



December 2014

PROFESSIONAL MISCONDUCT

DOJ Could Strengthen Procedures For Disciplining Its Attorneys

Why GAO Did This Study

Instances of professional misconduct—such as a violation of an attorney’s responsibilities to be honest—among DOJ attorneys have called into question DOJ’s efforts to oversee attorney behavior, including its processes for investigating and disciplining misconduct complaints.

Congress mandated GAO to review DOJ’s performance in disciplining attorneys. This report addresses (1) DOJ’s processes to manage misconduct complaints; (2) how supervisors determine work responsibilities for attorneys accused of, or found to have engaged in, misconduct; and (3) DOJ’s policies for paying for representation for attorneys investigated for misconduct. GAO reviewed DOJ regulatory obligations and policies, and legal representation costs from fiscal years 2008 through 2013. GAO also analyzed survey responses on assigning work responsibilities from 48 selected litigating sections. Responses are not generalizable, but provided helpful insights. GAO also interviewed DOJ officials who manage misconduct complaints.

What GAO Recommends

GAO recommends that DOJ (1) require components to demonstrate that they have implemented discipline for misconduct and (2) establish near-term milestones for expanding PMRU’s jurisdiction to decide discipline for all attorneys with findings of misconduct. DOJ agreed with GAO’s recommendations.

View [GAO-15-156](#). For more information, contact Eileen Larence at (202) 512-8777 or <mailto:larencee@gao.gov>.

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DOJ Could Strengthen Procedures for Disciplining Its Attorneys

What GAO Found

The Department of Justice (DOJ) has made changes to improve its processes for managing complaints of attorney professional misconduct since 2011 but has not implemented plans to improve processes for demonstrating that discipline is implemented, or achieving timely and consistent discipline decisions. For example, GAO found that changes to the Office of Professional Responsibility’s (OPR) processes for assessing the merits of misconduct complaints reduced assessment time that took up to 90 days in 2008 to about 7 days in 2014. However, GAO found that DOJ does not require its components to demonstrate that attorneys have served the discipline imposed on them for misconduct. Ensuring that discipline is implemented helps hold attorneys accountable for violating professional standards and provides the public reasonable assurance that misconduct is being addressed. DOJ also has not implemented a change called for in a January 2011 memorandum from the Attorney General that would expand the purview of the Professional Misconduct Review Unit (PMRU)—the unit that proposes and decides discipline for attorneys with findings of misconduct by OPR. With this change, PMRU would go from deciding discipline for attorneys with professional misconduct findings in U.S. Attorneys’ Offices (USAO) and the Criminal Division to all components. According to the Attorney General, this change could help reduce delays in implementing discipline and ensure consistent decisions about discipline. DOJ did not provide GAO with reasons for not making this change.

DOJ policy provides that supervisors of attorneys accused of, or found to have engaged in, professional misconduct can use discretion to determine what work to assign to these attorneys. DOJ also provides agency-wide guidance to supervisors, such as administrative directives and the *U.S. Attorneys’ Manual*, that identify steps supervisors may take when dealing with attorneys accused of misconduct. Representatives for 12 of the 20 USAOs and 20 of the 28 litigating sections we surveyed reported that supervisors assign work on a case-by-case basis but consider factors, such as the nature of the alleged misconduct, in doing so. A smaller number of respondents reported that supervisors may assign work to such attorneys no differently than to other attorneys until the supervisors determine allegations have merit or professional misconduct is confirmed.

Under departmental policy, DOJ is not to authorize legal representation for attorneys in OPR proceedings, including representation to assist such attorneys in preparing submissions to support their defense. However, DOJ attorneys, like all federal employees, may be provided legal representation by DOJ for carrying out their duties, under certain circumstances. For example, DOJ may provide representation for an attorney whose conduct is the subject of a state bar proceeding while the attorney is also the subject of an OPR investigation related to the same conduct. The representation would cover defense for the state bar but not the OPR proceeding. As a result, from fiscal years 2008 through 2013, DOJ expended \$3.66 million for private counsel representation for 38 DOJ attorneys involved in 18 legal proceedings where there were also related OPR investigations. DOJ found 12 attorneys within these investigations to have engaged in professional misconduct.

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Abbreviations

CSTL	Constitutional and Specialized Torts Litigation Section
DOJ	Department of Justice
EOUSA	Executive Office for United States Attorneys
MSPB	Merit Systems Protection Board
NDC	National Discovery Coordinator
OARM	Office of Attorney Recruitment and Management
OIG	Office of the Inspector General
OPM	Office of Personnel Management
OPR	Office of Professional Responsibility
PMRU	Professional Misconduct Review Unit
USAM	United States Attorneys' Manual
USAO	United States Attorneys' Offices

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December 11, 2014

The Honorable Barbara A. Mikulski
Chairwoman
The Honorable Richard C. Shelby
Ranking Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Frank Wolf
Chairman
The Honorable Chaka Fattah
Ranking Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
House of Representatives

In 2009, the Attorney General moved to overturn the conviction of former senator Ted Stevens, who had been found guilty of seven felony counts of lying on Senate financial disclosure forms, upon finding that federal prosecutors had failed to disclose evidence that would have helped Senator Stevens to defend himself against false statement charges.¹ And in September 2013, a Louisiana federal judge overturned the convictions and ordered a new trial for five New Orleans police officers alleged to have shot unarmed civilians during the aftermath of Hurricane Katrina, finding that federal prosecutors violated Department of Justice (DOJ) regulations and various Rules of Professional Responsibility.² These and other high-profile instances of DOJ attorney professional misconduct raise questions about the behavior of attorneys within DOJ. Professional misconduct is a violation of an attorney's responsibilities to maintain honesty, trustworthiness, and fitness as a lawyer, and consists of actions

¹*United States v. Stevens*, No. 08-0321, (D.D.C. Apr. 1, 2009), ECF No. 324.

²*United States v. Bowen*, 969 F. Supp. 2d. 546, 549-50, 624-25 (E.D. La. 2013) (finding that prosecutors acting with anonymity used social media to circumvent ethical obligations and professional responsibility, and even to commit violations of the Code of Federal Regulations).

that involve dishonesty, fraud, deceit, or misrepresentation resulting in the obstruction of the administration of justice.³

The manner in which DOJ attorneys exercise their responsibilities has far-reaching implications, in terms of the consequences for individual citizens and government law enforcement efforts. According to the U.S. Attorneys' Manual (USAM), the success of the federal prosecutorial system ultimately relies on the character, integrity, and competence of those attorneys who are selected to represent the public interest in the federal criminal justice process.⁴ DOJ attorneys are guided by a general statement of principles, outlined in the USAM, which summarizes appropriate considerations attorneys are to weigh and desirable practices they are to follow, in discharging their responsibilities. DOJ attorneys are also subject to rules of professional conduct in the states where the attorney practices and where the attorney is licensed to practice. When attorneys are suspected of violating these rules of professional conduct, or other professional obligations, the Office of Professional Responsibility (OPR) within DOJ is in charge of receiving, reviewing, and investigating complaints of attorney misconduct. The Professional Misconduct Review Unit (PMRU), which DOJ established in 2011, is responsible for proposing and deciding discipline for attorneys in U.S. Attorneys' Offices (USAO) and DOJ's Criminal Division found to have engaged in professional misconduct, in accordance with federal disciplinary regulations.

In recent years, Members of Congress have raised questions about the independence and transparency of DOJ's process for investigating and

³According to DOJ officials, DOJ attorneys engage in professional misconduct when they intentionally violate or act in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or department regulation or policy in the exercise of their authority to investigate, litigate, or provide legal advice. According to DOJ officials, prosecutors are more likely to face allegations of professional misconduct than other types of attorneys because prosecutors compose a large percentage of DOJ attorneys and they handle a large volume of cases and allegations of professional misconduct are more likely to arise in the context of federal criminal prosecutions than in other matters DOJ handles.

⁴The United States Attorneys' Manual is designed as a reference for United States Attorneys, Assistant United States Attorneys, and department attorneys responsible for the prosecution of violations of federal law. The manual contains general policies and some procedures relevant to the work of the United States Attorneys' Offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice.

disciplining professional misconduct of its attorneys. The explanatory statement accompanying DOJ's fiscal year 2013 appropriations act, which was passed into law in March 2013, mandated GAO to review the department's performance in disciplining prosecutors.⁵ This report addresses the following questions:

1. To what extent does DOJ have processes to manage complaints of professional misconduct to discipline attorneys for findings of misconduct, and that advise on performance awards for these attorneys?
2. How do supervisors determine work responsibilities for attorneys accused of, or who have been found to have engaged in, professional misconduct?
3. What are DOJ's policies for paying or reimbursing the attorneys fees and costs of departmental employees in actions relating to allegations of contempt of court or prosecutorial misconduct, and what is the extent to which DOJ is paying for such costs?

To address our first objective, we reviewed DOJ guidance related to establishing and overseeing attorney standards of conduct, including ethical conduct, such as outlined in the USAM and published regulations.⁶ We assessed agency-wide policies establishing DOJ's processes for identifying, investigating, and disciplining professional misconduct, including OPR's Analytical Framework—which provides guidance on the types of behavior identified as professional misconduct—and how OPR conducts investigations into misconduct. We compared OPR's process for supervisory review of professional misconduct complaints with internal control standards to ensure that OPR management provided oversight of the receipt, review, and investigation of misconduct complaints.⁷ We reviewed OPR complaint data from fiscal years 2008 through 2013 in order to describe what, if any, changes occurred in the number of complaints and the length of time to complete inquiries and investigations

⁵The explanatory statement, which accompanied the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, incorporated by reference S. Rep. No. 112-158 (2012).

⁶See 28 C.F.R. pts. 45, 77. Also see *U.S. Attorneys' Manual, Standards of Conduct*, 1-4.000, *Personnel Management*, 3-4.000, *Principles of Federal Prosecution*, 9-27.000.

⁷GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

since DOJ's process for managing complaints of professional misconduct changed in 2011. We reviewed internal DOJ personnel and disciplinary documentation for all 40 cases for which OPR investigated attorneys for professional misconduct and for which PMRU was responsible for considering discipline from fiscal years 2011 through 2013, and compared DOJ's practices for documenting disciplinary actions with internal controls.⁸ We interviewed knowledgeable officials in OPR and PMRU, and selected DOJ components, such as the Criminal Division and the Executive Office for U.S. Attorneys (EOUSA), to obtain their views on how DOJ manages professional misconduct.⁹ We also interviewed and reviewed the literature produced by a variety of third-party stakeholders, such as advocacy groups and academics, to obtain information on their perspectives on DOJ's efforts to address professional misconduct. Interviews with these stakeholders cannot be generalized. However, they provide valuable insights about DOJ's abilities to effectively identify and address professional misconduct.

To address our second objective, we sent a questionnaire to 20 USAOs and 28 litigating sections within selected DOJ components to collect information on the various types of policies and procedures put in place to manage the work activities of attorneys accused of, or found to have engaged in, professional misconduct. We selected USAOs because EOUSA's General Counsel's Office stated that attorneys within these offices would be in the best position to discuss management of the work activities of attorneys alleged or found to have committed professional misconduct. We selected litigating sections to provide additional examples of how the department manages the work activities of attorneys alleged or found to have committed professional misconduct. To ensure that we obtained information across USAOs with varying workloads, we randomly selected 20 USAOs across all sizes using office case workload hours provided in the *U.S. Attorneys' 2012 Statistical Report*.¹⁰ We

⁸PMRU decided and imposed discipline for 22 of the attorneys that OPR investigated for professional misconduct. The remaining 16 attorneys resigned or retired either before PMRU reviewed their case or made a disciplinary determination.

