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Report to Congressional Requesters

August 2000

DEPARTMENT OF JUSTICE

Information on the Office of Professional Responsibility's Operations

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United States General Accounting Office
Washington, D.C. 20548

General Government Division

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August 14, 2000

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
House of Representatives

The Honorable William D. Delahunt
House of Representatives

The Department of Justice (Justice) states that its attorneys should be held to the highest ethical standards. Members of Congress, judges, and the media have voiced concerns about the professionalism and conduct of certain Justice attorneys over the past several years. Concerns have also been raised about the process for holding Justice's attorneys accountable to ethical standards. Because of these concerns, you asked us to review Justice's Office of Professional Responsibility (OPR), which is responsible for investigating allegations of misconduct involving Justice attorneys relating to the exercise of the attorneys' authority to investigate, litigate, or provide legal advice. This report responds to your request that we determine:

- how OPR conducts its inquiries into allegations of misconduct by Justice attorneys;
- to what extent OPR's workload, as well as budget, have changed;
- the possible range of disciplinary actions and procedures if employee misconduct is found;
- OPR's oversight relationship with similar offices in other Justice components; and
- the degree to which OPR has implemented our prior recommendations.

In addition, you asked us to provide information on how OPR is monitoring and implementing what are commonly referred to as the Hyde Attorneys Fees Amendment[1] and the Citizens Protection Act.[2] The Hyde Amendment, in general, allows prevailing parties in criminal cases to recover reasonable attorneys' fees where the court finds the position of the United States to be frivolous, vexatious, or in bad faith. Under the Citizens

[1]Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Public Law 105-119, 111 Stat. 2519, section 617.

[2]Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105-277, Div. A, 112 Stat. 2681-118, section 801.

Protection Act, in general, Justice's litigators are subject to certain ethical standards of the state where they conduct their activities.

Results in Brief

With regard to how OPR conducts its inquiries of allegations of misconduct involving Justice attorneys, OPR normally is to initially notify the attorney of the allegations and request a written response to the charges. On the basis of the response, OPR is then to determine whether further investigation is necessary or if the matter can be closed. If further investigation is determined to be warranted, OPR is to interview relevant individuals and analyze necessary documentation. After completing its investigation, OPR is to prepare a report of its findings and, if appropriate, include a recommended range of possible disciplinary actions. If the matter appears to involve a violation of a criminal law, OPR is to refer the matter to Justice's Public Integrity Section or the appropriate U.S. Attorney's office. On the basis of our limited review of case files and discussions with OPR officials, it appears that OPR is following its procedures and internal controls for conducting inquiries into allegations of misconduct by Justice attorneys.

With respect to OPR's workload, the number of authorized staff has remained fairly level at 33 to 35 over the past 4 fiscal years. The on-board staffing levels during this same period, however, have fluctuated from 29 to 34. The authorized funding levels have risen from $3.8 million in 1997 to $4.2 million in 2000, in constant 1999 dollars. The average time OPR spent on each investigation for which it substantiated allegations of misconduct was 9.3 months in fiscal year 1997 and 9.9 months in fiscal year 1998. The average time to complete investigations rose above the 12-month level in fiscal year 1999, to 14.5 months. Of the 15 investigations it closed during the first half of fiscal year 2000, OPR completed 5 within 12 months.

Administrative disciplinary actions that can be taken when professional misconduct is found can range from an oral reprimand to termination of employment, depending on the circumstances of each case, such as the nature and severity of the offense and the experience level of the subject attorney. Justice OPR does not impose final disciplinary actions; rather, it recommends a range of disciplinary actions when its investigations substantiate that attorneys engaged in professional misconduct. It is the responsibility of the head of the office where the attorney works to impose final disciplinary action and report to OPR on what action was taken. The head of the office must get approval from the Deputy Attorney General should he or she want to impose a disciplinary action either more or less severe than the range of disciplinary actions recommended by OPR. For professional misconduct cases substantiated by OPR from fiscal year 1997

through the first half of 2000, the final disciplinary actions taken deviated from OPR's recommended range about 26 percent of the time. Half of the actual disciplinary actions imposed, in those cases, were more severe than OPR's recommended range, and half were less severe.

Justice OPR is also responsible for overseeing, on behalf of the Attorney General, the operations of similar offices in two other Justice components, the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI). These agencies have established their own OPRs, which are tasked with investigating allegations of misconduct by employees in their respective agencies. Justice OPR monitors the investigative and other activities of these offices through the receipt of contemporaneous reports and communications from FBI and DEA officials. Justice OPR also relies on FBI and DEA monthly status reports which show the number of matters opened and the disposition of closed matters, to stay abreast of their activities.

OPR has taken action to implement our prior recommendations. In response to recommendations in our 1992 report,[3] OPR has established written investigative procedures. In response to the findings contained in our 1994 report,[4] the Attorney General issued an order clarifying the jurisdiction for both OPR and Justice's Office of the Inspector General (Justice OIG).

With respect to Hyde Amendment cases, OPR reviews monthly Justice reports on such claims for fees to determine whether there are any matters that should be investigated. At the time of our review, nine matters were in various stages of investigation or inquiry and one had been closed by OPR on June 11, 2000. Regarding implementing the Citizens Protection Act, OPR evaluates the subjects' conduct by applying the most stringent rules of either the state bar association where the subject is licensed or the state where the case took place.

In a letter dated July 28, 2000, OPR's Deputy Counsel stated that Justice had no comments on the substance of our report. However, she provided some technical comments, which we incorporated where appropriate.

Background

The Attorney General created OPR in December 1975 to help ensure that Justice employees continue to uphold high ethical standards. Until 1994,

[3]Employee Misconduct: Justice Should Clearly Document Investigative Actions, (GAO/GGD-92-31, Feb. 7, 1992).

[4]Office of General Counsel Opinion (GAO/OGC-94-24, Apr. 15, 1994).

OPR conducted investigations into allegations of misconduct by any Justice employee. Following the appointment of a permanent Inspector General in 1990, jurisdictional disputes developed and cooperation between OPR and Justice's OIG declined.

To resolve these disputes, the Attorney General issued Justice Order 1931-94 on November 8, 1994, to clarify the respective jurisdictions of OPR and OIG. As defined in that order, OPR has jurisdiction to investigate allegations of professional misconduct involving Justice attorneys. Attorney General Order 1931-94 also gave OPR jurisdiction to investigate allegations of misconduct by law enforcement personnel when they are related to allegations of misconduct by attorneys within OPR's jurisdiction.

Scope and Methodology

To determine how OPR investigates allegations of misconduct, we reviewed

- documents describing OPR investigative policies and procedures, such as OPR's Analytical Framework;
- OPR Annual Reports for fiscal years 1997 and 1998;
- case files and database printouts from OPR's internal case management systems; and
- applicable laws and regulations.

