

U.S. DEPARTMENT OF JUSTICE



**OFFICE OF
PROFESSIONAL RESPONSIBILITY**

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2005

U.S. Department of Justice
Office of Professional Responsibility

Fiscal Year 2005 Annual Report

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Annual Report for Fiscal Year 2005

Introduction

The Office of Professional Responsibility (OPR) was established in the Department of Justice by order of the Attorney General dated December 9, 1975, to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is the Office's thirtieth annual report to the Attorney General, and it covers fiscal year 2005 (October 1, 2004 - September 30, 2005).

Jurisdiction and Functions of OPR

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

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

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence or non-frivolous allegation of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Information provided to OPR may be confidential. In appropriate cases, OPR will disclose that information to the extent necessary to resolve the allegation, or when required by law.

Upon receipt, OPR reviews each allegation and determines whether further investigation is warranted. If it is, OPR determines whether to conduct an inquiry or a full investigation in a specific case. This determination is a matter of investigative judgment and involves consideration of many

factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation.

The majority of complaints reviewed by OPR each year are determined not to warrant further investigation because, for example, the complaint is frivolous on its face, is outside OPR's jurisdiction, or is vague and unsupported by any evidence. In some cases, OPR initiates an inquiry because more information is needed to resolve the matter. In such cases, OPR may request additional information from the complainant or obtain a written response from the attorney against whom the allegation was made, and may review other relevant materials such as pleadings and transcripts. Most inquiries are resolved based on the additional written record.

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

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

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

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. It is those officials who are responsible for imposing any disciplinary action that may be appropriate. In matters where OPR concludes that a Department attorney engaged in professional misconduct, pursuant to Department policy OPR includes in its report a recommended range of discipline. Although OPR's recommendation is not binding on the management official responsible for discipline, pursuant to Department policy, if the disciplinary official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), that official must notify the Office of the Deputy

Attorney General in advance of implementing that decision. Pursuant to Department policy, once a disciplinary action is final, OPR notifies the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed. The referral policy includes findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. OPR does not, however, make bar referrals where the conduct in question involved exclusively internal Department interests which do not appear directly 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 conduct at issue should be referred to the relevant state bar counsel.

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

Significant Activities in Fiscal Year 2005

During fiscal year 2005, OPR participated in non-investigative, policy, and project-oriented activities of the Department. OPR participated in numerous educational and training activities both within and outside the Department of Justice to increase awareness of the ethical obligations imposed by statutes, court decisions, regulations, Department policies, and bar rules. During fiscal year 2005, OPR participated in the Anti-Terrorism Advisory Counsel Coordinators' Conference at the National Advocacy Center. OPR attorneys also made presentations in several media relations workshops given at the National Advocacy Center focusing on the policies and ethical issues concerning contacts with the media. OPR attorneys participated in a symposium on prosecutorial ethics at the Georgetown University Law Center, and in a meeting on prosecutorial ethics sponsored by the City Bar of New York. In addition, OPR attorneys participated at the National Conference of First Assistant United States Attorneys, and at the National Conference of Civil Chiefs.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys participated in a presentation to officials of the Albanian government regarding the operation and functioning of OPR within the Department. In addition, as part of an ongoing OPDAT training being conducted in the Republic of Georgia, an OPR attorney traveled to that country and made a series of presentations to regional prosecutors and to members of the Georgian Procuracy's Office of the Inspector General regarding the operation of OPR. OPR attorneys also met with judges from Afghanistan to discuss issues associated with prosecutorial ethics.

OPR continued to serve as the Department's liaison to state bar counsel on matters affecting the professional responsibility of Department attorneys. OPR also attended the mid-year and annual meetings of the National Organization of Bar Counsel that addressed current trends in attorney regulation, and participated on a panel addressing issues of prosecutorial misconduct. 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 advises other Department components regarding instances of possible professional misconduct by non-Department attorneys. In thirty-seven such matters handled by OPR in fiscal year 2005, OPR reviewed information relating to possible misconduct by the attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar referrals were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly.

In fiscal year 2003, the Attorney General's Advisory Committee approved a plan under which OPR created a Rapid Response Team designed to enhance OPR's ability to respond quickly and effectively to misconduct allegations that arise in matters of particular importance to the Department. The Rapid Response Team initially consisted of one permanent OPR attorney and one experienced DOJ attorney serving a one-year detail at OPR. The work of the Rapid Response Team, like the other work at OPR, is directed and supervised by the Counsel and the Deputy Counsel. In fiscal year 2004, OPR expanded the Rapid Response Team to include two additional permanent OPR attorneys and two additional experienced DOJ attorneys serving details. In fiscal year 2005, the Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

As noted in OPR's Annual Report for Fiscal Year 2002, OPR no longer exercises oversight of the Offices of Professional Responsibility in the Federal Bureau of Investigation (FBI/OPR) or the Drug Enforcement Administration (DEA/OPR). In July 2001, the Attorney General placed those internal inspection units under the oversight of the OIG. 66 Fed. Reg. 37902 (July 20, 2001). Accordingly, OPR's Annual Report no longer contains information about the operation of those offices. OPR continued, however, to exercise jurisdiction over FBI and DEA agents when allegations of misconduct against such agents related to the exercise of a Department of Justice attorney's authority to investigate, litigate, or provide legal advice. OPR also continued to share with the OIG responsibility for reviewing and investigating (as appropriate) whistleblower complaints by FBI employees.

