the documents provided, rather than the thousands of documents on each individual computer disc, to ensure that the production manifest matched the list of documents provided by the agents. The agents discovered the problem when reviewing the

discovery production with a defense attorney after the Fed. R. Crim. P. 16 deadline had passed. OPR concluded that the production error was a mistake, that Department policy allowed the DOJ attorney to delegate portions of the large-volume discovery production, and that the DOJ attorney's review of the production manifests was neither unreasonable nor inconsistent with Department policy.

OPR also reviewed the DOJ attorney's failure to timely locate and disclose a witness' proffer agreement despite a reference to the document in investigative reports the government had previously disclosed. The DOJ attorney was not aware that a supervisor, who was not assigned to the case, had executed the proffer agreement. The DOJ attorney later found the proffer in a separate part of the case file, rather than in the dedicated *Giglio* folder he maintained. OPR concluded that by failing to review the entire file and timely locate and provide the witness' proffer, the DOJ attorney exhibited careless performance for an attorney of his experience.

In addition, OPR reviewed the DOJ attorney's failure to provide the defense with a cooperating witness' correct criminal record and determined that the failure was the result of an agent's inadvertent transposition of digits in the witness' social security number. The transposition caused the DOJ attorney to mistakenly provide a criminal record belonging to a different individual with the same name as the cooperating defendant.

Lastly, OPR reviewed the DOJ attorney's letter to defense counsel. After he learned of the production error concerning the computer discs, rather than provide the undisclosed material to counsel for the multiple defendants involved in the matter, the DOJ attorney sent a letter inviting each defense attorney to inspect the government's evidence. The court concluded that, because the letter did not specifically draw attention to the production error, the DOJ attorney drafted the letter with reckless disregard for its accuracy. OPR concluded that the letter failed to provide adequate notice of the production error and that, by drafting such a letter, the DOJ attorney exhibited careless performance for an attorney of his experience. OPR closed the inquiry and referred the matter to the component to address as a performance issue.

Interference with Defendant's Right to Counsel; Abuse of Authority or Misuse of Official Position. A DOJ component notified OPR that a court criticized a DOJ attorney for arranging the transfer of a defendant from one detention facility to another without notifying defense counsel of the transfer. The Department attorney arranged the transfer in order to facilitate a local law enforcement investigation into a separate, local matter involving the defendant. The defendant was not represented by counsel in the local matter, but he requested the assistance of counsel when local law enforcement officers interviewed him. The local law enforcement officers ignored the defendant's request, questioned him without counsel, and the defendant made incriminating statements. The defendant was subsequently charged in the local matter and taken before a local court for a bond hearing. Although the defendant was still in federal custody at the time he was taken before the local court, the local authorities did not obtain a writ to secure the defendant's presence at the bond hearing.

Based on the results of its inquiry, OPR concluded that the Department attorney did not act improperly in this matter. OPR found that the defendant was transferred in order to facilitate a legitimate law enforcement purpose, and concluded that the Department attorney did not have a clear, unambiguous obligation under the circumstances to notify defense counsel of the transfer. There was nothing illegal or improper *per se* about the transfer of the defendant, because the government used both facilities where the defendant was detained to house federal pretrial detainees. OPR's inquiry revealed no evidence that the transfer related to the defendant's federal case, or that it was used as a pretext for interrogating the defendant about his federal charges. Moreover, notwithstanding the failure of the local authorities to obtain a writ for the defendant's appearance at the local bond hearing, OPR's inquiry revealed no evidence that the DOJ attorney knew or should have known that the defendant would be erroneously taken to that hearing.

In addition, OPR concluded that the DOJ attorney was not responsible for the violations of the defendant's Fifth and Sixth Amendment rights by the local law enforcement officers because the DOJ attorney was not present when the officers interviewed the defendant and did not participate in the interview. OPR's inquiry revealed no evidence that the DOJ attorney knew that the defendant's requests for counsel during the interview had been ignored, or that he should have known that the local law enforcement officers would ignore the defendant's requests for counsel. Because OPR concluded that further investigation was unlikely to result in a finding of professional misconduct, OPR closed its inquiry in the matter.

Examples of Investigations Closed in Fiscal Year 2016

The following are examples of investigations OPR closed during Fiscal Year 2016.

Misleading the Court; Failure to Comply with Discovery; Brady/Jencks Violation; Failure to Comply with Court Order; Failure to Comply with DOJ Policy, Rules, Regulations; and Failure to Keep Client Informed. A DOJ attorney reported to OPR that in a drug conspiracy case involving multiple defendants, the court issued an order dismissing the indictment with prejudice based on a *Brady/Giglio* violation, a discovery violation, and a finding of prosecutorial misconduct. OPR initiated an inquiry, which it later converted to an investigation. OPR obtained and analyzed pleadings, pertinent documents, and e-mails. OPR requested and reviewed a written response from the DOJ attorney, conducted witness interviews, and interviewed the DOJ attorney. Based on those interviews, OPR gathered additional documents and requested and received a supplemental written response from the DOJ attorney.

Before obtaining the indictment, the DOJ attorney learned, but did not disclose to the defense, that one of the defendants, who had agreed to cooperate and testify, was acting on behalf of the targets of another ongoing, covert investigation, and that the cooperating co-defendant had been promised a favorable sentence recommendation in exchange for his cooperation in the ongoing investigation. In the midst of trial, during cross-examination of the cooperating co-defendant, the DOJ attorney disclosed, for the first time, reports of interviews containing exculpatory information. In addition, the court found that the reports also contained *Giglio* information that could have been used by the defense to impeach the cooperating co-defendant. When confronted with the failure to disclose this information, the DOJ attorney falsely represented

to the court that the prosecutor handling the ongoing investigation had asked him not to disclose the co-defendant's cooperation in the ongoing investigation because it would jeopardize the investigation. In dismissing the case with prejudice, the court took into consideration the DOJ attorney's repeated failure to comply with court orders to disclose confidential informant information, laboratory reports, and expert witness materials. Because of these numerous failures, the court had granted multiple extensions to comply with court-ordered deadlines, and it had repeatedly postponed the trial, causing an impermissible delay of the proceedings that could not be cured by a further continuance to permit the defense to investigate the *Brady/Giglio* information that was withheld from the defense until the midst of trial.