We also discussed OPR investigative procedures and clarified related issues with OPR officials.

To determine the degree to which OPR's workload and budget have changed, we reviewed budgetary and staffing information from OPR officials and Justice's fiscal year 2001 budget submission. Information on OPR performance measures and workload statistics was obtained from Justice's Fiscal Year 2001 Summary Performance Plan, Justice's fiscal year 2001 budget submission, and OPR officials responsible for maintaining workload statistics.

To identify the possible range of disciplinary actions and procedures if employee misconduct is found, we reviewed (1) regulations and policies on Justice's disciplinary processes, including Human Resources Order 1200.1, on Discipline and Adverse Actions; and (2) general guidelines for disciplining attorneys, such as the Model Rules for Lawyer Disciplinary Enforcement published by the American Bar Association (ABA). We also discussed the process for disciplining Justice attorneys with Justice OPR officials.

To determine Justice OPR's oversight relationships with similar offices in other Justice components, we discussed relevant issues with officials from Justice, FBI, and DEA OPRs, as well as Justice's OIG. In addition, we reviewed procedures, statistics, and reports on investigative activities published by relevant Justice components to compare organizational and procedural differences with Justice OPR's counterparts.

To determine the extent to which OPR has implemented our prior recommendations, we reviewed our relevant reports. We also reviewed two 1998 Justice OIG reports concerning travel abuses by certain OPR attorneys. We then interviewed OPR officials to obtain their views on how they had implemented our prior and OIG recommendations, reviewed applicable regulations issued by OPR in response to these reports, and performed separate reviews of OPR's case files and internal case management system in order to determine the degree to which OPR had implemented our prior recommendations.

To determine OPR's efforts relative to the Hyde Amendment and the Citizens Protection Act, we

- reviewed the respective statutes;
- held discussions with OPR officials on OPR's role in implementing these provisions;
- reviewed regulations promulgated pursuant to these statutes;
- reviewed OPR documentation and correspondence related to implementation of these provisions; and
- discussed the impacts of these laws and provisions with external organizations, such as the ABA.

We performed our work from January to July 2000 in accordance with generally accepted government auditing standards. We requested comments on a draft of this report from the Attorney General or her designee. OPR's Deputy Counsel responded in a letter dated July 28, 2000, which we discuss at the end of this report.

Data Accuracy and Reliability

Generally, we relied on the workload statistics, such as the numbers of complaints received, provided to us by OPR. In reviewing how OPR conducts its investigations, we did not directly observe how OPR employees perform their investigative duties, nor did we reinvestigate closed OPR matters. However, we reviewed a limited number of case files to determine (1) whether required documentation was included to indicate what had been done during the investigations, (2) who had been interviewed, and (3) what conclusions had been reached by OPR. From a

list of 698 closed cases handled by OPR attorneys during fiscal years 1997 through 1999, we reviewed 8 randomly selected cases. The results of these case reviews are not projectible to the universe of closed cases. To demonstrate the types of matters handled by OPR's program analysts, OPR officials provided us with an additional 16 cases closed during the same period. We also reviewed a printout summary from OPR's case management database for all of the investigations in which OPR substantiated the allegations of misconduct for fiscal year 1997 through the first half of fiscal year 2000.[5]

How OPR Conducts Inquiries Into Allegations of Misconduct

On the basis of our limited review of case files and discussions with OPR officials, it appears that OPR is following its procedures and internal controls for conducting inquiries into allegations of misconduct by Justice attorneys. Generally, the files that we reviewed included sufficient documentation, although varying in degrees of organization, to allow one to understand what had been done during the investigation, who had been interviewed, and what conclusions were reached by OPR.

OPR's Investigative Procedures

Under OPR's investigative procedures, upon receiving a written complaint alleging misconduct, a program analyst is to make a preliminary determination as to whether the allegations fall within OPR's jurisdiction and an inquiry is warranted, or whether it should be closed administratively. A complaint may be closed administratively if, for example, it

- should be referred to another Justice component, for example, OIG or the FBI's OPR;
- should be consolidated with another matter already open;
- lacks sufficient evidence to warrant an inquiry; or
- involves issues still before the courts.

OPR's Deputy Counsel is to review and approve any determination made by a program analyst to close a matter administratively.

If the complaint involves matters that appear to be a violation of a criminal law, OPR is to refer the matter to Justice's Public Integrity Section or the appropriate U.S. Attorney's office. If a complaint is within OPR's jurisdiction and an inquiry is warranted, the matter is to be assigned to an OPR Assistant Counsel. The Assistant Counsel is to notify the subject of the allegations and request a written response to those allegations. On the basis of the subject's written response, the Assistant Counsel handling the

[5]Fiscal year 2000 data are as of March 31, 2000.

matter can either (1) close the matter as unsubstantiated with a written memorandum to the file or (2) determine that additional information is needed to resolve the matter and convert the inquiry to a full investigation. According to OPR officials, the decision to convert an inquiry to an investigation is approved by the Deputy Counsel. Further, the decision to close an inquiry or investigation is approved by both the Counsel and Deputy Counsel in OPR.

According to OPR officials, when a full investigation is warranted, the Assistant Counsel is to conduct interviews of the subject, complainant, any witnesses, and others as deemed appropriate. The Assistant Counsel is also to collect and review any documentation submitted by the parties involved. On the basis of this investigation, the Assistant Counsel is to prepare a report of the findings in the matter. The Counsel and the Deputy Counsel review and approve the report. If the allegations are substantiated as professional misconduct, OPR is to recommend a range of disciplinary actions to the head of the office where the subject works, who in turn is responsible for deciding what final disciplinary actions are taken.

See appendix I for a flowchart that outlines OPR's general process for handling complaints alleging misconduct.

OPR's Budget and Workload Statistics

OPR's budget for fiscal year 2000 authorized 35 staff positions—21 attorneys and 14 support staff (e.g., program analysts, paralegals, and clerical staff) to carry out its responsibilities for investigating allegations of misconduct against Justice attorneys. As of March 31, 2000, OPR had 31 staff on board—18 attorneys and 13 support staff (4 program analysts, 3 paralegals, 2 Freedom of Information Act specialists, 1 computer specialist, and 3 administrative support staff). In constant dollars, OPR's authorized funding has remained fairly stable from fiscal year 1997 to fiscal year 2000. Table 1 shows OPR's authorized and actual staffing levels and authorized funding levels since fiscal year 1997.

