

# Professional Responsibility Program – FY 18 Annual Report

## FY 2018 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 eighteenth 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 FY18. 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 5, 2018, at Vermont Law School in South Royalton. Twenty-eight Professional Responsibility Program members and invited guests attended the full day educational program. Attorneys who attended the entire program earned 4.25 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**  
**Mr. Kevin O’Donnell**  
**Ms. Lisa Ventriss**

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**Deb Laferriere**  
Program Administrator

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### 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 Court amendments to V.R.P.C. 1.7 and 1.8. The [Order](#), promulgated on January 8, 2018, effective March 12, 2018, added Rule 1.8(j) to prohibit sexual relations between a lawyer and client unless a consensual sexual relationship existed when the client-lawyer relationship commenced. Comment [17] was amended to clarify that the rule applies to all sexual relationships formed after the commencement of the professional client-lawyer relationship, including consensual sexual relationships and sexual relationships in which there is no prejudice to the client's interests in the matter that is the subject of the professional relationship. Comment [18] was added to provide guidance on sexual relationships that predate the commencement of the client-lawyer relationship.

Comment [12] to Rule 1.7 was deleted due to the simultaneous amendment to Rule 1.8(j), which explicitly precludes a lawyer from having a sexual relationship with a client unless a consensual sexual relationship existed when the client-lawyer relationship began.

In addition, the Board recommended amending Comments to Rule 1.1 of the Vermont Rules of Professional Conduct. The proposed amendments track the ABA Ethics 20/20 changes to Model Rule 1.1 and its comments. Comments [6] and [7] were added to address the phenomenon of "outsourcing" work by lawyers and are intended to clarify how the duty of competence interrelate to such practices. Former

Comment [6] was renumbered Comment [8] and proposed to make clear that the duty of competence includes a general understanding of technology and its potential impact on client matters.

### F. Staffing Update

No staffing changes were made in FY 2018. The Program is fully staffed with a full-time Bar Counsel, full-time Disciplinary Counsel, part-time Program Administrator and part-time Administrative Assistant. 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

During FY18, Mark DiStefano served as Hearing Panel Counsel. In general, he attends hearings and phone conferences and writes a first draft of any opinion or order for the panel. He is also available to provide research, pre-hearing memos or other legal assistance to the Hearing Panels.

In cases where there are public disciplinary proceedings pending, the files in those cases are a matter of public record and available on our website: [Professional Responsibility Board Public Cases](#).

As FY18 ended, the following individuals served as members of Hearing Panels:

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

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

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

Joseph F. Cook, Esq., Chair  
James Valente, Esq.  
Mr. Greg Worden

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

Sheila Ware, Esq., Chair  
Jeffrey S. Marlin, Esq.  
(Vacant)

### **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. (*Deceased June 2018*)  
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.  
Mr. Patrick Burke

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

Karl C. Anderson, Esq., Chair  
Kate Thomas, Esq.  
Ms. Joanne Cillo

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

Jonathan M. Cohen, Esq., Chair  
Mary Welford, 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 FY18:

### **Attorneys**

Steven Adler, Esq.  
Joseph F. Cahill, Jr., Esq.  
Emily Gould, Esq.  
Robert Fairbanks, Esq.  
Stephanie Foley, Esq.  
Edward French, Esq.  
Leslie Hanafin, Esq.  
Lon McClintock, Esq.  
Katherine Mosenthal, Esq.  
Robert O'Neill, Esq.  
Susan Palmer, Esq.  
Alan Rome, Esq.  
Janet Shaw, Esq.

### **Public Members**

Ms. Susan Fay  
Ms. Judith Lidie  
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, 2017 through June 30, 2018. Throughout the report, that period of time will be referred to as “FY18.”

## II. Report of Activities of Bar Counsel

### A. Introduction

Bar counsel’s goal is to use proactive methods to reduce disciplinary violations. To that end, bar counsel responds to inquiries, teaches continuing legal education seminar, and engages in other forms of outreach. Bar counsel also screens disciplinary complaints.

### B. Ethics Inquiries

Rule 9 of Administrative Order 9 states:

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

- An inquiry is when someone contacts bar counsel to discuss how the Rules of Professional Conduct apply to a particular situation. In FY18, bar counsel received 1263 inquiries. The total represents a 14% increase over FY17 and is more than double the total inquiries received when Professional Responsibility Program restructured in FY13.

