

# Professional Responsibility Program

## FY 2016 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 the seventeenth annual report submitted in accordance with this mandate.

### I. Report of Activities of the Board

Pursuant to A.O. 9, Rule 1.A., the Board is appointed by the Supreme Court and consists of seven members: three members of the bar of this state, three public members and one judge or retired judge. The Board is responsible for overseeing the program and implementing, coordinating and periodically reviewing its policies and goals.

#### A. Policies

No new policies were adopted in FY 16. The complete list of Policies is listed on the Judiciary website.

#### B. Annual Training Meeting

The Professional Responsibility Program held its annual meeting on June 1, 2016, at the Capitol Plaza in Montpelier. Thirty-three Professional Responsibility Program members and invited guests attended the full day educational program. Attorneys who attended the entire program earned 4.5 CLE credits.

#### C. Supervision of the Program’s Case Docket and Review of Case Management Procedures

Each month the Program Administrator provided the Board with a 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.

## *Professional Responsibility Board*

**Jan Eastman, Esq., Chair**  
**Michael Hanley, Esq., Vice-Chair**  
**Hon. Brian Burgess (Retired Justice)**  
**Carolyn Anderson, Esq.**  
**Mr. Christopher Chapman**  
**Ms. Linda O’Brien**  
**Ms. Lisa Ventriss**

## *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](mailto:Michael.kennedy@vermont.gov)  
<https://vtbarcounsel.wordpress.com>

**Brandy Sickles**  
Administrative Assistant

## *Office of Disciplinary Counsel*

**Beth DeBernardi, Esq.**  
Disciplinary Counsel

**Mailing Address:**  
32 Cherry Street, Suite 213  
Burlington, VT 05401  
Telephone: 802-859-3000  
[Beth.DeBernardi@vermont.gov](mailto:Beth.DeBernardi@vermont.gov)

## *Program Administrator*

**Deb Laferriere**  
Program Administrator

**Mailing Address:**  
Vermont Supreme Court  
109 State Street  
Montpelier, VT 05609-0703



#### **D. 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.

#### **E. Rule Amendments**

The Board recommended to the Supreme Court an amendment to A.O. 9 changing the terms and term limits for Board members. The proposed amendments were sent out to the Bar for comment; no comments were received. The Supreme Court promulgated the amendment on January 11, 2016; effective March 11, 2016. The amendment changed the terms for Board members from (3) three year terms to (2) five year terms with adjustments as necessary over the next few years to synchronize the terms.

The Board recommended to the Supreme Court amendments to V.R.Pr.C. 1.15A, 1.15(b), (c), (f) and (g), 1.5(f)-(g) and 1(o) and (p), and 8.3(c). Proposed amendments were sent out to the Bar for comment by the Civil Rules Committee. The amendments were promulgated by the Supreme Court on March 7, 2016; effective May 9, 2016. The amendments authorized lawyers to treat fees paid in advance as their own in certain specific situations.

In addition, a proposed amendment adding a Comment to Rule 1.2 of the Vermont Rules of Professional Conduct was sent out to the Bar for comment in February 2016. The Board expects to make a recommendation to the Court in FY17. The proposal would authorize lawyers to provide legal advice on certain issues related to marijuana.

#### **F. Staffing Update**

As a part of a broader Judiciary-wide review of staffing, the State Court Administrator consulted with the Professional Responsibility Board regarding staffing levels in support of the

disciplinary docket. This review of staffing issues, indicated that over time the non-disciplinary processes for providing support to Vermont attorneys have increased in nature and time. Rule changes, especially those affecting admission to the Vermont Bar, have necessitated additional legal support for other Supreme Court committees including the Board of Bar Examiners, the Character and Fitness Committee and the Mandatory Continuing Legal Education Committee, the traditional disciplinary docket has shrunk. This is typical of most jurisdictions around the country.

As a result of the staffing review and the changes in workload among the different programs, certain staffing changes were made and more are expected in FY2017.

We want to thank all of the judicial staff who have helped make these changes. We expect that, when fully staffed, our committees and staff will continue to provide the highest standards of practice for their work on behalf of the Supreme Court and the Vermont Bar.

