Vermont Bar Association

Seminar Materials

Following Moses, Breaking Commandments, and Receiving Edicts From on High

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Fairlee, VT

Faculty:
Paul Gillies, Esq.
Hon. Robert Mello
Susan Swasta
William Wargo, Esq.
Moses Leads the Way
Vermont Superior Court Judge Robert A. Mello discusses Moses Robinson and his crucial role in the creation of an independent judiciary in Vermont.

Breaking Commandments
Paul S. Gillies, Esq. provides a historical survey of the egregious behavior of lawyers and judges in Vermont.

Documenting the Judicial Past
Vermont Archivist Susan Swasta presents a historical overview based on archival resources with a focus on the Vermont Court Records Project.

Using the Past in the Present
Paul S. Gillies, Esq. discusses sources of legal history for the practitioner. Paul is the author of *Uncommon Law, Ancient Roads, and other Ruminations on Vermont Legal History*, just published by the Vermont Historical Society and partially funded by the Vermont Bar Association.

Speakers:
Vermont Superior Court Judge Robert A. Mello
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Susan Swasta, Archivist II, Vermont State Archives and Records Administration
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Outline of
Remarks by Superior Judge Robert A. Mello on:
MOSES ROBINSON AND THE CREATION OF AN INDEPENDENT JUDICIARY IN VERMONT

Why such a familiar idea as the need for an independent judiciary is still worth discussing.
The judiciary was not always independent.
There are valuable lessons to be learned by recalling how and why it came about.

Before 1776 judges in America were an “appendage of royal authority.”
They generally enforced royal policies at the local level.
They were “much scorned” by the populace.

For Vermonters, the Albany eviction trials of 1770 provide a spectacular example of what can go wrong when judges are not independent and impartial.
The suits were designed to evict settlers from land claimed by political cronies of New York’s royal government.
The judge had a financial interest in the outcome.
The judge did not follow the rule of law.
The settlers viewed the outcome as a travesty of justice.
The rulings sparked Vermont’s revolt from New York.

The outbreak of the American Revolution did not immediately bring independence to the judiciary.
Popularly-elected legislatures limited the kinds of cases courts could hear.
They exercised appellate jurisdiction over the courts, often reversing their decisions and ordering new trials.
Moses Robinson is elected Vermont’s first chief justice in 1778, but he continues to also serve as a member of Vermont’s executive branch of government.

The Vermont Supreme Court’s May 1779 Westminster Term
Chief Justice Moses Robinson follows the rule of law over the objection of Ethan Allen in dealing with “Yorkers” revolting from Vermont’s new self-declared government.
Robinson also awards damages to “Pompey Brakkee, Negro” for the value of services provided to the man who claimed him as his slave.
The May 1779 Westminster Term was a defining moment for the Court.

Vermont’s judiciary becomes independent in 1786.
A Constitutional convention is convened in Manchester, Vermont.
Moses Robinson is elected President of the convention.
The convention adopts a sweeping separation of powers provision.
The convention adopts amendments guaranteeing the independence of the judiciary.
The convention rejects amendments that would have overturned Vermont’s unique form of democracy.
Moses Robinson vacates his position on the Governor’s Council.
Vermont’s judiciary is, at last, independent.
All this occurred before the great Constitutional convention in Philadelphia.
The amendments adopted in 1786 remain a part of our Constitution today.
THE GREAT FALLS:
A Survey of the Regulation of the Profession of Law
1778-2013

In Adam’s Fall, We Sinned All.
Isaac Watts, The New England Primer (1777)¹

Aristotle, in his Poetics, measured tragedy by the depth of the fall. The fall of an utter villain is “neither pitiful nor terrible.” The tragic figure is one who is “highly renowned and prosperous,” brought down by “some great error or frailty.”²

The profession of law elevates those who are licensed, giving them special powers, beyond those inherent in the general population. Once elevated, the licensees become responsible for their acts. Justice Allen Sturtevant explained why the law should punish those who act as lawyers without credentials, and why we license lawyers: “The office of an attorney is an important one. He represents the interests and stands in the place of his clients. Great matters are entrusted to his care, and it is necessary that sufficient regulations be had with reference to them. An unqualified person in his practice is not under oath, nor has he ever satisfied the court of his qualifications and ability to practice. He is not learned in the law. He is not under the supervision or control of the courts, nor can he be reprimanded or disbarred for any unprofessional conduct. The public has a right to be protected against the unauthorized practice of the law by unqualified persons.”³ Lawyers are licensed so they can be regulated, and disbarred, if necessary.

