

## Annual Report of the Professional Responsibility Program for FY 2003

March 18, 2004

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The Professional Responsibility Board is required by A.O. 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.

### I. INTRODUCTION AND OVERVIEW

This is the fourth annual report to be issued by the Professional Responsibility Program which came into existence on September 1, 1999. The Program replaced the former Professional Conduct Board which operated from 1972 until April of 2000. While its predecessor's mission was focused solely on lawyer discipline, the Professional Responsibility Program has a wider mandate. It is:

(1) to resolve complaints against attorneys through fair and prompt dispute resolution procedures, (2) to investigate and discipline attorney misconduct, and (3) to assist attorneys and the public by providing education, advice, referrals, and other information designed to maintain and enhance the standards of professional responsibility.

Administrative Order 9, Preamble.

Now in its fourth year of operation, the Program has complete data over four years and has begun to take a critical look at whether the changes to the system occasioned by the mandates of the Rules adopted in September of 1999 have advanced the overall quality and purpose of the program. While level funded and without the services of the Bar Counsel for a significant portion of the year, the Board was able to function at an efficient level and accomplished the first series of random audits of trust accounts, submitted proposed changes to Rule 1.15 and began the consideration of developing and adopting a program compatible to our existing program, designed to address disciplinary issues involving impaired lawyers.

This report covers the period beginning July 1, 2002 and ending June 30, 2003.

### II. REPORT OF ACTIVITIES OF THE PROGRAM

#### A. Report of Activities of Bar Counsel

Bar Counsel's powers and duties are set forth at Rule 3.B. of Administrative Order No. 9:

Bar Counsel shall administer the dispute resolution program; respond to inquiries from lawyers regarding ethics and law practice; consult and coordinate with state and local bar associations, the Judicial Conduct Board, the Board of Bar Examiners and other related organizations regarding matters concerning attorney conduct and professional responsibility;

confer periodically with the Board to review program operations; provide administrative and legal support to the Board and assistance panels; and perform such other functions as are necessary to accomplish the goals of the program.

In addition, Rule 9 states:

Inquiries from attorneys regarding 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.

Any report of how these duties were carried out during the fiscal year must begin by noting that Bar Counsel was on personal or medical leave a substantial part of the fiscal year. This decrease from the previous year necessarily affected the ability to reach goals and reduced the statistical measure of productivity accordingly.

## **1. Administration of the Dispute Resolution Program**

Bar Counsel's first duty is to administer the dispute resolution program which is administered formally within the framework of the Assistance Panels (Rule 4) and informally through the intake and resolution of telephonic inquiries. The latter, as it is the first level on non-disciplinary dispute resolution which a member of the public will encounter, is addressed here first.

### **a. Informal Resolution: Inquiries**

We receive informal inquiries about lawyer conduct from clients, other members of the public, lawyers, and judges. Anyone who has a concern about a lawyer's conduct but has not yet filed a complaint may contact Bar Counsel for information and assistance as to how he or she might proceed. Where there are minor disputes that can be mediated or resolved easily, Bar Counsel will do so. In all cases, Bar Counsel explains to the caller his or her options and choices including the filing of a formal complaint, mediation, fee arbitration, private litigation, etc.

In addition, Bar Counsel receives inquiries from lawyers seeking ethical guidance regarding his or her own conduct. These callers are generally seeking informal and speedy guidance as to where to look for answers. Bar Counsel provides resources and educational information and occasionally may refer the caller to the VBA Professional Responsibility Committee for a formal advisory opinion.

Unlike formal complaints which are received and screened by Disciplinary Counsel, inquiries are generally received and resolved by telephone and occasionally by e-mail.

#### **i. Inquiries From Members of the Public Concerning Possible Misconduct**

Bar Counsel tracks contacts from members of the public separately from those of lawyers or judges. In this regard, the program essentially mirrors the typical Consumer Assistance Program operated by an increasing number of jurisdictions around the country.

Anyone who calls either the Burlington or Montpelier Office with a concern or complaint

about a lawyer's conduct is briefly interviewed by one of the administrative assistants who reduces the caller's concern to writing, and sends it to Bar Counsel. Unless it is clear that the complainant ought to file a complaint promptly, in which case complainant will be so advised, Bar Counsel then contacts the caller personally to discuss the concerns and tries to resolve the matter if appropriate. Bar Counsel's goal is to contact most callers within the week and to have every inquiry resolved within 30 days. Those goals were regularly met during the fiscal year when Bar Counsel was not on leave.

The types of inquiries received are as varied as are the resources needed to respond to them. Not all informal inquiries can or should be resolved. Some raise disciplinary issues, some cannot be resolved informally without written material, some require more resources than are available to Bar Counsel. Bar Counsel's work is reviewed by a member of the Board who reads her progress notes on each of the informal inquiries received.

This year we responded to 145 people who had questions or concerns about attorney conduct. Of these, 62% were successfully resolved. Thirty-four per cent of all callers (public and lawyers) were advised to file formal complaints. The remaining 4% were referred to other sources.

Fielding 145 inquiries is approximately 25% less than the 201 inquiries handled in FY2002. This may be attributable to the fact that, while Bar Counsel was on leave 25% of the year, most callers' concerns could not be resolved A up front@ because there was no one available to assume this responsibility. Rather, during Bar Counsel's absence, fielding inquiries from the public was suspended, and callers were advised to file formal complaints. There are no statistics measuring the number of callers who actually followed through with formal complaints; similarly there is no measure that demand for this service decreased during the fiscal year.

## **ii. Inquiries from Attorneys**

Informal telephonic and e-mail questions from lawyers both within and beyond Vermont are handled the same way as inquiries from non-lawyers. However, the duty to respond to these inquiries is more specifically mandated by the Rule 9 duty to provide preventative advice and education to lawyers with questions about ethics. The questions range from requests for simple information to consultations over complex ethical dilemmas which would require significant legal research.

The numbers of contacts from lawyers has been strong since this program was initiated.

During FY 2000 the calls were minimal as the new program began. During FY 2001, Bar Counsel fielded telephone calls from 42 different attorneys. During FY 2002, the calls increased by 22% to 64 lawyers. In FY2003, Bar Counsel and members of the Board acting in her stead responded to 61 lawyers. Of the 61, the concerns of 50 of these lawyers were resolved to their satisfaction. Ten were advised to file disciplinary complaints and 1 attorney was referred to the VBA's Professional Responsibility Committee for a formal advisory opinion.

### **b. Formal Resolution: Assistance Panels**

Assistance Panels serve two functions. They serve either as mediators of disputes between two parties, invariably a lawyer and a client. Or they serve as a diversion board, handling cases of very minor misconduct that would otherwise be dismissed, in much the same way that court diversion boards do. Sitting in either role, the Assistance Panels represent a very progressive approach to demonstrating a high level of responsibility to the

public.

Each Assistance Panel consists of three volunteers, all trained in mediation, at least one of whom is a public member and one of whom is a member of the Professional Responsibility Board. In addition to the seven Board members, the following volunteers serve on Assistance Panels:

<ul style="list-style-type: none"> <li>• Joseph F. Cahill, Jr., Esq.</li> <li>• Irene Carbine</li> <li>• Ted Davis</li> <li>• Alice Estey</li> <li>• Susan Fay</li> <li>• Emily Gould, Esq.</li> <li>• Robert Fairbanks, Esq.</li> <li>• Honorable Ellen Maloney</li> </ul>	<ul style="list-style-type: none"> <li>• Larry Mandell, Esq.</li> <li>• Katherine Mosenthal, Esq.</li> <li>• Susan Palmer, Esq.</li> <li>• Alan Rome, Esq.</li> <li>• Janet Shaw, Esq.</li> <li>• Rachel Siegel</li> <li>• R. Brownson Spencer II</li> <li>• John Webber, Esq.</li> </ul>
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The referral of cases to the Assistance Panels was down from the previous two years. However, statistics indicate that the Panels promptly dealt with all cases which were referred to them as reflected in the following table:

**Table 1: Assistance Panel Cases**

	FY 2002	FY 2003
Number of Cases Referred	19	14
Number of Cases Heard	16	13
Number of Cases Disposed	19	10

In response to a recommendation made at the June 2002 annual meeting, a questionnaire was created to collect their comments from participants of Assistance Panel hearings in order to determine their opinion as to the value of the experience. During the year, the questionnaire was handed out to participants at the conclusion of the hearing. The participants were asked to fill it out and return it in a pre-stamped envelope. During FY 2003, a total of 21 questionnaires were distributed; 12 were returned. Of those 12, all but one contained positive comments. The Assistance Panel members themselves continue to report that they find their service on the panels very rewarding. They see, in most cases, that the experience appears to make a significant difference to the participants.

## **2. Consultation and Co-ordination with other Organizations**

Bar Counsel's second duty is to work with other organizations regarding matters concerning attorney conduct and professional responsibility. To that end, she undertook the following tasks during fiscal 2003.

- a. Bar Counsel met with the chair of the VBA Fee Arbitration Committee to review issues

of mutual concern and co-ordinate areas of mutual interest.

b. Along with the chair of the Board, Bar Counsel met with representatives of the ABA's Commission on Lawyer Assistance Projects which conducted a study of Vermont's response to lawyer impairment. Additionally, Bar Counsel contacted ABA staff counsel to obtain additional information on the nationwide response to lawyer impairment within the Judiciary, as opposed to bar associations. Plans were begun to use some of this information to prepare a CLE for the Vermont Bar Association's annual meeting next fiscal year as well as to begin to consider how or whether the ABA's recommendations would ever be adopted in Vermont.

c. A sub-committee of the Supreme Court's Civil Rules Committee began the task of reviewing the 2002 changes which the ABA made to the Model Rules of Professional Conduct. Bar Counsel began working with this group in April of this year. Because she had been the reporter for the Supreme Court's study group in 1997 which initially considered adopting the Model Rules of Conduct and because the rules eventually adopted varied significantly from the national model, she prepared a document which compared and contrasted all three versions of the Rules: the ABA's pre-2002 version, Vermont's existing rules, and the proposed 2002 changes. Bar Counsel has been attending the subcommittee's meetings and is working with its members in crafting the proposed rules to suit Vermont's particular needs without straying too far from the proposed rule so as to lose the value of using a national model.

d. Bar Counsel worked with the chair of the Board of Bar Examiners and staff to resolve problems with how lawyers licensing status was tracked. The hope was to eliminate confusion regarding the status of inactive lawyers and resigned lawyers, particularly those who had resigned under disciplinary investigation.