⁹The Criminal Division develops, enforces, and supervises the application of all federal criminal laws except those specifically assigned to other divisions. The Executive Office for U.S. Attorneys provides administrative support for the 93 United States Attorneys. PMRU proposes and decides discipline only for attorneys within these components.

¹⁰We used the 2012 report because it contained the most recent data available at the time of our sample selection.

selected litigating sections within DOJ components that have experience managing attorneys subject to a complaint of professional misconduct from fiscal years 2008 through 2013.¹¹ Using these criteria, we sent questionnaires to DOJ's Criminal Division, Civil Rights Division, Tax Division, Environment and Natural Resources Division, Antitrust Division, and Civil Division. Because we used a nongeneralizable sample, our findings cannot be used to make inferences about other USAOs or DOJ components. We received responses from all 20 USAOs and 28 litigating sections.

To address our final objective, we analyzed DOJ's policies for providing legal representation to federal employees.¹² We assessed agency-wide policy guidelines, identifying the circumstances under which federal employees are eligible to receive representation by private counsel at DOJ's expense. We collected DOJ data from fiscal years 2008 through 2013 on (1) the number of cases in which DOJ approved legal representation for federal employees, and (2) the total amount DOJ expended for private counsel representation for federal employees. We assessed the reliability of both sets of these data by interviewing knowledgeable agency officials. We concluded that these data were sufficiently reliable for the purposes of this report.

We conducted this performance audit from September 2013 to December 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Attorney General established OPR in December 1975 as a response to the ethical abuses and misconduct that DOJ officials committed during

¹¹We selected only those divisions within DOJ that had an attorney who was charged with the intentional or reckless violation of a clear and unambiguous standard of conduct, rule, statute, or law from fiscal years 2008 through 2013. Even though OPR can investigate law enforcement officials for their role in assisting attorneys with investigating, we did not include DOJ's law enforcement divisions within our sample.

¹²DOJ's published statement of policy for individual capacity representation is found at 28.C.F.R. §§ 50.15-16.

the Watergate scandal to ensure that department employees perform their duties in accordance with professional standards. OPR's mission is to hold accountable department attorneys, and law enforcement agents who work with those attorneys, who abuse their power or otherwise violate the ethical standards required of them by law. OPR has jurisdiction to investigate allegations of professional misconduct when the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice.¹³ OPR is headed by a Counsel who is a career Senior Executive Service member who reports to the Attorney General and the Deputy Attorney General.¹⁴

OPR receives and investigates complaints of professional misconduct for all department attorneys, including complaints that relate to attorneys' discovery obligations—their obligations to share information about witnesses and evidence relevant to the lawsuit. Discovery is a process that enables prosecutors and defense attorneys to know before the trial begins what evidence may be presented, and is designed to allow all parties to have the necessary information needed to effectively litigate a case.¹⁵ In addition to their discovery obligations, attorneys are subject to standards, rules, and obligations relating to their professional conduct from multiple authorities. Specifically, department attorneys are subject to obligations imposed by the U.S. Constitution and case law, federal laws, state bar and court rules of professional conduct, standards of conduct established by the USAM, and department regulations, policies, and procedures. Section 1-4.100 of the USAM requires DOJ attorneys to report to their supervisors any evidence or nonfrivolous allegation of misconduct that may be in violation of any law, rule, regulation, order, or applicable professional standard. The manual requires supervisors to

¹³This includes allegations relating to the actions of the department's immigration judges and Board of Immigration Appeals members. OPR also has jurisdiction to investigate allegations of misconduct against DOJ law enforcement personnel that are related to allegations of attorney misconduct within the jurisdiction of OPR.

¹⁴See 28 C.F.R. § 0.39.

¹⁵Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) establish the discovery obligations of federal prosecutors. According to DOJ policy, it is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team to ensure that the defendant has a fair trial. The prosecution team includes, among other others, federal, state, and local law enforcement officers participating in the investigation and prosecution of the criminal case against the defendant.

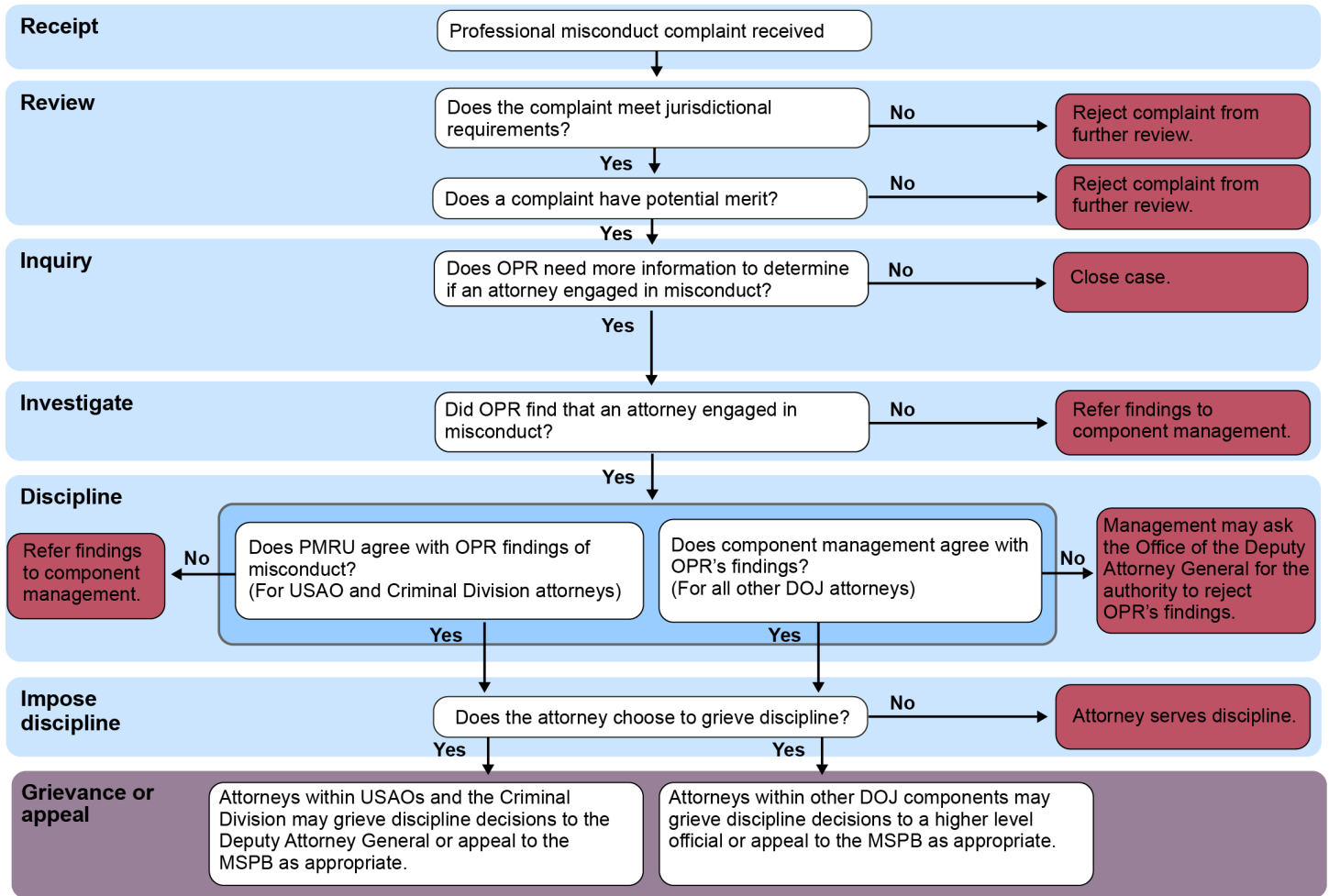
evaluate whether the misconduct at issue is serious, and if so, report it to the appropriate office in DOJ.

DOJ's Process for Managing Complaints of Professional Misconduct

OPR receives complaints of professional misconduct from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, DOJ employees, and other federal agencies. OPR is to review each complaint, and assess whether an attorney engaged in professional misconduct. If an attorney is found to have engaged in misconduct, OPR is to refer its findings to PMRU or the attorney's component head to consider disciplinary action. Attorneys who are found to have engaged in misconduct can appeal disciplinary decisions, or submit grievances, to their component head, the Deputy Attorney General, or the Merit Systems Protection Board (MSPB) depending on the component for which they work and the type and length of the discipline imposed.¹⁶ Figure 1 shows DOJ's process for managing and disciplining professional misconduct.

¹⁶MSPB is an independent, quasijudicial agency in the executive branch that hears and decides appeals for many kinds of actions federal agencies may take against the employees who work for these agencies.

Figure 1: The Department of Justice’s (DOJ) Process for Managing and Disciplining Professional Misconduct



OPR Office of Professional Responsibility
 PMRU Professional Misconduct Review Unit
 USAO United States Attorneys’ Office
 MSPB Merit Systems Protection Board

Source: GAO analysis of DOJ’s discipline process for attorneys accused of professional misconduct. | GAO-15-156

Table note 1: OPR will refer findings of poor judgment to component management for discipline. PMRU will also refer its findings to component management if PMRU decides to reduce OPR’s findings of misconduct to poor judgment.

Table note 2: For attorneys within USAOs and the Criminal Division, PMRU is the proposing and deciding official for all disciplinary actions. For attorneys in other DOJ components, component management is both the proposing and deciding official for suspensions of 14 days or less. For suspensions of 15 days or more, removals, or demotions, component management is the proposing official and the Office of Attorney Recruitment and Management is the deciding official. For suspensions imposed for 15 days or more, demotions, and removals, all attorneys may appeal to the MSPB.

-
- **Inquiry.** OPR initiates an inquiry when it needs more information to resolve the complaint. In such cases, OPR is to request a written response to the allegations and supporting documentation—such as documents or e-mail records regarding the underlying allegation of misconduct and the attorney’s professional background and experience, among other things—from the attorney who is the subject of a complaint and the component head. OPR may also collect documents and e-mail records, and review case files and court pleadings.
 - **Investigations.** In cases that cannot be resolved based on a review of the written record, OPR is to initiate an investigation of the alleged misconduct. This includes requesting and reviewing additional relevant documents and conducting interviews of the subject attorney(s) and witnesses. OPR makes findings of professional misconduct only after conducting a full investigation.
 - **Discipline.** When OPR determines an attorney has engaged in misconduct, OPR provides a written report of its findings and conclusions to PMRU or the attorney’s respective component management for disciplinary action. PMRU is to review OPR’s findings to determine if OPR’s evidence is sufficient to support a finding of misconduct. If PMRU decides to reduce OPR’s findings of misconduct to poor judgment, it is to refer its decision to the attorney’s component management for discipline. Component management may ask the Office of the Deputy Attorney General for the authority to reject OPR’s findings if management disagrees with the findings. However, component management must uphold OPR’s findings if the Office of the Deputy Attorney General denies its request. For instances in which OPR found the attorney to have engaged in poor judgment, OPR is to refer its findings to the attorney’s component management to determine whether discipline is appropriate.
 - **Impose discipline.** If it is determined by PMRU, component management, or the Office of Attorney Recruitment and Management (OARM) that an attorney engaged in misconduct, component management is responsible for implementing the discipline decided.¹⁷

¹⁷OARM is responsible for DOJ’s recruitment efforts for law students and DOJ attorneys. OARM also has delegated authority to take final action in matters pertaining to the employment, separation and general administration of DOJ attorneys and law students in grades GS-15 (or equivalent) and below.

