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**U. S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2006**

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U.S. Department of Justice  
Office of Professional Responsibility

Fiscal Year 2006 Annual Report

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## **Annual Report for Fiscal Year 2006**

### **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 thirty-first annual report to the Attorney General, and it covers fiscal year 2006 (October 1, 2005 - September 30, 2006).

### **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, 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. 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 notification policy includes findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a professional obligation or standard. OPR does not, however, make bar notifications 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 relevant state bar counsel should be notified of the conduct 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.

### **Significant Activities in Fiscal Year 2006**

During fiscal year 2006, 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 2006, OPR addressed the American Bar Association's National Conference on Professional Responsibility. OPR made presentations in media relations workshops given at the National Advocacy Center focusing on the policies and ethical issues concerning contacts with the media. OPR also addressed immigration judges at an Executive Office for Immigration Review conference and participated in a panel on ethics issues at a federal practice seminar. In addition, OPR addressed the National Conference of Criminal Chiefs and participated in the U.S. Attorney's Conference.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training program, OPR participated in a presentation to government officials from the Republic of Georgia regarding the operation and functioning of OPR within the Department. In addition, OPR addressed government officials from Israel and the People's Republic of China regarding OPR's role at the Department and 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 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 ethics issues and OPR's role at the Department. In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary

authorities of findings of professional misconduct against Department attorneys and responded to the bars' requests for additional information on those matters. OPR also advised other Department components regarding instances of possible professional misconduct by non-Department attorneys. In thirty-five such matters handled by OPR in fiscal year 2006, 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 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 2006, the Rapid Response Team continued to be instrumental in handling expeditiously matters of importance to the Department.

In addition, OPR continued to exercise jurisdiction over FBI 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 2006, OPR received 869 complaints and other letters and memoranda requesting assistance. OPR determined that 230 of the matters, or approximately 26%, warranted further review by OPR attorneys. OPR opened full investigations in eighty-four of those matters; the remaining 146, 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 639 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 2006**

*Characteristics of Investigations Opened in Fiscal Year 2006:* OPR investigations opened in fiscal year 2006 were based on complaints from a variety of sources, as reflected in Table 1.

**TABLE 1**

<b>Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2006</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Judicial opinions & referrals <sup>1</sup>	58	69.0%
Private attorneys	2	2.4%
Department components	21	25.0%
Private parties	0	0.0%
Other agencies	3	3.6%
<b>Total</b>	<b>84</b>	<b>100.0%</b>

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

OPR opened a total of eighty-four new investigations in fiscal year 2006. Four of these matters involved non-attorney subjects. None of those four matters also involved attorney subjects. The eighty-four investigations involved 152 separate allegations of misconduct. The subject matter of the 152 allegations is set out in Table 2.

**TABLE 2**

<b>Misconduct Allegations in Investigations Opened in Fiscal Year 2006, by Type of Allegation</b>		
<b>Type of Allegation</b>	<b>New Allegations Investigated in FY 2006</b>	<b>Percentage of All Allegations in Investigations</b>
Abuse of authority, including abuse of prosecutorial discretion	36	23.7%
Improper remarks to a grand jury, during trial, or in pleadings	13	8.6%
Misrepresentation to the court and/or opposing counsel	26	17.1%
Unauthorized disclosure of information, including grand jury information protected by Rule 6(e), Fed. R. Crim. P.	3	2.0%
Failure to competently and/or diligently represent the client's interests	14	9.2%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery	20	13.1%
Failure to comply with court orders or federal rules	3	2.0%
Conflict of interest	2	1.3%
Failure to comply with DOJ rules and regulations	12	7.9%
Subornation of perjury/failure to correct false testimony	0	0.0%
Interference with defendant's rights	10	6.6%
Lateness (i.e., missed filing dates)	4	2.6%
Lack of fitness to practice law	7	4.6%
Improper contact with represented party	2	1.3%
Failure to comply with congressional requests, including subpoenas	0	0.0%
Unauthorized practice of law	0	0.0%
<b>Total</b>	<b>152</b>	<b>100.0%</b>

*Investigations Closed in Fiscal Year 2006:* OPR closed a total of eighty-eight investigations in fiscal year 2006. Two of the investigations closed involved non-attorney subjects. Of the eighty-



eight investigations that were closed during the fiscal year, OPR found professional misconduct in eighteen, or approximately 20%, of the matters. Of the eighteen matters in fiscal year 2006 in which OPR found professional misconduct, six involved at least one finding of intentional professional misconduct by a Department attorney.<sup>2</sup> In fourteen of the eighteen 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 four cases in which OPR also found that the Department attorney engaged in intentional professional misconduct).<sup>3</sup> In the remaining two matters, OPR found that non-attorney Department employees engaged in intentional misconduct and/or reckless disregard of an applicable obligation or standard. The proportion of investigations resulting in findings of professional misconduct on the part of Department attorneys was lower than in fiscal year 2005, in which OPR found professional misconduct in 28% of the investigations it closed.