OPR concluded that the DOJ attorney: (1) committed intentional professional misconduct in violation of his *Brady/Giglio* obligations, when he knowingly and purposefully withheld *Brady/Giglio* information from the defense; (2) committed intentional professional misconduct in violation of the court's orders directing the government to disclose to the defense all *Brady/Giglio* information, when he knowingly and purposefully withheld the information from the defense; (3) committed intentional professional misconduct in violation of applicable state rules of professional conduct, when he knowingly and purposefully failed to timely disclose information to the defense that tended to negate guilt, conduct that also was prejudicial to the administration of justice; (4) committed intentional professional misconduct in violation of Department policy when he knowingly and purposefully failed to timely disclose exculpatory and impeachment information to the defense; (5) committed intentional professional misconduct in violation of applicable state rules of professional conduct, when he falsely stated to the court that he was asked not to disclose what a cooperating co-defendant told investigators about another, ongoing investigation; (6) committed professional misconduct in violation of applicable state rules of professional conduct, when in reckless disregard of his obligation to act with reasonable diligence and promptness in representing his client, he repeatedly failed to comply with lawful discovery requests and court-ordered discovery deadlines; (7) committed professional misconduct in violation of applicable state rules of professional conduct, when in reckless disregard of his obligation to keep his client reasonably informed about the status of the matter he was handling, he failed to keep his supervisors reasonably informed about the status of the prosecution to permit it to make informed decisions regarding the representation; and (8) committed professional misconduct in violation of applicable state rules of professional conduct, when in reckless disregard of his duty of fairness to an opposing party and counsel, he failed to make reasonably diligent efforts to comply with legally proper discovery requests by opposing parties.

Because the DOJ attorney knowingly misrepresented to the court what he was told about the cooperating co-defendant and the targets of the other, ongoing investigation, he also committed intentional professional misconduct in violation of applicable state rules of professional conduct, which generally prohibits attorneys from engaging in conduct involving misrepresentations, fraud, or deceit. Given OPR's findings that the DOJ attorney violated specific applicable state rules of professional conduct, a more specific provision dealing with candor to the court, OPR did not analyze in detail the applicability of the more general provisions of the state's rules of professional conduct. Likewise, because the DOJ attorney's failure to act with reasonable diligence was prejudicial to the administration of justice, he also committed professional misconduct in reckless disregard of his obligations pursuant to applicable state rules of professional conduct. Given OPR's finding that the DOJ attorney violated a specific applicable state rule of professional

conduct, a more specific provision dealing with diligence, OPR also did not analyze in detail the applicability of the more general provisions of the state's applicable rules of professional conduct.

OPR referred the matter to the PMRU.

Failure to Comply with Discovery Order; Brady/Rule 16 Violation; Interference with Attorney-Client Privilege; Violation of Defendants' Sixth Amendment Rights; Misrepresentations to Court. A court criticized DOJ attorneys for their late and partial production of discovery materials, their misrepresentations to the court and defense counsel, and their violations of their disclosure obligations under Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963). The court also found that the government interfered with the defendants' attorney-client privileged communications, and that they violated the defendants' Sixth Amendment rights by monitoring communications between the defendants and their respective legal teams. Finally, the court criticized the team that was created to filter privileged communications from the DOJ trial attorneys. OPR initiated an inquiry into the judicial findings and criticism, which it later converted into an investigation.

Based on the results of its investigation, OPR determined that none of the DOJ attorneys committed professional misconduct. Rather, OPR found that they attempted to comply with the Department's policy and the DOJ component's criminal discovery policy, and that they produced massive amounts of discovery, both before and after the court's discovery deadline, pursuant to their continuing obligation to produce discovery. Given the size and complexity of the underlying case, OPR concluded that the DOJ attorneys were not required to personally review all the materials produced in discovery. In addition, OPR determined that although the DOJ attorneys committed a technical violation of Rule 16 by producing discovery late, they did not intentionally violate the rule and did not act in reckless disregard of their obligations under that rule. OPR found, however, that the DOJ trial attorneys exercised poor judgment by failing to create in advance of the charging decision a system or process to determine the likely universe of documents subject to discovery. In order to properly manage discovery, they should have taken steps, before the charging decision was made, to assess which entities had responsive documents, the scope of the documents held by each entity, and the formats in which such documents were maintained. In addition, OPR determined that the DOJ attorneys did not violate their obligations under *Brady* by the late production of discovery, in part because the defense attorneys had similar materials or were already aware of the substance of the information contained in the late-produced materials.

The OPR investigation revealed that, unbeknownst to the DOJ attorneys, agents on the prosecution team had monitored and reviewed the defendants' communications with their respective legal teams. However, the DOJ attorneys had explicitly instructed the institutions holding the defendants not to transmit to the agents any legal communications, and there was no evidence that the DOJ trial attorneys knew that legal communications were being monitored, or that they ever saw, heard, or read any legal communications between the defendants and their legal teams. Because the interception of the defendants' legal communications was not purposeful, and because there was no evidence that the DOJ trial attorneys were privy to the defense's trial strategy or tactics and tailored the government's case accordingly, there was no substantial prejudice to the defense, and the DOJ attorneys did not violate the Sixth Amendment. OPR concluded, however, that the DOJ attorneys made mistakes or exercised poor judgment in a number of respects. Among other things, OPR concluded that one DOJ attorney exercised poor judgment in the drafting of

filter team instructions that led to potentially conflicting roles for the DOJ attorney assigned to the filter team. OPR also concluded that the DOJ filter team attorney exercised poor judgment when he received what he knew to be a defendant's recorded calls with his legal team, and took no action to alert the DOJ trial attorneys to the issue, which likely would have led to the cessation of the interception and recording of the defendants' legal calls. In addition, the OPR investigation revealed that the DOJ attorneys made mistakes and exercised poor judgment in several of their oral and written representations to the court, but that they were unaware at the time that their representations were inaccurate.

Improper Bolstering of Government Witness; Improper Opening Statement; Improper Closing Argument. A court of appeals determined that a DOJ attorney: (1) improperly bolstered the credibility of the government's immunized witnesses during his opening statement; (2) introduced into evidence immunity agreements during the direct examination of government witnesses before their credibility had been attacked, and asked them during direct examination about the truth-telling provisions of their immunity agreements; and (3) made improper comments in his rebuttal closing argument by referring to his background in the local community, as well as to the consequences of the jury's verdict. The court of appeals reversed and remanded the conviction because of the DOJ attorney's misconduct. OPR initiated an inquiry, which it later converted into an investigation.

OPR concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligation not to vouch for the credibility of witnesses, when he repeatedly bolstered the government's immunized witnesses in his opening statement despite defense objections and the court's admonitions. OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in eliciting testimony about the truth-telling provisions of the immunity agreements and by introducing into evidence the immunity agreements, in light of the absence of objections to his questions and the district court's rulings allowing the agreements into evidence. Finally, OPR concluded that the DOJ attorney made a number of mistakes during his rebuttal closing argument, but that he did not commit misconduct or exercise poor judgment. The DOJ attorney resigned from the Department during OPR's investigation. Accordingly, the PMRU was unable to impose discipline. Because OPR's misconduct findings did not implicate state bar rules, the former DOJ attorney's misconduct was not referred to the applicable state bar.