Table 1: OPR's Authorized and Actual Staffing and Funding Levels

	Fiscal year			
Budget	**1997**	**1998**	**1999**	**2000**[a]
Staffing levels				
Authorized	33	35	35	35
Actual	29	31	34	31
Authorized funding (in millions)	$3.7	$4.1	$4.3	$4.3
Funding in constant 1999 dollars (in millions)	$3.8	$4.2	$4.3	$4.2

[a]Actual staffing level is as of March 31, 2000.

Source: OPR and Gross Domestic Product Price Index.

Number of Complaints Received

Over the past 3 fiscal years, OPR has received about 1,000 complaints each year of alleged misconduct by Justice personnel. About half of the complaints received were handled by OPR's program analysts and were closed administratively for reasons such as

- the allegations of misconduct did not fall within OPR's jurisdiction,
- the allegations lacked sufficient evidence to warrant an inquiry, or
- the allegations involved issues that were still before the courts.

Table 2 shows the number of complaints received by OPR for the last 3 full fiscal years and the first half of fiscal year 2000, and the disposition for the closed investigations.

Table 2: Number of Complaints Received by OPR During Fiscal Years 1997 to 2000

	Fiscal year			
Number of matters	**1997**	**1998**	**1999**	**2000[a]**
Complaints received	1,085	982	1,340	506
Investigations opened	98	77	88	58
Investigations closed	124	83	63	47
Of the closed investigations, number in which "professional misconduct"[b] was found	20	12	12	5
Of the closed investigations, number in which OPR found the Justice attorney exercised "poor judgment"[c] (lesser offense)	16	15	12	12
Number of complaints handled by OPR attorneys as inquiries or miscellaneous matters (not investigations), and closed	370	468	428	149
Number of matters handled by OPR program analysts as miscellaneous matters and closed	579	409	776	303

[a]Fiscal year 2000 data are as of March 31, 2000.

[b]OPR officially recognizes professional misconduct at two levels: intentional misconduct or reckless disregard. According to OPR, "an attorney engages in intentional misconduct when (1) the attorney acts with the purpose of violating an obligation imposed by law, applicable rule of professional conduct, or department policy or regulation or (2) acts knowing that the natural and probable consequences of his or her action is to violate the obligation. An attorney acts in reckless disregard of an obligation when the attorney (1) knows or should know of the obligation, (2) knows or should know that his or her conduct involves a substantial likelihood that the obligation will be violated, and (3) nonetheless engages in the conduct, which is objectively unreasonable under the circumstances."

[c]OPR defines poor judgment as when an attorney is faced with alternative courses of actions, the attorney 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.

Source: OPR.

Sources of Complaints

Complaints of misconduct allegations may be received from a variety of sources, such as judges, opposing attorneys, other department personnel, or private citizens. Table 3 shows the sources of the complaints for the investigations that OPR opened during fiscal year 1997 through the first half of fiscal year 2000.

Table 3: Sources of Complaints for Investigations Opened by OPR

Source of complaint	Fiscal year 1997	1998	1999	2000[a]
Justice employees or components	42	29	11	15
Judicial findings or criticism	32	28	53	33
Private attorneys	10	10	14	4
Private parties	7	5	7	3
Other federal, state, or local agencies	5	5	2	1
Congressional referrals	1	0	0	0
Inmates	1	0	1	2
Total	**98**	**77**	**88**	**58**

[a]Fiscal year 2000 data are as of March 31, 2000.

Source: OPR.

Types of Allegations

Over the years, OPR has developed codes to categorize the allegations for reporting purposes in its case tracking system. A complaint can contain more than one allegation of misconduct. For example, a complainant may write to OPR that an Assistant United States Attorney (AUSA) improperly disclosed information about a case to the media, that he misrepresented information during the trial, and that he made improper remarks during closing arguments. In this instance, the allegations would be coded by OPR as unauthorized disclosure of confidential, including grand jury, information; misrepresentation to the court and/or opposing counsel; and improper remarks to a grand jury, during trial, or in pleadings. Table 4 shows the types of allegations received for the investigations that OPR closed from fiscal year 1997 through the first half of fiscal year 2000.

Table 4: Types of Allegations for Investigations Closed by OPR

Type of allegations	Investigations, Fiscal year 1997	1998	1999	2000[a]	Inquiries, Fiscal year 1999[b]	2000[a]
Abuse of authority, including abuse of prosecutorial discretion	43	44	35	14	44	37
Unauthorized disclosure of confidential, including grand jury, information	15	13	12	4	9	16
Misrepresentation to the court and/or opposing counsel	25	21	13	5	3	9
Improper remarks to a grand jury, during trial, or in pleadings	12	10	23	19	0	6
Failure to comply with court orders or federal rules	2	12	8	6	0	1
Conflict of interest	16	3	7	2	6	5
Failure to perform/dereliction of duty	20	15	12	3	7	18
Failure to comply with certain federal requirements regarding the discovery and disclosure of evidence	11	12	8	12	3	4
Failure to comply with DOJ rules and regulations	3	4	6	3	11	7
Subornation of perjury/failure to correct false testimony	5	3	6	3	3	5
Fitness to practice law	10	4	3	4	4	7
Interference with defendant's rights	2	1	3	0	2	7
Other[c]	7	8	8	4	2	6
Total	**171**	**150**	**144**	**79**	**94**	**128**

[a]Fiscal year 2000 data are as of March 31, 2000.

[b]The inquiries database was not implemented until July 1999.

[c]Includes instances of failure to comply with civil discovery; improper contact with represented parties; unauthorized practice of law; lateness (i.e., missing filing dates); and failure to comply with congressional discovery request.

Source: OPR.

Judicial Findings or Criticisms

As shown in table 3, one of the major sources of complaints of misconduct is judicial findings or criticisms. Specifically, during trial proceedings, a judge could admonish an AUSA for improper conduct. A judge could also contact the U.S. Attorney in that district, who would then refer the matter to OPR. In some cases, the judge might contact OPR directly.

Transcripts of judicial decisions or opinions could also include references of judicial admonishments or criticisms of an AUSA made by the judge. According to OPR officials, they routinely conduct searches of legal databases to determine if these types of criticism have occurred. Table 5 shows the disposition of closed investigations initiated by OPR as a result of judicial findings or criticisms.

Table 5: Disposition of Closed Investigations Initiated by OPR as a Result of Judicial Findings or Criticisms

	Fiscal year			
Disposition	**1997**	**1998**	**1999**	**2000**[a]
Professional misconduct	8	4	6	3
Poor judgment	2	6	4	2
Performance problems, mistakes, or other criticisms	0	1	0	5
No finding of misconduct, poor judgment, or other criticism	13	17	17	13
Total	**23**	**28**	**27**	**23**

[a]Fiscal year 2000 data are as of March 31, 2000.

Source: OPR.