Disciplinary action was initiated against attorneys in fourteen of the sixteen matters in which OPR found professional misconduct by Department attorneys. In three matters, OPR's recommendation that disciplinary action be taken against the subject attorney remained pending at the close of fiscal year 2006 because the attorneys or their supervisors filed grievances. In three matters, the subject attorneys who were found to have engaged in professional misconduct resigned following OPR's recommendation of disciplinary action. In one matter, OPR's recommendation that discipline be imposed was not accepted by the Department. With respect to the remaining seven matters in which disciplinary proceedings were initiated, the subject attorneys in three of the matters were suspended for a period of time and the attorneys in four of the matters received reprimands.

OPR also closed thirteen investigations, or approximately 15% of the eighty-eight investigations, with at least one finding that an attorney exercised poor judgment.<sup>4</sup> Two of those

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<sup>2</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 that consequence is a result that the obligation or standard unambiguously prohibits.

<sup>3</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 the circumstances.

<sup>4</sup> 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

thirteen matters also involved findings of professional misconduct, and are included in the eighteen matters that contained findings of professional misconduct. Twenty-two matters, or approximately 25%, involved at least one finding that an attorney made a mistake.<sup>5</sup> Three of those twenty-two matters also included a finding of professional misconduct. Thus, of the eighty-eight matters closed, OPR found professional misconduct or poor judgment in twenty-nine matters, or approximately 33%, which is down from the 41% of matters in which OPR found professional misconduct or poor judgment in fiscal year 2005.

*Examples of Investigations Closed in Fiscal Year 2006<sup>6</sup>*

1. *Failure to Diligently Represent the Interests of the Client; Misrepresentation to the Court.* During the course of another investigation, OPR obtained evidence that a DOJ attorney may have engaged in professional misconduct by failing to correct a misleading affidavit that had been submitted to the court.

OPR conducted an investigation and found that the DOJ attorney had been informed that an affidavit by an agent submitted to a judge in support of an arrest warrant was false in that it purported to state facts within the personal knowledge of the agent when, in fact, the agent was reporting information learned from a local law enforcement officer. In order to correct the record, the DOJ attorney elicited testimony from the agent before the grand jury. The DOJ attorney did not, however, elicit testimony that the affidavit contained false representations or ask the agent to identify and correct all of the incorrect statements in the affidavit. The DOJ attorney also did not notify the judge about the false averments in the affidavit.

OPR concluded that the DOJ attorney engaged in a course of conduct that was in reckless disregard of her duty of competent representation by failing to advise the judge of the inaccuracies; failing to learn and relate relevant facts to her office's professional responsibility officer; failing to ascertain the nature and extent of the misstatements in the affidavit before presenting the agent's testimony to the grand jury; and failing to elicit clear testimony from the agent to correct the record.

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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.

<sup>5</sup> 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.

<sup>6</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.

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

2. *Improper Cross-Examination.* A court of appeals criticized a DOJ attorney for asking a defendant during cross-examination whether several government witnesses, including law enforcement agents, had lied in their testimony.

OPR conducted an investigation and found that the DOJ attorney did not engage in professional misconduct, but rather made an excusable mistake when he asked the defendant about the veracity of certain government witnesses. OPR found that the DOJ attorney had limited federal trial experience and had been unaware of a binding judicial decision deeming such questions to be improper. OPR concluded that the DOJ attorney's conduct was not objectively unreasonable under the circumstances.

3. *Lack of Diligence; Misrepresentation to the Court.* A litigating component reported to OPR that a DOJ attorney repeatedly failed to prepare cases for trial, resulting in numerous dismissals for lack of prosecution. The DOJ attorney also reportedly misrepresented to the court the status of the government's readiness for trial in one case.

OPR conducted an investigation and concluded that the DOJ attorney committed professional misconduct by acting in reckless disregard of her professional obligation to represent the interests of her client by failing to diligently and competently prepare for trials. OPR concluded further that the DOJ attorney engaged in intentional professional misconduct by knowingly misrepresenting to the court that the government was ready to proceed to trial when, in fact, it was not.