Discovery - Rule 16; Discovery - Impeachment/Jencks; Misrepresentation/Misleading the Court; Misrepresentation to Opposing Counsel; Failure to Comply with DOJ Rules and Regulations; Unprofessional or Unethical Behavior. A DOJ attorney self-reported to OPR allegations that he made false representations to defense counsel and the court concerning the identification of a defendant as the perpetrator of an armed assault on a confidential informant (CI). The CI, who had previously purchased drugs from the defendant as part of his cooperation with law enforcement authorities, reported to law enforcement that the defendant had pointed a gun at the CI and his wife. However, in a meeting with the DOJ attorney, the CI recanted his identification of the defendant as the assailant, acknowledged that his identification of the defendant had been based on his wife's identification of the assailant, and stated that his wife had subsequently identified someone other than the defendant as the assailant. The defendants characterized the CI's misidentification of the defendant as exculpatory and complained that the DOJ attorney should have disclosed the misidentification earlier. Further inquiry by OPR revealed

numerous discovery issues related to the CI's misidentification of the defendant as the armed assailant.

OPR conducted an investigation and concluded that the DOJ attorney: (1) acted in reckless disregard of his obligations under the DOJ component's discovery policy by failing to produce to the defense an investigative report memorializing the CI's initial identification of the defendant as the armed assailant; (2) acted in reckless disregard of his obligation to produce material impeachment evidence affecting the CI's credibility by failing to disclose to the defense in the related case the CI's recantation of his identification of the defendant as the armed assailant; (3) exercised poor judgment by failing to memorialize, or cause to be memorialized by an agent, the CI's recantation when it occurred; (4) exercised poor judgment in the manner in which he responded to the defendant's attorney regarding the identity of the CI's assailant; (5) acted in reckless disregard of his obligation not to engage in conduct prejudicial to the administration of justice, when he produced to the defendant's attorney redacted investigative reports memorializing the CI's identification of the defendant as the armed assailant but did not disclose to the attorney that the CI had recanted his identification of the defendant until five or six weeks after the investigative reports were produced; (6) acted in reckless disregard of his obligation under the DOJ component's discovery policy, when he failed to produce the redacted investigative reports memorializing the CI's identification of the defendant as the armed assailant at a time defense counsel could have made use of them in a pretrial suppression hearing; (7) acted in reckless disregard of his obligation not to engage in conduct involving misrepresentation, when he failed to provide an accurate and complete narrative of the facts concerning the CI's misidentification of the armed assailant in the government's response to the defendant's motion to dismiss; (8) acted in reckless disregard of his obligations to disclose material impeachment evidence affecting a government witness' credibility, when he failed to disclose the CI's third inconsistent account of the armed assault; (9) acted in reckless disregard of his obligation not to engage in conduct involving misrepresentation, when he sent an e-mail to trial and appellate counsel in a related case that did not accurately and completely describe the CI's recantation; and (10) acted in reckless disregard of his obligations to timely disclose discovery material to the defendants in the unrelated case, when he failed to make diligent efforts to obtain and disclose the defendants' statements, in violation of the court's scheduling order and a local rule.

Finally, OPR found that the DOJ attorney's handling of discovery matters, together with OPR's conclusions that he engaged in professional misconduct in multiple respects, raised significant concerns about the DOJ attorney's competence, and OPR found that his performance fell below the level of competency expected of a DOJ attorney.

OPR referred its findings to the PMRU for consideration of possible discipline. The PMRU upheld OPR's findings of professional misconduct, suspended the DOJ attorney without pay, and authorized OPR to refer its findings to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

Improper Examination of a Witness. A DOJ attorney self-reported to OPR judicial criticism of his cross-examination of a defendant. Prior to the trial, the DOJ attorney had represented to the court that the government would not attempt to introduce evidence concerning the defendant's background. During the trial, the defendant testified and offered substantial

information concerning his background. The court declared a mistrial after the DOJ attorney cross-examined the defendant concerning matters peripheral to his testimony about his background, but rejected the defense argument that the DOJ attorney had deliberately provoked a mistrial.

OPR conducted an investigation and found the evidence insufficient to conclude that the DOJ attorney intentionally violated the court's order. OPR also found that the DOJ attorney did not act in reckless disregard of his obligation to comply with the court's order because the parameters of the court's order were not clear and unambiguous. The defendant's oral motion to limit testimony concerning the defendant's background failed to describe specifically the proscribed information, and the court granted the oral motion without comment. OPR also found that the DOJ attorney's cross-examination concerned issues raised by the defendant's direct testimony, and the defendant's answers unexpectedly reflected the proscribed information. OPR concluded, however, that the DOJ attorney exercised poor judgment by failing to seek more specific direction from the court concerning the application of its order prohibiting inquiry into the defendant's background.

Whistleblower -- Retaliation for Protected Disclosure. The Department's Office of the Inspector General referred to OPR a complaint from an FBI employee alleging that as a consequence of his disclosure to FBI management concerning a security issue created by another FBI employee, he was temporarily reassigned to a less desirable duty station and his annual performance appraisal rating was unfairly downgraded.

OPR found jurisdiction to investigate the claim of whistleblower retaliation because the FBI employee had made a disclosure to an official designated by 28 C.F.R. § 27.1(a) to receive protected disclosures, and the FBI employee had a reasonable belief that his disclosures concerning a possible security violation evidenced a violation of FBI guidelines and regulations.

OPR found credible evidence that the FBI employee had acted in an unprofessional manner towards another FBI employee, and that his unprofessional conduct was magnified by the fact that the conduct occurred in the presence of non-FBI law enforcement agents. The FBI employee admitted to OPR that he had acted in an unprofessional manner toward his colleague. OPR found that the FBI employee's temporary reassignment to another duty station and the downgrading of his performance appraisal rating were not retaliatory, but were an attempt to address and redress the FBI employee's unprofessional behavior. OPR found that the supervisor took these steps after conducting a reasonable inquiry concerning the FBI employee's conduct toward his colleague. Accordingly, OPR concluded that there was clear and convincing evidence that the FBI would have taken the same personnel actions with respect to the FBI employee in the absence of his protected disclosures. OPR therefore closed its investigation.

Improper Closing or Rebuttal Argument. A DOJ attorney reported judicial criticism of his closing argument, during which he repeatedly referred to the defendant's prior conviction and urged the jury to consider it as evidence of the defendant's guilt. Although the court upheld the defendant's conviction, it found that the DOJ attorney improperly urged the jury to convict the defendant because of his prior conviction for similar crimes.