Performance Goals

OPR's one key performance goal is to fully investigate and resolve allegations of misconduct in less than 12 months. This goal is linked to Justice's departmentwide strategic goal of strengthening oversight and integrity programs. According to OPR officials, in addition to the 12-month goal for investigations, OPR also has an informal, internal goal of completing all inquiries or converting them to investigations within 6 months. As part of Justice's fiscal year 2001 Summary Performance Plan, OPR included baseline trend data and specific target levels for the number of investigations it expected to complete within 12 months for fiscal years 2000 and 2001. For example, OPR established target levels of 80 and 90 investigations to be completed within 1 year in fiscal years 2000 and 2001, respectively.

We reviewed a computer summary from OPR's case management system for all of the investigations closed for fiscal year 1997 through the first half

of fiscal year 2000 in which the allegations were substantiated for either professional misconduct or for poor judgment. During fiscal years 1997 and 1998, OPR on average took less than 12 months to complete the investigations. However, for fiscal year 1999 and the first half of fiscal year 2000, the average time for OPR to complete the investigations increased to 14.5 and 17.7 months, respectively. In May 1999, OPR formally adopted a performance goal of fully investigating allegations of professional misconduct by Justice attorneys and resolving them in less than 12 months. Table 6 shows the number of cases OPR completed in 12 months or less and the average months to complete investigations, by fiscal year.

Table 6: Number of Investigations Completed in 12 Months or Less and the Average Number of Months to Complete Investigations, by Fiscal Year

Fiscal year	Number of cases closed	Number of cases completed in less than 12 months	Percentage of cases completed in less than 12 months	Average number of months per case
1997	36	25	69%	9.3
1998	27	18	67%	9.9
1999	21	7	33%	14.5
2000[a]	15	5	33%	17.7[b]
Total	**99**	**55**	**56%**	**11.8**

[a]Fiscal year 2000 data are as of March 31, 2000.

[b]The average time, in months, for OPR to close investigations for fiscal year 2000 might be lower for the entire fiscal year because, generally, investigations were closed faster towards the end of each fiscal year.

Source: GAO analysis of computer summary from OPR's case management system.

OPR attributed the increase in the average length of time it took to close fiscal year 2000 investigations to an increase in the caseloads of its attorneys while staffing levels remained largely unchanged. OPR officials stated that this was due to a hiring freeze initiated by Justice as of November 23, 1999. OPR also noted that it was not fully staffed during this period and that, as of March 31, 2000, it had only 18 attorneys. OPR believed it needed a staff of 40, including 24 attorneys, to meet its performance goals of completing investigations within 12 months and inquiries within 6 months. In addition, according to OPR, it conducted a number of protracted investigations into highly sensitive and complex matters during this period.

Disciplinary Actions and Procedures If Misconduct Is Found

When professional misconduct is found, OPR is to recommend a range of disciplinary actions consistent with its established procedures. OPR officially recognizes professional misconduct at two levels: intentional misconduct or reckless disregard. According to OPR,

"An attorney engages in intentional misconduct when (1) the attorney acts with the purpose of violating an obligation imposed by law, applicable rule of professional conduct, or department policy or regulation or (2) acts knowing that the natural and probable consequences of his or her action is to violate the obligation. An attorney acts in reckless disregard of an obligation when the attorney (1) knows or should know of the obligation, (2) knows or should know that his or her conduct involves a substantial likelihood that the obligation will be violated, and (3) nonetheless engages in the conduct, which is objectively unreasonable under the circumstances."

Justice Order 1752.1A, "Standard Schedule of Disciplinary Offenses and Penalties," dated April 27, 1981, contained a schedule of recommended ranges of disciplinary actions for various misconduct activities that were to be applied departmentwide. Justice Order 1200.1, issued August 25, 1998, rescinded Order 1752.1A and authorized each Justice division or bureau to develop unit-specific recommended ranges of disciplinary actions for employee misconduct. According to OPR officials, the superceded Justice disciplinary order contained little attorney-specific guidance on imposing appropriate administrative penalties. In the absence of a prescribed range of recommended discipline, OPR makes recommendations on the basis of what it has recommended in past similar investigations where misconduct was substantiated. OPR maintains an internal document that lists the ranges of disciplinary actions recommended according to the types of misconduct found, what factors were considered in formulating OPR's range of recommended discipline, and what final actions were taken. According to OPR officials, this document develops a body of precedent for recommending discipline that is consistent with similar findings of misconduct.

The head of the office where the subject works (e.g., Justice's Civil Division) is responsible for determining the final discipline to be imposed. Once discipline is imposed subsequent to an OPR finding of misconduct, the office is supposed to report back to OPR on what final disciplinary actions were taken. Any deviation by the head of the office from OPR's recommended range of actions, either less or more severe, must be approved by the Deputy Attorney General.

We reviewed the internal document that OPR maintains to track the recommended ranges of disciplinary actions for investigations where misconduct allegations were substantiated. For those investigations closed in fiscal year 1997 through the first half of fiscal year 2000, the final actions taken deviated from what OPR recommended in about 26 percent of the investigations. Of those that deviated, half were more severe than what OPR recommended and half were less severe.

OPR can also substantiate the allegations but, instead of finding professional misconduct, find that the subject used poor judgment. According to OPR,

> "An attorney exercises poor judgment when, faced with alternative courses of actions, the attorney 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."

If OPR finds that a Justice attorney exercised poor judgment, OPR makes no recommendations of disciplinary action since professional misconduct was not found. Instead, the matter is referred to the head of the office where the attorney works for "consideration in a management context." After reviewing OPR's findings, the head of the office where the subject works has the discretion to decide whether disciplinary measures are appropriate, training or counseling is needed, or no further actions are necessary. OPR also followed up with the offices to determine what, if anything, had been done and incorporated this information into its internal document for tracking disciplinary actions.