For attorneys within USAOs and the Criminal Division, PMRU is the proposing and deciding disciplinary office.¹⁸ Because PMRU speaks for the department on such matters, the two components are not at liberty to disagree with PMRU's decision. For attorneys in other DOJ components, component managers, who handle these matters as only one of their many assigned responsibilities, are the proposing and deciding officials for admonishments, reprimands, and suspensions of 14 days or less. For suspensions of 15 days or more, demotions, and removals, component management is the proposing official and OARM is the deciding official. Component management may disagree with OPR's findings, but only with the approval of the Office of the Deputy Attorney General.

- **Grievance or appeal.** USAO and Criminal Division attorneys who are found to have engaged in misconduct can grieve PMRU's decision to the Deputy Attorney General for findings in which PMRU imposed a suspension for 14 days or less. For findings in which PMRU imposed a suspension for 15 days or more, these attorneys may appeal to MSPB. Attorneys within other DOJ components who are found by component management or OARM to have engaged in misconduct can submit grievances for suspensions imposed for 14 days or less to a higher level official in their component, and for 15 days or more to MSBP.

OPR uses its Analytical Framework to determine whether an attorney engaged in misconduct, and DOJ employees may refer to OPR's Analytical Framework when determining whether an action constitutes misconduct. Under the Analytical Framework, OPR finds department attorneys engage in professional misconduct when they intentionally violate or act in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or department regulation or policy. Under the framework, attorneys can also be found to have exercised poor judgment, engaged in other inappropriate conduct, made

¹⁸According to Office of Personnel Management (OPM) definitions, a proposing official is a management official who has the delegated authority to issue a notice of proposed adverse action. A deciding official is a management official designated to make the final decision in connection with a proposed adverse action. According to DOJ, the deciding official has the authority to hear the subject's oral response to a proposed action.

a mistake, or acted appropriately under all the circumstances.¹⁹ The Privacy Act places limitations on the disclosure of specific findings of professional misconduct and other information that OPR maintains about these cases, such as the name of the attorney found to have engaged in misconduct.²⁰ OPR, however, discloses summary-level information on its findings in its *Annual Report*, including descriptions of investigations it closed and its resolution of the matter, without identifying the subject of its investigation.

Independence and Transparency

Historically, Members of Congress and other third-party stakeholders, such as the American Bar Association, have stated that they believe that DOJ's processes for investigating and disciplining professional misconduct are not transparent and prevent attorneys from being held publically accountable for their actions. These long-standing concerns have prompted some Members of Congress to publically call for allowing DOJ's Office of the Inspector General (OIG) to investigate allegations of professional misconduct so as to better ensure that the public is provided sufficient information on attorney behavior. Currently, in accordance with statute, DOJ's OIG does not have jurisdiction to investigate complaints of professional misconduct against DOJ attorneys, including complaints against the Attorney General, Deputy Attorney General, and other senior department attorneys; the OIG may otherwise conduct audits and investigations it considers appropriate, including regarding OPR.²¹

¹⁹Under OPR's Analytical Framework, an attorney exercises poor judgment when faced with alternative courses of action, that person chooses a course of action 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 that person may not have violated, or acted in reckless disregard of, a clear obligation or standard. A mistake results from excusable human error despite an attorney's exercise of reasonable care under the circumstances.

²⁰See 5 U.S.C. § 552a. According to DOJ, it may not share information on OPR investigations or disciplinary action taken against an attorney except under exceptions to the Privacy Act, including disclosures to Congress and routine use exceptions, such as for bar disciplinary action or in response to a written request by a judicial officer to where it is relevant to the judicial office or the court.

²¹Section 8E of the Inspector General Act of 1978, as amended, requires that OIG refer to OPR allegations of misconduct involving department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. According to DOJ OIG's Chief of Staff/Senior Counsel, OIG has not been requested to conduct a review over OPR's processes for investigating professional misconduct.

However, the OIG has partnered with OPR in a few instances to investigate the Attorney General, the Deputy Attorney General, and other high-ranking DOJ officials in professional misconduct investigations because of overlapping issues involving both OIG's and OPR's jurisdictions.²²

Legislation that would allow the OIG to investigate professional misconduct complaints has been introduced on numerous occasions, with the most recent legislation introduced in March 2014.²³ The Attorney General testified in April 2014 before Congress that he does not support any action that would put misconduct investigations under the OIG's jurisdiction because he believes that OPR has unique expertise for looking at complaints of misconduct and, where appropriate, recommending punishment.²⁴ On the other hand, the current DOJ Inspector General has criticized the different treatment related to professional misconduct that department attorneys receive from OPR's oversight, noting that investigating attorneys differently from other department employees has a detrimental effect on public confidence in DOJ's ability to review its own attorneys' misconduct. The DOJ Inspector General has also testified in support of OIG jurisdiction over professional misconduct investigations, stating that OIG's statutory and operational independence from DOJ ensures that OIG investigations occur through a transparent and publicly accountable process. In 1994, GAO issued a legal opinion stating that GAO does not believe an OIG is institutionally less capable of reviewing matters that pertain to discretionary legal judgments, provided the OIG has the necessary experience and expertise to do so.²⁵

²²In addition, 28 C.F.R. § 0.29e(a)(6) provides a formal mechanism allowing the Inspector General to request that the Deputy Attorney General authorize OIG to handle particular professional misconduct investigations within the jurisdiction of OPR. The Deputy Attorney must approve OIG's request before the OIG can investigate professional misconduct.

²³E.g., S. 2127, 113th Cong. (2014); H.R. 3847, 111th Cong. (2009); S. 2324, 110th Cong. (2007); H.R. 9238, 110th Cong. (2007).

²⁴Hearing of the House Judiciary Committee Subject: "Oversight of the U.S. Department of Justice" Chaired by: Representative Robert Goodlatte (R-VA) Witness: Attorney General Eric Holder Location: 2141 Rayburn House Office Building, Washington, D.C. Time: 10:04 a.m. EDT Date: Tuesday, April 8, 2014.

²⁵[B-256322](#), Apr. 15, 1994.

Other stakeholders have raised concerns about the transparency of OPR's misconduct investigations. For example, in August 2010, the American Bar Association called on DOJ to release information on completed professional misconduct investigations to give the public confidence that lawyers engaged in serious misconduct are held accountable and to educate the public about the type of complaints that often are made that are unwarranted. Additionally, in March 2013, the National Association of Assistant United States Attorneys called on OPR to make its findings of misconduct inquiries and investigations more accessible and available to Assistant U.S. Attorneys. The Association believes that doing so will allow Assistant U.S. Attorneys to better ensure due process in OPR investigations. However, OPR's position is that it is prohibited under the Privacy Act from releasing specific information related to its investigations—such as the name of the accused attorney—unless otherwise identified by the act's routine-use clause. However, according to OPR, this clause allows OPR to share information on its investigations with Congress and for routine-use exceptions, such as for bar disciplinary action or in response to a written request by a judicial officer where it is relevant to the judicial office or the court.²⁶ To help provide greater transparency of its investigations, OPR provides summaries of its findings in its *Annual Reports*.²⁷

DOJ Has Processes to Manage Complaints of Professional Misconduct, but Faces Challenges in Disciplining Attorneys

OPR has implemented processes to better manage professional misconduct complaints since 2011, and DOJ is taking steps to help address how it identifies and prevents such misconduct among department attorneys. However, DOJ has not implemented its plan to expand the jurisdiction of PMRU to ensure that discipline for professional misconduct is applied consistently and in a timely manner for all department attorneys. Furthermore, not all DOJ components have mechanisms in place to ensure that attorneys found to have engaged in misconduct serve the discipline imposed upon them.

²⁶See 5 U.S.C. § 552a; Privacy Act of 1974; System of Records, 76 Fed. Reg. 66752-54 (Oct. 27, 2011).

²⁷OPR's *Annual Reports* provide information to the public on the number of misconduct complaints received and the number of inquiries and investigations in a given fiscal year. The reports also provide summary-level information on OPR's findings of misconduct.

OPR Has Implemented Processes to Better Manage Professional Misconduct Complaints

OPR Actions to Increase the Timeliness of Its Complaint Review Process

OPR has taken steps to increase its timeliness in managing the average 1,000 professional misconduct complaints it receives each year by redesigning its processes for receiving and investigating these complaints. According to OPR's Deputy Counsel, prior to 2011, OPR could not resolve the number of complaints received in a timely manner because the process it used to assess complaints was time-consuming and inefficient. For example, prior to 2011, OPR used to open many misconduct complaints as investigations rather than inquiries, and most investigations are inherently more time-consuming and costly for the agency because they involve in-depth file reviews and interviews. At that time, OPR also staffed its office in part with attorneys who were on detail from other DOJ components. According to OPR's Deputy Counsel, because these attorneys were on detail, they lacked the expertise to most efficiently assess and investigate complaints. Often, because of these attorneys' short tenure with the office, they did not resolve complaints before completing their detail. New attorneys assigned to these matters would restart the inquiry or investigation, which would increase the amount of time it took for complaints to be resolved. The Deputy Counsel reported that, prior to 2011, OPR sometimes took as long as 90 days or more to initially assess complaint allegations and 2 years or more to completely investigate and resolve a complaint.

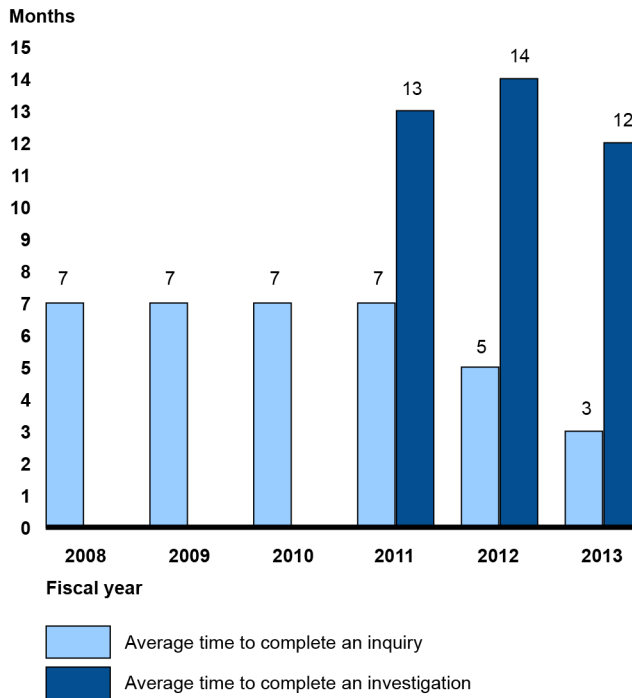
To better ensure the timeliness of complaint review and resolution, OPR redesigned its process to ensure that OPR reviews complaints for merit during an inquiry phase before OPR approves resources for an investigation. According to OPR's Deputy Counsel, OPR made this change to ensure that it expends staffing resources only for investigations on complaints where there is a reasonable likelihood of a misconduct finding. According to OPR's Deputy Counsel, OPR currently is staffed with 21 attorneys with experience in investigating professional misconduct allegations to review and investigate complaints and does not have attorneys detailed from other components. The Deputy Counsel said that OPR no longer has to expend additional time and resources training staff on short details so OPR can assess and investigate complaints more quickly. Furthermore, the Deputy Counsel reported that changes to OPR's intake process have reduced the amount of time it takes OPR to

initially assess the merit of a complaint from up to 90 days to approximately 7 days.

