

Manual for Assistance Panel Members

Introduction

Frequently Asked Questions

1. Why do we have Assistance Panels?

Under the Rules Governing the Disciplinary Process for the Professional Conduct Board (A.O. 9) which was in effect from 1989 until 1999, the system was oriented entirely toward prosecution of ethical violations. Based on the ABA Model Rules for Discipline, it was and continues to be, particularly in some of the more urban and populous states, an effective means of regulating the professional behavior of lawyers.

Many states felt that another component was needed because there was little way to respond to minor cases of misconduct or to resolve ongoing problems in attorney-client relationships. Some states began to develop two separate programs in response.

One was a diversion program, modeled roughly along the lines of criminal diversion programs¹ where a prosecutor has authority to send a case to a community board in lieu of prosecution.

The second was a consumer assistance program where staff lawyers endeavor to resolve complaints as they come in or, if a formal investigation is necessary, help complainants shape their letters of complaints so that they clearly explain to the disciplinary counsel the substance of the allegations.

Under the initiative of former Justice James L. Morse, new rules were drafted for Vermont which incorporated these two programs, referenced in two separate sections of the new A.O. 9. One is at Rule 10; the other is at Rule 4.

¹ In the Criminal Diversion program in Vermont, at the time these changes were under consideration, the Diversion Board in each county met to hear from the defendant and the victim as to what happened, why it happened, the acknowledgment of culpability by the defendant, and why the behavior would not be repeated. The Diversion Board would then either conclude that the process was sufficient or might impose a sanction – such as acquiring more education or completing public service. The program in each county was staffed by an administrator who initially interviewed all parties, ensured that cases were processed, provided support to the Board at meetings, monitored the defendant's compliance with any sanctions imposed, and reported back to the prosecutor as to whether or not the defendant successfully completed the program. If the defendant did, the prosecutor dismissed the charges. If the defendant did not, the prosecutor could reconsider whether or not to continue with formal prosecution. A defendant who reoffended was not allowed to participate again in the Diversion Program.

Rule 10² empowers counsel to resolve complaints informally at the screening stage or, if necessary and appropriate, refer the matter to an Assistance Panel for resolution. It was left purposefully vague so that all three components of the Program would have the flexibility to determine the specifics of operation, with the notion that the Board would have the authority to determine how best to assign counsel resources.³

Rule 4⁴ describes the Assistance Panel process. It is purposefully lacking in great detail in order to allow creativity and experimentation in developing the process.

² The Rule provides, in relevant part, Rule 10. Filing and Review of Complaints,

A. Screening. All complaints will be screened by counsel for the Professional Responsibility Program, who may contact the subject attorney and conduct other limited investigation necessary to determine the nature of the inquiry and whether it can be resolved through non-disciplinary dispute resolution methods. Counsel may attempt to resolve any complaint, of whatever nature, that does not appear to require formal intervention by an assistance panel or the disciplinary program.

B. Referral to Assistance Panel. Counsel may refer any matter that does not appear to require prosecution and sanctions to the assistance panel (see Rule 4) or other dispute resolution programs including, but not limited to, the Arbitration of Fee Complaints Committee of the Vermont Bar Association.

³ For instance, the drafters purposefully declined to specify which counsel – Bar Counsel or Disciplinary Counsel – was to handle such screening and purposefully declined to specify whether a “complaint” means an informal telephone inquiry or a formal letter of complaint.

⁴ The Rule provides, in relevant part, “All inquiries concerning attorney conduct shall be directed to the Professional Responsibility Program.

A. Appointment. The chair of the Board shall appoint three-member assistance panels as may be required, and shall appoint one of the members to serve as chair. Terms shall be for two years. The membership of each assistance panel shall include at least one member of the Board, and at least one public member, who may be the same person. Two members shall constitute a quorum, and the panel shall act only with the concurrence of two members. Vacancies shall be filled by the Board chair.

B. Powers and Duties.

(1) The assistance panel shall review all complaints referred to it by bar counsel or disciplinary counsel and provide a process to resolve such complaints. The panel may meet with the person filing the complaint and the attorney who is the subject thereof, and, with the concurrence of the attorney, may impose conditions as an alternative to discipline. Any terms or conditions shall be stated in writing, and may include, but shall not be limited to, participation in law office management training, continuing legal education, psychological counseling, substance abuse programs, and referral to fee arbitration. The panel may transfer any matter to disciplinary counsel which, in its view, is more appropriate for disciplinary proceedings.

