



TO: The Vermont Supreme Court
Honorable Paul L. Reiber, Chief Justice
Honorable John A. Dooley, Associate Justice
Honorable Denise R. Johnson, Associate Justice
Honorable Marilyn S. Skoglund, Associate Justice
Honorable Brian L. Burgess, Associate Justice

FROM: The Professional Responsibility Board

RE: Annual Report of the Professional Responsibility Program for FY 2009

DATE: September 22, 2009

The Professional Responsibility Board is required by Administrative Order 9, Rule 1 E.(2) to provide to the Supreme Court “an annual report, including statistics and recommendations for any rule changes, which report shall be public.” The following is the tenth annual report submitted in accordance with this mandate.

I. Report of Activities of Board

Pursuant to [A.O. 9, Rule 1.A.](#), the Board is appointed by the Supreme Court and consists of seven members; three members of the bar of this state, three public members and one judge or retired judge. The members of the Board as FY 2009 (June 30, 2009) closed were:

George Nostrand, Esq. – Chair
Mr. Donald Keelan, CPA – Vice-Chair
Honorable Alan Cheever
Jan Eastman, Esq.
Larry Novins, Esq.
Ms. Linda O’Brien
Mr. Randolph Rowland

The Board is responsible for overseeing the program and implementing, coordinating and periodically reviewing its policies and goals.

A. [Policies](#)

The complete list of [Policies](#) adopted and/or amended by the Board, can be found on the Judiciary website.

B. Proposed Amendments to the Rules of Professional Conduct

On June 17, 2009, the Vermont Supreme Court amended the Vermont Rules of Professional Conduct to incorporate comprehensive and significant changes to the American Bar Association's Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 2001-2003. The [Amendments](#) became effective September 1, 2009.

C. Appointment of Hearing Panels

The following individuals served as members of standing Hearing Panels:

Hearing Panel No. 1

Larry Miller, Esq., Chair
Sue Ritter, Esq.
Diane Drake

Hearing Panel No. 2

Jesse M. Corum, Esq., Chair
Theodore C. Kramer, Esq.
Christopher G. Chapman

Hearing Panel No. 3

Leo Bisson, Esq., Chair
Oreste Valsangiacomo, Jr., Esq.
Paul Rumley

Hearing Panel No. 4

Bruce C. Palmer, Esq., Chair
William Piper, Esq.
Florence Chamberlin

Hearing Panel No. 5

Robert P. Keiner, Esq., Chair
Elizabeth Miller, Esq.
Dr. Kim Montgomery

Hearing Panel No. 6

Alison J. Bell, Esq., Chair
Eric A. Johnson, Esq.
Lisa Ventriss

Hearing Panel No. 7

Harland L. Miller III, Esq., Chair
Mark Hall, Esq.
Stephen V. Carbone

Hearing Panel No. 8

John T. Leddy, Esq., Chair
Joseph Obuchowski, Esq.
Tim Volk

Hearing Panel No. 9

Stephen Dardeck, Esq., Chair
Shannon Aldridge Bertrand, Esq.
Barbara Carris

Hearing Panel No. 10

Lon T. McClintock, Esq., Chair
Kristina Pollard, Esq.
Dr. Bob Bergman

As a result of suggestions made at its 2008 annual meeting, on September 30, 2008, the Board, with the assistance of Leslie Black, Esq., Hearing Panel counsel, adopted a comprehensive [Hearing Panel Manual](#) for the use of both attorney and lay member Hearing Panel members.

D. Trust Accounts

The Vermont Professional Responsibility Board, with the assistance of Deputy Disciplinary Counsel Beth DeBernardi and Board Member Donald Keelan, CPA, prepared a booklet entitled "[Managing Client Trust Accounts, Rules, Regulations and Tips](#)" as a guide for both new and experienced lawyers in dealing with trust accounting questions. The purpose of the booklet is to provide attorneys with the basic rules, highlight the areas that will always require an attorney's best judgment because there are no absolute rules, and dispense some practical experience provided by years of answering lawyers' questions.