OPR recommended disciplinary action against the DOJ attorney, ranging from a thirty-day suspension to termination, but the attorney resigned from the Department before discipline could be imposed. OPR referred its professional misconduct findings to the appropriate state bar authorities.

4. *Ex Parte Communication with the Court.* A litigating component referred to OPR an allegation that a DOJ attorney provided information to a judge's law clerk about a defendant whose case was pending before the court, knowing that the law clerk would convey the information to the judge. The defendant's lawyer did not participate in and had not consented to the *ex parte* communication between the DOJ attorney and law clerk.

OPR conducted an investigation and found that the DOJ attorney committed professional misconduct by acting in reckless disregard of his obligation under applicable state bar rules to refrain from communicating with the court *ex parte* on a substantive matter unless authorized to do so by law or court order.

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

5. *Discovery Violation.* A court of appeals reversed a conviction, ruling that a DOJ attorney failed to disclose the victim's psychiatric records until the eve of trial in violation of *Brady*.

OPR conducted an investigation and concluded that the DOJ attorney did not violate the *Brady* doctrine because the records in question were disclosed before the commencement of trial and defense counsel was able to use the records effectively during trial. Nevertheless, OPR concluded that the prosecutor acted in reckless disregard of her duties of competence and diligence under the pertinent state bar rules by failing to personally review the records to determine if they contained exculpatory material.

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

6. *Failure to Comply with DOJ Rules and Regulations.* A litigating component referred to OPR a memorandum recommending the termination of a multi-million dollar fraud investigation. The recommendation was premised on the DOJ attorney's opinion that the critical evidence gathered against the target of the investigation would be suppressed at trial because the federal law enforcement agent in charge of the investigation had failed to exercise appropriate control of a confidential informant. According to the memorandum, the confidential informant impermissibly encouraged the target's employee to remove documents and things from his employer's home and private office.

OPR conducted an investigation and found that the agent committed professional misconduct by improperly handling physical evidence in his agency's custody, and by failing to properly document the actions of the confidential informant. OPR recommended that disciplinary action be taken against the law enforcement agent. OPR concluded that the DOJ attorney who supervised the investigation did not commit professional misconduct or exercise poor judgment in the matter because he did not know nor approve of the agent's conduct.

7. *Failure to Follow Supervisory Direction; Unauthorized Modification of a Plea Agreement.* A litigating component reported to OPR that a DOJ attorney made material, unauthorized changes to a plea agreement and that she violated office policy when she failed to object to the release of two defendants pending sentencing.

OPR conducted an investigation and concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment by making the modifications to the plea agreement without notifying her supervisors. OPR found that the office's policy was not clear and that the DOJ attorney had a reasonable and good faith belief that she could make minor

modifications to the agreement without supervisory approval. OPR also concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment in connection with the defendants' release pending sentencing. OPR found that the DOJ attorney was following office practice which allowed attorneys to determine on a case-by-case basis whether to oppose release pending sentencing.

8. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for stating in closing argument that defense counsel had fabricated a claim about a police officer at trial. The court found that the DOJ attorney's remarks were inappropriate and impugned defense counsel's reputation by misconstruing facts in the record.

OPR conducted an investigation and concluded that the DOJ attorney made an excusable mistake when he mistakenly attributed the statement to defense counsel. OPR credited the DOJ attorney's claim that he meant to say that the defendant, and not defense counsel, fabricated the story about the police officer. OPR also noted that the DOJ attorney's comments were made in rebuttal closing argument when he had little time to prepare for his remarks.

9. *Abuse of Prosecutive Authority; Communications with Defense Counsel.* A court of appeals criticized DOJ attorneys for failing to file a Federal Rule of Criminal Procedure Rule 35 motion for a reduction in sentence pursuant to a plea agreement reached between a defendant and the government. The court determined that the government's decision not to file a Rule 35 motion was made in bad faith and lacked a rational relationship to a legitimate governmental interest.

OPR conducted an investigation and found that the DOJ attorneys did not commit professional misconduct because neither attorney violated a clearly and unambiguously applicable rule. OPR further found that the DOJ attorneys did not exercise poor judgment because their decision was supported by a reasonable interpretation of the law. In the course of its investigation, OPR also discovered that one of the DOJ attorneys had written intemperate and inappropriate letters to defense counsel. OPR concluded that in doing so the DOJ attorney exercised poor judgment. OPR referred its finding of poor judgment to the DOJ attorney's employing component for consideration in a management context.