(2) Upon the imposition of conditions, the complaint may be conditionally closed. Upon motion of the attorney and proof of successful completion of any terms or conditions, the complaint will be dismissed.

(3) If an attorney refuses to participate in the assistance program, or fails to comply with any terms or conditions, the complaint may be referred to disciplinary counsel for further action.

2. What happens to complaints before they are referred to an Assistance Panel?

As presently administered, matters are resolved outside the disciplinary process in a number of ways. All informal inquiries – usually received by telephone – are referred to Bar Counsel who generally does one of the following: first, resolves the matter with the parties, second, advises the caller to file a formal complaint and assists the caller in narrowing the scope of the complaint to relevant areas, or, third, advises the caller as to what other options are available to him or her outside the Professional Responsibility Program.

All written complaints are referred to Disciplinary Counsel for screening and, where a potential issue of actionable misconduct is raised in the complaint letter, appropriate, investigation. Disciplinary Counsel has authority to refer the matter to an Assistance Panel after screening or after investigation.

3. How are cases assigned?

Bar Counsel selects the members of the panel based on a variety of factors. These may include: geographical convenience for the parties, conflicts of interest between panel members and parties, gender balance, availability, and particular professional expertise and experience.

4. What is the role of the public member?

The legal profession in the United States is the only profession that is self-regulated. While physicians, accountants, architects, pharmacists and other licensed professions are generally regulated through an arm of the executive branch (such as, in Vermont's case, the Secretary of State or the Department of Health), lawyers are generally regulated through the state bar association or through the Supreme Court. In Vermont, the state constitution empowers the Vermont Supreme Court to regulate members of the bar.

One of the results of this self-regulation is a feeling among some sectors of the populous that lawyers “cover-up” for other lawyers and that they are biased in favor of lawyers.

In response to these concerns, there is a national trend to allowing more openness and less confidentiality in the disciplinary system and to allow more non-lawyer participation.

To that end, at least one member of each Assistance Panel must be a public member. It is hoped that the public member will offer a unique perspective to whatever problem is presented. It is our general experience that lay members assist the lawyer members in viewing and resolving problems from a different and valued approach.

5. Who selects the chair?

Until the panel actually convenes, the Board member of the panel acts as chair. The panel is free to select a different chair once it convenes.

6. What are the parties told beforehand?

When Disciplinary Counsel sends his letter to the parties advising them that he is referring the matter to an Assistance Panel, he briefly explains the reasons for his decision.

Bar Counsel then has a personal telephone conference with each of the parties to ascertain their willingness to participate. A lengthy letter describing the process is then sent to the parties. Assistance Panel members also receive a copy of these letters. These are included as *Attachment A* at the end of this memo.

7. What information does the Assistance Panel receive before the meeting?

A copy of the complaint, the response, Disciplinary Counsel's letters to the parties explaining the reason for the referral (as opposed to dismissal or prosecution), relevant supporting documents if necessary, and a memo which usually describes the results of the investigation. Disciplinary Counsel may choose to transmit to the AP information as to the Respondent's disciplinary history.⁵ Bar Counsel is also available to discuss the case with panel members.

8. What if one of the parties does not wish to participate or if it appears that Assistance Panel review is unnecessary or not suitable?

Bar Counsel has the authority to dismiss the case or refer it back to Disciplinary Counsel.

9. What should Panel Members do in a hearing?

Panel members should ensure that each party is heard in a fair and non-judgmental way. How you wish to run the meetings is up to you.

The normal format is to meet with the parties together. Some panels find that it is not appropriate to have direct contact between the Complainant and the Respondent and will meet with the parties separately. However you choose to do this, keep in mind that while Respondents have access to the original complaint, the complainants have no

⁵ 29. In making a referral to an Assistance Panel, Disciplinary Counsel shall explain his rationale to the Respondent and the Panel for a referral, which may include reference to relevant past disciplinary history. (October 20, 2006).

access to the response. Therefore, it is valuable for the complainant to hear, either directly or through the Assistance Panel, Respondent's perspective on what happened and why.

After allowing each party an opportunity to be heard and to hear what the other has to say, the Panel members confer privately amongst each other, then meet with the parties, convey the panels suggestions for resolution, and secure agreement that conditions will be met. Once the parties have reached an agreement as to disposition, if Respondent fails to carry out the conditions of that agreement, the matter may be referred back to Disciplinary Counsel for failure to co-operate.

