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United States General Accounting Office  
Washington, DC 20548

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January 19, 2001

The Honorable Henry J. Hyde  
House of Representatives

The Honorable William D. Delahunt  
House of Representatives

Subject: Follow-up Information on the Operations of the Department of Justice's  
Office of Professional Responsibility

Because of concerns raised about the professionalism and conduct of certain Department of Justice (Justice) attorneys, as well as the process for holding them accountable to ethical standards, you asked us to provide information about certain aspects of the operations of Justice's Office of Professional Responsibility (OPR). OPR is responsible for investigating allegations of misconduct involving Justice attorneys' exercise of their authority to investigate, litigate, or provide legal advice. On August 14, 2000, we issued a report on OPR operations in response to that request.<sup>1</sup>

As a follow-up to the August report, you asked that we provide you with information on seven specific issues relating to OPR operations.<sup>2</sup> These questions dealt with the types of allegations, the sources of allegations, and the results of investigations that OPR conducted during fiscal years 1997 through the first half of 2000 for various categories of investigations; what information about findings of misconduct are placed in an attorney's personnel folder and for how long; how many OPR investigations involved attorneys who had resigned or retired from Justice; whether OPR followed up on investigations it closed for administrative reasons; and OPR's handling of matters relative to the Hyde Amendment<sup>3</sup> and the Citizens Protection Act.<sup>4</sup>

To obtain this information, we met with OPR officials to discuss the specific issues and identify possible sources of data. We relied on the information provided by OPR in preparing this letter. We performed our work from September through November, 2000, in accordance with generally accepted government auditing standards.

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<sup>1</sup>*Department of Justice: Information on the Office of Professional Responsibility's Operations*, (GAO/GGD-00-187, Aug. 14, 2000).

<sup>2</sup>Representative Hyde requested this information as the former Chairman of the Committee on the Judiciary.

<sup>3</sup>Section 617 of Public Law 105-119, commonly referred to as 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.

<sup>4</sup>Under the Citizens Protection Act (P.L. 105-277, section 801), in general, Justice litigators are subject to certain ethical standards of the state where they conduct their activities.

## Results

The specific issues you asked us to follow up on and the responses to those issues are enumerated below.

### Question 1

**For each investigation for which OPR substantiated misconduct allegations, either for professional misconduct or poor judgment, what were the source of the allegations, the specific allegations and OPR's findings, the range of disciplinary actions recommended by OPR, and the final disciplinary actions? And, if the matter was referred to the appropriate state bar association(s), did OPR know what actions, if any, the state bar(s) took against the subject?**

Enclosure I summarizes the results of each of the 49 closed investigations for fiscal years 1997 through the first half of 2000 in which OPR found that attorneys had engaged in professional misconduct. The enclosure shows, among other things, the source of the allegations, the specific allegations and OPR's findings, and the disciplinary actions recommended and taken.

For those cases in which OPR determined that an attorney had exercised poor judgment, OPR officials said that they had summary data from its case tracking system only since fiscal year 1998. They said that they would have had to manually review the case files for the fiscal year 1997 cases to determine the information requested. Enclosure II summarizes the results of each of the 39 closed investigations for fiscal years 1998 through the first half of 2000 in which OPR found that attorneys had engaged in poor judgment. The enclosure shows, among other things, the source of the allegations, the specific allegations, and the disciplinary actions taken.

Concerning investigations in which OPR substantiates professional misconduct allegations, OPR officials told us that it is their procedure to inform the state bar association(s) where an attorney is licensed to practice only in those cases in which the attorney was found to have engaged in intentional misconduct. They said OPR does not have a standard procedure for following up with state bar associations to determine what actions, if any, the associations took in response to OPR's findings. An OPR official also told us that privacy concerns may prevent some state bar associations from informing OPR about any disciplinary actions imposed. Thus, OPR usually does not know what actions state bar associations may take against attorneys who were found to have engaged in intentional misconduct. If OPR had any interactions with state bar associations in any of these matters, it is noted in the tables in enclosures I and II.

### Question 2

**What, if anything, is placed in the attorney's personnel folder with regard to findings of professional misconduct or poor judgment, and how long is this information kept in the attorney's folder?**

OPR officials said that what is placed in the attorney's official personnel folder is governed by Office of Personnel Management (OPM) regulations and other guidelines on what materials may be placed in an federal employee's personnel folder.<sup>5</sup> According to OPM, a Standard Form 50 documenting official personnel actions, such

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<sup>5</sup>OPR officials also noted that they keep all investigative case files for 5 years and then send them to the Federal Records Center for retention for 30 years.

as a suspension or removal, would be made a permanent part of an attorney's personnel folder. A written reprimand would be placed in an attorney's personnel folder temporarily, in accordance with OPM's guidance. On August 25, 1998, Justice issued DOJ 1200.1, Human Resources Order, which provided more detailed instruction on both of these matters. According to DOJ 1200.1:

- Standard Form 50s concerning adverse actions are permanent records that must remain in the official personnel folder unless cancellation is ordered by a third party or is required by a valid settlement agreement.
- A reprimand will be placed in the official personnel folder for a period not to exceed 3 years (or less, if the department component has established a shorter maximum duration either unilaterally or through collective bargaining), at which time it must be removed.
- The retention period begins the day that the reprimand is delivered to the employee, even if it is not actually filed in the official personnel folder until later.
- A reprimand may be removed prior to expiration if it is determined by management that it should be removed. A decision on whether to remove a reprimand sooner is not a grievable matter and may be made only by the official issuing the reprimand, his or her successor, or someone organizationally superior to that official.
- Reprimands must be removed from the official personnel folder when the employee leaves government service or transfers to another agency.
- Copies of removed reprimands may be maintained for statistical purposes by the personnel office and can be used in certain circumstances to support more serious discipline for later offenses.

### **Question 3**

**How many cases involved attorneys who resigned or retired as a result of an OPR investigation, and were the appropriate state bar association(s) informed of the misconduct allegations against these individuals?**

OPR officials said that they could not categorically determine whether any Justice attorneys resigned or retired as a result of an OPR investigation. They said that it would be difficult to show a cause-and-effect relationship and indicated that many of the attorneys would vehemently deny that they resigned or retired because of an investigation. However, OPR officials said that once an investigation is opened, they usually complete it if other Justice employees were involved or the allegations involved serious institutional issues, regardless of whether an attorney resigns or retires. If they decide to close an investigation without completing it, OPR officials said that they are to get approval from the Deputy Attorney General. In any case, if the attorney was no longer employed by Justice, no disciplinary actions could be imposed.

OPR's Deputy Counsel said that OPR does not have a policy of automatically informing the appropriate state bar associations about allegations involving Justice attorneys who have resigned or retired. They said, generally, such referrals were made only in those cases involving matters of a serious nature or in cases in which the Justice attorney refused to cooperate in OPR investigations. Enclosure III summarizes 49 investigations that OPR identified that it had closed during fiscal years 1997 through the first half of 2000 and that involved attorneys who had resigned or

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retired.<sup>6</sup> The enclosure shows, among other things, the source of the allegations, the specific allegations, and OPR's findings. If OPR had any interactions with state bar associations in any of these matters, it is noted also in the table in the enclosure.

#### **Question 4**

**Regarding matters that OPR closed administratively because they involved issues that were still before the courts, had OPR "flagged" these cases to be investigated at a later date?**

OPR officials said that in cases in which OPR administratively closed a matter because it involved issues that were still before the courts, the matter was coded separately in OPR's case tracking database. According to OPR officials, they periodically print out a list of these matters and have the Assistant Counsels check the status of the cases to decide whether the matters should be revisited or closed. If an issue before the court was denied, such as a motion for dismissal that was based on alleged prosecutorial misconduct, OPR officials said they would usually close the matter. However, if a judicial authority finds that misconduct by a Justice attorney occurred, then the U.S. Attorney's Office where the attorney is assigned forwards this finding to OPR or OPR will discover the matter as a result of its periodic checks, according to OPR officials.

#### **Question 5**

**Concerning the OPR investigations that were triggered by Hyde Amendment claims, what were the specifics of the one investigation that OPR had closed, and how long have the other investigations been open?**

OPR officials said that they do not open an investigation every time a litigant files a claim pursuant to the Hyde Amendment. According to OPR officials, OPR reviews every claim filed under the Hyde Amendment to determine if any facts or issues arising from Hyde-related matters warrant an inquiry by OPR. As of September 30, 2000, the officials said that there had been 95 claims filed since the passage of the Hyde Amendment in November 1997. According to OPR, the government settled the claims in two cases, and the defendants prevailed on their claims in seven cases (four of which were on appeal). OPR has initiated 3 inquiries and 8 investigations on 11 claims.<sup>7</sup> Two of the inquiries and the eight investigations were still pending in OPR, and one inquiry had been closed. In addition, OPR officials said that OPR continues to monitor all cases in which there are pending claims for fees pursuant to the Hyde Amendment.

Concerning the Hyde Amendment-related case that OPR closed, the inquiry was opened in August 1999 and closed in June 2000. In this case, the defendant alleged that the Internal Revenue Service had engaged in vexatious conduct and sought attorney's fees and expenses. OPR concluded that no Justice attorney had exercised poor judgment or engaged in misconduct in connection with this case. Enclosure IV provides OPR's summaries of the allegations for the 11 Hyde Amendment-related cases and shows when each was opened.

#### **Question 6**

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<sup>6</sup>Some of the investigations noted in enclosure III are also summarized in enclosures I and II.

<sup>7</sup>Since our August 2000 report (GAO/GGD-00-187) was issued, OPR opened an additional Hyde Amendment-related case.

**Concerning the Citizens Protection Act, how does OPR monitor the Act, how many times have conflicts arisen from applying the rules from different bar associations, and how often was professional misconduct or poor judgment found in those situations?**

OPR's Deputy Counsel said that OPR routinely ask attorneys against whom allegations have been made to identify each state in which they are licensed to practice law. OPR then follows Justice guidelines, as shown below, to determine which ethical rules govern the conduct of the attorney under certain situations.

1. In most instances, an attorney's conduct is governed by the ethical rules of the court before which the attorney is litigating (or conducting a grand jury) or by the rules of the attorney's state of licensure.
  - a. If the attorney's conduct is related to a court proceeding (or grand jury investigation) under prevailing choice-of-law principles, the ethical rules of the court generally govern the attorney's conduct.
  - b. If, however, the ethical rules of the attorney's state of licensure are more restrictive than the court's ethical rules, the rules of the state of licensure govern the attorney's conduct, unless the state's rules contain a choice-of-laws provision that provides that under such circumstances the ethical rules of the court apply. If the state's rules do not contain a choice-of-law provision, the more restrictive rule applies.
2. If the conduct in question is not related to a court proceeding (or grand jury investigation), the ethical rules of the attorney's state of licensure apply, unless the rules of that state provide otherwise. Thus, if the rules of the attorney's state of licensure contain a choice-of-law provision that applies the rules of the court before which the matter will eventually be brought, then the court's ethical rules govern.
3. If the conduct in question is not related to an ongoing court proceeding (or grand jury investigation) and the ethical rules of the court before which the action will eventually be brought are more restrictive than the rules of the attorney's state of licensure, then the ethical rules of the court govern.

OPR's case tracking system does not include information on (1) the number of times OPR had encountered conflicting ethical rules in its investigations or (2) how many times misconduct was found in those instances. Thus, according to OPR, the information is simply not available.

**Question 7**

**For those investigations OPR conducted as a result of judicial findings or criticism and found that no misconduct or poor judgment had occurred, what were the allegations that were made?**

Table 1 shows the types of allegations that were made for those investigations OPR conducted as a result of judicial findings or criticism and found that no misconduct or poor judgment had occurred.

**Table 1: Types of Allegations for Investigations OPR Conducted as a Result of Judicial Findings or Criticism**

Type of allegation	Fiscal year			
	1997	1998	1999	2000 <sup>a</sup>
Abuse of authority, including abuse of prosecutorial discretion	4	4	5	5
Unauthorized disclosure of confidential, including grand jury, information	0	1	1	1
Misrepresentation to the court and/or opposing counsel	3	5	7	3
Improper remarks to a grand jury, during trial, or in pleadings	1	2	9	0
Failure to comply with court orders or federal rules	2	2	6	1
Failure to perform/Dereliction of duty	1	4	1	0
Failure to comply with certain federal requirements regarding the discovery and disclosure of evidence	5	5	4	4
Failure to comply with Justice rules and regulations	2	0	0	0
Subornation of perjury/Failure to correct false testimony	1	1	0	2
Fitness to practice law	1	0	1	0
Interference with defendant's rights	1	1	0	0
<b>Total</b>	<b>21</b>	<b>25</b>	<b>34</b>	<b>16</b>

<sup>a</sup>Fiscal year 2000 data are as of March 31, 2000.  
Source: OPR.

Following the Committee's request for information on the types of allegations that were made for these investigations, OPR indicated, in a memorandum to us, that it had conducted additional research on these cases. According to OPR's Deputy Counsel, this additional research, drawn from the case investigative reports and the OPR attorneys who conducted the investigations, permits a more detailed analysis of its approach to the investigation of these matters.

OPR acknowledged that the large number of cases (60) in which the courts either seriously criticized a Justice attorney or found misconduct, in which OPR found no misconduct, poor judgment, or other criticism, could raise the question of whether OPR had been too lenient in judging attorney conduct. OPR's Deputy Counsel said, however, that there are sound reasons why a court may find misconduct where OPR did not. According to OPR, unlike a court, which must rule on the record before it, OPR delves into the matter and makes an assessment of the attorney's handling of the case. Focusing on the obligation or standard that allegedly was violated, OPR examines all of the facts to determine whether an attorney acted intentionally or in reckless disregard of the applicable obligation or standard, exercised poor judgment, made a mistake, or exhibited a performance problem. According to OPR, courts, whose primary function is to ensure that a defendant's rights are protected, do not and cannot undertake the same focused investigation on the reasons for the attorney's conduct.

As previously noted, OPR conducted additional research on the 60 cases that were included in the category, "No finding of misconduct, poor judgment, or other criticism" in table 5 of our August 2000 report. OPR's Deputy Counsel said that a closer examination of the cases shows that actual disagreements between the courts and OPR were not as common as they appeared, and that OPR and the courts actually agreed in about half of the cases. OPR provided additional information on 33 of these 60 cases.

1. In 18 cases, while OPR did not find professional misconduct or poor judgment, it did criticize the attorneys' conduct and/or took note of the better practice or preferred course of conduct for Justice attorneys. In light of this additional information, OPR believes these matters were erroneously included in the "No finding of misconduct, poor judgment, or other criticism" category in table 5 of our August 2000 report.<sup>8</sup> These cases, according to OPR, should have been in the "Performance problems, mistakes, or other criticism" category in that table.
2. In five cases, a court of appeals reversed, vacated, or disagreed with a district court's criticisms of the attorneys.<sup>9</sup>
3. In three cases, a district court or bankruptcy court later reversed, vacated, or disagreed with its own previous criticism or finding of misconduct.
4. In five cases, a district court subsequently stated that it did not believe the attorneys' conduct was intentional.<sup>10</sup>
5. In two cases, OPR agreed with a court's criticism but concluded that the errors were attributable to agents, not attorneys.
6. In three cases, OPR closed its investigation without making findings for various administrative reasons, including one matter that OPR referred to a state bar disciplinary authority for investigation.
7. In one case, the court criticized state law enforcement agents and not federal prosecutors.
8. In one case, the matter was opened on the basis of a complaint from a retired state judge who was not acting in a judicial capacity.<sup>11</sup>

Enclosure V provides OPR's summaries of those cases in category 1 above, enclosure VI provides OPR's summaries of those cases in categories 2 through 8 above, and enclosure VII provides OPR's summaries of those cases not in any of the above categories.

On the basis of its additional research, OPR revised table 5 on page 10 of our August 2000 report showing the disposition of closed investigations that OPR had done as a result of judicial findings or criticism. Table 2 below shows OPR's revised information.

**Table 2: Disposition of Closed Investigations Initiated by OPR as a Result of Judicial Criticism or Judicial Findings**

Disposition	Fiscal year				Total
	1997	1998	1999	2000 <sup>a</sup>	
Professional misconduct	8	4	6	3	21

<sup>8</sup>In 1 of these 18 matters, OPR criticized the conduct of 1 of the attorneys involved but did not criticize 2 other attorneys who had been criticized by the court.