Intake and Initial Evaluation of Complaints

In fiscal year 2005, OPR received 827 complaints and other letters and memoranda requesting assistance. OPR determined that 257 of the matters, or approximately 31%, warranted further review by OPR attorneys. OPR opened full investigations in eighty-seven of those matters; the remaining 170, which are termed "inquiries," were resolved with no findings of professional misconduct, based on further review, additional information from the complainants, responses from the subjects, or other information. When information developed in an inquiry indicated that further investigation was warranted, the matter was converted to a full investigation.

The remaining 557 matters were determined not to warrant an inquiry by OPR because, for example, they related to matters outside the jurisdiction of OPR; sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported by any evidence; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department of Justice component. A supervisory OPR attorney and the Deputy Counsel reviewed all such dispositions.

OPR Investigations in Fiscal Year 2005

Characteristics of Investigations Opened in Fiscal Year 2005: OPR investigations opened in fiscal year 2005 were based on complaints from a variety of sources, as reflected in Table 1.

TABLE 1

| Sources of Complaints in Investigations Opened in FY 2005 | | |
|--|---|---|
| Source | Complaints Leading to Investigations | Percentage of All Investigations |
| Judicial opinions & referrals ¹ | 60 | 69.0% |
| Private attorneys | 6 | 6.9% |
| Department components | 17 | 19.5% |
| Private parties | 2 | 2.3% |
| Other agencies | 2 | 2.3% |
| Total | 87 | 100.0% |

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

OPR opened a total of eighty-seven new investigations in fiscal year 2005. Four of these matters involved non-attorney subjects, but three of these four matters also involved attorney subjects. The eighty-seven investigations involved 124 separate allegations of misconduct. The subject matter of the 124 allegations is set out in Table 2.

TABLE 2

| Misconduct Allegations in Investigations Opened in Fiscal Year 2005, by Type of Allegation | | |
|---|--|--|
| Type of Allegation | New Allegations Investigated in FY 2005 | Percentage of All Allegations in Investigations |
| Abuse of authority, including abuse of prosecutorial discretion | 28 | 22.6% |
| Improper remarks to a grand jury, during trial, or in pleadings | 23 | 18.5% |
| Misrepresentation to the court and/or opposing counsel | 11 | 8.9% |
| Unauthorized disclosure of information, including grand jury information protected by Rule 6(e), Fed. R. Crim. P. | 7 | 5.7% |
| Failure to perform/derelection of duty | 8 | 6.5% |
| Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery | 14 | 11.3% |
| Failure to comply with court orders or federal rules | 5 | 4.0% |
| Conflict of interest | 2 | 1.6% |
| Failure to comply with DOJ rules and regulations | 7 | 5.7% |
| Subornation of perjury/failure to correct false testimony | 3 | 2.4% |
| Interference with defendant's rights | 2 | 1.6% |
| Lateness (i.e., missed filing dates) | 6 | 4.8% |
| Lack of fitness to practice law | 3 | 2.4% |
| Improper contact with represented party | 2 | 1.6% |
| Failure to comply with congressional requests, including subpoenas | 0 | 0.0% |
| Unauthorized practice of law | 0 | 0.0% |
| Other ² | 3 | 2.4% |
| Total | 124 | 100.0% |

Investigations Closed in Fiscal Year 2005: OPR closed a total of eighty-eight investigations in fiscal year 2005. Three of the investigations closed involved non-attorney subjects. Of the eighty-eight investigations that were closed during the fiscal year, OPR found professional

² Such matters include allegations of retaliation, fraud, and theft.

misconduct in twenty-five, or approximately 28%, of the matters. Of the twenty-five matters in fiscal year 2005 in which OPR found professional misconduct, seven involved at least one finding of intentional professional misconduct by a Department attorney.³ In twenty of the twenty-five matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable obligation or standard (this figure includes three cases in which OPR also found that the Department attorney engaged in intentional professional misconduct).⁴ In the remaining one matter, OPR found that a non-attorney Department employee engaged in intentional misconduct. The proportion of investigations resulting in findings of professional misconduct on the part of Department attorneys was slightly lower than in fiscal year 2004, in which OPR found professional misconduct in 29% of the investigations it closed.

