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# **U.S. DEPARTMENT OF JUSTICE**



## **OFFICE OF PROFESSIONAL RESPONSIBILITY**

### **ANNUAL REPORT**

**2011**

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

**Fiscal Year 2011 Annual Report**

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## **OPR Annual Report for Fiscal Year 2011**

### **Introduction**

The Office of Professional Responsibility (OPR) was established in the Department of Justice (Department or DOJ) by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 36th Annual Report to the Attorney General, and it covers Fiscal Year 2011 (October 1, 2010 through September 30, 2011).

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

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

Misconduct allegations that OPR historically investigates include *Brady*, *Giglio*, Federal Rule of Criminal Procedure 16, 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 represent competently and diligently the interests of the government; failure to comply with court orders, including scheduling orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors apprised of significant developments in a case; and the exercise of prosecutorial discretion based on improper purposes. In addition, OPR examines cases in which courts have awarded Hyde Amendment fees to the defendant based on a finding that the government's conduct was frivolous, vexatious, or in bad faith.

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors

any evidence or non-frivolous allegation of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Department employees are required to report to OPR all misconduct findings made by judges.

Upon receipt, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, in which it typically gathers documents and information and obtains written submissions from subjects and components, or a full investigation, in which it also interviews relevant 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 the source of the allegation. Although some matters begin as investigations, OPR typically will open a matter as an inquiry and then assess the information obtained prior to conducting an investigation. An inquiry or investigation may have more than one Department attorney as the subject of the inquiry or investigation.

Each year, OPR determines that the majority of complaints does not warrant further inquiry because, for example, the complaint is outside OPR's jurisdiction, pertains to matters addressed by a court where no misconduct has been found, is frivolous on its face, or is vague and unsupported. 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 an allegation was made. OPR also may review other relevant materials such as pleadings and transcripts. Most inquiries are resolved with no misconduct finding based on the additional written record.

In cases that are not resolved based solely on the written record, and in all cases in which OPR believes misconduct may have occurred, OPR conducts a full investigation, including 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, under a confidentiality agreement, to review the transcript and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations and to provide information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal.

Department employees must refer judicial findings of misconduct to OPR. Except in extraordinary cases, such findings are evaluated by OPR regardless of any planned appeal.

OPR ordinarily completes investigations relating to the actions of attorneys who resign or retire during the course of the investigation in order to better assess the litigation impact of the alleged misconduct and to permit the Attorney General and Deputy Attorney General to judge the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it deems such action is in the best interest of the Department. Terminated investigations may nevertheless result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which reports to the Deputy Attorney General and is responsible for all disciplinary actions relating to OPR findings of professional misconduct against DOJ attorneys employed by certain components, including the Criminal Division and the Executive Office for United States Attorneys (EOUSA). The PMRU reviews only those cases involving findings by OPR of intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and the applicable law.<sup>1</sup> The PMRU also determines the appropriate level of discipline. In matters where OPR concludes that a Department attorney engaged in professional misconduct and the DOJ attorney is not employed by a component within the purview of the PMRU, pursuant to Department policy, OPR recommends a range of discipline. Although OPR's recommendation is not binding on the management officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), the management official must notify the Office of the Deputy Attorney General in advance of implementing that decision.

Once a disciplinary action for a DOJ attorney is final, OPR notifies the bar counsel in each jurisdiction where the attorney is licensed of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under their jurisdiction) or the Office of the Deputy Attorney General, once they have completed their disciplinary process. The Department's bar notification policy includes findings of intentional

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<sup>1</sup> OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, or to the relevant United States Attorney for appropriate action.

professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. OPR does not make bar notifications when the conduct in question involved exclusively internal Department interests 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 relevant state bar counsel should be notified of the misconduct at issue.

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

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

In Fiscal Year 2011, OPR received 1,381 complaints and other correspondence and memoranda, of which 720, or 52%, were from incarcerated individuals. Some of these matters did not relate to issues under the jurisdiction of OPR, or merely sought information or assistance, and were referred to the appropriate government agency or Department component. OPR determined that 149 of the matters warranted further review by OPR attorneys and they were opened as inquiries. In addition, OPR opened 20 matters as investigations. When information develops in an inquiry indicating that further investigation is warranted, the matter is converted to an investigation.

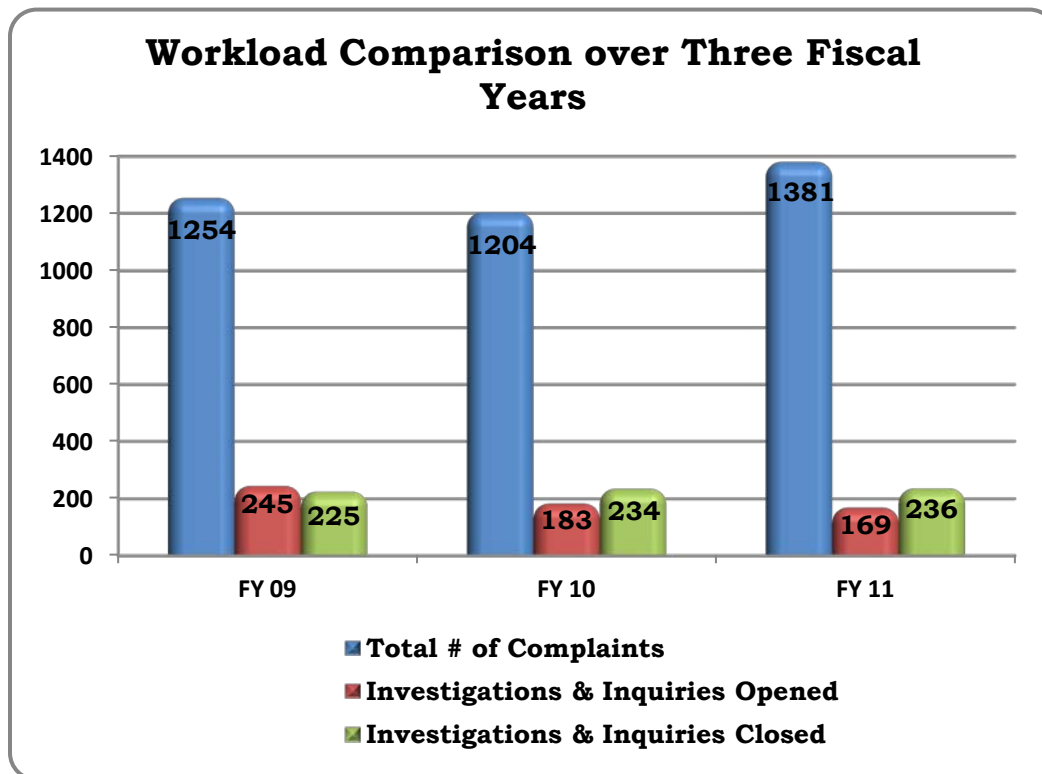
The remaining matters were determined not to warrant an inquiry or investigation by OPR because, for example, they sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported; or simply requested information. Those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

### **OPR Workload Summary for Fiscal Year 2011**

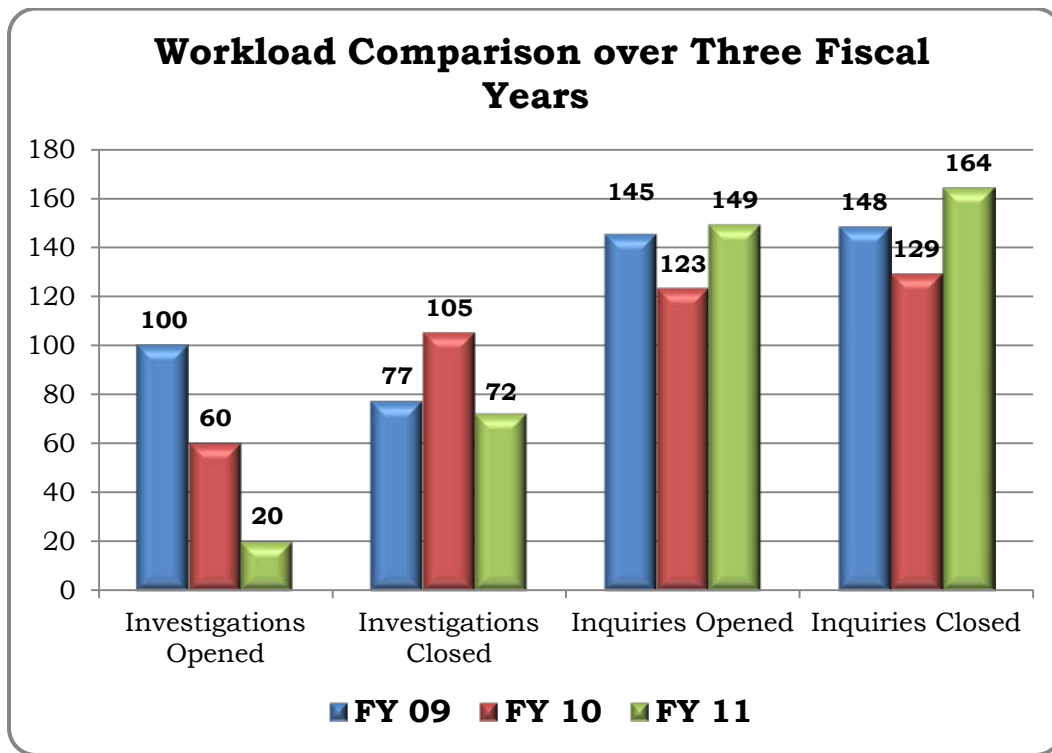
The information in Graphs 1 and 2 shows the number of complaints and correspondence, as well as the number of investigations and inquiries OPR opened and closed in the past three fiscal years. In Fiscal Year 2011, OPR received more complaints and correspondence, opened and closed more inquiries, and closed more matters than in the two previous fiscal years. In Fiscal Year 2011, OPR received 1,381 complaints and correspondence, opened as inquiries or investigations 169 matters, and closed 236 matters.

Accordingly, OPR was able to close 140% of the number of matters it opened, including closing more than three times the number of investigations it opened (20 investigations opened, 72 closed). Also in Fiscal Year 2011, OPR opened 26 more inquiries than were opened in Fiscal Year 2010 and closed 35 more inquiries than were closed in Fiscal Year 2010. See Graphs 1 and 2.

**Graph 1**



**Graph 2**



### **OPR Inquiries in Fiscal Year 2011**

*Inquiries Opened in Fiscal Year 2011:* The sources for the 149 matters designated as inquiries opened in Fiscal Year 2011 are set forth in Table 1.<sup>2</sup>

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<sup>2</sup> OPR evaluates allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department will make a referral to a state bar disciplinary organization. The 149 matters do not include matters involving proposed bar notifications involving non-DOJ attorneys.