#### **G. Appointment of Hearing Panels & Hearing Panel Counsel**

Lon McClintock was appointed by the Board to serve as Hearing Panel Counsel. Attorney McClintock, a former Hearing Panel Chair, provides assistance to Hearing Panels. 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.

The following individuals served as members of Hearing Panels during FY16:

##### **Hearing Panel No. 1**

R. Joseph O'Rourke, Esq., Chair  
John J. Kennelly, Esq.  
Ms. Joanne Cillo

##### **Hearing Panel No. 2**

Jean Brewster Giddings, Esq., Chair  
Joseph F. Cook, Esq.  
Mr. Greg Worden

## Professional Responsibility Program



### **Hearing Panel No. 3**

Sheila Ware, Esq., Chair  
Jeffrey S. Marlin, Esq.  
Mr. Kevin O'Donnell

### **Hearing Panel No. 4**

Jill L. Broderick, Esq., Chair  
Mary Parent, Esq.  
Mr. David Tucker

### **Hearing Panel No. 5**

Erin Gilmore, Esq., Chair  
Michele B. Patton, Esq.  
Mr. Christopher Bray

### **Hearing Panel No. 6**

Caryn E. Waxman, Esq., Chair  
John P. Cain, Esq.  
Mr. 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.  
Ms. Jeanne Collins

### **Hearing Panel No. 9**

Karl C. Anderson, Esq., Chair  
Kate Thomas, Esq.  
Mr. William Scranton

### **Hearing Panel No. 10**

Joseph O'Dea, Esq., Chair  
Jonathan M. Cohen, Esq.  
Mr. Roger Preuss

## **H. Assistance Panels**

In addition to Board members, all of whom may serve on Assistance Panels, the following volunteers were appointed to the roster of Assistance Panels during FY16:

### **Attorneys**

Steven Adler, Esq.  
Joseph F. Cahill, Jr., Esq.  
Emily Gould, Esq.  
Robert Fairbanks, Esq.  
Katherine Mosenthal, Esq.  
Robert O'Neill, Esq.  
Susan Palmer, Esq.  
Alan Rome, Esq.  
Thomas Rounds, Esq.  
Janet Shaw, Esq.  
Peter Van Oot, Esq.

### **Public Members**

Ms. Susan Fay  
Leslie Hanafin, Esq.  
Ms. Judith Lidie  
Mr. Peter Keelan  
Mr. Neal Rodar  
Mr. R. Brownson Spencer II  
Mr. Peter Zuk

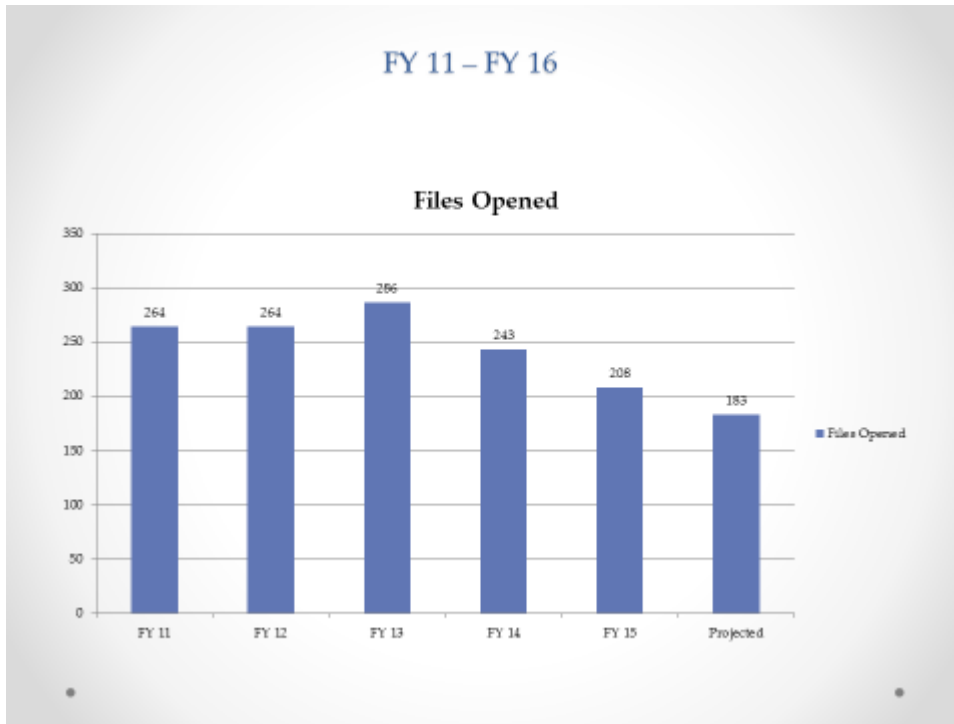
The following Reports of Bar Counsel and Disciplinary Counsel cover activities from July 1, 2015 through June 30, 2016. Throughout the report, that period of time will be referred to as "FY16."

