

Professional Responsibility Program FY 19 Annual Report

The Professional Responsibility Board is required by Administrative Order No. 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 submitted in accordance with this mandate.

PROFESSIONAL RESPONSIBILITY BOARD

Michael F. Hanley, Esq., Chair
Carolyn Anderson, Esq., Vice-Chair
Hon. Brian Burgess (Retired Justice)
Mr. Christopher Chapman
Mr. Kevin O’Donnell
Ms. Lisa Ventriss
Ms. Elizabeth Miller, Esq.

OFFICE OF BAR COUNSEL

Michael Kennedy, Esq.
Bar Counsel

Mailing Address:

32 Cherry Street, Suite 213
Burlington, VT 05401
Telephone: 802-859-3004

Michael.Kennedy@vermont.gov
<https://vtbarcounsel.wordpress.com>

OFFICE OF DISCIPLINARY COUNSEL

Sarah Katz, Esq.
Disciplinary Counsel

Mailing Address:

32 Cherry Street, Suite 213
Burlington, VT 05401
Telephone: 802-859-3000

Sarah.Katz@vermont.gov

Program Administrator

Merrick Grutchfield
Program Administrator

Mailing Address:

Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0703
Telephone: 802-828-3204

www.vermontjudiciary.org

Brandy Sickles
Administrative Assistant
Telephone: 802-859-3000

Board Activity Report

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

POLICIES

No new policies were adopted in FY19. The Board's policies are on the Judiciary [website](#).

ANNUAL TRAINING MEETING

The Professional Responsibility Program held its annual meeting on June 10, 2019, at Capitol Plaza Hotel in Montpelier. Thirty-seven Professional Responsibility Program members and invited guests attended the educational program. Attorneys who attended the entire program earned 3.00 CLE credits.

SUPERVISION OF THE PROGRAM'S CASE DOCKET & REVIEW OF CASE MANAGEMENT PROCEDURES

The Program Administrator provided the Board with a monthly case flow statistical report. In addition, Disciplinary Counsel and Bar Counsel each provided the Board, on a quarterly basis, with a detailed summary of their caseloads. The Board reviewed the reports.

TRUST ACCOUNTS

The Vermont Professional Responsibility Board has published a guide entitled "*Managing Client Trust Accounts, Rules, Regulations and Tips*" to assist both new and experienced lawyers in dealing with trust accounting questions and an *Audit Questionnaire* 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. Both documents are available on the Judiciary [website](#). In addition, during FY19, Bar Counsel authored a series of twelve [blog posts](#) on trust account management that are intended to augment the trust account manual.

RULE AMENDMENTS

Over the course of FY19, the Board recommended that the Court amend several of the Rules of Professional Conduct.

In December 2018, the Board recommended that the Court add a comment to Rule 1.1 to clarify that well-being is an aspect of competence. The Board also recommended that the Court amend Administrative Order 9 to authorize bar counsel to refer complaints to the Lawyers Assistance Program at screening.

In June 2019, the Board approved a proposal to recommend several additional Rules of Professional Conduct. The proposed amendments, which were pending review as the fiscal year ended, are summarized below:

- Rule 1.2(c) to require that a client's consent to a limited representation be confirmed in writing;

- Rule 1.6 to allow a lawyer to disclose information (1) to bar counsel to receive guidance; (2) to detect conflicts of interest arising from a change in employment;
- Rule 1.15 to require a lawyer to remit unidentified funds in trust to the Vermont Bar Foundation;
- Rule 1.15A to impose additional requirements related to trust account management; and,
- Minor changes to several other rules.

STAFFING UPDATE

In FY 2019 Program Administrator Deb Laferriere retired from the Program. She was replaced by Merrick Grutchfield who serves the program part time.

APPOINTMENT OF HEARING PANELS & HEARING PANEL COUNSEL

During FY19, Mark DiStefano served as Hearing Panel Counsel. In general, he attends hearings and phone conferences and writes a first draft of any opinion or order for the panel. He is also available to provide research, pre-hearing memos or other legal assistance to the Hearing Panels.

PRB Hearing Panels issued eight decisions in FY19. The decisions can be viewed [here](#). Several panels had matters under consideration as the fiscal year ended. The public hearing calendar is [here](#).