<sup>9</sup>One of these five matters is also included in category 1 above, because OPR criticized the conduct of the attorney.

<sup>10</sup>Four of these five matters are also included in category 1 above, because OPR criticized the conduct of the attorney.

<sup>11</sup>This matter was excluded from OPR's revised statistics since it was not opened on the basis of judicial criticism.

Poor judgment	2	6	4	2	14
Performance problems, mistakes, or other criticisms	4	8	3	9	24
No finding of misconduct, poor judgment, or other criticism	9	9	14	9	41
<b>Total</b>	<b>23</b>	<b>27</b>	<b>27</b>	<b>23</b>	<b>100</b>

<sup>a</sup>Fiscal year 2000 data are as of March 31, 2000.  
Source: OPR.

### Agency Comments

We requested comments on a draft of this letter from the Attorney General or her designee. OPR's Deputy Counsel responded in a letter dated January 9, 2001, that they had no comments on the substance of our draft letter. However, OPR provided some technical comments, which we incorporated where appropriate.

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As arranged with the Committee, we plan no further distribution of this letter 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; and the Attorney General. We will also make copies available to others upon request. This letter will also be available on GAO's home page at <http://www/gao.gov>.

Please contact Weldon McPhail, Assistant Director, or me on 512-8777 if you or your staff have any questions.



Richard M. Stana  
Director, Justice Issues

Enclosures – 7

**INVESTIGATIONS CLOSED WITH FINDINGS  
OF PROFESSIONAL MISCONDUCT  
FISCAL YEARS 1997 THROUGH 2000 (AS OF MAR. 31, 2000)**

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Apr. 5, 1995 Closed: Oct. 31, 1996	Private party	Reckless disregard (misrepresentations to the court and defense counsel; interference with defendant's rights)	10-day to 25-day suspension	After EOUSA proposed a 12-day suspension, the subject resigned his position as an AUSA later that year.	Not referred
AUSA  Opened: Oct. 10, 1995 Closed: Oct. 30, 1996	U.S. Court of Appeals	Intentional misconduct (improper closing argument; misrepresentations to the court and the Department of Justice)	7-day to 14-day suspension	EOUSA proposed the subject's removal from a position as AUSA on the basis of his handling of several cases. The subject was also suspended for 7 days. After serving the suspension, the subject grieved it. Thereafter, the subject signed a settlement agreement pursuant to which he resigned his position as an AUSA and remained on administrative leave for 120 days as an SAUSA. By signing the agreement, the subject effectively waived his right to pursue his challenge of the suspension.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary <sup>b</sup> once the summary has been reviewed and approved within Justice's prescribed review process.
AUSA  Opened: July 10, 1996 Closed: Oct. 31, 1996	U.S. District Court	Reckless disregard (improper remarks to a grand jury)	Written reprimand	The USAO sought approval from the ODAG to impose an admonishment rather than a reprimand. The ODAG approved a written admonishment.	Not referred
Attorney  Opened: July 29, 1996 Closed: Oct. 16, 1996	U.S. Court of Appeals	Reckless disregard (failure to comply with court orders and court rules)	Written reprimand	The subject was transferred and reassigned elsewhere within the Criminal Division. This transfer was deemed sufficient punishment, and no reprimand was issued.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Two AUSAs  Opened: June 29, 1994 Closed: Dec. 31, 1996	Private party	Intentional misconduct (abuse of authority [plea agreement]; improper contact with represented parties)	Subject #1: 5-day to 10-day suspension  Subject #2: written reprimand to 3-day suspension	Subject #1 received a 5-day suspension.  Subject #2 was issued a written reprimand.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.
AUSA  Opened: July 25, 1995 Closed: Dec. 24, 1996	U.S. District Court	Intentional misconduct (improper contact with represented parties)	10-day to 20-day suspension. OPR also recommended that the subject be required to attend an ethics training course and that for the next 6 months to 1 year, he be assigned to work under much closer supervision than the subject was given during the period involving the conduct at issue.	The subject received a 13-day suspension and was directed to attend an ethics course.	Referral was made to the appropriate state bar.
AUSA  Opened: Oct. 18, 1995 Closed: Feb. 3, 1997	FBI Special Agent	Intentional misconduct (misrepresentation to the court)	None	The subject resigned before conclusion of investigation. No discipline was imposed.	Referral was made to the appropriate state bar.
Immigration Judge  Opened: Mar. 1, 1995 Closed: Feb. 28, 1997	Board of Immigration Appeals	Intentional misconduct (fitness to represent the government as an INS judge); intentional misconduct (abuse of authority)	Recommended that subject be removed from his position as Immigration Judge and that he receive discipline ranging from a long suspension (over 30 days) to termination from Justice.	EOIR proposed that the subject be terminated. The subject agreed to submit a request for voluntary retirement in exchange for Justice canceling the proposed termination and removing any mention of it from his personnel file.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Immigration Judge  Opened: Aug. 4, 1995 Closed: Mar. 3, 1997	Private attorney	Reckless disregard (fitness to represent the government as an INS judge); intentional misconduct (abuse of authority)	Recommended a 10-day to 25-day suspension (OPR report). EOIR proposed termination on the basis of findings contained in OPR's report and other evidence considered by EOIR.	The subject was terminated.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.
AUSA  Opened: Apr. 16, 1996 Closed: Feb. 25, 1997	U.S. District Court	Reckless disregard (failure to comply with discovery; failure to perform). The subject recklessly disregarded his obligations to comply with court orders concerning discovery and to prepare the case for trial.	Written reprimand to 3- day suspension	The USAO issued a proposal for a 3-day suspension. After the subject submitted replies to the proposal, the suspension was modified to 2 days, which the subject served. The subject filed a grievance, and the 2-day suspension was sustained. The subject resigned and served under a time- limited SAUSA appointment. The subject filed a second- level grievance of his suspension, and it was mitigated to a 1-day suspension.	Not referred
AUSA  Opened: Oct. 4, 1996 Closed: Mar. 10, 1997	USAO	Intentional misconduct (fitness to practice law/ shoplifting)	Termination	The subject resigned following the conclusion of OPR's investigation. No discipline was imposed.	Referral was made to the appropriate state bar. (No public summary of this matter was drafted because it does not meet the criteria for public disclosure.)

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Two AUSAs  Opened: Dec. 23, 1996 Closed: May 1, 1997	USAO	Intentional misconduct (misrepresenting information to the court) –both subjects	Subject #1: 1-day to 3-day suspension  Subject #2: written reprimand	The USA proposed a 1-day suspension for subject #1 and an admonishment for subject #2. Subsequently, after considering the response of the subject to the proposal, the suspension was mitigated to a reprimand with the subject agreeing to be placed in a probationary status for 2 years.	Referral was made to the appropriate state bar.
AUSA and FBI Management Official  Opened: June 25, 1996 Closed: May 1, 1997	Criminal Division	Intentional misconduct (unauthorized disclosure of classified information) - both subjects	Written reprimand to 60-day suspension for each subject	Letters of caution were issued to both subjects, but no discipline was imposed because the deciding official disagreed with OPR's findings of intentional professional misconduct. The ODAG approved the deciding official's recommendation. Thus, OPR's finding was abrogated by Justice and provided no basis for a bar referral for the AUSA.	Not referred
AUSA  Opened: May 30, 1996 Closed: May 30, 1997	U.S. Magistrate Judge	Reckless disregard (failure to comply with <u>Giglio</u> <sup>c</sup> discovery)	Written reprimand to a short (3-day to 4-day) suspension	The subject received a written reprimand.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Apr. 21, 1997 Closed: June 4, 1997	Office of the Deputy Attorney General	Intentional misconduct (abuse of authority - improper use of official information); intentional misconduct (failure to perform/dereliction of duty – specifically, insubordination)	5-day to 25-day suspension	The subject was suspended for 5 days. The subject grieved the suspension, and the deciding official considered the matter and sustained the 5- day suspension. Subsequently, the ODAG rescinded the 5- day suspension and imposed a letter of reprimand but did not alter OPR's finding of intentional misconduct.	OPR intends to refer the matter to the appropriate state bar, now that the disciplinary process is complete. (No public summary of this matter was drafted because it does not meet the criteria for public disclosure of OPR's findings.)
AUSA  Opened: Mar. 3, 1996 Closed: June 6, 1997	U.S. District Court	Reckless disregard (failure to comply with discovery obligations; defied court orders; misrepresentations to the court; failure to correct false testimony; commented on the decision of one of the defendants not to testify)	7-day to 14-day suspension	The USAO requested authorization from the ODAG to deviate downward from OPR's recommended range of discipline. The USA proposed to issue a letter of reprimand and require the subject to take a course in professional responsibility. The ODAG authorized a 3- day suspension, which was proposed. A decision letter was issued imposing a 3- day suspension, which the subject did not grieve.	Not referred
AUSA  Opened: Dec. 4, 1996 Closed: July 11, 1997	USAO	Intentional misconduct (conflict of interest and fitness to practice law). The subject engaged in a sexual relationship with client of Justice case to which he was assigned and lied to his supervisor when asked about the relationship.	Lengthy suspension to termination	The USA prepared a proposed removal letter for the subject for his professional misconduct. Rather than receive the proposed removal letter, the subject elected to resign immediately in return for an appointment as a paid SAUSA, not to exceed 90 days.	Referral was made to the appropriate state bar.

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Aug. 22, 1997 Closed: Aug. 28, 1997	USAO	Intentional misconduct (misrepresentations to the court)	90-day suspension to termination	The subject resigned the position as an AUSA after receiving a letter from EOUSA proposing removal. The subject died during a 60-day appointment as SAUSA.	Not referred because the subject died.
AUSA  Opened: Dec. 23, 1996 Closed: Sept. 3, 1997	USAO	Intentional misconduct (misuse of office)	Termination	After a draft proposal letter recommending removal was provided to the subject, he began discussing resignation with USAO management. Subsequently, he was issued the formal proposed removal letter as well as additional materials that were relied upon in proposing removal. Thereafter, the subject signed a settlement agreement in which he agreed to resign his position as an AUSA and to serve a brief appointment as a SAUSA.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.
AUSA  Opened: Mar. 7, 1997 Closed: Sept. 15, 1997	U.S. District Court	Reckless disregard (abuse of authority)	Written reprimand to short suspension	The subject received a written reprimand.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Attorney  Opened: Aug. 15, 1997 Closed: Dec. 5, 1997	INS	Intentional misconduct (conflict of interest)	5-day to 10-day suspension and recommendation that the subject be recused in any matter involving the private attorney; OPR initiated a second investigation on the subject to examine allegations made by INS that certain assertions the subject made to OPR in the first investigation conflicted with information in the subject's personnel file.	The subject resigned in 1998. INS had put consideration of OPR's disciplinary recommendation on hold pending the outcome of OPR's second investigation on the subject. (In June 1998, OPR referred the allegations of falsification and misrepresentation to the FBI and closed the second investigation.)	OPR is holding its state bar referral in abeyance pending consideration of whether to offer the subject an opportunity to review and respond to OPR's findings and conclusions.
AUSA  Opened: June 24, 1997 Closed: Jan. 8, 1998	USAO	Reckless disregard (misrepresentation to the court)	Written reprimand to 3-day suspension	The subject received a written reprimand.	Not referred
AUSA  Opened: Nov. 20, 1996 Closed: Jan. 9, 1998	U.S. District Court	Reckless disregard (misrepresentation to the court)	Oral admonishment to written reprimand	The subject received an oral admonishment.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
<p>Attorney</p> <p>Opened: Aug. 15, 1997 Closed: Jan. 12, 1998</p>	<p>U.S. District Court</p>	<p>Intentional misconduct (failure to comply with court orders/federal rules)</p>	<p>15-day suspension to termination</p>	<p>The subject received a 10-day suspension.</p>	<p>Referrals were made to the appropriate state bars where the subject was licensed to practice. One of those state bars issued an informal admonishment to the subject. To date, OPR has received no information as to the outcome of the other state bar's investigation.</p>
<p>Former AUSA</p> <p>Opened: Mar. 4, 1996 Closed: Feb. 9, 1998</p>	<p>Private party</p>	<p>Intentional misconduct (abuse of prosecutive/ investigative discretion; failure to perform)</p>	<p>No recommendation because the subject was no longer a Justice employee. He resigned prior to the start of OPR's investigation.</p>	<p>This investigation involved other AUSAs as well as some FBI agents. OPR conducted the investigation jointly with the USAO, which needed to discover what the subject had done for the purposes of determining what needed to be disclosed to the defense regarding possible government misconduct. Also, the subject's conduct was potentially criminal, so OPR needed to review it from that point of view as well, despite the fact that he was no longer a Justice employee.</p>	<p>OPR is continuing to coordinate with the USAO with respect to disclosures to be made in court for discovery in connection with the defendants' motions for new trials on the basis of conduct at issue in the OPR investigation. Once the litigation concerning the new trial motions has been resolved, OPR will determine whether a public summary of its findings should be drafted and whether its findings should be referred to the appropriate state bar.</p>

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Former USA  Opened: Apr. 3, 1996 Closed: Feb. 9, 1998	Inmate	Reckless disregard (failure to comply with Justice rules and regulations)	No recommendation because the subject was no longer a Justice employee	N/A	Not referred
AUSA  Opened: Apr. 30, 1997 Closed: Feb. 9, 1998	U.S. Court of Appeals	Reckless disregard (misrepresentations to the court)	Written reprimand to 3- day suspension	The USAO requested authority to divert upward from OPR's recommended range of discipline. OPR had no objection. The subject received a 5- day suspension and was transferred in order to permit more direct supervision.	Not referred
AUSA  Opened: Feb. 14, 1997 Closed: Mar. 9, 1998	INS	Reckless disregard (misuse of office)	Oral admonishment to written reprimand	EOUSA reported that the USAO would issue a written admonishment.	Not referred
AUSA  Opened: Dec. 3, 1996 Closed: Apr. 1, 1998	USAO	Reckless disregard (misrepresentation to the court – passing off an altered document as the original)	Written reprimand to 3- day suspension	The subject received a written reprimand.	Not referred
Former SAUSAs  Opened: June 27, 1996 Closed: June 8, 1998	USAO	Reckless disregard (unauthorized disclosure of confidential information – both subjects)	Termination of the subjects' remaining SAUSA appointments	The attorneys' appointments as SAUSAs were revoked.	Not referred
AUSA  Opened: Sept. 23, 1997 Closed: June 5, 1998	U.S. District Court	Reckless disregard (failure to comply with <u>Brady</u> <sup>c</sup> obligation)	Oral admonishment to written reprimand	The subject received an oral admonishment.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Attorney  Opened: June 3, 1998 Closed: Sept. 25, 1998	INS	Intentional misconduct (misrepresentations to the court)	Lengthy suspension (minimum of 30 days) to termination	INS sent the subject a letter proposing his termination. The deciding official informed the subject that he was being terminated. An Administrative Law Judge of MSPB affirmed Justice's removal of the subject. The subject did not appeal.	Referral was made to the appropriate state bar.
AUSA  Opened: Aug. 6, 1997 Closed: Nov. 6, 1998	U.S. District Court	Reckless disregard (abuse of prosecutorial authority; failure to perform - failure to diligently represent the interests of the client)	7-day to 30-day suspension	The subject received a 10-day suspension.	Not referred
AUSA  Opened: Aug. 19, 1998 Closed: Feb. 5, 1999	U.S. District Court	Reckless disregard (misrepresentations to the court and defense counsel)	Written reprimand to 3-day suspension; supplemental training relating to federal discovery obligations	The USAO received authority to depart upward from OPR's recommended range and imposed a 14-day suspension for the subject as well as a related requirement for legal training on criminal discovery obligations. The subject did not appeal. Pending resolution of this matter by the state bar, the subject has not yet served the suspension.	Referral was made to the appropriate state bar. (Another state bar opened an investigation on its own.)
AUSA  Opened: Nov. 5, 1997 Closed: Mar. 5, 1999	USAO	Reckless disregard (abuse of discretion; interference with defendant's rights)	5-day to 10-day suspension	The subject received a 4-day suspension.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Aug. 5, 1997 Closed: May 6, 1999	Private attorney	Reckless disregard (misrepresentations to the court and opposing counsel)	OPR did not recommend a range of discipline in this matter because any discipline proposed would not have been a meaningful sanction due to subject's overall deficiencies as an AUSA. Instead, OPR recommended that the USA and EOUSA continue to explore all appropriate avenues to seek the subject's dismissal on the basis of nonsuitability or poor performance.	EOUSA worked with the USAO to propose the subject's removal. In the meantime, the subject applied for disability retirement and was awarded it by OPM. EOUSA rescinded its proposed removal letter in light of the subject's retirement.	Not referred
AUSA  Opened: Oct. 7, 1997 Closed: June 7, 1999	Private attorney	Reckless disregard (abuse of prosecutorial authority - abuse of grand jury process)	Oral admonishment to written reprimand	The subject received an oral admonishment.	Not referred
FBI Special Agents and Management Officials  Opened: Aug. 15, 1997 Closed: June 30, 1999	AUSA	The subjects found to have engaged in misconduct in this matter were FBI agents and managers. Since the misconduct allegations and findings were unrelated to those applicable to Justice attorneys, we have not listed them individually in this matrix.	N/A	A proposal for appropriate discipline is under consideration by Justice.	N/A