The Professional Responsibility Board has also revised their [Audit Questionnaire](#). The questionnaire is intended to serve as a tool to which Vermont attorneys can turn for self-assessment of the procedures by which their trust accounting systems are managed. The questionnaire is the result of several years of input from the Professional Responsibility Board, Bar

Counsel, Disciplinary Counsel, and Certified Public Accountants. Completion of the questionnaire is not a substitute for complying with the Vermont Rules of Professional Conduct. However, the questionnaire provides a starting point for self-education on trust account management.

The questionnaire and handbook were approved by the Board in the fall of 2008. All members of the Bar were notified of their availability and both documents are available on the Judiciary website.

E. Annual Training Meeting

The Professional Responsibility Program held its annual meeting on June 3, 2009, at the Comfort Inn Suites in White River Junction, Vermont. Board Chair George Nostrand welcomed the approximately 36 Professional Responsibility Program members and guests who attended the full day program. Leslie Black, Esq., counsel for the Hearing Panels, provided a summary of the decisions that issued during the past year. Led by Emily Gould, Esq., a volunteer Assistance Panel member, along with Randolph Rowland, Donald Keelan and Linda O'Brien, Board Members and volunteer Assistance Panel member Attorney Joseph F. Cahill, Jr., the panel conducted a mock Assistance Panel hearing. Randolph Rowland presented a one hour workshop on "*Communications.*" The meeting also included a one hour presentation on "*Professionalism in the Courts*" by the Hon. Peter Hall, U.S. Circuit Court Judge. Chief Justice Reiber, the Board's liaison, also addressed the group. In addition, Karen Gross, Esq., President of Southern Vermont College, presented a 1 hour CLE ethics credit speech on the "*Law's Role in a Troubled Economy: Savior/Sinner? Or Something Else?*" Bar Counsel Wendy Collins discussed "*Conflicts of Interest.*" Attorneys who attended the entire Program earned 4.25 CLE Credits (1.25 Ethics, 2 Professional and 1 General).

F. Supervision of the Program's Case Docket and Review of Case Management Procedures

Each month the Program Administrator provided the Board with a caseflow statistics report. In addition, Disciplinary Counsel provided the Board, on a quarterly basis, with a detailed summary and status of each case pending. The Board reviewed the reports at their Board meetings.

G. Records Retention Policy

The Board, spearheaded by Board Member Larry Novins, Esq., worked closely with the Secretary of State's Archives Office to develop a comprehensive record retention policy. On April 1, 2009, the [Professional Responsibility Board's Record Retention Schedule](#) was approved by the State Archivist.

H. Assistance Panels

As a result of suggestions made at its 2008 annual meeting, the Board, with the assistance of Bar Counsel, adopted a comprehensive [Assistance Panel Handbook](#) for the use of both attorney and lay member Assistance Panel members.

In addition to Board members, all of whom serve on Assistance Panels, the following additional volunteers were members of Assistance Panels during FY 2009:

Attorneys

Steven Adler, Esq.
Joseph F. Cahill, Jr., Esq.
Leslie Hanafin Cota, Esq.
Emily Gould, Esq.
Robert Fairbanks, Esq.
Larry Mandell, Esq.
Katherine Mosenthal, Esq.
Susan Palmer, Esq.
Alan Rome, Esq.
Thomas Rounds, Esq.
Janet Shaw, Esq.
Peter Van Oot, Esq.
John Webber, Esq.

Public Members

Ms. Irene Carbine
Ms. Susan Fay
Ms. Judith Lidie
Mr. Kevin O'Donnell
Mr. Neal Rodar
Ms. Rachel Siegel
Mr. R. Brownson Spencer II

II. Report of Activities of Disciplinary Counsel

A. Introduction

Disciplinary Counsel administers the disciplinary side of the Professional Responsibility Program. In FY 2009, the administration of the disciplinary program included the screening of new complaints, the formal investigation of complaints that were not resolved at the screening phase, and the prosecution of disciplinary cases. In addition, Disciplinary Counsel continued to spend a significant amount of time working with both the Professional Responsibility Board and the Bar on issues related to attorney ethics.