**Table 1**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2011</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions & referrals, including referrals by Department employees of judicial criticism <sup>3</sup>	50	33.5%
Private attorneys	21	14.1%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	45	30.2%
Private parties	20	13.4%
Other agencies	5	3.4%
Other sources	8	5.4%
<b>Total</b>	<b>149</b>	<b>100%</b>

The nature of the allegations against Department attorneys contained in the 149 inquiries is set forth in Table 2. Chart 1 provides a summary of the allegations by major category. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 149.

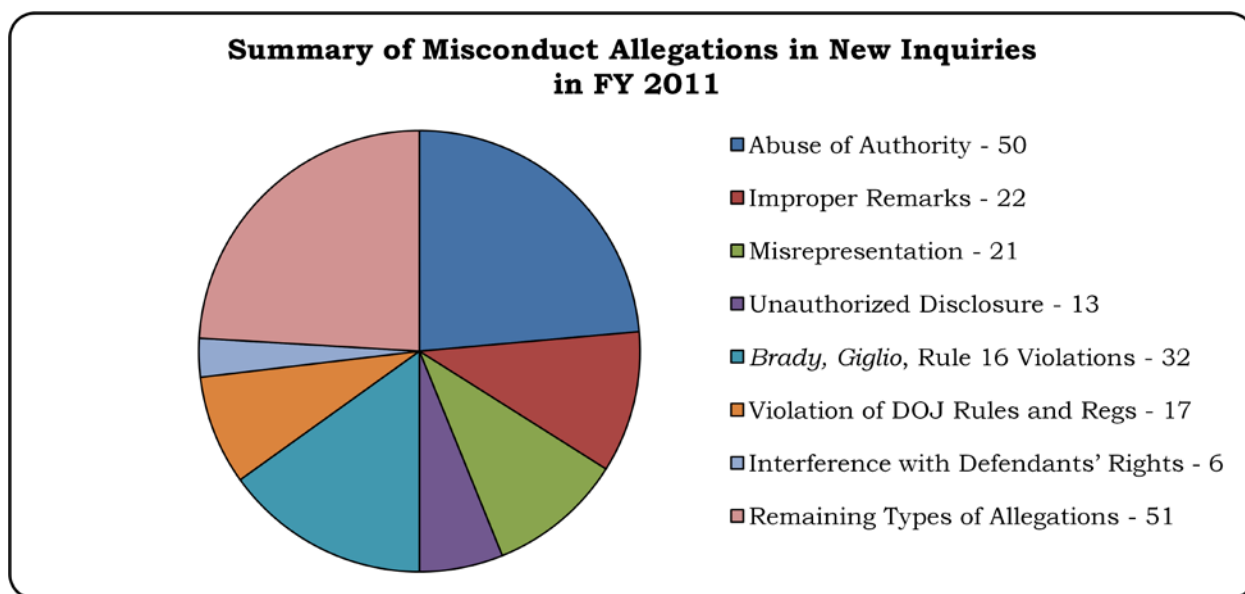
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<sup>3</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 2**

<b>Types of Misconduct Allegations in Inquiries Opened in FY 2011</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Abuse of authority, including abuse of prosecutorial discretion	50	23.6%
Improper remarks to a grand jury, during trial, or in pleadings	22	10.4%
Misrepresentation to the court and/or opposing counsel	21	9.9%
Unauthorized disclosure, including Fed. R. Crim. P. 6(e)	13	6.1%
Failure to competently or diligently represent the client's interests	5	2.4%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery	32	15.1%
Failure to comply with court orders or Federal Rules	6	2.8%
Failure to comply with DOJ rules and regulations	17	8.0%
Interference with defendants' rights	6	2.8%
Lateness ( <i>i.e.</i> , missed filing dates)	3	1.4%
Lack of fitness to practice law	0	0.0%
Failure to maintain active bar membership	6	2.8%
Whistleblower Complaints	11	5.2%
Failure to comply with federal law	5	2.4%
Conflict of Interest	4	1.9%
Conduct of Immigration Judges	3	1.4%
Other	8	3.8%
<b>Total</b>	<b>212</b>	<b>100%</b>

**Chart 1**



*Inquiries Closed in Fiscal Year 2011:* OPR closed a total of 164 inquiries in Fiscal Year 2011 involving allegations against Department attorneys.<sup>4</sup> The matters involved 257 separate allegations of professional misconduct (many matters involved multiple allegations). The manner in which the 257 allegations were resolved as inquiries in Fiscal Year 2011 is set forth in Table 3.<sup>5</sup>

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<sup>4</sup> OPR may designate more than one Department attorney as the subject of an inquiry. OPR closed an additional 55 inquiries involving proposed bar notifications for misconduct of non-Department attorneys.

<sup>5</sup> When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2011, 13 inquiries were converted to investigations.

**Table 3**

<b>Categories of Inquiry Allegations Resolved in FY 2011</b>		
<b>Type of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Total</b>
Performance or management matter. Referred to employing component	19	7.4%
More appropriately handled by another component or agency. Referred	10	3.9%
Issues previously addressed. No further action required by OPR at this time	11	4.3%
No merit to matter based on review of allegation	40	15.5%
No merit to allegation based on preliminary inquiry	44	17.1%
Consolidated with already open miscellaneous matter, inquiry, or investigation	3	1.2%
Inquiry closed because further investigation not likely to result in finding of misconduct	95	37.0%
Matter closed but being monitored for possible follow-up	4	1.5%
FBI whistleblower claim	3	1.2%
Other	28	10.9%
<b>Total</b>	<b>257</b>	<b>100%</b>

### **OPR Investigations in Fiscal Year 2011**

Investigations Opened in Fiscal Year 2011: OPR investigations opened in Fiscal Year 2011 were based on complaints from a variety of sources, as reflected in Table 4.

**Table 4**

<b>Initial Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2011</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Judicial opinions & referrals <sup>6</sup>	7	35.0%
Private attorneys	3	15.0%
Private parties	1	5.0%
Self-report by DOJ employees	3	15.0%
Department components	6	30.0%
<b>Total</b>	<b>20</b>	<b>100.0%</b>

Some of the 20 investigations opened by OPR involved multiple attorney subjects. There were 52 separate allegations of misconduct (many investigations involved multiple misconduct allegations). The subject matter of the 52 allegations is set out in Table 5. Chart 2 below depicts the allegations of misconduct by major categories.

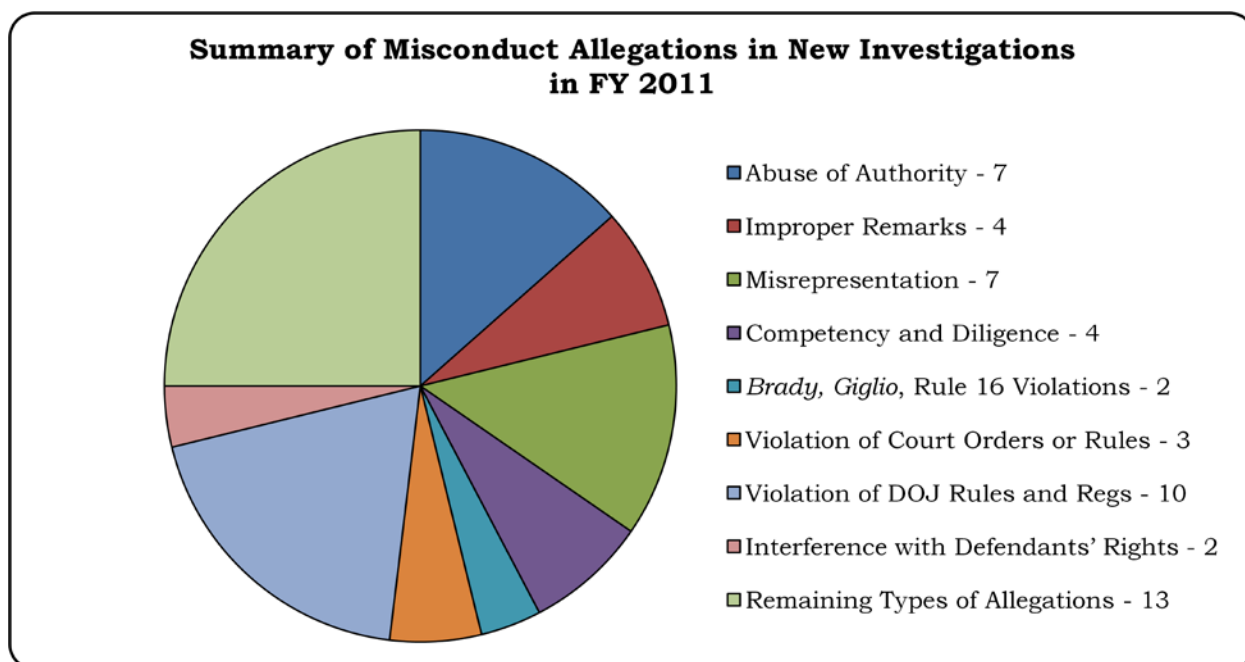
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<sup>6</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 5**

<b>Types of Misconduct Allegations in Investigations Opened in FY 2011</b>		
<b>Types of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations in Investigations</b>
Abuse of authority, including abuse of prosecutorial discretion	7	13.5%
Improper remarks to a grand jury, during trial, or in pleadings	4	7.7%
Misrepresentation to the court and/or opposing counsel	7	13.5%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	2	3.8%
Failure to competently and/or diligently represent the client's interests	4	7.7%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	2	3.8%
Failure to comply with court orders or Federal Rules	3	5.7%
Conflict of interest	1	2.0%
Failure to comply with DOJ rules and regulations	10	19.2%
Interference with defendants' rights	2	3.8%
Whistleblower Complaints	4	7.7%
Lack of fitness to practice law	2	3.8%
Failure to maintain active bar membership	2	3.8%
Failure to comply with federal law	1	2.0%
Conduct of Immigration Judges	1	2.0%
<b>Total</b>	<b>52</b>	<b>100%</b>

**Chart 2**



*Investigations Closed in Fiscal Year 2011:* OPR closed 72 investigations in Fiscal Year 2011. Some of these investigations included multiple attorney subjects, and four included non-attorney subjects (typically law enforcement officers). Of the 72 investigations, OPR found professional misconduct in 11, or in approximately 15%, of the matters. Of the 11 matters in which OPR found professional misconduct, 4 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>7</sup> In 9 of the 11 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard.<sup>8</sup> In resolving a matter, OPR may resolve one allegation by concluding, for example,

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

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

that the attorney engaged in intentional misconduct but resolve another allegation in the same matter by concluding that the attorney acted recklessly.

In Fiscal Year 2011, OPR made virtually the same number of misconduct findings as compared to Fiscal Year 2009, but fewer as compared to Fiscal Year 2010. In Fiscal Year 2009, OPR closed 77 investigations and found professional misconduct in 12, or approximately 16% of those matters. In Fiscal Year 2010, OPR closed 105 investigations and found professional misconduct in 24, or approximately 23%, of those matters.