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Feb. 24, 1998 Closed: Aug. 17, 1999	AUSA	Intentional misconduct (failure to perform - failure to diligently represent the interest of the client)	No recommendation because the subject was no longer a Justice employee	OPR referred the matter to the appropriate state bar.	Referral was made to the appropriate state bar. (No public summary of this matter was drafted because it does not meet the criteria for public disclosure.)
AUSA  Opened: Feb. 18, 1998 Closed: Sept. 16, 1999	U.S. Court of Appeals	Intentional misconduct (misrepresentations to the court); reckless disregard (improper remarks to the court – improper closing argument)	5-day to 10-day suspension	The USA proposed a 5-day suspension. The subject asked EOUSA to reduce the suspension due to financial hardship. Shortly thereafter, EOUSA reduced the suspension to 3 days.	Referral was made to the appropriate state bar.
AUSA  Opened: Nov. 5, 1997 Closed: Sept. 30, 1999	AUSA	Intentional misconduct (misrepresentations to the court; abuse of authority – unauthorized plea agreement)	No recommendation because the subject was no longer a Justice employee	OPR intends to refer the matter to the appropriate state bar.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.
Former AUSA  Opened: Jan. 28, 1998 Closed: Sept. 30, 1999	U.S. Court of Appeals	Reckless disregard (failure to comply with court order)	Written reprimand to 3-day suspension. In addition, OPR referred for management consideration additional factors that may have contributed to the poor quality of two of the government's briefs in the case at issue.	The subject received a written reprimand.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: May 29, 1998 Closed: Sept. 30, 1999	U.S. Court of Appeals	Reckless disregard (failure to comply with discovery (Rule 16))	Oral admonishment to written reprimand	The subject received a written reprimand.	Not referred
AUSA  Opened: Apr. 7, 1999 Closed: Sept. 30, 1999	U.S. Court of Appeals	Reckless disregard (improper remarks – closing argument)	Oral admonishment to short suspension; additionally, a suggestion that the EOUSA and USA provide the subject with supplemental training related to closing arguments	The subject received an oral admonishment.	Not referred
AUSA  Opened: Oct. 7, 1997 Closed: Nov. 30, 1999	USAO	Reckless disregard (misrepresentations /misleading the court)	Written reprimand to 5-day suspension	After obtaining the ODAG's approval to depart upward from OPR's recommended range, a proposal for a 10-day suspension was made. The matter is pending.	The state bar initiated an inquiry into the subject's conduct as a result of press accounts of misconduct allegations against the subject. OPR is cooperating with the state bar regarding its pending inquiry.
AUSA  Opened: Nov. 3, 1997 Closed: Nov. 30, 1999	USAO	Intentional misconduct (lateness – missed filing second brief); reckless disregard (lateness - missed filing date for first brief; fitness to practice law – unprofessional or unethical behavior)	15-day suspension to termination	The USAO proposed the subject's removal. Thereafter, the subject agreed to resign, and the USA agreed to appoint him as a SAUSA until Sept. 2000 (when he reaches retirement eligibility) and to withdraw the notice of proposed removal.	OPR intends to refer the matter to the appropriate state bar.

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>OPR's findings and specific allegations</b>	<b>OPR's recommended range of discipline</b>	<b>Final disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
SAUSA and AUSA  Opened: May 13, 1997 Closed: Dec. 8, 1999	U.S. District Court	Reckless disregard (misrepresentations to the court; failure to perform – failed to prepare portion of case for trial; failure to comply with discovery) -- both subjects	No recommendation for subject #1 because he was no longer a Justice employee  1-day to 5-day suspension for subject #2.	The USAO intends to issue a 3-day suspension to subject #2.	Not referred
AUSA  Opened: Dec. 10, 1997 Closed: Jan. 31, 2000	U.S. District Court	Intentional misconduct (failure to perform); reckless disregard (failure to perform and misrepresentation to the court)	15-day suspension to termination	The proposing official is considering a lengthy suspension to removal. However, the USAO requested that no action be taken against the subject until a personnel matter involving another AUSA in the USAO is resolved.	OPR intends to refer the matter to the appropriate state bar after the disciplinary process is complete.
AUSA  Opened: Nov. 30, 1998 Closed: Mar. 2, 2000	U.S. District Court	Reckless disregard (failure to comply with discovery - <u>Brady</u> )	Oral admonishment to written reprimand	The subject received an oral admonishment.	Not referred

**Legend:**

AUSA – Assistant U.S. Attorney  
 EOIR – Executive Office for Immigration Review  
 EOUSA – Executive Office for U.S. Attorneys  
 FBI – Federal Bureau of Investigation  
 INS – Immigration and Naturalization Service  
 MSPB – Merit Systems Protection Board  
 N/A – Not applicable

ODAG – Office of the Deputy Attorney General  
 OPM – Office of Personnel Management  
 OPR – Office of Professional Responsibility  
 SAUSA – Special Assistant U.S. Attorney  
 USA – U.S. Attorney  
 USAO – U.S. Attorney’s Office

<sup>a</sup>To help protect their privacy, all of the subjects in the investigations set forth in this table are referred to by the masculine pronoun, regardless of their gender.

<sup>b</sup>In December 1993, the Department of Justice issued a policy governing public disclosure of OPR’s findings in certain cases. Justice is to disclose the final disposition, after all administrative reviews have been completed, of any matter that meets certain criteria. If a matter meets the criteria, OPR is to prepare a summary explaining the context of the allegations and the final disposition of the matter. The final decision to release a public summary is made by the Attorney General.

<sup>c</sup>Brady, Giglio, the Jencks Act, and Rule 16 of the Federal Rules of Criminal Procedure are references to various discovery and disclosure requirements and rules in criminal proceedings. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters occurring before a grand jury.

Source: OPR.

**INVESTIGATIONS CLOSED WITH FINDINGS OF POOR JUDGMENT**  
**FISCAL YEARS 1998 THROUGH 2000 (AS OF MAR. 31, 2000)**

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Apr. 3, 1996 Closed: Feb. 9, 1998	Inmate	Abuse of prosecutive or investigative authority	The USAO reportedly required the subject to prepare and present an in-house training session to the USAO's criminal AUSAs on the specific policy at issue.	Not referred
AUSA  Opened: Mar. 19, 1997 Closed: Jan. 5, 1998	U.S. Court of Appeals	Misrepresentation to the court - failure to clarify witness' testimony	The USA took no further action in this matter.	Not referred
AUSA  Opened: Apr. 22, 1997 Closed: Jan. 22, 1998	Anonymous	Conflict of interest	The USAO orally counseled the subject concerning management issues raised in OPR's report.	Not referred
Two AUSAs  Opened: May 9, 1997 Closed: June 8, 1998	USAO	Failure to perform--both subjects	Both subjects resigned during the course of OPR's investigation. Because they were no longer Justice employees, no disciplinary action was taken.	Not referred
AUSA  Opened: June 16, 1997 Closed: Jan. 22, 1998	U.S. District Court	Conflict of interest; failure to perform	The USA assigned the subject to prepare and present an officewide training session on conflicts of interest issues that arise in a USAO.	Not referred
AUSA  Opened: Aug. 12, 1997 Closed: Aug. 11, 1998	USAO	Conflict of interest	The subject received an oral admonishment, and the USA notified the court of the inadvertent violation of Rule 6(e) of the Federal Rules of Criminal Procedure <sup>b</sup> (disclosure of grand jury information) by the subject.	Not referred
Attorney  Opened: Sept. 11, 1997 Closed: Feb. 9, 1998	Self-referral by subject	Failure to maintain active license with state bar	The subject received an oral reprimand.	No referral. OPR contacted the appropriate state bar about subject's license and back dues.

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Sept. 15, 1997 Closed: Jan. 9, 1998	USAO	Failure to perform	The subject was placed on a Performance Improvement Plan.	Not referred
AUSA  Opened: Sept. 23, 1997 Closed: Feb. 9, 1998	County Sheriff	Abuse of prosecutive or investigative authority (improper use of Notices to schedule interviews)	The subject received a written reprimand.	Not referred
AUSA  Opened: Sept. 15, 1997 Closed: Oct. 6, 1997	U.S. District Court	Improper closing argument	The subject received an oral admonishment.	Not referred
AUSA  Opened: Sept. 30, 1997 Closed: Dec. 23, 1997	Private party (defendant)	Abuse of prosecutive or investigative authority (failure to articulate more clearly to the court the basis of his decision to exclude a prospective juror)	The subject received a letter of admonishment.	Not referred
AUSA  Opened: Oct. 9, 1997 Closed: Jan. 8, 1998	U.S. District Court	Failure to comply with court order (failure to research whether he had any obligations upon unilaterally terminating a deposition)	The USAO held a 2-day training conference on discovery issues.	Not referred
AUSA  Opened: Nov. 10, 1997 Closed: July 24, 1998	U.S. District Court	Failure to comply with civil discovery	The USA advised that he was satisfied that the subject had made adjustments in his case management. The USA did not plan any additional training in response to OPR's report; however, the USA said he would monitor the subject's progress, directing him to additional training as necessary.	Not referred
One USA and two AUSAs  Opened: Dec. 22, 1997 Closed: May 8, 1998	U.S. District Court	Misrepresentation to the court	The subjects disagreed with OPR's finding of poor judgment and requested a review proceeding.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: June 24, 1998 Closed: July 22, 1998	U.S. Court of Appeals	Abuse of prosecutive or investigative authority	No disciplinary action was taken.	Not referred
FBI Special Agents and Management Officials  Opened: Aug. 15, 1997 Closed: June 30, 1999	USAO	The subjects who were found to have engaged in professional misconduct and exhibited poor judgment in this matter were FBI agents and managers. Since the misconduct allegations and findings were unrelated to those applicable to Justice attorneys, we have not listed them individually in this matrix.	A proposal for appropriate discipline is under consideration by Justice.	N/A
AUSA  Opened: Sept. 15, 1997 Closed: Mar. 5, 1999	U.S. Court of Appeals (referred to OPR by the Grievance Committee)	Failure to comply with discovery – <u>Brady</u> <sup>b</sup>	Although the subject resigned from Justice prior to OPR's receipt of the matter from a state bar, OPR conducted an investigation because the state bar counsel agreed to defer its own investigation until OPR had completed a review of the matter, and the seriousness of the appeals court's finding was of significant institutional interest. Because he was no longer a Justice employee, no disciplinary action was taken.	This matter was brought to OPR's attention by the state bar counsel, and after OPR had completed its investigation, OPR shared its report with the bar counsel.
Attorney  Opened: Oct. 3, 1997 Closed: Jan. 13, 1999	INS	Misuse of position	Since the time of the events giving rise to this matter, the subject has attended advanced ethics training. The subject was also counseled by supervisors regarding the regulations prohibiting misuse of position. Therefore, no additional training was required of the subject.	Not referred
AUSA  Opened: Oct. 3, 1997 Closed: Oct. 27, 1998	USAO	Failure to perform	The USAO said it would address OPR's findings in the subject's performance appraisal.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Feb. 18, 1998 Closed: Sept. 16, 1999	U.S. Court of Appeals	Misrepresentations to the court; improper remarks to the court	OPR found professional misconduct as well as poor judgment in this matter. Because disciplinary action was taken with regard to the misconduct finding, no additional action was taken regarding the poor judgment finding.	Referral of intentional professional misconduct finding was made to the appropriate state bar.
AUSA  Opened: Feb. 19, 1998 Closed: Oct. 15, 1998	AUSA	Failure to perform	The USAO counseled the subject.	Not referred
AUSA  Opened: Apr. 1, 1998 Closed: Apr. 2, 1999	INS Special Agent	Misrepresentation to the court	No action was taken because the USAO disagreed with OPR's finding and appealed to EOUSA. While the issue was pending with EOUSA, the subject resigned from Justice.	Complainant contacted the appropriate state bar. The state bar found no professional misconduct and dismissed the case.
AUSA  Opened: May 29, 1998 Closed: Sept. 30, 1999	U.S. Court of Appeals	Failure to comply with discovery rules	OPR found professional misconduct as well as poor judgment in this matter. Because disciplinary action was taken with regard to the misconduct finding, no additional action was taken regarding the poor judgment finding.	Not referred
AUSA  Opened: July 15, 1998 Closed: May 7, 1999	U.S. Court of Appeals	Abuse of prosecutive or investigative authority	The USA counseled the subject prior to the OPR investigation and circulated a memorandum to staff regarding office policy on the subject at issue.	Not referred
AUSA  Opened: July 24, 1998 Closed: Feb. 3, 1999	USAO	Unauthorized leak of information (nonmedia)	The subject was placed on a Performance Improvement Plan.	Not referred
AUSA  Opened: Aug. 19, 1998 Closed: July 6, 1999	U.S. Court of Appeals	Abuse of prosecutive or investigative authority (improper examination of a witness)	The subject received an oral admonishment.	Not referred

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Nov. 5, 1998 Closed: Aug. 10, 1999	U.S. District Court	Lateness with court order	The USA and an AUSA had earlier admonished the subject, and the judicial criticism was reflected in the performance evaluation. No additional action was taken.	Not referred
Attorney  Opened: Mar. 24, 1997 Closed: Nov. 30, 1999	Immigration Judge	Failure to perform	The subject was counseled regarding the lack of preparedness, lack of candor with the court, and other areas of poor judgment noted in OPR's report. The subject's performance reportedly has shown significant improvement, in part because of increased staffing at the facility to which he is assigned.	Not referred
AUSA  Opened: Sept. 23, 1997 Closed: Nov. 30, 1999	Criminal Division	Abuse of prosecutive or investigative authority; contempt of court	The subject was counseled and advised to review the <i>United States Attorneys Manual</i> on the topic at issue.	Not referred
AUSA  Opened: Oct. 7, 1997 Closed: Nov. 30, 1999	USAO	Abuse of authority or misuse of position; abuse of prosecutive or investigative authority (including improper introduction of evidence)	OPR found professional misconduct as well as poor judgment in this matter. Because disciplinary action is being taken with regard to the misconduct finding, no additional action will be taken regarding the poor judgment finding.	The appropriate state bar initiated an inquiry into the subject's conduct as a result of press accounts of misconduct allegations against the subject. OPR is cooperating with the state bar with regard to its pending inquiry.
AUSA  Opened: Dec. 10, 1997 Closed: Jan. 31, 2000	U.S. District Court	Failure to perform	OPR found professional misconduct as well as poor judgment in this matter. Because disciplinary action is being taken with regard to the misconduct finding, no additional action will be taken regarding the poor judgment finding.	OPR intends to refer its intentional professional misconduct finding to the appropriate state bar.
AUSA  Opened: Nov. 13, 1998 Closed: Nov. 30, 1999	Private attorney	Unauthorized disclosure (nonmedia)	Because the subject retired (for reasons unrelated to OPR's investigation), no disciplinary action was taken.	The appropriate state bar reviewed and dismissed grievance (not result of OPR referral).