We regulate for various purposes—to punish the respondent, to provide notice to others of what wrongs are actionable, to protect the public, and to protect the reputation of the profession. Bad lawyers are bad business for everyone, and from the beginning, the reputation of lawyers has always been bad. “No one born in Ripton,” wrote Samuel Damon, its historian, “has had the misfortune to be a doctor, lawyer, judge, or member of any of the learned professions.”⁴ Ira K. Batchelder was the only lawyer in Peru for many years, which Nancy M. Haynes explained, “is at once a credit to the town as well as to him.”⁵ “Lawyers have never thrived in this locality,” wrote Gay H. Naramore, historian of Underhill, “Cheese making or horse raising is usually esteemed more honorable as well as lucrative.”⁶

By 1869, there had been about 25 lawyers who had practiced in Lyndon. George Cahoon, an early historian of the town, wrote, “It is lucky that they were not all here together, for it would have been dry pickings, and some might have obtained a bad name; but spreading them over a

¹ Isaac Watts, The New England Primer (ed., 1777), http://www.sacred-texts.com/chr/nep/1777/. Based on a translation of Lazarus Spengler’s poem, “Durch Adams Fall ist ganz verderbt” (1524), which itself as based on I Corinthians 15:22 (“As in Adam all die, even so in Christ shall be made live.”)
³ In re Flint, 110 Vt. 38 (1938).
⁴ Samuel Damon, “Ripton,” in Abby Maria Hemenway, ed., Vermont Historical Gazetteer I (Burlington, Vt.: Miss A.M. Hemenway, 1867), 85.
⁵ Nancy M. Haynes, “Peru,” id., 212.
space of nearly 60 years, they all had had opportunities to make themselves useful. Some look upon a lawyer as a sort of harbinger of evil, but this is illiberal, his duty is suppress evil; and if governed by principle, he will endeavor to do it.”7 Before Orion W. Butler came to Stowe in 1826, there was a strong local prejudice against lawyers, who were considered, if not an absolute nuisance, “certainly no better than a necessary evil.”8 The first two lawyers in Benson stayed only a few months, were “held in poor repute” and “went elsewhere, or absconded.”9 When Concord attorney David Hibbard, Jr. died, they said the community had lost an “honest lawyer,” as if that were an anomaly.10

Lawyers are not all alike, even as they are held to the same high standards. Their relative strengths and weaknesses reflect those in the general population. Augustus Young, Stowe’s first lawyer, lacked the tact and “shrewd knowledge of human nature, so necessary to successful practice as a lawyer. The world seemed to be a little too fast for him, and he was often behind time in fulfilling his purposes.”11 How familiar that sounds. We wrestle with priorities, deadlines, and demands, leaving no time for deliberation. We take shortcuts. We forget things. We make mistakes.

“No rogue e’er felt the halter drawn. With good opinion of the law.”12 When people lose lawsuits, go to jail, fail to achieve their expectations in court, lawyers are among the first to be blamed. Some clients will complain. Some will file professional conduct complaints. Some complaints will sting, and some will be fatal (at least, to a career).

A very small percentage of attorneys fall so far that their licenses are affected. In our history, at least 40 lawyers have been disbarred, 69 have been suspended, 72 have received public reprimands, and 141 have received private admonishments. Eight have been reinstated, after disbarment.13 It is an incomplete record, however. There are voids in the reporting. Relying on what can be found in published reports of actions of the various systems of lawyer discipline over the history of Vermont, this survey attempts to sum up what lawyers have done wrong and how they have been sanctioned for those acts or failures to act, and to reflect on why it happens.