10. *Failure to Comply with Court Order.* A federal court found that a DOJ attorney violated a court order by failing to seal discovery materials and by failing to return discovery materials at the close of the legal proceedings. After initiating an investigation, OPR learned that the DOJ attorney had resigned from the Department.

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 purposes of imposing discipline on the DOJ attorney; and whether the Department's litigation position was affected by the attorney's conduct. In this case, OPR recommended to the Office of the Deputy Attorney General that the investigation be terminated. OPR closed its investigation after its recommendation was approved.

11. *Improper Opening Statement.* A court of appeals criticized a DOJ attorney for characterizing the defendant in opening statement as running a business selling narcotics when the defendant was only charged with one count of distribution of narcotics. The court of appeals found that the DOJ attorney mischaracterized the evidence, but that the error was harmless.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR noted, however, that the better practice would have been for the DOJ attorney to have tailored her language more narrowly to the charged conduct.

12. *Discovery Violations.* A district court granted a defendant's motion for a new trial based on a finding that the government's expert witness notice was deficient under Federal Rule of Criminal Procedure 16, resulting in the denial of the defendant's right to effective cross-examination. The court also found that the government's failure to promptly turn over reports by the expert in the possession of the FBI violated Rule 16, the Jencks Act, and possibly *Brady*.

OPR conducted an investigation and found that the expert witness notice was not deficient because the expert testified at trial within the scope of the notice. OPR further found that the late production of the expert's reports was due to circumstances beyond the DOJ attorney's control. Accordingly, OPR concluded that the DOJ attorney did not commit professional misconduct or exercise poor judgment.

13. *Failure to Comply with Court Order.* A district court criticized a DOJ attorney for filing documents in open court that previously had been filed under seal pursuant to a protective order, and for subpoenaing documents after the close of discovery by using a trial subpoena.

OPR conducted an investigation and found that the DOJ attorney committed intentional professional misconduct by repeatedly filing previously sealed documents in the public record. OPR also found that the DOJ attorney committed professional misconduct by issuing a subpoena for records after the close of discovery in reckless disregard of the court's scheduling order.

OPR recommended a range of discipline from a three-day to a seven-day suspension without pay. Disciplinary proceedings are pending.

14. *Unauthorized Disclosure to the Media.* OPR received an allegation that a DOJ attorney disclosed information to the media pertaining to a public official in violation of Department rules governing the release of information relating to criminal proceedings and uncharged third parties.

OPR conducted an investigation and found that the official had not been indicted and was not the subject of any ongoing criminal investigation. OPR found further that the DOJ attorney made generic references to the public official and did not unnecessarily identify uncharged third parties. As a result, OPR concluded that the comments made by the DOJ attorney did not violate the Department's rules governing the release of information relating to criminal proceedings or uncharged third parties, and thus the attorney did not commit professional misconduct.

15. *Misconduct by an Immigration Judge.* A private attorney alleged that an immigration judge had engaged in misconduct by conducting a substantive merits hearing concerning her client without her presence and without providing notice that the hearing's focus had changed from a status hearing to a hearing about the merits of the case.

OPR conducted an investigation and concluded that the attorney's claims were without merit. OPR found that the attorney had received multiple notices from the immigration judge that identified the substantive nature of the upcoming hearing. Additionally, OPR found that when the attorney did not appear for the hearing, the immigration judge gave the attorney's client the opportunity to reschedule the hearing. The attorney's client declined to do so. Consequently, OPR concluded that the immigration judge did not commit professional misconduct or exercise poor judgment by proceeding with the hearing without the attorney.

16. *Obstructive Conduct During Deposition.* A district court imposed sanctions on a DOJ attorney for obstructing the course of a deposition.

OPR conducted an investigation and concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment. OPR reviewed the videotape of the deposition and found that, while the deposition transcript implied that the DOJ attorney interrupted an ongoing exchange between the witness and opposing counsel, the videotape revealed that the DOJ attorney's statement came only after several minutes of silence during which opposing counsel appeared to be searching for documents. The videotape showed that some of the silences were so long that the witness closed his eyes and appeared to be asleep. OPR also found that the DOJ attorney did not make any obstructive comments during the deposition in an attempt to change the witness' testimony.