The Deputy Counsel stated that OPR's goal is to review a complaint within 1 week of receipt, complete an inquiry within 6 months, and complete an investigation within 12 months. We found that in 2013 it took OPR an average of 3 months to complete an inquiry and 12 months to complete an investigation.²⁸ Figure 2 shows a decrease in the average time to complete an inquiry from 7 months in fiscal year 2008 to 3 months in fiscal year 2013. The Deputy Counsel attributed this decrease to OPR's new approach to reviewing and assessing all complaints for merit before it approves resources for an investigation.

²⁸According to OPR's Deputy Counsel, some of the complaints OPR receives take longer to resolve than others for a variety of reasons. For example, OPR sometimes must put on hold complaints that are part of judicial proceedings or appellate reviews until the proceedings are resolved, depending on a number of factors. In addition, if OPR does not have sufficient information regarding the complaint, or the more factually complicated a complaint is, the longer it will take OPR to resolve. Because OPR permits attorneys to review a draft report when OPR finds misconduct they can delay issuing a final report. Further, OPR cannot compel third parties, such as judges, defense attorneys, and non-DOJ witnesses, to participate in an OPR review or provide pertinent information, which, according to OPR, can make it difficult for OPR to investigate a complaint in a timely manner.

Figure 2: The Office of Professional Responsibility (OPR) Time-Frames for Addressing Inquiries and Investigations Completed by OPR from Fiscal Years 2008 through 2013



Source: GAO analysis of OPR data. | GAO-15-156

Note: OPR provided data on the average time to complete an investigation for investigations initiated since October 1, 2010. Fiscal year 2011 was the year in which OPR modified its method for handling misconduct complaints.

OPR Actions to More Efficiently Review Complaints of Misconduct

OPR has taken steps to increase the efficiency of its complaint review process by better focusing its time and resources on those cases where misconduct most likely occurred. In 2011, OPR dedicated one full-time Senior Associate Counsel to determine whether misconduct complaints warrant further review, in part to manage complaints more quickly and efficiently. The Senior Associate Counsel works with three full-time staff to determine the merit of the average 1,000 complaints it receives each year.²⁹ The Senior Associate Counsel described the process used to assess a complaint. When a complaint comes in, the staff review and

²⁹The Senior Associate Counsel and his staff document all decisions to reject, close, or accept a complaint through OPR's case management system, called Law Manager.

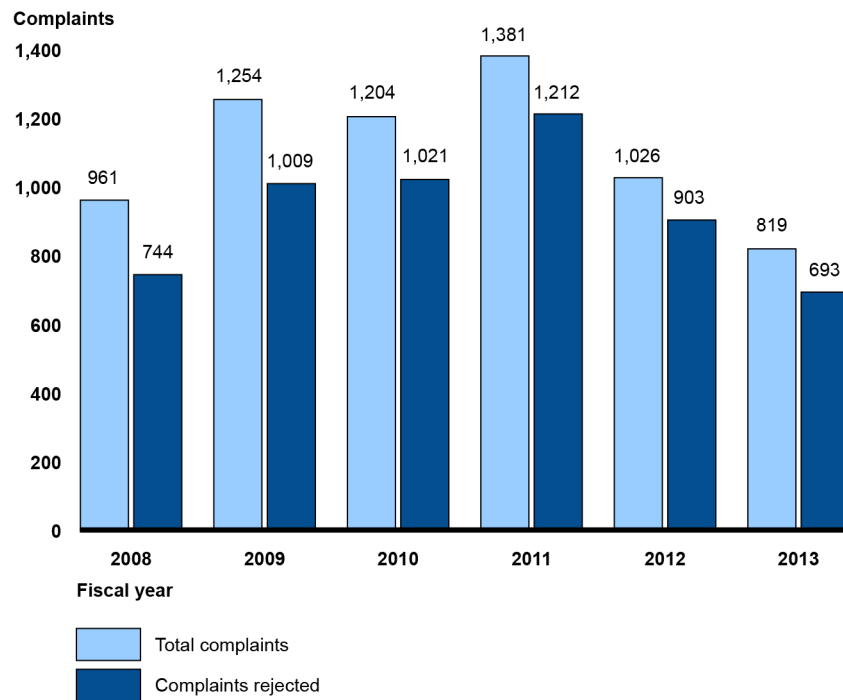
assess it against several criteria, such as whether OPR has jurisdiction or another component is more appropriate to manage the issue, whether the complaint includes enough information for OPR to assess it, or whether the courts are still considering the conduct included in the complaint. These kinds of complaints can include, for example, complaints from private individuals about the performance of judges or local or federal law enforcement officers, or numerous complaints from incarcerated prisoners about their treatment while incarcerated—all of which are generally outside of OPR’s jurisdiction.³⁰ OPR staff propose an initial decision and the Senior Associate Counsel or another supervisory Associate Counsel reviews the decision before taking action. OPR informs the complainant of its decision, and may refer some complaints to the components with jurisdiction for these issues, as appropriate. The Counsel for OPR and Deputy Counsel stated that this process has helped to increase the efficiency of the complaint review process because it allows OPR management to focus its time and resources on those cases where misconduct most likely occurred.

The Deputy Counsel explained that the remaining complaints typically include all referrals from judicial decisions or judicial criticism, the Congress, DOJ attorneys, and components, as well as high-profile or significant matters. The Senior Associate Counsel assesses and evaluates all of these complaints to determine whether OPR should accept the complaint for inquiry or investigation. If the Associate Counsel determines that the complaint is outside of OPR’s jurisdiction or does not establish facts that would likely support a misconduct finding, the Senior Associate Counsel notifies the complainant that the matter does not merit further OPR review. For any remaining complaints from these sources, the Senior Associate Counsel prepares a brief memo describing the complaint and applicable circumstances, and recommending that OPR either reject or accept the complaint. The Deputy Counsel or Counsel reviews the memo and must approve the recommendation to reject or accept the complaint. OPR notifies the complainant of any rejected complaints and will open up an inquiry on any complaints that it accepts for further review.

³⁰Although these matters fall outside of OPR’s jurisdiction—which is to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice—according to OPR’s Deputy Counsel, where appropriate, OPR refers these matters to DOJ components, including the OIG, so that they may properly exercise jurisdiction.

According to OPR's *Annual Report* for fiscal year 2013, OPR's review of complaints eliminated approximately 85 percent (693 of 819) of complaints for that fiscal year.³¹ OPR's *Annual Report* does not provide data on the number of complaints rejected for being outside of OPR's jurisdiction or for not having sufficient information to support a misconduct finding. However, according to OPR's Deputy Counsel, OPR's case management system maintains documentation on each complaint and OPR's disposition of the complaint. Figure 3 shows how many complaints OPR opened for review and the number it rejected from fiscal years 2008 through 2013.

Figure 3: Comparison of the Total Number of Complaints the Office of Professional Responsibility (OPR) Received and Rejected from Fiscal Years 2008 through 2013



Source: GAO analysis of OPR data. | GAO-15-156

³¹GAO did not assess DOJ's use of professional judgment in determining which complaints to reject from further review.

According to the Senior Associate Counsel, he and his staff make decisions to reject matters using the criteria set forth in the Analytical Framework and erring on the side of caution, so as to try to ensure that they do not intentionally dismiss any instance of misconduct. According to Deputy Counsel, he is confident of the Senior Associate Counsel's decisions because the Senior Associate Counsel has years of experience at DOJ and OPR. According to the Deputy Counsel, OPR management meets with the Senior Associate Counsel twice a month to discuss how to manage incoming complaints. The Deputy Counsel explained that this gives them the ability to monitor the Senior Associate Counsel's activities and decisions, and the opportunity to discuss complaints of note.

Given the relatively high number of complaints rejected and concerns about the transparency of OPR's process, we considered what steps OPR takes to help ensure supervisory review of the process for evaluating incoming complaints. We found that OPR's procedures for determining to reject or elevate a complaint are designed consistent with federal internal control standards that call for management to review staff activities to ensure that agency goals and objectives are met.

OPR Actions to Ensure Consistency and Transparency of Its Investigations

OPR implemented office-wide procedures to help ensure consistency of its professional misconduct investigations. For example, according to OPR's Deputy Counsel, OPR instructs staff who are investigating complaints of misconduct to develop an investigative plan, which is a roadmap detailing what steps staff will take to resolve the complaint and considers prior investigations to see how OPR handled cases similar in nature. The Deputy Counsel also stated that OPR management discusses with OPR attorneys and supervisors the investigative plan prior to converting the matter to an investigation and as the investigation progresses. According to OPR's Deputy Counsel, attorneys meet with the Counsel for OPR and the Deputy Counsel as well as their supervisor to discuss the progress of ongoing investigations. Once OPR completes an investigation, OPR senior management reviews all investigative findings before making a determination on whether an attorney had engaged in professional misconduct. The Counsel for OPR approves all findings of professional misconduct before they are closed and referred to either PMRU or the component to determine whether to impose disciplinary action.

In addition, the Deputy Counsel said that to ensure the transparency of its decision making, OPR makes its Analytical Framework, as well as its policies and procedures for handling professional misconduct investigations, available to all DOJ employees and the general public.

The Deputy Counsel stated that these documents, available on OPR’s website, outline how OPR reviews and investigates complaints, and provide the criteria OPR uses when determining whether an attorney engaged in professional misconduct. In addition, the Deputy Counsel stated that OPR takes steps to notify the public and relevant parties on the results of its findings. For example, OPR sends a letter of its findings to complainants at the conclusion of an inquiry or investigation, and provides investigative reports to DOJ management and relevant state bar associations when appropriate to notify them of the misconduct issues found. OPR generally also allows the attorney who is the subject of an investigation to provide a written defense to OPR’s tentative findings of professional misconduct prior to finalizing a report of investigation. Upon written request, OPR also provides its findings to federal judges who have made rulings criticizing the conduct of DOJ attorneys. Furthermore, OPR’s *Annual Reports* provide statistics on professional misconduct inquiries and investigations as well as summaries of cases in order to give the public more detail on the types of misconduct engaged in by DOJ attorneys.³²

Although Instances of Professional Misconduct May Go Unreported, DOJ Is Taking Steps to Help Better Identify and Prevent DOJ Attorney Misconduct

DOJ faces a number of factors outside of its control when it comes to identifying professional misconduct. For example, according to OPR’s Deputy Counsel, some instances of professional misconduct may go unreported to OPR because attorneys do not deem the behavior significant enough to report. The Deputy Counsel stated that cases of misconduct may not be referred to OPR because the attorney’s supervisor has concluded that misconduct did not occur. Supervisors have available to them the criteria set forth in the Analytical Framework to determine whether allegations and actions constitute misconduct. Furthermore, while supervisors and attorneys are required to report professional misconduct, failure to do so does not necessarily result in a penalty. According to OPR’s Deputy Counsel, DOJ does not have any set schedule of penalties if an attorney fails to report professional misconduct for at least two reasons. First, discipline must be imposed on an individual basis, taking into consideration established factors, and DOJ prefers the flexibility to recommend disciplinary measures on a case-by-case basis

³²According to OPR’s Deputy Counsel, OPR regularly reports to the Attorney General and Deputy Attorney General on the findings of professional misconduct investigations, in part, to provide statistics on OPR’s caseload. OPR also maintains reports—including a quarterly report for the department senior management—documenting the status of findings in resolving complaints, among other things.

rather than being restricted to a set of predetermined penalties. Second, according to OPR's Deputy Counsel, imposing penalties that are not based upon individual conduct and circumstances may serve to discourage attorneys from reporting misconduct. OPR's Deputy Counsel stated that OPR, through its training and outreach to employees, continually encourages attorneys to report misconduct.