## **II. Report of Activities of Bar Counsel**

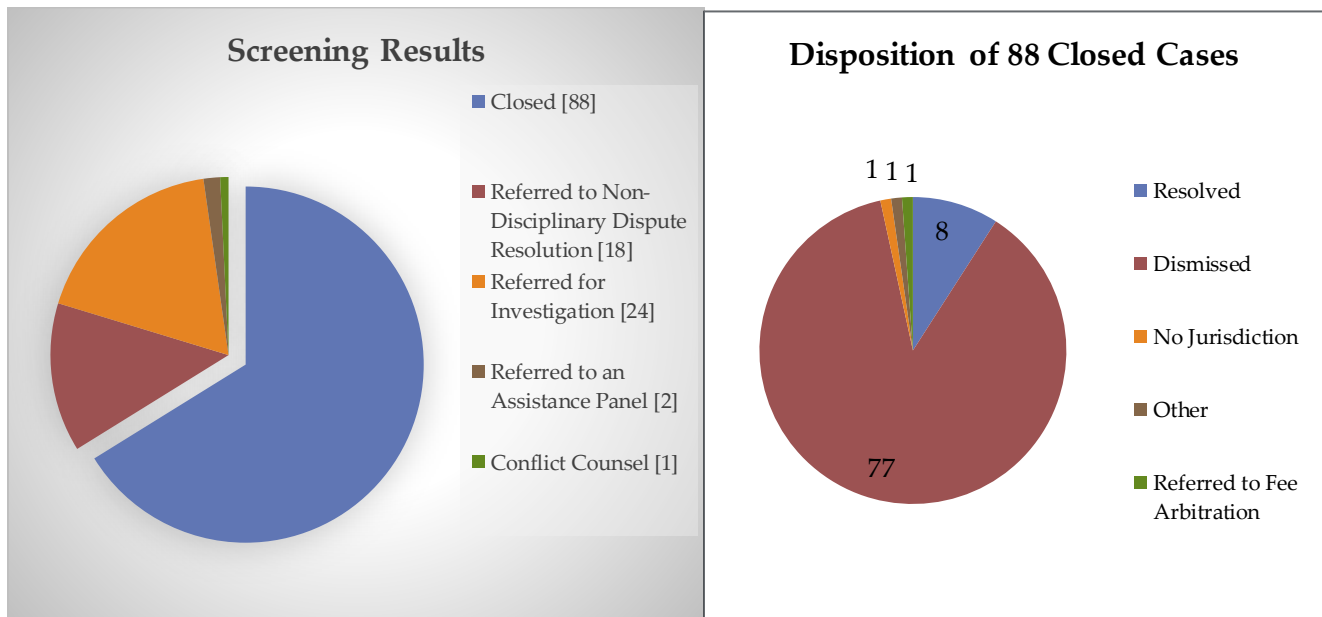
### **A. Screening Complaints**

The Professional Responsibility Program opened 183 new files in FY16, the fewest files opened in over 10 years.