17. *Improper Closing Argument.* A court of appeals criticized a DOJ attorney for using pejorative terms when referring to the defendant in closing argument. The court also stated that the

DOJ attorney may have improperly vouched by bringing her personal knowledge to bear on the case during closing argument.

OPR conducted an investigation and found that the DOJ attorney did not engage in professional misconduct or exercise poor judgment, but rather made an excusable mistake when she used pejorative terms to refer to the defendant. OPR concluded that the DOJ attorney reasonably believed that facts in evidence supported the use of such terms. OPR further concluded that the DOJ attorney did not violate the rule against vouching because she did not offer her personal opinion on the defendant's credibility, but rather suggested to the jury that common sense undermined the defendant's testimony. As such, OPR found that the DOJ attorney was arguing a reasonable inference based on evidence in the record.

18. *Improper Witness Examination; Improper Closing Argument.* A court of appeals reversed a conviction in part because a DOJ attorney improperly cross-examined the defendant by asking him if the case agent had lied on the stand, and vouched for the agent's credibility in closing and rebuttal arguments.

OPR conducted an investigation and found that the prohibition against asking a witness to comment on the veracity of another witness constituted a change in existing practice and the DOJ attorney had not been aware of the new rule established by the court of appeals. OPR concluded that the DOJ attorney did not engage in professional misconduct or exercise poor judgment, but rather made a mistake when he asked a witness to comment on the veracity of another witness and vouched for the credibility of the case agent.

19. *Improper Contact with Opposing Counsel.* A litigating component reported to OPR that after a court declared a mistrial in a criminal case as a result of a deadlocked jury, defense counsel telephoned a DOJ attorney and left a message asking her to call him back immediately. The DOJ attorney listened to the message and returned the call. At the beginning of the conversation, the DOJ attorney began recording the conversation without advising defense counsel and obtaining his permission. The defense attorney told the DOJ attorney that based on his conversations with several of the jurors in the criminal case, he believed that the judge or the court clerk, or both, had acted improperly in declaring a mistrial. When the DOJ attorney reported the conversation to a supervisor, the DOJ attorney mentioned that she had recorded the conversation. The supervisor told her that she should not have recorded the call without defense counsel's permission.

OPR conducted an investigation and concluded that the DOJ attorney exercised poor judgment by immediately returning the telephone call without taking the time to consult with her supervisor or colleagues about the propriety of recording a conversation without defense counsel's permission.



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

20. *Misleading the Court.* A litigating component notified OPR of a magistrate judge's report and recommendation that criticized the government for filing a memorandum containing intentionally misleading statements. The district court adopted the magistrate judge's recommendation, but did not impose the sanctions sought by opposing counsel.

OPR conducted an investigation and found that the subject at issue before the court was technical in nature. As such, the DOJ attorneys had to rely on the government's experts for advice about what to say in the memorandum. OPR concluded that because the DOJ attorneys had reasonably relied on their experts and the DOJ attorneys showed the memorandum to their supervisors prior to filing it with the court, the DOJ attorneys did not engage in professional misconduct or exercise poor judgment.

### **OPR Inquiries in Fiscal Year 2006**

*Characteristics of Inquiries Opened in Fiscal Year 2006:* The sources of the 146 matters designated as inquiries are set forth in Table 3. Eighteen of these matters were later converted to full investigations. The 146 matters do not include an additional thirty-five matters involving proposed bar referrals of non-Department attorneys. The nature of the 225 allegations against Department attorneys contained in the 146 inquiries is set forth in Table 4.

**TABLE 3**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2006</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions & referrals <sup>7</sup>	25	17.1%
Private attorneys	27	18.5%
Department components	53	36.3%
Private parties	30	20.5%
Other agencies	8	5.5%
Other sources	3	2.1%
<b>Total</b>	<b>146</b>	<b>100.0%</b>

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

**TABLE 4**

<b>Misconduct Allegations in Inquiries Opened in Fiscal Year 2006, by Type of Allegation</b>		
<b>Type of Allegation</b>	<b>Allegations in Inquiries</b>	<b>Percentage of All Allegations in Inquiries</b>
Abuse of authority, including abuse of prosecutorial discretion	76	33.8%
Improper remarks to a grand jury, during trial, or in pleadings	6	2.7%
Misrepresentation to the court and/or opposing counsel	26	11.6%
Unauthorized disclosure of information, including grand jury information protected by Rule 6(e), Fed. R. Crim. P.	26	11.6%
Failure to competently and/or diligently represent the client's interests	12	5.3%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Rule 16 discovery	10	4.4%
Failure to comply with court orders or federal rules	3	1.3%
Conflict of interest	12	5.3%
Failure to comply with DOJ rules and regulations	11	4.9%
Subornation of perjury/failure to correct false testimony	4	1.8%
Interference with defendant's rights	4	1.8%
Lateness (i.e., missed filing dates)	1	0.4%
Lack of fitness to practice law	7	3.1%
Improper contact with represented party	3	1.3%
Failure to comply with congressional requests, including subpoenas	0	0.0%
Unauthorized practice of law	13	5.8%
Other <sup>8</sup>	11	4.9%
<b>Total</b>	<b>225</b>	<b>100.0%</b>