The 11 misconduct findings in Fiscal Year 2011 related to 24 allegations of misconduct (some matters included more than one allegation of misconduct). Table 6 below depicts the 24 allegations sustained in the 11 misconduct cases closed during Fiscal Year 2011.

**Table 6**

<b>Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2011</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Lateness - Missed Deadlines	3	12.5%
Failure to Diligently Represent the Interests of the Client	3	12.5%
Failure to Comply with USAM Provision	2	8.3%
Unauthorized Disclosure to Media (including Privacy Act)	2	8.3%
Discovery <i>Brady</i> /Exculpatory Information	2	8.3%
Misrepresentation/Misleading the Court	2	8.3%
IJ - Bias, Appearance of Partiality	1	4.2%
IJ - Demeanor	1	4.2%
Failure to Comply with Speedy Trial Act	1	4.2%
Failure to Maintain Active Bar Membership	1	4.2%
Failure to Comply with DOJ Rules and Regulations	1	4.2%
Discovery/Impeachment/Jencks	1	4.2%
Lack of Candor to OPR	1	4.2%
Failure to Competently Represent the interest of the Client	1	4.2%
Other	2	8.3%
<b>Total</b>	<b>24</b>	<b>100%</b>

Disciplinary action already has been initiated or implemented against attorneys in 2 of the matters in which OPR found professional misconduct. In 1 matter, disciplinary action was initiated but not implemented because the subject attorney resigned from the Department following the conclusion of OPR's investigation and receipt of the disciplinary recommendation.



Disciplinary action was not initiated against attorneys in 2 instances because the subject attorneys were no longer employed by the Department at the conclusion of OPR's investigation. Disciplinary action was initiated but was pending in 6 matters at the close of Fiscal Year 2011. With respect to the 2 matters in which disciplinary proceedings were initiated and implemented, the subject attorney in 1 of the matters was suspended and the subject attorney in the other matter received a written reprimand.

OPR also closed 9 investigations, or approximately 13% of the 72 investigations closed in Fiscal Year 2011, with at least 1 finding that an attorney exercised poor judgment.<sup>9</sup> Three of those 9 matters also involved a finding of professional misconduct, and are included in the 11 matters that contained findings of professional misconduct. OPR does not make a disciplinary recommendation when it finds poor judgment alone, but rather refers the finding to the Department attorney's employing component for consideration in a management context. OPR also may recommend that management consider certain actions, such as additional training. Seventeen matters, or approximately 24%, involved at least 1 finding that an attorney made an excusable mistake. Five of those 17 matters also included a finding of professional misconduct or poor judgment. Thus, of the 72 matters closed, OPR found professional misconduct or poor judgment in 17 matters, or approximately 24%, which is slightly down from the 35 matters, or approximately 33% of matters, in which OPR found professional misconduct or poor judgment in Fiscal Year 2010, and the 22 matters, or approximately 29%, in which OPR found professional misconduct or poor judgment in Fiscal Year 2009.

### **Policy and Project-Oriented Activities in Fiscal Year 2011**

During Fiscal Year 2011, OPR participated in non-investigative, policy, and project-oriented activities of the Department. OPR attorneys participated in numerous educational and training activities within and outside the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During Fiscal Year 2011, an OPR attorney participated

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<sup>9</sup> 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 differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

in presentations in a media relations workshop focusing on the policies and ethical issues concerning contacts with the media. OPR attorneys also participated in the National Advocacy Center's Professional Responsibility Officers' Conference and the First Assistant United States Attorneys' Conference. OPR attorneys made presentations to the Attorney General's Advisory Committee, the Criminal Chiefs' Working Group, and to new Assistant United States Attorneys as part of the Department's orientation and training programs. An OPR attorney participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* disclosure obligations. OPR attorneys also made presentations to a University of Virginia Law School class and the District of Columbia Bar Counsel about how OPR investigates and resolves allegations of misconduct.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys participated in presentations to Indonesian, Japanese, and Vietnamese delegations about OPR's role in the Department and issues associated with professional ethics. An OPR attorney participated in a presentation to Albanian prosecutors about how OPR investigates immigration judges and conducts whistleblower complaints by FBI employees. An OPR attorney also participated in a working conference in Moldova on reforming the ethical rules that govern Moldovan prosecutors. An OPR attorney has been on detail to OPDAT for over a year in Iraq to assist criminal justice officials there in developing their criminal justice system.

OPR continued to serve as the Department's liaison to state bar councils on matters affecting the professional responsibility of Department attorneys. OPR attorneys attended the mid-year and annual meetings of the National Organization of Bar Counsel (NOBC) which addressed current trends in attorney regulation and discipline. An OPR attorney participated in the NOBC's program committee, which is responsible for choosing topics for presentations at the mid-year and annual meetings. An OPR attorney also served as the NOBC Articles Officer. The Articles Officer collects ethics, professional responsibility, and discipline articles written by NOBC members, catalogs them, and distributes them to requesting members.

In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also consulted with and advised other Department components regarding requests for notification to a state bar of instances of possible professional misconduct by non-DOJ attorneys. In 55 such matters that OPR opened during Fiscal Year 2011, OPR reviewed information relating to possible misconduct by non-DOJ attorneys, advised

components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly of the allegations of misconduct.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against such agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the OIG responsibility for reviewing and investigating (as appropriate) whistleblower complaints by FBI employees.

### **Examples of Inquiries Closed in Fiscal Year 2011<sup>10</sup>**

1. *Eliciting Inadmissible Evidence.* A court of appeals criticized a DOJ attorney for eliciting inadmissible testimony from an agent during trial. The agent testified about the standards that the government must meet in order to obtain a warrant. The agent explained that senior DOJ officials had reviewed the investigation and determined that there was ample evidence for a court to authorize the warrant. The court of appeals stated that because a relatively recent court opinion had concluded that it was improper to introduce that type of testimony in order to quell jurors' apprehensions about the warrant, the DOJ attorney should have known that she was eliciting inadmissible testimony. OPR initiated an inquiry and requested a written response from the DOJ attorney. OPR found that the DOJ attorney had been unaware of the earlier court decision because she had been working as a state court judge when the decision was issued. OPR noted that the district court did not comment on, and defense counsel did not object to, the testimony in question. Under these circumstances, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding. Although closing the matter, OPR reminded the DOJ attorney's office that all DOJ attorneys are responsible for being aware of and abiding by court precedent.

2. *Misleading the Court.* A district court criticized a DOJ attorney for failing to disclose facts in a conspiracy case. OPR initiated an inquiry and found that the DOJ attorney obtained a chart, subject to a confidentiality agreement, from the company that employed the defendants. After securing approval from the company's counsel, the DOJ attorney showed the chart to witnesses. The defense filed a motion to compel access to documents listed in the

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<sup>10</sup> To protect the privacy of the Department attorneys and other individuals involved in the investigations summarized, OPR has omitted names and identifying details from these examples. In addition, OPR has used female pronouns in odd-numbered examples and male pronouns in even-numbered examples regardless of the actual gender of the individual involved.

government's privilege log, including the chart. During the hearing on the motion to compel, the DOJ attorney argued that the chart was privileged. The DOJ attorney did not inform the court that some witnesses had seen the chart. The court denied the defense's motion to compel. Following a motion to reconsider, in which the court learned that the government had disclosed the chart to some witnesses, the court allowed the defense to view the chart and criticized the DOJ attorney for failing to inform the court that witnesses had seen the chart. Although criticizing the DOJ attorney, the court specifically concluded that the DOJ attorney did not act with an intent to mislead the court. Because such a finding negated the intent requirement in the state bar rule governing a lawyer's duty of candor to the court, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

3. *Brady and Obligation to Correct False Testimony.* A defense attorney alleged that a DOJ attorney violated her *Brady* obligations by failing to disclose that certain witnesses lacked any knowledge about the defendant's actions. Defense counsel also alleged that the DOJ attorney committed misconduct by failing to correct the testimony of a witness who testified (incorrectly) that she had not received a target letter. During cross-examination, the witness was shown a copy of the target letter and admitted that it was addressed to her. OPR initiated an inquiry and found that the DOJ attorney did not violate her *Brady* obligations because the fact that a witness lacks information about a defendant is considered "neutral" and does not fall within the definition of exculpatory evidence that must be disclosed pursuant to *Brady*. OPR also found that the DOJ attorney did not commit misconduct by failing to immediately correct the witness's denial of the target letter because the witness corrected her testimony after being shown the target letter. OPR also noted that the district court denied the defendant's motion for a mistrial. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

4. *Misrepresentation/Misleading the Court.* A DOJ component reported to OPR that misstatements had been incorporated into two affidavits submitted to a district court. OPR initiated an inquiry and found that the misstatements had been added to otherwise final versions of the affidavits by a DOJ attorney who did not possess personal knowledge of the facts of the case, but who had assisted in drafting the affidavits because he was an expert in extradition issues. The changes were not noticed by that attorney (he erroneously assumed a fact not in evidence), and neither the DOJ attorney who filed the affidavits with the court nor the affiants noticed the changes until after the affidavits had been filed. Immediately after discovering that the affidavits contained inaccuracies, the government notified the court of the error. Because the inaccurate affidavits resulted from a series of excusable mistakes,

OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

5. *Failure to Disclose Exculpatory Information.* A DOJ attorney reported to OPR that a district court criticized her for engaging in conduct that amounted to negligence. The DOJ attorney had obtained guilty verdicts in a fraud case. However, during jury polling, one juror stated that she believed that the defendants were not guilty, and the court declared a mistrial. A new prosecution team was assigned to re-try the case, and during discovery, they produced material that the first DOJ attorney had not produced. Upon receipt of the new information, the defendants alleged that the first DOJ attorney committed misconduct because she did not produce the information and because she made misrepresentations about the information to the court. Before the court issued a ruling, the new prosecution team reached plea agreements with the defendants. At a sentencing hearing, the court stated that the first DOJ attorney had acted negligently. The court did not make a finding of prosecutorial misconduct. OPR initiated an inquiry and found that the first DOJ attorney had accurately described to the court the material that had not been disclosed. OPR found that the DOJ attorney did not misrepresent the status of that material, and that the material was in such a state of degradation that it was no longer of use. Although OPR found that the DOJ attorney should have produced certain expert reports and affidavits, the inquiry revealed that a less experienced DOJ attorney had been assigned to monitor the production of such material, and that the defendants had been informed of the substance of some of the reports and affidavits. OPR also found that some of the material that the defendants alleged had been wrongfully withheld from them was inculpatory, not exculpatory in nature. Based on these findings, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