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

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

Source	Inquiries
Lawyer	1,049
Non Lawyer	170
Media	15
Law Student	14
Judge	7
Law Professor	6
Legislator	2

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

<b>Firm Size/Type</b>	<b>Inquiries</b>
0-3	446
4-6	247
7 or more	91
Public Defender	89
AAG/Government	78
State or Federal Prosecutor	67
In-House	31

- Nearly half of the inquiries involve conflicts or client confidences. By topic area:

<b>Topic Area</b>	<b>% of Total Inquiries</b>
Conflicts of Interest	34%
Client Confidences	15%
Trust Accounting Rules	12%
Rules on Candor/Honesty	11%
Communicating w Represented Person	10%
Duty to Report	9%
All Other	9%

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

<b>Business Days</b>	<b>Percent of Total Resolved</b>
Same	71%
1-2	21%
3-5	3%
More than 5	3%
Caller never returns bar counsel's call	2%

**C. Continuing Legal Education**

Bar counsel presented 34 continuing legal education seminars for a total of 48.75 credit hours. Bar counsel presented at seminars sponsored or arranged by:

Chittenden County Bar Association  
 Joan Loring Wing Inn of Court  
 Lamoille County Bar Association  
 Northern Vermont Inn of Court  
 Office of the Attorney General  
 Office of Child Support  
 Office of the Defender General  
 Department of State's Attorneys and Sheriffs  
 Rutland County Bar Association

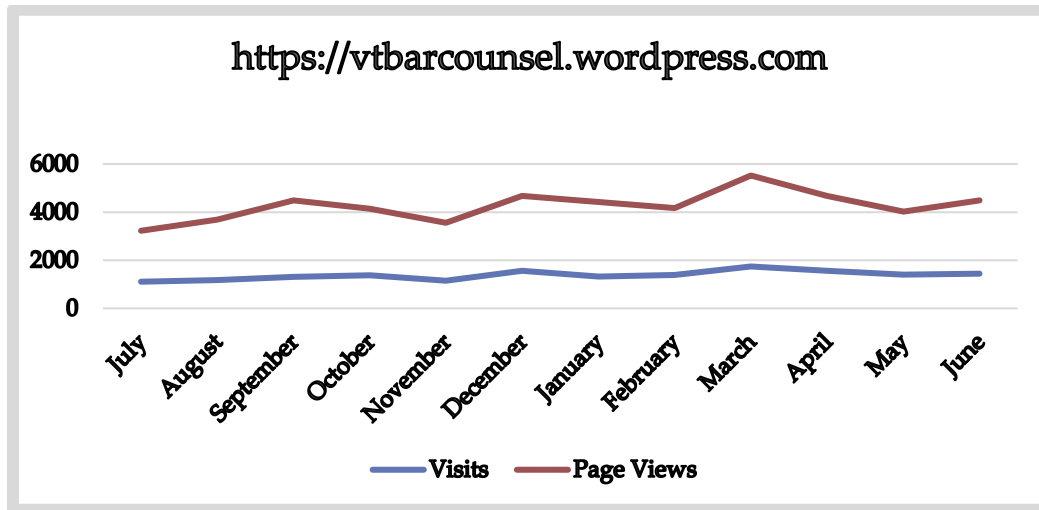
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Tri-State Insurance Defense Association  
Vermont Association of Criminal Defense Lawyers  
Vermont Attorney’s Title Corporation  
Vermont Bar Association  
Vermont Family Court Mediators  
Vermont Justice Fest  
Vermont Municipal Attorneys Association  
Washington County Bar Association  
Windham County Bar Association

**D. Blog/Social Media**

Bar counsel uses social media to engage in proactive regulation and to raise awareness of issues related to legal ethics. In FY18, bar counsel authored 226 blog posts. The blog received 16,544 visits, with visitors combined for 34,533 page views.