<b>Subject<sup>a</sup> Dates opened and closed</b>	<b>Source</b>	<b>Allegations</b>	<b>Disposition by component</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Nov. 10, 1997 Closed: Jan. 31, 2000	U.S. Court of Appeals	Improper examination of a witness	The subject was orally counseled concerning this matter.	Not referred
AUSA  Opened: Feb. 11, 1999 Closed: Jan. 31, 2000	FBI	Unauthorized disclosure to media	The subject received an oral admonishment.	Not referred
AUSA  Opened: Feb. 26, 1999 Closed: Mar. 31, 2000	Private attorney	Failure to perform (failure to diligently represent the interest of the client)	In July, the USAO reported that it was considering issuing a 2-day suspension.	Not referred
Attorney  Opened: Apr. 7, 1999 Closed: Mar. 31, 2000	Tax Division	Failure to fully disclose the status of a plea agreement when seeking Tax Division approval of the plea	Pending	Not referred
AUSA  Opened: Sept. 20, 1999 Closed: Mar. 31, 2000	U.S. Court of Appeals	Improper closing argument; improper introduction of evidence	The subject was counseled and instructed and provided with additional training.	Not referred
Attorney  Opened: Dec. 1, 1999 Closed: Jan. 31, 2000	Criminal Division	Unauthorized disclosure (nonmedia)	The subject was transferred to another section within the Criminal Division. The decision of whether to take disciplinary action was put on hold pending the completion of an inquiry into allegations the subject recently made involving other Criminal Division attorneys.	Not referred
AUSA  Opened: Jan. 11, 2000 Closed: Jan. 14, 2000	USAO	Unauthorized practice of law	The subject had earlier received an oral admonishment, and the USA determined that no further action was warranted.	Not referred

**Legend:**

ADAG – Assistant Deputy Attorney General  
AUSA – Assistant U.S. Attorney  
EOUSA – Executive Office for U.S. Attorneys  
FBI – Federal Bureau of Investigation  
INS – Immigration and Naturalization Service

N/A – Not applicable  
OPR – Office of Professional Responsibility  
USA – U.S. Attorney  
USAO – U.S. Attorney’s Office

<sup>a</sup>To help protect their privacy, all of the subjects in the investigations set forth in this table are referred to by the masculine pronoun, regardless of their gender.

<sup>b</sup>Brady, Giglio, the Jencks Act, and Rule 16 of the Federal Rules of Criminal Procedure are references to various discovery and disclosure requirements and rules in criminal proceedings. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters occurring before a grand jury.

Source: OPR.

**INVESTIGATION CLOSINGS INVOLVING SUBJECTS WHO RESIGNED OR  
RETIRED FISCAL YEARS 1997 THROUGH 2000 (AS OF MAR. 31, 2000)**

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Former AUSA  Opened: Dec. 20, 1994 Closed: Nov. 29, 1996	Private party	Discovery – <u>Brady</u> <sup>b</sup> violation, exculpatory information	No professional misconduct or poor judgment was found.	Not referred
Immigration Judge  Opened: Mar. 1, 1995 Closed: Feb. 28, 1997	Board of Immigration Appeals	Abuse of authority or misuse of official position; unprofessional statements or comments	Intentional professional misconduct found. OPR recommended that the subject be removed from the position of Immigration Judge and that the subject receive discipline ranging from a long suspension (over 30 days) to termination from Justice. EOIR proposed that the subject be terminated. The subject agreed to submit a request for voluntary retirement in exchange for Justice canceling the proposed termination and removing any mention of it from the personnel file.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary <sup>c</sup> once the summary has been reviewed and approved within Justice's prescribed review process.
AUSA  Opened: Apr. 5, 1995 Closed: Oct. 31, 1996	Defense attorney	Misrepresentations to the court and defense counsel; interference with defendant's rights	Professional misconduct (reckless disregard) found. OPR recommended a range of discipline from a 10-day to 25-day suspension. EOUSA proposed a 12-day suspension. The subject resigned the position as an AUSA.	Not referred
AUSA  Opened: May 16, 1995 Closed: Dec. 5, 1996	USAO	Improper or illegal wiretaps and electronic surveillance	No professional misconduct or poor judgment was found.	Not referred
AUSA  Opened: May 23, 1995 Closed: Mar. 31, 1997	Criminal Division	Unauthorized plea agreements	The subject resigned from Justice during OPR's investigation. On the basis of the subject's refusal to cooperate with the investigation (declined several times to be interviewed), OPR closed the investigation with the approval of the ADAG.	Not referred because the allegations concerned internal Justice policies and procedures, rather than a violation of any state bar rules.

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Former AUSA  Opened: June 7, 1995 Closed: Feb. 28, 1997	Inmate	Discovery – <u>Brady</u> violation; improper coercion/intimidation of a witness	The subject resigned prior to the start of OPR’s investigation. OPR conducted an investigation and found that the subject did not engage in professional misconduct or exhibit poor judgment.	Not referred
Former AUSA  Opened: Oct. 23, 1995 Closed: Apr. 29, 1997	Inmate	Discovery – impeachment/Jencks Act <sup>d</sup>	At the time OPR received the allegations, the subject was no longer employed by Justice. Because the allegations involved the actions of FBI and DEA agents as well, OPR referred the allegations to the FBI/OPR and DEA/OPR to be investigated. Upon those offices reporting back to OPR and upon consultation with the USAO, OPR, along with DEA and FBI, decided to initiate an investigation. No professional misconduct or poor judgment by the former AUSA was found.	Not referred
AUSA  Opened: Oct. 10, 1995 Closed: Oct. 30, 1996	U.S. Court of Appeals	Improper closing argument; misrepresentations to the court and Justice	Intentional professional misconduct was found. OPR recommended a 7-day to 14-day suspension. EOUSA proposed the subject’s removal from a position as AUSA on the basis of handling of several cases. The subject was also suspended for 7 days. After serving the suspension, the subject grieved it. Thereafter, the subject signed a settlement agreement pursuant to which he resigned his position as an AUSA and remained on administrative leave for 120 days as an SAUSA. By signing the agreement, the subject effectively waived his right to pursue his challenge of the suspension.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice’s prescribed review process.
AUSA  Opened: Oct. 18, 1995 Closed: Feb. 3, 1997	FBI Special Agent	Misrepresentation to the court	Intentional professional misconduct found. OPR did not recommend a range of discipline because the subject resigned before the conclusion of OPR’s investigation.	Referral was made to the appropriate state bar.
Former AUSA  Opened: Apr. 1, 1996 Closed: Sept. 11, 1997	USAO	Failure to comply with court order; lateness regarding court order	Because the subject, a former Justice employee, refused to cooperate, OPR closed the matter with the approval of the ADAG.	Referral was made to the appropriate state bar.

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Former AUSA  Opened: Apr. 29, 1996 Closed: Oct. 25, 1996	Justice employee	Failure to perform; abuse of prosecutive or investigative authority	OPR found the subject exercised poor judgment. Issues were previously addressed by the USAO. No further action was required, as the subject had already resigned from Justice.	Not referred
AUSA  Opened: Apr. 30, 1996 Closed: Apr. 1, 1997	U.S. Court of Appeals	Discovery – <u>Brady</u> violation/exculpatory information	No professional misconduct or poor judgment was found.	Not referred
AUSA  Opened: Apr. 30, 1996 Closed: Apr. 1, 1997	U.S. Court of Appeals	Discovery - <u>Brady</u> violation/exculpatory information	No professional misconduct or poor judgment was found.	Not referred
AUSA and FBI Management Official  Opened: June 25, 1996 Closed: May 1, 1997	Criminal Division	Unauthorized disclosure of classified information to media	OPR found intentional professional misconduct. OPR recommended a reprimand to 60-day suspension. The subject resigned after OPR closed its investigation. The deciding official issued letters of caution to the subject and another subject of this investigation (an AUSA) but decided to impose no discipline because he disagreed with OPR's findings of intentional professional misconduct. The ODAG approved the deciding official's recommendation. Thus, OPR's finding was abrogated by Justice and provided no basis for a state bar referral for the AUSA. (The FBI agent is not an attorney.)	Not referred
Attorney  Opened: Aug. 8, 1996 Closed: Jan. 31, 1997	Congressional referral	Abuse of prosecutive or investigative authority	Poor judgment was found but no action was taken because the subject had resigned from Justice.	Not referred
Attorney  Opened: Sept. 3, 1996 Closed: Sept. 26, 1997	EOUST	Conflict of interest	The subject resigned and declined to be interviewed, and OPR therefore closed the investigation with the approval of the ADAG.	Referral was made to the appropriate state bar. (No public summary of OPR's was drafted because this matter did not meet the criteria for public disclosure.)

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Apr. 16, 1996 Closed: Feb. 25, 1997	U.S. District Court	Failure to comply with discovery; failure to perform. The subject recklessly disregarded his obligations to comply with court orders concerning discovery and to prepare the case for trial.	OPR found that the subject engaged in professional misconduct. OPR recommended a written reprimand to 3-day suspension. The USAO issued a proposal for a 3-day suspension. After the subject submitted replies to the proposal, the suspension was modified to 2 days, which the subject served. The subject filed a grievance, and the 2-day suspension was sustained. The subject resigned and accepted a time-limited SAUSA appointment. Subsequently, the subject filed a second-level grievance of his suspension, and it was mitigated to a 1-day suspension.	Not referred
AUSA  Opened: Oct. 4, 1996 Closed: Mar. 10, 1997	USAO	Fitness to practice law (theft)	Intentional professional misconduct was found. The subject resigned following the conclusion of OPR's investigation.	Referral was made to the appropriate state bar. (No public summary of OPR's investigation was drafted because this matter did not meet the criteria for public disclosure.)
AUSA  Opened: Dec. 4, 1996 Closed: July 11, 1997	USAO	Conflict of interest and fitness to practice law	Intentional professional misconduct was found. Rather than receive the U.S. Attorney's proposed removal letter, the subject resigned in return for a paid appointment as an SAUSA, not to exceed 90 days.	Referral was made to the appropriate state bar.
AUSA  Opened: Dec. 23, 1996 Closed: Sept. 3, 1997	Self-referral by subject	Misuse of position	Intentional professional misconduct found. After a draft proposal letter recommending removal was provided to the subject, he began discussing resignation with USAO management. Subsequently, the subject was issued the formal proposed removal letter. The subject subsequently signed a settlement agreement in which he agreed to resign the position as an AUSA and to serve an appointment as a SAUSA, not to exceed 45 days.	OPR intends to refer the matter to the appropriate state bar in the form of a public summary once the summary has been reviewed and approved within Justice's prescribed review process.

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Aug. 22, 1997 Closed: Aug. 28, 1997	USAO	Misrepresentations to the court	Intentional professional misconduct found. OPR recommended a 90-day suspension to termination. The subject resigned the position as an AUSA after receiving a letter from EOUSA proposing removal. The subject died during a 60-day appointment as SAUSA.	Not referred because the subject died.
Attorney  Opened: Jan. 5, 1996 Closed: May 11, 1998	Criminal Division	Unauthorized disclosure (nonmedia)	No professional misconduct or poor judgment was found. The subject resigned from Justice during the course of OPR's investigation.	Not referred
Former AUSA  Opened: Mar. 4, 1996 Closed: Feb. 9, 1998	Private party	Abuse of prosecutive/ investigative discretion; failure to perform	The subject resigned prior to the start of OPR's investigation, which involved other AUSAs, as well as some FBI agents. OPR conducted the investigation jointly with the USAO, which needed to discover what the subject had done for the purposes of determining what needed to be disclosed to the defense regarding possible government misconduct. Also, the subject's conduct was potentially criminal, so OPR needed to review it from that point of view as well, despite the fact that the subject was no longer a Justice employee. OPR found that the subject engaged in intentional professional misconduct. No range of discipline was recommended, however, because the subject was no longer employed by Justice.	OPR is continuing to coordinate with the USAO with respect to disclosures to be made in court for discovery in connection with the defendants' motions for new trials on the basis of conduct at issue in the OPR investigation. Once the litigation concerning the new trial motions has been resolved, OPR will determine whether a public summary of its findings should be proposed and whether its findings should be referred to the appropriate state bar.
Former AUSA  Opened: Mar. 4, 1997 Closed: Feb. 25, 1998	Defense attorney	Conflict of interest or violation of postemployment restrictions	The subject resigned from Justice prior to the start of OPR's investigation. OPR conducted an investigation and found that the subject did not engage in professional misconduct or poor judgment.	Not referred

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSAs  Opened: May 9, 1997 Closed: June 8, 1998	AUSA	Unauthorized disclosure (nonmedia)/other; discovery–impeachment/Jencks Act <sup>b</sup>	Both subjects resigned during the course of OPR's investigation. OPR found that they exercised poor judgment. Because they were no longer Justice employees, no disciplinary action was taken.	Not referred
Attorney  Opened: Aug. 15, 1997 Closed: Dec. 5, 1997	INS	Conflict of interest	Intentional professional misconduct found. OPR recommended a range of discipline from a 5-day to 10-day suspension and that the subject be recused from any matter involving the private attorney. OPR initiated a second investigation on the subject to examine assertions made by INS that certain assertions made to OPR in a previous OPR investigation conflicted with information in his personnel file. The subject resigned. INS had put consideration of OPR's disciplinary recommendation for the subject on hold pending the outcome of OPR's second investigation. (OPR referred the allegations of falsification and misrepresentation to the FBI and closed the second investigation.)	OPR is holding its state bar referral in abeyance pending consideration of whether to offer the subject a review proceeding.
AUSA  Opened: Sept. 15, 1997 Closed: Jan. 9, 1998	USAO	Failure to perform; lateness	The USAO placed the subject on a Performance Improvement Plan.	Not referred
AUSA  Opened: Oct. 23, 1997 Closed: Feb. 9, 1998	Private party	Fitness to practice law/unauthorized outside practice of law	The subject resigned from his position as AUSA prior to the completion of OPR's investigation. The complaint did not raise significant institutional issues. OPR determined that this matter would be more appropriately handled by a state bar, which already had a pending inquiry on the subject.	Referral was made to the appropriate state bar.
AUSA  Opened: Nov. 5, 1997 Closed: Nov. 12, 1997	Defendant	Abuse of prosecutive or investigative authority	No professional misconduct or poor judgment was found. The subject resigned from Justice during the course of OPR's investigation.	Not referred

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Attorney  Opened: Jan. 28, 1997 Closed: June 8, 1998	INS	Falsification of records	After the subject resigned, the matter was referred to the FBI for consideration of a criminal investigation for false statements in a background investigation. (Subject was the subject of a previous OPR investigation, in which OPR found that he engaged in intentional professional misconduct.)	OPR is holding its state bar referral in abeyance pending consideration of whether to offer the subject a review proceeding regarding the intentional misconduct finding.
AUSA  Opened: Feb. 26, 1998 Closed: Mar. 9, 1998	Anonymous	Abuse of authority or misuse of position	No professional misconduct or poor judgment was found. The subject resigned following OPR's investigation.	Not referred
Former Attorney  Opened: Mar. 7, 1997 Closed: May 17, 1999	Antitrust Division	Unauthorized disclosure (nonmedia)	The subject, who had resigned from Justice prior to the start of OPR's investigation, was identified as the source of an unauthorized disclosure to defense counsel. The subject refused to cooperate with OPR's investigation. OPR referred the matter to the appropriate state bar.	Referral was made to the appropriate state bar.
AUSA  Opened: Aug. 5, 1997 Closed: May 6, 1999	Private attorney	Misrepresentations to the court and opposing counsel	Professional misconduct (reckless disregard) was found. OPR did not recommend a range of discipline in this matter because any discipline proposed would not have been a meaningful sanction due to subject's overall deficiencies as an AUSA. Instead, OPR recommended that the USA and EOUSA continue to explore all appropriate avenues to seek the subject's dismissal on the basis of nonsuitability or poor performance. EOUSA worked with the USAO in proposing the subject's removal. In the meantime, the subject applied for disability retirement and was awarded it by OPM. EOUSA agreed to rescind its proposed removal letter in light of the retirement.	Not referred

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
FBI Special Agents and Management Officials  Opened: Aug. 15, 1997 Closed: June 30, 1997	AUSA	The subjects who were found to have engaged in misconduct in this matter were FBI agents and managers. Since the misconduct allegations and findings were unrelated to those applicable to Justice attorneys, we have not listed them individually in this matrix.	Four of the subjects, all of whom were FBI employees, resigned.	N/A
Former AUSA  Opened: Sept. 15, 1997 Closed: Mar. 5, 1999	U.S. Court of Appeals, referred to OPR by the Grievance Committee, State Bar	Discovery – <u>Brady</u> violation	Although the subject resigned from Justice prior to OPR's receipt of the matter from the state bar, OPR conducted an investigation because the state bar counsel agreed to defer its own investigation until OPR had completed a review of the matter, and the seriousness of the appeals court's finding was of significant institutional interest. OPR conducted an investigation and found that the subject exercised poor judgment. Because the subject was no longer a Justice employee, no disciplinary action was taken.	This matter was brought to OPR's attention by the state bar counsel, and after OPR had completed its investigation, OPR shared its report with the bar counsel.
Former AUSA  Opened: Nov. 5, 1997 Closed: Sept. 30, 1999	AUSA	Misrepresentations to the court; abuse of authority (unauthorized plea agreement)	Intentional professional misconduct was found. Because the subject was no longer a Justice employee, OPR did not recommend a range of discipline.	OPR intends to refer the matter (in form of public summary) to the appropriate state bar, pending approval and release of a public summary, which will be drafted.
AUSA  Opened: Feb. 24, 1998 Closed: Aug. 17, 1999	AUSA	Failure to perform (failure to diligently represent the interest of the client)	Intentional professional misconduct was found. Subject resigned shortly after OPR received this allegation. Because the subject was no longer a Justice employee, OPR did not recommend a range of discipline.	Referral was made to the appropriate state bar. (No public summary of this matter was drafted because it does not meet the criteria for public disclosure.)