Third-party stakeholders seeking to strengthen oversight of attorneys who engage in professional misconduct also identified factors that stakeholders believe make it difficult for OPR to fully recognize professional misconduct. These factors include, among others, the fear of retaliation for reporting the professional misconduct of colleagues or supervisors, and the presumption that an attorney who willingly engaged in misconduct is not going to report his or her actions to OPR. OPR also has no authority over judges and defense attorneys and OPR cannot compel them to report misconduct when it occurs. However, according to OPR's fiscal year 2013 *Annual Report*, OPR receives allegations of misconduct from attorneys and judges. According to OPR's *Annual Report*, such allegations constituted approximately 42 percent of all investigations opened, and allegations from department attorneys constituted approximately 46 percent of all investigations opened.

OPR Actions to Identify Misconduct

OPR is taking actions to help it better identify instances of potential professional misconduct that go unreported. For example, OPR routinely conducts searches of available judicial opinions to help detect potential cases of misconduct that judges and other attorneys do not report directly to OPR.³³ Specifically, OPR utilizes Westlaw—an online legal research database for legal and law-related materials and services—to conduct nationwide searches of available judicial opinions that may indicate criticism of government attorneys or professional misconduct that may not have been reported to OPR. OPR assistant attorneys review the results from the Westlaw searches and determine whether to forward the results

³³A judicial opinion is a court's written statement explaining its decision in a given case. To ensure that OPR identifies the subject of a judicial opinion when the opinion does not explicitly name the attorney, OPR's Deputy Counsel reported that OPR will examine court documents and that OPR can typically identify the attorney in question through an examination of the docket sheets. The Deputy Counsel also stated that if OPR cannot identify the attorney in question, OPR will send a letter to the USAO or head of the component involved requesting responses to specific questions about the case.

for further review.³⁴ OPR officials estimated that Westlaw searches at most identify about one case a month where a DOJ employee may have engaged in professional misconduct but did not report it to DOJ. According to OPR's Deputy Counsel, OPR also reviews media sources on a daily basis, such as newspapers, websites, and internal DOJ publications on recent court cases. According to the Deputy Counsel, when OPR identifies a matter that should have been reported but was not, OPR includes in its inquiry or investigation why the matter was not properly reported and PMRU will take this into account when determining the penalty. In addition, OPR regularly meets with DOJ attorneys to train them on professional responsibility standards, including their responsibility to report misconduct, OPR's complaint resolution process, and the logistics of referring a misconduct case to OPR. Furthermore, OPR tracks the extent to which any attorneys or supervisors have repeatedly engaged in professional misconduct. According to the Deputy Counsel, OPR reviews the role of supervisors in managing such attorneys accused of misconduct during its inquiries and investigations.

DOJ Actions to Prevent Misconduct

DOJ takes several actions to help prevent instances of professional misconduct among department attorneys, with significant efforts devoted to training. For example, in 2009 DOJ created the National Discovery Coordinator (NDC) position to develop, implement, and administer discovery training for department attorneys to address concerns about department attorneys failing to meet their discovery obligations, such as in the Ted Stevens trial.³⁵ DOJ also developed its *Federal Criminal Discovery Blue Book*—a comprehensive legal analysis and source of advice on criminal discovery practices—to help attorneys better understand their discovery obligations.³⁶ In addition, according to OPR's

³⁴According to OPR's Deputy Counsel, OPR conducts its Westlaw database searches using a list of broad search terms related to misconduct to identify judicial opinions where DOJ attorneys may have engaged in misconduct. Westlaw searches identify approximately 100 to 150 potential cases using the broad search terms; after review of these potential instances, a few every 2 weeks are deemed to warrant further OPR review.

³⁵Attorneys in the Ted Stevens trial found to have violated their discovery obligations by failing to disclose statements by prosecution witnesses from trial preparation sessions and by failing to disclose information that contradicted prosecutorial evidence, according to a May 2012 DOJ memo.

³⁶According to DOJ, the *Blue Book* was designed to provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations and to serve as a litigation manual by all DOJ prosecutors and paralegals.

Deputy Counsel, DOJ requires that all litigators take 2 hours of professional responsibility training each year.³⁷ To institutionalize the department's efforts to address discovery obligations, DOJ amended the USAM to formalize the requirements for professional responsibility training. In addition, DOJ has established the Professional Responsibility Advisory Office to assist attorneys with questions and concerns related to the attorneys' ethical obligations.³⁸

DOJ Does Not Ensure Discipline Is Implemented or Consistent and Some Attorneys Found to Have Engaged in Misconduct Receive Performance Awards

Ensuring Discipline Is Implemented

DOJ does not require components to demonstrate that attorneys found to have engaged in professional misconduct serve the discipline imposed upon them. EOUSA—the component that provides administrative support to USAOs—recently developed a mechanism to require USAOs to demonstrate that discipline for professional misconduct has been implemented, but other DOJ components do not have such a mechanism. We reviewed 40 cases for which OPR made a finding of professional misconduct for attorneys within USAOs and the Criminal Division and that PMRU assessed for disciplinary action, from fiscal years 2011 through 2013 (37 USAO cases and 3 Criminal Division cases). According to our analysis of OPR, EOUSA, and Criminal Division data, 16 of these attorneys (40 percent) resigned or retired either before OPR could

³⁷Litigators meet their professional responsibility training requirements in one of several ways, including, among other things, attending trainings held by NDC; watching training videos developed by DOJ's learning center and the NDC; or identifying training that will be approved by the NDC and their office's criminal discovery coordinator. The NDC consistently works with EOUSA's Office of Legal Education to develop new discovery trainings.

³⁸ The Professional Responsibility Advisory Office has the responsibility for providing advice to government attorneys and the leadership within the department on issues relating to professional responsibility and ethics.

complete its investigation or before PMRU could impose discipline. At the time of our request, EOUSA had documentation to support the resignations or retirements for 8 of these 16 attorneys (50 percent) but no longer had documentation for the other 8 because of record retention requirements.³⁹ PMRU decided and imposed discipline for another 22 of the 40 attorneys (19 USAO attorneys and 3 Criminal Division attorneys).⁴⁰ Our review found that 1 of these USAO attorneys did not serve the disciplinary sentence imposed until our inquiry uncovered this condition. A representative from EOUSA's General Counsel's Office reported that the attorney went undisciplined for 2 years before EOUSA became aware of this situation and took action to ensure that discipline was implemented.⁴¹ PMRU imposed no discipline for the 2 remaining attorneys within USAOs because it found poor judgment in one case and the last case remains pending. EOUSA had documentation showing that components implemented discipline for 17 of these 19 cases while the Criminal Division had documentation for 2 of 3. However, EOUSA could not provide documentation of final actions for 2 cases and the Criminal Division could not provide documentation for 1 case.

An official from EOUSA's General Counsel's Office reported that at the time of our finding, EOUSA was in the process of revising its procedures for documenting and implementing discipline to better ensure accountability over disciplinary decisions in response to a DOJ OIG audit,

³⁹Record retention requirements generally mandate that employees' personnel files be transferred to the National Personnel Records Center within 90 days of their separation which could include resignation or retirement. According to Office of Personnel Management guidance, when employees separate from the federal government, employees' Official Personnel Folders are generally transferred to the National Personnel Records Center within 90 days of separation and are maintained for 65 years. We considered a copy of the Standard Form 50—which documents personnel actions, such as separation from the federal government—or resignation letter to be sufficient documentation showing that an attorney resigned or retired.

⁴⁰For the 19 attorneys within USAOs disciplined for misconduct by PMRU, 15 received suspensions of a day or more, 2 received letters of admonishment, and 2 received written reprimands. For attorneys within the Criminal Division, 3 received suspensions of a day or more. In one of these cases, the DOJ attorney grieved a 3-day suspension and the Office of the Deputy Attorney General vacated the discipline decision, determining that the conduct at issue constituted poor judgment rather than reckless misconduct.

⁴¹An official from EOUSA reported that EOUSA uncovered this situation at the same time the Division was also in the process of establishing its new procedures for documenting that discipline was implemented. This official stated that he did not anticipate that EOUSA would be unsuccessful in implementing discipline in the future.

completed in February of 2014.⁴² This official stated that EOUSA now requires USAOs to provide documentation to EOUSA's General Counsel's Office certifying that the USAO implemented the discipline imposed for any misconduct finding. EOUSA maintains all documentation related to professional misconduct cases in its case management system.

According to the Associate Deputy Attorney General, other than EOUSA, no other DOJ component has similar procedures or mechanisms in place to ensure that discipline for professional misconduct is implemented.⁴³ One component reported that it had no need to implement a process because OPR has not found any of its attorneys to have engaged in professional misconduct. While this may be true to date, the component is not prepared to ensure discipline is implemented if OPR does have misconduct findings in the future. Another component reported that when OPR finds that an attorney engaged in misconduct, component management works with the attorney's supervisor to ensure that discipline is implemented. Nevertheless, this component does not have an internal control in place to be able to demonstrate that the component has implemented the discipline.

The DOJ OIG conducted a series of reviews assessing department components' disciplinary systems. Since 2004, and as recently as February 2014, the DOJ OIG reported on problems with components failing to implement discipline and maintain discipline records in employee personnel files.⁴⁴ Among other things, the OIG routinely found that DOJ components lack documentation related to disciplinary actions and ensure that disciplinary decisions are imposed consistently. The most recent DOJ OIG report, which focused on EOUSA's disciplinary system,

⁴²Department of Justice, Office of the Inspector General, Evaluations and Inspections Division, *USAOs' and EOUSA's Disciplinary Process*, I-2014-001 (Washington, D.C.: February 2014).

⁴³The Criminal Division reported that it follows up with section management to ensure that they have implemented the discipline PMRU imposed, but does not have specific requirements in place for ensuring that discipline for misconduct is implemented.

⁴⁴Department of Justice, Office of the Inspector General, Evaluations and Inspections Division, *Review of the Federal Bureau of Investigation's Disciplinary System*, I-2009-002 (Washington, D.C.: May 2009); *Review of the Drug Enforcement Administration's Disciplinary System*, I-2004-002 (Washington, D.C.: January 2004); and *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Disciplinary System*, I-2005-009 (Washington, D.C.: September 2009).

found that EOUSA was unable to determine whether discipline was implemented or evaluate disciplinary trends among USAOs because of lack of documentation.⁴⁵ EOUSA has since taken steps to address OIG's concerns, according to an EOUSA official. Although these OIG reports focus more broadly on DOJ's discipline system rather than professional misconduct, they identify systemic issues related to DOJ's ability to hold employees and attorneys accountable for their actions.