# Professional Responsibility Program



Bar Counsel screened 133 of the new files.<sup>1</sup>

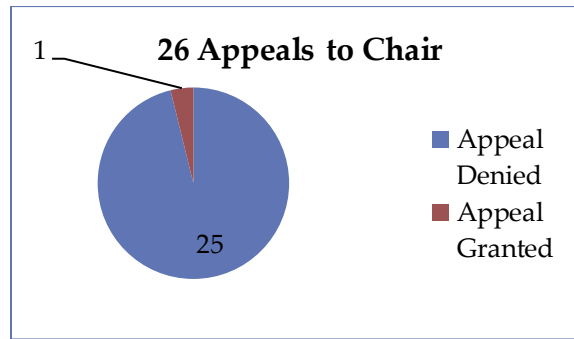


<sup>1</sup> Bar Counsel does not screen bank's reports of overdrafts to attorney trust accounts. Overdraft notices go straight to investigation by Disciplinary Counsel. There are also other instances in which a complaint goes straight to investigation without being screened. In FY16, 47 cases went to investigation without being screened and 3 cases were immediately assigned to conflict counsel.

## Professional Responsibility Program



By rule, if a file is closed at screening or resolved in the dispute resolution program, the complainant has thirty days to appeal to the Chair of the Professional Responsibility Board. Twenty-six complainants appealed Bar Counsel's decision to dismiss. The Chair upheld the dismissals in all but one case. That case was referred to Disciplinary Counsel for investigation and was ultimately dismissed.



### B. Dispute Resolution

Bar Counsel administers the Dispute Resolution Program (“DRP”). Complaints that are referred to DRP are resolved in a manner that does not involve a disciplinary sanction. A referral can be made by Bar Counsel at screening or by Disciplinary Counsel after an investigation. Eighteen complaints were referred to the Dispute Resolution Program in FY16. There are different methods to resolve complaints that are referred to DRP. Each complaint referred to DRP by Disciplinary Counsel is assigned to an assistance panel. With respect to the complaints referred to DRP at screening, Bar Counsel resolves some, while assistance panels resolve others.

When a complaint in DRP is assigned to an assistance panel, the panel may choose to resolve the complaint with or without a hearing. *A.O. 9, Rule 4(B)(1)*. The panel may also choose to impose conditions as an alternative to discipline. If conditions are imposed, the complaint is “conditionally closed.” *A.O. 9, Rule 4(B)(2)*. A complaint that is conditionally closed is dismissed upon motion of the attorney demonstrating successful completion of any terms or conditions. *Id.* An Assistance Panel has the discretion to transfer a matter to Disciplinary Counsel if it concludes that the matter is more appropriate for disciplinary proceedings.

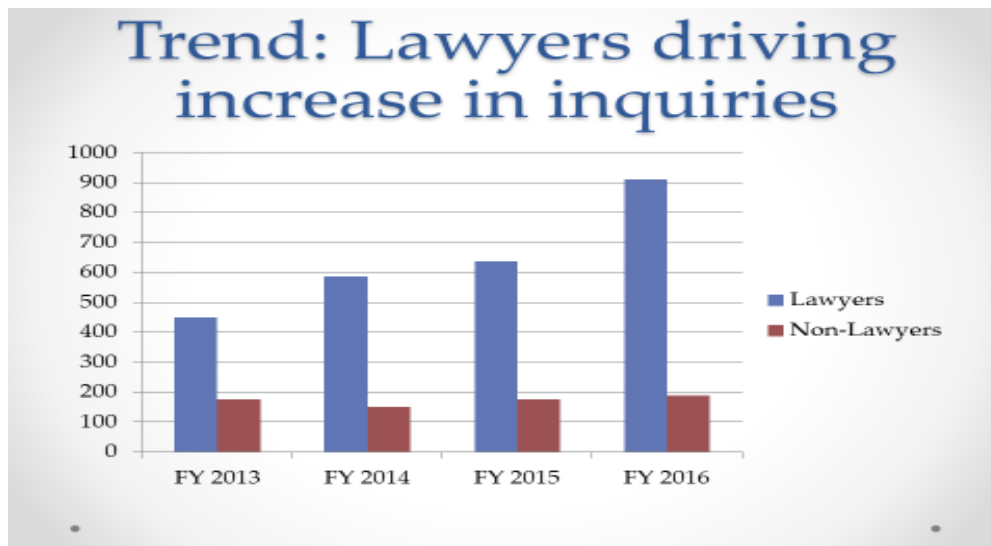
### C. Inquiries *A.O. 9, Rule 9*

Bar Counsel responds to ethical inquiries. In FY16, Bar Counsel received 1100 inquiries and resolved 1093. Seven were carried to FY17.