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Feb. 26, 1998 Closed: June 7, 1999	Inmate	Failure to comply with Justice rules and regulations	Subject resigned from Justice for reasons unrelated to OPR's investigation. This investigation also involved other Justice attorneys. No professional misconduct was found.	Not referred
Former AUSA  Opened: Mar. 23, 1998 Closed: Aug. 18, 1999	Private party	Failure to perform	The subject resigned from Justice prior to the initiation of OPR's investigation. OPR recommended that the investigation be terminated in view of, among other things, the fact that there were no significant departmental interests involved. The ADAG approved OPR's recommendation.	Not referred, because OPR's initial inquiry disclosed no support for the allegation.
AUSA  Opened: Apr. 1, 1998 Closed: Apr. 2, 1999	INS Special Agent	Perjury	OPR found that the subject exercised poor judgment. No action was taken by USAO because that Office disagreed with OPR's finding and appealed to EOUSA. While the issue was pending with EOUSA, the subject resigned from Justice.	Complainant contacted the appropriate state bar. The state bar found no professional misconduct and dismissed the case.
Former AUSA  Opened: July 29, 1998 Closed: Nov. 18, 1998	U.S. District Court	Failure to comply with court order	Subject resigned after the USA expressed concern about the subject's performance in this and other cases. The ODAG approved OPR's recommendation to close the matter without investigation.	Referral was made to the appropriate state bar.
Former SAUSA and former Attorney  Opened: May 13, 1997 Closed: Dec. 8, 1999	U.S. District Court	Subject #1: misrepresentations to the court; failure to perform; failure to comply with discovery  Subject #2: discovery, impeachment/Jencks Act <sup>b</sup>	Subject #1: Professional misconduct (reckless disregard) was found. OPR did not recommend a range of discipline because the subject was no longer employed by Justice. The subject resigned after OPR's investigation was concluded.  Subject #2: No professional misconduct or poor judgment was found. The subject resigned after OPR's investigation was concluded.	Not referred for either subject
Attorney  Opened: Dec. 1, 1999 Closed: Jan. 31, 2000	INS	Unauthorized disclosure (nonmedia)	No professional misconduct or poor judgment was found.	Not referred

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
AUSA  Opened: Nov. 3, 1997 Closed: Nov. 30, 1999	USAO	Lateness (missed filing re: second brief); lateness (missed filing date re: first brief); fitness to practice law (unprofessional or unethical behavior)	OPR found professional misconduct and recommended a range of discipline from a 15-day suspension to termination. The USAO proposed the subject's removal. Thereafter, he agreed to resign, and the USA agreed to appoint him as a SAUSA until Sept. 2000 (when he reaches retirement eligibility) and to withdraw the notice of proposed removal.	OPR intends to refer the intentional professional misconduct finding to the appropriate state bar.
AUSA  Opened: Sept. 23, 1997 Closed: Nov. 30, 1999	Private attorney	Misrepresentation to the court; failure to perform	OPR found that the subject exercised poor judgment. Subject resigned from Justice prior to the conclusion of OPR's investigation.	Not referred
Former AUSA  Opened: Nov. 13, 1998 Closed: Nov. 30, 1999	Private attorney	Subornation of perjury	OPR found that the subject exercised poor judgment in telecopying unredacted draft pleading to a civilian witness. Because the subject resigned prior to the conclusion of OPR's investigation (for reasons unrelated to the investigation), no disciplinary action was taken.	The appropriate state bar reviewed and dismissed the grievance (not result of OPR referral).
AUSA  Opened: Aug. 31, 1999 Closed: Mar. 30, 2000	U.S. District Court	Abuse of prosecutive or investigative authority	Although the subject resigned prior to OPR's receipt of the matter, the USAO and the subject requested an investigation. OPR conducted an investigation and found that the subject did not exercise professional misconduct or poor judgment; rather he acted appropriately under the circumstances.	Not referred
U.S. Attorney  Opened: Sept. 9, 1999 Closed: Mar. 2, 2000	Anonymous	Abuse of prosecutive or investigative authority	On the basis of OPR's review of the anonymous complaint and a response by an AUSA, OPR determined that the allegations concerning the subject, who resigned prior to OPR's initiation of an investigation, were without merit.	Not referred

<b>Subject<sup>a</sup> Dates open and closed</b>	<b>Source</b>	<b>Allegation(s)</b>	<b>Findings and disposition</b>	<b>Bar referral and bar disciplinary action, if any</b>
Attorneys and AUSAs  Opened: Jan.21, 2000 Closed: Jan. 31, 2000	U.S. District Court	Discovery – <u>Brady</u> / exculpatory information	In view of the conclusory nature of the judicial criticism, the departures of the subject attorneys from Justice, the absence of any publicity surrounding the criticism, and the passage of time, OPR recommended that the investigation be terminated. The ADAG approved the recommendation to close the matter.	Not referred

**Legend:**

ADAG – Assistant Deputy Attorney General  
 AUSA – Assistant U.S. Attorney  
 DEA – Drug Enforcement Administration  
 EOIR – Executive Office for Immigration Review  
 EOUSA – Executive Office for U.S. Attorneys  
 EOUST – Executive Office for U.S. Trustees  
 FBI – Federal Bureau of Investigation  
 INS – Immigration and Naturalization Service

N/A – Not applicable  
 ODAG – Office of the Deputy Attorney General  
 OPM – Office of Personnel Management  
 OPR – Office of Professional Responsibility  
 SAUSA – Special Assistant U.S. Attorney  
 USA – U.S. Attorney  
 USAO – U.S. Attorney’s Office

<sup>a</sup>To help protect their privacy, all of the subjects in the investigations set forth in this table are referred to by the masculine pronoun, regardless of their gender.

<sup>b</sup>Brady Giglio, the Jencks Act, and Rule 16 of the Federal Rules of Criminal Procedure are references to various discovery and disclosure requirements and rules in criminal proceedings. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters occurring before a grand jury

<sup>c</sup>In December 1993, the Department of Justice issued a policy governing public disclosure of OPR’s findings in certain cases. Justice is to disclose the final disposition, after all administrative reviews have been completed, of any matter that meets certain criteria. If a matter meets the criteria, OPR is to prepare a summary explaining the context of the allegations and the final disposition of the matter. The final decision to release a public summary is made by the Attorney General.

Source: OPR.

## **SUMMARIES OF HYDE AMENDMENT MATTERS**

According to OPR officials, OPR reviews every claim filed under the Hyde Amendment to determine if any facts or issues arising from Hyde-related matters warrant an inquiry by OPR. As of September 30, 2000, they said that there had been 95 claims filed since the passage of the Hyde Amendment in November 1997. According to OPR, the government settled the claims in two cases, and the defendants prevailed on their claims in seven cases (four of which were on appeal). OPR has initiated 3 inquiries and 8 investigations on 11 claims. Ten of those were still pending in OPR, and 1 inquiry had been closed. In addition, OPR says it continues to monitor all cases in which there are pending claims for fees pursuant to the Hyde Amendment. The following are OPR's summaries of the allegations for the 10 ongoing matters and the allegations and findings of the closed inquiry.

### **Ongoing Matters**

**Case 1:** This matter was opened in March 1998. The court of appeals reversed all of the convictions in a multidefendant prosecution for conspiracy; money laundering; and wire, mail, and tax fraud. The principal ground for reversal was that four of the five alleged objects of the conspiracy were not criminal because the alleged victims were private entities, not the United States. Under then-existing circuit precedent, a Section 371 conspiracy required the United States to be the victim of the conspiracy. Although the district court considered the issue and denied the defendants' motion to dismiss, the court of appeals ruled that the government had acted in "bad faith" because it had charged and prosecuted the defendants with conduct that was not a crime at the time of the indictment and trial. The defendants applied for fees pursuant to the Hyde Amendment. Their petition was dismissed by the district court in July 2000. The matter remains under investigation by OPR.

**Case 2:** This matter was opened in September 1998. After plea agreements had been entered by defendants in a money laundering and conspiracy case, a federal agency produced documents pursuant to a Freedom of Information Act (FOIA) request that had been filed by the defendants while criminal charges were pending against them. The documents had not been produced by the agency while the prosecution was pending because FOIA exempts records or information compiled for law enforcement purposes when disclosure would reasonably be expected to interfere with enforcement proceedings. After the documents were released, the principal corporate defendant claimed that the documents contained exculpatory information that should have been produced by the prosecutor while the criminal case was pending. The defendant filed a motion for fees under the Hyde Amendment, which was granted by the district court. The court of appeals reversed the district court's award of fees in April 2000. The OPR investigation is ongoing.

**Case 3:** This matter was opened in September 1998. The district court granted a writ of coram nobis<sup>12</sup> and a motion to dismiss on the grounds that the defendants were exempt

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<sup>12</sup>A writ of coram nobis is a "writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact." *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999).

from prosecution under the antitrust provisions relied on by the government. The government appealed the district court's ruling regarding the applicability of the exemption. The court of appeals affirmed the district court's ruling. Defendants then filed a petition for fees under the Hyde Amendment. The district judge denied the petition for fees on the grounds that although he ultimately disagreed with the government's legal theory, the prosecution's theory had been reasonable and the standards for award of fees under the Hyde Amendment were not met. That ruling is now on appeal. The OPR investigation is being held in abeyance pending the appeal.

**Case 4:** This matter was opened in March 1999. The district court granted defendants' motion for judgment of acquittal in a case involving a 31-count bank fraud indictment. In ruling that the defendants met the standard for award of fees under the Hyde Amendment, the district judge determined that the prosecution had no evidence of criminal conduct, only civil violations; the government had filed an excessive number of charges against the defendants; the government failed to prove criminal intent; and the prosecution deliberately attempted to mislead the court through the use of expert witness testimony. The government filed a motion for reconsideration, which was denied by the district court. The government then appealed. The court of appeals affirmed the district court's denial of the motion for reconsideration on procedural grounds in June 2000. The OPR investigation is ongoing.

**Case 5:** This matter was opened in June 1999. Three defendants were charged with misusing federal monies. The district court granted a motion for judgment of acquittal filed by one of the three defendants and subsequently granted that defendant's petition for fees under the Hyde Amendment. In granting the petition for fees, the district judge noted that the evidence against the defendant was so weak that it cast doubt on whether there was probable cause to seek the indictment. The OPR investigation is ongoing.

**Case 6:** This matter was opened in June 1999. In a prosecution that was based on the defendant's possession of stolen explosive materials, the district court granted a motion for judgment of acquittal on the ground that the government had failed to prove that the defendant knew that the explosive materials at issue were stolen. The defendant subsequently filed a motion for fees under the Hyde Amendment. The petition was denied on jurisdictional grounds. The OPR inquiry is ongoing.

**Case 7:** This matter was opened in June 1999. Prior to trial, an indictment for alleged violations of the Clean Water Act was dismissed by the court upon motion by the government. After the OPR inquiry was opened, one of the defendants filed a petition for attorneys' fees under the Hyde Amendment alleging that there was never any credible evidence to support the charges in the indictment. In July 2000, the district court awarded fees under the Hyde Amendment, ruling that the prosecution had been "clearly vexatious." The OPR investigation is ongoing.

**Case 8:** This matter was opened in June 1999, prior to the filing of the Hyde Amendment motion. The trial of a prosecution for tax evasion ended in a hung jury, and the government dismissed the case rather than retry it. The defendant filed a motion for fees under the Hyde Amendment, which was denied by the district court in August 2000. The OPR inquiry is ongoing.

**Case 9:** This matter was opened in July 1999. The indictment charged 13 defendants in a case arising from alleged misappropriation of federal housing funds. The charges against two defendants were dismissed upon motion by the government prior to trial, and the charges against five more defendants were dismissed upon motion by the government prior to submission to the jury. The jury acquitted or hung on the counts against the remaining six defendants. The government acted to dismiss the case against those defendants on which the jury hung rather than retrying the case. Seven defendants filed for Hyde fees, and the district court granted three of those petitions. The court ruled that a reasonable prosecutor would have known that the charges against those three defendants could not be sustained. Appeals and cross-appeals have been briefed but not yet argued before the court of appeals. The OPR investigation is ongoing.

**Case 10:** This matter was opened in December 1999. A defendant who had been acquitted on charges of drug trafficking filed a Hyde Amendment motion. The primary evidence that the defendant was involved in the drug conspiracy were tapes of recorded conversations. There was conflicting evidence as to whether the voice in the recordings was the defendant's voice. The OPR inquiry is being held in abeyance until the district court rules on the defendant's Hyde Amendment application.

#### **Closed Inquiry**

**Case 1:** This matter was opened in August 1999. The defendant, indicted for tax and bankruptcy fraud, filed a Hyde Amendment claim after the government acted to dismiss the indictment. The defendant's application sought attorneys' fees and expenses "because of the vexatious conduct of the Internal Revenue Service." The government entered into a settlement agreement with the defendant whereby he was paid \$75,000 in exchange for the dismissal of his claims. The settlement agreement provided that the settlement should not be construed as an admission that the position of the government was vexatious, frivolous, or in bad faith. In June 2000, OPR completed a preliminary inquiry, concluding that no Justice Department attorney exercised poor judgment or engaged in misconduct in connection with the case. However, that conclusion is being reviewed internally, and the inquiry may be reopened.

**OPR'S SUMMARIES OF JUDICIAL FINDINGS CASES  
THAT OPR RECLASSIFIED**

In table 5 of our August 2000 report on OPR's operations, we reported that there had been 60 investigations opened by OPR as a result of judicial findings or criticisms for which OPR had found no professional misconduct or poor judgment. Upon further research, OPR concluded that it had erroneously classified 18 of those 60 cases and that these should have been classified as ones where OPR found that there had been performance problems, mistakes, or other criticisms. The following are OPR's summaries of these 18 cases.

**Cases Closed in Fiscal Year 1997**

1. A U.S. court of appeals reversed a conviction because a prosecutor failed to advise the defense about an agreement with a government witness to dismiss certain charges in exchange for the witness' testimony. The court also found that the prosecutor failed to disclose certain medical records that could have potentially impeached a government witness.

OPR did not find professional misconduct because it concluded that the failures at issue were neither intentional nor reckless. However, OPR did conclude that those failures were serious enough to have warranted a review of the prosecutor's performance by his superiors (which did not occur since the prosecutor had left government service). OPR's conclusion was supported by an independent investigation of this incident undertaken by the bar disciplinary authority of the jurisdiction in which the prosecutor was licensed to practice. That investigation was terminated because it failed to disclose clear and convincing evidence of an ethical violation.