OPR conducted an investigation and concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligation not to violate the prohibition of Fed. R. Evid. 404(b) against offering evidence of a person's character to show that the person acted in accordance with that character, and his obligation pursuant to the applicable rules of professional conduct not to refer to irrelevant or inadmissible evidence. In reaching its conclusion, OPR found that the outline that the DOJ attorney had prepared and relied upon during much of his closing argument closely tracked the closing argument's structure and language, except when the DOJ attorney made the extemporaneous comments that the court criticized. While the DOJ attorney's comments were extemporaneous, and the DOJ attorney described himself as flustered by his effort to avoid arguing the defendant's propensity to commit the crime charged, OPR found that, as an experienced prosecutor, the DOJ attorney should have been able to avoid referring to the defendant's prior conviction for a similar crime. OPR further concluded that to the extent that the DOJ attorney knew that he was becoming flustered or confused in his attempt to make a permissible argument, he should have avoided extemporaneous comment on this topic and not strayed from his prepared presentation. OPR concluded that the DOJ attorney's failure to avoid violating Rule 404(b) was a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in such a situation.

OPR referred its findings to the PMRU, which concluded that there was preponderant evidence to support OPR's finding that the DOJ attorney acted in reckless disregard of his obligations under Fed. R. Evid. 404(b) and the applicable state rules of professional conduct. Because the DOJ attorney resigned from the Department before the PMRU completed its review, no discipline could be imposed. At the direction of the PMRU, OPR notified the DOJ attorney's state bar of OPR's finding.

Discovery – Rule 16; Failure to Comply with Court Order or Federal Rule; Failure to Comply with U.S. Attorneys' Manual Provision. A DOJ attorney failed until the eve of trial to disclose admissions the victim had made approximately six months earlier that she and the defendant had engaged in consensual sexual relations before the defendant was charged with sexually abusing her. The defense moved to dismiss, claiming it was unprepared for trial because of the late disclosure. The court continued the trial and set a hearing on the motion to dismiss. On the date of the scheduled hearing, the government dismissed the sexual abuse charge in exchange for a guilty plea to a lesser charge of first-degree burglary. After self-reporting the late disclosure to OPR, the DOJ attorney resigned from the Department.

OPR conducted an investigation. The DOJ attorney told OPR that he intended to timely disclose the victim's admission that she had prior sexual encounters with the defendant. However, an initial report of interview by an agent detailing the admission contained inconsistent statements by the victim that the DOJ attorney believed needed further clarification before disclosure, and the DOJ attorney instructed the agent to prepare a revised version. The defendant entered, but then withdrew, a guilty plea, and the DOJ attorney failed to notice until the eve of trial, after the deadline for disclosure had passed, that the agent never provided him the revised interview report. OPR

concluded that by failing to timely disclose evidence of the victim's prior sexual encounters with the defendant, as well as her inconsistent statements, the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligations under Fed. R. Crim. P. 16, the court's scheduling order, and Section 9-5.001 of the U.S. Attorneys' Manual.

OPR referred its findings to the PMRU, which concluded that the DOJ attorney exercised poor judgment, but did not engage in reckless professional misconduct, when he relied on the agent's submission of the final version of the report as the event that would trigger the DOJ attorney to make a disclosure to the defense.

Conflict of Interest/Appearance of Conflict of Interest; Improper Contacts with Represented Party. A defense attorney alleged that a DOJ attorney took custody of the defendant's minor child when the defendant was sentenced to incarceration. The defense attorney also alleged that the DOJ attorney likely had prohibited discussions with the defendant about his case. The DOJ attorney, who was not prosecuting the defendant's case, resigned from the Department after DOJ received the defense attorney's allegations.

During OPR's investigation, the DOJ attorney described the defendant as his close friend and relative and acknowledged that he took custody of the defendant's minor child after the defendant was incarcerated. The DOJ attorney also admitted that the defendant and the defendant's minor child resided at his home during the week before the sentencing, but stated it was necessary to help the minor child adjust to the impending custodial arrangement. The DOJ attorney and the defendant denied engaging in any case-related discussions, and OPR did not substantiate the allegation of prohibited contacts with a represented person. OPR concluded that the DOJ attorney also did not violate any other applicable rule, and did not engage in professional misconduct. Rather, OPR concluded that the DOJ attorney exercised poor judgment when the DOJ attorney failed to recognize the potential appearance of impropriety of the actions he took in connection with the case, and failed to keep his supervisors fully informed of his actions.

Failure to Comply with DOJ Rules and Regulations; Misrepresentation/Misleading the Court. Two defendants moved for a new trial after learning that a cooperating co-defendant who testified against them at their trial had, with the government's help, also cooperated with state authorities in an unrelated state prosecution. In opposing the defendants' new trial motions, the two DOJ attorneys who tried the case represented that they did not offer the cooperator any benefit, and that he did not receive any benefit from them for assisting the state's prosecution. A video recording, however, showed that one of the DOJ attorneys promised the cooperator before the defendants' trial that the government would make a favorable sentencing recommendation if the cooperator assisted the state's prosecution. Moreover, after the trial but before the government filed its opposition to the defendants' new trial motions, the DOJ attorneys filed a motion for downward departure on the cooperator's behalf, reciting the cooperator's assistance in the state prosecution. The defendants moved for dismissal of the case, accusing the government of bad

faith in failing to disclose the promise made to the cooperator, and of making misrepresentations to the court in its post-trial submissions.

OPR conducted an investigation and concluded that the DOJ attorney who promised the cooperator a favorable sentencing recommendation engaged in intentional professional misconduct, in violation of Section 9-5.001 of the U.S. Attorneys' Manual and his component office's written discovery policy, by failing to disclose to the defendants the promise and the fact that the cooperator had assisted the state. OPR further concluded that this DOJ attorney engaged in intentional professional misconduct in violation of the rule of professional conduct prohibiting misrepresentations to a court by falsely stating in the government's post-trial submissions that the cooperator had not been offered anything, and had not obtained a benefit, for assisting the state.

OPR also concluded that the second DOJ attorney, who knew that the cooperator had assisted the state, but not that the first DOJ attorney had promised him a benefit for doing so, engaged in professional misconduct by recklessly disregarding his obligation, pursuant to U.S. Attorneys' Manual § 9-5.001 and his component office's written discovery policy, to disclose to the defendants that the cooperator had assisted the state. In addition, OPR concluded that the second DOJ attorney, who knew that the government had recited the assistance to the state in the downward departure motion filed on the cooperator's behalf, recklessly disregarded his obligation not to make misrepresentations to a court when he falsely stated to the court in one of the post-trial submissions that the cooperator had obtained no benefit for assisting the state.