Throughout FY 2009, Disciplinary Counsel's office consisted of two full-time attorneys, Disciplinary Counsel and Deputy Disciplinary Counsel, and a part-time administrative assistant. The office worked closely with the Board, Bar Counsel, and the Board's Program Administrator.

B. The Investigation and Prosecution of Ethics Complaints

Disciplinary Counsel's core function is to investigate and prosecute disciplinary complaints. In FY 2009, Disciplinary Counsel received or otherwise opened 242 complaints.

C. Screening

Upon receipt, an ethics complaint is "screened" by Disciplinary Counsel or Deputy Disciplinary Counsel. [See A.O. 9, Rule 10.](#) The screening process is rather informal and is intended to determine the nature of the complaint and whether it can be resolved through non-disciplinary methods. Indeed, the screening attorney may attempt to resolve any complaint that does not require formal action by an Assistance Panel or the disciplinary program.

Most disciplinary investigations begin with a complaint directly to Disciplinary Counsel, Michael Kennedy. Sometimes an investigation may begin in response to a newspaper, radio, or television story about an attorney. Many assume that the Disciplinary Counsel is aware of stories

that appear in the media. This is not always the case, especially when the stories appear in some of the state’s smaller news outlets. **Anyone concerned about attorney discipline should feel free to forward news stories about Vermont attorneys to Mr. Kennedy.**

In general, if a complaint alleges misconduct that might require a disciplinary sanction, the complaint is referred for a formal investigation by Disciplinary Counsel. Otherwise, the screening attorney either dismisses the complaint or refers it to an Assistance Panel for non-disciplinary resolution.

In FY 2009, 242 files were assigned docket numbers for screening by Counsel for the Professional Responsibility Program. Disciplinary Counsel screened 242 (which included 8 cases from FY 08); 3¹ cases were assigned to Conflict Counsel for screening, and 5 cases remained at screening stage at the end of the fiscal year. Of the 242 complaints screened by Disciplinary Counsel, 80 were dismissed at screening. The other 162 were referred for formal disciplinary investigations.

1. Complaints Dismissed at Screening

If a complaint does not allege conduct that appears to require a disciplinary sanction, it is dismissed at screening. Upon dismissal, each complaint is assigned a “dismissal code.” Each dismissal code represents a different reason for the decision to dismiss a particular complaint. The 80 complaints that were dismissed at screening in FY 2009 were dismissed for the following reasons:

Table 1

Cases Dismissed at Screening Stage	
Resolved	4
No Cause of Action	68
Insufficient/No Evidence	6
Referred to Fee Dispute	1
Post Conviction Relief Issue	1
Total	80

If a complaint is dismissed at screening, the complainant is advised, in writing, of the reason for the decision to dismiss and of his or her right to appeal the decision to dismiss to the Chair of the Professional Responsibility Board within sixty days. [See A.O. 9, Rule 10\(D\)](#). By contrast, if Disciplinary Counsel dismisses a complaint after the conclusion of a formal investigation, the complainant has no right to appellate review.

In FY 2009, 17 complainants appealed Disciplinary Counsel’s decision to dismiss a complaint at screening; 16 of the appeals were upheld by the chair; 1 case was referred to Disciplinary Counsel for further investigation. That case remained under investigation at the end of the fiscal year.

¹ If Disciplinary Counsel has a conflict that prohibits his office from screening a particular complaint, the Board’s Program Administrator refers the complaint to private counsel for screening.

D. Formal Investigations by Disciplinary Counsel

As mentioned, a complaint is referred for a formal investigation by Disciplinary Counsel if it alleges misconduct that appears to require a disciplinary sanction. The first step in the investigation is to require the attorney who is the subject of the complaint to file a written response to the allegations. Disciplinary Counsel reviews the response and then conducts whatever additional investigation is appropriate.

Upon concluding an investigation, Disciplinary Counsel has three options: (1) dismiss the complaint; (2) refer the complaint to an Assistance Panel for non-disciplinary resolution; or (3) ask a Hearing Panel to review for probable cause Disciplinary Counsel's decision to file formal disciplinary charges against the attorney.