2. A U.S. district court dismissed an indictment because the court found that the particulars of a search of the defendant's cell violated his right to a fair trial, and that the government's misconduct was responsible for that violation.

OPR did not find professional misconduct because it found that the search was conducted pursuant to a warrant that was supported by probable cause, and the prosecutor who caused the warrant to be executed took reasonable precautions to ensure that privileged material in the defendant's cell was not searched. OPR did note that the better practice would have been for the prosecutor to have advised the magistrate who issued the warrant that the defense had stated its intent to file a motion challenging the search, even though that motion did not seek a stay of the search. Also, OPR's conclusion was supported by an independent decision of the court of appeals, which reversed the district court's dismissal and reinstated the indictment.

3. A U.S. district judge found during a trial that a prosecutor had committed misconduct by attempting to introduce as rebuttal evidence a statement that the court had previously ruled would not be admitted.

OPR did not find professional misconduct because the court's initial ruling specifically reserved the question of whether the statement would be admissible as rebuttal evidence, and because the defendant's direct questioning of an expert witness opened the door to admission of the statement at issue. The prosecutor attempted to introduce

the statement in such a way as to allow the defendant to object prior to its disclosure, which he did, which allowed the court to rule on admissibility outside the presence of the jury. The prosecutor agreed with OPR that it would have been better to seek court approval prior to trying to introduce the statement.

4. A U.S. district judge (Judge A) denied the government's motion for a reduction in sentence and criticized one prosecutor for making a blatantly false representation in a separate motion to a different federal judge (Judge B), a second prosecutor for his handling of the motion, and a third prosecutor for urging the first two prosecutors to file the motion.

OPR did not find professional misconduct after examining transcripts and pleadings from the underlying case, interviewing the prosecutors involved, and reviewing letters solicited from Judges A and B. OPR found that the first prosecutor made a misrepresentation to Judge B, but that it was a mistake based on inadequate preparation. Judge B stated to OPR that the first prosecutor's error was "an honest mistake" that did not affect the court's ruling. OPR found that the second prosecutor handled the motion for reduction in sentence in an appropriate manner, because he did not realize that Judge A had changed the manner in which he handled such motions. Judge A stated to OPR that the second prosecutor had always displayed candor in his dealings with the court and that he did not think disciplinary action should be taken against him. OPR found that the third prosecutor did not act inappropriately in requesting the other prosecutors to file the motion, since the information presented to Judge A about the defendant's assistance had a reasonable basis and was not false.

#### **Cases Closed in Fiscal Year 1998**

5. A U.S. district court found a prosecutor in contempt of court and ordered him to pay a \$500 fine for violating Rule 6(e) of the Federal Rules of Criminal Procedure governing disclosure of information presented to or derived from a grand jury proceeding.

OPR did not find professional misconduct, but it did find that the prosecutor made a mistake. OPR agreed with the district court that the prosecutor's release of the material covered by Rule 6(e) was not intentional, but was a mistake (in this case a failure to attach a form to the materials that instructed the recipient not to disclose the materials). In addition, OPR found that the prosecutor improperly disclosed the protected material to state law enforcement agents without first obtaining court or Justice approval. That disclosure was also a mistake, but it did not amount to professional misconduct.

6. A U.S. court of appeals stated that a prosecutor did not provide summaries of interviews with a witness to the defense prior to trial in violation of Brady.<sup>13</sup> In connection with the same proceeding, an appellate judge filed an Order to Show Cause why the prosecutor should not be subject to disciplinary proceedings for misconduct by putting on perjured testimony in the redirect examination of that witness.

OPR found that the prosecutor had not committed misconduct for the following reasons: (1) a federal magistrate assigned to investigate the appellate judge's order to show cause found after an extensive investigation that the prosecutor did not suborn perjury or otherwise act unprofessionally; OPR reached a similar conclusion for reasons that

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<sup>13</sup>Brady and the Jencks Act refer to certain discovery and disclosure requirements in criminal proceedings.

included the trial judge's opinion that jurors received truthful testimony and (2) although OPR concluded that the interview summaries at issue did in fact contain exculpatory information, the prosecutor did not violate professional standards by not producing them to the defendant before trial because (a) the prosecutor acted reasonably when he relied on his memory of the interviews of an inarticulate witness in concluding that the notes were not exculpatory; (b) he advised defense counsel that the interviews differed in their scope and content; and (c) he submitted the materials in question to the court for in camera<sup>14</sup> review, which allowed the court to identify exculpatory information in the summaries while protecting leads in an ongoing investigation. Although OPR did not find professional misconduct by the prosecutor, it did criticize him for failing to review the interview summaries side-by-side, which would have facilitated a search for exculpatory information.

7. A U.S. court of appeals reversed convictions in a criminal case, ruling that the government violated Brady by failing to provide the defense with copies of tape-recorded telephone conversations between an incarcerated government witness and a law enforcement agent with whom the witness had a clandestine sexual affair. The court of appeals also criticized certain of the lead attorney's comments during rebuttal closing argument, ruling that the comments sought to misrepresent the law enforcement agent's role in the case.

OPR did not find professional misconduct. Prosecutors informed the trial court and defense counsel of the sexual affair 3 months before the trial date and also informed them of the existence of the tape-recorded telephone conversations. On the basis of the lead attorney's review and assessment of the content of the tapes, the government declined to produce the tapes on the grounds that they did not contain Brady or other discoverable materials. OPR also determined that the lead attorney's assessment of the tapes' discoverability was reasonable. OPR determined that, despite a reasonable method of reviewing the tapes, the lead attorney inadvertently failed to note some portions of the tapes that arguably showed that the cooperating witness had an expectation of a specific reduction in sentence. Although this oversight constituted a mistake, it did not rise to the level of professional misconduct or poor judgment. Finally, OPR determined that the rebuttal argument comments criticized by the court of appeals were a fair characterization of the facts of the underlying investigation.

8. A U.S. court of appeals reversed a defendant's convictions because of an attorney's improper comments during closing argument, including commenting on the insufficiency of the defendant's evidence and facts not in evidence.

OPR did not find professional misconduct. Although OPR agreed with the court's finding that the closing argument was sufficiently prejudicial to require a reversal of the defendant's convictions, it concluded that the Justice attorney's erroneous statements were not intentional transgressions of the defendant's right to a fair trial. OPR found that although the Justice attorney had legitimate reasons for believing his comments were proper, his choice of words was regrettable.

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<sup>14</sup>An in camera review refers to a review occurring before a judge, either in the judge's chambers or in the courtroom with all spectators excluded.

9. A U.S. district court criticized a federal prosecutor for violating the rule governing contact with a represented party.

OPR did not find professional misconduct. OPR concluded that the attorney did not violate the rule governing contact with a represented party when he authorized an agent to contact the defendant's wife to ask who was representing the codefendant. OPR found that the wife did not constitute a "represented party" under the applicable regulation. OPR did find, however, that the prosecutor made a mistake because he should have specifically advised the agent that he could only ask the wife whether she knew who represented the codefendant and nothing more. OPR further found that the attorney should have instructed the agent not to talk to the wife about potential conflicts between her husband and his attorney or to say anything else that would potentially interfere with the attorney-client relationship between them. OPR also concluded that it would have been preferable for the attorney to have used other means to determine whether a conflict existed between the husband and his attorney.

10. A U.S. district court suppressed evidence obtained from a judicially authorized wiretap because the court found that the government's affidavit that was submitted in support of the wiretap application was misleading.

OPR did not find professional misconduct, concluding that the errors contained in the affidavit were not a deliberate attempt to conceal the true facts or mislead the court so it would authorize the wiretap. Rather, OPR determined that the affidavit's errors (and resulting misimpressions by the court) were caused by the prosecutor's failure to review carefully the affidavit and his failure to clarify and explain more precisely in the affidavit the reasons the wiretap was necessary. Because the prosecutor resigned prior to the completion of OPR's investigation and because the errors were performance related, the Department took no performance-based action.

11. A U.S. court of appeals criticized the government's handling at trial of its obligations under Brady and the Jencks Act.<sup>15</sup> The court found that the prosecutor should have personally reviewed for possible Brady material police officers' rough notes and should have disclosed to the defense earlier than it did a statement of a witness that was favorable to the defense. The court also criticized the prosecution's unilateral redaction of material from police reports it produced to the defense as Jencks material, and denounced its method of redacting some reports without making it obvious to the defense that material had been redacted.

OPR did not find professional misconduct. After reviewing the notes, the witness statement and the police reports cited by the court as well as relevant pleadings and transcripts, and interviewing the attorneys and agents involved in the case, OPR concluded that the prosecutor had acted in good faith and had discharged his Brady obligations in handling the rough notes and the witness statement. However, OPR found the prosecutor should have provided the witness statement to the defense at an earlier time. OPR also concluded that, though the prosecutor should have made more obvious what material had been redacted from two police reports, he did not improperly attempt to conceal information from the defense by nonobvious redactions and attempted in good faith to comply with his obligations under the Jencks Act.

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<sup>15</sup>Brady and the Jencks Act refer to certain discovery and disclosure requirements in criminal proceedings.

**Cases Closed in Fiscal Year 1999**

12. A U.S. court of appeals found in two cases that USAO attorneys had improperly used subpoenas to compel witnesses to attend ex parte<sup>16</sup> pretrial interviews in violation of Rule 17 of the Federal Rules of Criminal Procedure. At the request of the court of appeals, OPR investigated the USAO's subpoena practice.

OPR did not find professional misconduct, concluding that although subpoenas had been improperly served to compel witnesses to attend interviews as opposed to court hearings, the practice had occurred due to inadvertence and clerical errors. Moreover, the USAO took immediate steps to correct the improper use of subpoenas as soon as it learned of the problem. The USAO gave prompt notification to the courts and counsel for defendants in cases in which subpoenas had been issued for ex parte witness interviews and the defendants had gone to trial and were convicted. Accordingly, because the improper practice was not intentional, had been halted, and the USAO educated all attorneys and staff about the problem, OPR recommended that no further action was necessary.

13. A U.S. court of appeals reversed a defendant's conviction finding that the prosecutor had made an improper statement in closing argument that prejudiced the defendant's right to a fair trial. The court ruled that the prosecutor mischaracterized a witness' testimony by seeming to quote the testimony in a way that assumed a fact not clearly testified to by the witness.

OPR did not find professional misconduct, concluding that the prosecutor had intended to paraphrase the witness' testimony rather than to quote it. OPR found that the district court had ruled that the disputed fact was in evidence, and that defense counsel had not objected to the questioning of the witness or to the portion of the closing argument that was criticized by the court of appeals. OPR concluded that although the prosecutor made a mistake in asking the witness an ambiguous question, under all the circumstances of the case, the prosecutor did not commit professional misconduct.

14. A U.S. court of appeals found that two statements made by prosecutors during closing argument were improper, but not sufficiently prejudicial to warrant reversal of convictions, because any harmful effect of the two improper statements was cured by quickly sustained objections and instructions by the court.

OPR did not find professional misconduct. Although OPR found that the comments were improper, they were spontaneous comments made in response to the defense counsel's argument in a contentious and complex trial. Moreover, prosecutors immediately ceased the improper comments upon the court sustaining the defense counsel's objection. The district judge told OPR that he did not believe that the prosecutors intentionally sought to prejudice the defendants by their comments.

**Cases Closed in Fiscal Year 2000**

15. A U.S. court of appeals expressed concern about a prosecutor's conduct and candor regarding his reasons for several peremptory challenges of African-Americans during

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<sup>16</sup>The term ex parte refers to actions "done or made at the instance and for the benefit of one party only, usually without notice to or argument from the adverse party." *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999).

voir dire.<sup>17</sup> Nevertheless, the court affirmed the district court's ruling that the prosecutor's peremptory challenges were race-neutral.

OPR did not find professional misconduct for the following reasons: (a) the prosecutor did not challenge other potential African-American jurors; (b) the reasons he stated for his peremptory challenges were equally applicable to those potential African-American jurors he did not challenge; (c) OPR found credible the prosecutor's reasons for distinguishing between an African-American and white juror with similar, but not identical employment; (d) OPR found that although the prosecutor's rationale for the exercise of peremptory challenges may have been less than fully cogent, they were race-neutral—which is all that is required to satisfy a Batson challenge<sup>18</sup>—and the rationale was not as far-fetched as suggested by the court of appeals; and (e) the trial judge, who observed the prosecutor's demeanor during voir dire, concluded that the prosecutor's decisions were race-neutral. OPR concluded that the prosecutor failed to clearly articulate his reasons for exercising the peremptory challenges at issue, a lack of clarity that contributed to the court of appeals' critical comments.

16. A U.S. district court granted a motion for a new trial on the ground that the prosecutor knowingly used perjured testimony that could have affected the jury's verdict. During the trial, a cooperating former codefendant falsely testified that a certain name was his true name. The cooperator also testified that he was unable to identify an individual—his brother—in a photograph shown to him while he was on the witness stand.

OPR did not find professional misconduct. Prior to trial, the prosecutor conducted a criminal background check on the cooperator and reviewed various official reports and documents, all of which identified the cooperator by the name under which he testified. OPR concluded that it was reasonable for the prosecutor to rely on this information. One of the reports the prosecutor reviewed listed an alias that later turned out to be the witness' true name. OPR noted that, once it was decided that the cooperator would testify in support of the government's case, it would have been a better practice for the prosecutor to have conducted a separate criminal history check under the alias listed in the report. The prosecutor should then have questioned the witness about the alias. However, under the circumstances, OPR did not find that the prosecutor committed professional misconduct or exercised poor judgment. Finally, the district judge wrote to OPR and stated that he believed the prosecutor's failure to discover the cooperator's true name was inadvertent.

17. A U.S. district court granted a new trial to several defendants on the basis that the government engaged in prosecutorial misconduct by allowing false statements and false impressions in a witness' testimony to pass to the jury uncorrected. The court concluded that, although the government made a file in another case available to the defense as part of the office's open file discovery policy, the government's general advice for the defense to look at the file did not satisfy its obligation to advise the defense of materials in it that evidenced the falsity of the witness' testimony.

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<sup>17</sup>The term voir dire refers to, among other things, a "preliminary examination of prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999).

<sup>18</sup>A "Batson challenge" requires the prosecution to provide a race-related reason for exercise of preemptory challenges in light of the defendant's allegation that the challenges are racially motivated.

OPR did not find professional misconduct, concluding that the testimony of the witness, when viewed in context, was not false. OPR found that the witness was asked questions and gave answers that were ambiguous and that were not probed by defense counsel for more detail. OPR noted that, although it might have been preferable, as the prosecutor in the case acknowledged, for the government to have given a copy of the file in the other case to the defense as part of the materials it provided, there was no legal requirement for it to do so.

18. A U.S. district court excluded color images of child pornography in a criminal trial on the ground that the prosecutor had provided poorer-quality, black-and-white photocopies to the defense and had not provided the color images until shortly before trial. The district court suggested that the prosecutor had either tried to sandbag defense counsel or had simply performed shoddy work. The government filed an interlocutory appeal<sup>19</sup> of the exclusion order, but the court of appeals ruled that the district court's findings were not clearly erroneous.

OPR did not find professional misconduct, after examining transcripts and other materials from the prosecution; reviewing a written response from the prosecutor; and interviewing the prosecutor, other Justice attorneys, defense counsel, and the U.S. district judge. OPR found that the prosecutor did not intend to sandbag the defense because (a) the color images were available to the defense through "open file" discovery; (b) the prosecutor had a reasonable basis for believing that defense counsel knew there were color images; (c) he provided the color images to the defense prior to trial (and as soon as they were requested); (d) in a letter to the United States Attorney after the criminal case, the U.S. district judge stated that the late disclosure of the color images was just poor lawyering and that the prosecutor did not intend to evade his discovery obligations; (e) the judge stated to OPR that the prosecutor did not commit professional misconduct and that investigating the prosecutor would be a waste of government resources; and (f) defense counsel told OPR that the prosecutor had not intended to sandbag him. OPR concluded, however, that it would have been a better practice for the prosecutor to have compared with defense counsel the black-and-white photocopies and the color images to ensure that the purposes of discovery were fulfilled.