Bar Counsel's position has been full-time since the beginning of FY13. Inquiries have risen each year.



The increase in inquiries is driven by an increase in calls from attorneys.



The vast majority of inquiries are resolved within a day or two.

The topics most frequently raised in the FY16 inquiries:

- Conflicts of Interest
- Client Confidences
- Trust Account Management/Client Property
- Duty to Report
- Candor/Fairness to Opposing Party
- Unauthorized Practice of Law
- Advertising/Firm Names/Letterhead



**D. Education & Outreach**

**Continuing Legal Education Seminars**

In FY16, Bar Counsel presented 28 continuing legal education seminars that totaled 44 hours. Bar Counsel presented at seminars sponsored by:

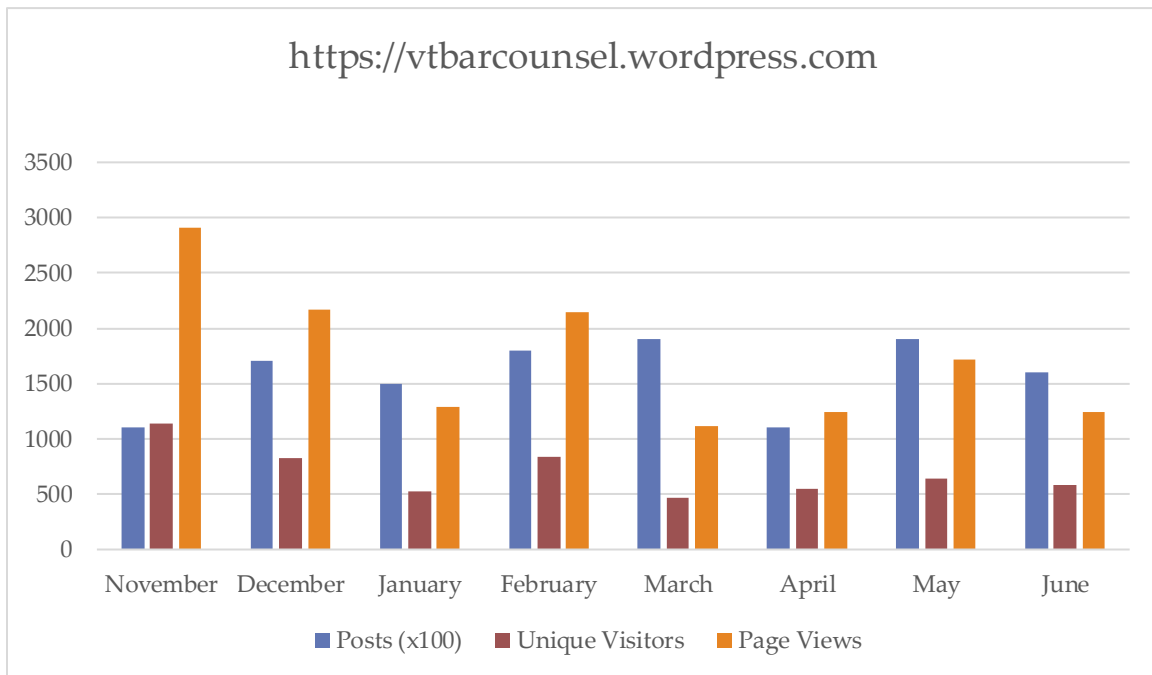
Professional Responsibility Board  
Addison County Bar Association  
Bennington County Bar Association  
Chittenden County Bar Association  
Franklin County Bar Association  
Rutland County Bar Association  
Washington County Bar Association  
National Association of Attorney General’s  
Northern Vermont Inns of Court

Vermont Attorneys Title Corp.  
Vermont Law School  
Vermont Bar Association  
VBA Young Lawyers’ Division  
Office of the Attorney General  
Office of the Defender General  
Office of the Sheriffs and State’s Attorneys