Lawyers have been sanctioned for their behaviors from the beginning, but not always by the Court.14 Charles Phelps moved to Marlboro in 1764 and opened a law office. He was the

7 George Cahoon, “Lyndon,” id., 356.
8 Id., 729.
10 Id, 978.
11 M.N. Winslow, “Stowe,” in Abby Maria Hemenway, Vermont Historical Gazetteer II (Burlington, Vt.: Miss A.M. Hemenway, 1871), 728.
12 Cahoon, “Lyndon,” Hemenway, Gazetteer I, 351. Cahoon appears to be the first to use these lines in print.
13 In re Macero, PRD Digest No. 161 (2013); In re Harwood, id., No. 157 (2013); In re Neisner, id., No. 139 (2011), In re Blais, id., No. 58 (2003); In re Lichtenberg, id., No. 1 (1999); In re Capriola, 145 Vt. 245 (1984); In re Harrington, 134 Vt. 549 (1976); In re Haddad, 130 Vt. 586 (1972).
14 Lawyer misconduct may also be punished by opposing counsel, outside the courtroom, by poisonous letters and angry talk, or even a duel. “Mr. Johnson” was a lawyer from Highgate who emigrated to the west, where he encountered another lawyer, and offended him in some way, leading the lawyer to challenge him to a duel. Johnson, having the rights to the choice of weapons and mode of fighting, named pistols, “which were to be loaded with
third settler of that place. As a Tory, his property was seized by the Court of Confiscation in 1784, including his law library, which became the foundation of the first Vermont State Law Library.15 There was an attorney in Concord named Richardson, who, “becoming obnoxious to the people, was rode out of town upon a blacksmith’s bellows.”16

Professional regulation is distinct from the criminal law.17 Some lawyers have been convicted of crime, but the most a lawyer can suffer from the disciplinary process is the loss of a license. You are demoted, returned to non-privileged status, defrocked, stricken from the rolls. A license is not a right, and not every due process advantage is given to lawyer-respondents.18 Convictions of a civil and criminal nature can have an effect on the Court’s decision to disbar an attorney. Through the power of contempt, or some power akin to it, lawyers are regularly sanctioned in situ, by trial judges.19 And there is always a legal malpractice claim, waiting in the wings.20 But in the regulation of lawyers, the standards are different.

Those standards changed over time. Before the adoption of the Code of Professional Responsibility in 1971 and the Rules of Professional Conduct in 1999, the Supreme Court had no adopted, formal set of standards by which to measure the conduct of lawyers, except by reference to the Vermont Bar Association Code of Ethics and later the ABA Canons. Earlier still, there was only discretion to guide the Court, applying the oath that attorneys took upon

\[\text{powder and ball, and each was to hold the muzzle of his pistol in the other’s mouth, and both fire at a given signal.}\]
The duel was cancelled, the offense forgiven. Warren Robinson, “Highgate,” Hemenway, Gazetteer II, 264-6.

18 Discipline of lawyers is neither civil nor criminal, but lawyers have basic due process rights, including a full opportunity to explain the circumstances of an accusation and the right to offer mitigating evidence about sanctions. In re Fink, 189 Vt. 470, 472-473 (2011), citing In re Berk, 157 Vt. at 528. A license is at most a privilege subordinate to the public interest and police power of the state. Carousel Grill, Inc. v. Liquor Control Board, 123 Vt. 93, 94 (1962).
19 These sanctions don’t directly involve the license. The conviction of a man for selling marijuana and contempt of court was reversed in 2002 when the defense attorney was found unduly coercive in pressuring the defendant to plead guilty. In re Quinn, 174 Vt. 562 (2002). A prosecutor promised if reelected to obtain a second conviction. He failed to disqualify himself from the subsequent trial. While not a sanction, the practice is disapproved of by the Court. State v. Hohman, 138 Vt. 502 (1980). A defense attorney absolutely assured client of suspended sentence and probation for pleading guilty. In re Newton, 125 Vt. 453 (1966). A lawyer was guilty of summary criminal contempt for refusing to comply with a court order that he consult with his client before withdrawing a plea agreement. In re Duckman, 179 Vt. 467 (2006).
20 The first reported appellate decision on legal malpractice is Houghton v. Leinwohl, 135 Vt. 380 (1977).
admission as the guide. A chart of sanctions over time would show that what began very slowly and tentatively at the end of the 19th century has grown into a mature system today, with the resources and administrative support necessary to ensure its own integrity.

Before we get to integrity, let’s start with authority. Although early laws gave the Court the right to admit attorneys to practice, and impliedly to delicense them, Justice Sherman Moulton noted in 1932 that, “The Court's inherent power of discipline is not derived from the Constitution, or, necessarily, from the statutes of the State. It has existed from time immemorial.” In 1988, Chief Justice Frederic Allen refined that idea, explaining, “The inherent power of discipline exists in the trial courts as well, albeit their powers are less than those of this Court.”