**E. Screening Disciplinary Complaints**

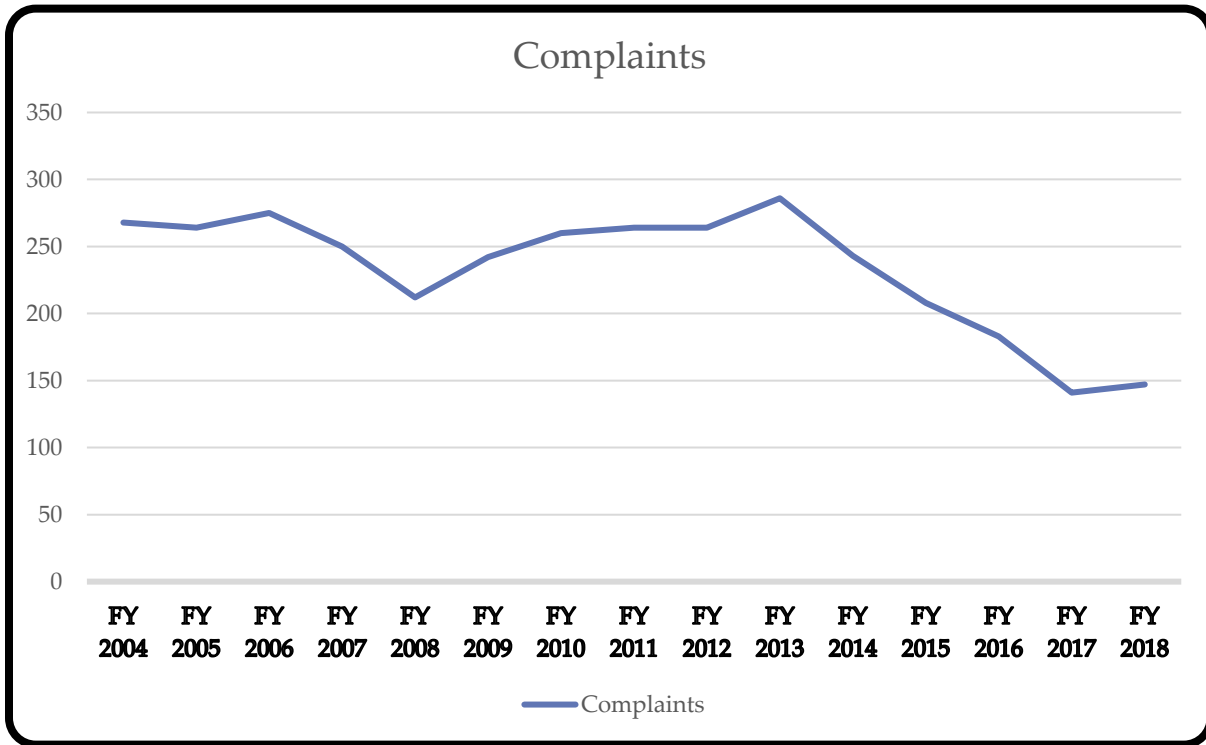
Rule 10 of Administrative Order No. 9, requires bar counsel to screen disciplinary complaints. The Professional Responsibility Program received 147 complaints in FY18. That is 6 more than were received in FY17 but continues a trend that has seen a significant decline in complaints received. The past two years have seen an average number of new complaints that is:

48% less than the 15-year high,  
39% less than the 15-year average,  
37.5% less than the 10-year average  
and 23% less than the 5-year average.

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Complaints received:



The screening process is one in which bar counsel conducts a limited investigation to determine the nature of the complaint and whether it can be resolved via non-disciplinary dispute resolution methods and without referral for formal intervention by an assistance panel or formal investigation by disciplinary counsel.

Bar counsel’s options upon screening a complaint, with the number of times each option was utilized in FY18.

Screening Decision	Number
Resolved/Dismissed	81
Referred to disciplinary counsel	28
Referred to diversion program	13
Bar counsel did not screen <sup>1</sup>	25

<sup>1</sup> There are several types of complaints that bar counsel does not screen. By rule, bar counsel cannot screen a complaint filed against a board member. Nor does bar counsel screen any complaint in which he has a conflict, including complaints filed against him. Finally, by rule, financial institutions that maintain pooled interest-bearing trust accounts (“IOLTA”), must notify the PRP whenever a trust account is overdrawn or an instrument drawn on a trust account is presented against insufficient funds. Per Board policy, trust account overdrafts are referred directly to disciplinary counsel for investigation.

In other words, of the complaints that bar counsel screened, 73% were dismissed or resolved at screening; 27% were referred for formal intervention by the PRP’s diversion program or formal investigation by disciplinary counsel.

By rule, if bar counsel resolves or dismisses a complaint at screening, the complainant may request that the Board chair review bar counsel’s decision not to refer the complaint to diversion or disciplinary counsel. Of the 81 complaints resolved or dismissed at screening in FY18, 15 were appealed to the Chair. The Chair upheld bar counsel’s decision in each.

## **F. Other**

In January 2018, the Chief Justice appointed bar counsel to the Vermont Commission on Well-Being in the Legal Profession. Bar counsel chairs the Regulators sub-committee.

In October 2017, bar counsel termed off as the president of the Vermont Bar Association’s Board of Bar Managers. Throughout the fiscal year, bar counsel served as immediate past-president and chaired the Board’s Governance Committee.