OPR referred its findings to the PMRU, which imposed a suspension without pay regarding the first DOJ attorney. The PMRU determined that although the first DOJ attorney's failures to disclose and his inaccurate representations rose to the level of professional misconduct, they were reckless rather than intentional. In addition, the PMRU sustained OPR's finding that the second DOJ attorney engaged in reckless professional misconduct in violation of Department policy. The PMRU issued a reprimand to the second DOJ attorney. At the direction of the PMRU, OPR notified the state bar of OPR's findings for both DOJ attorneys.

Misrepresentation/Misleading the Court; Discovery – Brady/Exculpatory Information. A DOJ component advised OPR that it had withdrawn its opposition to a homicide defendant's motion for a new trial because the government had failed to comply with its discovery obligations. The government acknowledged that it possessed, but had failed to disclose prior to the defendant's trial, information that a cooperating witness in the homicide case attempted to obstruct justice in an unrelated drug case in which the cooperating witness was a defendant.

OPR found that the government violated its constitutional discovery obligations, as well as Department policy, when the DOJ attorneys failed to disclose materially favorable evidence known to the government concerning the cooperating witness' participation in the murder of an individual who was cooperating in an unrelated drug case against the defendant and others. The favorable evidence had been disclosed to DOJ attorneys who worked in the same office as the DOJ attorneys

handling the homicide prosecution but who were investigating different and unrelated crimes. During debriefings of the cooperating witness, who was also cooperating in the unrelated matter, the witness made statements that implicated him in a scheme to first pressure the individual not to testify in the drug case and then to murder the individual. The cooperating witness' inculpatory statements were not provided to the DOJ attorneys handling the homicide prosecution and therefore were not disclosed to the homicide defendant. OPR also found that the DOJ attorneys handling the homicide prosecution made inaccurate representations when questioned by the court about the government's investigation of the murder of the witness in the drug case and the cooperating witness' potential involvement in that murder.

OPR concluded that the senior DOJ attorney handling the homicide prosecution was not aware of the impeachment information concerning the cooperating witness and did not intentionally fail to discover it. OPR concluded, however, that the senior DOJ attorney exercised poor judgment by failing to diligently pursue information about the statements the cooperating witness made to other DOJ attorneys in the same office. OPR also concluded that the senior DOJ attorney exercised poor judgment when he relied on hurried and incomplete efforts during the homicide trial to obtain information sought by the court, which resulted in inaccurate and incomplete representations being made to the court.

OPR concluded that the junior DOJ attorney handling the homicide prosecution had no trial responsibilities with respect to the cooperating witness and therefore did not commit professional misconduct or exercise poor judgment with respect to the government's failure to disclose impeachment information about the cooperating witness. Although the junior DOJ attorney made an inaccurate statement to the court, OPR did not conclude that his misrepresentation constituted professional misconduct or poor judgment. OPR concluded that the DOJ attorneys who interviewed the cooperating witness during the drug investigation exercised poor judgment when they failed to inform the DOJ attorneys handling the homicide prosecution about the cooperating witness' inculpatory statements.

Failure to Comply with Court Order or Federal Rule. A DOJ component notified OPR that a district court had determined that the DOJ attorneys handling a homicide case and their supervisor violated a protective order when the supervisor communicated with a potential witness regarding a topic prohibited by the court. OPR found that the government violated the court's order when the supervisor contacted the potential witness after the court had prohibited the trial attorneys from doing so. OPR also found that although the supervisor had an independent reason for contacting the witness about the topic that was the subject of the protective order and believed that the protective order did not apply to him, the supervisor exercised extremely poor judgment when he did so after being informed about the protective order. OPR concluded that the senior DOJ trial attorney exercised extremely poor judgment when he failed to provide the supervisor with a full and accurate account of the terms of the protective order, thereby facilitating the violation of the court's order. The senior DOJ attorney also exercised extremely poor judgment by not promptly informing the court of the supervisor's contact with the witness and instead only

informed the court in response to the court's questioning. OPR concluded that the junior DOJ attorney exercised poor judgment by failing to express his disagreement with the senior DOJ attorney's inaccurate description of the court's order and by not promptly informing the court about the supervisor's contact with the witness.

Failure to Comply with DOJ Rules and Regulations. A DOJ attorney self-reported to OPR potential deficiencies in his grand jury presentation. In response to a defense motion to dismiss the indictment, the DOJ attorney reviewed the grand jury transcripts and noticed that his questions contained potentially prejudicial characterizations of the defendant. The DOJ attorney brought these statements to the attention of his supervisor, who, upon reviewing the transcripts, identified additional deficiencies in the DOJ attorney's grand jury presentation. Based on these deficiencies, the government moved to dismiss the indictment.

OPR conducted an investigation and concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligations pursuant to Department policy with regard to his grand jury presentation by: (1) failing to present sufficient evidence to support a probable cause determination by the grand jury; (2) presenting evidence to the grand jury of conduct not charged in the indictment that could inflame, unfairly prejudice, or improperly influence the grand jury, without proper foundation or explanation; (3) making inappropriate and prejudicial comments before the grand jury; (4) relying on hearsay evidence without explaining the hearsay nature of the testimony or clearly identifying the sources of that evidence for the grand jury; and (5) improperly providing factual information to the grand jury through his own unsworn statements rather than through a sworn witness. OPR further concluded that the DOJ attorney exercised poor judgment during his grand jury presentation by presenting evidence of the defendant's other uncharged fraudulent conduct without clarifying for the grand jury the limited relevance of that evidence.

The DOJ attorney also self-reported to OPR judicial criticism of his conduct with regard to discovery in two additional cases. In both cases, the district court criticized the DOJ attorney with respect to the timeliness and thoroughness of his discovery practice. Based on the results of its investigation, OPR concluded that the DOJ attorney did not commit professional misconduct in those cases.

OPR reported its findings and conclusions to the PMRU. The PMRU was unable to impose discipline due to the DOJ attorney's retirement. Because OPR had not found a violation of an applicable bar rule, no referral to the state bar was authorized.

Whistleblower – Retaliation for Protected Disclosure. A former FBI employee alleged that FBI managers took away his management responsibilities and constructively discharged him from employment with the FBI in retaliation for protected disclosures he had made regarding improper discrimination by other FBI managers.

OPR conducted an investigation and concluded that the former FBI employee had made protected disclosures that entitled him to protection from retaliation under the Department's FBI whistleblower regulations. OPR concluded, however, that there was clear and convincing evidence that the FBI would have taken the allegedly retaliatory personnel actions even in the absence of the former employee's protected disclosures. An independent office had investigated allegations that the former FBI employee had attempted to influence the testimony of a witness in a case, and concluded that the former FBI employee had acted unprofessionally and had made remarks that gave the appearance that he was attempting to improperly influence the testimony of a witness. As a result, the FBI proposed the former employee's removal, and OPR found that it would have done so even in the absence of the former FBI employee's protected disclosures. Accordingly, OPR terminated its investigation.