### **3. Providing Administrative and Legal Support to the Board**

Aside from the normal administrative support functions rendered every year, Bar Counsel provided the Board, as requested, with a rewritten version of Administrative Order No. 9. This document was prepared so that the Board, in turn, might consider whether to propose certain changes to the Supreme Court. The primary change contemplated in this document is the insertion of an appellate process within the Professional Responsibility Program between the hearing panel decision and the review by the Vermont Supreme Court. This might be achieved in any number of ways including reworking the role of the current board or creating a separate adjudicative board out of the existing hearing panels. The primary policy reason driving such a change is the need for overall consistency in the decisions reached at the hearing panel level, particularly now that cases of public sanctions are no longer always taken up for review by the Court.

The rewrite of Administrative Order No. 9 also suggested correction of a number of drafting errors in the 1999 version of the Order plus clarified some procedural issues and addressed some inconsistencies.

The Board expects to take up this issue in FY 2004.

### **4. Publishing of Decisions**

Rule 13 provides that Bar Counsel is responsible for notifying various national disciplinary, state and federal agencies of the imposition of public discipline. The rule also requires Bar Counsel to notify the courts within the State of Vermont and the local newspaper when a lawyer has been publicly disciplined. Bar Counsel's office also publishes each hearing panel decision through VALS (Vermont Automated Library Systems). The public can access

these decisions through the Judiciary's homepage at [www.vermontjudiciary.org](http://www.vermontjudiciary.org). The decisions are distributed to other publishers and are maintained in a loose-leaf binder for public access as required by Rule 13 E. This year, 19 decisions were issued. In addition, Bar Counsel publishes a digest, with each decision summarized, also available for viewing on the Judiciary's homepage. The digest is attached hereto as **Appendix A**.

## B. Report of Activities of Disciplinary Counsel

### Introduction

Pursuant to Rule 3(B)(2) of Administrative Order 9, Disciplinary Counsel administers the disciplinary program, investigates and litigates disciplinary and disability matters, and confers periodically with the Professional Responsibility Board. In FY 2003, the Office of Disciplinary Counsel (A ODC@ ) consisted of Disciplinary Counsel, Deputy Disciplinary Counsel, and an Administrative Assistant to Disciplinary Counsel. For the purposes of this report, the staff is collectively referred to as A Disciplinary Counsel.@ This is the report of Disciplinary Counsel's activities in FY 2003.

Rule 10 requires that A all inquiries concerning attorney conduct will be directed to the Professional Responsibility Program@ and A [a]ll complaints will be screened by counsel@ for the Program. For the past three years, Bar Counsel has been the program counsel who has assumed responsibility for screening all of the formal complaints. For administrative reasons, the Board assigned the screening function to Disciplinary Counsel early in FY 2003.

### 1. Screening of Formal Disciplinary Complaints

Written complaints are filed with Disciplinary Counsel. Upon receipt, they are processed by administrative staff and then directed to an attorney for screening.

Disciplinary Counsel aspires to screen each complaint within 30 days of receipt. That goal was met in the vast majority of cases. The purpose of the screening process is defined by Rule 10 of Administrative Order 9. Specifically, complaints are screened in order to determine the nature of the inquiry and whether it can be resolved through non-disciplinary methods. *A.O. 9, Rule 9(A)*. While the specifics of the screening process vary from case to case, it usually entails a limited investigation. If the complaint appears to allege misconduct that would require a disciplinary sanction, it is referred for a more formal investigation. *A.O. 9, Rule 9(C)*. Otherwise, upon the conclusion of the screening process, Disciplinary Counsel may dismiss a complaint or refer it for non-disciplinary resolution.

#### Nature of the Complaints

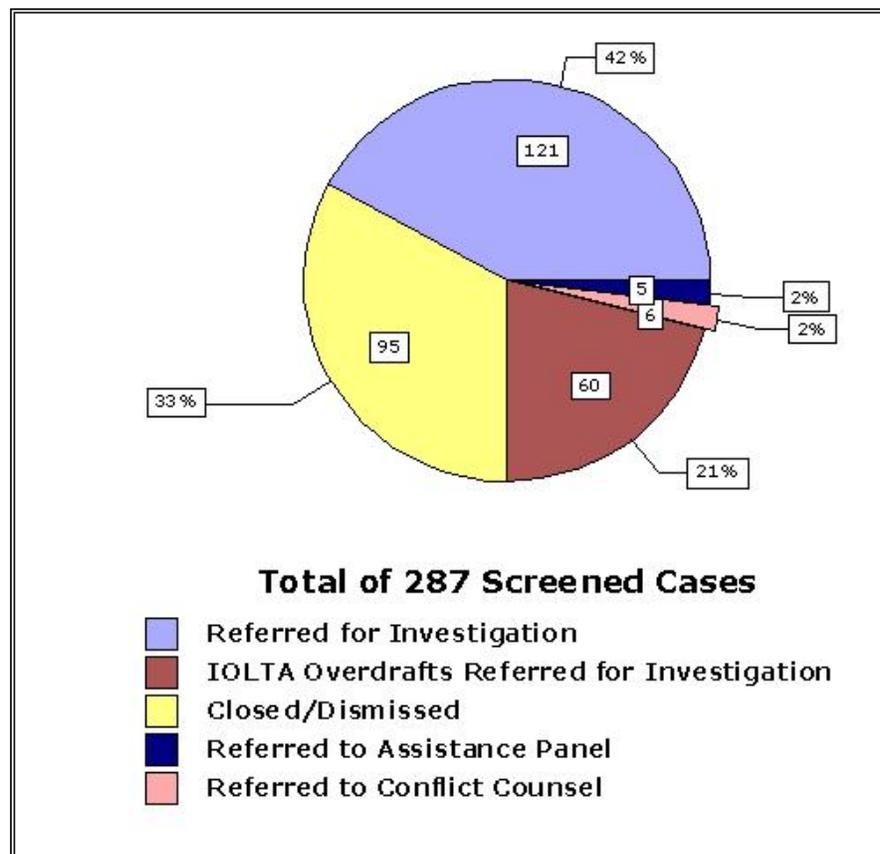
Not counting notices of overdrafts to trust accounts, the PRB received 225 complaints in FY 2003. Most complaints include more than one type of allegation. As such, it is somewhat difficult to categorize the nature of complaints. However, certain allegations appear more often than others. The following allegations appeared most frequently:

<b>Complaints that included allegations of:</b>	<b>225 Total Complaints</b>
Lack of Diligence/Neglect:	76
Communication Failure:	56
Misrepresentation:	31
Conflict of Interest:	27

The clear majority of complaints lodged against lawyers involve, in one way or another, a client's belief that his or her lawyer has neglected a matter and/or failed to keep the client updated as to the status of a matter.

This fiscal year the program received 285 new cases, up from 247 in FY 2002 and 204 in FY 2001. As the fiscal year opened, 7 cases that had been filed in FY 2002 needed to be screened, thus 292 cases were received for screening. Counsel was able to screen 287 of them by the end of the fiscal year. Of these 287 cases, 121 were complaints that were referred for further investigation, 60 were IOLTA overdrafts that required further investigation, 5 were sent to Assistance Panels for mediated resolutions, 6 were sent to conflict counsel, and 95 were dismissed. These results are graphically represented in Chart 2.

**Chart 2: Disposition After Initial Screening**



For the third year, we have tracked the reasons for closing cases at initial screening to give a better sense of the kind of cases that do not go on to the investigation or mediation stage. Of the 95 cases closed at screening:

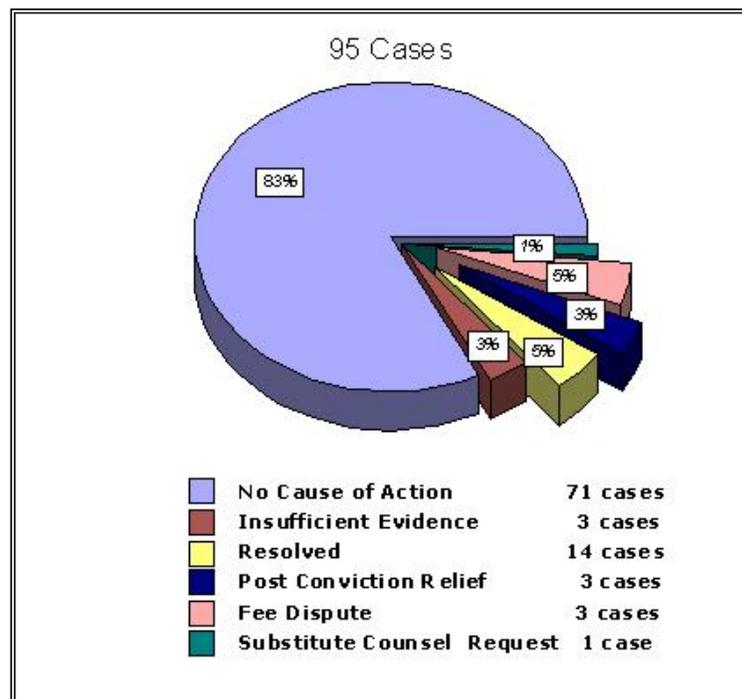
- A. 74 (78%) were dismissed either because they did not allege conduct that violated the Rules of Professional Conduct or because the screening process failed to reveal sufficient support for further investigation;
- B. 14 (15%) were resolved by counsel without the need to refer the matter to an Assistance Panel for more formal mediation;

C. 3 (3%) were dismissed as being petitions for post conviction relief, something over which the Board has no jurisdiction;

D. 3 (3%) were dismissed as involving fees disputes that did not rise to the level of an unethical fee. In each of these three cases, the complainant was advised of the existence of the Vermont Bar Association Fee Arbitration Committee and was advised to contact the Chair of that Committee for additional information; and

E. One (1%) was dismissed because the complainant was asked nothing more than for an order that substitute counsel be named to represent him.