6. *Failure to Honor Plea Agreement.* A court of appeals criticized a DOJ attorney for disclosing to the district court statements that the defendant made during a debriefing session pursuant to a plea agreement. Under the terms of the plea agreement, the defendant agreed to cooperate and answer questions about his role in the offense truthfully and completely. In turn, the government agreed not to disclose at sentencing incriminating information provided by the defendant during the debriefing. The plea agreement explicitly prohibited the defendant from making false, misleading, or materially incomplete statements during the debriefing, and cautioned that a violation of this prohibition would constitute a breach of the agreement which would release the government from its obligation not to disclose the debriefing information at sentencing. When the defendant filed his sentencing memorandum, he made representations to the district court that minimized his role in the offense, and materially contradicted his debriefing statements. In response, the DOJ attorney disclosed pertinent incriminating information that

the defendant had disclosed during the debriefing. The district court relied on the information to impose an enhanced sentence. On appeal, the court of appeals vacated the sentence, and remanded the matter for resentencing. In doing so, the court indicated that the DOJ attorney had breached the plea agreement by disclosing the debriefing information to the district court. OPR initiated an inquiry and found that the disclosure was permissible because the defendant's sentencing memorandum materially contradicted the defendant's debriefing statements. As such, the defendant violated the plea agreement by being untruthful, and the government was released from its obligations under the agreement. Furthermore, OPR found that as an officer of the court, the DOJ attorney had a duty to inform the court about the defendant's inconsistent statements so the court could calculate an appropriate sentence based on complete and accurate information. Since the disclosure was permissible and the DOJ attorney had a duty to disclose the statements, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

7. *Improper Examination of a Witness.* A court of appeals criticized a DOJ attorney for asking a defense expert a question on cross-examination that implied that the expert helped exonerate guilty people. Although the court upheld the defendant's convictions, it stated in its order and judgment that the DOJ attorney committed prosecutorial misconduct by asking the question. OPR initiated an inquiry and found that the government had filed a motion asking the court to amend its order and judgment to find that the DOJ attorney asked an improper question, rather than committed prosecutorial misconduct. Upon reconsideration, the court granted the motion and noted that the attorney's cross-examination involved a single incident that resulted in no prejudice to the defendant. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Failure to Comply with DOJ Rules and Regulations.* An agent alleged that a DOJ attorney failed to disclose all readily provable material facts to the court at sentencing in violation of a directive from the Attorney General. The agent also alleged that the DOJ attorney engaged in fact bargaining by agreeing to stipulate to facts in a plea agreement that were less severe than the readily provable facts, which would have supported a more serious charge. OPR initiated an inquiry and found that the court had been fully apprised of the defendant's role in the offense, and there was no basis to conclude that the DOJ attorney concealed information from the court at sentencing. The inquiry revealed that the DOJ attorney concluded that there was insufficient evidence to prove that the defendant had the requisite state of mind to have committed the more serious offense for which the agent believed the defendant should have been charged. The DOJ attorney regarded the facts that the agent believed to be "readily provable" as unreliable and that, even if true, they failed

to establish the requisite intent to commit the more serious offense. OPR also found no evidence that the DOJ attorney engaged in fact bargaining. Consequently, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

9. *Improper Closing or Rebuttal Argument.* A court of appeals vacated a defendant's death sentence, finding that the government's rebuttal closing argument violated the defendant's Fifth and Sixth Amendment rights. At the sentencing phase of the trial, the defendant read aloud an allocution that focused on mitigating factors such as acceptance of responsibility. In rebuttal closing argument, the DOJ attorney stated that until the defendant read the allocution, she had denied all responsibility for the crimes. Only now, after the government had proved its case, did the defendant accept responsibility. The DOJ attorney also stated that the defendant could have testified, but instead chose to allocute. The DOJ attorney noted that because the allocution was unsworn and did not relate to the facts of the crimes, the government was prohibited from cross-examining her. On appeal, the court determined that the government violated the defendant's Sixth Amendment right to trial by treating the defendant's failure to plead guilty as an aggravating circumstance in rebuttal. The court also found that the government violated the defendant's Fifth Amendment right against self-incrimination by asking the jury to consider the fact that the defendant had declined to testify. OPR initiated an inquiry and found that in this context, there was no clear and unambiguous rule regarding the constitutionality of commenting on the defendant's decision to go to trial. OPR also found that it was unclear whether the DOJ attorney had in fact treated the defendant's decision to go to trial as an aggravating factor. As to the Fifth Amendment violation, OPR noted that the court ruled in the case for the first time that an unsworn allocution constituted a limited Fifth Amendment waiver. As such, OPR determined that the line between constitutionally acceptable and unacceptable comments about the defendant's decision to allocute and not testify previously had been unclear. Given the ambiguity in the law, OPR closed this matter because further investigation was not likely to lead to a professional misconduct finding.

10. *Judicial Bias by an Immigration Judge.* A private attorney alleged that an Immigration Judge (IJ) engaged in professional misconduct when he denied his client's application for cancellation of removal. The client faced removal charges based on his convictions on theft and federal tax evasion charges. The client also had been the subject of numerous lawsuits alleging that he defrauded investors in various business ventures. According to the private attorney, the IJ was hostile and biased toward his client during the removal proceeding, and based his decision on information provided by the Department of Homeland Security (DHS) concerning lawsuits that his client had never seen. The private attorney also alleged that the IJ ignored factors in his client's favor and refused to allow him to present numerous character witnesses.

OPR initiated an inquiry and reviewed the underlying record, including more than five hours of audiotapes from the removal proceeding. OPR noted that the private attorney did not review the tapes, even though another attorney had represented his client (the alien) at the removal proceeding. By listening to the tapes, OPR found that the information about the lawsuits was introduced during the proceeding by the alien's then attorney; not DHS. OPR also found that the IJ considered several factors in favor of the alien, even though the alien repeatedly resisted providing the IJ with a full accounting of his troubled history. OPR also found that the IJ allowed a number of character witnesses to testify for the alien, and the alien's then attorney did not object to the IJ's decision to exclude other witnesses on the basis of redundancy. Lastly, OPR's review of the tapes provided no support for the private attorney's allegation that the IJ displayed hostility and bias during the hearing. In light of the lack of evidentiary support for the allegations, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

11. *Improper Rebuttal.* A court of appeals criticized a DOJ attorney for making improper remarks during rebuttal closing argument. The court chastised the DOJ attorney for referring to other witnesses who could have testified for the government but did not, and also for attributing a prejudicial statement to the defendant when, in fact, it had been made by the defendant's sister. Notwithstanding these errors, the court concluded that the remarks did not require a mistrial. OPR initiated an inquiry. The DOJ attorney readily acknowledged that she should not have referred to other witnesses who could have testified. OPR noted that the DOJ attorney made the remark during rebuttal argument when she had little time to reflect, and the remark was made in response to questions that the defense raised during closing argument about why the government had not introduced more testimony. As to the statement that the DOJ attorney wrongly attributed to the defendant, OPR noted that although the defendant had not made that *specific* remark, she had made a similar comment. OPR noted that this mistake also occurred during rebuttal argument when the DOJ attorney had little time to prepare. OPR also noted that this case was the first time that the DOJ attorney had been cited by a court for improper closing argument. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Judicial Criticism of the Basis for an Argument on Appeal.* A court of appeals criticized the government's argument on appeal in support of a decision by the Board of Immigration Appeals (BIA) denying relief under the Convention Against Torture (CAT). The court found that the BIA and the government ignored evidence establishing the likelihood of torture, including certain affidavits and an arrest warrant that the alien had submitted to the immigration court. The court also found that the government should have



recognized the error of the BIA's decision and should have supported, rather than opposed, the petitioner's position. OPR initiated an inquiry and found that the court's criticism was misplaced. OPR noted that the government's position on appeal was consistent with the scope of the decisions by the BIA and the Immigration Judge (IJ). OPR found that the IJ did not base his decision denying relief under CAT on the affidavits because he questioned their reliability. As such, the government had presented the case correctly on appeal. OPR also noted that officials at both the Department and the Department of Homeland Security agreed, based on the evidence, that the alien's appeal should be opposed. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

13. *Improper Cross-Examination of Defendant and Improper Closing Argument.* A defendant who had been convicted of conspiracy to distribute narcotics alleged that a DOJ attorney who prosecuted her case committed professional misconduct by questioning her during cross-examination as to her income and lifestyle, and by remarking during closing argument on the defendant's unexplained wealth, her failure to pay taxes, and her failure to produce evidence in support of her defense. OPR initiated an inquiry and found that the defendant had previously raised the same allegations with OPR, and that OPR had declined to investigate the allegations because they could have been or already had been addressed through litigation and there were no extenuating circumstances warranting further review by OPR. OPR also determined that the defendant had raised the same issues with the district court and the court of appeals, both of whom found that there had been no prosecutorial misconduct. Upon receiving this second complaint from the defendant, OPR again reviewed the allegations and found that the defendant had not submitted any new information or facts. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for statements made during closing argument in a criminal trial. The court found that the DOJ attorney's statements about the defense theory of the case were improper because they relayed to the jury the DOJ attorney's impression of the evidence and improperly introduced evidence outside of the record. The court also criticized the DOJ attorney for improperly making references to his own impression of the evidence with statements such as "I believe" and "I determined." Although the court found that the DOJ attorney's statements were improper, the court concluded that it was harmless error and upheld the conviction. OPR initiated an inquiry. The DOJ attorney stated that he did not intend to convey his impressions of the evidence or introduce evidence outside of the record. OPR noted that defense counsel did not object to the DOJ attorney's remarks and that the court of appeals found that the improper

statements were not unduly prejudicial to the defense. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding. OPR, however, referred the matter to the DOJ attorney's supervisors to take whatever action they deemed appropriate in a management context.

15. *Candor to the Court.* A DOJ component reported to OPR that a DOJ attorney told a district court, in response to a request for Jencks material from defense counsel, that no Jencks material existed for any of the government's witnesses who were to testify at an upcoming suppression hearing. During the suppression hearing, one of the government's witnesses stated that she had previously testified before a federal grand jury. The court ordered the production of the witness's grand jury testimony pursuant to Federal Rule of Criminal Procedure 26.2. OPR initiated an inquiry and found that the DOJ attorney had been unaware that Federal Rule of Criminal Procedure 26.2 extended the Jencks Act to pre-trial suppression hearings. The DOJ attorney acknowledged that her understanding of the law was mistaken, but explained that prior to this case, the only time she had disclosed a grand jury transcript was in association with calling a witness at trial. OPR reviewed the transcript of the suppression hearing and noted that defense counsel couched her oral argument in terms of a Jencks Act request, but failed to mention Federal Rule of Criminal Procedure Rule 26.2. OPR also found that the DOJ attorney mistakenly believed, pursuant to Federal Rule of Criminal Procedure 6(e), that grand jury transcripts could not be released until a witness testified at trial. Under these circumstances, OPR credited the DOJ attorney's assertion that she did not knowingly mislead the court in violation of her obligation of candor. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding, but referred the matter to the DOJ attorney's supervisors for whatever action they deemed appropriate to ensure that the DOJ attorney performed in strict accordance with the Federal Rules of Criminal Procedure and the Department's policies governing discovery.