Disciplinary action was initiated against attorneys in sixteen of the twenty-five matters in which OPR found professional misconduct. In seven matters, OPR's recommendation that disciplinary action be taken against the subject attorney remained pending at the close of fiscal year 2005. In the remaining two matters, the subject attorneys who were found to have engaged in professional misconduct resigned from the Department prior to the completion of the OPR investigation. With respect to the sixteen matters in which disciplinary proceedings were initiated, the subject attorneys in eight of the matters were suspended for a period of time; attorneys in six of the matters received reprimands; and attorneys in the other two matters were in the process of grieving the proposed discipline.

OPR also closed sixteen investigations, or approximately 18% of the eighty-eight investigations, with at least one finding that an attorney exercised poor judgment.⁵ Five of those sixteen matters also involved findings of professional misconduct, and are included in the twenty-five matters that contained findings of professional misconduct. Eighteen matters, or approximately

³ OPR finds intentional professional misconduct when it concludes that an attorney violated an obligation or standard by (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

⁴ OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes (1) that the attorney knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) that the attorney knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) that the attorney nevertheless engaged in the conduct, which was objectively unreasonable under all the circumstances.

⁵ OPR finds that an attorney has exercised poor judgment when, faced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

21%, involved at least one finding that an attorney made a mistake.⁶ Two of those eighteen matters also included a finding of professional misconduct. Thus, of the eighty-eight matters closed, OPR found professional misconduct or poor judgment in thirty-six matters, or approximately 41%, which is the same percentage of matters in which OPR found professional misconduct or poor judgment in fiscal year 2004.

Examples of Investigations Closed in Fiscal Year 2005⁷

1. *Lack of Diligence; Failure to Obtain Supervisory Approval.* A litigating component reported to OPR that a DOJ attorney consistently failed to prepare cases for trial, resulting in numerous dismissals for want of prosecution. The DOJ attorney also was reported to have failed to obtain supervisory approvals for plea offers and voluntary dismissals.

OPR conducted an investigation and concluded that in several cases the DOJ attorney acted in reckless disregard of her obligation to diligently and competently prepare for trial. OPR concluded further that the DOJ attorney engaged in intentional professional misconduct by violating the litigating component's policy requiring supervisory approval for plea offers and voluntary dismissals, and that her conduct also violated her duty under the applicable state bar rule to communicate and consult with her client.

OPR recommended that disciplinary action be taken against the DOJ attorney. The DOJ attorney resigned from the Department prior to any action being taken on OPR's findings. OPR referred its findings of professional misconduct to the appropriate state bar authorities.

2. *Discovery Violation; Investigatory Misconduct.* A district court dismissed a criminal indictment because it found that the government refused to comply with a discovery order. The court criticized the government for failing to disclose that an individual had been paid to arrange the drug transaction that led to the criminal charges.

OPR conducted an investigation of the DOJ attorneys and a DOJ law enforcement agent who handled the investigation and prosecution. OPR concluded that the DOJ attorneys did not engage in professional misconduct or exercise poor judgment, but rather acted appropriately under the circumstances. OPR found that the attorneys responded promptly to defense discovery requests for information about informants, and reasonably relied on the case agent's assurance that only one

⁶ OPR finds that an attorney made a mistake when the attorney's conduct constituted excusable human error despite the exercise of reasonable care under the circumstances.

⁷ 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.

informant had been used in the case. OPR found further that the case agent had not been aware that a person besides the informant had received money, and that the government took appropriate steps to address the situation after it learned that information.

3. *Improper Examination of a Witness.* A court of appeals criticized a DOJ attorney for eliciting testimony from a witness concerning the credibility of another witness. OPR conducted an investigation and found that the district court had overruled the defense objections to the line of questioning, and that the DOJ attorney reasonably believed her questions were appropriate. OPR concluded that the questioning was not appropriate, but that it constituted a mistake rather than professional misconduct in light of the district court's rulings and in light of the DOJ attorney's relative inexperience.

4. *Coercion of a Witness.* A defense attorney alleged that a DOJ attorney improperly coerced a witness not to testify on behalf of the attorney's client. The witness was a co-defendant who had pleaded guilty, but who had planned to provide testimony favorable to the attorney's client. The DOJ attorney spoke with the witness in the presence of the witness' attorney, after which the witness decided not to testify.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or improperly coerce the witness. OPR concluded further that the DOJ attorney exercised poor judgment by meeting personally with the witness and warning him that his anticipated testimony could lead to a perjury prosecution.

5. *Unauthorized Disclosure to the Media.* A district court criticized a DOJ attorney for disclosing to the media confidential information that the court had stated was not part of the public record. After initiating an investigation, OPR learned that the DOJ attorney had resigned from the Department before the court issued its decision criticizing her conduct.

When a DOJ attorney resigns from the Department prior to or during an OPR investigation, OPR considers various factors to determine whether to proceed with an investigation. Such factors include OPR's limited resources; whether the investigation implicates significant institutional concerns that go beyond the narrow purpose of imposing discipline on the DOJ attorney; and whether the Department's litigation position was altered by the attorney's conduct. In this case, OPR recommended to the Office of the Deputy Attorney General that the investigation be terminated and the court's findings referred to the appropriate state bar authorities. OPR closed its investigation after its recommendation was approved, and referred the matter to the appropriate state bar authorities.