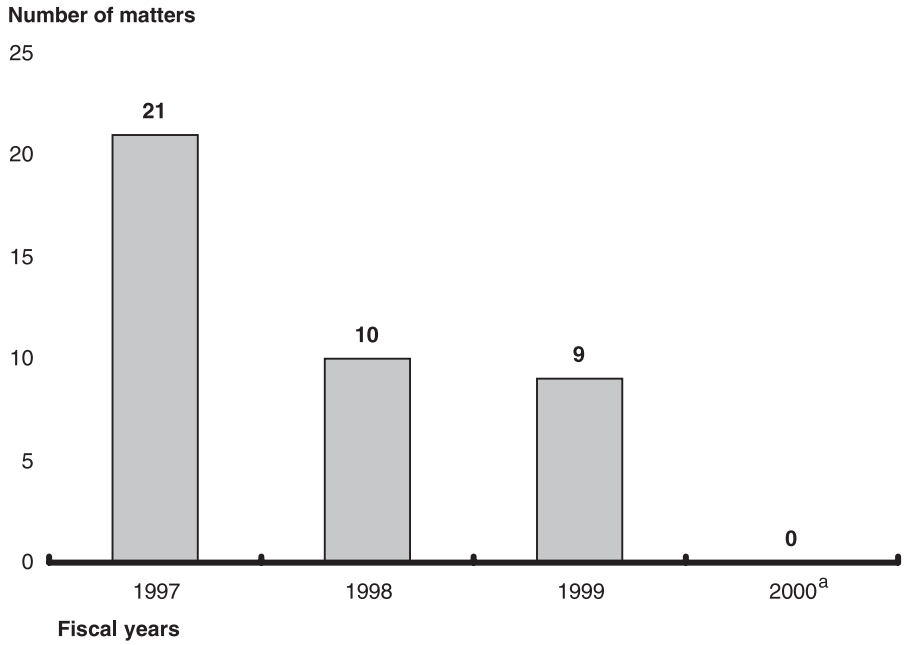
OPR can also determine that the allegations are unfounded or that a subject simply made a mistake in performing his/her duties to investigate, litigate, or prosecute. In these instances, OPR closes the case as unsubstantiated; that is, it could find no basis to support the allegations and the matter is closed without sanctions.

As noted earlier in this report, if the matter involved appears to be a violation of a criminal law, OPR refers the matter to Justice's Public Integrity Section or the appropriate U.S. Attorney's office.

Referrals to State Bar Associations

After completing its investigation, if Justice OPR substantiates that a Justice attorney committed intentional misconduct, its policy is to notify the state bar(s) of which the attorney is a member of these findings. Figure 1 shows the number of matters referred to state bars for fiscal year 1997 through the first fiscal year half of 2000.

Figure 1: Number of Matters OPR Referred to State Bar Associations



[a]According to an OPR official, there have been no referrals in fiscal year 2000 to date because OPR does not notify state bars as to findings of intentional misconduct by Justice attorneys until the applicable disciplinary process has "run its course." Once final discipline has been imposed, then the state bar is notified. Fiscal year 2000 data are as of June 2000.

Source: OPR.

According to OPR officials, they encourage state bars to defer to OPR in investigating complaints against Justice attorneys because they believe that OPR is in the best position to conduct the investigations. OPR officials believe that they have greater and easier access to Justice employees and department documentation. When state bars do defer to OPR, OPR reciprocates by forwarding its relevant investigative reports to the bar association with jurisdiction over the Justice attorney.

OPR's Working Relationships With Other Similar Justice Components

Justice OPR has some limited oversight responsibilities over similar offices in two other Justice components, FBI and DEA. These agencies have established their own OPRs, which are tasked with investigating allegations of misconduct by employees in their respective agencies. Justice OPR's oversight functions include monitoring matters referred to and being investigated by FBI and DEA OPRs, opining on prosecutive issues related to investigations, and conducting joint investigations in specialized situations.

Justice OPR's oversight of the FBI and DEA OPRs includes information sharing. The FBI and DEA OPRs provide monthly lists of matters opened and resolved to Justice OPR. In addition, when it opens an investigation of employee misconduct, FBI OPR sends a written notice to Justice OPR. These lists include the disposition of the allegations in each closed investigation, the subject's position, and other information. Justice OPR officials said that they review these lists for any irregularities, such as unusually light or severe disciplinary actions that were imposed. In addition, Justice OPR publishes an annual report that includes case statistics and sample summaries from closed investigations conducted by FBI and DEA OPRs.

Justice OPR has limited oversight responsibility, and both the FBI and DEA OPRs operate fairly autonomously. Justice OPR and these two offices have separate jurisdictions and distinct case file systems. The FBI and DEA OPRs also have more specific investigative procedures, formal policies that direct the preparation of investigative reports, and formal internal disciplinary and appeals processes. In addition, FBI and DEA OPRs' investigative procedures tend to be more structured. According to FBI and DEA OPR officials, they commonly use signed, sworn statements as an investigative tool; polygraph tests to help resolve factual issues; and court reporters to fully document interviews when serious allegations are present.

Officials from Justice, FBI, and DEA OPRs characterized their working relationships as cooperative. For instance, Justice OPR officials said that they are available for consultation on professional responsibility matters. Also, Justice OPR conducts joint investigations with the FBI or DEA OPRs, such as in the case of overlapping jurisdictions when Justice attorneys and employees of those agencies are involved in alleged misconduct. The FBI and DEA OPRs can also transfer matters normally under their jurisdiction to Justice OPR if a conflict of interest is present, such as in cases in which the allegations involve officials from their OPR.

Justice OPR officials stated that when they receive a complaint concerning an employee under the FBI or DEA OPR's jurisdiction, absent any special circumstances, they refer the matter to the respective OPR. The referral includes a cover memorandum signed by the Deputy Counsel and the original complaint. Once a matter is referred to FBI or DEA OPR, Justice OPR closes the matter in its computer database and does not generally track the specific referrals since the subjects are outside its jurisdiction. However, with significant matters, such as allegations that might rise to the level of criminality, Justice OPR can request that the FBI and DEA

OPRs keep it advised on the status of the complaint and the resolution of any resulting investigations.

Changes OPR Has Made as a Result of Our Prior Reports

We have issued reports on OPR operations in 1992, 1994, and 1995.[6] Of these three reports, only our 1992 report contained recommendations to correct OPR deficiencies. In the 1992 report, we recommended that the Attorney General direct the Counsel, OPR, to

- establish basic standards for conducting OPR investigations;
- establish standards for case documentation, including requirements for the contents of each case file, such as a listing of potential interview subjects in the case, a chronology of actions taken, and a rationale for actions taken or not taken and for decisions reached;
- as appropriate, review the case files to identify any possible systemic changes that might be needed to Justice's procedures and operations; and
- follow up more consistently on the results of misconduct investigations done by other components and what disciplinary actions, if any, were taken as a result of all misconduct investigations—both those done by OPR attorneys and those done by other components within Justice. This information should be part of the files.

OPR has taken action to respond to each recommendation. On May 12, 1992, OPR issued internal guidelines for investigating allegations of misconduct and for documenting in the case files the investigative work done, including the rationale for why some actions may not have been completed and, for substantiated cases, what disciplinary actions were taken. The internal guidelines also indicated that OPR would require that a review of case files for systemic problems be done on at least an annual basis. As noted on page 6 of this report, OPR appears to be adhering to these guidelines.