The matters opened as inquiries during fiscal year 2006 were remarkably diverse. Many of those matters did not involve a complaint against a Department attorney. For example, some

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<sup>8</sup> These matters include allegations of retaliation, bias, and an inquiry into one of OPR's decisions.

inquiries were based on allegations of whistleblower retaliation made by FBI employees or those acting on behalf of FBI employees. Others involved abuse of prosecutive authority by agents. Thus, only limited comparisons may be made between this data and information regarding OPR investigations.

*Inquiries Closed in Fiscal Year 2006:* OPR closed a total of 150 inquiries in fiscal year 2006 involving allegations against Department attorneys, and an additional thirty-three inquiries involving proposed bar referrals on private attorneys. Eighteen of the 150 inquiries were converted to full investigations after evidence was developed that further investigation was required; 132 matters involving 188 separate allegations of professional misconduct were closed. The manner in which the 188 allegations were resolved as inquiries in fiscal year 2006 is set forth in Table 5.

**TABLE 5**

<b>Categories of Inquiry Allegations Resolved in Fiscal Year 2006</b>		
<b>Type of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Total</b>
Referred. More appropriately handled by another component or agency.	13	6.9%
Issues previously addressed. No further action required by OPR at this time.	1	0.5%
No merit to allegation based on review of matter.	60	31.9%
Consolidated with already open miscellaneous matter, inquiry, or investigation.	0	0.0%
Converted to an investigation.	25	13.3%
FBI or DEA matter - resolved administratively.	0	0.0%
Inquiry completed; further inquiry not likely to result in finding of misconduct.	50	26.6%
Matter being monitored.	21	11.2%
FBI Whistleblower Claim.	6	3.2%
Other	12	6.4%
<b>Total</b>	<b>188</b>	<b>100.0%</b>

*Examples of Inquiries Closed in Fiscal Year 2006*

1. *Unauthorized Disclosure of Information.* OPR received an allegation from a cooperating witness that she had been identified by name during a press conference and in extradition papers after having received assurances of confidentiality from DOJ attorneys. OPR initiated an inquiry and found that there was no evidence that DOJ attorneys were responsible for the witness' name being mentioned in the press conference. OPR found further that the witness had not been promised confidentiality in regard to the extradition papers. Accordingly, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.
2. *Abuse of Prosecutive Authority.* A litigating component reported to OPR that a defendant filed lawsuits against two DOJ attorneys alleging misconduct. The defendant, a tax protester, alleged that the indictment against him was obtained by fraud and in violation of his constitutional rights. He also claimed that he was being discriminated against based on his ethnicity. OPR initiated an inquiry and reviewed the allegations from the defendant. OPR found no evidence that the court overseeing the government's case against the tax protester found misconduct by the DOJ attorneys. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding. However, OPR requested that the litigating component advise OPR if the defendant's lawsuits were found to be meritorious.
3. *Unauthorized Practice of Law.* OPR received information from a DOJ component that a relator in a *qui tam* case filed a complaint with a state bar against a DOJ attorney, alleging that the DOJ attorney had engaged in the unauthorized practice of law by defending the *qui tam* action while employed with the Department. OPR initiated an inquiry and found that the DOJ attorney had defended the *qui tam* while in private practice; not while employed by the Department. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding. However, OPR asked the DOJ component to advise it if the state bar made any adverse findings against the DOJ attorney.
4. *Unauthorized Disclosure to the Media.* The Department of Justice OIG referred to OPR allegations that a DOJ attorney disclosed Federal Rule of Criminal Procedure 6(e) material and other sensitive and confidential information to the media. OPR initiated an inquiry and reviewed a written response from the attorney accused of making the unauthorized disclosures. OPR found that no improper disclosures had been made to the media. Accordingly, OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.
5. *Misrepresentation to the Court.* A district court criticized DOJ attorneys for filing motions containing incomplete, misleading, or false information. OPR initiated an inquiry and reviewed written responses from the DOJ attorneys who filed the motions. OPR found that no misrepresentations had been made to the court. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