**Chart 3: Cases Dismissed by Screener - Reasons for Dismissals**

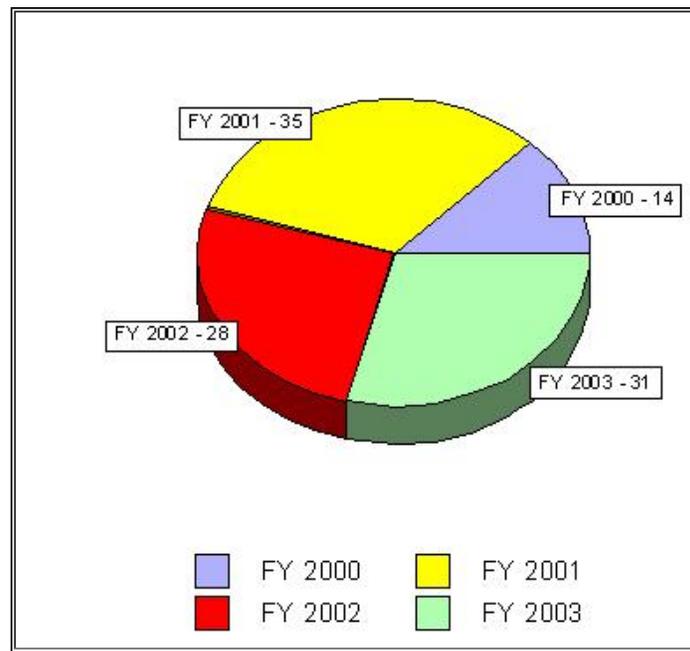


If a complaint is dismissed at screening, the complainant is advised, in writing, of the reason for that decision. The complainant is also advised of his or her right to appeal the decision, within 60 days, to the Chair of the Board.

In FY 2003, 31 (33%) complainants appealed the decision to dismiss a complaint at screening. 29 of the appeals were upheld by the Chair; 2 were referred to counsel for further investigation. Disciplinary Counsel eventually dismissed each of the appeals that the Chair referred for further investigation.

In general, the number of appeals was consistent with the numbers from previous years. For instance, in FY 2001, approximately 38% of those complainants whose cases were dismissed at screening appealed to the Chair. In FY 2002, 27% appealed to the Chair.

**Chart 4: Appeals to Chair**



## 2. The Investigation & Prosecution of Complaints: An Overview of the Process

Disciplinary Counsel's core function is to investigate and prosecute disciplinary matters. In FY 2003, Disciplinary Counsel investigated approximately 215 complaints; the 121 that were referred during the fiscal year and the 94 that had been pending when the fiscal year opened. By comparison, Disciplinary Counsel investigated 187 complaints in FY 2002.

Typically, when a complaint is referred for a formal investigation, the respondent is given three weeks to file a written response with Disciplinary Counsel. Upon receipt of the response, the matter is reviewed and is assigned to Disciplinary Counsel or Deputy Disciplinary Counsel. The attorney handling the case typically contacts both the respondent and the complainant with questions and/or requests for information. Other witnesses are interviewed and, in most cases, documents related to the underlying representation are reviewed. Most interviews are informal. However, in some instances, Disciplinary Counsel requests an investigatory subpoena and, if one is granted, interviews a particular witness under oath.<sup>1</sup> Upon the conclusion of an investigation, a complaint is either dismissed, referred to an Assistance Panel, or prosecuted.

A complaint can be dismissed for a variety of reasons. **Appendix B**, Section E(7) of this report discusses the cases that Disciplinary Counsel dismissed in FY 2003.

When Disciplinary Counsel refers a complaint to an Assistance Panel, it is usually a case in which the lawyer has not violated the Rules of Professional Conduct, but has acted in such a manner as to indicate that a dialogue with an Assistance Panel would assist the lawyer in improving his or her practice and/or communication skills. Frequently there has been a breakdown in communication between the lawyer and the client that, hopefully, can be resolved by an Assistance Panel. Section E(6) discusses the cases that Disciplinary Counsel referred to Assistance Panels in FY 2003.

If Disciplinary Counsel decides to prosecute a complaint, the prosecution begins with Disciplinary Counsel asking a hearing panel to review for probable cause the decision to file

formal disciplinary charges.<sup>2</sup> If probable cause is found, Disciplinary Counsel files a petition of misconduct, unless the parties stipulate to misconduct.<sup>3</sup>

Upon the filing of a petition of misconduct, the respondent has twenty days to file a formal answer.<sup>4</sup> Within twenty days of the filing of an answer, the parties must exchange witness lists.<sup>5</sup> Within sixty days of the filing of an answer, the parties may take depositions and make requests for production.<sup>6</sup> At trial, Disciplinary Counsel must prove its case by clear and convincing evidence.<sup>7</sup>

The process is a bit different when a case is submitted by stipulation. Typically, the parties stipulate to misconduct and join to recommend a particular sanction. However, it is not uncommon for the parties to stipulate to misconduct and then submit argument as to the appropriate sanction. In either case, the hearing panel to which a stipulation is assigned can either reject the stipulation or accept it and impose whatever sanction it deems appropriate.<sup>8</sup>

A hearing panel has sixty days from the conclusion of any hearing to issue its decision.<sup>9</sup> Hearing Panel decisions may be appealed by the respondent or Disciplinary Counsel. Even if neither party appeals, the Vermont Supreme Court is free to order a review of a particular decision on its own motion.<sup>10</sup>

It is difficult to quantify the work that goes into an A investigation@ or a A prosecution.@ For example, it is not uncommon for a case that ends up being dismissed to involve more work than a case that results in a stipulation to misconduct. Nonetheless, previous Annual Reports have focused on statistics and Disciplinary Counsel's caseload. The remainder of this report is intended to provide a statistical review of the cases handled by Disciplinary Counsel in FY 2003.

### **3. The Docket**

#### **a. Overview**

As FY 2003 opened, Disciplinary Counsel had 94 cases under investigation and 7 cases in litigation. During the course of the year, 121 other complaints were referred for investigation. Thus, to one degree or another, Disciplinary Counsel worked on approximately 222 cases in FY 2003. This report will address the following areas:

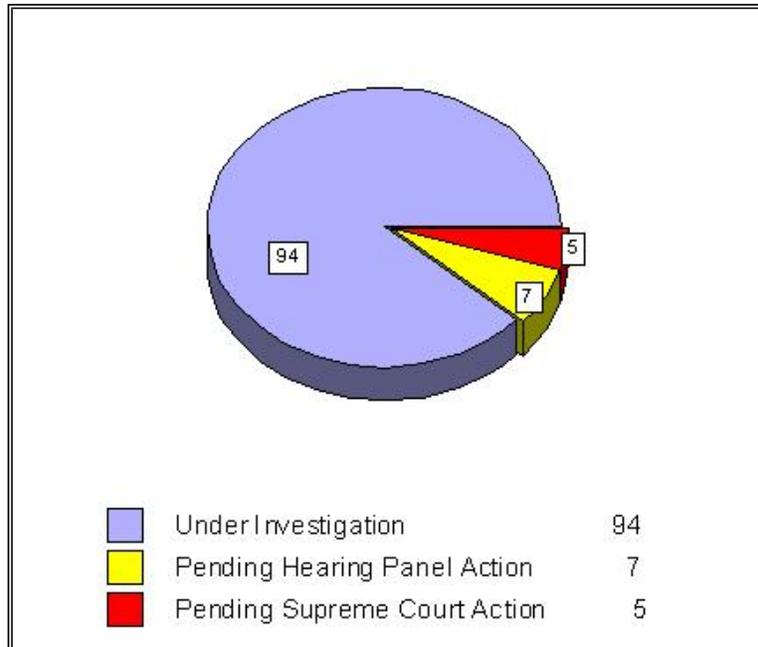
- (1) Disciplinary Counsel's docket as FY 2003 began;
- (2) What happened to the cases on the docket as FY 2003 began;
- (3) Cases that were referred to Disciplinary Counsel during the course of FY 2003;
- (4) Formal action taken by Disciplinary Counsel in FY 2003; and
- (5) Disciplinary Counsel's docket as FY 2003 closed.

The statistics from FY 2003 indicate that the A backlog@ of cases under investigation continues to be virtually eliminated.

#### **b. Disciplinary Counsel's Docket as FY 2003 Opened**

As FY 2003 opened, Disciplinary Counsel had 94 open cases, compared to 70 cases when FY 2002 opened. In addition, 7 were pending hearing panel action, 6 were pending Supreme Court action, and 5 were pending Assistance Panel action.

**Chart 5: Beginning of FY 2003 - Status of Cases Under Investigation**



**c. What Happened to the 94 Cases that were Under Investigation as the Fiscal Year Opened?**

As mentioned, 94 cases were under investigation as FY 2003 opened. As FY 2003 closed, the status of the A original 94" was as follows:

**Chart 6: Status of A Original 94"**

Dismissed by Disciplinary Counsel:	48
Remained Under Investigation:	25
Closed B Discipline Resulted:	9
Pending Hearing Panel Action:	3
Referred to Assistance Panel:	4
Probable Cause Found, Pending Formal Charges:	2
Dismissed by Hearing Panel:	0
Closed B Lawyer Reinstated:	0
Pending Supreme Court Action:	3

Thus, of the 94 cases that were under investigation as FY 2003 opened, formal action was taken in 79 were resolved during the fiscal year. This is not to say that nothing was done in the other twenty-five. Rather, the investigations in those cases simply were not completed in FY 2003.

#### **d. Cases that Came to Disciplinary Counsel in FY 2003**

During FY 2003, 188 new cases came to Disciplinary Counsel. They arrived via four routes:

Referred by Screening Counsel:	121
IOLTA Overdraft Notices:	60
Appeals of Cases Dismissed at Screening <sup>11</sup> :	2
Opened by Disciplinary Counsel:	5

Of these 188 cases, forty remained under investigation as the fiscal year ended. In other words, over 80% of the investigations opened by Disciplinary Counsel in FY 2003 were completed during the fiscal year.

#### **e. Formal Action taken by Disciplinary Counsel in FY 2003**

For the purposes of this report, A formal action@ is deemed to have occurred when Disciplinary Counsel took any of the following steps: (1) stipulated to a disbarment on consent; (2) filed a petition for an interim suspension; (3) filed a petition of misconduct; (4) filed a request for review for probable cause; (5) filed a stipulation to misconduct; (6) referred a case to an assistance panel; or (7) dismissed a case. In FY 2003, the number of cases in which each type of formal action took place was as follows:

##### **Chart 7: Formal Action**

Disbarment on Consent:	0
Petition for Interim Suspension:	1
Requests for Review for Probable Cause:	14
Petitions of Misconduct:	7
Stipulations to Misconduct:	12
Petition for Interim Suspension:	1
Referred to an Assistance Panel:	9
Referred to Conflict Counsel:	1
Dismissed:	179

##### **1. Disbarment on Consent B 1**

Rule 19 of Administrative Order sets out the procedure by which an attorney who is the subject of a disciplinary investigation can resign. If the resignation is accepted, the Supreme Court enters an order disbarring the attorney on consent. One disbarment on consent was filed this fiscal year.<sup>12</sup>

##### **2. Petitions for Interim Suspension B 1**

When Disciplinary Counsel receives evidence indicating that a lawyer has violated the Rules of Professional Conduct and poses a substantial threat of serious harm to the public, Rule 18 of Administrative 9 requires Disciplinary Counsel to transmit the evidence to the Supreme Court along with a proposed order for an interim suspension of the attorney's license

to practice law. In FY 2003, Disciplinary Counsel filed one petition for an interim suspension.<sup>13</sup> After the matter went to trial, the hearing panel recommended a 3-year suspension. The Respondent appealed, and it was pending before the Supreme Court as FY 2003 ended.