Failure to Disclose Exculpatory Information; Violation of Defendant's Constitutional Right to a Speedy Trial; Failure to Comply with Department Policy. A court found that a DOJ attorney failed to timely disclose to the defense forensic reports that included material, exculpatory information, and that delays resulting from the belated disclosure and two earlier mistrials deprived the defendants of their constitutional right to a speedy trial. When the attorney learned, shortly after the second mistrial, that he had not received or produced the reports at issue, he requested copies from the investigative agency that prepared them. Although the agency promptly provided copies of the reports to the DOJ attorney, approximately four months passed before he provided the information to defense counsel, which was only five days before the third trial was scheduled to begin. The court found that the information contained in the forensic report was exculpatory; that the delay in disclosing the report, which had been generated years earlier, was extreme and impermissible, and that the length of the delay created uncertainty as to what investigative leads might have been generated from the information had it been disclosed in a timely manner. As a sanction for the government's conduct, the court dismissed the indictment with prejudice.

Based on the results of its investigation, OPR concluded that the attorney acted in reckless disregard of his obligations pursuant to Department policy, as set forth in the U.S. Attorneys' Manual § 9-5.001, to produce exculpatory information to the defense reasonably promptly after receiving it. OPR concluded that the attorney's conscious decision to not immediately produce the reports, or take any steps to ensure that he would do so promptly, was inexplicable and objectively unreasonable under the circumstances. OPR further concluded that the attorney exercised extremely poor judgment when he relied entirely and exclusively on case agents to determine which forensic tests should be conducted, and then to furnish him with the results of those tests. OPR noted that the attorney's "hands-off" approach in dealing with the forensic analyses created an unacceptable risk that evidence or discoverable information could be overlooked.

OPR further concluded that the disclosure of the reports shortly before the third trial date did not violate the attorney's obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), or the applicable rules of professional conduct. OPR found no evidence that the attorney intentionally

withheld favorable information from the defense, or that the belated disclosure of the forensic reports was part of a pattern of withholding discovery. Moreover, the information contained in the reports was not material to the outcome in light of the other evidence at trial, and the defendants' ability to make use of that information at trial was not meaningfully diminished as a result of the delayed disclosure.

Finally, OPR examined the reasons for delay in the case, including the events that led the court to declare two mistrials, and concluded that, with the exception of the belated disclosure of forensic reports, the delays were not attributable to misconduct by the attorney. Accordingly, OPR concluded that the attorney's actions did not deprive the defendants of their constitutional right to a speedy trial.

OPR referred its findings to the PMRU, which upheld OPR's finding that the attorney acted in reckless disregard of his obligations pursuant to Department policy, and issued a letter of reprimand to the DOJ attorney. The PMRU disagreed with OPR's conclusion that the attorney exercised poor judgment when he relied entirely on case agents to handle all aspects of forensic testing and to provide him with results of those tests, and therefore did not consider this finding in determining the appropriate discipline. Because OPR's misconduct finding did not implicate state bar rules, the DOJ attorney's misconduct was not referred to the applicable state bar.

Unauthorized Disclosure. A DOJ component notified OPR that a DOJ attorney sent an internal e-mail containing sensitive, confidential information concerning an ongoing Department matter to a former DOJ attorney who was in private practice. Following an investigation, OPR concluded that the DOJ attorney committed intentional professional misconduct by knowingly revealing confidential client information to a person not authorized to receive it, in violation of rules of professional conduct and DOJ directives.

In reaching this conclusion, OPR found no evidence that the DOJ attorney made the unauthorized disclosure to obtain a personal benefit or to harm the Department. Rather, OPR found that the DOJ attorney was upset about personal and professional challenges, and he forwarded the e-mail to the former DOJ attorney, his longtime friend, seeking encouragement. When informed that the e-mail had been sent to him, the former DOJ attorney indicated that he deleted the e-mail without reading it or forwarding it to anyone else. Nevertheless, the e-mail contained highly sensitive information, and the DOJ attorney breached his professional obligation to safeguard client confidences by knowingly sending such confidential information to another person without authorization.

OPR referred its findings to the PMRU for consideration of possible discipline. The DOJ attorney retired soon after OPR issued its report. Therefore, the PMRU was unable to impose discipline.

Discovery – Failure to Disclose Impeachment/Jencks Act Material. A DOJ component advised OPR that an experienced DOJ attorney had failed to disclose to the defense the grand jury

testimony of a law enforcement agent who had testified for the prosecution at trial regarding the same subject matter, as required by the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2. In a post-trial pleading, the DOJ attorney had explained to the court that he had not realized that he was required to disclose a witness' grand jury testimony pursuant to the Jencks Act and Rule 26.2 and that he thought grand jury secrecy rules prohibited such disclosures.

OPR conducted an investigation and concluded that the attorney, who retired from the Department shortly after being interviewed by OPR, violated the Jencks Act and Rule 26.2 by failing to disclose to the defense the transcript of the agent's grand jury testimony. OPR found that the attorney did not act intentionally in order to gain an unfair advantage at trial or for some other improper purpose. Nevertheless, OPR found the attorney committed professional misconduct when he acted in reckless disregard of his obligation to disclose the grand jury testimony, as required by the Jencks Act and Rule 26.2, as well as state bar rules, which required him to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. OPR concluded that, for any DOJ attorney—let alone one with significant experience—to be unaware that grand jury transcripts are witness statements for purposes of the Jencks Act and Rule 26.2, was objectively unreasonable under all the circumstances, and a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR referred its findings to the PRMU, which upheld OPR's findings of professional misconduct and authorized OPR to refer its findings to the state bar. OPR referred its findings of professional misconduct to the appropriate state bar disciplinary authority.

Improper Contacts with a Represented Party; Misrepresentation; Unprofessional Behavior. Defense counsel reported to OPR that during a trial for possession of a firearm by a felon, the DOJ attorney prosecuting the case made misrepresentations to the court and defense counsel and improperly communicated with the defendant without counsel's consent.

The defendant was a passenger in a car searched by the police following an investigative stop, and a firearm was found under the seat where the defendant had been sitting. At trial, the government presented witnesses who testified that the firearm was likely placed under the seat by a right-handed individual, but presented no evidence that the defendant was actually right-handed. Defense counsel alleged that, in order to obtain evidence that the defendant was right-handed, the DOJ attorney falsely told the court and defense counsel that he had misplaced some stipulations that the defendant had signed prior to trial, so that the government's case agent could observe which hand the defendant used to sign the new stipulations and, thereafter, testify with regard to such observation. Defense counsel also alleged that, at the DOJ attorney's direction, a court employee directed the defendant to provide a handwriting sample without counsel's consent. The court did not allow the government to call the government's case agent or the court employee as a witness. The defendant was acquitted after trial, and the court made no findings that the DOJ attorney had engaged in misconduct.