6. *Abuse of the Grand Jury Process.* A district court criticized a litigating component for using grand jury subpoenas to compel witnesses to appear at the litigating component's office for interviews. OPR initiated an inquiry and found that the DOJ attorneys were following a long-established office policy. OPR found further that as a result of the court's ruling, that policy had been changed. Grand jury subpoenas now direct witnesses to report to the U.S. Courthouse where the grand jury sits, and not the litigating component's office. If a DOJ attorney wants to meet with a witness prior to his or her grand jury appearance, the DOJ attorney must send a letter inviting the witness to come to an interview, specifying that the interview is voluntary. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

7. *Misuse of Official Position.* OPR received an allegation from defense counsel that a DOJ attorney improperly reviewed the defense counsel's file and communicated with the defendant and his girlfriend about the file matter. OPR initiated an inquiry, reviewed pertinent pleadings, and reviewed a written response from the DOJ attorney. The written response and pleadings revealed that the DOJ attorney, who had not been the prosecutor on the case, was married to a defense attorney who had represented the defendant. Prior to trial, that defense attorney was hospitalized and was no longer capable of representing the defendant. As a result, the DOJ attorney, acting as the wife of the defense attorney and not as a DOJ attorney, called the defendant's girlfriend and told her that her husband could no longer represent the defendant and that the defendant needed to retain a new attorney. After hiring a new attorney, defense counsel filed a motion alleging misconduct by the DOJ attorney because she allegedly examined her husband's file containing attorney-client information and told the defendant's girlfriend that the defendant should plead guilty to the charges. The government opposed the motion. After conducting an evidentiary hearing in the matter, the court denied the motion to dismiss and made no finding of misconduct against the DOJ attorney.

Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

8. *Failure to Disclose Exculpatory Material.* A DOJ attorney self-reported to OPR that a defense attorney alleged that the DOJ attorney engaged in prosecutorial misconduct by failing to disclose exculpatory evidence in violation of *Brady*. OPR initiated an inquiry and reviewed the transcript. OPR concluded that the professional misconduct allegations were unfounded because there was neither a judicial finding of misconduct nor serious judicial criticism on which to premise an investigation. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

9. *Violation of Speedy Trial Act.* A district court found that the government violated a defendant's Sixth Amendment right to a speedy trial because of a six-year delay between indictment and the defendant's arrest. OPR initiated an inquiry and found that the reason for the six-year delay was that the defendant had fled the country and remained abroad for six years. OPR found that the

FBI made reasonable efforts to locate the defendant during the six-year time period, eventually arresting her when her international flight made a refueling stop in the United States. OPR also concluded that the court's decision conflicted with circuit precedent holding that the Speedy Trial Act does not attach while the indictment remains sealed, which had been the case. Accordingly, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

10. *Contact With a Represented Party.* OPR received an allegation from a prisoner that a DOJ attorney met with him prior to trial without the knowledge or consent of his defense counsel. OPR initiated an inquiry and found that prior to trial, the then-defendant agreed to cooperate with the government and such cooperation necessitated meeting with the DOJ attorney and government agents without the presence of his attorney. OPR further learned that the then-defendant's attorney understood, approved, and authorized such meetings. Since no evidence supported the allegation of unauthorized contact, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

11. *Unauthorized Disclosure to the Media.* OPR received an allegation from a defense attorney who represented a target of a federal grand jury investigation that DOJ attorneys had leaked matters occurring before the grand jury to the media. OPR initiated an inquiry. All of the DOJ attorneys denied having leaked information to the media. Since the universe of non-DOJ individuals potentially responsible for the alleged disclosure was very large and the defense attorney had no evidence to support the allegation that DOJ attorneys were responsible for the leak, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

12. *Failure to Comply with Scheduling Deadlines.* OPR received information from a DOJ component that a district court imposed a monetary sanction upon a DOJ attorney and opposing counsel for failing to meet and consult, as required by the Federal Rules of Civil Procedure, prior to the initial scheduling conference. Although the court subsequently withdrew its sanction, OPR initiated an inquiry and found that it was standard practice in that district for plaintiff's counsel, which in this case was opposing counsel, to arrange the pre-scheduling conference meeting. OPR further found that the DOJ attorney had acted timely and appropriately in all other aspects of the case. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