As FY19 ended, the following individuals served as members of Hearing Panels:

Hearing Panel No. 1

Anthony Iarrapino, Esq.
Emily Tredeau, Esq.
Mr. Scott Hess

Hearing Panel No. 2

Joseph Cook, Esq., Chair
James Valente, Esq.
Ms. Deedee Jones

Hearing Panel No. 3

Sheila Ware, Esq., Chair
Gary Karnedy, Esq.
Mr. Peter Zuk

Hearing Panel No. 4

Mary Parent, Esq., Chair
Cara L. Cookson, Esq.
Mr. Thad Richardson

Hearing Panel No. 5

Michele B. Patton, Esq., Chair
Bonnie Badgewick, Esq.
Ms. Traci Cherrier

Hearing Panel No. 6

Caryn Waxman, Esq., Chair
David Berman, Esq.
William Schubart

Hearing Panel No. 7

Jesse Bugbee, Esq., Chair
Vanessa Kittell, Esq.
Mr. Carl Rosenquist

Hearing Panel No. 8

Beth Novotny, Esq., Chair
Andrew D. Manitsky, Esq.
Mr. Patrick Burke

Hearing Panel No. 9

Karl C. Anderson, Esq., Chair
Kate Thomas, Esq.
Mr. Thomas J. Sabotka

Hearing Panel No. 10

Jonathan M. Cohen, Esq., Chair
Mary Welford, Esq.
Ms. Kelley Legacy

ASSISTANCE PANELS

In addition to Board members, all of whom may serve on Assistance Panels, the following volunteers served as Assistance Panel members during FY19:

Attorneys

Steven Adler, Esq.
Shannon Bertrand, Esq.
Joseph F. Cahill, Jr., Esq.
Robert Fairbanks, Esq.
Stephanie Foley, Esq.
Edward French, Esq.
Leslie Hanafin, Esq.
Deborah Kirchwey, Esq.
Thea Lloyd, Esq.
Lon McClintock, Esq.
Robert O'Neill, Esq.
Susan Palmer, Esq.
Alan Rome, Esq.
Janet Shaw, Esq.

Public Members

Lynn Dunton
Susan Fay
Jennifer Guarino
Judith Lidie
Holly Poulin
Neal Rodar
R. Brownson Spencer II
Susan Terry
Eric Wheeler

Activity Reports

The following Reports of Bar Counsel and Disciplinary Counsel cover activities from July 1, 2018 through June 30, 2019. Throughout the report, that time period will be referred to as “FY19.”

Bar Counsel

INTRODUCTION

Bar Counsel’s goal is proactive regulation: working with attorneys to address risk and avoid problems. To that end, bar counsel responds to ethics inquiries, teaches continuing legal education seminars, and engages in other forms of outreach. Bar Counsel’s activities are designed to assist lawyers to develop and maintain the tools necessary to provide competent representation in a way that meets the high standards of professionalism and civility expected of attorneys admitted to the bar of the Vermont Supreme Court. Bar Counsel also screens disciplinary complaint and administers the non-disciplinary dispute resolution program.

ETHICS INQUIRIES

Rule 9 of Administrative Order 9 states:

“Inquiries from attorneys who have ethical issues or practice questions shall be referred to bar counsel, who may provide referrals, educational materials, and preventive advice and information to assist attorneys to achieve and maintain high standards of professional responsibility.”

Bar Counsel received 1,272 inquiries in FY 2018. The total marks the most inquiries received in a single year since the position of bar counsel was made full-time in 2012.