With respect to identifying possible systemic problems, OPR provided examples of policy changes it recommended on the basis of its reviews of case files. For example, OPR found that some recent court cases might indicate an increased judicial willingness, under certain circumstances, to declare nonfederal participants "functionally part" of a federal prosecutorial team, who would be subject to those disclosure responsibilities applicable to the U.S. Attorneys. Accordingly, OPR suggested that the Attorney General consider advising all districts to provide guidance to nonfederal case agents on the procedures for preserving all notes, witness statements, and other records relating to a

[6]GAO/GGD-92-31; GAO/OGC-94-24; and GAO/OSI-95-8.

case. In response to OPR's suggestion, the Executive Office for U.S. Attorneys advised that it had made available to all U.S. Attorney's offices nationwide a letter reminding agents of their responsibilities to preserve notes made during their investigations. See appendix II for further details about this and other examples of OPR's reviews of systemic problems.

Finally, OPR has taken action to consistently follow up on the final disciplinary actions taken. As noted on page 12 of this report, the heads of the offices where the employees work are responsible for deciding what the final disciplinary actions will be and for reporting to OPR on what actions were taken. An OPR official said that the offices generally do report back to them on what actions were taken. However, according to OPR officials, OPR also periodically follows up with individual Justice components to obtain this information. OPR tracks the final disciplinary actions via an internal document that lists (1) the OPR case number and subject name(s), (2) OPR's finding, (3) OPR's recommended range of disciplinary actions, and (4) the final action(s) taken.

Our other two reports relating to OPR's operations and responsibilities did not contain recommendations. The 1994 report[7] was an opinion by our Office of General Counsel concerning the jurisdictional disputes over misconduct matters between OPR and Justice's OIG. In response to this opinion, the Attorney General issued an order clarifying the jurisdiction for both OPR and OIG. The 1995 report[8] evaluated the extent to which OPR had addressed our 1992 recommendations.

Justice OIG Reports

During our work, we became aware of two Justice OIG reports, issued in April 1998 and July 1998, relating to travel abuses by certain OPR attorneys. In January 1998, while the OIG was conducting its investigation of travel abuses, OPR's then Acting Counsel reexamined its travel regulations and, on January 21, 1998, distributed a memorandum entitled "Policy on Approval of Official Travel." This internal OPR memo laid out travel policies, such as use of the per-diem allowance method and that actual subsistence would be approved on a case-by-case basis. In addition, according to OPR officials, all OPR managers attended a meeting in February 1998 with Justice Management Division's Consolidated Administrative Office staff, on further instructions for compliance with Justice's travel regulations.

[7]GAO/OGC-94-24.

[8]Department of Justice: Office of Professional Responsibility's Case-Handling Procedures (GAO/OSI-95-8, Mar. 31, 1995).

OPR's Role in Monitoring and Implementing the Hyde Amendment and the Citizens Protection Act

The Hyde Attorneys Fees Amendment, enacted November 26, 1997, as part of Justice's fiscal year 1998 appropriations act,[9] allows a defendant acquitted in a criminal case to recover reasonable attorneys' fees and other litigating expenses where the federal government's position is found by the court to be vexatious, frivolous, or in bad faith.

Hyde Amendment cases provide another mechanism by which OPR can become aware of matters relating to alleged misconduct by Justice attorneys. The Appellate Section of Justice's Criminal Division produces monthly reports summarizing all claims for attorneys' fees submitted pursuant to the Hyde Amendment. According to OPR officials, they review these reports to determine if the facts of the case constitute grounds for an OPR investigation. OPR does not ordinarily investigate possible attorney wrongdoing until the final outcome of the case is known. OPR officials said this is because a claim for attorneys' fees under the Hyde Amendment may result in additional litigation, which could produce more facts relevant to an OPR investigation.

According to OPR officials, at the time of our review, OPR was looking into nine matters, in various stages of investigation or inquiry, that stemmed from Hyde Amendment claims and had closed one matter on June 11, 2000. Also, Justice recently promulgated an internal regulation (DOJ Order 2030, signed by the Attorney General on May 9, 2000) that designated responsibilities for Justice components for paying awards relevant to Hyde Amendment claims.

The Citizens Protection Act,[10] otherwise known as the McDade-Murtha Act, requires Justice litigators, including prosecutors in U.S. Attorney offices, to be subject to the ethical standards of the state where such attorney engages in that attorney's duties. Justice's implementing regulations further defined the phrase "where such attorney engages in that attorney's duties" to mean either (1) if a case is pending, the rules of ethical conduct adopted by the court before which the case is pending or (2) if there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure.

In performing its responsibilities regarding the Citizens Protection Act, according to the documents we reviewed OPR initially determined the state bar(s) of which the subject was a member. In its notification letter to

[9]P.L. 105-119, 111 Stat. 2519, Section 617 (1997).

[10]P.L. 105-277, section 801.

a subject of an OPR investigation, OPR requested that the subject identify each state in which he or she was licensed to practice law. OPR evaluated the attorney's conduct by applying the most stringent rules of either the licensing state(s) or the state where the case took place. According to OPR officials, this technique is necessary because Justice attorneys may appear for the government in the courts of any jurisdiction, regardless of their state of licensure, and because many Justice attorneys are licensed to practice law by more than one state bar.

An OPR official described a hypothetical situation in which a Justice attorney can handle a case in Virginia but also be subject to Ohio bar rules. Justice attorneys have to be members of at least one state bar, but not necessarily the one in which the case is pending. Therefore, a Justice attorney arguing a case in Virginia could be held liable for misconduct as defined by Ohio state bar rules, if the Justice attorney belongs to the Ohio bar and the Ohio rules are more stringent. Conversely, in this hypothetical situation, the attorney's conduct would be evaluated against the Virginia rules if those bar rules were more stringent.

According to OPR officials, all Justice attorneys should be knowledgeable of the rules of the state bar(s) to which they belong, and Justice maintains a clearinghouse of all states' bar rules in its Professional Responsibility Advisory Office.

Agency Comments

We requested comments on a draft of this report from the Attorney General or her designee. OPR's Deputy Counsel responded in a letter dated July 28, 2000, that Justice had no comments on the substance of the report. However, she provided some technical comments, which we incorporated where appropriate.

As arranged with the Committee, we plan no further distribution of this report until 30 days after its date. We will then send copies to Senator Orrin G. Hatch, Chairman, and Senator Patrick J. Leahy, Ranking Minority Member, Senate Committee on the Judiciary; Representative John Conyers, Jr., Ranking Minority Member, House Committee on the Judiciary; the Honorable Janet Reno, Attorney General; the Honorable Donnie R. Marshall, Administrator, DEA; the Honorable Louis Freeh, Director, FBI; and the Honorable Robert L. Ashbaugh, Acting Inspector General, Department of Justice. We will also make copies available to others upon request.

Please contact Weldon McPhail or me on 512-8777 if you or your staff have any questions. Other major contributors to this report are acknowledged in appendix III.