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

It was a year of significant change in the Office of Disciplinary Counsel (“ODC”).

For the first time in many years, ODC was staffed with a single full-time attorney instead of one and a half. Special disciplinary counsels also handled several cases as noted below.

### **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.



FY18 opened with 10 formal investigations pending. During the fiscal year, an additional 62 files were opened for investigation. At the close of the fiscal year, there were 25 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 FY18, there were no consents to disbarment.

### **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 FY18, disciplinary counsel filed three petitions for reciprocal discipline with the Supreme Court. The Court imposed reciprocal discipline in the following three cases:

**PRB Docket No. 2017-045** (*In re Joseph P. Palmisano*). Respondent was disciplined in Arizona and received a reciprocal two-year suspension in Vermont. See [PRB Decision No. 207](#).

**PRB Docket No. 2018-097** (*In re William Conner*) Disbarment. Respondent was disciplined in New Hampshire and received a reciprocal disbarment in Vermont. See [PRB Decision No. 217](#).

**PRB Docket No. 2018-078** (*In re Robert Moyer*) Respondent was disciplined in Tennessee and received a reciprocal public reprimand in Vermont. See [PRB Decision No. 213](#).

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

Upon the receipt of sufficient evidence showing that an attorney has either committed a violation of the ethics rules or is under a disability as set forth in Rule 21.A. and presently poses a substantial threat of serious harm to the public, disciplinary counsel is required to transmit the evidence to the Supreme Court, along with a proposed order for the interim suspension of the attorney's license to practice law. In FY18, disciplinary counsel filed a joint petition for an interim suspension due to a medical condition that prevented her (*In re Amy Klingler*) from practicing law. The Supreme Court transferred Respondent's license to interim suspension status. See [PRB Decision No. 208](#)

### **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 FY18, Hearing Panels issued 4 decisions. [PRB Decisions 169, 211, 212, and 214 – *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 in FY18, the Court ordered review of two decisions on its own motion.

In **PRB Decision No. 169** (*In re W. Michael Nawrath*), special disciplinary counsel Renee Mobbs charged the Respondent with multiple violations of the Rules of Professional Conduct. Respondent did not answer or otherwise defend. Thus, the charges were deemed admitted and a hearing panel issued a decision disbaring Respondent.

In **PRB Decision 211** (*In re Matthew Gilmond*), litigated by special disciplinary counsel Edward Adrian, the Hearing Panel suspended Attorney Gilmond’s license for six months after concluding that he had failed to effectuate a settlement that his client had reached with an opposing party, failed to communicate with the client, and engaged in conduct involving misrepresentation and dishonesty while dealing with his client and opposing counsel.

In **PRB Decision No. 212** (*In re Phyllis McCoy-Jacien*), a Hearing Panel suspended the Respondent’s law license for nine months after concluding that she had failed to file her Vermont tax return as directed under PRB Decision No. 196 and failed to respond to numerous written and oral requests for information regarding compliance with the probation conditions that were imposed in PRB Decision No. 196. The Court affirmed the nine-month suspension, adopted the Hearing Panel decision as a final decision of the Court and ordered the decision published in Vermont Reports.

In **PRB Decision No. 214**, (*In re Glenn Robinson*), litigated by special disciplinary counsel Robert Simpson, the Court ordered review upon its own motion and the parties were directed to focus primarily on the propriety of the recommended sanction. As the fiscal year ended, the appeal was pending and being handled by disciplinary counsel Sarah Katz.

## **2. Probable Cause Review, A.O. 9, Rule 11(C)**

The Chair of the Board designates one hearing panel to serve as the Probable Cause Panel for a term of one year. In FY18 six Requests for Probable Cause were filed and probable cause was found in all six cases. Five resulted in formal charges being filed.

## **3. Petitions of Misconduct and Stipulations**

Disciplinary counsel’s charging document is known as a “Petition of Misconduct.” In FY18, three Petitions of Misconduct (*In re John Canney III*, *In re Phyllis McCoy-Jacien*, and *In re Errol Tabacco*) were filed. Both *Canney* and *Tabacco* were pending as FY18 ended.

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 FY18, four new disciplinary proceedings were commenced by Stipulation. The Hearing Panel rejected two of the stipulations (*Anonymous Attorney*) and returned the files to disciplinary counsel; one file resulted in a dismissal, and in the second file, disciplinary counsel filed an amended stipulation which was pending before the Hearing Panel as the fiscal year ended. The third file, *In re Gregory Vigue*, resulted in a public reprimand. The fourth file, *In re Thomas Dailey*, was pending as the fiscal year ended.