Fiscal Year	Inquiries
2019	1,265
2018	1,263
2017	1,109
2016	1,100
2015	827
2014	750
2013	627

Most of the inquiries come from lawyers. However, bar counsel also received inquiries from non-lawyers, judges, law students, law professors, and members of the media

Source	Inquiries
Lawyer	1,091
Non Lawyer	140
Media	8
Law Student	4
Judge	16
Law Professor	6

All types of lawyers make inquiries. By firm size and type:

Firm Size/Type	Inquiries
0-3	457
4-6	265
7 or more	73
In-House	35
Government*	261

** Includes state & federal government attorneys of all types.*

Most inquiries involve more than one of the topic areas covered by the Rules of Professional Conduct. Nearly half involves conflicts of interest or client confidences. The rules/topic areas that arise most often, measured as percentage of total inquiries that included the topic area:

Topic Area	% of Total Inquiries
Conflicts of Interest	31%
Client Confidences	19%
Withdrawal	14%
Duty to Report	9%
Communicating w Represented Person	9%
Trust Account Issues	8%

Most inquires are resolved on the same day that they are received. Time to resolve:

Business Days	Percent of Total Resolved
Same	76%
1-2	15%
3-5	3%
More than 5	3%
Caller never returns bar counsel's call	3%

CONTINUING LEGAL EDUCATION

Bar Counsel presented 41 continuing legal education seminars for a total of 55.75 credit hours. Bar Counsel presented at seminars sponsored or arranged by:

- Attorney General's Office
- Barre Rotary Club
- Bennington County Bar Association
- Chittenden County Bar Association
- Defender General's Office
- Department of Children & Families
- Franklin County Bar Association
- Joan Loring Wing Inn of Court
- Lynn Lynn Blackman & Manitsky
- McCormick Fitzpatrick Kasper & Burchard
- New Hampshire Association of Criminal Defense Lawyers
- Paul Frank & Collins
- Primmer Piper Eggleston & Cramer
- Professional Responsibility Program
- Rutland County Bar Association
- Ryan Smith & Carbine
- Sheriffs & State's Attorneys
- Vermont Association of Criminal Defense Lawyers
- Vermont Association of Family Mediators
- Vermont Association for Justice
- Vermont Bar Association
- Vermont Bar Foundation
- Vermont Law School
- Vermont Tax Seminar

BLOG/SOCIAL MEDIA

Bar Counsel uses social media to engage in proactive regulation and to raise awareness of issues related to legal ethics. The blog is <https://vtbarcounsel.wordpress.com>. Fiscal Year 2019 saw significant increase in engagement.

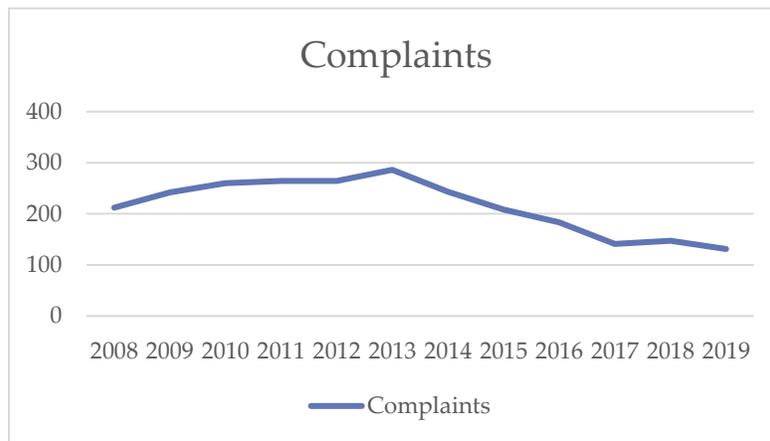
	FY 18	FY19	Change
Posts	226	218	(-3.5%)
Visits	16,554	21,944	+32.5%
Page Visits	34,533	43,407	+25.6%

SCREENING DISCIPLINARY COMPLAINTS

A goal of proactive regulation is to reduce the number of complaints filed against lawyers. For the last several years, the Professional Responsibility Program has done exactly that.

Fiscal Year	New Disciplinary Complaints
FY 2019	131
FY 2018	147
FY 2017	141
FY 2016	183
FY 2015	208
FY 2014	243
FY 2013	283

The number of complaints received in FY 2019 represents an all-time low and is less than half the number of complaints received in FY 2013, the first year of the restructured PRP. Whereas complaints rose in each of the five years preceding the restructuring, they have declined at a significant and steady pace ever since.



By rule, bar counsel screens every complaint. The screening process is one in which bar counsel conducts a limited investigation to determine the nature of the complaint and whether it can be resolved via non-disciplinary dispute resolution methods and without referral for formal intervention by an assistance panel or formal investigation by disciplinary counsel. Per policy of the PRP, a notice of overdraft to an attorney’s pooled interest-bearing trust account is referred directly to disciplinary counsel for investigation and is not screened by bar counsel.