### **3. Requests for Review for Probable Cause B 14**

Upon concluding an investigation and deciding to file formal disciplinary charges, Disciplinary Counsel is not permitted to file a petition of misconduct. Rather, Disciplinary Counsel must file a request asking a hearing panel to review for probable cause the decision to file formal charges.<sup>14</sup> A request for probable cause review usually includes both an affidavit describing the investigation and a memorandum of law in support of Disciplinary Counsel's decision to file formal charges. In FY 2003, Disciplinary Counsel filed fourteen (14) requests for probable cause review. Thirteen (13) of the requests were granted and one (1) request was withdrawn.<sup>15</sup> In other words, in nearly 100% of the cases that Disciplinary Counsel decided to file formal disciplinary charges against an attorney, an independent hearing panel found that the decision was supported by probable cause.

### **4. Petitions of Misconduct B 7**

Once a hearing panel finds that the decision to file formal charges is supported by probable cause, Disciplinary Counsel is authorized to file a Petition of Misconduct. In the disciplinary system, a Petition of Misconduct is, in effect, a complaint that outlines the facts supporting the charged violation.

In FY 2003, Disciplinary Counsel filed seven (7) Petitions of Misconduct, involving 6 respondents. By comparison, eight (8) were filed in FY 2002.

As FY 2003 closed, four (4) of the petitions had resulted in a final discipline order, two (2) were pending hearing panel action, and one (1) case was on appeal to the Supreme Court.

More specifically, the four final discipline orders included:

- Suspensions: 3 (involving 2 attorneys)
- Reprimands: 1

The case on appeal to the Supreme Court was one in which the hearing panel recommended a three-year suspension.

### **5. Stipulations to Misconduct B 12**

It is not uncommon for a respondent to stipulate to misconduct. In most cases involving stipulations, Disciplinary Counsel and the respondent submit a Stipulation of Facts, a Joint Recommendation as to Conclusions of Law, and a Joint Recommendation as to Sanction.

In FY 2003, there were twelve (12) cases in which stipulations of

misconduct were filed. The cases involved ten (10) attorneys.<sup>16</sup> Ten (10) resulted in final disciplinary orders during FY 2003 and one resulted in a hearing panel decision that was pending Supreme Court review as the fiscal year ended. The twelfth stipulation remained pending in front of hearing panel. In that case, a decision had been issued during the fiscal year, but Disciplinary Counsel filed a Motion to Reconsider one aspect of the decision.

Of the 10 stipulations that resulted in final discipline orders, the following sanctions were imposed:

- Admonitions: 7
- Public Reprimands: 1
- Suspensions: 2

The case that was pending approval by the Supreme Court involved an admonition, as did the case in which Disciplinary Counsel had filed a Motion to Reconsider.

#### **6. Referrals to Assistance Panels B 9**

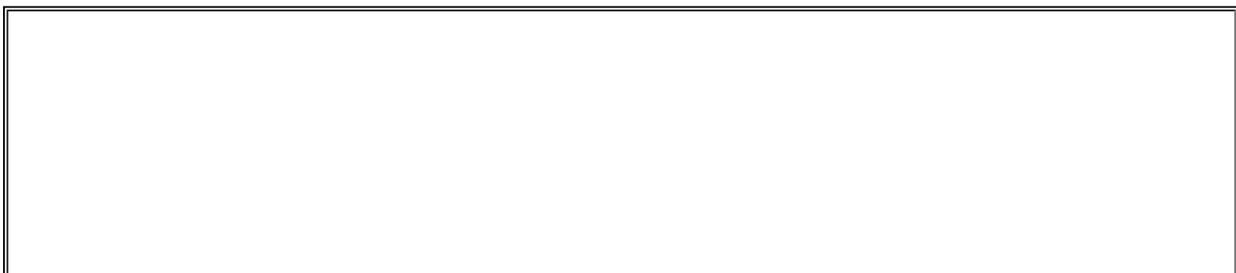
Disciplinary Counsel may refer a case to an Assistance Panel. Typically, Disciplinary Counsel refers to an Assistance Panel cases in which the lawyer has not violated the Rules of Professional Conduct, but has acted in such a manner as to indicate that a dialogue with an Assistance Panel would assist the lawyer in improving his or her practice and/or communication skills. Frequently there has been a breakdown in communication between the lawyer and the client that, hopefully, can be resolved by an Assistance Panel.

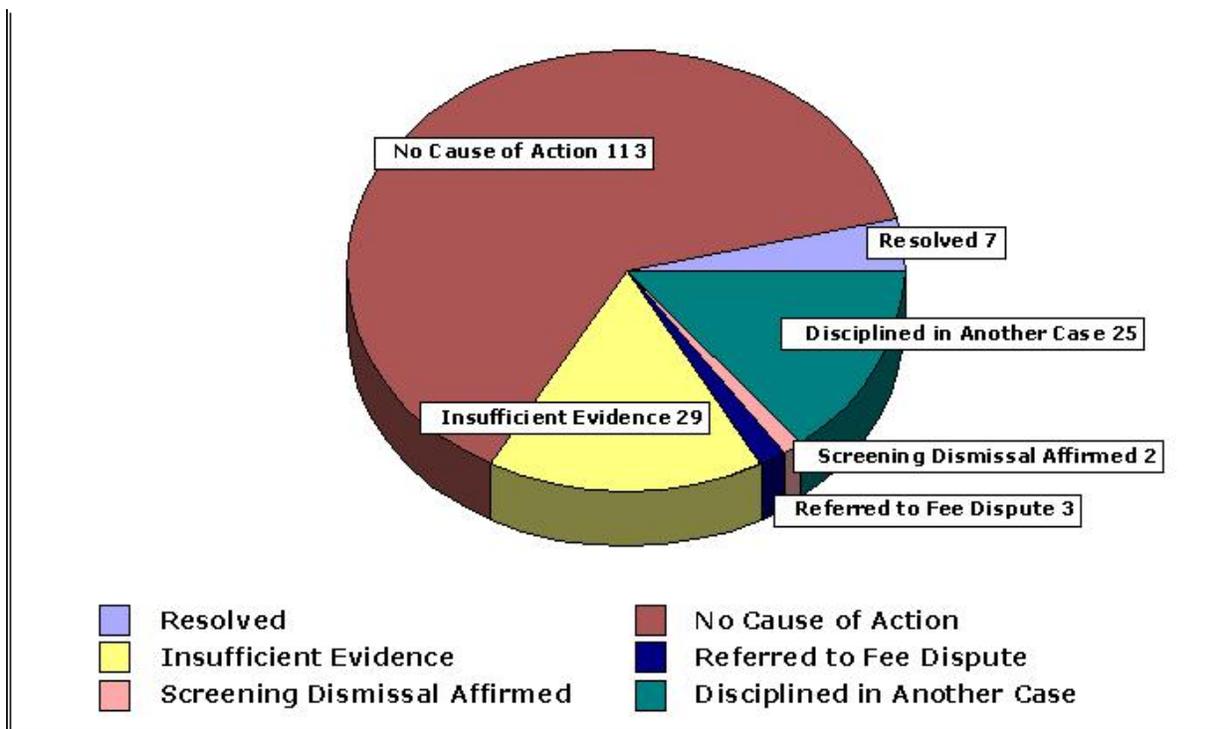
In FY 2003, Disciplinary Counsel referred nine (9) cases to Assistance Panels.<sup>17</sup> By comparison, six (6) cases were referred to Assistance Panels in FY 2002.

#### **7. Dismissals B 179**

If, upon concluding an investigation, Disciplinary Counsel decides not to file formal disciplinary charges, a complaint is dismissed. In FY 2003, Disciplinary Counsel dismissed one hundred and seventy-nine (179) complaints. The following chart illustrates the breakdown of the 179 cases dismissed by Disciplinary Counsel in FY 2003:

**Chart 8: Reasons for 179 Dismissals in FY 2003**

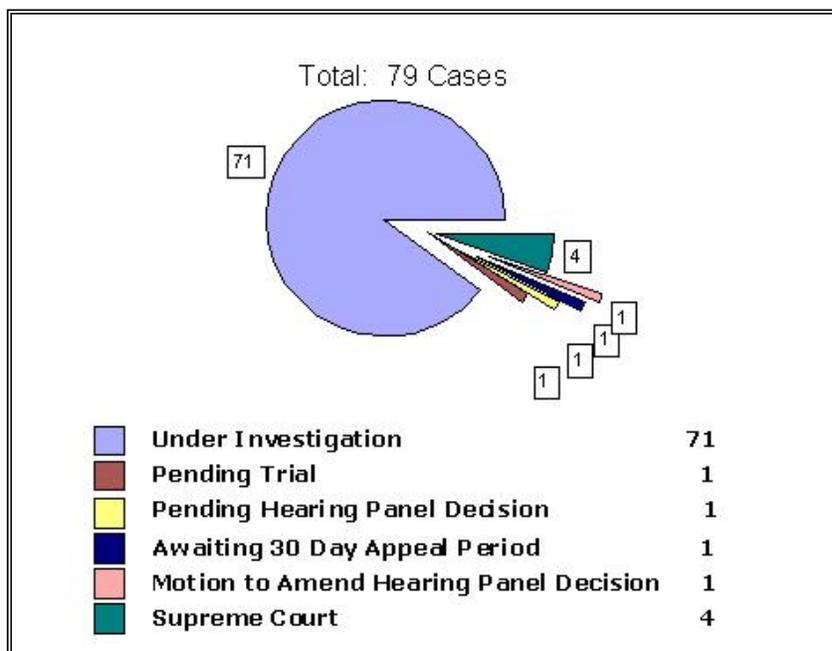




**g. Disciplinary Counsel's Docket as FY 2003 Closed**

As FY 2003 closed, Disciplinary Counsel had 79 open cases. As of June 30, 2003, the status of those cases was as follows:

**Chart 9: Status of Open Cases**



Previous reports have focused on the ages of the cases under investigation. Traditionally, the Board has defined an A old@ case as one that has been under investigation for more than two years. As FY 2003, closed, 5 of the 71 (7%) cases under investigation had been open for more than two years.