**Blog/Social Media**

Bar Counsel has a blog: <https://vtbarcounsel.wordpress.com> and a Twitter account @vtbarcounsel that he uses for education and outreach. The blog started in November 2015. The stats for FY16:

## Professional Responsibility Program



### **In-House CLE/Inquiry**

In January, Bar Counsel started a new program. He contacted the managing partners at the so-called “large firms” and offered to meet with a firm’s attorneys/staff for 1 hour. He offered to treat the meetings as a combination of CLE seminar/firm-wide inquiry. In FY16, Bar Counsel met with six firms. The topics most frequently raised were:

- Conflicts of interest
- Crafting Strong Representation Agreements
- Cloud storage/Confidentiality & E-Mail Encryption
- File Retention
- Advising Clients on Issues Related to Social Media/Discovery of ESI
- Advising Clients on Issues related to Legal Marijuana

### **E. Boards and Committees**

#### **Attorney Licensing, Bar Admissions, MCLE**

During FY16, Bar Counsel continued to run all other aspects of the Court’s licensing programs. Those duties included supervising and administering the attorney licensing office and providing legal and administrative support to the Court Administrator, the Board of Bar Examiners, the Character and Fitness Committee, and the Continuing Legal Education Board. Among other things, Bar Counsel administered the July and February bar examinations, supervised the process by which attorneys apply for admission without examination, supervised the license renewal process and staffed meetings of the Court’s boards and committees.





### **Vermont Bar Association**

In May 2016, Bar Counsel assumed the duties as President of the Vermont Bar Association.

## **III. Report of the Activities of Disciplinary Counsel**

### **A. Introduction**

Disciplinary Counsel administers the disciplinary side of the Professional Responsibility Program, pursuant to A.O. 9, Rule 3(B)(2). Disciplinary Counsel's core function is to investigate and prosecute disciplinary complaints and disability matters.

### **B. Formal Investigations by Disciplinary Counsel**

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 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 request a written answer from the attorney under investigation. Disciplinary Counsel then reviews the written answer and conducts whatever additional investigation is appropriate. Upon concluding an investigation, Disciplinary Counsel has three options: (1) dismiss the complaint; (2) refer the complaint for non-disciplinary resolution; or (3) initiate a formal disciplinary or disability proceeding.

FY16 opened with 32 formal investigations pending. During the fiscal year, an additional 74 files were opened for investigation. At the close of the fiscal year, there were 29 investigations pending.

#### **1. Disciplinary Cases before the Supreme Court**

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

In cases where an attorney consents to disbarment under A.O. 9, Rule 19, the case is filed with the Board for review and recommendation to the Supreme Court. The Court then issues a decision ordering the disbarment. In FY16, Disciplinary Counsel filed one disbarment case under Rule 19: *In re Christopher Sullivan*. Attorney Sullivan was disbarred by the Court on November 24, 2015, for engaging in conduct which constituted a serious crime.

##### **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. In FY16, Disciplinary Counsel filed one petition for reciprocal discipline with the Supreme Court of a Vermont attorney disciplined in Arizona. The Court imposed reciprocal discipline.



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

Upon the receipt of sufficient evidence showing that an attorney has violated the ethics rules and presently poses a substantial threat of harm to the public, 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 FY16, Disciplinary Counsel filed 3 petitions for an interim suspension (*In re William M. O’Brien, In re Kenneth M. Appel, and In re Elizabeth Norsworthy*). The *O’Brien* and *Appel* petitions were granted in FY16 by the Court; the *Norsworthy* petition was pending as of the close of FY16. (It was granted on July 1, 2016 (FY17).)

**d. Cases on Review by the Court**

When a Hearing Panel issues a decision, either party may appeal that decision to the Supreme Court. If neither party appeals, the Court may, on its own motion, order review of the Hearing Panel’s decision.

During FY16, Hearing Panels issued 5 decisions. [PRB Decisions 188, 189, 190, 194 and 195 – *see below*]. Each of those decisions was subject to appeal by either party, as well as a 30-day review period by the Court. No appeals were filed, but the Court ordered review of two decisions on its own motion in FY16. In *Obregon*, the Court affirmed the public reprimand. In *PRB File No. 2015-002*, the Court adopted the Hearing Panel decision as a final decision of the Court and ordered the decision published in Vermont Reports.