16. *Interference with Defendant's Right to Counsel.* In an order denying a plaintiff's request for attorney's fees, a district court criticized two DOJ attorneys for eavesdropping on a privileged conversation between the plaintiff and his attorney. Although the court found that the DOJ attorneys acted inappropriately, the court stated that the DOJ attorneys did not intend to overhear the privileged conversation, it took time for them to realize that the conversation was privileged, and they immediately disclosed the incident to the court. The court stated that any information improperly obtained by the government had been ameliorated by a court order barring the government from acting on the privileged information and, as such, attorney's fees were not warranted. OPR initiated an inquiry and found that the DOJ attorneys overheard the conversation between the plaintiff and his attorney when the mediator's telephone system accidentally malfunctioned during a break in a

settlement conference. OPR found that the DOJ attorneys did not affirmatively seek out attorney-client privileged information and, in fact, the mediator specifically instructed the DOJ attorneys to stay on the telephone during the break. OPR also found that the record was unclear as to when the DOJ attorneys realized that the conversation contained privileged information. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Failure to Comply with DOJ Rules and Regulations.* OPR received an allegation from defense counsel in a false claims *qui tam* action that a DOJ attorney violated Department policy against raising the possibility of a criminal prosecution as leverage to obtain better civil settlement terms by suggesting a global settlement. Defense counsel alleged that the idea of a global settlement first arose when the DOJ attorney told her in a telephone call that there was a pending criminal case in another judicial district that would have to be taken into account as part of a settlement. OPR initiated an inquiry and found that defense counsel was the one who first raised the possibility of a global settlement in a communication preceding the telephone call. Thus, the DOJ attorney's discussion about a global settlement during the telephone call had not been unprompted. OPR also found that the DOJ attorney was familiar with and adhered to Department guidance concerning global settlements in her dealings with defense counsel. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Constitutional or Civil Rights Violation.* A district court found that DOJ attorneys improperly exercised two peremptory challenges during jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), which holds that the use of a peremptory challenge to exclude a person from a petit jury based on race violates the Equal Protection Clause. OPR initiated an inquiry and reviewed pertinent portions of the jury selection transcript and other materials. OPR found that the DOJ attorneys provided facially-valid, race-neutral justifications for both peremptory challenges. The court, however, rejected the justifications without any showing from defense counsel that the justifications were pretextual and purposefully discriminatory. Because there was no evidence that the DOJ attorneys exercised peremptory challenges based on race, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

19. *Duty of Candor.* A DOJ component reported to OPR that a DOJ attorney who worked in the component's appellate division may have violated her duty of candor in three cases. OPR initiated an inquiry. In the first case, the DOJ attorney allegedly failed to alert her supervisor and the court of appeals to the fact that a written plea agreement had not been signed by the trial prosecutor. The trial prosecutor asserted that she signed the plea agreement, but the

signed agreement had not been entered into the record. OPR reviewed the case and noted that the omission of the trial prosecutor's signature on the plea agreement was not an issue raised on appeal.

In the second case, the DOJ attorney allegedly misrepresented to her supervisor and to the district court that a proffer letter had been signed by the defendant. In fact, the proffer letter (which could not be found in the government's file) had not been signed by the defendant. OPR found that the confusion about whether the defendant had signed the proffer letter, an issue in the post-conviction litigation, stemmed from a misunderstanding. After it became clear at an evidentiary hearing that the defendant knew about the proffer but did not actually sign it, the DOJ attorney immediately filed a motion acknowledging that the defendant had not signed the proffer letter and apologizing if the government's assertions had misled the court. The court ultimately denied the defendant's petition for post-conviction relief.

In the third case, the district court was critical of the government's characterization of the defendant's claim in a 28 U.S.C. § 2255 petition. The DOJ attorney did not file a supplemental pleading to correct these alleged mischaracterizations. OPR reviewed the record and found that the DOJ attorney focused on only one portion of the defendant's claim in the analysis section of the government's brief, but in other parts of the brief, the attorney quoted directly and accurately from the defendant's petition. As for the failure to file a supplemental pleading, OPR found that because the court's order criticizing the government's response did not require the government to supplement its filing, the DOJ attorney's failure to do so did not violate a clear and unambiguous rule.

After requesting a response from the DOJ attorney, OPR learned that the DOJ attorney had resigned from the Department. Given that the errors in the three cases did not appear to be intentional or reckless in nature, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

20. *Failure to Comply with Legal Requirements or Policies Relating to Search Warrants.* A DOJ attorney reported to OPR that he accessed a personal e-mail account of a potential defendant during an investigation that led to the defendant's prosecution. The DOJ attorney did not obtain a warrant prior to accessing the e-mail account. OPR initiated an inquiry and found that the DOJ attorney had been reviewing videotapes of prison visits between the defendant (who was in prison for another offense) and his friends because the government had reason to believe that the defendant was involved in child sex trafficking. While reviewing the tapes, the DOJ attorney heard the defendant ask a friend to delete e-mails from his personal e-mail account. In order to accomplish this, the defendant revealed his user name and password. The

DOJ attorney subsequently accessed the personal e-mail account, believing that the defendant had relinquished his privacy rights relating to the account. The DOJ attorney did not review the messages for content, but only for the time frames involved and to determine whether anything had been deleted. Although the DOJ attorney should have obtained a search warrant prior to logging on to the defendant's e-mail account, OPR found that the DOJ attorney did not have prior experience with electronic evidence issues and believed that accessing the e-mail account was permissible because of the defendant's disclosure of his account information. OPR also found that the government did not use the information gleaned from the e-mail account during its prosecution of the defendant. Under these circumstances, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

### **Examples of Investigations Closed in Fiscal Year 2011**

1. *Unauthorized Disclosure of Sensitive Information; Candor to the Court.* A DOJ attorney reported to OPR that she failed to seal an asset forfeiture complaint containing an agent's declaration about an ongoing criminal investigation. The information in the declaration was subsequently reported in a newspaper article, placing the criminal investigation and the safety of a confidential informant at risk.

OPR conducted an investigation and found that the DOJ attorney was aware that the information contained in the declaration was sensitive and should have been filed under seal. The DOJ attorney stated that she simply forgot to do so. OPR concluded that by failing to file the declaration under seal, the DOJ attorney engaged in professional misconduct in reckless disregard of her duties to provide competent representation and to protect client confidences.

During the course of the investigation, OPR learned that the DOJ attorney filed a belated motion to seal. In the motion, she asserted that the agency with which she was working failed to timely advise her office that the information in the declaration was sensitive and needed to be sealed. OPR found that the agency *had* advised the DOJ attorney's office that the information in the declaration was sensitive. When confronted, the DOJ attorney acknowledged that she was aware that the agency had advised her office of the need to protect the information contained in the agent's declaration. Based on this admission, OPR concluded that the DOJ attorney committed intentional misconduct in violation of her duty of candor to the court when she prepared and filed a motion to seal knowing that she inaccurately blamed an agency for failing to notify her office about the sensitivity of the information contained in the declaration.

OPR referred its findings of professional misconduct to the PMRU. The PMRU affirmed OPR's findings of professional misconduct and imposed a fourteen-day suspension. The appropriate state bar authorities will be notified of OPR's findings of professional misconduct.

2. *Improper Closing Argument; Candor to the Court; Brady Violation; Violation of Court Order.* A district court granted the defendant a new penalty phase hearing in a death penalty case based on findings that, among other reasons, DOJ attorneys improperly used, and failed to disclose, prejudicial victim impact statements made by the victim's wife; and a DOJ attorney made inflammatory remarks in rebuttal closing argument that were designed to appeal to the passions of the jury. The court also found that the DOJ attorneys improperly commented in closing arguments on the defendant's decision not to testify, but concluded that this error did not warrant a new sentencing proceeding. OPR also investigated issues raised by the defendant in his motion for a new trial, including whether the government failed to disclose information concerning financial benefits that the victim's widow received as compensation resulting from her husband's death, and whether the government intentionally misled the jury by implying during cross-examination of a defense witness that the defendant committed an uncharged criminal offense when the government knew, or should have known, that the defendant was incarcerated at the time of the crime. OPR conducted an investigation.

OPR found that the DOJ attorney who placed the victim's widow on the stand was not aware until the widow testified that she had inserted prejudicial comments into her victim impact statement. Although not intentional or reckless in nature, OPR determined that the DOJ attorney exercised poor judgment by inadequately advising the widow on the appropriate contents of a victim impact statement and for failing to ensure that he fully knew the contents of the victim impact statement. OPR also concluded that the DOJ attorney made a mistake by inadvertently failing to disclose the victim's statement prior to the penalty phase hearing, and exercised poor judgment when he told the court that he had disclosed the widow's victim impact statement when, evidence showed, he had not made the requisite disclosure.

OPR concluded that a DOJ attorney did not commit professional misconduct or exercise poor judgment by making inflammatory remarks in rebuttal closing argument, including contrasting the value of the life of the victim with the value of the life of the defendant, because no clear and unambiguous standards governed such comments. OPR further concluded that the DOJ attorneys made a mistake by highlighting in closing arguments certain witness testimony. A witness testified that if the defendant were a real man, he would be saying things himself rather than relying on the witness to do so. OPR noted that the jury was likely to construe the witness's testimony

as a comment on the defendant's decision not to testify, and thus the DOJ attorneys should not have brought it up again in closing arguments.

The government charged as a non-statutory aggravating factor justifying the death penalty, and the jury unanimously concluded, that the victim's murder had caused great financial problems for his wife and family. The widow testified that the victim's murder had destroyed her financially. In a motion for a new trial, the defendant alleged that the government failed to disclose evidence that the widow received financial benefits following her husband's death. The government opposed the motion, stating that the government was unaware of any financial benefit received by the victim's widow following her husband's murder. OPR found that the victim's widow had received significant financial compensation from governmental and private sources following her husband's death, including funds from a Department program. OPR, however, concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment by failing to disclose the widow's financial information because they were unaware of the compensation and had reasonably relied on the widow's representations. OPR found, however, that a DOJ attorney exercised poor judgment when, without conducting a more thorough search, he affirmatively represented to the court that the government was unaware of any financial benefits given to the widow.

In addition, OPR concluded that a DOJ attorney made a mistake when he cross-examined a defense witness in a manner that suggested that the defendant may have committed an uncharged offense. Although the government was in possession of information showing the defendant was incarcerated at the time of the offense, OPR found insufficient evidence to establish that the DOJ attorney personally was aware of this information.

OPR referred its findings of poor judgment to the DOJ attorneys' employing component for consideration in a management context.