OPR initiated an inquiry, which it later converted to an investigation. Based on the results of its investigation, OPR concluded that there was insufficient evidence to establish that the DOJ attorney made material misrepresentations to the court and defense counsel concerning two missing stipulations signed by the defendant. No witness offered direct evidence demonstrating that the DOJ attorney had lied to the court or defense counsel, and OPR found credible the DOJ attorney's denial of the allegation. In addition, OPR found clear and convincing evidence that the DOJ attorney did not instruct a court employee to improperly obtain the defendant's handwriting sample. Rather, OPR concluded that the DOJ attorney asked the employee to observe the defendant, and the employee, on his own initiative, directed the defendant to write something on a piece of paper. Although OPR concluded that the DOJ attorney did not commit professional misconduct in this matter, OPR concluded that he exercised poor judgment by failing to properly prepare for trial and by enlisting the aid of court personnel to gather evidence during trial, without seeking guidance from a supervisor and without the approval of the court employee's supervisors. OPR's poor judgment finding was referred to the DOJ component to address as a performance matter.

Failure to Disclose Brady and Giglio Information. A DOJ attorney reported to OPR that he failed to timely produce favorable impeachment evidence to the defense in a prosecution for sexual exploitation of a child and the unlawful transport of a firearm. Following the close of proof at trial, the DOJ attorney learned that the government had in its possession a police report indicating that the victim had made potentially false allegations against an innocent person in a subsequent, unrelated sexual assault matter. The DOJ attorney provided the report to the defense, and the court allowed the defense to cross-examine the victim concerning the potentially false allegations. The court made no findings that the DOJ attorney committed misconduct or violated his *Giglio* obligations, but recommended that the matter be reported to OPR.

OPR initiated an inquiry, which it later converted to an investigation. Based on the results of its investigation, OPR concluded that the DOJ attorney learned of the existence of the police report regarding the victim's subsequent sexual assault matter well in advance of trial. However, the DOJ attorney failed to properly review the report and learn that the victim had made potentially false allegations. Nevertheless, OPR concluded that the DOJ attorney's conduct did not violate *Giglio*, because he provided the material in time for the defense to make adequate use of it at trial. OPR concluded that the DOJ attorney exercised poor judgment in fulfilling his obligations under Department policy by failing to thoroughly review the case file to identify and timely disclose potential impeachment material in the government's possession. OPR referred its poor judgment finding to the component, which counseled the attorney and required him to attend additional discovery training. OPR further determined that the DOJ attorney's co-counsel was unaware of the existence of the report and, thus, did not exercise poor judgment.

Failure to Maintain an Active Bar Membership. A DOJ attorney reported to OPR that he had been suspended from the bar for a 27-day-period for failing to pay his annual registration fee; as a result, he failed to maintain an active bar membership, in violation of DOJ policy. The

attorney, who was new to the Department and to the bar, learned of his suspension from a Department official who was processing his initial background check. The DOJ attorney claimed that he had not received notice of the registration deadline because he had relocated without updating his mailing address with the bar, although bar regulations required him to do so. The DOJ attorney provided OPR with a forwarded notice of delinquent payment he received after he had already been summarily suspended for failure to pay his registration fee. In the DOJ attorney's initial report to OPR, he incorrectly claimed that the delinquent payment notice contained no language regarding the potential for suspension.

OPR initiated an inquiry, which it later converted to an investigation. OPR concluded that, although it was a very close question, the DOJ attorney did not commit professional misconduct when he failed to timely pay his annual bar registration fee. Rather, OPR concluded that he exercised poor judgment when he failed to update his contact information with the bar and thereafter failed to thoroughly review and immediately address forwarded correspondence he received concerning his license to practice law. OPR further concluded that the DOJ attorney did not commit professional misconduct by practicing law without a license, but made a mistake by operating under the erroneous belief that he remained at all pertinent times authorized to practice law. Lastly, OPR concluded that the DOJ attorney made a mistake by making an inaccurate assertion in his initial report to OPR concerning the contents of the notice of delinquency. OPR referred its poor judgment finding to the DOJ component, which thereafter cautioned the DOJ attorney regarding his conduct.

Failure to Comply with Plea Agreement Policies; Failure to Comply with Sentencing Recommendation Policy; Dishonest and Deceitful Conduct. A DOJ component notified OPR that a DOJ attorney failed to obtain supervisory approval for more than 25 plea agreements he negotiated in connection with several long-term drug investigations, each involving multiple co-defendants. A number of the defendants were charged with drug trafficking crimes that exposed them to mandatory-minimum sentences, pursuant to 21 U.S.C. §§ 841(b)(1)(A) and (B). The unauthorized plea agreements involved, among other things: (1) charging decisions that either lowered or eliminated certain defendants' mandatory-minimum sentencing exposure; (2) commitments by the government to file motions pursuant to § 5K1.1 of the U.S. Sentencing Guidelines (the Guidelines), requesting downward departures from the advisory sentencing ranges specified by the Guidelines for certain defendants; (3) sentencing concessions by the government – including recommendations for probation – resulting in variances outside the advisory Guidelines ranges specified for certain defendants; and (4) recommendations for specific sentences, pursuant to Fed. R. Crim. P. 11(c)(1)(C), resulting in variances outside the advisory Guidelines ranges specified for certain defendants. In some of the cases, the sentencing concessions fell 25 percent or more below the applicable Guidelines range sentences. In a separate case involving drug and firearms charges that exposed the defendant to consecutive mandatory-minimum sentences, the DOJ attorney acted contrary to the approval he had obtained to resolve the case pursuant to Rule 11(c)(1)(C) with a specific, binding sentencing

recommendation of 5 years' imprisonment. Instead, at the defendant's sentencing, the DOJ attorney recommended a probationary sentence.

OPR concluded that the attorney engaged in intentional professional misconduct by knowingly and purposefully violating his obligation, pursuant to Department policies, to obtain supervisory approval for each of the plea agreements he entered into, and by recommending probation in the case for which he had obtained approval to recommend a sentence of 60 months' imprisonment. In addition, OPR concluded that the attorney engaged in intentional professional misconduct, in violation of applicable state bar rules, because the attorney knowingly and purposefully failed to abide by his client's directives to obtain supervisory approval for the plea agreements, and because the attorney knowingly and purposefully failed to consult with his client about decisions that were material to the government's prosecution objectives. Finally, OPR found that the attorney intentionally misled his component into believing that he had handled his cases in the manner required by applicable Department policies to accomplish the government's prosecution objectives. OPR's investigation revealed that, because the attorney disagreed with those objectives, he knowingly acted in contravention of the policies to accomplish objectives he personally believed were preferable to those directed by his client's authorized representative. OPR found that, in doing so, the attorney intentionally engaged in an ongoing pattern of dishonest and deceitful conduct. OPR's findings have been referred to the PMRU.