10. What should Assistance Panels not do in a hearing?

The Assistance Panel members should avoid any statements the Respondent could perceive as threatening or intimidating. If the Respondent is reluctant to co-operate, the best course of action may be to send the case back to Disciplinary Counsel.

11. What are the duties of the chair of the Assistance Panel?

Aside from taking responsibility for running the hearing, the Chair needs to be in contact with Bar Counsel to report the results and any conditions that might have been imposed. This should be done as soon as practicable after the meeting.

12. What are the duties of Bar Counsel?

Bar Counsel vets the parties for suitability for the process, constructs membership of the particular panel, is available to attend hearings or is on call to assist during the hearing, consults with the chair after the hearing to review results, sends letters to the parties as necessary confirming the results of the meeting and articulating conditions imposed, if substantial, writing letters of dismissal.

Through the efforts of Deb Laferriere, Program Administrator, the hearings are scheduled, hearing rooms secured, and all applicable documents are sent to the Panel.

13. If the Assistance Panel thinks a case should be prosecuted, can we refer it back?

Yes, but whether it will be prosecuted is entirely up to the Office of Disciplinary Counsel. The Assistance Panel cannot refer it back with a directive to prosecute.

14. What kind of resolutions have been fashioned in the past and what are the range of options?

The options are wide ranging, subject to the creativity of the panel and the agreement of Respondent to comply with conditions. Resolutions that have been used in the past here and in other states include:

- letters of apology, which the Panel may decide to review and approve before distribution,
- Continuing Legal Education courses on problem areas of law or law office management,
- retention of another member of the bar to supervise work or act as a mentor (usually selected by retained at the Respondent with AP's approval's and at Respondent's expense if there is one),
- directive to consult with the Vermont Bar Association Practice Management Coordinator,
- Respondent agreeing to refund money or to handle case pro bono,
- Review of fee agreements or other forms,
- Referral to the VBA's Employees Assistance Program which provides counseling regarding substance abuse, mental health issues, stress and other personal problems,
- Referral to Lawyers Helping Other Lawyers, an independent peer support group,
- Respondent speaking at CLE presentations or writing articles for publication regarding whatever caused the complaint and how other lawyers might avoid such problems, and
- Reporting to Bar Counsel on a periodic basis

15. Who enforces the conditions or monitors them?

Bar Counsel in consultation with the Panel chair as necessary. *Please note that the Panel should impose a time line as to when conditions must be completed. Respondent should be advised that failure to complete in a timely manner will result in referral back to Disciplinary Counsel. See Policy 13 at footnote 6, below.*

16. What if the Respondent does not appear for the hearing?

The panel has the option of attempting to call the Respondent, continuing the hearing without the Respondent, sending the file back to Disciplinary Counsel, rescheduling or dismissing the case. The panel has the authority to decide what to do.

17. What if the Complainant does not appear for the hearing?

It is conceivable that a complainant, who has agreed to appear, will not appear because of the time away from work or other responsibilities. It is recommended that you contact complainant by telephone, if possible, and advise him or her that you are going forward nonetheless. When we have done this in the past, the complainant has often decided to participate after all, usually by telephone.

If you can't reach the complainant, you can proceed anyhow. Given the expense of convening the hearings in the first place, rescheduling is not optimum. Again, the panel has authority to decide what to do.

18. Has the Board adopted any policies that relate to Assistance Panels?

There are currently six policies in effect which concern the assistance panel process.⁶ All of the policies of the Professional Responsibility Board can be found in each year's annual report or on our webpage by clicking on the following link: <http://www.vermontjudiciary.org/Committees/boards/PRBPoliciesAdopted.htm>

19. What information about assistance panel proceedings is shared with Disciplinary Counsel?

Assistance Panel proceedings are completely confidential and separate from the disciplinary arm of the Professional Responsibility Program. Once a referral is made to the Assistance Panel, members of the panel should not communicate with Disciplinary Counsel regarding any aspects of the matter. Bar Counsel will advise Disciplinary Counsel as to when the case is closed; otherwise, no information is released to

⁶ **Policy 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. (January 21, 2000).

Policy 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. (January 21, 2000).

Policy 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. (May 8, 2000).

Policy 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. (February 16, 2001).

Policy 18. Each Assistance 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).