Thus, for the second consecutive year, the number of A old@ cases that were under investigation remained low. Over the past several years, while the number of cases has risen, significant progress has been made in investigating cases before they become A old@ .

<b>Close of Fiscal Year</b>	<b>Cases Older than 2 Years</b>	<b>% of Docket</b>
2003	5 of 71	7%
2002	5 of 89	5.38%
2001	10 of 47	21.2%
2000	14 of 56	25%

#### **4. Staff**

For the second year in a row, Disciplinary Counsel's staff remained constant throughout the fiscal year.

#### **5. Miscellaneous**

Disciplinary Counsel performs several tasks in addition to its core function of investigating and prosecuting disciplinary matters. The work below represents some of the additional tasks that Disciplinary Counsel performed in FY 2003:

- A. As mentioned above, early in FY 2003, Disciplinary Counsel undertook to screen all disciplinary complaints.
- B. Working with the Board, Disciplinary Counsel put out a Request for Proposals that sought bids from accountants willing to perform random audits of trust accounts. Disciplinary Counsel received three bids and recommended a particular firm to the Board. The Board agreed with the recommendation and Disciplinary Counsel entered into a Letter of Agreement with the firm.

In addition, working with both the Bar and the Board, Disciplinary Counsel participated in the random selection of 6 firms to be audited. Two of the firms had more than 6 lawyers, two had between 4 and 6, and two had 3 or fewer.

- C. Disciplinary Counsel's administrative assistant worked extensively with Bar Counsel and the PRB's Program Administrator to docket phone inquiries and new complaints. When a new complaint is filed, Disciplinary Counsel's administrative assistant creates a file and forwards hard copies and electronic copies to Screening Counsel and the Board's Program Administrator.
- D. Deputy Disciplinary Counsel attended the annual meeting of the National Organization of Bar Counsel and, throughout the fiscal year, she and Disciplinary Counsel remained active in the NOBC's discussions of issues related to lawyer discipline.
- E. Disciplinary Counsel served as a panel member at a CLE on trust-account management. In addition, Disciplinary Counsel appeared on a panel at a CLE designed to address the reporting duties of in-house counsel.

- F. Disciplinary Counsel lectured at the Vermont Law School on ethical issues related to the use of the internet and e-mail.

## **6. Conclusion**

With significant assistance from the PRB, Disciplinary Counsel was able to continue the fair, efficient, and effective investigation of ethics complaints filed against Vermont attorneys. As a result of the work done in FY 2003, it appears that in FY 2004 both complainants and respondents will be able to continue to expect ethics investigations to be completed in a timely and fair fashion.

## **C. Report of Activities of Board**

The Board held seven business meetings during FY 2003, in addition to an annual meeting for all program members. The highlights of its accomplishments are as follows:

### **1. Annual Training Meeting**

The Professional Responsibility Board held its annual meeting at the Costello Courthouse on Friday, May 16 with approximately 30 board members, staff, hearing panel members and assistance panel members attending.

In a addition to a welcome and introduction by Chair Joan Wing, the morning agenda topics included A The Year in Review B Panel Decisions from FY > 03" presented by Leslie Black, Esq., a " Brief Explanation of the Random Audits" co-presented by Vice-Chair Steven Adler and Disciplinary Counsel Michael Kennedy, A Trust Accounts B Why the PRB Should Care@ presented by Peter Zuk of the Vermont Attorneys Title Corporation, and A Reparative & Restorative Justice: How it Might Apply to Lawyer Discipline,@ presented by David Peebles of the Vermont Department of Corrections.

The afternoon agenda included a panel discussion on " The Experience ; Shared Thoughts; Suggested Improvements." Views from different perspectives included a member from a hearing panel, a probable cause panel, an assistance panel, an attorney who has served as Conflict Counsel and an attorney who had represented a respondent before the Professional Responsibility Board and other professional licensing boards.

The meeting concluded with a wrap-up and closing remarks. Attorney members who participated earned 4.25 CLE ethics credits.

### **2. New Policies**

The Board adopted, one new policy, amended one previous policy and rescinded one policy.

The Board adopted Policy No. 24 in which the Board decided that assistance panels will not have access to respondent's disciplinary history. (September 19, 2002).

Policy No. 17 authorized the Board to share minutes of its meeting with the Court Administrator and the Chief Justice. In FY 2003, Associate Justice Morse was appointed as the Court's liaison to the Board. As such, that policy was amended as reflected in Policy No. 25 to allow the Board to share meeting minutes with the court-appointed liaison as well as the Court Administrator and Chief Justice.

The Board abolished (Policy No. 5) the so-called A wall@ that prohibited Bar Counsel from sharing with Disciplinary Counsel statements made by a respondent during the screening of a complaint. Prior to making the change, the Chair met with Bar's Board of Managers so as to provide the Bar with notice of the proposed change. The Board of Managers expressed support for the change and the wall was eventually abolished by vote of the Board (Policy No. 26).

All of the policies which have been adopted in the prior four years of the Board's existence are published in **Appendix C** attached at the back of this annual report.

### 3. Hearing Panels

Pursuant to A.O. No. 9, Rule 2.A., the chair of the Board appoints standing hearing panels as may be required. Each hearing panel consists of two members of the bar of this state and one public member. The chair of the Board also appoints a lawyer-member of each hearing panel to serve as chair of the panel. Terms are for two years, and no member shall serve for more than three consecutive terms or parts thereof. Members of the Board may not serve simultaneously as members of a hearing panel. The following volunteers served on hearing panels during FY2003:

<b>Hearing Panel 1</b>	<b>Hearing Panel 2</b>
<ul style="list-style-type: none"> <li>• Barry Griffith, Esq., Chair</li> <li>• Martha Smysrski, Esq.</li> <li>• Stephen Anthony (Tony) Carbine</li> </ul>	<ul style="list-style-type: none"> <li>• Douglas Richards, Esq., Chair</li> <li>• Lawrin Crispe, Esq.</li> <li>• Michael Filipiak</li> </ul>
<b>Hearing Panel 3 (Probable Cause Panel)</b>	<b>Hearing Panel 4</b>
<ul style="list-style-type: none"> <li>• Robert O'Neill, Esq., Chair</li> <li>• S. Stacy Chapman, Esq.</li> <li>• Ruth Stokes</li> </ul>	<ul style="list-style-type: none"> <li>• Paul Ferber, Esq., Chair</li> <li>• Robert M. Butterfield, Esq.</li> <li>• George Coppernrath</li> </ul>
<b>Hearing Panel 5</b>	<b>Hearing Panel 6</b>
<ul style="list-style-type: none"> <li>• Mark Sperry, Esq., Chair</li> <li>• Jane Woodruff, Esq.</li> <li>• Sara Gear Boyd</li> </ul>	<ul style="list-style-type: none"> <li>• Judith Salamandra Corso, Esq., Chair</li> <li>• James Gallagher, Esq.</li> <li>• Toby Young</li> </ul>
<b>Hearing Panel 7</b>	<b>Hearing Panel 8</b>
<ul style="list-style-type: none"> <li>• Richard H. Wadhams, Esq., Chair</li> <li>• Keith Kasper, Esq.</li> <li>• Sam Hand</li> </ul>	<ul style="list-style-type: none"> <li>• Eileen Blackwood, Esq., Chair</li> <li>• Peter Bluhm, Esq.</li> <li>• Patricia Coates</li> </ul>

Leslie G. Black, former chair of the Professional Conduct Board and the Judicial Conduct Board, and who is one of Vermont's leading experts on the law of ethics, serves as hearing panel counsel on a part time basis to assist the panels as necessary.

### 4. Assistance Panel Questionnaires

Along with Bar Counsel, the Board developed a questionnaire to distribute to participants in matters that are referred to Assistance Panels. The questionnaire is designed to assess the strengths and weaknesses of the non-disciplinary resolution process.

### 5. Proposed Amendment to Rule 1.15

The Board proposed that the Supreme Court amend Rule 1.15 to read as follows:

A lawyer shall hold **funds and** property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's **and/or law firm's** own **funds and** property. Funds shall be kept in accordance with Rules 1.15A, B, and C. **No funds belonging to the lawyer or law firm, except funds reasonably sufficient to pay or avoid the imposition of fees or charges imposed by the financial institution, may be deposited in such an account.** Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be preserved for a period of six years after termination of the representation.

The Board proposed the following comment to the amended rule:

The Rule does not represent a departure from the notion that lawyers shall not commingle funds with client funds. Rather, the intent of the Rule is to allow lawyers and firms to deposit into client trust accounts the minimum amount of their own money necessary to cover fees that are reasonably expected to be charged by the financial institution at which the account is maintained. The question of whether the amount of the lawyer's or firm's funds is A reasonably sufficient@ will depend on a variety of factors, including, but not limited to, the nature of the lawyer's practice, the frequency of activity in the trust account, the fees charged by the financial institution, the frequency with which the fees are charged, and whether the amount of non-client funds is reasonably related to bank fees or whether the deposited funds appear intended to serve as a pad designed to prevent overdrafts to the trust account.

While the Rule allows lawyers and firms to deposit their own funds into trust accounts, lawyers and firms should avail themselves of other options of paying the bank fees that result from the operation and maintenance of a client trust account. For example, lawyers should inquire as to whether the financial institution will bill the lawyer for the fees or charge the fees against a separate account, such as an operating account. Such options are preferable to the decision to deposit non-client funds into a client trust account.

The Supreme Court had not acted on the Board's recommendation at fiscal year's end.

## 6. Random Audits of Trust Accounts

In November of 2002, the Board decided to conduct and fund six random audits of lawyer trust accounts. To that end, the Board issued a Request for Proposals that solicited bids from accounting firms interested in performing the audits. Three firms submitted proposals. The Board eventually retained Sullivan, Powers & Co. to conduct the audits.

The Board decided to audit 2 large firms, 2 mid-size firms, and 2 small firms. The Board defined the sizes as follows:

Large Firms: More than 7 lawyers  
 Mid-Size: 4-7 lawyers  
 Small Firms: 1-3 lawyers

The Vermont Bar Association assisted in this endeavor by providing the Board with a list of all the lawyers in the State. The list was broken down by the categories referenced above and assigned a number to each lawyer in each category. The Board used a computer program that randomly generates numbers to select the firms that would be audited.