The 131 complaints received in FY 2019:

Screening Decision	Number
Resolved/Dismissed by Bar Counsel	64
Referred to Disciplinary Counsel for investigation	30
Referred to diversion program	9
Trust Account Overdraft Notices	16
Not screened by Bar Counsel*	7
At screening when FY 2019 ended	5

* There are several types of complaints that bar counsel does not screen. By rule, bar counsel cannot screen a complaint filed against a board member. Nor does bar counsel screen any complaint in which he has a conflict, including complaints filed against him. Finally, by rule, financial institutions that maintain pooled interest-bearing trust accounts (“IOLTA”), must notify the PRP whenever a trust account is overdrawn or an instrument drawn on a trust account is presented against insufficient funds. Per Board policy, overdraft notices are forwarded directly to Disciplinary Counsel for review and are not screened by Bar Counsel.

Disciplinary Counsel

INTRODUCTION

Disciplinary counsel administers the disciplinary side of the Professional Responsibility Program, pursuant to A.O. 9, Rule 3(B)(2). The office of disciplinary counsel is staffed by one full-time attorney and one part-time administrative assistant. Occasionally, disciplinary counsel utilizes additional contract resources, such as an investigator or a certified public accountant.

Disciplinary counsel’s core function is to investigate, charge, and litigate disciplinary complaints and disability matters from the stage of an initial complaint up to and including appeals before the Vermont Supreme Court. Numerical statistics do not necessarily provide an accurate snapshot of resource allocation or enforcement priorities in a given year in the office of disciplinary counsel. One primary reason for this is that a single investigation may take anywhere from a few hours by a single attorney to several months of work with the invaluable help of contract investigative support. The length of time a matter takes to investigate may not necessarily correlate to whether or not a lawyer is ultimately charged with a violation of the Rules of Professional Conduct.

INVESTIGATION

Complaints come to disciplinary counsel for investigation in three main ways. The majority are written complaints received by the program, which are screened by bar counsel and referred to disciplinary counsel for investigation. Disciplinary counsel also receives and investigates all automated notices from approved financial institutions of any overdrafts in attorney trust (IOLTA) accounts. Finally,

disciplinary counsel may open an investigation on any other matter that comes to her attention which, if true, might constitute a violation of the Rules of Professional Conduct.

When a complaint requires investigation, disciplinary counsel will generally first request a written response from the attorney under investigation. Disciplinary counsel then reviews the written response and conducts whatever additional investigation is appropriate. In the vast majority of investigations, disciplinary counsel performs an in-person interview of the lawyer under investigation, ordinarily at that lawyer's location of practice.

A portion of matters are investigated but no charge or disability proceeding results from the investigation. Some matters may be referred to non-disciplinary resolution and some are closed out without further action. In all instances, complainants and respondents are interviewed as part of the investigative process and notified in writing of the disposition of the matter with a brief explanation.

a. Referrals to Non-Disciplinary Resolution

Upon concluding an investigation, and as an alternative to commencing formal disciplinary or disability proceedings, disciplinary counsel may refer cases for non-disciplinary resolution. In FY19, one case was referred to bar counsel for assignment to an Assistance Panel and one was referred to dispute resolution by fee arbitration.

b. Dismissals

Disciplinary counsel investigated and dismissed 36 complaints in FY19. The reasons for the dismissals usually relate to inability to prove a specific rule violation by clear and convincing evidence or other considerations such as enforcement priorities or development of the law in the area of lawyer discipline.

c. Investigative Docket Status

FY19 opened with 19 formal investigations pending. During the fiscal year, an additional 45 files were opened for investigation. At the close of the fiscal year, there were 11 investigations pending.

LITIGATION

When disciplinary counsel charges a lawyer, the case begins by filing either in the Supreme Court or with the program administrator for assignment to a hearing panel, depending on the type of action. Matters assigned to a hearing panel are subject to direct appeal to the Supreme Court. Procedure in lawyer discipline matters is governed by A.O. 9. Proceedings are neither civil nor criminal. Violations must be proved by clear and convincing evidence.