Policy 29. In making a referral to an Assistance Panel, Disciplinary Counsel shall explain his rationale to the Respondent and the Panel for a referral, which may include reference to relevant past disciplinary history. (October 20, 2006).

Disciplinary Counsel's Office. Likewise, no record is made of the proceedings and all participants are required to keep confidential whatever occurs before the Panel. Please contact Bar Counsel with requests for any additional information or assistance.

20. Who should I contact in the event of an emergency?

Any problems that arise should be brought to the attention of Bar Counsel. Contact numbers for Bar Counsel and for the Program Administrator are included in the packet you receive for each case assigned to you. They are also attached here as *Attachment B*.

Letter to Respondent

Dear Attorney [*insert name of Respondent*]:

Thank you for speaking with me about scheduling this matter for hearing. This is to confirm that the Assistance Panel will meet on [*insert Date of ADR Hearing*], in the [*insert Location for hearing*], beginning at [*Time for Hearing*]. Arrangements have been made for [*insert Complainant Salutation and Complainant's Last Name*] to participate by phone.

I am writing to give you a full explanation of what you can expect to happen at the hearing.

Assistance Panels act pursuant to A.O. 9, Rule 4B which is at page 439 of the green volume containing Vermont Rules of Probate Procedure and Administrative Orders and Rules. It can also be viewed on the Judiciary website at:
<http://www.vermontjudiciary.org/Committees/prbrules/prbao9.htm#B.%20%20Powers%20and%20Duties>.

Our rules require that at least one member of the panel be a member of the Board, and at least one member must be a member of the public, who is not a lawyer. In this case, the panel will consist of [*insert names of panel members and the county where they reside*]. Each of these people has experience in serving on Assistance Panels and has participated in hearings. Each is serving on a volunteer basis.

Your participation is also voluntary. If you choose not to participate, the Assistance Panel has the authority to return the case to Disciplinary Counsel for proceedings as he sees fit.

There are generally two kinds of cases which the Assistance Panels considers.

The first kind is the situation where one or both of the parties, usually client and attorney, have a disagreement about the representation. The Assistance Panel's task in such a case is to help the two parties reach a resolution that they both find fair and reasonable. These are rarely cases involving lawyer misconduct. These are usually cases involving a breakdown of trust or communication between lawyer and client.

The other type of case involves situations where the lawyer may have engaged in some minor misconduct which does not rise to the level of a sanctionable offense. Such cases are referred to us because Disciplinary Counsel has concluded that the problem should be addressed in some meaningful way. Perhaps the lawyer has not recognized the ethical issue. Perhaps a letter of apology is due. Perhaps the Respondent needs some additional training in a specific area of the law. Perhaps the Assistance Panel finds there are no ethical issues to be addressed.

There are a host of responses that may be appropriate. It is the job of the Assistance Panel to determine what that response should be.

Many cases involve a combination of both situations. Regardless of which sort of situation is involved here, the basic format for addressing your case is the same.

First, the Assistance Panel will already have some familiarity with your case. It will have a copy of the complaint and a copy of your answer.

Second, the parties will meet with the Assistance Panel, either separately or together as that Panel deems appropriate. Each will be given an opportunity to explain his or her perspective on the events that led to the filing of the complaint. At this point, panel members will often pose questions or engage in a discussion with you. The atmosphere is informal.

At the conclusion of this dialogue, which usually takes less than an hour, the parties may be excused for a few minutes so that the panel members may confer among themselves. The panel will then meet again with the parties and discuss the Panel's recommendations as to how the case should be resolved.

After hearing a case, the Assistance Panel may decide that this matter it is not appropriate for informal resolution. In such situations, the Assistance Panel has the authority to refer the case to Disciplinary Counsel for further investigation and perhaps filing of formal charges. That will be up to Disciplinary Counsel to decide. None of the information learned by the Assistance Panel, however, can be conveyed to Disciplinary Counsel. The proceedings remain confidential.

In most cases, however, the matter is resolved then and there. If there are any conditions imposed upon the Respondent, those conditions must be satisfied before the case is closed. Failure to satisfy these conditions may itself lead to a separate disciplinary action against you. However, if the conditions are met and the case is closed, it is carried on your record as a dismissal. In every case, the proceedings before the panel are completely confidential. There will be no record. No information obtained during the meeting with the Assistance Panel can be shared with Disciplinary Counsel.