**2. Probable Cause Review**

The Chair of the Board designates one hearing panel to serve as the Probable Cause Panel for a term of one year. The Probable Cause Panel rotates in January. As FY16 opened, one Request for Probable Cause was pending, and two additional Requests for Probable Cause were filed during FY16; probable cause was found in all three cases. A.O. 9, Rule 11(C).

**3. Petitions of Misconduct and Stipulations**

Disciplinary Counsel’s charging document is known as a “Petition of Misconduct.” In FY16, one Petition of Misconduct (*In re Christopher Sullivan*) was filed; the Respondent subsequently filed an Affidavit of Resignation which was accepted by the Vermont Supreme Court.

At the beginning of FY16, two disciplinary proceedings, which had been filed in the previous fiscal year, were still pending with hearing panels. In one case (*In re Christena Obregon*), the Hearing Panel accepted the parties’ stipulation to a public reprimand. The Supreme Court ordered review on its own motion; heard oral argument and issued an order affirming the public reprimand. In the second case (*In re Anonymous Attorney; PRB Docket No. 2015-002*), the Hearing Panel issued a decision approving an Admonition by Disciplinary Counsel; the Supreme Court ordered review on its own motion and adopted the Hearing Panel decision.

As an alternative to a Petition of Misconduct, Disciplinary Counsel and a respondent may commence formal disciplinary proceedings by filing a Stipulation of Facts. From there, the parties may either join to recommend a particular sanction or request a hearing on the appropriate sanction. During FY16, seven disciplinary proceedings were commenced by Stipulation. Three of those stipulations were approved by Hearing Panels and finalized during FY16. Two of those were stipulations to a private admonition, and one was a stipulation to a public reprimand with probation (*In re Norman Blais*).



As FY16 closed, the remaining four cases were still pending before hearing panels. Those cases include one stipulation & joint recommendation for a suspension; one stipulation & joint recommendation for a public reprimand and probation; one stipulation & joint recommendation for a private admonition; and one stipulation and joint request for a sanctions hearing.

#### **4. Disability Proceedings under A.O. 9, Rule 21**

Disciplinary Counsel did not initiate any new disability cases in FY16.

#### **5. Reinstatement Petitions under A.O. 9, Rule 22**

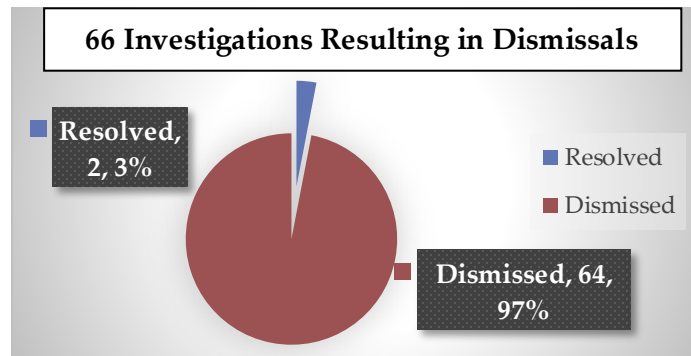
No reinstatement petitions were initiated in FY16.

#### **6. Referrals to Non Disciplinary Resolution**

Upon concluding an investigation, and as an alternative to commencing formal disciplinary proceedings, Disciplinary Counsel may refer cases for non-disciplinary resolution. In FY16, one case was referred to Bar Council for assignment to an Assistance Panel; that case was still pending with the Assistance Panel at the close of FY16. Another case was referred for non-disciplinary resolution, and was successfully resolved through that process.

#### **7. Dismissals**

Disciplinary Counsel's Office investigated and dismissed 66 complaints in FY16. The reasons for the dismissals are set out in the following table:



#### **8. Docket at End of FY16**

As the fiscal year closed, 29 complaints were under investigation by Disciplinary Counsel, and 4 cases were being prosecuted before Hearing Panels.

#### **C. Continuing Legal Education Seminars**

In FY16, Disciplinary Counsel presented one Continuing Legal Education seminar at the Capitol Plaza in Montpelier, on the topic of Ethics in the Practice of Real Estate, for Vermont Attorneys Title Corporation.