Neither DOJ nor component management requires its offices that impose discipline to demonstrate that they actually implemented the discipline, such as by requiring that offices provide components copies of the Standard Form 50 to document personnel action or other documentation that would show the discipline implemented—similar to the mechanism EOUSA recently established in response to OIG's findings. According to OPR's Deputy Counsel, OPR tracks all matters in which OPR found misconduct and discipline has not been decided by preparing a quarterly report for senior management. OPR removes cases from its report only once OPR has confirmed with PMRU or the component that discipline has been imposed. However, DOJ does not have a mechanism in place to ensure that component management actually implements discipline once it has been imposed. Federal agencies are required to implement disciplinary systems consistent with federal regulations developed by the Office of Personnel Management (OPM).⁴⁶ In addition, DOJ's Associate Deputy Attorney General agreed that requiring components to demonstrate that discipline is implemented is an important step in ensuring that attorneys are disciplined for violations of professional standards, and DOJ could do more to ensure that discipline for misconduct is implemented agency-wide. By requiring that component management demonstrate that it has implemented discipline, DOJ will have better oversight of disciplinary decisions to ensure they are carried out agency-wide.

Disciplinary action is not only punitive, but preventive, as it sends a message to attorneys across DOJ that there are consequences for misconduct. *Standards for Internal Control in the Federal Government* call

⁴⁵Department of Justice, Office of the Inspector General, Evaluations and Inspections Division, *Review of the USAOs' and EOUSA's Disciplinary Process*, I-2014-001 (Washington, D.C.: February 2014).

⁴⁶Title 5, United States Code, Chapter 75 establishes the legal framework for federal agencies to address employee misconduct.

Consistent and Timely Discipline Decisions

for control activities to be established to ensure that management's directives are carried out.⁴⁷ An example of such a control activity is a mechanism for ensuring that discipline for professional misconduct is implemented. Requiring components that impose discipline to demonstrate that they actually implemented the discipline, as EOUSA has required, will help provide reasonable assurance that all attorneys are held accountable for professional misconduct.

DOJ has plans to help ensure consistent and timely decisions about discipline for attorneys who OPR finds to have engaged in professional misconduct, but has not yet implemented these plans. DOJ did not provide GAO with reasons for why it has not yet taken action to implement these changes. DOJ plans to expand using PMRU as the official disciplinary component for department attorneys found to have engaged in misconduct from USAOs and the Criminal Division to all litigating components. According to a January 14, 2011 memo from the Attorney General, because the department employees handle disciplinary matters as only one of many assigned responsibilities, disciplinary procedures at DOJ have resulted in delays in completion of the disciplinary process and create the risk of inconsistent application in disciplinary measures for similar offenses. The Attorney General stated that using PMRU—which focuses exclusively on such disciplinary matters—for department attorneys found to have engaged in professional misconduct will help to address these issues.

According to the Associate Deputy Attorney General, the department is currently reviewing a memo that would bring all divisions under PMRU's disciplinary process but has no timetable for implementing these changes. Given that the department has not taken action in almost 4 years on the Attorney General's original January 2011 memo calling for the change with PMRU, establishing near-term milestones for implementing this change would help to provide the department with some accountability for achieving the Attorney General's goal. Using milestones as a means for management for meeting established agency objectives is consistent with project management criteria found in *A Guide to the Project Management Body of Knowledge*.⁴⁸ Setting milestones to

⁴⁷[GAO/AIMD-00-21.3.1](#).

⁴⁸Project Management Institute, *A Guide to the Project Management Body of Knowledge* (PMBOK® Guide), Fifth Edition, (Newtown Square, Pa: 2013).

ensure the needed changes are implemented will help provide DOJ with reasonable assurance that attorneys who OPR finds to have engaged in professional misconduct are disciplined in both a timely and consistent manner.

Providing Performance Awards

To address concerns that attorneys found to have engaged in professional misconduct received performance awards or a promotion, we asked EOUSA and the Criminal Division to provide us data on the number of attorneys receiving an award or promotion within 1 year of PMRU's disciplinary decision. We found that DOJ awarded 9 attorneys that PMRU disciplined a division-level or discretionary award for good performance within 1 year of PMRU's decision.⁴⁹ According to DOJ, discretionary awards are of minimal value and an attorney's division management can approve these awards.⁵⁰ Four attorneys within USAOs received a time-off award for an average of about 22 hours while 2 attorneys with USAOs received lump sum cash awards between \$1,100 and \$2,000.⁵¹ In addition, 2 attorneys from USAOs received both a lump sum cash and time off award. Similarly, 1 Criminal Division attorney received a quality step increase award. None of the attorneys received a department-level award, such as, a Senior-Executive Service, Attorney General, or Presidential Award, all of which are vetted by the Senior Executive Resources Board, a performance review board that is chaired by the Associate Deputy Attorney General and composed of senior DOJ officials. This performance review board vets nominated attorneys to determine if they had misconduct and other performance or behavior-related issues and if these affected consideration for awards. DOJ officials reported that many of the awards that these attorneys received were based on specific performance during a rating year that did not include the conduct that led to discipline. Accordingly, DOJ also stated that there is nothing inconsistent with receiving a performance award for

⁴⁹If we do not count the number of attorneys that resigned or retired before PMRU decided discipline, the percentage of attorneys receiving performance awards would be 38 percent (9 of 24).

⁵⁰Examples of discretionary awards include lump-sum cash award, honorary award, informal recognition award, and a time-off award.

⁵¹According to the Office of Personnel Management, a time-off award is time off from duty, without loss of pay or charge to leave, granted to a Federal employee as a form of incentive or recognition; and a lump sum cash award is a performance-based cash award, also commonly known as a rating-based award, and is based on the most recent performance rating.

outstanding or exemplary performance, yet previously being disciplined for misconduct.

According to DOJ's Deputy Assistant Attorney General for Human Resources and Administration and Chief Human Capital Officer, DOJ does not have an official policy for granting awards or for recognizing the good performance of attorneys that have been accused of, or found to have engaged in, professional misconduct. The Deputy stated that DOJ components have the discretion to award employees with time-off and cash awards as the components see fit. The Deputy stated that these awards are of modest amounts and serve to boost morale and recognize good performance in a timely manner.

Supervisors Use Managerial Discretion as well as DOJ Guidance and Other Support when Assigning Work to, and Overseeing, Attorneys

Supervisors of attorneys accused of, or found to have engaged, in professional misconduct use managerial discretion when determining what work responsibilities they will assign to these attorneys and ensuring that these attorneys are complying with professional standards. According to an official within EOUSA's General Counsel's office, DOJ provides for the use of managerial discretion in dealing with personnel issues to allow supervisors the flexibility in managing the workload and staff. In surveying 20 USAOs and 28 litigating sections, respondents to our questionnaire reported that, in addition to using managerial discretion, they use other agency-wide resources and guidance to assist them in making such decisions. For example, DOJ has general guidance for supervisors, outlined in several administrative directives issued by OARM, on disciplinary actions that they can take to ensure that employees are complying with standards of conduct, including guidance for making determinations about work assignments for attorneys under investigation for misconduct.⁵² DOJ also provides guidance to supervisors on how to manage attorney departures from professional standards. For example, the USAM provides guidance on standards of conduct for DOJ attorneys and the U.S. Attorneys' Procedures help supervisors apply DOJ procedural guidance on a variety of issues, including personnel management. In addition, several DOJ internal offices offer support for

⁵²See DOJ Human Resource Order 1200.1. Our review of DOJ's Human Resource Order 1200.1 found that DOJ affords managers the authority to remove or reassign attorneys to different case assignments based on their assessed risk of whether an attorney's actions pose a threat to the order of the office or whether the attorney's presence in the office would negatively affect their efforts to effectively administer justice.

supervisors when managing professional misconduct, such as the Professional Responsibility Advisory Office, EOUSA's General Counsel's Office, and OPR.

Over half of our respondents, 12 of 20 USAOs and 20 of 28 litigating sections, have had experience in managing attorneys accused of, or found to have engaged in, professional misconduct. These respondents reported that they assign work to attorneys on a case-by-case basis but based on a variety of factors, including the following:⁵³

- **The nature of the alleged misconduct.** Sixteen USAOs and 19 litigating sections reported that they consider the seriousness of the nature of the possible misconduct when assigning work responsibilities or the circumstances contributing to the allegation or finding of misconduct.
- **Trust.** Seven USAOs and 4 litigating sections said that they determine the extent to which the attorney can be entrusted with responsibility for conducting investigations and prosecutions.
- **Nature of available work assignments.** Five USAOs and 11 litigating sections reported that before making a determination about what to assign an attorney found to have engaged in professional misconduct, they determine whether the assignment relates to a complaint of misconduct that OPR is investigating.
- **Attorney skill set and previous experience.** Ten USAOs and 5 litigating sections reported that they consider the attorney's prior performance when determining work assignments, including whether the attorney had a history of misconduct. One USAO reported that if the offending attorney had a personal difficulty, such as a death in the family that might have contributed to the misconduct, the office might approach the finding as a one-time error and continue to assign the attorney important cases but with closer supervision in light of the OPR finding.

According to the Associate Deputy Attorney General, USAOs also consider the availability of resources when assigning work assignments.

⁵³Respondents often cited more than one factor in the bullets below so the numbers will not add to 20 USAOs or 28 litigating sections.

The Associate Deputy Attorney General reported that USAOs will often assign attorneys to cases based on risk level and will use their professional judgment to determine whether an attorney accused of, or found to have engaged in, professional misconduct poses risk to a case when determining work assignments. The remaining 8 USAOs and 8 litigating sections reported that they did not have experience in managing attorneys accused of, or found to have engaged in, professional misconduct. Nevertheless, 7 of these USAOs and 4 of these litigating sections provided a variety of hypothetical examples of how they would assign work responsibilities to these attorneys and cited factors they would consider when doing so, which were similar to those discussed above. Finally, 1 of the USAOs and 4 of the litigating sections did not have experience in managing attorneys in these situations and did not provide information on what factors they would consider when making such determinations.

In addition to the factors cited above, respondents reported other issues they consider when assigning work responsibilities. For example, they may not assign work responsibilities to attorneys accused of professional misconduct any differently than other attorneys until they consult with EOUSA's General Counsel's Office or component management. Specifically, one litigating section reported that it does not normally take ongoing OPR investigations into consideration when making work assignments unless the investigation casts doubt on the attorney's ongoing capacity to practice law on behalf of the federal government. Respondents reported that they may also not consider allegations of professional misconduct when assigning work responsibilities if they determine that the allegation may lack merit. For example, one litigating section reported that whether a pending OPR review should influence work assignments depends, in part, upon the office's evaluation of the nature, seriousness, and merit of the allegation and the likelihood it may lead to an OPR finding of professional misconduct.⁵⁴ Finally, they may not alter work assignments in situations where an attorney did not engage in misconduct but did engage in other types of poor behavior, such as committing negligent conduct or making a mistake. The respondents said that they believe these types of issues are best addressed through training and closer supervision.

⁵⁴Because GAO did not review the individual cases of professional misconduct, we did not evaluate whether management's judgments when reaching such conclusions were appropriate.