On July 1, 2008, Disciplinary Counsel was investigating 56 complaints. Another 163 cases (162 Disciplinary Counsel referrals and 1 Chair referral) were referred for formal investigations during the fiscal year.

1. Formal Disciplinary Proceedings

By rule, formal disciplinary proceedings can be commenced in one of two ways: the filing of a petition of misconduct, or, the filing of a stipulation of facts. [See A.O. 9, Rule 11\(D\)\(1\).](#) In FY 2009, Disciplinary Counsel commenced formal disciplinary proceedings in 11 cases.

a. Petitions for Interim Suspension

Rule 18 of Administrative Order No. 9 requires Disciplinary Counsel, upon the "receipt of sufficient evidence" showing that an attorney has violated the ethics rules and presently poses a substantial threat of harm to the public, to transmit the evidence to the Court along with a proposed order for the interim suspension of the attorney's license to practice law. Disciplinary Counsel filed one stipulated Petition for Interim Suspension in FY 2009.

b. Petitions of Misconduct

Disciplinary Counsel's charging document is known as a "Petition of Misconduct." The petition must be sufficiently clear so as to notify the attorney of the alleged misconduct and the rules allegedly violated. An attorney has twenty days to answer a petition. Once an Answer is filed, each party has the right to conduct discovery in advance of a disciplinary hearing. In FY 2009, Disciplinary Counsel filed 5 petitions of misconduct.

c. Stipulations

As an alternative to a Petition of Misconduct, Disciplinary Counsel and a respondent may commence formal disciplinary proceedings by filing a Stipulation of Facts. From there, the parties may either join to recommend a particular sanction or present argument as to the appropriate sanction. In FY 2009, there were 6 cases in which Disciplinary Counsel joined with a respondent to commence formal proceedings via stipulated facts.

d. Disability Proceedings

In FY 2009, there were no cases in which Disciplinary Counsel alleged that an attorney should be transferred to disability inactive status. There was, however, one hearing at which a panel considered a lawyer's contention that she suffered from a disability that prohibited her from assisting in her own defense. The lawyer raised the claim in FY 2008 and was immediately transferred to disability inactive status. After the hearing that was held in FY 2009, the panel concluded that the lawyer did not suffer from a disability that prohibited her from assisting in her own defense. The panel recommended that the Court reinstate the lawyer to active status. The Court affirmed the panel's recommendation.

e. Reinstatement Petitions

In FY 2009, no reinstatement petitions were filed.

f. Other

There was one case in which a Petition of Misconduct had been filed in January of 2004, and the Respondent was placed on interim suspension in November 2005. The disciplinary proceeding was stayed pending resolution of a related criminal matter. The stay was lifted during FY 2008, and a contested sanctions hearing was held in April 2008. On July 28, 2008, the Hearing Panel issued a decision (PRB Decision 112) imposing a one year suspension.

g. Summary

Disciplinary Counsel commenced formal proceedings in 11 cases.

2. Referrals to Non Disciplinary Resolution

Upon concluding an investigation, and as an alternative to commencing formal disciplinary proceedings, Disciplinary Counsel may refer a case to an Assistance Panel for non-disciplinary resolution. In FY 2009, Disciplinary Counsel referred 12 cases to an Assistance Panel.

3. Dismissals

If Disciplinary Counsel's investigation indicates that neither formal charges nor a referral to an Assistance Panel is appropriate, a case is dismissed. In FY 2009, Disciplinary Counsel investigated and dismissed 146 complaints. The reasons for the dismissals are set out in the following table:

Table 2

Complaints Dismissed by Disciplinary Counsel After Investigation	
Resolved	13
No Cause of Action	72
Insufficient Evidence to Prove a Violation	49
Refer to Fee Dispute	1
Lack of Jurisdiction	2
Chair Granted Appeal; Dismissed After Investigation	1
Denial of Probable Cause	3
Disciplined in Another File	4
PCR Issue	1
TOTAL	146

4. Docket at End of FY 2009

In sum, Disciplinary Counsel completed 158 investigations in FY2009. As the fiscal year closed, 50 complaints were under investigation by Disciplinary Counsel.