Supreme Court Original Jurisdiction Matters

Several types of lawyer discipline matters begin by original jurisdiction in the Supreme Court. These categories are set out below.

a. Consent to Disbarment under A.O. 9, Rule 19

In cases where an attorney consents to disbarment under A.O. 9, Rule 19, disciplinary counsel sends documentation to the Board for review, and the Board makes a recommendation to the Supreme Court. The Court then issues a decision. In FY19, there was one consent to disbarment, *In re John Canney III*, PRB File No. 2017-113, 194 A.3d 267 (2018).

b. Petitions for Reciprocal Discipline under A.O. 9, Rule 20

Vermont-licensed attorneys who are disciplined in other jurisdictions are subject to reciprocal discipline in Vermont. A.O. 9 requires that disciplinary counsel file notice of any discipline of a Vermont attorney. The Court then generally provides opportunity for briefing on whether identical discipline should be imposed. In FY19, disciplinary counsel received no notice of any Vermont-licensed attorney disciplined in another jurisdiction and accordingly filed no petitions for reciprocal discipline with the Supreme Court.

c. Petitions for Interim Suspension under A.O. 9, Rule 18

Upon the receipt of sufficient evidence showing that an attorney has either committed a violation of the ethics rules or is under a disability as set forth in Rule 21.A. and presently poses a substantial threat of serious harm to the public, disciplinary counsel is required to transmit the evidence to the Supreme Court, along with a proposed order for the interim suspension of the attorney's license to practice law. In FY19, disciplinary counsel filed no petitions for interim suspension. Interim suspension is a temporary status until further action is taken by disciplinary counsel.

d. Trustee proceedings under A.O. 9, Rule 24

The Court may appoint a lawyer to act as a trustee of a deceased, suspended or disabled lawyer's practice to inventory files and to protect the interests of the lawyer's clients. In FY19, there was an instance of a lawyer refusing to comply with an appointed trustee's requests for information the trustee needed to carry out his duty. The Court held a hearing and found the lawyer in contempt. When the lawyer failed to appear or meet the purge conditions, the Court issued a bench warrant for her arrest. The lawyer eventually provided the requested information and cooperated with the trustee, who was able to carry out his appointment.

e. Disability Proceedings under A.O. 9, Rule 21

Disciplinary counsel did not file any new disability cases in FY19.

f. Reinstatement Petitions under A.O. 9, Rule 22

No reinstatement petitions were initiated in FY19.

Hearing Panel Matters

All other types of lawyer discipline and disability matters begin by filing with the program administrator and assignment to hearing panels.

a. Probable Cause Review, A.O. 9, Rule 11.C

Before a case is charged publicly by petition of misconduct, disciplinary counsel must file a nonpublic request for finding of probable cause. One hearing panel serves as the probable cause panel for a term of one year. In FY19, eight requests for finding of probable cause were filed (involving 12 matters) and probable cause was found in all 12 matters.

b. Petitions of Misconduct, Stipulations, and Hearings

Disciplinary counsel may charge a case by filing either a petition of misconduct or a stipulation of facts. The matter is assigned to a hearing panel by rotation, and the panel may take evidence on violations, sanction, or both. Charges, hearing notices, and pleadings are posted to the Board's webpage under the tab [hearing calendar](#).

In FY19, disciplinary counsel charged eight cases (involving twelve matters) by petition of misconduct and four cases (involving five matters) by stipulation of facts. Of these cases, one (involving two matters) was being prosecuted by a specially appointed disciplinary counsel.

Eight hearings were held in locations around the state. Hearings are open to the public and usually held in courthouses. Of the twelve new cases filed in FY19, six (involving nine matters) remained pending before hearing panels into the next fiscal year.

c. Hearing Panel Decisions

During FY19, hearing panels issued eight decisions, PRB Decision Nos. 218, 219, 220, 221, 222, 223, 224, and 225. All decisions are posted to the [webpage](#). If no appeal is taken, the decisions become final.

d. Appeals

When a Hearing Panel issues a decision, either party may appeal that decision to the Supreme Court. The Court may also, on its own motion, order review of the Hearing Panel's decision whether or not either party appeals. Of the hearing panel decisions issued in FY19, one appeal was filed, but later voluntarily dismissed (*In re Norman Watts*, PRB Decision No. 224). The Court ordered review of one decision on its own motion (*In re Stacey Adamski*, PRB Decision No. 221), and that matter is still pending.