According to respondents, DOJ provides guidance and training—such as through the USAM and discovery training—to help ensure that attorneys are abiding by professional standards. Furthermore, all 20 of the USAOs and 26 of 28 litigating sections identified a variety of factors they use to help ensure that supervisors are providing adequate oversight of their attorneys who have been accused of, or have been found to have engaged in, misconduct.⁵⁵ These include, among others, requiring that

- management routinely discusses any performance or conduct issues with staff attorneys and takes corrective actions accordingly;
- management reviews written products;
- supervisors meet regularly with staff attorneys to review the status of their cases or to routinely assess staff performance; and
- supervisors take training on how to provide adequate oversight of attorneys' work responsibilities.

Furthermore, 5 respondents reported that they routinely meet with judges to address any concerns that arise regarding an attorney's professional responsibilities and obligations during the course of litigation. For example, one USAO reported that the U.S. Attorney and other senior management attend the quarterly meetings of the U.S. Magistrate Judges in the district. According to this USAO, these meetings provide feedback from the judiciary as to how the office is doing in handling cases before the Magistrate Judges, and a venue to raise any problems or issues, such as concerns about attorney conduct.

⁵⁵The remaining 2 litigating sections did not provide information on factors they used to ensure supervisors are providing adequate oversight of their attorneys who have been accused of or have been found to have engaged in misconduct.

DOJ's Policy Is Not to Provide Counsel for Its Attorneys for OPR Proceedings, but DOJ Paid \$3.66 Million over 6 Years for Private Counsel Representation in Related Legal Proceedings

Under departmental policy, DOJ is not to authorize legal representation for purposes of defending attorneys in proceedings that OPR conducts because it is generally not in the interests of the United States to provide federal employees with legal representation in internal agency administrative investigations.⁵⁶ This policy also precludes legal representation to assist employees in preparing submissions to support their defense in internal disciplinary investigations, or to represent employees in agency disciplinary proceedings, including those that OPR conducts.

However, DOJ attorneys, like all federal employees, may receive legal representation under certain circumstances. According to a DOJ policy statement published in the Code of Federal Regulations,⁵⁷ DOJ may provide counsel if a federal employee has been sued, subpoenaed, or individually charged—this means the employee could be personally liable for any judgment against the employee, such as having to pay a monetary award or sanction, or the employee otherwise faces personal exposure, such as the loss of a license to practice law.⁵⁸ To be eligible for representation, requests for representation must involve conduct that reasonably appears to have been performed within the scope of that person's federal employment. In addition, providing representation must

⁵⁶In addition, representation generally is not available in federal criminal proceedings, and employees may never receive representation in instances in which DOJ has sought an indictment or filed information against the employee. 28 C.F.R. §§ 50.15(a)(4), (7), 50.16(c)(2)(i). Representation may be available in proceedings unrelated to the indictment or information, as appropriate. See §§ 50.15(a)(7), 50.16(c)(2)(i). An indictment or information is the formal charge made by a prosecutor to initiate a criminal proceeding against the accused.

⁵⁷Federal law provides the Attorney General with the authority "to attend to the interests of the United States." 28 U.S.C. § 517. See also 28 U.S.C. § 516 (providing for the Attorney General's authority to conduct litigation "in which the United States, an agency, or officer thereof is a party, or is interested"). DOJ policy statements concerning individual capacity representation are found at 28 C.F.R. §§ 50.15-50.16.

⁵⁸In an "official capacity" suit, the defendant employee is named, but the real defendant is the United States and any adverse judgment would be directed to the actions or resources of the United States. In those cases, DOJ defends the matter just as it does other cases against the United States and the federal employee does not need a separate attorney because there is no risk of personal liability.

be “in the interest of the United States.”⁵⁹ According to DOJ, if an employee acted within the scope of employment, DOJ’s starting assumption is that it is in the interest of the United States to provide representation.

According to DOJ officials, DOJ has long recognized that it serves the government’s interest to represent federal employees who may face personal liability, or a lawsuit, as a result of fulfilling their work responsibilities, even where the employee has made a mistake but was acting in good faith attempting to perform federal duties. As a result, in certain instances, DOJ authorizes legal representation for DOJ attorneys who are involved in legal proceedings for certain actions because the attorneys were acting in their capacity as federal employees, even where they are involved in a concurrent OPR or other internal investigation for the same actions. For example, according to DOJ, assuming that an attorney’s request for representation meets the criteria set forth in DOJ’s policy statement, DOJ could provide representation for a DOJ attorney who is the subject of a state bar proceeding while that attorney is also the subject of an OPR investigation related to the same conduct. However, representation would be limited to the state bar proceeding, not for defense in the OPR investigation.

According to the Director of the Constitutional and Specialized Torts Litigation Section (CSTL) within DOJ’s Civil Division—the primary section that authorizes legal representation for federal employees—internal investigations are relatively common in high-profile matters.⁶⁰ In addition, the Director said that DOJ does not assume that an internal investigation will find that an employee has committed misconduct and, therefore, will not automatically withhold representation from an attorney who is also under investigation. Under its policies, before authorizing representation in a case where there appears to exist the possibility of an OPR investigation of the same subject matter, CSTL (or the relevant litigating

⁵⁹Other factors that may be considered include whether the employee’s actions were in accordance with agency policy, whether the employee has given a truthful account of events, and whether the employing agency has disciplined the employee for the conduct giving rise to the suit.

⁶⁰Federal employees submit requests for legal representation through the employee’s federal agency to the Civil Division, or other appropriate litigation division. 28 C.F.R. § 50.15(a)(1). Litigating divisions must consult with the Civil Division before approving private counsel representation. § 50.16(b).

division) contacts OPR and the relevant prosecuting divisions within DOJ to determine whether there is an open OPR investigation relating to the matter for which representation is sought. CSTL (or the relevant litigating divisions) also contacts OPR and the relevant prosecuting components within DOJ to determine whether the employee requesting representation is also the subject of a federal criminal investigation or a defendant in a criminal case.

DOJ can authorize either direct representation—through a DOJ attorney—or private counsel representation. Direct representation is the most common form of legal representation, and DOJ provides this as the default. During fiscal years 2008 through 2013, DOJ provided direct representation in more than 5,300 matters.⁶¹ However, where there is a conflict of interest among defendants, among other circumstances, DOJ may pay for private counsel representation at DOJ's expense to ensure that each defendant receives appropriate representation for his or her specific circumstances.⁶² We determined that DOJ expended \$3.66 million from fiscal years 2008 through 2013 for private counsel representation for 38 DOJ attorneys, in headquarters or in an USAO, involved in 18 legal proceedings where there were also related OPR

⁶¹A matter may include multiple federal employees.

⁶²DOJ may provide private counsel at DOJ expense as opposed to direct representation in certain circumstances, including where there is a federal criminal proceeding; where conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all; or where representation of the employee could involve the assertion of a position that conflicts with the interests of the United States. In addition, DOJ's practice has been to provide retroactive reimbursement for private counsel representation in situations where DOJ determines that the employee has made a timely and otherwise appropriate request for representation and was acting within the scope of the person's employment, but there is insufficient time due to the nature and/or timing of the proceeding to consider whether representation is in the interest of the United States. In these cases, once DOJ makes its determination on representation, DOJ may authorize continued private counsel representation or direct DOJ representation. We did not identify any instances where DOJ representation provided in a federal criminal proceeding.

investigations.⁶³ This amount was about 23 percent of the total \$16.1 million that DOJ expended for private counsel during this time period for all matters in which at least one DOJ employee was represented.⁶⁴ Costs for private counsel representation across the federal government during this time period totaled \$25.5 million. In the related OPR investigations, DOJ found 12 attorneys to have engaged in professional misconduct.⁶⁵

Situations can arise in a variety of circumstances where DOJ authorizes representation through private counsel at DOJ's expense, and there is also a related OPR investigation. Ten of the 18 proceedings we identified that had a related OPR investigation involved allegations of the failure to disclose certain required evidence in the discovery process. For example:

- In one instance, DOJ authorized private counsel at DOJ's expense for a department prosecutor involved in a state bar proceeding related to allegations that the prosecutor had failed to disclose that a victim stated he did not see who shot him. The bar recommended a 30-day suspension, but the final decision remains pending. Given the bar's involvement, as well as the fact that the attorney left DOJ, OPR closed the matter as an inquiry.
- In another case, the trial court judge found that a number of prosecutors had, among other things, filed a superseding indictment in bad faith and failed to disclose evidence regarding cooperating

⁶³Three matters amounted for more than \$2.7 million of the \$3.66 million total. CSTL identified one additional case where funds obligated in fiscal year 2009 were paid to private counsel for one employee. However, according to CSTL officials, the vast majority of the costs incurred in connection with this case for multiple other employees were paid prior to fiscal year 2008, and all related OPR investigations were issued by January 2005. Therefore, we have excluded this case from our analysis. We also identified an additional 6 attorneys in these matters for whom DOJ approved representation by private counsel; however, no funds were expended for their representation.

⁶⁴DOJ employees include attorneys and employees from all of its components, including the Bureau of Prisons, and law enforcement agencies, such as the Federal Bureau of Investigation, among others.

⁶⁵These 12 attorneys that PMRU or OPR, as applicable, found to have engaged in professional misconduct may or may not have received private counsel representation from DOJ. To ensure the confidentiality of those under investigation, GAO did not collect the names of the attorneys receiving legal representation or who were the subject of the related OPR investigations.

witnesses.⁶⁶ The court of appeals rejected the original finding, among other things, that the trial court had violated the constitutional right to due process of the two lead prosecutors by sanctioning them without notice to rebut the charges against them. Upon remand of the case to the trial court, no further disciplinary proceedings were initiated.⁶⁷ The departmental investigation of these attorneys ultimately found that 1 had exercised poor judgment.

- In another instance, DOJ authorized private counsel representation at DOJ's expense for a prosecutor to respond to a court order to show cause why sanctions should not be imposed for the failure to disclose exculpatory evidence.⁶⁸ After a hearing, the district court found that the violation was unintentional and the prosecutor was unlikely to commit comparable errors in the future, so the court decided not to impose sanctions. A related OPR investigation determined that 1 attorney involved in this case had engaged in professional misconduct in reckless disregard of the attorney's obligations and PMRU imposed a suspension.

Conclusions

The manner in which DOJ attorneys exercise their decision-making authority has far-reaching implications, in terms of justice and effectiveness in law enforcement. Ensuring that federal attorneys are held accountable when they do not meet their professional obligations is important for providing the public with assurance that those contributing to the fair administration of federal laws are not impairing the government's law enforcement efforts and are acting as good government stewards. DOJ has taken actions to help better manage its process for receiving and investigating complaints of professional misconduct, but continues to face a number of factors outside of its control when it comes to identifying misconduct. To help address these factors, DOJ has implemented a variety of training programs for its attorneys and implemented procedures to help detect instances of misconduct that go unreported. However, until DOJ consistently

⁶⁶A superseding indictment replaces a prior indictment. The purpose of the superseding indictment may be, for example, to correct technical errors, such as dates or names, or to add new charges and defendants.

⁶⁷There were also related bar proceedings related to this conduct.