The audits took place in May and June of 2003. These were compliance audits designed to determine whether the lawyer/firm maintained:

- A ledger or system showing all receipts and disbursements from trust accounts;
- A separate accounting page, record, or column showing a running balance for each client;
- Records documenting timely notice to the client of all receipts and disbursements from the trust account; and
- An index of all trust accounts.

As the Fiscal Year ended the Board was awaiting the auditor's reports. The Board intends to conduct full audits in the next fiscal year and will work with the Court to determine funding sources for such audits.

### III. CONCLUSION

The Program has met many of its goals for the last fiscal year and continue to struggle with the issues surrounding funding of the Program, consideration of new programs, accomplishing full audits and prioritizing within its budget. In the next fiscal year, the Board will be taking a critical look at the conclusions drawn from its four year experience under the new Rules.

## Appendix A

### Digest of Professional Responsibility Board Decisions

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Decision #	Case Name & Docket Number	Violation Found	Sanction Imposed	Decision Date	Summary
1	<i>In re Andrew Lichtenberg</i>	Not Applicable	Reinstatement	12/03/99	Upon successful petition of Respondent,

	PRB 2000.038				previous suspension order lifted by the Supreme Court on January 5, 2000.  E.O. 99-533.
2	<i>Unidentified Lawyer</i>  PRB 1999.149	DR 1-102(A) (7)	Admonition by  Disciplinary Counsel	02/28/00	Respondent possessed marijuana. No review by Court undertaken.
3	<i>Unidentified Lawyer</i>  1998.028	DR 4-101(B) (1)	Admonition by  Disciplinary Counsel	04/13/00	Respondent sold a computer to a non-lawyer, knowing that it contained confidential client files. No review by Court undertaken.
4	<i>Unidentified Lawyer</i>  1999.009	DR 4-101(B) (1)	Admonition by  Disciplinary Counsel	04/20/00	Respondent disclosed the secrets of one client to a second client without disclosing the first client's name. Respond- ent provided so many details about the first client's situation that second client was able to identify the first client. When the second client told respondent she thought she knew the person, the Respondent confirmed the first client's identity. No review by Court undertaken.
5	<i>Unidentified Lawyer</i>  1997.049	DR 6-101(A) (3)	Admonition by  Disciplinary Counsel	04/21/00	Respondent neglected a legal matter entrusted to him by failing to

					complete service of a complaint within sixty days of filing, thus resulting in the Court granting a motion to dismiss. Respondent promptly referred client to malpractice carrier. No review by Court undertaken.
6	<i>In re David Singiser</i>	DR 1-102(A) (5)	Disbarment	5/31/00	Respondent abandoned his clients, failed to provide accountings of client funds, made misrepresentations to the court, and failed to respond to Disciplinary Counsel. No review by Court undertaken.
	1999.020	DR 1-102(A) (7)			
	1999.038	DR 1-110(A)			
	1999.051	(2)			
	1999.054	DR 6-101(A) (3)			
	1999.090	DR 9-102(B)			
	1999.104	(3)			
		DR 1-102(A) (4)			
		DR 2-110(C)			
7	<i>In re Katherine Kent</i>	DR 1-102(A) (5)	2 Year Suspension	05/31/00	Respondent neglected her client, failed to return a file to him, improperly withdrew from representation, and abandoned her client. Respondent failed to respond to a request from Disciplinary Counsel for information and failed to advise the Board of Bar
	1999.039	DR 1-102(A) (7)			
	1999.052	DR 2-110(A) (2)			
	1999.053				
	1999.094	DR 6-101(A) (3)			

					Examiners of a correct and current address. No review by Court undertaken.
8	<i>Unidentified Lawyer</i> 1999.172	DR 6-101(A) (3)	Admonition by Disciplinary Counsel	06/01/00	Respondent failed to file a Quit Claim Deed which awarded to the client the marital residence, free and clear of her ex-husband's interests. No review by Court undertaken.
9	<i>Unidentified Lawyer</i> 2000.015	DR 7-104(A) (1)	Admonition by Disciplinary Counsel	06/08/00	Respondent communicated with an adverse represented party, on the subject matter of the litigation, without receiving permission from opposing counsel. No review by Court undertaken.
10	<i>In re Sheldon Keitel</i> 1999.121	Hearing Panel found violations of DR 7-10(C)(6) and DR 7-102(A)(1) by default judgment and recommended public reprimand. Supreme Court ordered further review on its own motion.	Dismissed	07/05/00	Supreme Court declined to find that Respondent, a lawyer on inactive status appearing pro se, violated DR 7-102(A)(1) (prohibiting a lawyer from taking any action A on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another@ ) or DR 7-106(C)(6) (prohibiting a lawyer A

					appearing in his professional capacity before a tribunal@ ) when he wrote a letter to the family court stating that the magistrate in his divorce case had his A head up his ass.@ The Court, nevertheless, required the Board of Bar Examiners to consider this conduct should Respondent ever choose to reactivate his license to practice law. Supreme Court entry order filed March 2, 2001.
11	<i>Unidentified Lawyer</i> 1998.021	DR 1-102(A) (5)	Admonition by Disciplinary Counsel	07/21/00	Prosecutor failed to disclose to defense counsel or the court that prosecutor's deputy had previously represented the defendant in a related matter. No review by Court undertaken.
12	<i>Unidentified Lawyer</i> 1997.028	DR 6-101(A) (3)	Admonition by Disciplinary Counsel	07/25/00	Respondent neglected a client's case for two years, missing a statute of limitations, and causing clients= to lose their cause of action. No review by Court undertaken.
13	<i>In re Joseph Wool</i>	DR 1-102(A) (5)	Public Reprimand	12/04/00	Respondent failed to comply with probationary

	1999.180	Rule 8.4(d)				terms imposed by the Supreme Court in 1999, requiring Respondent to submit written reports to Disciplinary Counsel every 60 days. Respondent failed to co-operate with Disciplinary Counsel's investigation of four new complaints, all filed after the 199 probation order requiring that no new disciplinary violations be committed. No review by Court undertaken.
	1999.189	Rule 7(D) of A.O. 9				
	2000.050					
	2000.061					
	2000.077					
	2000.082					
	2000.087					
14	<i>In re Craig Wenk</i>	DR 6-101(A) (3)	Six Month Suspension	10/16/00		Respondent failed to communicate properly with his client over a three year period and gave his client false information about the status of client's case in court when, in truth, Respondent had never filed the law suit. No review by Court undertaken.
	1996.050	DR 7-101(A) (2)				
		DR 1-102(A) (4)				
15	<i>Unidentified Lawyer</i> 2000.019		Admonition by Hearing Panel	10/24/00		Respondent failed to co-operate with Disciplinary Counsel's investigation, ignoring two letters requesting a response to a complaint filed by another lawyer. No review by Court

					undertaken.
16	<i>Unidentified Lawyer</i> 1995.019	Rule 7(D) of A.O. 9	Admonition by Disciplinary Counsel and 6 Month Probation	01/24/01	Respondent did not respond to request from PCB counsel seeking information about Respondent's compliance with conditions imposed by a PCB hearing panel sitting as an alternative dispute resolution (NDR) panel. In fact, Respondent did not comply with NDR panel's conditions. Hearing Panel found that Respondent violated Rule 7(D) by failing to furnish information to Disciplinary Counsel or a Hearing Panel. No review by Court undertaken.
17	<i>In re Joseph Wool</i> 2000.164 2000.171 2000.196 2000.209	Rule 1.15(b) Rule 1.16(d) Rule 8.4(c) Rule 8.4(h) Rule 1.3	Suspension of 1 year & Reimbursement of Retainers	05/24/01	Respondent failed to render an accounting of retainers received from clients, failed to refund advance payments that were not earned, failed to represent clients in a diligent manner and neglected a client's case.
18	<i>Unidentified Lawyer</i> 1997.011	None	Dismissed	05/31/01	Insufficient evidence of misrepresentation or conduct prejudicial to the administration of

					justice in the way prosecutor answered inquiry from defense counsel re: the identity of person participating in deposition.
19	<i>In re Arthur Heald</i> 2000.197 2001.051	Rule 1.3 Rule 1.4(a) Rule 8.4(d)	Suspension of 2 months & Reimbursement of Legal Fees and Expenses Incurred by Complainant	06/05/01	Respondent publicly reprimanded and ordered to reimburse legal fees after he neglected to remit his client's withholding taxes in a timely manner, resulting in the assessment of an IRS penalty. Respondent failed to respond to his client's requests for help in rectifying this error. Client incurred substantial expenses in bringing suit against Respondent. Per Supreme Court Entry Order, Hearing Panel decision reversed and public reprimand imposed on 1/18/02.
20	<i>Unidentified Lawyer</i> 2000.091	Rule 1.11(c) (1)	Admonition by Disciplinary Counsel	07/13/01	Respondent improperly presided at a Town Board meeting during which that Board considered the merits of a matter in which Respondent had

					served as private counsel. No review by Court undertaken.
21	<i>Unidentified Lawyer</i> 2000.217	DR 6-101(A) (3)	Admonition by Hearing Panel	07/23/01	Respondent neglected a foreclosure action entrusted to him. No review by Court undertaken.
22	<i>In re Sigismund Wysolmerski</i> PRB 2001.171	Not applicable	Reinstatement	08/15/01	Respondent readmitted to the Vermont Bar per Entry Order of the Supreme Court on August 30, 2001. E.O. 2001-381.
23	<i>Unidentified Lawyer</i> 2001.022	DR 4-101(B) (1)	Admonition by Hearing Panel	08/20/01	Respondent disclosed to a relative of a murder victim an unsolicited letter from the pre-trial detainee charged with that murder. No review by Court undertaken.
24	<i>Unidentified Lawyer</i> 2001.176	Rule 1.3	Admonition by Disciplinary Counsel	09/12/01	Respondent failed to explore with his client whether there might be any defenses to a collection action. Respondent further acted without diligence or promptness when Respondent neglected to file any opposition to a Motion for Summary Judgment. Little or no injury resulted. No review by Court undertaken.
25	<i>In re Kjaere</i>	Rule 1.5(b)	Suspension of	10/01/01	Respondent spent