Richard M. Stana
Associate Director, Administration
of Justice Issues

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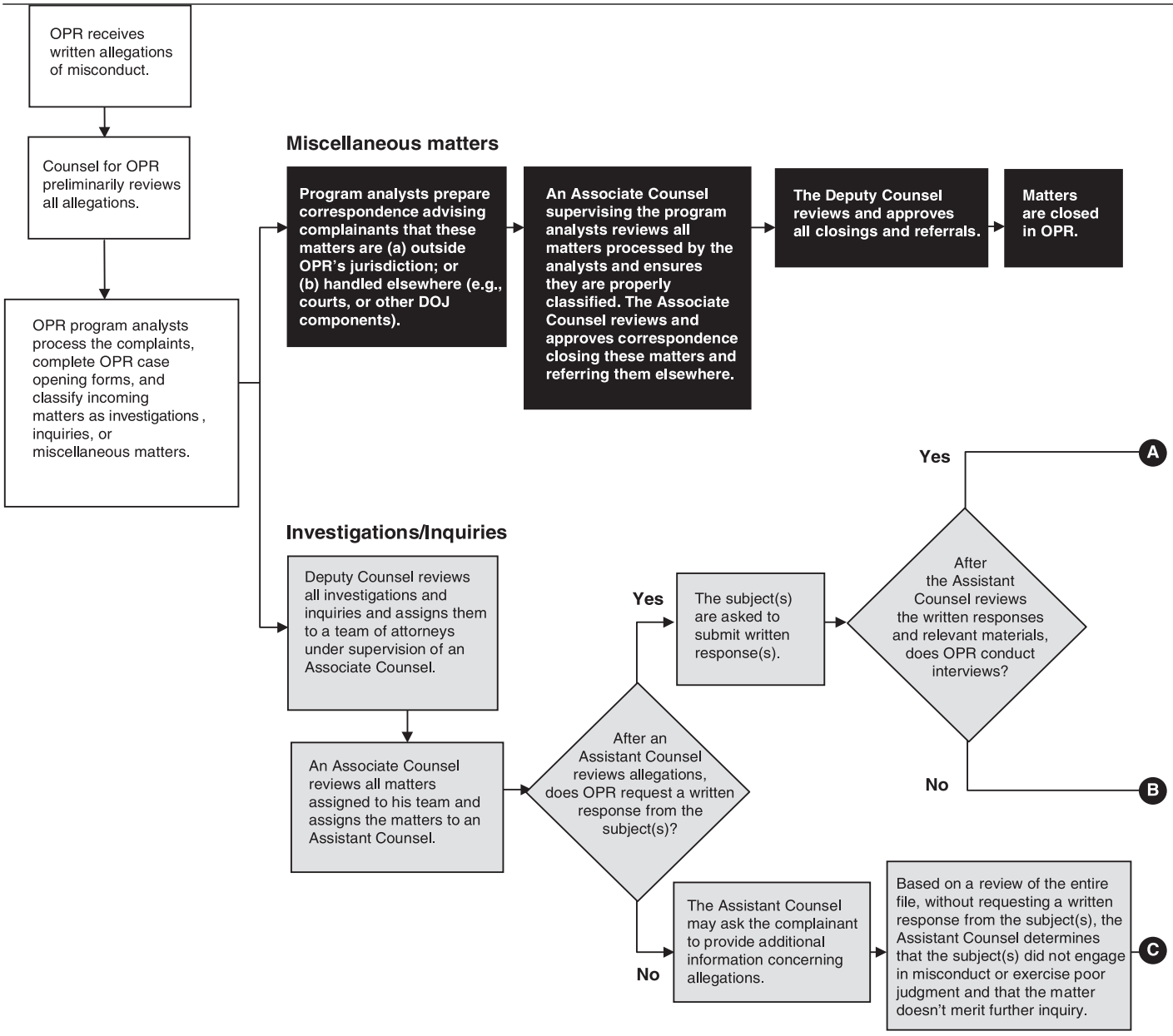
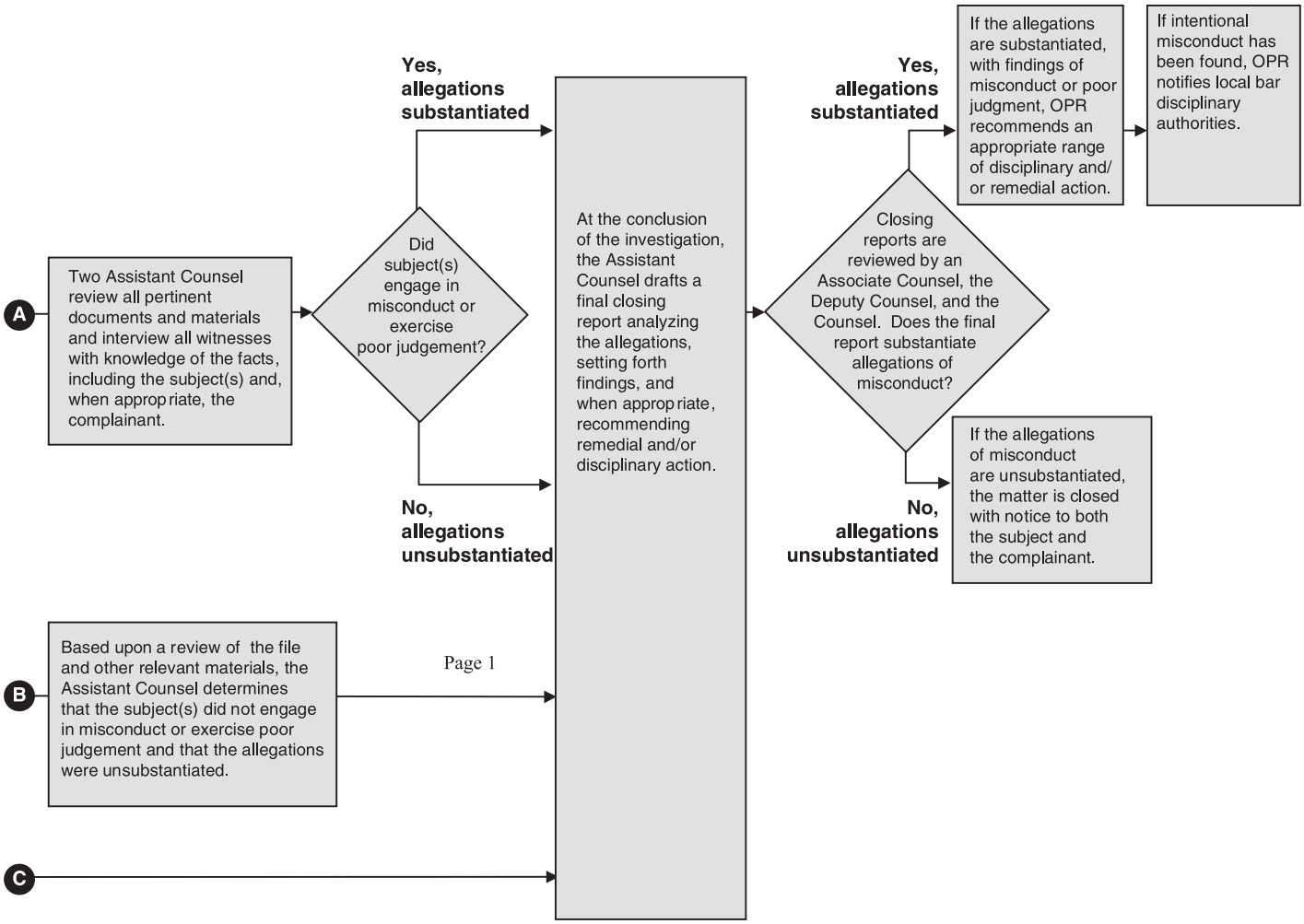
Abbreviations