3. *Alleged Misrepresentation to the Court.* A week before a criminal trial was scheduled to begin, a DOJ attorney provided the court, for *in camera* review, a police department internal affairs report. The internal affairs report found that a police officer whom the DOJ attorney intended to call as a witness at trial had wrongly claimed that she was unable to identify fellow officers who, in an unrelated case, had been accused of employing excessive force. At trial, before the police officer was called to testify, the DOJ attorney also provided the court with a memorandum stating that the internal affairs report did not contain information pertaining to the police officer's truthfulness. The court, upon reviewing the report, characterized the statement in the DOJ attorney's memorandum as a misrepresentation and ordered the government to provide the internal affairs report to the defendant.

Several weeks after the trial ended, the court issued an order to show cause, directing the DOJ attorney to state why the court should not refer her to the state bar disciplinary authorities for submitting an inaccurate memorandum. After reviewing the DOJ attorney's response, the court reaffirmed its earlier ruling that the memorandum was inaccurate, but vacated the order to show cause on the ground that the internal affairs report was muddled and disjointed. Given the confusing nature of the report, the court found that the DOJ attorney's mistaken interpretation of the report was done in good faith and constituted an inadvertent error.

OPR conducted an investigation and confirmed that the DOJ attorney's memorandum to the court was inaccurate. OPR found, however, that the inaccuracy did not stem from an intention to mislead the court, but rather a cursory review of a disorganized and confusing report. Because the DOJ attorney simply misunderstood the report, OPR concluded, much as the court had, that the inaccurate interpretation of the memorandum constituted an excusable mistake.

4. *Vouching for Witnesses.* A court of appeals found that a DOJ attorney impermissibly vouched for cooperating witnesses during his rebuttal closing argument. The court also suggested that the DOJ attorney acted improperly by analogizing the case to an infamous local murder case, and by asking the jury to convict the defendants in order to bring justice to the victims.

OPR conducted an investigation and found that in closing argument, defense counsel alleged that the government had purchased the testimony of the cooperating witnesses. In response to this allegation, the DOJ attorney told the jury in rebuttal argument that the judge was not gullible and that in assessing the appropriate sentences for the cooperating witnesses, the judge would not credit the testimony of anyone who had lied. OPR concluded that the DOJ attorney's invocation of the court's authority constituted improper vouching. OPR determined, however, that the DOJ attorney did not commit professional misconduct or exercise poor judgment because the vouching occurred in direct response to defense counsel's false allegation, it came in rebuttal, and it was extemporaneous in nature so the DOJ attorney had little time to reflect. OPR also found that the DOJ attorney did not commit professional misconduct or exercise poor judgment by analogizing the case to an infamous local murder case because the comment was made as part of a legitimate attempt to demonstrate that the government often has to rely on unsavory witnesses to prove its case. OPR also concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment by asking the jury to convict the defendants to bring justice to the victims. OPR found that although the comment should not have been made, it did not constitute professional misconduct or poor judgment because the comment



was made near the end of a long summation at the close of a complex case, it was not inflammatory, and it likely had little effect on the jury.

5. *Brady Violation; Failure to Abide by Court Order, Local Rules, and DOJ Policy Regarding Discovery; Candor to the Court.* A district court found that a DOJ attorney violated *Brady*, and a local court rule governing the disclosure of exculpatory material, when she failed to disclose notes she had taken during interviews with the agent who arrested the defendant. The court found that the notes showed that the agent made materially inconsistent statements about the circumstances surrounding the defendant's arrest.

OPR conducted an investigation and found that the DOJ attorney failed to produce the notes prior to a court-ordered discovery deadline. Rather, the notes came to light during a pre-trial suppression hearing challenging the defendant's arrest. During the hearing, the DOJ attorney provided the notes to the court for *in camera* review. The DOJ attorney told the court that she had reviewed the notes, and they did not contain exculpatory information. The court subsequently reviewed the notes and found that they contained numerous notations that appeared to be materially inconsistent with each other, as well as with the agent's testimony at the suppression hearing.

OPR determined that in failing to disclose the notes prior to the suppression hearing, the DOJ attorney engaged in professional misconduct in reckless disregard of her obligations arising under the court's discovery order, local rules, and DOJ policy mandating the timely disclosure of exculpatory and impeachment evidence. OPR concluded that the DOJ attorney, an experienced prosecutor, should have recognized the exculpatory nature of the information in the notes and the way that the notes could have been used to impeach the agent's expected testimony. OPR found that the DOJ attorney's failure to do so represented a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR concluded that the DOJ attorney did not engage in professional misconduct in violation of her duty of candor when she told the court that she had reviewed the notes and they did not contain exculpatory material. OPR found that due to time constraints, the DOJ attorney had reviewed the notes in a cursory fashion. As a result of the cursory review, the DOJ attorney mistakenly told the court that the notes did not contain inconsistent statements. Although OPR found that the DOJ attorney did not engage in professional misconduct, OPR concluded that by making representations to the court about the nature of the notes before she had time to meaningfully review them, the DOJ attorney exercised poor judgment. OPR referred its finding of professional misconduct to the PMRU.

6. *Failure to Comply with Speedy Trial Act; Failure to Comply with DOJ Policy, Rule, or Regulation.* A district court dismissed a criminal complaint with prejudice as a result of a Speedy Trial Act violation. OPR also learned during the course of its investigation that the DOJ attorney handling the case had not been an active member of a state bar for approximately thirteen years.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation to comply with the Speedy Trial Act when he failed to file motions to exclude the time within which an information or indictment had to be filed in the case. Although motions to exclude time under the Speedy Trial Act were originally filed, the DOJ attorney eventually stopped filing them because he thought that the case was going to be resolved either by a dismissal or a plea. OPR concluded that the DOJ attorney knew, or should have known, based on his experience and the unambiguous nature of the Speedy Trial Act, that by not continuing to file motions to exclude the time, the Speedy Trial Act would be violated. OPR found that the DOJ attorney's belief that a resolution would eventually be reached in the case did not justify his violation of the Speedy Trial Act, and was objectively unreasonable under the circumstances.

OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his statutory and Department obligations to maintain an active bar membership in any state bar for approximately thirteen years. OPR concluded that the DOJ attorney knew, or should have known, that he was not an active member of a state bar when he stopped receiving correspondence from the bar. OPR found that the DOJ attorney's conduct over the years was objectively unreasonable under the circumstances.

OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the Department's annual bar certification requirement when he certified that he was an active member of a state bar, when he was not. OPR concluded that the DOJ attorney knew, or should have known, that he was not an active member of the bar because he had not complied with any of the bar's annual requirements. OPR found that the DOJ attorney's interpretation that the Department's bar certification forms were seeking information about whether he was the subject of any state bar disciplinary proceedings was unfounded based on the clear language of the forms. OPR referred its professional misconduct findings to the PMRU.

7. *Failure to Diligently Represent the Interests of the Client; Lateness and Missed Deadlines.* A DOJ component reported allegations of misconduct against a DOJ attorney in ten separate cases. In the first case, the DOJ attorney allegedly failed to follow her supervisor's instructions regarding the removal of a state court case to federal court. In the second case, the DOJ

attorney allegedly failed to prepare and file an appellate brief, despite repeated instructions to do so. In the third through seventh cases, the DOJ attorney allegedly failed to file timely responses to the complaints, or otherwise resolve the cases. In an eighth case, the case was originally filed in state court, but later removed to the district court. Despite the removal, the DOJ attorney allegedly moved to reopen the case in state court and vacate a default judgment. In the ninth case, the DOJ attorney allegedly failed to file a response to a complaint. The magistrate judge denied the plaintiff's motion for summary judgment, but was critical of the DOJ attorney's failure to file any pleading despite several requests for enlargements of time. In the tenth case, the DOJ attorney allegedly failed to file a timely response to a plaintiff's petition seeking naturalization. The DOJ attorney and plaintiff's counsel later filed a joint motion to extend time and the DOJ attorney filed a response to the petition. The DOJ attorney then filed a joint stipulation of facts which was not reviewed or authorized by the agency client or the DOJ attorney's supervisors. The stipulation conceded the merits of the plaintiff's complaint. In addition, the plaintiff filed a proposed order granting the petition seeking naturalization, which the DOJ attorney did not oppose. The court entered an order in favor of the plaintiff. When plaintiff's counsel filed a motion for attorney's fees, the DOJ attorney did not notify the agency client or her supervisors and did not oppose the motion. When the agency client learned of the motion, the DOJ attorney was instructed to negotiate a settlement of the fees.

OPR conducted an investigation and concluded that, in handling the first nine cases, the DOJ attorney violated the applicable rules of professional conduct by failing to seek the lawful objectives of her client; by acting without reasonable diligence and competence in handling her cases; and by failing to keep her client reasonably informed about the status of her matters. OPR further concluded that the DOJ attorney violated the Federal Rules of Civil Procedure and the relevant rule of professional conduct by failing to comply with court deadlines and scheduling orders, including her repeated failure to file motions to extend time or letting extensions expire without taking action. OPR also concluded that the DOJ attorney twice violated the deadline in 28 U.S.C. § 1446, which sets forth the requirements for removal of state cases to federal court in a timely manner. In addition, OPR concluded that the DOJ attorney repeatedly violated Federal Rule of Civil Procedure 12(a)(2) by failing to file a response to a complaint within the 60-day deadline. By engaging in this conduct, OPR concluded that the DOJ attorney engaged in intentional professional misconduct by knowingly engaging in a pattern and practice of violating clear and unambiguous obligations under the applicable rules of professional conduct, district court rules, court orders, the Federal Rules of Civil Procedure, and other relevant statutes. With regard to the tenth case, OPR concluded that the DOJ attorney engaged in intentional professional misconduct when she purposefully and knowingly failed to seek the lawful

objectives of the agency client, and failed to act with reasonable competence and diligence in violation of the applicable rules of professional conduct.

OPR referred its findings of professional misconduct to the PMRU. The DOJ attorney resigned from the Department.

8. *Abuse of Authority or Misuse of Official Position; Abuse of Prosecutive or Investigative Authority; Failure to Comply with other DOJ Policy, Rule or Regulation.* Several congressmen questioned the government's voluntary dismissal of a Voting Rights Act complaint against some of the defendants in a civil suit. In that suit, the Department alleged that the defendants had violated the Voting Rights Act by directing or engaging in coercion, threats, and intimidation toward poll workers and voters at a polling place during the 2008 federal general election. After the defendants failed to answer the complaint, the clerk of the court duly entered defaults against all of the defendants. In order to obtain a default judgment, however, the government still had to satisfy the district court that the relief it was seeking -- a nationwide injunction against each of the defendants -- was both necessary and appropriate under the facts and the law. After considering the facts and law, DOJ supervisors decided to dismiss the case against most of the defendants, and to pursue more narrowly-tailored injunctive relief against the remaining defendant. The congressmen questioned whether DOJ's voluntary dismissal of the claims against most of the defendants was politically motivated, noting that they were unaware of any changes in the facts between the filing of the original complaint and DOJ's subsequent decision to dismiss most of the defendants. The congressmen also questioned whether there was any impropriety in the filing of the original complaint.

