



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 2008

DATE: September 25, 2008

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 ninth 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 of the members of the bar of this state, three public members and one judge or retired judge. The members of the Board as FY 2008 (June 30, 2008) 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 online at: <http://www.vermontjudiciary.org/Committees/boards/PRBPoliciesAdopted.htm>.

B. Proposed Amendments to the Rules of Professional Conduct

The Board continued to keep abreast of the work of the study committee of the Civil Rules Committee. As the fiscal year ended, the Civil Rules Committee had forwarded the proposed amendments to the Rules of Professional Conduct to the Vermont Supreme Court, and the amendments are under consideration by the Vermont Supreme Court.

C. Appointment of Hearing Panels

The following individuals served as members of standing hearing panels:

Hearing Panel No. 1Hearing

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

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
Robert M. Butterfield, 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

Richard H. Wadhams, Esq., Chair
Keith Kasper, Esq.
Sam Hand

Hearing Panel No. 8

Eileen Blackwood, Esq., Chair
Peter Bluhm, Esq.
Tim Volk

Hearing Panel No. 9

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

Hearing Panel No. 10

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

*Robert Butterfield completed his final term in the spring of 2008 and William Piper, Esq., was appointed to fill the vacancy.

As a result of suggestions made at its annual meeting, the Board, with the assistance of Leslie Black, Esq., Hearing Panel counsel, is in the process of developing a comprehensive handbook for the use of both attorney and lay member hearing panel members.

D. Compliance Audits of Trust Accounts

The Professional Responsibility Board secured funding from the Vermont Supreme Court to conduct audits of attorney's trust accounting systems. The Board retained a certified public accounting firm to conduct the audits and worked with the accountant to design the audit program. The Board delegated the specifics of the audits to Disciplinary Counsel. In addition, at the direction of the Board, the audit questionnaire is currently undergoing revisions, subject to final approval by the Board at its September 08 meeting. It is anticipated that once finalized, the questionnaire, in addition to being posted on the Judiciary website, will be sent to the VBA with the suggestion that they post it on their website as well.

E. Annual Training Meeting

The Professional Responsibility Program held its annual meeting on June 11, 2008, at the Comfort Inn Suites in White River Junction, Vermont. Approximately 45 members of the Program attended the full day program. Leslie Black, Esq., counsel for the Hearing Panels, provided a summary of the decisions that have issued during the past year. Susan Palmer, a volunteer assistance panel member, led a panel discussion on the *Do's and Don'ts, Tools and Resources for Hearing and Assistance Panels*. James Knapp, Esq., of the Vermont Bar Association presented on the VBA's *Law Practice Management Program*, a tool that may be a resource for Assistance and/or Hearing Panels. Sam Hoar, Esq. and Robert Paolini, Esq., Executive Director of the VBA discussed the proposed professionalism CLE credits. The meeting also included an address by

Chief Justice Reiber, the Board's liaison, entitled "*Tracing the Development of Ethical Standards Governing the Practice of Law.*" In addition, the Chair and General Counsel of the New Hampshire Disciplinary Board spoke to the group about how their disciplinary organization operates. Attorneys who attended the Program earned 4 CLE ethics credits.

In response to requests made by assistance panel members at its annual meeting, the Board, with the assistance of Wendy Collins, Bar Counsel, is in the process of developing a comprehensive handbook for the use of Assistance Panel attorney and public members.

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

Each month the Program Administrator provided the Board with a caseload 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 has been working closely with the Secretary of State's Archives Office to develop a comprehensive record retention policy. The Board expects that in the fall of 2008, the State Archivist will provide us with a recommended record retention schedule. The recommendations will be based on discussions that the Secretary of State's Archives Office has had with staff, their analyses of related laws and regulations, model practices and record center inquiries. The Board hopes to be able to review and finalize the policy by December of 2008.

II. Report of Activities of Disciplinary Counsel

A. Introduction

Disciplinary Counsel administers the disciplinary side of the Professional Responsibility Program. In FY 2008, 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 2008, 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 2008, Disciplinary Counsel received or otherwise opened 212 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 2008, 212 files were assigned docket numbers for screening by counsel for the Professional Responsibility Program. Disciplinary Counsel screened 197, 7¹ cases were assigned to Conflict Counsel for screening, and 8 cases remained at screening stage as the fiscal year ended. Of the 197 complaints screened by Disciplinary Counsel, 53 were dismissed at screening. The other 144 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 53 complaints that were dismissed at screening in FY 2008 were dismissed for the following reasons:

Table 1

Cases Dismissed at Screening Stage	
No Cause of Action	40
Insufficient/No Evidence	6
Referred to Fee Dispute	2
Post Conviction Relief Issue	4
Lack of Jurisdiction	1
Total	53

If a complaint is dismissed at screening, the complainant may appeal the dismissal to the Chair of the Professional Responsibility Board. [A.O. 9, Rule 10\(D\)](#). The complainant is advised, in writing, of the reason for the decision to dismiss. The complainant is also advised of his or her right to appeal the decision, within 60 days, to the Chair of the Board. 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 2008, 15 complainants appealed Disciplinary Counsel’s decision to dismiss a complaint at screening; 13 of the appeals were upheld by the chair; 2 cases were referred to

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.

Disciplinary Counsel for further investigation. Both of those cases were under investigation as the fiscal year ended.

D. Formal Investigations by Disciplinary Counsel

As mentioned above, 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.

As FY 2008 began, Disciplinary Counsel was investigating 55 complaints. Another 146 were referred to Disciplinary Counsel 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. [A.O. 9, Rule 11\(D\)\(1\)](#). In FY 2008, Disciplinary Counsel commenced formal disciplinary proceedings in 11 cases.

a. Petitions for Interim Suspension

Rule 18 of Administrative Order 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 did not file any Petitions for Interim Suspension in FY 2008.

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 2008, Disciplinary Counsel filed one petition 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 2008, there were 9 cases in which Disciplinary Counsel joined with a respondent to commence formal proceedings via stipulated facts. There was 1 case in which Special Conflict Disciplinary Counsel joined with Respondent to commence formal proceedings via stipulated facts.

d. Disability Proceedings

There were 11 cases in which Disciplinary Counsel joined with the Respondent to recommend that the Respondent's license be transferred to disability/inactive status. The 11 cases involved a total of 3 lawyers. There was another matter that was scheduled for a sanctions hearing in which the Respondent alleged that she was unable to assist in her own defense due to a mental and/or physical disability. As a result, and pursuant to Rule 21(B) of Administrative Order No. 9, the Supreme Court transferred the lawyer to disability/active status pending determination of the incapacity. That matter remained pending as the fiscal year ended.

e. Reinstatement Petitions

There was one case in which a lawyer petitioned for reinstatement after having been disbarred in 2002. Disciplinary Counsel did not oppose the petition, but did not join with the lawyer to recommend reinstatement. After a hearing before a hearing panel, the lawyer was eventually reinstated to the practice of law after the Hearing Panel concluded that the Respondent met the qualifications to resume the practice of law.

f. Other

There was one case in which a Petition of Misconduct had been filed in January of 2004. 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 FY2008, and a contested sanctions hearing was held in April. The matter remained pending before a hearing panel as the fiscal year ended.

g. Summary

Disciplinary Counsel commenced formal proceedings in 21 cases involving 13 lawyers.

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 2008, Disciplinary Counsel referred 10 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 2008, Disciplinary Counsel investigated and dismissed 123 complaints. The reasons for the dismissals are set out in the following table:

Table 2

Complaints Dismissed by Disciplinary Counsel After Investigation	
Resolved	17
No Cause of Action	53
Insufficient Evidence to Prove a Violation	46
Refer to Fee Dispute	1
Lack of Jurisdiction	1
Denial of Probable Cause	1
Disciplined in Another File	2
Transferred to Disability/Inactive Status in Another File	2
TOTAL	123

4. Docket as FY 2008 Ended

In sum, Disciplinary Counsel completed 154 investigations in Fiscal Year 2008. As the fiscal year closed, 56 complaints were under investigation by Disciplinary Counsel.

5. Continuing Legal Education Seminars

In FY 2008, 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 and the Vermont Association of Criminal Defense Attorneys. In addition, Disciplinary Counsel appeared twice at Vermont Law School: once before Professor Jennifer Sargent's "Legal Profession" class, and once before Adjunct Professor Kaveh Shahi's "Internet Law" class.

III. Report of Activities of Bar Counsel

Bar Counsel is responsible for several aspects of the Professional Responsibility Program. Below is a summary of what was accomplished as to each.

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

A. Inquiries from Individual Lawyers

Bar Counsel provides informal, confidential information and assistance to lawyers who have questions regarding professional responsibility. This service is provided primarily on a one-to-one basis, usually by telephone. As in the past, the area of most concern to lawyers is conflicts of interest.