Failure to Comply with Discovery Obligations; Rule 16, Brady/Giglio, Jencks Act. A DOJ component notified OPR that a district court criticized a DOJ attorney for violating its order establishing pretrial deadlines for disclosure of all Rule 16, *Brady/Giglio*, and Jencks Act material. Although the attorney disclosed most of the material by the prescribed deadlines, he disclosed some Rule 16 material after the applicable deadline had passed but nonetheless prior to the trial. The court sanctioned the government for the untimely Rule 16 disclosures by excluding the evidence from the trial. The attorney belatedly disclosed Jencks Act material concerning one witness, as well as *Giglio* material concerning two witnesses, several days after the witnesses testified at the trial. The court allowed the defense to recall each witness for further cross-examination, but sanctioned the government by instructing the jury that the trial had been delayed due to the attorney's late disclosures.

Based on its preliminary investigation, OPR determined that the attorney substantially complied with his disclosure obligations, notwithstanding the violations that were the subject of the court's criticism. The attorney disclosed the vast majority of the discoverable material by the prescribed pretrial deadlines, and the belated disclosures were inadvertent. In addition, because of the remedial action taken by the court, any prejudice to the defense resulting from the late disclosures was *de minimis*.

Prior to OPR's completion of its investigation, the attorney resigned from the Department. OPR determined that its investigation in this matter did not implicate significant institutional concerns beyond that of imposing discipline. Because disciplining the attorney was rendered moot

by his resignation, and because OPR found no evidence that the attorney intentionally violated or acted in reckless disregard of his disclosure obligations, OPR terminated its investigation in this matter.

Failure to Maintain Active Bar Membership; Lack of Candor to OPR. A DOJ component notified OPR that a DOJ attorney's active bar membership had lapsed for 50 days in 2013 due to non-payment of dues. The attorney represented to OPR and his component that a third-party was responsible for paying his dues, that he relied on the third party to pay them, and that he was not aware that his dues had not been paid until he attempted to verify his status as an active member of the bar in connection with the Department's annual active bar membership certification. Upon learning that his bar license had been administratively suspended by the bar, the attorney paid the outstanding dues and late fee and was reinstated that same day.

During OPR's investigation into the attorney's 2013 active bar membership lapse, OPR learned that the attorney's active bar membership had previously lapsed for a 22-month period, also due to non-payment of dues. Although the attorney's bar license had been administratively suspended by the bar, and it was not reinstated until the attorney paid the outstanding dues and late fees that had accrued during the 22-month period, the attorney did not report his suspension from the bar or his active bar membership lapse to his component or to OPR. When asked about his failure to report the lapse and suspension, the attorney represented to OPR that he was not aware at the time that his active bar membership had lapsed or that his bar license had been suspended, and he further represented that he had no recollection of being reinstated to active bar membership status, or of paying the delinquent dues and late fees required for reinstatement.

Based on the results of its investigation, OPR concluded that the attorney engaged in misconduct by acting in reckless disregard of his obligation, pursuant to statute and Department policy, to at all times be authorized to practice law when he allowed his active bar membership to lapse for the 50-day period in 2013, and for the prior lapse for a 22-month period. In addition, OPR concluded that the attorney violated his duty of candor and honesty by falsely representing to OPR and his component that a third-party was responsible for paying his 2013 bar dues and that he relied on the third-party to do so, and also by falsely representing to OPR that he was not aware of his prior 22-month suspension from the bar or his subsequent reinstatement. Finally, OPR concluded that the evidence was insufficient to establish that the attorney engaged in the unauthorized practice of law while suspended during either period.

OPR referred its report of investigation to the PMRU, which upheld OPR's findings and conclusions and suspended the attorney without pay. The PMRU authorized OPR to refer its professional misconduct finding to the appropriate state bar disciplinary authorities, and OPR has done so.

Failure to Comply with Discovery Obligations – Brady/Exculpatory Information; Violation of the Defendant’s Constitutional Rights. DOJ attorneys self-reported that a court criticized their failure to disclose impeachment evidence. The DOJ attorneys had called a witness during a criminal trial and did not disclose to the defense that a federal agency was investigating the witness for potential fraud resulting from his ongoing business practices. Based on comments that the defense had made to the DOJ attorneys previously, the DOJ believed that the defense already knew about both the investigation and the witness’ ongoing business practices. The jury returned guilty verdicts against all defendants.

Unknown to the prosecutors, during their trial the federal agency had contacted their office for assistance in filing a civil complaint against the witness for multiple counts of fraud. A DOJ attorney in another division of the office filed the complaint on behalf of the agency two days after trial had ended. The prosecutors first learned about the complaint filing four days after the trial had ended and promptly disclosed the filing to the defense. The defense moved to dismiss or for a new trial. The court denied the motion on the ground that the undisclosed evidence was not material, but was critical of the government’s failure to disclose potential impeachment evidence known to the government at the time of trial. On appeal, the court of appeals held that the government violated its *Brady* obligations because the fraud investigation was directly relevant to the witness’ credibility and material to the outcome of the trial.

OPR concluded that when the Department prosecutors learned about the investigation prior to trial and did not disclose that information to the defense, they did not engage in professional misconduct in violation of their obligations under *Brady*, the U.S. Attorneys’ Manual § 9-500.1(D), or the applicable state bar rule because the prosecutors reasonably believed that the defense already knew about the investigation. OPR further found that the Department attorneys did not exercise poor judgment. OPR found, however, that they made a mistake; the better practice would have been for the prosecutors to advise the defense about the investigation once they learned of it.

OPR concluded that the DOJ attorney who filed the complaint exercised poor judgment by failing to notify the prosecutors promptly about the filing of the complaint. The attorney had reason to know that the defendant named in the agency complaint and the government witness in the trial were the same person, yet she did not notify the prosecutors about the complaint. OPR referred its poor judgment finding to the component to address as a personnel matter.

Conclusion

During Fiscal Year 2016, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation’s principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both inside and outside the Department, and continued to serve as the Department’s liaison with state bar counsel. OPR also met with

delegations of several foreign countries to discuss issues of prosecutorial ethics. OPR's activities in Fiscal Year 2016 have increased awareness of ethical standards and responsibilities throughout the Department of Justice, and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.