OPR conducted an investigation and concluded that the DOJ supervisors did not commit professional misconduct or exercise poor judgment, but rather acted appropriately, in the exercise of their supervisory duties in connection with the dismissal of the defendants. OPR found no evidence that the decision to dismiss the case against most of the defendants was predicated on political considerations. OPR found that the decision by the career supervisory attorneys was made following appropriate consultation with career DOJ trial attorneys and supervisors, as well as DOJ leadership. OPR found no evidence of improper political interference or influence from within or outside the Department in connection with the decision in the case. Instead, OPR concluded that the decision to dismiss most of the defendants and to seek more narrowly-tailored injunctive relief against the remaining defendant was predicated on a good faith assessment of the law and the facts of the case and had a reasonable basis. OPR found no evidence that political considerations were a motivating factor in reaching the decision.

OPR also concluded that the decision to initiate the case was based upon a good faith assessment of the facts and the law. OPR found no evidence that political considerations were a motivating factor in authorizing the civil action. Furthermore, OPR found no evidence to support allegations, which were raised during the course of OPR's investigation, that the decision makers, either in bringing or dismissing the claims, were influenced by the race of the defendants, or any considerations other than an assessment of the evidence and the applicable law.

9. *Duty to Keep Client Informed; Duty of Candor to the Court.* A DOJ attorney executed a side letter with a corporate defendant, limiting the future employment prospects of one of the defendant's employees. The side letter was not disclosed to the affected employee, the court, or to the DOJ attorney's supervisors. The side letter also was not incorporated into the parties' settlement agreement, despite the fact that the settlement agreement purported to contain all the terms of agreement between the parties.

OPR conducted an investigation and concluded that by executing the side letter without supervisory approval, the DOJ attorney engaged in professional misconduct in reckless disregard of her duty to inform the client of decisions requiring informed consent, and to keep the client reasonably informed of the status of the matter. OPR also concluded that the DOJ attorney engaged in professional misconduct in reckless disregard of her duty of candor to the court when she filed a settlement agreement purporting to encompass all the terms of agreement between the parties when, only days earlier, the DOJ attorney had executed the side letter. However, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment when, after the affected employee discovered the side letter's existence, she suggested that the employee consider a release of potential civil claims against the Department. OPR determined that there was no prohibition against such release agreements.

The DOJ attorney resigned during the investigation. OPR notified the appropriate state bar authorities of its findings of professional misconduct.

10. *Improper Closing Argument Remarks.* A court of appeals vacated the defendants' convictions on firearms and drug conspiracy charges, finding that a DOJ attorney made improper comments during his closing argument. The DOJ attorney focused the jury's attention on the large amount of ammunition seized from the defendants and told the jury that many lives were saved because of the actions of the agents. The DOJ attorney also stated that several public housing residents refused to testify because they feared for their lives due to a fight occurring in public housing projects, and he referred to a defendant as being armed for a fight in the projects. Lastly, the DOJ attorney exhorted the jury to do its job and find the defendants guilty.

OPR conducted an investigation and found that the DOJ attorney's comment about lives being saved due to the action of the agents was improper because the defendants were not charged with murder and, although ammunition was in evidence, there was no evidence that any lives had been saved due to the arrests. Although improper, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment because the DOJ attorney denied any intent to inflame the jury and OPR found the denial credible; the comment was made in rebuttal argument, immediately after defense counsel called the government agents liars and the government's case a fraud; and the DOJ attorney, who was relatively inexperienced at the time, made the remark in the heat of trial when he had little time to reflect.

OPR determined that the DOJ attorney's reference to the fight occurring in public housing projects was proper because defense counsel opened the door to the comment when he raised the issue of public housing projects in their closing arguments. OPR also determined that the DOJ attorney's reference to one of the defendants as being armed for a fight in the projects did not constitute professional misconduct or poor judgment because the DOJ attorney did not ask the jury to convict any of the defendants on the basis that they were from a particular neighborhood, or because the prosecution was part of a larger fight occurring in the neighborhood. Lastly, OPR found that the DOJ attorney's charge to the jury to do its job and find the defendants guilty was improper, but did not constitute professional misconduct or poor judgment because the comment came at the end of a lengthy extemporaneous rebuttal argument, and had little impact on the jury. Under these circumstances, OPR found that the charge constituted a mistake.

11. *Duty of Candor to the Court.* A court of appeals questioned a DOJ attorney's candor to the court. At trial, the defendant objected to being escorted into the courtroom in shackles. The district court overruled the objection, without stating the grounds for its ruling, and the defendant was kept in shackles throughout the trial. The jury convicted the defendant on all counts. The court of appeals found that the defendant's due process rights had been violated, and it reversed and remanded the case. The court of appeals noted that the government failed in its appellate brief to cite controlling case law regarding the constitutionality of shackling a defendant during trial. The court suggested that the government's failure to do so constituted a violation of its duty of candor to the court.

OPR conducted an investigation and found that the DOJ attorney who drafted the appellate brief did not prosecute the case and assumed (incorrectly) that the defendant had been shackled only briefly, and thus the constitutionality of shackling a defendant throughout the trial was not an issue that needed to be addressed by the government. OPR found that the DOJ appellate attorney's assumptions were based on the following: (1) there was no

specific finding on the record by the district court that the defendant needed to be shackled throughout trial, and longstanding legal precedent prohibited a court from shackling a defendant throughout a trial without making such a finding; (2) had the defendant been shackled for any length of time, the defense attorney would have reiterated her objection on the record, which she did not do; (3) common court practice was to unshackle a defendant upon entering the courtroom; and (4) the defendant's assertions about being shackled were false given the absence of any other reference to shackling in the record and the defendant's penchant for making false claims. Although the DOJ appellate attorney's assumptions were inaccurate, OPR determined that the DOJ appellate attorney did not commit professional misconduct or exercise poor judgment in violation of her duty of candor to the court because she did not purposely or knowingly draft the brief based on false assumptions. OPR also found that the DOJ attorney did not act in reckless disregard of her duty not to misstate the law to the court because she made reasonable (albeit erroneous) assumptions.

12. *Grand Jury Abuse.* A district court found that a DOJ attorney did not apprise one of the defendants in a corruption scheme of his status as a "target" before he testified in the grand jury. In failing to do so, the court said that the government violated the United States Attorneys' Manual (USAM), but nevertheless denied the defendant's motion to suppress the grand jury testimony. A defense counsel also alleged that grand jury witnesses were not properly informed of their status as "targets" or "subjects" of the grand jury investigation, and that grand jury witnesses did not receive appropriate warnings before being questioned in the grand jury.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct as to the defendant. OPR reached this conclusion because the DOJ attorney steadfastly maintained that the defendant properly was classified as a "subject" rather than a "target" because he was not a putative defendant in the government's eyes until he testified falsely in the grand jury. OPR found no evidence to contradict this assertion. Given the absence of contradictory evidence, and the subjectivity inherent in the USAM's definition of a target, OPR determined that the DOJ attorney did not commit professional misconduct. OPR determined, however, that the DOJ attorney exercised poor judgment by classifying the defendant as a subject rather than a target because, at the time of the defendant's grand jury appearance, the government had already obtained a search warrant based on evidence in its possession that the defendant had committed a federal crime, unrelated to the corruption scheme that was the subject of the grand jury investigation. Given the existence of the search warrant, OPR found that the more prudent course would have been to classify the defendant as a target. OPR also found that the DOJ attorney exercised poor judgment by failing to properly advise grand jury witnesses of their rights in accordance with the

USAM. OPR referred its findings of poor judgment to the DOJ attorney's employing component for consideration in a management context.

13. *Discovery Violation - Brady/Pretextual Prosecution.* A district court expressed concern about the timing of the government's *Brady* disclosures, as well as the government's delay in seeking to dismiss the indictment. However, the court declined to make any findings of prosecutorial misconduct.

The defendant was charged in a drug conspiracy. The defendant's trial was continued when the government requested a delay to conduct witness depositions. Shortly thereafter, the defendant offered to cooperate, and the government met with the defendant over several months in an effort to negotiate a plea agreement. After those negotiations fell through, the government moved to dismiss the indictment. The court granted the motion to dismiss the indictment with prejudice, but in doing so, expressed concern about the timing of the government's *Brady* disclosures. The court also questioned why the government had waited so long to seek a dismissal of the case, particularly since the defendant had been detained pending trial.

OPR conducted an investigation and determined, as to the *Brady* concerns, that because a trial never occurred and the trial was weeks away when the government made its *Brady* disclosures, any delay in disclosing the fact that certain government witnesses had recanted their previous statements would not have affected the fairness of the trial. As to the concerns about the government's delay in seeking a dismissal of the case, OPR found no evidence that the government's case was pretextual and that their true goal was to hold the defendant in jail for as long as possible before eventually dismissing the charges. In reaching this determination, OPR noted that not long after the defendant was indicted, Immigration and Customs Enforcement served a detainer to ensure that she would be held pending immigration proceedings. Moreover, authorities from a foreign country wanted to extradite the defendant so that it could pursue its own case against her. Thus, OPR found that even if the government had decided to dismiss its case earlier, when some of the evidentiary concerns first appeared, the defendant would still have faced detention either in the United States or abroad. Accordingly, OPR concluded that the DOJ attorney who prosecuted the case did not commit professional misconduct or exercise poor judgment in the matter.

14. *Failure to Provide Diligent Representation.* A DOJ component reported to OPR that a DOJ attorney mishandled three cases assigned to him.

OPR conducted an investigation. In the first case, the defendant, who had been indicted on murder and firearms related charges, transferred highly-encumbered real property to his son. After the defendant was convicted of both crimes, the DOJ attorney filed a lien against the real property. To avoid



litigating a fraudulent conveyance action until after the defendant's appeal had been heard and affirmed, the DOJ attorney entered into an escrow agreement with the defendant's son in which the DOJ attorney agreed to release the government's lien upon the son's deposit of \$100,000 into an escrow account. The parties agreed that the United States would receive the funds if, within four years of affirmation of the defendant's conviction, a court of competent jurisdiction entered a final order validating the government's lien. If no such order was entered within four years, the funds would be returned to the defendant's son. After the appellate court affirmed the defendant's conviction, the DOJ attorney failed to obtain a final order validating the government's lien within four years. Thus, the escrow funds were released to the defendant's son as a result of the DOJ attorney's failure to act.