Demand for this service continues to be strong. 169 requests for assistance were received this year, up from 146 last year, and four times the number received when this program was instituted in FY2001. Ninety percent of all lawyer inquiries received were resolved. There was minimal backlog of cases not closed by the end of the year.

B. General Educational Services

At the request of various outside agencies, Bar Counsel participated in presenting five educational programs sponsored by the following: Bennington Bar Association, Office of the Attorney General, Vermont Bar Association, Vermont Attorneys Title Corporations, and Vermont Law School.

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

A. Assistance Panels

Bar Counsel is responsible for the administration of the alternative dispute resolution program, which consists of the work done by the Assistance Panels.

In FY 2008, 10 cases were referred by Disciplinary Counsel. Assistance Panels held hearings in 7 cases. By the end of the fiscal year, 2 heard cases remained open pending completion of conditions which were being monitored by Bar Counsel.

B. Informal Inquiries from Members of the Public

Bar Counsel responds to telephone calls from informal complainants and endeavors to mediate or otherwise resolve the problem, provide options to the caller as to how additional help can be obtained from other sources, or assist the caller in structuring a complaint which fully explains his or her concerns. The majority of clients who call complain about neglect or lack of communication.

During FY 2008, 173 inquiries were received from the public. Nearly 86% of them were resolved. As with inquiries from lawyers, there was a backlog of cases that were not closed by the end of the year.

The statistical breakdown for all inquiries, both public and lawyer, is contained in Tables 3 and 4:

Table 3

Intake of Informal Inquiries FY 2001-2008								
	2001	2002	2003	2004	2005	2006	2007	2008 ²
Total Inquiries Received: All Sources	169	201	145	119	245	232	331	342
New From Public	127	137	84	73	137	135	185	173
New From Lawyers	42	64	61	46	108	97	146	169

² Twelve of these inquiries were received and completed by the Office of Disciplinary Counsel.

Table 4

Disposition of Informal Inquiries FY 2001-2008								
	2001	2002	2003	2004	2005	2006	2007	2008
DISPOSITION:								
Total Cases Closed	169	201	145	119	245	230	335	323
Issues Resolved: All Sources	119	111	90	81	157	160	226	224
From Public	89	54	40	45	65	73	100	81
From Lawyers	30	57	50	36	92	87	126	143
Advised to File Complaint: All	42	84	49	30	67	46	66	62
From Public	38	81	39	25	57	45	56	57
From Lawyers	4	3	10	5	10	1	10	5
Other Disposition: All Sources	8	6	6	8	21	24	43	37
From Public	0	2	5	3	15	16	31	27
From Lawyers	8	4	1	5	6	8	12	10
Cases Carried Over to Next FY						4	0	19

Consultation and Co-ordination with Other Related Agencies Concerning Attorney Conduct and Professional Responsibility. A.O. 9, Rule 3 B.1

Bar Counsel communicated with the VBA regarding a number of issues of mutual concern including law office management, the increase in the unauthorized practice of law, proposed amendments to the ABA Model Rules of Professional Conduct, and conflicts with the banking industry regarding lawyer trust accounts. There was no interaction regarding the VBA's lawyers' assistance program which responds to issues of lawyer mental health and substance abuse, generally considered the major causes for lawyer misconduct.

Martha Hicks-Robinson, the Program Administrator for the Licensing Board, continued efforts to develop a closer working relationship among relevant judicial and outside agencies by convening meetings of group representatives. Bar Counsel was unable to attend.

Disseminating Disciplinary Information. A.O. 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 courts and agencies both within and without Vermont. All of the technical work, such as tracking cases, preparing cover letters, transmitting text of decisions for posting on the web, has been delegated to our Program Administrator, Deb Laferriere. Seven decisions were published in FY 2008.

Bar Counsel writes a digest of each decision so that the reader can skim through the synopses to locate relevant cases. Although the [digest](#) and the text of the [decisions](#) are online, neither is searchable. As of the end of the fiscal year, 110 cases are in the digest. Creation of a search mechanism is desirable.

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.

The Board anticipates in early FY 2009 to be able to provide both Hearing Panel members and Assistance Panel members with procedural manuals. In addition, the Board also expects to finalize a Trust Account Handbook to assist the Bar in managing trust accounts as well as providing to members of the Bar a revised audit questionnaire. Final approval of the handbooks as well as the questionnaire are all on the Board's fall 2008 agenda. Once approved, all of the handbooks and the questionnaire will be published and posted on the Judiciary website.

The Board acknowledges with gratitude the many volunteers serving on hearing and assistance panels, who have contributed significantly to the overall success of the Program.