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<sup>19</sup>An interlocutory appeal is an appeal that occurs prior to the trial court's final ruling on the case.

**OPR'S SUMMARIES OF ADDITIONAL JUDICIAL FINDINGS CASES**

OPR's research into the 60 investigations that it opened as a result of judicial findings or criticisms but for which it had found no professional misconduct or poor judgment revealed that some of the findings or criticisms were reversed, vacated, or disagreed with by the district court itself or by a court of appeals. Further, some of the cases were closed by OPR for various administrative reasons, did not involve federal prosecutors, or were opened on the basis of a complaint from a retired state judge who was not acting in a judicial capacity. The following are OPR's summaries of these cases.

**Cases Closed in Fiscal Year 1997**

1. A U.S. district court dismissed without prejudice certain charges from a superseding indictment for misjoinder (improper union of offenses), and drew an inference that the prosecution had added those charges because the defendants did not agree to a plea deal. The district judge later issued a supplementary order stating that he no longer found that those events gave rise to an inference of prosecutorial bad faith, noting that the government had advised him that it routinely expressed a willingness in plea negotiations to forgo filing additional charges if a plea deal were reached.

OPR did not find professional misconduct, noting that the district judge's initial order did not find that the government had in fact engaged in vindictive prosecution, only that the events gave rise to such an inference. Appellate courts have declined to apply a presumption of vindictiveness when the government supersedes an indictment to add charges following unsuccessful plea negotiations. OPR found that the government's theory of joinder appeared to have been asserted in good faith, as the district judge apparently recognized in his supplemental order.

2. A U.S. district court issued an Order to Show Cause why an attorney should not be sanctioned and criticized the government for failing to produce certain documents as directed by a court order. The latter order required the government to produce documents or submit proposed redactions by a certain date.

OPR did not find professional misconduct by the Justice attorney because the attorney's explanation for the failure to produce was plausible, and the order was ambiguous on when the documents should have been produced in the event that the government sought to withhold them in their entirety. The judge vacated the order on the basis of the government's response to the order.

**Cases Closed in Fiscal Year 1998**

3. A U.S. district court dismissed a prosecution on the grounds that the indictment evidenced prosecutorial vindictiveness. The court reasoned that the defendant--who was already serving a sentence on related charges to which he had pleaded guilty--was indicted to punish him for having filed a habeas corpus petition.

OPR did not find professional misconduct, after examining transcripts and pleadings from the criminal case; reviewing written responses from the prosecutor and his supervisor; and interviewing the prosecutor, other Justice attorneys, and the district judge who dismissed the prosecution. The record did not support a finding of

vindictiveness. The prosecutor had allowed the defendant to plead to a lesser charge because the defendant said that he could provide information about persons who smuggled machine guns and hand grenades into the district. The defendant later admitted providing false information and thus violated his plea agreement obligation to cooperate and provide truthful information, which led to the subsequent indictment. Also, the prosecutor made a written memorial of his intent to re-charge the defendant before the defendant filed his habeas petition. Finally, the district judge stated to OPR that the prosecutor's actions had "no vindictiveness at all" and that his finding of prosecutorial vindictiveness was "just a label" he employed because he thought the government should not "go after" the defendant because he was already serving a significant sentence.

4. A U.S. district court ruled that Justice attorneys committed misconduct in a complex civil case by taking dishonest litigating positions. The district court ruled further that the Justice attorneys acted in bad faith during discovery.

OPR did not find professional misconduct after examining voluminous materials relating to the underlying litigation and interviewing more than 10 government attorneys who were involved in the case. OPR concluded that the Justice attorneys did not engage in professional misconduct. OPR found that a witness declaration at the heart of the government's legal arguments was not false, and that the government's litigating positions were not dishonest and were based on information that was disclosed to the court and opposing counsel. Finally, OPR found that the Justice attorneys did not act in bad faith in discovery. The court of appeals subsequently ruled that the district court's findings about the government's litigating positions and discovery practice were clearly erroneous.

5. A U.S. district court issued a written order criticizing state law enforcement agents' failure to identify and produce exculpatory evidence in their possession to the defendant in a federal criminal prosecution. While the court specifically found that the failure to provide required disclosures was not directly the fault of the USAO, OPR opened an investigation into the matter to determine whether the actions of the assigned attorneys contributed to the government's untimely disclosures.

OPR did not find professional misconduct, noting that on request of the state law enforcement agency involved, the USAO provided training on federal criminal procedure to state law enforcement agents.

6. A retired state judge alleged that he had reported to a Justice attorney facts that he believed evidenced public corruption, which the attorney had failed properly to pursue. The retired judge alleged that the attorney had prematurely instructed a law enforcement agent to terminate the investigation of the matter, and that the attorney, when asked, had misrepresented the status of the investigation.

OPR did not find professional misconduct, concluding that the prosecutor had done nothing improper in seeking a preliminary investigation by an investigative agency of the retired judge's allegations, and in declining to pursue the investigation when no evidence of a federal crime was found.

### **Cases Closed in Fiscal Year 1999**

7. A U.S. bankruptcy judge found that a trial attorney acted unethically at a hearing because the attorney failed to inform the court that a letter had been sent by the Justice to another government agency. The letter requested that certain contract payments to the debtor be held in abeyance, which the court believed would have prejudiced a secured creditor.

OPR did not find professional misconduct, concluding that the bankruptcy court's finding was based upon incorrect assumptions about the trial attorney's knowledge at the time the letter at issue was sent. OPR also concluded that due to the particular circumstances giving rise to the letter and the trial attorney's limited role in the bankruptcy proceedings, the attorney failed to recognize the letter's potential effect on the bankruptcy. The bankruptcy court later vacated its finding of unethical conduct once additional evidence regarding this matter was brought to its attention.

8. A U.S. district court found that a prosecutor had committed misconduct by eliciting prejudicial testimony from a witness and was overly solicitous of the jury. The Judge nevertheless affirmed the jury's convictions because the misconduct had not deprived the defendants of a fair trial.

OPR did not find professional misconduct for several reasons: (a) OPR agreed with the prosecutor's explanation of why the testimony was relevant, admissible, and not prejudicial; (b) multiple witness interviews failed to uncover any evidence that the prosecutor intended to elicit prejudicial testimony; and (c) posttrial interviews with jurors showed that they were not tainted by the prejudice that concerned the court. The court of appeals affirmed the defendants' convictions and rejected the district court's assertion that the prosecutor's questioning was improper or that he was overly solicitous to the jury.

9. A U.S. district court granted defendants a new trial on the grounds that the government violated its obligation under Brady<sup>20</sup> by failing to discover and produce certain documents from a federal agency's files. The court reasoned that the documents undercut government arguments made at trial.

OPR did not find professional misconduct after examining documents and testimony from the trial and posttrial proceedings, reviewing written submissions from the two prosecutors involved, and interviewing the two prosecutors. OPR concluded that the prosecutors did not violate the government's Brady obligations and that the government did not make the arguments attributed to it by the district court. The court of appeals subsequently reversed the district court, ruling that there was no Brady violation and that the government did not make the arguments attributed to it by the district court.

10. A U.S. district court criticized a prosecutor for ambushing the defense by not advising them earlier of the government's intention to call a witness who created a conflict of interest for the defense attorney.

OPR did not find professional misconduct, concluding that the government had never definitively told the defense that the witness would not testify for the government, and as soon as the witness agreed to cooperate with the government, the defense was informed

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<sup>20</sup>The Brady doctrine refers to certain discovery and disclosure requirements in criminal proceedings.

of that fact. Therefore, OPR concluded that the judicial criticism was not supported by the evidence. The court of appeals subsequently vacated the district court's finding.

11. A U.S. district court imposed monetary sanctions on an attorney for failing to comply with the court's order for the government to discuss in a brief the position it took on one aspect of a motion filed by the opposing party. The court stated that the brief filed by the attorney provided no useful argument on this issue.

Shortly after opening an investigation into the matter, OPR learned that the attorney had resigned from government service. OPR recommended that its investigation be closed and that the matter be referred to the former attorney's bar disciplinary authorities because (a) the obligation to comply with court orders is well known and applicable to all attorneys; (b) the misconduct had already been noted and sanctioned by the court, putting all Justice attorneys on notice that the conduct was improper; (c) no disciplinary action could be taken since the attorney had resigned; and (d) referral to the bar would afford the attorney an opportunity to defend or explain the conduct. The Office of the Deputy Attorney General approved this recommendation; OPR referred the matter to the bar and closed its investigation without findings.

12. A U.S. court of appeals reversed a defendant's convictions on some, but not all, counts on the grounds that aspects of a prosecutor's closing argument were improper.

OPR opened an investigation and was informed that the prosecutor had left government employment for private practice. After repeated unsuccessful attempts at securing the cooperation of the former prosecutor and thus being unable to pursue the investigation, OPR referred the misconduct finding to the relevant state bar.

13. A U.S. court of appeals reversed a conviction because of a prosecutor's improper remarks during opening statement and closing argument.

OPR did not find professional misconduct. OPR concluded that the prosecutor was unaware of certain facts at the time he made his remarks that caused them to be misleading, and that law enforcement agents failed to tell the prosecutor of the relevant facts. Thus, based upon what the prosecutor knew at the time of trial, the arguments were appropriate, made in good faith, and were not made for purposes of prejudicing the defendant's right to a fair trial.

#### **Cases Closed in Fiscal Year 2000**

14. A U.S. district court dismissed a civil complaint because prosecutors failed to disclose to the defendant information the court deemed relevant to the defense.

For several reasons, OPR closed the case after conducting a preliminary investigation: (a) the court's legal and factual analyses were weak and unpersuasive; (b) the attorneys at issue had left government employment many years previously; (c) in connection with the same litigation, OPR had previously investigated four other misconduct allegations and did not substantiate any of them; (d) given the prior investigations, it was unlikely any new information would have been discovered; (e) a full investigation would not be likely to deter future misconduct given the extensive media coverage of this case and the previous allegations of misconduct; and (f) the incident at issue occurred many years ago, making an investigation exceedingly difficult.

15. A U.S. court of appeals and a U.S. district court upheld a magistrate judge's ruling that a search warrant affidavit contained false information, and that the information was included in the affidavit with at least a reckless disregard for the truth.

OPR did not find professional misconduct, concluding that the agents who drafted the affidavit were responsible for its contents, not the prosecutors. OPR found that the prosecutors did not commit professional misconduct in their supervisory roles over the agents' conduct, as they were justified under the circumstances in relying on the judgment of the agents regarding the affidavit.

**OPR'S SUMMARIES OF JUDICIAL FINDINGS CASES OPR OPENED  
BUT NO PROFESSIONAL MISCONDUCT, POOR JUDGMENT,  
OR OTHER CRITICISM FOUND**

The following are OPR's summaries of cases OPR opened as a result of judicial findings or criticism but for which it had found no professional misconduct, poor judgment, or other criticism

**Cases Closed in Fiscal Year 1997**

1. A Special Master (who is neither a federal judge nor magistrate) imposed monetary sanctions on the government for withdrawing its designation of a deposition during the course of the deposition, a withdrawal the Special Master found substantially unjustified.

OPR did not find professional misconduct on the part of the trial attorneys litigating the case for the following reasons: (a) the Special Master found "some" but not "substantial" justification for the conduct at issue; (b) the Special Master did not find that the prosecutors had engaged in professional misconduct or acted in bad faith; (c) the Special Master's sanctions included only payment of defendants' reasonable expenses in connection with the issue of the witness' designation, and did not include punitive sanctions; and (d) the litigation settled on terms that provided that the United States was not liable for the awarded sanctions.

2. A U.S. district court found that the government's supplemental civil discovery response was intentionally incomplete, evasive, and not made in good faith, and accused the government of engaging in a pattern of evasion and stonewalling. The court also found that government counsel committed an implied misrepresentation by failing to correct a deposition witness' testimony relating to his review of certain documents, that government counsel were evasive when they said at a hearing that there was no evidence that the witness destroyed documents, and that government counsel were guilty of a fraud on the court for allowing the court to believe that a note written by a witness was an original, rather than a rewrite of the original note.

OPR did not find professional misconduct, concluding that the court's findings were not supported by the record, after reviewing pleadings, memorandums, and transcripts and interviewing numerous witnesses. The government's supplemental discovery response was accurate; the witness recanted the deposition statement and no one could recall seeing documents like the ones described by the witness prior to his recantation. Government counsel properly corrected the witness' deposition testimony; at the hearing, government counsel accurately stated that there was no evidence of document destruction other than the witness' original statement to that effect, which he later recanted. As to the note, to the best of the government's information, the note was the original and not a rewrite.

3. A U.S. court of appeals reversed the defendants' convictions and remanded for a new trial, finding that the prosecutor's words referring to the defendants in rebuttal closing argument and a comment on the low level of crime in the community constituted an improper appeal to local allegiances. The court of appeals also strongly hinted that the attorney's appeal to the jury was racist.

OPR did not find professional misconduct, on the basis of a review of the complete trial transcript, other documents, and interviews with numerous witnesses, including the trial judge. OPR found that the comments the court of appeals criticized were not an appeal to bias or prejudice but were an explanation of why undercover agents engaged in successively more serious transactions with the defendants, to rebut an entrapment defense. OPR also found that none of the participants in the trial it interviewed understood the Justice attorney's comments as such an appeal, and that such an interpretation was inconsistent with the attorney's reputation. OPR noted that the closing argument issue was raised in the defendants' brief on appeal only as an improper character evidence issue, and that neither the attorneys nor the court of appeals raised it at oral argument.

4. A U.S. district court adopted a magistrate judge's recommendation that an indictment be dismissed because prosecutors did not act in good faith in responding to discovery orders. Specifically, the magistrate found that the government failed to follow the district's open-file discovery policy, timely produce available statistical compilations, and timely provide to the defense certain materials from a law enforcement manual.

OPR did not find professional misconduct because (a) the open-file policy protected grand jury transcripts and other items from early disclosure, and the prosecutors were in compliance with that policy; (b) the statistical compilations in question did not exist, but prosecutors made an effort to produce newly generated statistics; and (c) OPR determined that prosecutors were acting in good faith with respect to production of the law enforcement manual, since production was complicated by a governmentwide furlough.

5. A U.S. court of appeals criticized public comments made by a prosecutor as false, misleading, self-serving, unjust, and unprofessional.

OPR did not find professional misconduct because the court of appeals adopted district court findings that had been made without any evidentiary basis. Upon close examination of the written and oral statements of the prosecutor, OPR found no support for the allegation that the prosecutor made inappropriate statements to the press with respect to the indictment or conviction of either criminal defendant because the statement at issue, which had not been accurately quoted by the court, accurately described the scope of various federal statutes.

6. A U.S. district court criticized Justice attorneys for their conduct at trial of a civil case against the government, including sponsoring false testimony, misinterpreting a prior decision of the circuit court (which had remanded the case to the district court for a trial), improperly asserting a good faith defense, and improperly calling a witness at trial.

OPR concluded that the trial attorneys did not commit professional misconduct or exercise poor judgment; they did not sponsor false testimony; they correctly interpreted the circuit court's decision; and their reliance on the good faith defense was proper. OPR noted that in reversing the decision of the district court, the court of appeals concluded that the district judge was so hostile toward the government's attorneys that it took the extraordinary step of ordering that the case be reassigned to a different district judge for retrial.

7. A U.S. court of appeals reversed a conviction because a prosecutor failed to disclose to the defense information regarding apparent perjury in another judicial proceeding by a prosecution witness.

OPR did not find professional misconduct because in the particular circumstances of this case, where the defense had ready access to the information at issue, OPR did not believe that the failure to disclose was intentional or reckless. OPR's conclusion was supported by an independent investigation of this incident undertaken by the bar disciplinary authority of the jurisdiction in which the prosecutor was licensed to practice. That investigation was terminated because it failed to disclose clear and convincing evidence of an ethical violation.

#### **Cases Closed in Fiscal Year 1998**

8. A U.S. district court judge granted a motion to dismiss an indictment for prosecutorial misconduct at the conclusion of the government's case-in-chief at trial. The district judge found that one Justice attorney misrepresented whether a witness was taking medication, that another Justice attorney misrepresented whether he had told a witness not to talk to the defense, and that both attorneys failed to produce in a timely manner transcripts of the grand jury testimonies of a number of witnesses whose testimonies the judge found exculpatory.