	<i>Andrews</i>	Rule 1.15(a)	6 mos. and 1 day;		client funds for personal use and attempted to double her agreed upon hourly rate retroactively. No review by Court undertaken.
	2001.014	Rule 1.15(A)	Respondent		
		Rule 1.16(d)	to reimburse client for unearned fees		
26	<i>In re William Frattini</i>		Disbarment	08/31/01	Respondent was convicted of three criminal offenses in the state of Maine for violations of embezzlement from a financial institution, mail fraud and tax evasion. Supreme Court Entry Order 2001-397 accepts resignation on 9/26/01.
	2001.078				
27	<i>Unidentified Lawyer</i>	DR 1-102(A) (5)	Admonition by Hearing Panel	10/15/01	Respondent negligently failed to disclose to defense counsel or to the Court the fact that Respondent had previously represented the defendant being prosecuted by Respondent's Office. No review by Court undertaken.
	1998.020				
28	<i>In re David Sunshine</i>	DR 6-101(A) (3)	4 month suspension	12/05/01	Respondent neglected two different client's cases, resulting in the dismissal and barring of the client's claims. Respondent also deceived one client by failing to disclose to him
	2001.001 and 2001.075	Rule 1.3	commencing 1/1/02;		
		Rule 8.4(d)	followed by 2		
		Rule 8.4(c)	year probation		

					that his case had been dismissed and by leading him to believe that the case would soon go to trial. No review by Court undertaken.
29	<i>Unidentified Lawyer</i> 2002.200	None	Dismissed	12/12/01	A petition of misconduct for failing to respond to Disciplinary Counsel's request for information in violation of A.O. 9, Rule 7D was dismissed after Respondent provided evidence of reasonable grounds to justify his inaction. No review by Court undertaken.
30	<i>Unidentified Lawyer</i> 2000.167	Rule 1.3	Admonition by Disciplinary Counsel	01/15/02	Respondent failed to respond to client or to probate court's many requests for action over a two month period due to conflicting trial court responsibilities. No review by Court undertaken.
31	<i>In re Norman Blais</i> 1998.033, 1999.043 & 2000.042	DR 6-101(A) (3)  DR 1-102(4)	5 Month Suspension  18 Month Probation	02/14/02	Respondent neglected five client matters and failed to file claims in court, thereby allowing the statute of limitations to expire in two cases. In addition, Respondent also made misrepresentations

					to three of his clients. Supreme Court Entry Order filed December 19, 2002.
32	<i>Unidentified Lawyer</i>  2001.184	Rule 8.4(h)	Admonition by Disciplinary Counsel	3/25/02	Respondent was rude and made unjustified comments about another attorney's youth, which presumably implied criticism because of lack of experience. Respondent also inappropriately handled the transfer of a file and the claim of an attorney's lien. No review by Court undertaken.
33	<i>In re Thomas Daly</i>  2001.189	None	Dismissed	5/13/02	A petition of misconduct for violating Rules 1.5 and 1.15(b) of the Vermont Rules of Professional Conduct was dismissed because of lack of jurisdiction over the Respondent for conduct alleged to have occurred prior to his admission to the Vermont Bar. No review by Court undertaken.
34	<i>In re Andrew Goldberg</i>  2000.081	DR 6-101(A) (3)  DR 6-101(A) (1)  DR 1-102(A) (5)	Public Reprimand  Transfer to A Inactive@  Status for 4 Months	5/14/02	A solo practitioner with only three years experience undertook representation in a products liability case in which he had no experience

			If license is reactivated; 2 year probation also imposed		or expertise. He subsequently neglected the case, causing it to be dismissed. Complainant recovered for damages through a legal malpractice action. A public reprimand was imposed due to several mitigating circumstances including Respondent having left the practice of law with no plans to return to Vermont and with strong probationary conditions imposed in the event he should seek to reactivate his license to practice. No review by Court undertaken.
35	<i>In re Thomas Bailey</i> 2002.118	Rule 1.3 Rule 1.4 Rule 8.4(c) Rule 8.4(d)	Disbarred	5/17/02	Respondent neglected a legal matter entrusted to him by failing to pursue an accident claim for his client, as agreed to, and subsequently allowing the statute of limitations to lapse. Supreme Court Entry Order 02-228 accepts resignation on 5/31/02.
36	<i>Unidentified Attorney</i> 2001.117	Rule 1.4(a) Rule 8.4(d)	Admonition with 18 month Probationary Period	6/14/02	Respondent who did not return client's calls regarding the

					status of a six-month overdue QDRO in a post-divorce matter was disciplined for failing to keep her client reasonably informed. No review by Court undertaken.
37	<i>Unidentified Attorney</i> 2000.161	Rule 8.4(d)	Admonition with 18 month Probationary Period	6/14/02	Respondent failed to comply with an agreement reached with a Assistance Panel. No review by Court undertaken.
38	<i>Unidentified Attorney</i> 2002.214	Rule 7.3	Admonition by Disciplinary Counsel	07/30/02	Respondent sent written solicitations for legal work not identified as advertising material. No review by Court undertaken.
39	<i>In re Raymond Massucco</i> 1998.050	DR 6-101(A) (3) DR 2-106	Public Reprimand	08/14/02	Respondent neglected an estate matter that caused the heirs to experience unnecessary stress, anxiety and emotional turmoil as well as extensive litigation in the probate court. In addition, Respondent charged excessive fees. No review by Court undertaken.
40	<i>Unidentified Attorney</i> 2002.201	Rule 1.4(a)	Admonition by Disciplinary Counsel	9/17/02	Respondent failed to comply with his client's reasonable request for an accounting of his fee. No review by

					Court undertaken.
41	<i>In re Robert Andres</i> 2002.110	Rule 1.3	Two Months Suspension	9/18/02	Respondent failed to act with reasonable diligence and promptness in a criminal case by failing to attend a pretrial hearing and he intentionally abandoned his client's case by failing to respond to a motion for summary judgment. <b>ON APPEAL - Pending.</b>
42	<i>In re Frederick S. Lane III</i> 2002.205	Rule 8.4(b)(c) & (h)	Disbarment	10/09/02	While serving as Treasurer of the Chittenden County Democrats, Respondent temporarily used the Party's funds under his control for personal purposes. Supreme Court Entry Order 02-431 accepts resignation on 10/9/02.
43	<i>In re Howard Sinnott</i> 2001.190	Rule 1.5(a)		10/22/02 04/07/03	Respondent, who voluntarily left the practice of law, was reprimanded and ordered to reimburse \$1200 to his client for charging an unreasonable fee when he used a standard flat rate but did nothing to advance his client's cause. <b>Supreme Court</b>

					<b>E.O. 2003-170 dated 2/12/04 declined to reach the issue of whether respondent's fee agreement was a nonrefundable fee.</b>
44	<i>In re Robert DiPalma</i> 2002.031	Rule 1.3 DR 6-101(A) (3)	Public Reprimand  2 Years Probation	10/29/02	Respondent neglected a client litigation matter for several months, resulting in the suit being dismissed, and failed to keep his client informed about the status of his case. No review by Court undertaken.
45	<i>Anonymous Attorney</i> 1999.065 and 2000.122	DR 7-102(A) (1)	Admonition by Disciplinary Counsel	10/29/02	Respondent filed pleadings containing intemperate language which was unprofessional, uncivil and intended solely to harass and embarrass the opposing party and her counsel. No review by Court undertaken.
46	<i>Anonymous Attorney</i> 2001.165	Rule 4.3	Admonition by Disciplinary Counsel	11/20/02	Respondent interviewed a municipal employee against whom he knew he might bring a tort action. Based on Respondent's assurances that he wasn't going to sue the town, the employee

					obviously understood that there was no liability on his own part either, a misunderstanding which Respondent did not correct. The employee made several incriminating statements which Respondent later used in a suit against the employee personally. No review by Court undertaken.
47	<i>Anonymous Attorney</i> 2002.203	Rule 1.3	Admonition by Disciplinary Counsel	12/12/02	Respondent completed a real estate closing, withheld tax funds, but forgot to file the tax withholding with the Tax Department for seven months until his client brought the error to his attention. No review by Court undertaken.
48	<i>In re Norman Blais</i>  2002.108	Rule 1.3 Rule 1.4(a)	Six Month Suspension  12 Month Probation (Minimum)  concurrent with sanction imposed in PRB 31	12/30/02	Respondent neglected a client's personal injury case and failed to keep his client reasonably informed about the status of her case.
49	<i>In re Thomas Daly</i>  2002.042	Rule 8.4(d)	3 Year Suspension  <i>Effective May</i>	03/07/03	Respondent engaged in conduct prejudicial to the

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administration of justice by failing to supplement his Petition for Admission to the Vermont Bar to reveal that he was the defendant in a consumer fraud complaint and that his firm was the subject of an inquiry by the New York Committee on Professional Standards. No review by Court undertaken.

50	<i>In re Anne Whitten</i>  2000.040	None	Dismissed	3/13/03	A Petition of Misconduct alleging a violation of DR 7-104(A)(1) (causing another to communicate with a represented party) was dismissed upon motion of Special Disciplinary Counsel due to failure to meet burden of clear and convincing evidence.
51	<i>In re Charles Capriola</i>  1999.035 & 1999.036	DR 5-104(a)  DR 1-102(A) (7)	Public Reprimand	4/7/03	Respondent borrowed money from two different clients without advising either client that his interests in the loan differed from their interests. No review by Court undertaken.
52	<i>In re Robert Andres</i>  2002.043 &	Rule 8.4(h)	3 Year Suspension	4/7/03	Respondent engaged in conduct adversely reflecting on his

	2003.031				fitness to practice law as a result of his conviction for simple assault and his violation of terms of probation. <b>ON APPEAL - Pending.</b>
53	<i>In re Lance Harrington</i>	DR1-102(A) (3)	3 Year Suspension	4/14/03	Respondent entered into fee agreements that led to a federal investigation. Respondent was convicted of submitting false information to the Social Security Administration stating that his fee agreements complied with the law, when in fact he knew they did not. No review by Court undertaken.
	2002.144	Rule 8.4(b)	effective 1/9/03		
54	<i>In re Arthur Heald</i>	Rule 8.4(d)	30 Day Suspension, commencing 45 days from date of decision	5/5/03	Respondent, who has a significant disciplinary history, was suspended after he failed to respond to a complaint filed against him and then failed to file an answer to a petition of misconduct. No review by Court undertaken.
	2003.141 & 2003.142				
55	<i>Anonymous Attorney</i> 2002-093	Rule 7.1(c)	Admonition by Disciplinary Counsel	6/4/03 Amended 11/19/03	Respondent placed an advertisement in the Yellow Pages stating that the lawyers in the firm were <b>A the</b> experts in....@

					enumerated areas of law, thereby wrongfully comparing their services to those of other lawyers. <b>Supreme Court has ordered review on its own motion. Pending.</b>
56	<i>Anonymous Attorney</i> 2003-183	Rule 1.3	Admonition by Disciplinary Counsel	6/9/03	Respondent, who was the closing agent, failed to disburse three checks following a real estate closing, one of which was to the clients= credit card company. Such delay resulted in late fees and interest accruing on the clients= account. No Review by Court undertaken.