In the second case, the defendant signed a plea agreement obligating him to make five annual payments of \$75,000 in lieu of forfeiting the family farm. The defendant, however, failed to make payments under the agreement for the first three years. The DOJ attorney did not take any steps to enforce the payments, although it was his responsibility to do so. Subsequently, the matter was assigned to another DOJ attorney who filed a motion for specific performance of the plea agreement. After the court entered an order directing the defendant's specific performance, the defendant corrected his arrears and subsequently remained current in his payments.

In the third case, the court ordered the government to show cause why a forfeiture case pending on the court's docket should not be dismissed for abandonment. The DOJ attorney had filed the civil forfeiture case against certain real property on the ground that it constituted money laundering and drug trafficking proceeds. A couple of months later, a federal grand jury returned an indictment that included a forfeiture count for the same property. After the indictment, the DOJ attorney failed either to prosecute or stay the civil forfeiture case or otherwise inform the court of the pending criminal case.

OPR concluded that in failing to vigorously pursue these cases, the DOJ attorney engaged in professional misconduct in reckless disregard of his professional obligation to diligently represent his client.

OPR referred its finding of professional misconduct to the PMRU. The PMRU affirmed OPR's finding of professional misconduct and proposed a fourteen-day suspension without pay. The DOJ attorney subsequently retired and challenged the PMRU's finding. After reviewing the challenge, the PMRU affirmed its finding and authorized OPR to notify the appropriate state bar authorities of the professional misconduct finding.

15. *Candor to Opposing Counsel and the Court.* A DOJ component reported to OPR that a DOJ attorney made inaccurate statements to the court in a

hearing about what occurred in a prior meeting between the government and defense counsel.

OPR conducted an investigation and found that at the meeting in question, defense counsel asked the DOJ attorney whether she planned to record the meeting. The DOJ attorney, who was surreptitiously recording the meeting, stated that she did not intend to record the meeting. Within seconds of the misrepresentation, defense counsel announced that she wanted to record the meeting. In response, the DOJ attorney said that she would also record the meeting and produced her recorder.

During a court hearing about the meeting, the DOJ attorney testified that her supervisors had authorized her to surreptitiously record the meeting. OPR determined that this statement was accurate. In response to a question from the court, the DOJ attorney also testified that her supervisors had authorized her to misrepresent to defense counsel her intent to record the meeting. OPR determined that this statement was inaccurate.

OPR concluded that the DOJ attorney did not commit professional misconduct by representing to defense counsel as she did her intentions regarding recording the meeting. OPR noted that prior to the meeting with defense counsel, neither the DOJ attorney nor her supervisors had considered what should be done if defense counsel asked her whether she planned to record the meeting. OPR determined that the DOJ attorney, who was relatively inexperienced, was caught off-guard by defense counsel's question and had insufficient time to consider the proper course of action. OPR also concluded that the DOJ attorney did not commit professional misconduct by telling the court that her supervisors had authorized her to represent her intentions as she did regarding recording the meeting. OPR found that in preparing for the hearing, neither the DOJ attorney nor the government attorney who prepared her for the hearing anticipated the court's question about whether the DOJ attorney's supervisors had given her advance approval to misrepresent her intentions. OPR credited the DOJ attorney's assertion that she was attempting to convey to the court that her supervisors had not addressed whether she should affirmatively lie to defense counsel, but that she had failed to explain her meaning clearly. The DOJ attorney's assertion is supported by the fact that during the hearing, she promptly corrected her initial incorrect response to the court.

Although OPR found that the DOJ attorney did not commit professional misconduct, OPR determined that the DOJ attorney exercised poor judgment because the cumulative effect of the DOJ attorney's course of conduct -- both in making inaccurate statements to defense counsel and the court -- was in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. OPR referred its finding of poor

judgment to the DOJ attorney's employing component for consideration in a management context.

16. *Conflict of Interest; Failure to Perform.* A DOJ attorney reported to OPR that he had dated an attorney who had served as defense counsel on some of his cases, and that he had not disclosed the relationship to his supervisors.

OPR conducted an investigation and found that the DOJ attorney worked on two cases in which the attorney whom he was dating served as defense counsel. In the first case, the DOJ attorney asked another prosecutor to take over the case when the parties entered into plea negotiations. Although the case was resolved in a manner favorable to the government, the DOJ attorney never informed his supervisor why he had transferred the case to another prosecutor. In the second case, the DOJ attorney was removed from the case for administrative reasons after an initial court appearance. The DOJ attorney continued to hide his relationship until it was revealed when an employee in the defense counsel's firm reported the relationship to the firm's supervisors. The defense counsel withdrew from the case.

OPR determined that no actual conflict of interest existed because the DOJ attorney removed himself from the first case, and he was removed due to administrative reasons from the second case. Although no actual conflict existed, OPR determined that by failing to inform his supervisors that he was dating the defense counsel, the DOJ attorney engaged in professional misconduct in reckless disregard of his obligation to keep the client reasonably informed about significant developments in the case.

OPR referred its finding of professional misconduct to the PMRU. The PMRU affirmed OPR's finding of professional misconduct and issued a letter of reprimand.

17. *Failure to Comply with Discovery/Impeachment Requirements.* A district court declared a mistrial after finding that the government engaged in misconduct by failing to produce exculpatory impeachment information about a cooperating witness.

OPR conducted an investigation and found that the DOJ attorney prosecuting the case (the first attorney) had been unaware that another DOJ attorney (the second attorney) had argued at the cooperating witness's sentencing hearing that the witness had been untruthful. The first attorney asked her supervisor whether the cooperating witness had any credibility problems, and the supervisor told the first attorney to speak to the second attorney. The second attorney recalled that the witness did not have credibility issues. Accordingly, the first attorney did not disclose any exculpatory impeachment information.

OPR concluded that the DOJ attorneys did not commit professional misconduct or exercise poor judgment in this matter. Although the second attorney failed to alert the first attorney to the fact that she advised the court that the witness had lied to the government, OPR concluded that the error resulted from a faulty memory and, as such, constituted a mistake. OPR also concluded that the first DOJ attorney's failure to independently verify the information that she received from the second DOJ attorney by reviewing the witness's sentencing transcript herself was reasonable under the circumstances. OPR found that the first attorney had been substituted for a third attorney shortly before trial. OPR concluded that under such time-pressured circumstances, the first attorney reasonably relied upon the information orally provided to her by the second attorney. OPR, however, referred to the attorney's component for consideration in a management context the decision to substitute counsel in such close proximity to trial.

18. *Immigration Judge, Improper Bias.* The Board of Immigration Appeals (BIA) found that a DOJ Immigration Judge's (IJ) conduct at a removal hearing deprived the petitioner of due process because the IJ lacked impartiality. The BIA found that the IJ used insulting language, questioned the petitioner in a prosecutorial tone, and badgered the petitioner. The BIA also found that the IJ's perjury finding against the petitioner was not supported by the evidence. Based on the IJ's lack of impartiality, the BIA vacated the decision and remanded the case to a different IJ.

OPR conducted an investigation and concluded that the IJ committed professional misconduct by acting in reckless disregard of his obligation to appear fair and impartial in the administration of justice. As part of an earlier criminal case, the petitioner pled guilty to a misprision of felony. The IJ made it clear at the pretrial conference in the removal case that the IJ intended to deny relief to the petitioner unless the petitioner admitted that he had laundered money generated by the distribution of methamphetamine. OPR found that the IJ mistakenly believed that money laundering was an element of the misprision of felony to which the petitioner had pled guilty. OPR found that the IJ exercised bias when he refused to consider attempts by the petitioner's counsel to explain to the IJ that the misprision of felony charge had not encompassed money laundering activities. Moreover, when the petitioner testified that he did not know that money had been generated by the distribution of methamphetamine, the IJ improperly concluded that the petitioner was lying and badgered him in an attempt to have him change his testimony. OPR also found that the IJ appeared biased when he accused the petitioner of lying on ten occasions during his testimony, and interrupted petitioner's counsel several times during closing argument to make disparaging and sarcastic remarks about the petitioner.

OPR referred its findings to the IJ's management but did not recommend a disciplinary sanction because the IJ retired prior to the completion of OPR's investigation.

19. *Abuse of Prosecutive Authority.* A district court dismissed a superseding indictment, which contained additional criminal charges, on the ground that the government engaged in actual vindictiveness by filing the superseding indictment. The court originally denied the motion to dismiss the indictment, but subsequently granted it based upon statements that a DOJ attorney made during a hearing. The court found that certain statements suggested that the government brought the superseding indictment because the defendant had rejected a proposed plea agreement and started filing pre-trial motions.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment. OPR found no evidence that the DOJ attorney filed the superseding indictment based on improper grounds or harbored personal animus toward the defendant. Rather, OPR determined that the DOJ attorney's decision to pursue a superseding indictment was based on new evidence obtained after defense counsel told the government that the defendant was uninterested in continuing plea negotiations and intended to go to trial. Although the DOJ attorney did not commit professional misconduct or exercise poor judgment, OPR concluded that the DOJ attorney made a mistake when, arguing extemporaneously, she used shorthand phrases to explain the reason why the government decided to file the superseding indictment. By employing such shortcuts, the DOJ attorney opened the door for the court's misunderstanding, which led to the dismissal of the superseding indictment.

20. *Violation of DOJ Media Guidelines.* A DOJ component reported to OPR that a DOJ attorney, who had not been authorized to speak with the media, communicated with reporters about search warrants that were executed as part of a fraud investigation.

OPR conducted an investigation and found that after the search warrants were executed, the DOJ attorney provided information about the investigation to a reporter. The DOJ attorney then sent e-mails to other reporters, advising them that he had information about a case that might be of interest to them. The DOJ attorney's supervisors learned of his actions when they noted that the DOJ attorney was quoted in various news reports discussing the case, including identifying the owners of the properties that were searched.

OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the Department's policy governing media contacts when he made unauthorized statements concerning an ongoing investigation. The policy, contained in § 1-7.401(E) and

§ 1-7.530(B) of the United States Attorneys' Manual, prohibits comments about pending cases without the prior approval of a Department official. In concluding that the DOJ attorney engaged in professional misconduct, OPR noted that the policy was clear and unambiguous, and that the DOJ attorney was an experienced prosecutor who had previously held a senior management position in his office. OPR also noted that the DOJ attorney admitted that his comments were in violation of the Department's policy, and told OPR that he would not have made the comments about the case had he reviewed the policies beforehand.

OPR found, however, that the DOJ attorney did not violate his state bar's rules of professional conduct. The rule on extrajudicial comments protected people accused of criminal activity. Although the DOJ attorney identified the owners of the property searched by the agents, he told the media that there were no charges pending against them. Thus, OPR found that the state bar rule on extrajudicial comments was inapplicable.

OPR referred its finding of professional misconduct to the PMRU. The PMRU affirmed OPR's finding of professional misconduct and imposed a one-day suspension.

## **Conclusion**

During Fiscal Year 2011, 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 within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in Fiscal Year 2011 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, 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.