5. Continuing Legal Education Seminars

In FY 2009, Disciplinary Counsel appeared at several Continuing Legal Education seminars. While most of the seminars were sponsored by the Vermont Bar Association, Disciplinary Counsel also presented at seminars sponsored by the Office of the Defender General, Vermont Association for Justice, and the Vermont Attorneys Title Corporation. In addition, Disciplinary Counsel appeared twice at Vermont Law School, speaking to classes taught by Professor Tracy Bach.

6. Other

Disciplinary Counsel Michael Kennedy was elected to the Vermont Bar Association's Board of Managers.

III. Report of Activities of Bar Counsel

Bar Counsel is employed part-time and is responsible for several aspects of the Professional Responsibility Program. Approximately three-quarters of Bar Counsel's time is spent responding to inquiries from both lawyers and members of the public regarding professional conduct. Additional responsibilities include administering the Assistance Panel program, publishing decisions, consulting with outside agencies concerned with the professionalism of lawyers, presenting continuing legal education programs for lawyers, and attending to miscellaneous administrative duties.

Below is a summary of what was accomplished as to each of these responsibilities.

A. Lawyer Education A.O. 9, Rules 9, 3B. (1)

1. Specific Questions: Inquiries from individual lawyers.

Bar Counsel provides informal, confidential information and assistance to lawyers who have questions regarding professional responsibility. This service, provided on a one-to-one basis and usually by telephone, is Bar Counsel's top priority. Bar Counsel endeavors to respond to lawyer inquiries immediately upon learning of the lawyers' contact with the Program.

Demand for this service has grown every year since this program was first introduced. There has been an increase in requests from lawyers for this advice and information. There appears to be an increase in awareness among Vermont attorneys that this confidential advice is available to them.

Many requests come from lawyers who are sole practitioners or who practice in small law firms. They often cite the lack of available mentors and their lack of expertise in this area of law as the reason for their call to Bar Counsel. Most questions – some 94% this year – are resolved to the lawyer’s satisfaction. Lawyers invariably express appreciation that this service is available. The vast majority of questions posed by attorneys concerns conflicts of interest. Other issues raised included duty to report misconduct, dispositions of client files, managing trust accounts, advertising, and the unlicensed practice of law.

This year a total of 181 inquiries were received from lawyers², a 7% increase over last year’s inquiries. Caseload and Disposition for lawyer inquiries, as well as success of resolving questions to the lawyers’ satisfaction, is set forth below at Table 3.

TABLE 3

LAWYER INQUIRIES Caseload and Dispositions	
Received during fiscal year	181
Carried over from previous fiscal year	11
TOTAL CASELOAD	192
<i>Change in Caseload</i>	+14%
Resolved	181
Advised to file formal complaint	5
Other	6
TOTAL CLOSED	192
<i>Percentage of Cases Where Questions Resolved to Lawyer’s Satisfaction</i>	+94%

2. *General educational services.*

Two CLE educational programs at the annual and mid-annual meetings of the Vermont Bar Association were presented by Bar Counsel. Legal issues discussed there included conflicts of interest, limiting representation, communication, client neglect, and inappropriate personal contact with clients. Bar Counsel assisted the Board in planning training and speakers for the Annual Meeting.

B. Alternative Dispute Resolution A.O. 9, Rules 3.B.1., 4, 10

1. *Informal Program: Inquiries from Members of the Public.*

The Vermont Professional Responsibility Program receives calls daily at its offices in Montpelier and Burlington from members of the public who have complaints or questions about the conduct of particular Vermont lawyers. Where appropriate, these telephone inquiries are referred to Bar Counsel who responds in any number of ways: mediating a resolution with the attorney, assisting the caller in structuring a formal complaint, or providing other options to callers as to where help might be obtained if the matter is not properly within the lawyer disciplinary system. Through this screening process, Bar Counsel endeavors to quickly solve minor problems between lawyers and their clients in order to minimize the number of formal complaints filed with the Office of Disciplinary Counsel where those complaints are unlikely to result in discipline or referral to the formal alternative dispute resolution program.