OPR did not find professional misconduct after reviewing relevant grand jury and trial transcripts and interviewing the two Justice attorneys and others involved in the case. OPR concluded that the statements the Justice attorneys made in court did not misrepresent the facts and that the attorneys did not suppress exculpatory material from the defense. OPR found that the statements of one Justice attorney accurately advised the judge what the attorney knew of the witness' current medical circumstances, and that the statements of the other attorney accurately reflected that he had not advised a witness not to speak with the defense. OPR also found that the Justice attorneys disclosed impeachment material to the defense in a timely manner and were not obligated to provide the defense with the testimonies of witnesses that did not tend to negate the guilt of the defendants and was available to the defense with reasonable diligence. OPR found that the Justice attorneys had a good understanding of their disclosure obligations and discussed disclosure issues during the case with their supervisors.

9. A U.S. district court requested that OPR investigate the disclosure of confidential government information that was subject to a sealing order in a civil case and a Justice attorney's failure to notify the judge when the attorney discovered that the information had been disclosed.

OPR did not find professional misconduct. OPR found that the documents that had been disclosed had not been subject to the sealing order and did not originate from Justice. OPR also found it unlikely under the circumstances that, of all the government personnel who had access to the documents, Justice employees were responsible for their disclosure. Finally, OPR concluded that the Justice attorney who discovered there had been a disclosure did not commit professional misconduct by failing to notify the judge but acted appropriately when he referred the matter to the investigative office of an involved agency.

10. In two successively decided cases, a U.S. court of appeals criticized a prosecutor's closing arguments, stating in one case that the attorney's comments invited the jury to consider issues beyond the guilt or innocence of the defendant and, in the other case, that his comments were improper, or at least of questionable propriety.

OPR did not find professional misconduct. A full investigation, including a thorough review of the circuit's closing argument case law, showed that the attorney's remarks, when viewed in context and compared with similar comments set forth in closing argument precedent in the circuit, were arguably permissible. The attorney was able to provide reasonable, good faith explanations for why he believed, from his understanding of closing argument case law, that his comments were permissible. In some instances, the circuit's closing argument case law did not provide clear, unequivocal guidance regarding what comments constituted improper closing argument. OPR recommended that the attorney's component provide training concerning the state of the law governing closing arguments in the circuit.

11. A U.S. court of appeals criticized a prosecutor for failing to advise the district court that an upward departure from the sentencing guidelines was invalid. At sentencing, the district court announced that it was going to depart from the sentencing guidelines and impose a longer sentence because of the victim's death. The defendant's attorney objected to the upward departure because no prior notice of the departure had been given and because the Sentencing Commission had already taken death into consideration when setting the sentencing guidelines. The circuit court concluded that the prosecutor had a duty to inform the district court that it could not depart upwardly on account of the victim's death. Because of the prosecutor's breach of this duty, the circuit court stated that the prosecutor's conduct was reprehensible.

OPR did not find professional misconduct, concluding that the circuit court's criticism of the prosecutor was unsupported by the record. Prior to the sentencing, adequate notice had not been given by the district court concerning the intended upward departure. Thus, the prosecutor did not know that there was going to be an upward departure and, therefore, had not familiarized himself with the relevant provisions of the sentencing guidelines. Also, this was the first murder case that the prosecutor had handled in which departure was an issue. The USAO vigorously defended the sentence on appeal and believed that the departure was warranted under the facts of the case.

12. A U.S. district court criticized what he called a USAO "policy" of refusing to grant immunity to a witness called by the defense, when that witness had been previously granted immunity if called to testify by the prosecution (in this particular case, the prosecution did not in fact call the witness).

OPR did not find professional misconduct because applicable circuit court case law holds that the government is not required to grant immunity to defense witnesses. In addition, the USAO denied that it had the policy referred to by the court, and did grant the witness immunity after considering the court's criticisms.

13. A U.S. court of appeals found that a prosecutor acted improperly by warning the attorney for a potential defense witness, just days prior to trial, that if the witness testified for the defense, the government would revoke the witness' immunity and prosecute him. The witness previously had appeared before the grand jury, pursuant to

court-ordered immunity, and had been warned by the prosecutor of the consequences of giving false testimony.

OPR did not find professional misconduct, after reviewing transcripts of the grand jury proceedings and interviewing the Justice attorney. The Justice attorney did not threaten to revoke the witness' immunity; he noted only that the immunity would not have been applicable if the witness voluntarily testified for the defense. Moreover, the prosecutor did not inform the witness of the potential for self-incrimination while testifying without immunity. Instead, after the prosecutor learned the witness might testify at trial, he advised the witness' attorney of the potential for self-incrimination.

#### **Cases Closed in Fiscal Year 1999**

14. A U.S. court of appeals reversed a defendant's convictions on the grounds that instances of prosecutorial vouching on behalf of government witnesses had affected the jury's verdict.

OPR did not find professional misconduct for the following reasons: At trial, the defense had attacked the credibility of the government's witnesses who were testifying pursuant to plea agreements. The prosecutor responded by introducing evidence of the truthfulness requirements of those agreements in the government's case-in-chief and asking an FBI agent questions relating to the witnesses' cooperation with the government. OPR concluded that the prosecutor reasonably believed, consistent with his understanding of circuit law and his prior experience, that it was permissible to introduce this evidence in response to the defense's attack on the witnesses. At the time of the trial, it was not clear under the circuit's case law what constituted improper witness vouching, particularly in the context of rehabilitating cooperating witnesses. Therefore, there was no reason for the prosecutor to know whether his conduct was improper, especially since neither the defense nor the district court objected to any of his questions or his closing argument.

15. A U.S. district court released an INS detainee from custody in part because of concerns about a Justice attorney's possible misrepresentations to the court. The detainee's counsel alleged that Justice attorneys and agents conspired to use an immigration proceeding to deliver an alien to a foreign country in the absence of an extradition treaty. In addition, it was alleged that the government relied on altered or manipulated documents in seeking the detainee's expulsion from the United States.

OPR did not find professional misconduct after interviewing 36 witnesses and reviewing over 5,000 pages of transcripts and documents. OPR found that the government's case was not a pretext to deliver the detainee to foreign authorities because there was sufficient evidence of visa fraud to warrant deportation. OPR concluded that the government did not detain him in custody to deliver him to the foreign authorities. Rather, OPR found that he was detained because there was sufficient evidence he was a flight risk. Moreover, OPR noted that he was released on bond, which was inconsistent with an intent to deliver him to a foreign country. Finally, OPR concluded that the government reasonably did not question the reliability of some of the documents it used in the immigration proceeding because it had evidence corroborating the documents.

16. A U.S. district court ordered the government's "Notice of Intent to Seek Death Penalty" stricken from the record because it was filed by the prosecutor before the

Attorney General's (AG's) capital case review committee had completed its review of the case and without the AG's certification that the case would proceed as a death penalty case. The district judge also criticized the prosecutor for failing to meet the court-imposed deadline for filing of the notice.

OPR did not find professional misconduct, concluding that the prosecutor filed the Notice of Intent to Seek Death Penalty because he was instructed to do so by the AG's review committee as a protective measure to allow the committee to complete its review of the case without missing the deadline for filing the notice. The prosecutor was candid, telling the judge that the AG had not in fact certified the case and that the notice had been filed as a protective measure while the determination of whether the case would proceed as a death penalty case was made. OPR determined that the Federal Death Penalty Act does not require that the AG review and certify a case to proceed as a capital case before the government may file its notice of intent to seek death penalty. Only Justice's internal protocol requires that the AG complete a review and certification before a federal prosecution can proceed as a capital case. Experts within Justice agreed that it is legally permissible for a Justice prosecutor to file a notice of intent to seek the death penalty without the AG's review and certification. Therefore, it was incorrect for the district judge to criticize the prosecutor's filing of the notice. OPR determined that the prosecutor had taken reasonable steps to obtain an extension of the court-imposed deadline for filing the notice and was given reason to believe that his extension would be granted. OPR determined that it was only after the deadline had passed that the district court refused to grant the requests for extension.

17. A U.S. district court issued two opinions criticizing the conduct of Justice attorneys handling a civil case. In the first opinion, the court criticized the government for providing discovery on a rolling basis, conduct for which the court previously criticized the government in another case. In the second opinion, the court criticized the government for failing to reasonably determine the availability of a witness for deposition.

OPR did not find professional misconduct, concluding that the government's production of documents was consistent with accepted practice and a reasonable construction of Rule 34 of the Federal Rules of Civil Procedure governing the production of documents, because the government timely objected to the discovery requests at issue. In addition, OPR found that the present case was distinguishable from the prior case in which the court criticized the government, and the prior judicial criticism was specifically limited to that particular case. The two cases involved different discovery mechanisms and different responses by the government. Similarly, OPR found that the government did reasonably determine the witness' availability for deposition and offered to make him available for deposition at reasonable times with reasonable notice. Therefore, OPR concluded that the evidence did not support the judicial criticism.

18. A U.S. court of appeals criticized an U.S. Attorney (USA) in terms that created the impression that the criticism was directed at the USA individually. The court of appeals accused the USA of settling a case for political reasons related to the subject matter of the case, in order to prevent the court from deciding the case on the merits.

OPR did not find professional misconduct. OPR determined that the USAO litigated the case as it would have any other case of that subject matter. The line attorneys who

handled the case made litigation and strategy decisions that were based on the client agency's best interests and on the most defensible legal positions. OPR found no indication that litigation decisions in the case were based on the desire to advance a particular political agenda. OPR concluded that the court of appeals' criticisms were based on faulty assumptions and misapprehensions. For example, the court of appeals assumed that the USA was directly and personally involved in litigating the case. OPR determined that the USA had no direct involvement in the litigation, either in the district court or the court of appeals.

19. A U.S. district court dismissed without prejudice an indictment because of the government's violation of the Speedy Trial Act. The district court concluded that the indictment should be dismissed because of a 6-week period in which the defendant had been detained without a continuance under the act. The judge was critical of the government's practices and procedures used in requesting the continuances, the magistrate judges who granted them, and the defense attorneys who consented to the continuances without express authorization from the defendant.

OPR did not find professional misconduct because the district court did not find misconduct or comment on any particular prosecutor, and because a clerical error had caused the delay at issue. OPR also noted that the USAO stated it would make any changes that were needed in its practices and procedures for seeking continuances.

20. Two U.S. courts of appeals and a U.S. district court criticized a prosecutor in three separate cases. In the first case, the court admonished the prosecutor for violating the spirit of a ruling on a motion in limine<sup>21</sup> by asking a particular question on re-direct. In the second case, the court upheld a conviction but criticized a comment the prosecutor made in closing argument. In the third case, the court upheld a conviction but ruled that the prosecutor's cross-examination of the defendant was not proper under a federal rule of evidence.

OPR did not find professional misconduct, concluding that the prosecutor acted appropriately under the circumstances in each of the three cases, and that the cases, taken together, did not reflect a pattern of professional misconduct. In the first case, OPR found that the prosecutor did not violate the letter or spirit of the ruling on the motion in limine because he asked a question that was clearly not encompassed by the ruling on the motion, since it related to a different subject matter. In the second case, OPR found that the prosecutor's reference in closing argument to the defendant's criminal expertise was appropriate because the defense had made it a central issue at trial. In the third case, OPR found that the prosecutor's cross-examination of the defendant was appropriate, finding that the cross-examination was intended to rebut the defendant's testimony on direct examination and noting that the trial judge had approved the questions that the court of appeals found improper.

### **Cases Closed in Fiscal Year 2000**

21. A U.S. district court sanctioned the government for failure to provide the defense with an adequate written summary of its expert witness' testimony in a timely manner as required by Rule 16 of the Federal Rules of Criminal Procedure as well as by the judge's

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<sup>21</sup>A motion in limine is a "pretrial request that certain inadmissible evidence not be referred to or offered at trial." *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999).

discovery order. The court excluded the government's expert witness from testifying because the witness summary was deficient.

OPR did not find professional misconduct, concluding that the witness summary met the minimum requirements of Rule 16. OPR also found that the court's discovery order was not entirely clear and that contrary to the court's reading, the discovery order did not inform the prosecutor precisely of what he must do.

22. A U.S. court of appeals vacated a defendant's convictions because of the cumulative effect of the government's failure to disclose to the defense several witness interviews containing exculpatory information in violation of Brady.<sup>22</sup> The district court found that the government's handling of an expert witness was intentionally misleading.

OPR did not find professional misconduct. OPR concluded that (a) the prosecutor reasonably believed that all memorandums of witness interviews had been produced to the defendant in connection with an earlier trial; (b) the prosecutor did not know of the existence of two of the witness interviews that the court found to be exculpatory; and (c) the prosecutor did not mislead the court or jury by failing to disclose the fact that the government's expert witness was the case agent who had investigated the defendant, because the prosecutor did not hide the agent's role in the case, and reasonably believed that it would have been objectionable to affirmatively bring out the agent's role in the criminal investigation during his testimony.

23. A U.S. district court found that a Justice attorney submitted a false report of an interview in support of a motion to the court.

OPR did not find professional misconduct, after reviewing the judge's order, the Justice attorney's written response to the misconduct allegation, transcripts of court proceedings, the appellate briefs of the parties, and other relevant documents. OPR found that the facts set forth in the report of interview were all supported by evidence, common sense, and general experience, and that the witness' later denials of statements made in the interview were contradicted by his own testimony. OPR concluded that the Justice attorney did not engage in professional misconduct but acted appropriately under all of the circumstances. OPR noted that the misconduct allegation arose only after the court of appeals suggested or implied that the district court judge should recuse himself from the case.

24. A U.S. court of appeals found that a prosecutor's perjury warnings to an attorney for a defense witness substantially interfered with the witness' decision of whether to testify, thereby depriving the defendant of his Sixth Amendment right to compulsory process to obtain witnesses in his favor.

OPR did not find professional misconduct, concluding that the appellate court's decision was based on incomplete and inaccurate information. OPR's investigation revealed that the prosecutor had a substantial factual basis for believing that the witness would commit perjury if she testified, a factual basis that was ignored by the court of appeals.

25. A U.S. district court gave a defendant a downward departure in sentencing as a result of alleged misconduct of a former prosecutor who knowingly and intentionally brought

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<sup>22</sup>The Brady doctrine refers to certain discovery and disclosure requirements in criminal proceedings.

two eyewitnesses into the courtroom during a pre-trial proceeding to enable them to view the defendant so that they could positively identify him at trial.

OPR did not find professional misconduct. OPR interviewed numerous persons, including the two eyewitnesses. The former prosecutor credibly stated that he did not instruct the witnesses to enter the courtroom and that he did not know that they were present during the pretrial hearing. Moreover, under relevant case law, the mere fact that the witnesses entered the courtroom on their own accord, or possibly at the request of an agent, and as a result saw the defendant, is not improper.

26. A U.S. district judge issued a posttrial opinion that criticized government prosecutors for identifying three unindicted co-conspirators by name in a pleading that was filed before the trial, causing the persons named to suffer a violation of their due process rights.

OPR did not find professional misconduct. OPR found that, before filing the pleading, the prosecutors conducted research into the propriety of naming unindicted co-conspirators and received supervisory approval before doing so. OPR also found that their action was not contrary to any applicable case law, and that the district court had not previously advised the government that such an action would be improper. OPR noted that defense counsel had objected when the prosecutors earlier filed another pleading under seal.

27. A U.S. district judge in a civil case stated that he did not believe the trial testimony of a Justice attorney concerning a grand jury investigation, and that certain statements the attorney made to the grand jury were false. The district judge commented that he believed the Justice attorney in his trial testimony was disrespectful to the court.

OPR did not find professional misconduct. OPR found that neither the attorney nor his supervisors believed there was any problem with his trial testimony or his earlier statements to the grand jury. OPR found no evidence that the attorney in his trial testimony lied, gave misleading or evasive answers, or omitted material information. OPR also found that the attorney did not show a lack of respect for the court but simply could not provide the simple, short answers the district judge wanted in response to the complex or vague questions the judge posed.