ABA	American Bar Association
AUSA	Assistant United States Attorney
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
OIG	Office of the Inspector General
OPR	Office of Professional Responsibility

Flow Chart of OPR's Investigative Procedures




A
Two Assistant Counsel review all pertinent documents and materials and interview all witnesses with knowledge of the facts, including the subject(s) and, when appropriate, the complainant.
Did subject(s) engage in misconduct or exercise poor judgement?
Yes, allegations substantiated
No, allegations unsubstantiated
B
Based upon a review of the file and other relevant materials, the Assistant Counsel determines that the subject(s) did not engage in misconduct or exercise poor judgement and that the allegations were unsubstantiated.
Page 1
C
At the conclusion of the investigation, the Assistant Counsel drafts a final closing report analyzing the allegations, setting forth findings, and when appropriate, recommending remedial and/or disciplinary action.
Closing reports are reviewed by an Associate Counsel, the Deputy Counsel, and the Counsel. Does the final report substantiate allegations of misconduct?
Yes, allegations substantiated
If the allegations are substantiated, with findings of misconduct or poor judgment, OPR recommends an appropriate range of disciplinary and/ or remedial action.
If intentional misconduct has been found, OPR notifies local bar disciplinary authorities.
No, allegations unsubstantiated
If the allegations of misconduct are unsubstantiated, the matter is closed with notice to both the subject and the complainant.

Source: OPR

Examples of Policy Changes Recommended by OPR as a Result of Case File Reviews

One of the recommendations we made in our 1992 report[1] was that OPR should, as appropriate, review the case files to identify any possible systemic changes that might be needed to Justice's procedures and operations. In response to our recommendations, OPR issued internal guidelines, that among other things, required that a review of case files for systemic problems be done on at least an annual basis. We asked OPR for examples of instances where it had identified systemic problems and made recommendations for departmentwide or unit-specific changes. OPR provided the following examples.

Documentation of Responsibilities of Nonfederal Agents Involved in Criminal Investigations

In July 1995, OPR advised the Attorney General of a potential problem illustrated by a 1994 opinion of the U.S. District Court in Massachusetts, United States v. Mannarino.[2]

In Mannarino, the Court found that a state police officer was "functionally part of the United States Attorney's prosecutorial team" and was subject to those disclosure responsibilities applicable to the United States Attorneys.[3] The Court was highly critical of the government's "decision to leave the preservation of materials whose disclosure was plainly required to a person unprepared by disposition or training to perform that function."[4]

OPR noted that this and other recent cases may signal an increasing judicial willingness in criminal cases to declare nonfederal agencies "functionally part" of federal prosecutions. The U.S. Attorney for the District of Massachusetts prepared a standard written notice to be given to all nonfederal case agents participating in joint federal/nonfederal investigations, directing them to preserve all notes, witness statements, and other records relating to the case. OPR suggested that the Attorney General consider whether such advice should be provided in all districts.

In August 1996, the Executive Office for U.S. Attorneys (EOUSA) advised that it had made available to all U.S. Attorneys' offices nationwide a letter reminding agents of their responsibilities to preserve notes made during investigations.

[1] GAO/GGD-92-31.

[2] 850 F. Supp. 57 (D. Mass. 1994).

[3] Id. at 64, 68.

[4] Id at 71.

Disclosure and Discovery Obligations and Conflicts of Interest

In May 1996, OPR advised the Attorney General that "[t]he frequency with which improper disclosures, conflicts of interest, and failure to satisfy discovery obligations arise in misconduct allegations leads us to suggest that you instruct appropriate components to stress these categories in on-going Departmental training."

In August 1996, EOUSA advised OPR that it had designed a training course on the handling of complex litigation that included instruction on these issues. The training course was offered first in a district that OPR reported as having an especially high rate of allegations of professional misconduct.

Witness Cooperation in Multiple Jurisdictions

In September 1996, OPR noted that it was investigating three complaints of alleged misconduct arising out of friction between U.S. Attorneys' offices over the joint use of witnesses. OPR advised the Attorney General that such problems "may sometimes threaten and even undermine successful prosecutions of significant cases," and that such problems could be expected to increase "as multi-jurisdictional prosecutions arising out of related schemes become more common." OPR stated that "[t]he Department may want to implement procedures to address the resulting frictions between jurisdictions."

In August 1997, EOUSA advised all U.S. Attorneys to instruct Assistant U.S. Attorneys to bring matters of this nature to the U.S. Attorneys' attention for resolution, with the help, if necessary, of Justice's Criminal Division.

Attorney Bar Memberships

In November 1996, OPR advised the Attorney General that it had become aware that a Justice attorney who had been found by OPR to have engaged in intentional professional misconduct was not an active member of any bar. OPR had discovered this information in the process of implementing Justice's policy on notifying the appropriate state bar of the finding of intentional professional misconduct. OPR suggested that "the Department consider asking the Office of Attorney Personnel Management to maintain a current list (updated annually) of bar memberships for all Department attorneys. This will help OPR in its inquiries: our attorneys report, as might be expected, that asking subjects of investigations for their bar memberships often seems to chill the interviews. Such a list will also assist the Department by helping to insure that all attorneys are active members of a bar in good standing."

In May 1997, Justice adopted a new policy requiring all Justice attorneys to certify annually that they are duly licensed and authorized to practice law in at least one jurisdiction, and to identify the jurisdiction.

GAO Contacts and Staff Acknowledgments

GAO Contacts

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Acknowledgments

In addition to those named above, Seto Bagdoyan, Geoffrey Hamilton, Andrew Hoffman, Tim Outlaw, and Barry Seltser made key contributions to this report.

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