² This includes 12 inquiries which were handled by Attorney Sheila Ware, Chair of the VBA Professional Responsibility Committee, who kindly volunteered to do so during Bar Counsel’s absence in the month of June.

Each year since inception of this program in FY 2001, Bar Counsel has been able to resolve about half of the complaints raised by telephone callers. This was again the case in FY 2009. Of the 154 new public inquiries in the caseload this year, more than half were resolved successfully. Bar Counsel closed about 30% of the inquiries by referring the callers to the Office of Disciplinary Counsel. The remaining cases were closed for other reasons including referral to outside agencies such as the VBA Fee Arbitration Committee. Caseload and Disposition Statistics are set forth below at Table 4.

The area of most concern to callers continues to be neglect by or lack of communication with lawyers. There was an increase of questions regarding the termination of the attorney-client relationship. While in the past most calls concerned matters arising in the Family or District Courts, there was an increase in calls concerning probate matters.

TABLE 4

PUBLIC INQUIRIES Caseload and Dispositions	
Received during fiscal year	154
Carried over from previous FY	8
TOTAL CASELOAD	162
Resolved	86
Advised to file formal complaint	48
Other	26
TOTAL CLOSED	160
<i>Percentage of Caseload Resolved</i>	<i>53%</i>

2. Formal Program: Assistance Panels

Bar Counsel is responsible for the administration of the formal program for alternative dispute resolution. This work is carried out by the Assistance Panels which are comprised of volunteer lawyers and members of the public. In situations where neither informal resolution by Bar Counsel nor formal processing by Disciplinary Counsel is appropriate, Assistance Panels resolve disputes in confidential meetings with Respondents and Complainants. Bar Counsel provides support for this program in such areas as selecting the members of each Assistance Panel, communicating with the parties, monitoring probationary terms and providing information and training to panel members.

Assistance Panels resolved 14 cases this year (12 by hearing; 2 without hearing). At the end of the fiscal year, 3 cases remained open (1 pending completion of conditions 2 awaiting hearing).

C. Co-ordination with Other Agencies
A.O. 9, Rules 9, 3B. (1)

Throughout the year, Bar Counsel was in regular communication with the Executive Director of the Vermont Bar Association on a number of issues of mutual concern including law office management, the increase in the unauthorized practice of law, continuing legal education, and the

proposed amendments to the ABA Model Rules of Professional Conduct. There was no interaction this year with the VBA's lawyers' assistance program which responds to issues of lawyer mental health and substance abuse.

D. Dissemination of Disciplinary Information.

AO 9, Rule 13

Bar Counsel is responsible for publishing the final decisions of the Professional Responsibility Program and ensuring that they are properly distributed to other courts and agencies both within and without Vermont. Eight decisions were published in FY 2008. Bar Counsel receives every decision, writes to all appropriate parties of the decisions, and writes a digest of each decision so that readers can locate relevant law by reviewing these synopses. Although the [digest](#) and the text of the [decisions](#) are online, regrettably their usefulness is limited because it is not searchable. Creation of a search mechanism is desirable, although there are no pending plans to do so. As of the end of the fiscal year, PRB cases have been digested. All of the technical work required in disseminating disciplinary information is performed by the Program Administrator, Deb Laferriere.

IV. CONCLUSION

This past year, the Professional Responsibility Program continued to administer the lawyer discipline program and to assist attorneys and the public to maintain and enhance the highest standards of professional responsibility.

In FY 2009, the Board was able to provide both Hearing Panel members and Assistance Panel members with procedural manuals. In addition, the Board also finalized a Trust Account Handbook and a revised audit questionnaire in order to assist members of the Bar in managing their trust accounts. All of the handbooks and the questionnaire have been published and posted on the Judiciary website. In addition, the Board was able to develop and finalize a comprehensive records retention policy.

The Board acknowledges with gratitude the many volunteers serving on Hearing and Assistance Panels and as Conflict Counsel, who have contributed significantly to the overall success of the Program.