6. *Discovery Violation.* As a result of a routine Westlaw search, OPR learned of a court of appeals decision that criticized a DOJ attorney for failing to timely disclose information about a key

government witness in a criminal prosecution. The court of appeals found that the government had led the district court and the defense to believe that all impeachment evidence had been disclosed, but that the DOJ attorney knew of additional impeachment information.

OPR conducted an investigation and found that the additional impeachment information was disclosed to the defense several weeks before the trial. Therefore, OPR concluded that the DOJ attorney did not improperly conceal information or mislead the district court or the defense. OPR found that the DOJ attorney disclosed the additional impeachment information in time for the defense to have a reasonable opportunity to make use of the information at trial, and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment.

7. *Misconduct Before the Grand Jury.* A litigating component reported to OPR that a DOJ attorney made an unrecorded presentation to a grand jury that included discussions of political and other issues unrelated to the work of the grand jury, and that the DOJ attorney had given small gifts to grand jurors and had communicated about personal matters with a grand juror outside of the grand jury context.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation under Federal Rule of Criminal Procedure 6(e)(1) to record all proceedings before the grand jury. OPR also concluded that the DOJ attorney engaged in professional misconduct by providing small gifts to grand jurors, and exercised poor judgment by communicating with a grand juror outside of the grand jury context. Finally, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation not to improperly influence, inflame, or prejudice the grand jury.

The DOJ attorney resigned from the Department prior to the completion of OPR's investigation, so OPR did not make any disciplinary recommendation. OPR did not refer the findings of professional misconduct to the appropriate state bar authorities because the findings did not implicate applicable bar rules.

8. *Breach of Plea Agreement.* A court of appeals vacated a sentence and remanded for re-sentencing on the ground that a DOJ attorney breached the plea agreement by making statements at the sentencing that had the effect of advocating for a longer sentence than had been agreed upon by the parties. OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct, but rather exercised poor judgment by making statements that placed undue emphasis on aggravating facts of the offense. The statements were made in the part of the hearing reserved by the court for recommendations concerning the appropriate guideline range.

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

9. *Vindictive Prosecution.* A district court dismissed an indictment with prejudice, ruling that a DOJ attorney had engaged in prosecutorial vindictiveness by entering into a pretrial diversion agreement with the defendant instead of dismissing the charges.

OPR conducted an investigation and found no evidence of hostility or vindictiveness on the part of the DOJ attorney. OPR found that the DOJ attorney obtained supervisory approval for the pretrial diversion agreement, and that such an agreement was appropriate given the seriousness of the offense. Accordingly, OPR concluded that the DOJ attorney acted appropriately under the circumstances.

10. *Misrepresentation to the Court.* A district court criticized a DOJ attorney for presenting a criminal information that was not supported by the facts and did not describe accurately the offense committed by the defendant. In addition, the court found that the DOJ attorney gave deceptive answers to the court's questions in an attempt to induce the court to adjudicate the defendant guilty of an offense she did not commit.

OPR conducted an investigation and found that the DOJ attorney misidentified the financial form on which the defendant's false statement was made. OPR found that the criminal information and statement of facts had been reviewed by the attorney's supervisors, and that there was an adequate basis in fact for the charge. OPR found further that the DOJ attorney did not make false or misleading statements to the court, and that the attorney's drafting error stemmed from the attorney's relative inexperience with the financial procedures at issue in the case. Accordingly, OPR concluded that the DOJ attorney's conduct constituted a mistake rather than professional misconduct.

11. *Contact With a Represented Party.* A district court ruled that a DOJ attorney violated a state bar rule by authorizing a law enforcement agent to contact a represented party without the consent of the party's lawyer.

OPR conducted an investigation and concluded that the DOJ attorney was frustrated by the opposing lawyer's supposed inability to locate his client. The DOJ attorney asked the law enforcement agent to locate the represented party. The agent found the represented party and questioned him about his failure to appear for a proceeding. OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation to comply with the state bar rule prohibiting contacts with a represented party.

The DOJ attorney received a reprimand. OPR referred its finding of professional misconduct to the appropriate state bar authorities.

12. *Late Filing.* A court of appeals criticized a DOJ attorney for filing a brief more than three months late, despite having received several extensions of time. The court ordered the late brief

stricken from the record, and noted that the DOJ attorney had filed briefs late in other cases after the expiration of extensions.