We hope the benefit of this program is that cases will be resolved in an educational, not punitive framework.

If you have any questions, I would welcome the opportunity to discuss this matter with you further. Please do not hesitate to call me at 802-251-2023. I am generally at that number on Tuesday through Friday between 8 a.m. and 1 p.m.

Very truly yours,
Wendy S. Collins

Letter to Complainant

Dear [insert name of Complainant]:

Thank you for speaking with me about scheduling this matter for hearing. This is to confirm that the Assistance Panel will meet on [insert Date of ADR Hearing], in the [insert Location for hearing], beginning at [Time for Hearing]. Arrangements have been made for [insert Complainant Salutation and Complainant's Last Name] to participate by phone.

I am writing to give you a full explanation of what you can expect to happen at the hearing.

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Our rules require that at least one member of the panel be a member of the Board, and at least one member must be a member of the public, who is not a lawyer. In this case, the panel will consist of [insert Assistance Panel Members and county where they reside]. Each of these people has experience in serving on Assistance Panels and has participated in hearings. Each is serving on a volunteer basis.

The Respondent's participation is also voluntary. If the lawyer chooses not to participate, the Assistance Panel has the authority to return the case to Disciplinary Counsel for proceedings as he sees fit.

There are generally two kinds of cases which the Assistance Panel considers.

The first kind is the situation where one or both of the parties, usually client and attorney, have a disagreement about the representation. The Assistance Panel's task in such a case is to help the two parties reach a resolution that they both find fair and reasonable. These are rarely cases involving lawyer misconduct. These are usually cases involving a breakdown of trust or communication between lawyer and client.

The other type of case involves situations where the lawyer may have engaged in some minor misconduct which does not rise to the level of a sanctionable offense. Such cases are referred to us because Disciplinary Counsel has concluded that the problem should be addressed in some meaningful way. Perhaps the lawyer has not recognized the ethical issue. Perhaps a letter of apology is due. Perhaps the Respondent needs some additional training in a specific area of the law. Perhaps the Assistance Panel finds there are no ethical issues to be addressed. There are a host of responses that may be appropriate. It is the job of the Assistance Panel to determine what that response should be.

Many cases involve a combination of both situations. Regardless of whether this case involves minor misconduct or a disagreement that needs to be mediated, the basic format for addressing your case is the same.

First, the Assistance Panel will already have some familiarity with this situation. It will have a copy of your complaint and a copy of Respondent's answer.

Second, the parties will meet with the Assistance Panel, either separately or together as that Panel deems appropriate. Each of you will be given an opportunity to explain your perspective on the events that led to the filing of the complaint. At this point, panel members will often pose questions or engage in a discussion with the parties. The atmosphere is informal.

At the conclusion of this dialogue, which often takes about an hour, the parties will be excused for a few minutes so that the panel members may confer among themselves. The Panel will then meet again with the parties and discuss the Panel's recommendations as to how the case should be resolved.

After hearing the case, the Assistance Panel may decide that this matter is not appropriate for informal resolution. In such situations, the Assistance Panel has the authority to refer the case to Disciplinary Counsel for further investigation and perhaps filing of formal charges. That will be up to Disciplinary Counsel to decide. None of the information learned by the Assistance Panel, however, can be conveyed to Disciplinary Counsel. The proceedings will remain confidential.

In most cases, however, the matter is resolved then and there. If there are any conditions imposed upon the Respondent, those conditions must be satisfied before the case is closed.

This is a voluntary process, and Respondent has already agreed to participate. If conditions are imposed by the Assistance Panel, Respondent is obligated to meet them. Failure to satisfy conditions may itself lead to a separate disciplinary action against Respondent. However, if Respondent meets the conditions, the case is closed, and it is carried on the Respondent's record as a dismissal.

In every case, the proceedings before the panel are completely confidential. There will be no record. No information obtained during the meeting with the Assistance Panel can be shared with Disciplinary Counsel.

We hope the benefit of this program is that cases will be resolved promptly and in an educational, not punitive framework.

If you have any questions, I would welcome the opportunity to discuss this matter with you further. Please do not hesitate to call me at 802-251-2023. I am generally at that number on Tuesday through Friday between 8 a.m. and 1 p.m.

Very truly yours,

Wendy S. Collins

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*Wendy Collins' primary office is located in Brattleboro. However, mail should be directed to the Montpelier office.