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

Disciplinary counsel initiated 4 new disability cases in FY18. *In re Elizabeth Norsworthy*, *In re Scott Williams*, *In re Jacob Durell*, and *In re Alan Sheredy*. All four attorneys were transferred to disability/inactive status.

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

No reinstatement petitions were initiated in FY18.

#### 6. Transfers from Disability Inactive to Active Status, A.O. Rule 21(E)

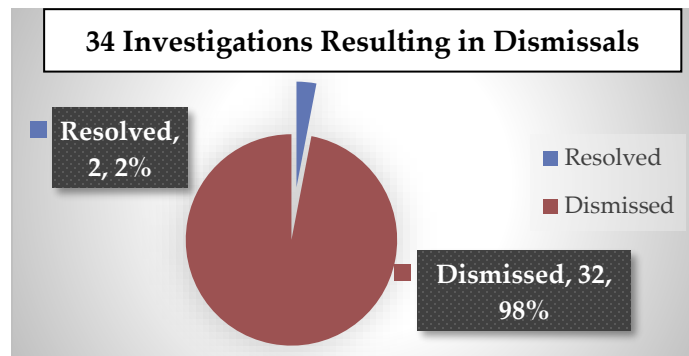
One attorney *In re Jacob Durell*, whose license had been placed on disability/inactive status earlier in the year, provided evidence to the Court that his disability had been removed, and his license was reinstated to active status.

#### 7. 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 FY18, 3 cases were referred to bar counsel for assignment to an Assistance Panel; one case was still pending with the Assistance Panel at the close of FY18; the remaining two cases were referred back to disciplinary counsel.

#### 8. Dismissals

Disciplinary counsel investigated and dismissed 34 complaints in FY18. The reasons for the dismissals are set out in the following table:



#### 9. Docket at End of FY18

As the fiscal year closed, 17 complaints were under investigation by disciplinary counsel, and 4 cases were being prosecuted before Hearing Panels. In addition, two more complaints were being investigated by a specially appointed disciplinary counsel.

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

In FY18, Disciplinary Counsel presented four trainings for the following groups:

Washington County Bar Association  
Vermont Association of Criminal Defense Lawyers  
Vermont Law School Energy Clinic  
Vermont Paralegal Organization

### **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 FY18 opened, disciplinary counsel was monitoring three attorneys who were on disciplinary probation. One attorney successfully completed probation during the fiscal year, and one attorney *[In re Phyllis McCoy](#)* was suspended for nine months for failing to comply with the provisions of her probation. At the close of the fiscal year, disciplinary counsel continued to monitor one attorney on probation.

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

In FY18, upon receiving notification from a bank that an attorney had an overdraft in the attorney's trust account, disciplinary counsel opened 13 IOLTA overdraft related cases. Two additional cases were opened after a compliance exam had been conducted on the attorneys' trust accounts. All 15 cases were investigated. As the fiscal year ended, there were 2 such cases still pending and 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. The current list of [Approved Financial Institutions](#) is updated as needed.

### **G. Contract Certified Public Accountants**

In FY18, reviewed existing contracts for two Certified Public Accountants and renewed them. Disciplinary counsel assigns trust account compliance exams to the CPAs for attorneys selected at random. The CPAs are also assigned to conduct compliance exams when need becomes apparent as part of a disciplinary or disability investigation, and they consult with disciplinary counsel on an ongoing basis. For each exam, the CPA examines the lawyer's records, conducts inquiry, and produces a written report analyzing compliance with trust accounting rules.

### **H. Contract Investigators**

From time to time, disciplinary investigations arise in which disciplinary counsel requires contract investigator services. In FY18, disciplinary counsel published a request for proposal seeking licensed investigators. Bids were submitted and reviewed, and two licensed investigators were placed under two-year contract.

## 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 FY18, at the request of the Board, disciplinary counsel began the process of revising the Hearing Panel Manual. This project is still ongoing. Disciplinary counsel also produced to the Board and to the Court Administrator recommendations regarding compensation for trustees appointed under A.O. 9, Rule 24 in instances when a lawyer's license is suspended or transferred to disability inactive.

## IV. CONCLUSION

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

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

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

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

Edward Adrian, Esq.  
Renee Mobbs, Esq.  
Craig Nolan, Esq.  
Robert Simpson, Esq.

The Board would like to acknowledge the efforts and passing of long-time hearing panel member John Cain, who had served as a hearing panel member since 2013.

The Board would also like to thank Jan Eastman, who served as a Board member for 11 years, the last 10 of which she served as chair.