OPR conducted an investigation and found that the Department has been overwhelmed with appeals from rulings by the Board of Immigration Appeals (BIA). The substantial increase in case load stemmed in part from increased immigration law enforcement, and in part from a streamlined appeals process at the BIA that allowed appeals from immigration judges to be reviewed by one judge rather than by a three-judge panel, and that authorized the issuance of brief, standardized opinions by individual BIA judges. This initiative succeeded in reducing a BIA backlog that exceeded 50,000 cases, but one effect was that it increased dramatically the number of appeals from the BIA to the federal courts of appeal. OPR found that the DOJ attorneys assigned to handle that case load were not able, despite significant efforts, to keep pace with the new work load. Unfortunately, this resulted in numerous late filings.

OPR found that the Department had recognized the problem and was beginning to devote additional resources to handling the immigration appeals. OPR concluded that the late filings by the DOJ attorney in this case reflected systemic rather than personal shortcomings, and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment.

13. *Abuse of Prosecutive Authority.* A bankruptcy court criticized a DOJ attorney for pursuing a strategy of delay, and for sponsoring legal arguments that lacked merit for the purpose of delaying the case and harassing the other parties to the litigation.

OPR conducted an investigation and found that the DOJ attorney raised arguments on behalf of the government that were based on well-established case law, and that she did not act to delay the proceedings. Accordingly, OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment.

14. *Mishandling Classified Information.* A litigating component referred to OPR an allegation that a DOJ attorney mishandled classified information by giving access to the information to support personnel who did not have security clearances, and by placing classified information on non-secure network computers.

OPR conducted an investigation and found that the DOJ attorney knew that the information he was using was classified, and that he knew from past cases what steps were necessary to protect classified information. OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of his obligation to ensure that classified information was handled properly.

The DOJ attorney received a reprimand. OPR did not refer its finding of professional misconduct to the appropriate state bar authorities because the conduct involved internal Department processes and did not implicate a bar rule.

15. *Unauthorized Disclosure to the Media.* OPR received an allegation that a DOJ attorney disclosed to the media information pertaining to an investigation and prosecution of a defendant. The information, which related to a sealed indictment and to plea discussions, was distributed widely in newspapers.

OPR conducted an investigation and found that the reporter who initially wrote about the information had access to numerous sources outside the government, and that those sources apparently provided him with considerable information about the government's investigation. OPR concluded that it was unable to identify the source or sources of the alleged unauthorized disclosures, and declined to issue subpoenas to the reporter(s) in question for information about their sources.

16. *Failure to Maintain Active Bar License.* A DOJ attorney reported to OPR that he had been suspended from a state bar for three months for failing to pay annual dues, and thus was not an active member of any state bar for that period, in violation of the Department's requirement.

OPR conducted an investigation and found that the DOJ attorney knew of the Department's requirement that its attorneys maintain active membership in at least one state bar. OPR also found that the attorney had been suspended by another state bar for the same period for failure to pay dues. The DOJ attorney admitted receiving annual bar dues statements, but denied having received notices that he owed his dues by a certain date. OPR found that both state bars had sent multiple notices to the DOJ attorney's address, and concluded that the DOJ attorney engaged in intentional professional misconduct by failing to maintain an active bar membership.

The DOJ attorney received a reprimand. OPR referred its findings of professional misconduct to the appropriate state bar authorities.

17. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for referring in closing argument to facts that were not in evidence to bolster the credibility of government witnesses. The court affirmed the defendant's conviction, finding that the improper argument was not so prejudicial that it denied the defendant a fair trial.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct, but rather exercised poor judgment, by attempting to rebut an attack on the credibility of government witnesses by urging the jury to rely on another jury's finding that the witnesses were credible.

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

18. *Lack of Diligence.* A litigating component referred to OPR a district court's criticism of a DOJ attorney for failing to respond to a defendant's motion to dismiss, and reported further that the DOJ attorney failed to report the dismissal to his supervisors. In another case, the DOJ attorney's last-minute motion for an extension of time was denied, resulting in the government missing the filing deadline for a pre-trial brief.

OPR conducted an investigation and found that staffing shortages had forced the DOJ attorney to cover every civil case in his litigating component for a period of six weeks, and to cover the majority of civil cases for months after that. OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment in either of the two cases, but rather that he made a mistake in the first case by not noticing there was an unanswered motion to dismiss in a case file he inherited, and in the second case by assuming that the court would grant an extension of time.

19. *Discovery Violation.* A district court criticized two DOJ attorneys for failing to disclose to the defense that a government witness had made conflicting statements regarding his role in the charged offense. OPR conducted an investigation and found that the DOJ attorneys committed professional misconduct by acting in reckless disregard of their discovery obligations.

Each of the DOJ attorneys received a one-day suspension. OPR referred its findings of professional misconduct to the appropriate state bar authorities.

20. *Speedy Trial Act Violation.* A litigating component referred to OPR a district court's finding that a DOJ attorney violated the Speedy Trial Act. OPR conducted an investigation and found that the DOJ attorney failed to recalculate the amount of time remaining under the Speedy Trial Act after the court ruled on a defense motion, and the DOJ attorney failed to respond to the defense motion to dismiss on Speedy Trial Act grounds. OPR found that the DOJ attorney knew it was his responsibility to keep track of the time, and that he failed to do so because he focused on trying to resolve the case in plea negotiations. In addition, OPR found that the DOJ attorney had violated the Speedy Trial Act in another case, and was on notice to attend to the requirements of the Act. Accordingly, OPR concluded that the DOJ attorney engaged in intentional professional misconduct.