#### **D. Probation**

In addition to prosecuting all disciplinary and disability cases, Disciplinary Counsel is also responsible for monitoring all attorneys who are placed on probation by a Hearing Panel or the Court. As FY16 opened, Disciplinary Counsel was monitoring 3 attorneys who were on disciplinary probation. One attorney successfully completed probation during the fiscal year, and 1 additional attorney was placed on probation. At the close of the fiscal year, Disciplinary Counsel continued to monitor 3 attorneys on probation.

#### **E. Compliance with the Trust Account Rules**

In FY16, Disciplinary Counsel opened 37 IOLTA overdraft related cases; 26 cases were opened as the result of notification from a bank that an attorney had an overdraft in the attorney's trust account; 9 cases were opened as a result of the attorneys' self-reporting overdrafts or issues with their trust accounts; and two cases were opened after a compliance exam had been conducted on the attorneys' trust accounts. All 39 cases were investigated. As the fiscal year ended, there were two such cases still pending. One case resulted in the parties stipulating to an admonition which was before a Hearing Panel, and the other case remained under investigation.

#### **F. 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 enters into 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. In December of 2015, Disciplinary Counsel entered into new agreements with all financial institutions, and January 2016, the current list of approved financial institutions was sent to all members of the Bar.

#### **G. Requests for Proposals for CPA's to Conduct Trust Account Compliance Exams**

Every three years, Disciplinary Counsel engages in a process to request proposals from Vermont-licensed CPAs to conduct compliance examinations of selected attorney client trust accounts. As FY16 began, Disciplinary Counsel had one-year contracts with two different CPA's, both of which were set to expire at year end and were not renewable beyond FY16. In June of 2016, Disciplinary Counsel prepared and published an 18-page RFP for new proposals from CPAs interested in conducting our compliance exams. The RFP was published on the BGS website and invitations to bid were sent to current contractors. The RFP provided for bidders to submit written proposals by a deadline of August 10, 2017, so as of FY16 end, the RFP process was ongoing.

#### **H. Trust Account Compliance Exams**

During each fiscal year, Disciplinary Counsel engages one or more CPAs to conduct compliance exams of selected attorney trust accounts. During FY16, Disciplinary Counsel engaged two CPA's to conduct a total of 14 trust account compliance exams (7 exams each). Each examination results in a written report being sent to Disciplinary Counsel for review. Disciplinary Counsel opened files for two of the 14 reports in FY16, to follow up on some minor issues. Disciplinary Counsel followed up with those lawyers, and then closed the files as resolved. Disciplinary Counsel also coordinated with New Hampshire Disciplinary Counsel on one compliance examination of an attorney trust account for an attorney who was admitted in both jurisdictions. That compliance examination did not find evidence of misconduct, and the investigation was closed.

## Professional Responsibility Program



### **I. 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 FY16, Disciplinary Counsel conferred with the Board to review operations in September, December, March, and May. Disciplinary Counsel also prepared and submitted a budget request to the Board in March 2106, requesting funding for the trust account compliance examination program for the next fiscal year. Disciplinary Counsel also researched and prepared a legal memorandum for the Board on the standard of proof in disciplinary matters, along with a recommendation, for the Board's consideration.

Disciplinary Counsel also changed the process for sending the standard trust account system survey to members of the bar during FY16. In previous fiscal years, the survey would be sent to 100 randomly selected attorneys every year, for completion and return to Disciplinary Counsel. Under the new process, all attorneys who have trust accounts will be asked to complete the survey once every three years, and print and retain the results, to be available to Disciplinary Counsel on request.

### **IV. CONCLUSION**

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

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 Professional Responsibility Board also wishes to give special thanks to Attorney Leslie Black, who retired after providing many years of dedicated service and expertise in her role as Counsel to the Hearing Panels.

The Board would also like to welcome Lon McClintock, who assumed the duties of our new Hearing Panel Counsel in February 2016.

The Board would also like to thank Kimberly Rubin, who resigned this summer as Deputy Disciplinary Counsel, for her service.