⁶⁸An order to show cause is an order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief.

ensures that all attorneys found to have engaged in misconduct are appropriately disciplined, DOJ cannot effectively address violations of professional standards. By requiring that components demonstrate they actually implemented the discipline imposed for misconduct, DOJ can help provide Congress and the public reasonable assurance that professional misconduct does not go unaddressed. Furthermore, by requiring that DOJ establish near-term milestones for expanding PMRU's jurisdiction to all department attorneys, DOJ can better ensure that it is addressing violations of professional misconduct for all department attorneys in a timely and consistent manner.

Recommendations for Executive Action

To help provide Congress and the public with reasonable assurance that attorneys found to have engaged in professional misconduct are disciplined, and prevent delays in implementing this discipline, we recommend that the Attorney General take the following two actions:

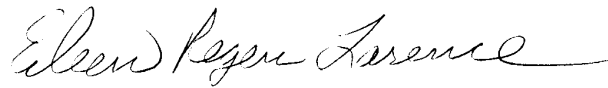
- require components that impose discipline to demonstrate that they actually implemented the discipline—similar to EOUSA's requirement, and
- establish near-term milestones that will hold the department accountable for completing its goal to expand PMRU's jurisdiction to all department attorneys found by OPR to have engaged in professional misconduct.

Agency Comments and Our Evaluation

We provided a draft of this report to DOJ for review and comment. On November 26, DOJ's Audit Liaison Group informed us via email that the department concurred with our recommendations. In terms of our recommendation on expanding PMRU's jurisdiction, DOJ reported that even though the department has not taken steps to do this, the change is under active consideration. DOJ also provided technical comments, which we incorporated in the report as appropriate.

We are sending copies of the report to the Attorney General of the United States and appropriate congressional committees. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8777 or larencee@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.



Eileen R. Larence
Director, Homeland Security and Justice

Appendix I: Objectives, Scope, and Methodology

1. To what extent does the Department of Justice (DOJ) have processes to manage complaints of professional misconduct to discipline attorneys for findings of misconduct, and that advise on performance awards for these attorneys?
2. How do supervisors determine work responsibilities for attorneys accused of, or who have been found to have engaged in, professional misconduct?
3. What are DOJ's policies for paying or reimbursing the attorneys fees and costs of departmental employees in actions relating to allegations of contempt of court or prosecutorial misconduct, and what is the extent to which DOJ is paying for such costs?

To address our first objective, we reviewed DOJ guidance related to establishing and overseeing attorney standards of conduct, including ethical conduct, such as outlined in the U.S. Attorneys' Manual (USAM) and published regulations.¹ We also reviewed previous GAO² and DOJ Inspector General³ reports on DOJ's processes for managing professional misconduct and disciplining attorneys. We assessed federal and agency-wide policies establishing DOJ's processes for identifying, investigating, and disciplining professional misconduct, including OPR's Analytical Framework, which provides guidance on the types of behavior identified as professional misconduct, and how OPR conducts investigations into misconduct. We compared OPR's process for supervisory review of professional misconduct complaints with internal control standards to ensure that OPR management was providing

¹See 28 C.F.R. pts. 45, 77. Also see *U.S. Attorneys' Manual, Standards of Conduct*, 1-4.000, *Personnel Management*, 3-4.000, *Principles of Federal Prosecution*, 9-27.000.

²GAO, *Follow-up Information on the Operations of the Department of Justice's Office of Professional Responsibility*, [GAO-135-01R](#) (Washington, D.C.: Jan. 19, 2001); *Information on the Office of Professional Responsibility's Operations*, [GAO/GGD-00-187](#) (Washington, D.C.: Aug. 14, 2000); *Employee Misconduct: Justice Should Clearly Document Investigative Actions*, [GAO/GGD-92-31](#) (Washington, D.C.: Feb. 7, 1992); and [B-256322](#), Apr. 15, 1994.

³DOJ Office of the Inspector General, Evaluations and Inspections Division, *Review of the Federal Bureau of Investigation's Disciplinary System*, I-2009-002 (Washington, D.C.: May 2009); *Review of the Drug Enforcement Administration's Disciplinary System*, I-2004-002 (Washington, D.C.: January 2004); *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Disciplinary System*, I-2005-009 (Washington, D.C.: September 2009); and *Review of the USAO's and EOUSA's Disciplinary Process*, I-2014-001 (Washington, D.C.: February 2014).

sufficient management oversight over the receipt and review of misconduct complaints.⁴ We reviewed DOJ educational resources available to assist attorneys in meeting their professional responsibilities, as well as requirements for training related to professional responsibility the department required of its attorneys. We reviewed OPR complaint data from fiscal years 2008 through 2013 in order to describe what, if any, changes occurred in the number of complaints and the length of time to complete inquiries and investigations since DOJ's process for managing complaints of professional misconduct changed in 2011. We reviewed OPR complaint data from fiscal years 2008 through 2013 in order to describe what, if any, changes occurred in the number of complaints and the length of time to complete inquiries and investigations since DOJ's process for managing complaints of professional misconduct changed in 2011. We reviewed internal DOJ personnel and disciplinary documentation for 40 cases that the Office of Professional Responsibility (OPR) investigated for professional misconduct between fiscal years 2011 and 2013 to determine the discipline imposed upon these attorneys, and compared DOJ's practices for documenting disciplinary actions with internal controls. We reviewed these cases because they were the first and only cases of professional misconduct, at the time of our review, for which the Professional Misconduct Review Unit (PMRU) has jurisdiction to review and assess for disciplinary action. For each case, we reviewed internal DOJ personnel and disciplinary documentation to determine the discipline imposed upon attorneys found to have engaged in professional misconduct and the extent to which DOJ implemented disciplinary decisions when attorneys were found to have engaged in professional misconduct. We did not test whether discipline imposed was consistent across offenses because the type and length of discipline is dependent upon DOJ's professional judgment. For these attorneys we also determined whether DOJ had provided a performance award or promotion to them within 1 year of PMRU's disciplinary decision.

To identify what constituted a performance award we used criteria provided by the Office of Personnel Management (OPM), which allows agencies to provide one of four types of awards to federal employees: lump-sum cash awards, honorary awards, informal recognition awards, and time-off awards. We also reviewed DOJ-provided data to determine

⁴GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD 00-21.3.1](#) (Washington, D.C.: November 1999).

whether these attorneys had received any DOJ-specific awards. In addition, we interviewed the Deputy Assistant Attorney General for Human Resources and Administration to determine how DOJ decides which employees are eligible to receive an award. We also interviewed senior-level DOJ officials within OPR, PMRU, the Criminal Division, the Executive Office for U.S. Attorneys (EOUSA), and the Professional Responsibility Advisory Office, and the National Discovery Coordinator to obtain their views on how DOJ manages complaints of professional misconduct and identifies actions DOJ has taken to help deter departures from professional standards. We interviewed and reviewed the literature produced by a variety of third-party stakeholders, such as advocacy groups and academics, to obtain information on their perspectives on DOJ's efforts to address professional misconduct. Interviews with these stakeholders cannot be generalized. However, they provide valuable insights about DOJ's abilities to effectively identify and address professional misconduct within the department.

To address our second objective, we sent a questionnaire to 20 selected U.S. Attorneys' Offices (USAO) and 28 litigating sections within selected DOJ components to collect information on the various types of policies and procedures put in place to manage the work activities of attorneys accused of or found to have engaged in professional misconduct. We selected USAOs because officials from EOUSA's General Counsel's Office stated that attorneys within the USAOs would be in the best position to discuss management of the work activities of attorneys alleged or found to have committed professional misconduct. We selected litigating sections to provide additional examples of how the department manages the work activities of attorneys alleged or found to have committed professional misconduct. To ensure that we obtained information across USAOs with varying workloads, we ordered DOJ's 93 USAOs by size using office case workload hours provided in the *U.S. Attorneys' 2012 Statistical Report*, divided these into quartiles, and randomly selected 5 USAOs within each quartile.⁵ We selected litigating sections within DOJ components that have experience managing attorneys subject to a complaint of professional misconduct between

⁵We used the 2012 report because it was the only report publically available at the time of our sample selection.

fiscal years 2008 and 2013.⁶ Using these criteria, we sent questionnaires to the Criminal Division, Civil Rights Division, Tax Division, Environment and Natural Resources Division, Antitrust Division, and the Civil Division. Because we used a nongeneralizable sample, our findings cannot be used to make inferences about other USAOs or DOJ components. We received responses from all 20 USAOs and 28 litigating offices within DOJ components. We did not independently verify the data reported by offices in the questionnaire; however, we interviewed senior-level officials with EOUSA's General Counsel to assess the reasonableness of the data reported. We believe the data are reliable for our purposes. We also interviewed officials within EOUSA to identify what challenges may arise when managing attorneys are accused of, or who have been found to have engaged in, professional misconduct, and to determine how they manage attorneys' work assignments.

To address our third objective, we analyzed DOJ's policies for providing legal representation to federal employees as outlined in 28 C.F.R § 50.15 and 28 C.F.R § 50.16. We assessed agency-wide policy guidelines identifying the circumstances under which federal employees are eligible to receive representation by private counsel at DOJ expense. We collected data from the Constitutional and Specialized Torts Litigation Section (CSTL) of the Civil Division—the primary section that authorizes legal representation for federal employees and maintaining data on these requests—and the Civil Division's Office of Planning and Budget Evaluation, on the number of cases for which DOJ approved legal representation for federal employees, between fiscal years 2008 and 2013. We also collected cost data from DOJ on the total amount the DOJ paid to provide legal representation by private counsel to federal employees between fiscal years 2008 and 2013. We did not collect cost data from DOJ on the amount it expended to provide direct representation because of the time and difficulty required of DOJ to collect this data. We did, however, collect cost data from DOJ on the amount expended for private counsel because DOJ keeps receipts for expenditures made to private counsel firms. We assessed the reliability of both sets of these data by interviewing staff within CSTL and the Civil Division's Office of

⁶We selected only those divisions within DOJ that had an attorney who was charged with the intentional or reckless violation of a clear and unambiguous standard of conduct, rule, statute, or law from fiscal years 2008 through 2013. Even though OPR can investigate law enforcement officials for their role in assisting attorneys with investigating, we did not include DOJ's law enforcement divisions within our sample.

Budget. We concluded that these data were sufficiently reliable for the purposes of this report. To determine the amount paid by DOJ for private counsel representation for its attorneys where there was a related OPR investigation, we asked CSTL to provide data on matters where private counsel representation at DOJ expense was provided to attorneys in a main justice component or USAO, for fiscal years 2008 through 2013. OPR also provided information for each of these matters as to whether there was related OPR inquiry or investigation; OPR may not have investigated all persons to whom representation was granted. To determine the nature of the matters—including whether they involved the failure to disclose certain required evidence in the discovery process—we reviewed bar disciplinary decisions, docket sheets, judicial opinions, and other publically available documents describing allegations of professional misconduct related to these matters.

We conducted this performance audit from September 2013 to December 2014 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: GAO Contact and Staff Acknowledgements

GAO Contact

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Staff Acknowledgements

In addition to the contact named above, Dawn Locke (Assistant Director); Sara Margraf (Analyst-in-Charge); Wendy Dye; Lorraine Ettaro; Eric Hauswirth; Jonathan Hutto; Tracey King; Linda Miller; Jessica Orr; Tovah Rom; Joseph Som-Pimpong; and Janet Temko-Blinder made key contributions to this report.

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