The DOJ attorney received a five-day suspension. OPR referred its finding of professional misconduct to the appropriate state bar authorities.

OPR Inquiries in Fiscal Year 2005

Characteristics of Inquiries Opened in Fiscal Year 2005: The sources of the 170 matters designated as inquiries are set forth in Table 3. As noted above, twenty-six of these matters were later converted to full investigations. This figure does not include an additional thirty-nine matters involving proposed bar referrals of non-Department attorneys. The nature of the 232 allegations against Department attorneys contained in the 170 inquiries is set forth in Table 4.

TABLE 3

| Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2005 | | |
|--|--|------------------------------------|
| Source | Complaints Leading to Inquiries | Percentage of All Inquiries |
| Judicial opinions & referrals ⁸ | 23 | 13.5% |
| Private attorneys | 59 | 34.7% |
| Department components | 28 | 16.5% |
| Private parties | 38 | 22.4% |
| Other agencies | 12 | 7.0% |
| Other sources | 10 | 5.9% |
| Total | 170 | 100.0% |

⁸ This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

TABLE 4

| Misconduct Allegations in Inquiries Opened in Fiscal Year 2005, by Type of Allegation | | |
|---|-------------------------------------|---|
| Type of Allegation | Allegations in Inquiries | Percentage of All Allegations in Inquiries |
| Abuse of authority, including abuse of prosecutorial discretion | 87 | 37.5% |
| Improper remarks to a grand jury, during trial, or in pleadings | 8 | 3.4% |
| Misrepresentation to the court and/or opposing counsel | 9 | 3.9% |
| Unauthorized disclosure of information, including grand jury information protected by Rule 6(e), Fed. R. Crim. P. | 29 | 12.5% |
| Failure to perform/dereliction of duty | 15 | 6.5% |
| Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery | 10 | 4.3% |
| Failure to comply with court orders or federal rules | 1 | 0.4% |
| Conflict of interest | 13 | 5.6% |
| Failure to comply with DOJ rules and regulations | 21 | 9.0% |
| Subornation of perjury/failure to correct false testimony | 13 | 5.6% |
| Interference with defendant's rights | 4 | 1.7% |
| Lateness (i.e., missed filing dates) | 5 | 2.2% |
| Lack of fitness to practice law | 7 | 3.0% |
| Improper contact with represented party | 2 | 0.9% |
| Failure to comply with congressional requests, including subpoenas | 0 | 0.0% |
| Unauthorized practice of law | 2 | 0.9% |
| Other ⁹ | 6 | 2.6% |
| Total | 232 | 100.0% |

⁹ These matters include allegations of retaliation, fraud, and theft.

The matters opened as “inquiries” during fiscal year 2005 were remarkably diverse. Many of those matters did not involve a complaint against a DOJ attorney. For example, some inquiries were opened based on allegations of whistleblower retaliation made by FBI employees, or on memoranda memorializing prosecutive advice given by OPR attorneys in connection with matters under investigation by FBI/OPR. Others involved requests for advice from DOJ officials regarding their obligations to report suspected unethical conduct by private attorneys. Thus, only limited comparisons may be made between these data and information regarding OPR investigations.

Inquiries Closed in Fiscal Year 2005: OPR closed a total of 212 inquiries in fiscal year 2005 involving allegations against DOJ attorneys, and an additional thirty-seven inquiries involving proposed bar referrals on private attorneys. Twenty-six of the 212 inquiries were converted to full investigations after evidence was developed that further investigation was required; 186 matters involving 276 separate allegations of professional misconduct were closed. The manner in which the 276 allegations were resolved as inquiries in fiscal year 2005 is set forth in Table 5.

TABLE 5

| Categories of Inquiry Allegations Resolved in Fiscal Year 2005 | | |
|---|------------------------------|----------------------------|
| Type of Resolution | Number of Occurrences | Percentage of Total |
| Referred. More appropriately handled by another component or agency. | 37 | 13.4% |
| Issues previously addressed. No further action required by OPR at this time. | 4 | 1.4% |
| No merit to allegation based on review of matter | 86 | 31.2% |
| Consolidated with already open miscellaneous matter, inquiry, or investigation. | 1 | 0.4% |
| Converted to an investigation. | 38 | 13.8% |
| FBI or DEA matter - resolved administratively. | 1 | 0.4% |
| Inquiry completed; further inquiry not likely to result in finding of misconduct. | 66 | 23.9% |
| Matter being monitored. | 10 | 3.6% |
| FBI Whistleblower Claim. | 5 | 1.8% |
| Other | 28 | 10.1% |
| Total | 276 | 100.0% |