One matter on review by the Court still pending from FY 2018 was concluded by final order in FY 2019, *In re Glenn Robinson*, 2019 VT 8. The opinion adopted the panel's factual findings that the respondent engaged in sexual relationships with a client and sexual harassment of an employee but reversed the panel's imposition of a two-year suspension, imposing disbarment. Before *Robinson*, disbarment was generally imposed only in instances of felony convictions or misappropriation of client funds. The case accordingly signals other types of lawyer misconduct may also warrant the most severe sanction.

TRAINING

In FY19, Disciplinary Counsel attended three days of training provided by the National Organization of Bar Counsel.

PROBATION

Under A.O. 9, a hearing panel may order probation terms in connection with another sanction imposed for violations of the Rules of Professional Conduct. Disciplinary counsel is responsible for monitoring these attorneys. As FY19 opened, disciplinary counsel was monitoring one attorney on disciplinary probation. Two additional attorneys were placed on probation by a hearing panel in FY19. At the close of the fiscal year, disciplinary counsel continued to monitor all three attorneys on probation.

COMPLIANCE WITH THE TRUST ACCOUNT RULES

In FY19, upon receiving notification from a bank that an attorney had an overdraft in the attorney's trust account, disciplinary counsel opened 16 IOLTA overdraft related cases. Three additional cases were opened after a compliance exam had been conducted on the attorneys' trust accounts. All 19 cases were investigated.

APPROVED FINANCIAL INSTITUTIONS

Rule 1.15B(a)(1) of the Vermont Rules of Professional Conduct requires lawyers to maintain their trust accounts only in financial institutions approved by the Professional Responsibility Board. Disciplinary counsel oversees the written agreements with all approved financial institutions on an annual basis, whereby the institutions agree to the notice and other requirements set forth in the rules. The current list of [Approved Financial Institutions](#) is updated as needed.

CONTRACT CERTIFIED PUBLIC ACCOUNTANTS

Disciplinary counsel assigns trust account compliance exams to contract CPAs. The attorneys who are examined are generally selected at random. The CPAs are also assigned to conduct compliance exams when need becomes apparent as part of a disciplinary or disability investigation, and they consult with disciplinary counsel on an ongoing basis. For each exam, the CPA examines the lawyer's records, conducts inquiry, and produces a written report analyzing compliance with trust accounting rules. In FY19, existing contracts for two Certified Public Accountants were renewed.

CONTRACT INVESTIGATORS

From time to time, disciplinary investigations arise in which disciplinary counsel requires contract investigator services. In FY19, existing contracts for investigative services were renewed.

OTHER TASKS

A.O. 9, Rule 3(B)(2) provides that disciplinary counsel shall confer periodically with the Board to review operations and perform other assigned tasks. In FY18, at the request of the Board, disciplinary counsel began the process of revising the Hearing Panel Manual. This project is still ongoing.

Conclusion

The Professional Responsibility Program continued to administer the lawyer discipline program and to assist attorneys and the public to maintain and promote the highest standards of professional responsibility.

All participants in the Professional Responsibility Program are pleased to be of service to the Supreme Court, to the legal profession, and to the public. The Board acknowledges with gratitude the work of the staff and the many volunteers serving on Hearing and Assistance Panels and as Conflict Counsel, who have contributed significantly to the overall success of the Program.

We continue to provide an annual education and training opportunity for all participants in our program including Board members, Hearing Panel members, Assistance Panel members, Conflict Counsel and staff.

The Board would like to recognize and thank the following attorneys who served as special counsel, including:

Edward Adrian, Esq.
John Kennelly, Esq.
Renee Mobbs, Esq.
Craig Nolan, Esq.
Dan Richardson, Esq.
Robert Simpson, Esq.
Lawrence Slason, Esq.
Andy Strauss, Esq.