### **APPENDIX B**

CDC1 - CLOSED DISCIPLINARY COUNSEL - RESOLVED

CDC2 - CLOSED DISCIPLINARY COUNSEL - NO CAUSE OF ACTION

CDC3 - CLOSED DISCIPLINARY COUNSEL - INSUFFICIENT/NO EVIDENCE

CDC4 - CLOSED DISCIPLINARY COUNSEL - REFERRED TO FEE DISPUTE

CDC5 - CLOSED DISCIPLINARY COUNSEL - LACK OF JURISDICTION

CDC6 - CLOSED DISCIPLINARY COUNSEL - SCREENING COUNSEL DISMISSAL AFFIRMED

CDC7 - CLOSED BY DISCIPLINARY COUNSEL - TRANSFERRED TO DISABILITY/INACTIVE

CDC8 - CLOSED BY DISCIPLINARY COUNSEL - DENIAL OF PROBABLE CAUSE

CDC9 - CLOSED BY DISCIPLINARY COUNSEL - DISCIPLINED IN ANOTHER FILE

**APPENDIX C****POLICIES ADOPTED****FOR THE FISCAL YEAR 2000**

" " "

1. Inasmuch as the open meeting law at 1 V.S.A. ' 312 does not apply to the Judiciary, the Board concluded that it is not required to open its meetings to members of the press. However, because the PRB would like to educate the public on the function of the Professional Responsibility Program, it granted the request of a member of the media to attend that part of the September meeting in which Disciplinary Counsel and Bar Counsel presented a general overview of the new program. Left un- resolved was the issue of access to meeting minutes. (See September 1, 1999).

2. All inquiries from lawyers to Bar Counsel regarding ethics and law practice, as envisioned by A.O. 9, Rule 3 B(1) are confidential. (See October 7, 1999).

3. The Board amended the record destruction policy first adopted by the Professional Conduct Board in 1998. The new policy is as follows:

1. COMPLAINTS WHERE NO INVESTIGATION IS INITIATED BY DISCIPLINARY COUNSEL. Files pertaining to these complaints will be destroyed after one year. Bar Counsel will so advise complainants so that complainants can request return of documents prior to destruction.

2. COMPLAINTS WHICH ARE DISMISSED BY DISCIPLINARY COUNSEL AFTER INVESTIGATION OR REFERRED TO THE ASSISTANCE PANELS. Files regarding these complaints will be sent to public records for storage with an order to destroy after five years.

3. COMPLAINTS WHICH RESULT IN IMPOSITION OF DISCIPLINE OR TRANSFER TO DISABILITY STATUS. Files regarding these complaints will not be destroyed. (See October 7, 1999).

4. The Board will review all decisions of the hearing panels, but not before those decisions are published. When a hearing panel report is sent to the Supreme Court, the Board will be given a copy electronically. Review of decisions will be put on the agenda for the next meeting. (See January 21, 2000).

5. After Bar Counsel screens the complaint and makes a determination that the matter shall be referred to Disciplinary Counsel, Disciplinary Counsel will be provided with a copy of the complaint only. Copies of Respondent's response, Bar Counsel's notes, memos, communications, intake sheets, etc. will not be provided to Disciplinary Counsel. (See January 21, 2000). The Board agreed to revisit this issue after one year. It reaffirmed this policy on May 8, 2000, as follows: A Other than the complaint, any communication, written or otherwise, and any investigation performed by Office of Bar Counsel should not be communicated in any way to Disciplinary Counsel Office.@

6. All proceedings before Assistance Panels pursuant to Rule 4.B.(1) are confidential. If Bar Counsel refers a file to an Assistance Panel, the panel will receive the intake sheet, Bar Counsel's notes, annotations, and all information that is in the file. If the Assistance Panel

should deem that the case should be before Disciplinary Counsel, only the complaint will be given to Disciplinary Counsel. (See January 21, 2000).

7. Until the Supreme Court can address the inconsistency in A.O. 9, at Rule 12, Rule 11.D., and Rule 8(A)(5), the Board concludes that all proceedings initiated by a stipulation recommending admonition shall remain under seal. In event the hearing panel rejects the recommended admonition, the stipulation can be withdrawn and the file remains sealed. (See January 21, 2000).

8. If the Assistance Panel refers a matter to Disciplinary Counsel, Disciplinary Counsel must resolve it. The case may not be referred back to an Assistance Panel a second time. (See January 21, 2000).

9. A member of the PRB does not need to be present at every meeting of an Assistance Panel. A designee may be used. Pursuant to Rule 4. A., the Chair of the Board will appoint substitute members of Assistance Panels as necessary and will so notify Respondents and Complainants. (See May 8, 2000).

10. All correspondence and decisions by Hearing Panels are to be on Professional Responsibility Program stationery. (See, May 8, 2000).

11. In the event Disciplinary Counsel brings a new complaint against a respondent who has failed to cooperate in the investigation of an existing complaint, a new docket number will be assigned to that matter while the original complaint would retain its original file number. (See May 8, 2000).

#### **POLICIES ADOPTED**

#### **FOR THE FISCAL YEAR 2001**

" " "

12. Complainants will be allowed sixty days to appeal Bar Counsel's dismissal of their complaint. Bar Counsel informs the Complainant of this deadline and advises of a deadline in which to respond. This information has been added to the current language used in the dismissal letters sent out by Bar Counsel. (See November 30, 2000).

13. Bar Counsel will inform participants in case referred to Assistance Panels that failure to carry out a directive of the Assistance Panel could be grounds for a separate disciplinary violation. (See February 16, 2001).

14. A probable cause decision will follow the standard form and will only indicate whether or not PC was found. There will be no written decisions. (See April 26, 2001).

15. Second requests for PC are only submitted if the presence of different or new information is to be brought to the panel's attention. The Board agreed. (See April 26, 2001).

16. Respondent will be notified when the Complainant appeals Bar Counsel's decision to dismiss. (See June 14, 2001).

#### **POLICIES ADOPTED**

#### **FOR THE FISCAL YEAR 2002**

“ ” “

17. Copies of approved final minutes will be sent to the Court Administrator and to the Chief Justice. The minutes will remain confidential. (July 18, 2001).<sup>18</sup>
18. Each panel Chair has the discretion of allowing persons other than the parties to the complaint at an assistance panel meeting. If the situation arises wherein a complainant or respondent contacts the program to ask if a support person is allowed at the hearing, that person should be directed to the Chair of the panel so that he/she may make that determination. (August 30, 2001).
19. Filed Hearing Panel Decisions wherein private discipline is imposed will not be redacted to reflect gender neutrality. (August 30, 2001).
20. When Bar Counsel refers a complaint to Disciplinary Counsel's office, the Respondent will be given 20 days in which to respond. (December 7, 2001).
21. All finalized published decisions of the Board will be distributed electronically to assistance and hearing panel members. (March 1, 2002).
22. When formal proceedings are commenced by the filing of stipulated facts and a hearing panel determines that a hearing is not necessary, the hearing panel shall issue a decision containing its findings of fact, conclusions of law, and the sanction imposed, if any, within sixty days of the filing of the stipulated facts. The sixty day time period is directory and not jurisdictional. A hearing panel's failure to observe the sixty day time period does not justify the abatement or dismissal of the disciplinary or disability proceeding. (May 2, 2002).
23. All probable cause requests will be assigned to one panel for the next year. After one year, the hearing panels will rotate and another panel will receive probable cause requests for the following year. The Chair will determine which hearing panel is first in the rotation. (May 2, 2002).

### **POLICIES ADOPTED**

### **FOR THE FISCAL YEAR 2003**

“ ” “

24. The Board agreed, and it was decided, that assistance panels will not have access to a respondent's disciplinary history. (See September 19, 2002)
25. The Board amended Policy No. 17 so as to authorize distribution of its Minutes to the Chief Justice, the Court's liaison to the Board, and the Court Administrator. (See October 29, 2002)
26. The Board repealed Policy No. 5. All information obtained during the screening process may be shared with Disciplinary Counsel. (See January 30, 2003)

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### **Footnotes**

1. See Administrative Order 9, Rule 15(A)(1).
2. See A.O. 9, Rule 11(C)
3. See A.O. 9, Rule 11(C); A.O. 9, Rule 11(D)
4. A.O. 9, Rule 11(D)(3)
5. A.O. 9, Rule 15(B)(1)
6. Id.
7. A.O. 9, Rule 11(D)(5)(b)
8. A.O. 9, Rule 11(D)(5)(a)
9. A.O. 9, Rule 11(D)(5)(c). It is not uncommon for a panel to accept a stipulation without having a hearing. Thus, in FY 2002, the PRB adopted a policy requiring hearing panels to issue decisions within sixty days of the receipt of a stipulation.
10. A.O. 9, Rule 11(E)
11. See A.O. 9, Rule 10(D) which authorizes a complainant to appeal counsel's decision to dismiss a case without a formal investigation.
12. By comparison, 1 affidavit of resignation was filed in FY 2001 and 2 were filed in FY 2002.
13. By comparison, 1 petition for an interim suspension was filed in FY 2001 and 2 in FY 2002.
14. A.O. 9, Rule 11(C).
15. By comparison, twenty-seven (27) requests for review for probable cause were filed in FY 2001 and probable cause was found in twenty-five (25) cases. In FY 2002, twenty (20) requests for probable cause were filed and probable cause was found in nineteen (19) cases.
16. By way of comparison, in FY 2001, eight (8) stipulations of misconduct were filed. The stipulations involved eight (8) attorneys. In FY 2002, nine (9) stipulations to misconduct were filed. The stipulations involved seven (7) attorneys.
17. By comparison, seven (7) cases were referred to Assistance Panels in FY 2001 and six (6) cases were referred to Assistance Panels in FY 2002.
18. On October 19, 2002, the Board amended this Policy to also include the Court's liaison to the Board.

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