Examples of Inquiries Closed in Fiscal Year 2005

1. *Abuse of Prosecutive Authority; Unauthorized Disclosure.* The Department of Justice OIG referred to OPR allegations that a DOJ attorney failed to present a case to a grand jury and improperly disclosed a letter that declined prosecution in that matter. OPR initiated an inquiry and reviewed a written response from the attorney accused of misconduct. OPR found that the DOJ attorney consulted and acted with the approval of her supervisor, and that the disclosure did not violate any statute, regulation, or Department policy. OPR concluded that the attorney properly exercised her discretion to decline prosecution, and documented the reasons underlying the decision. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

2. *Obstruction of Justice.* OPR received an allegation from a defendant that a DOJ attorney fabricated evidence in a criminal prosecution, and that he acted vindictively by filing a superseding indictment. OPR initiated an inquiry and reviewed a written response from the DOJ attorney. OPR found that the defense had raised the issues in a motion filed with the district court where the case was pending, and that the court had rejected the motion. OPR generally refrains from investigating issues or allegations that were addressed and rejected by a court. Because no court had made a misconduct finding or criticized a DOJ attorney, and no other extraordinary circumstances were present, OPR closed this matter without further investigation.

3. *Misuse of Official Position.* OPR received an allegation that a DOJ attorney improperly represented her brother in a civil matter in federal court in violation of applicable regulations. OPR initiated an inquiry and found that the DOJ attorney had sought and received authorization from the Department before undertaking the representation of her brother, and that her *de minimis* use of government resources was permitted by the Department's *pro bono* policies. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

4. *Selective Prosecution.* OPR received an allegation that a government investigation and prosecution were politically motivated, and that a DOJ attorney and agents were attempting to manufacture a criminal case against a defendant. OPR initiated an inquiry and found that there was no evidence that the DOJ attorney or agents had acted improperly with respect to the investigation or prosecution. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

5. *Disclosure of Tax Information.* OPR received an allegation from a litigant alleging that a DOJ attorney had violated 26 U.S.C. § 7213 by disclosing in litigation information from a federal tax return. OPR initiated an inquiry and found that the disclosure occurred during discovery in a civil matter regarding the title to a property on which there was a lien for nonpayment of taxes. As part of the routine discovery in the case, the DOJ attorney released the transcripts of the defendant's tax returns to the attorneys for the defendant and for the plaintiff.

Based on its inquiry, OPR found that the disclosure to the plaintiff's attorney was required by Federal Rule of Civil Procedure 26 as well as by the local court rules, and was authorized by 26 U.S.C. § 6103(h)(4)(A), because the defendant was a party to the litigation and the cross-claim to foreclose the tax liens was a collection of civil liability with respect to the income tax imposed. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

6. *Failure to Maintain Active Bar Membership.* OPR received an allegation that a Special Assistant United States Attorney (SAUSA) had been suspended from active membership in a state bar for several years because he failed to pay his bar dues. OPR initiated an inquiry. The SAUSA claimed that he did not know that federal government attorneys had to pay bar dues. OPR found that under the state's rules, inactive status cannot be made valid retroactively by subsequent payment of dues. OPR also found that another federal agency had removed the attorney from federal service for, among other things, failing to maintain an active bar membership. OPR also found that the Department had terminated the SAUSA's temporary appointment. Because the attorney was no longer employed by the Department, OPR closed its inquiry without further investigation and referred the matter to the appropriate state bar authorities.

7. *False Statements.* The OIG referred to OPR an allegation from an inmate that a DOJ attorney submitted false information to a parole commission. The allegedly false information related to the nature of the offense for which the inmate had been convicted. OPR initiated an inquiry and found that the information had been submitted more than thirty years earlier, and the records relating to the information were no longer available. Since no evidence supported the allegation that the information provided by the DOJ attorney was false, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Abuse of Prosecutive Authority.* OPR received an allegation that a private citizen had filed a civil suit in which he accused two DOJ attorneys of violating his constitutional rights. OPR generally refrains from investigating issues or allegations that are pending before a court, absent a judicial finding of misconduct by a DOJ attorney or other extraordinary circumstances. Because no court had made a misconduct finding or criticized a DOJ attorney, and no other extraordinary circumstances were present, OPR closed this matter without further investigation.

9. *Unauthorized Disclosure of Grand Jury Material.* OPR received an allegation from a litigating component that a DOJ attorney improperly disclosed to defense counsel the existence of an *ex parte* sealed filing in a grand jury matter. OPR initiated an inquiry and reviewed a written response from the DOJ attorney accused of misconduct, as well as other relevant documents. Based on the results of its inquiry, OPR determined that further investigation was warranted. Accordingly, OPR converted this inquiry into an investigation.