13. *Conflict of Interest.* OPR received an allegation from a litigant that a DOJ attorney, whose family member had a personal relationship with the litigant, had improperly influenced the government's actions in the litigant's case. OPR initiated an inquiry and found that the DOJ attorney had properly advised her supervisor about the potential conflict arising from the family connection and that the supervisor had directed the DOJ attorney not to participate in the case. OPR

found that the DOJ attorney followed her supervisor's guidance. OPR also concluded that the government's litigating position was in line with the position the government had taken in similar cases. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

14. *Failure to Maintain Active Bar Membership.* A DOJ attorney reported to OPR that he failed to maintain an active bar membership in at least one state because he did not pay his annual bar dues. OPR initiated an inquiry and found that the DOJ attorney had in fact remained an active member of a bar. According to the pertinent state bar rules, the DOJ attorney had not lost his active bar status because the state had not, as required under its rules, initiated a proceeding to remove him from active bar status. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

15. *Lack of Candor to the Court.* OPR received an allegation from a private citizen that a DOJ attorney misled the court by sponsoring false and misleading expert testimony. OPR initiated an inquiry and found that the expert testimony concerned scientific evidence that neither the court nor other witnesses had deemed to be false or misleading. OPR concluded that the allegation of misconduct was based on the complainant's personal view of the validity of the scientific evidence. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

16. *Abuse of Authority; Misuse of Official Position.* The Executive Office for Immigration Review referred to OPR an allegation from a private attorney that an immigration judge improperly acted as a prosecutor rather than a neutral adjudicator. The attorney also alleged that the immigration judge failed to recuse himself from the case, failed to provide the attorney's client with an interpreter, and used official Department letterhead to communicate his dislike of the attorney to a local judge. Although the attorney subsequently withdrew his complaint, OPR initiated an inquiry and found that the immigration judge had acted appropriately as a neutral adjudicator. OPR further found that the judge did recuse himself from the case and that the attorney never asked the judge to provide his client with an interpreter. OPR concluded that the immigration judge's use of Department letterhead was a management matter and referred it to the Executive Office for Immigration Review for further action. OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

17. *Use of Inadmissible Evidence; Improper Filing with the Court.* A DOJ attorney reported to OPR that defense counsel filed a motion to sanction her for allegedly referencing inadmissible evidence and filing an unauthorized supplemental brief with the court. The court eventually denied defense counsel's motion for sanctions. OPR initiated an inquiry and found that the allegedly inadmissible evidence had been adopted by the defendant and, as a result, the DOJ attorney did not err when she referenced the evidence for impeachment purposes. Although OPR concluded that the



DOJ attorney made a mistake when she filed a supplemental brief that went beyond the guidelines established by the court, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

18. *Misuse of Official Position.* OPR received an anonymous letter alleging that a DOJ attorney improperly volunteered to contact a city on behalf of his cooperative building to determine who had been filing complaints against the cooperative building. The letter alleged that the purpose of the DOJ attorney's contact with the city was to identify the person or persons who had complained to the city and the anonymous complainant did not want that to occur. OPR initiated an inquiry and reviewed a written response from the DOJ attorney. OPR found that the allegation was without merit because the DOJ attorney volunteered in his personal capacity, not as a federal prosecutor, and he did not improperly engage in outside employment. OPR closed the matter because further investigation was not likely to result in a professional misconduct finding.

19. *Improper Assistance from a Non-DOJ Attorney.* OPR received information from a DOJ component that a DOJ attorney allowed a non-DOJ attorney to review confidential investigative documents and otherwise assist the DOJ attorney with her work. 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 to an investigation.

20. *Violation of the Speedy Trial Act.* A DOJ attorney self-reported to OPR that he violated the Speedy Trial Act by failing to file an information or indict a defendant within thirty days of arrest as required by 18 U.S.C. Section 3161(b). OPR initiated an inquiry and found that the DOJ attorney had been filing joint ninety-day speedy trial waivers with the court, but forgot to do so after he became involved in a quickly moving multi-defendant case. OPR found further that upon learning of the lapse in waiver, the DOJ attorney filed an information. The defendant subsequently agreed to plead to a count unaffected by the speedy trial lapse and the court did not criticize the DOJ attorney. Under these circumstances, OPR concluded that the DOJ attorney's conduct amounted to a mistake and OPR closed this matter because further investigation was not likely to result in a professional misconduct finding.

## **Conclusion**

During fiscal year 2006, 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 2006 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.