10. *Abuse of Authority.* OPR received an allegation from a defense attorney that a DOJ attorney interfered with his client's cooperation in a state court prosecution, and that a separate state court

prosecution of his client was based on fabricated testimony submitted by the Department. OPR initiated an inquiry and concluded that the allegation of interference was without merit. OPR found further that the claim of fabricated evidence was more appropriately addressed to the state court in which the prosecution was pending, because OPR generally refrains from investigating allegations that are pending before a court, absent extraordinary circumstances not present here. Accordingly, OPR closed this matter without further investigation.

11. *Failure to Pay Bar Dues.* An anonymous complainant alleged that immigration judges were improperly claiming an exemption from state bar dues. OPR initiated an inquiry and found that the immigration judges had requested judicial status, identified their positions, and were granted exemptions by the relevant state bar authorities. OPR found further that the immigration judges had received confirmation that the exemptions were proper from the bar's general counsel. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Abuse of Prosecutive Authority.* OPR received an allegation from a private attorney that a DOJ attorney accepted and retained computers belonging to the private attorney's law firm that were stolen by former disgruntled employees. OPR initiated an inquiry and found that the computers constituted evidence, and that there was no evidence that the DOJ attorney had acted improperly. Accordingly, OPR closed this matter.

13. *Improper Investigation.* OPR received an allegation from an attorney affiliated with a political party about statements made by an opposing political party relating to a request made to a state agency by two DOJ attorneys for public financial disclosure reports. The complainant alleged that the opposing party's statements showed that his party was the subject of a federal investigation. OPR initiated an inquiry and found that the DOJ attorneys had acted appropriately in requesting the information, and that the statements made by the opposing party characterizing the request were not attributable to the DOJ attorneys. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Conflict of Interest.* OPR received an allegation from a private attorney that a DOJ attorney should have disqualified himself from an investigation involving political figures because of the DOJ attorney's political affiliation. OPR initiated an inquiry but found no evidence of a political or personal relationship that would warrant disqualification in the matter. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

15. *Improper Litigation Tactics.* OPR received an allegation from a private attorney who complained that the DOJ attorney opposing him in litigation had deliberately delayed the case by seeking extensions of time to respond to discovery requests, and then failing to provide adequate responses to the requests. OPR initiated an inquiry and found no evidence to support the allegation

and no evidence that would warrant OPR becoming involved in the pending litigation. Accordingly, OPR closed this matter without further investigation.

16. *Abuse of Prosecutive or Investigative Authority.* OPR learned of judicial criticism of a litigating component for not prosecuting a private attorney who allegedly threatened to sue a bankruptcy trustee if the trustee did not dismiss claims against the attorney's client. OPR initiated an inquiry and found that the judicial criticism reflected a disagreement with the component's prosecutorial discretion. OPR noted that DOJ attorneys are vested with broad discretionary authority to determine whether and how to pursue criminal investigations and prosecutions, and that there was no evidence that the discretion was corruptly or inappropriately exercised. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Failure to Maintain Active Bar Membership.* OPR received information from a DOJ component that a DOJ attorney may have failed to maintain active membership in at least one state bar for a period of approximately five months. OPR initiated an inquiry and found that the DOJ attorney had remained an active member of a bar. According to the relevant state bar's procedures, late payment of dues affected a bar member's registration, but not her ability to continue to practice law. The DOJ attorney paid the bar dues before any suspension occurred, and was at all times a member in good standing of the bar. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Improper Contact with the Court.* OPR received an allegation that a DOJ attorney had acted improperly by transmitting a letter-brief to the court in a case where the United States was not a party, and had not sought leave to intervene or to appear as *amicus curiae*. OPR initiated an inquiry and found that the Department reasonably believed that the complaint in the case challenged the constitutionality of a federal statute, that the letter-brief had been approved by the head of the litigating component, and that the court had indicated that it would be receptive to receiving a letter-brief from the Department. OPR concluded that the Department has long maintained its authority to appear in cases by filing letter-briefs, and that the DOJ attorney had acted appropriately under the circumstances. Accordingly, OPR closed this matter.

19. *Subornation of Perjury.* OPR received an allegation from a criminal defendant that a DOJ attorney suborned perjury in connection with the prosecution that led to the inmate's conviction. OPR generally refrains from investigating allegations that could have been addressed to the court, or that were addressed to and rejected by the court. OPR initiated an inquiry and found that the inmate's complaint fit within that category. Accordingly, OPR closed this matter.

20. *Equal Employment Opportunity Complaint.* OPR received a complaint from a DOJ attorney alleging that management officials at his litigating component denied him a promotion and were interfering with the investigation into his EEO complaint. OPR initiated an inquiry and found that the proper forum for raising those allegations was in the context of the EEO proceedings. Accordingly, OPR advised the DOJ attorney that no action by OPR was warranted.

Conclusion

During fiscal year 2005, Department attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations or representatives of foreign countries to discuss issues of prosecutorial ethics. OPR's activities in fiscal year 2005 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department to meet the challenge of enforcing the law and defending the interests of the United States in an increasingly complex environment.