1. Authority to Regulate

The 1974 Constitutional amendments gave the Vermont Supreme Court the express constitutional power to discipline attorneys. “The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in this State.” Prior to 1974, the power was described by legislation. The first act of the first legislature was to regulate attorneys, in 1778. This law authorized the superior and county courts to “approve of, nominate and appoint” attorneys who would take the oath:

You ____________ solemnly swear by the everliving God, that you will do no falsehood, nor consent to any to be done in the court; and if you know of any to be done, you shall give knowledge thereof to the judges, or justices of this court, or some of them, that it may be reformed: you shall not, wittingly and willingly, or knowingly, promote, sue or procure to be sued, any false or unlawful suit, nor give aid or consent to the same: you shall demean yourself in the office of an attorney within the court, according to the best of your learning and discretion, and with good fidelity, as well to the court, as to the client. So help you God.

The statute ordered that “whosoever shall transgress rules of pleading appointed by any court, shall be liable to suffer such fine for every such offense as the said courts shall impose, not exceeding the sum of five pounds.” Attorneys were obliged to charge no more than a schedule of fees, and added, “the party that shall recover judgment shall have his attorney’s fees according

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21 In re Haddad, 106 Vt. 322, 325-326 (1934). In 1966, Elias F. Haddad moved for setting aside his judgment for disbarment in 1966 because 32 years had passed since the judgment. In re Haddad, 126 Vt. 85 (1966). Finally, in 1972, while denying his petition for reinstatement, the Supreme Court allowed Haddad to take the bar examination after finding he had overcome any concerns the Court had about his moral fitness with decades of good behavior and good works. In re Haddad, 120 Vt. 586 (1972).
24 Vermont Constitution, Ch. II, Sec. 30.
26 “An act for the appointment and regulating attorneys,” February 17, 1779, State Papers of Vermont XII, 89.
27 Id.
to the above regulations, allowed as part of cost of trial.” The fee for each case in the superior or county court was six pounds, as compared with the county surveyor’s per diem fee of six pounds, ten shillings. Surveyors enjoyed a better income than attorneys at that time.

The law was amended in 1787 to give the Supreme Court of Judicature—renamed from the Superior Court—the exclusive right to appoint and admit attorneys at “their bar,” and county courts to admit attorneys to their venues. The 1787 act also required attorneys to have at least three years of study with a Vermont licensed attorney or have earned a B.A. at a university or college and studied two years, and to pass an examination, to show “competent knowledge of the Laws for that purpose,” prior to admission. The courts were given the power to suspend or displace any of their attorneys for misdemeanors, or fine them not exceeding ten pounds for each offense.

A further refinement in 1789 explained that the 1787 act had not intended to exclude any attorney of good moral character who was in regular and approved practice in a neighboring state for more than three years, lived in Vermont and owned land for two years, from being examined and admitted, even without the local study. This statute is the first use of the phrase, “good moral character” in Vermont law as applied to attorneys. This became not only a precondition to admission, but a measure of continuing fitness to practice, but not for another century. “Moral character” is a troubling concept in a court of law, with natural law overtones, but it is a standard, however ill-defined, and no legitimate system of governance can remain respectable without standards.

The Judiciary Act of 1797, a product of the hand of Nathaniel Chipman, consolidated the various acts relating to the courts. Attorneys could be admitted to practice by passing an examination conducted by the county courts, and showing a competent knowledge of law and good moral character. Admission to the Supreme Court was by a similar process.

The first legislative act devoted exclusively to attorney misconduct was passed in 1807, and governed “attorneys and pettifoggers.” The use of the latter term reflected the general

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28 “An act in addition to an act, entitled, an act for the regulating and stating fees,” October 27, 1779, State Papers of Vermont II, 184, 185. All fines were “three-folded,” meaning, recovery for violation of the law was punished by treble damages or three times the overcharge.
29 “An act for the appointment and regulation of attorneys and proceedings at the bar,” March 7, 1787, Laws of Vermont (1785-1791), ed. John A. Williams, State Papers of Vermont XIV (Montpelier: Secretary of State, 1966), 216-217. The provisions of this act were suspended as they applied to Orange County in 1788, as there was but one practicing attorney in the county and a “real and immediate necessity” for more. Jedediah Parker Buckingham, who had been admitted in another state, was admitted without the local study or the exam. “An act to dispence with an act intitled, ‘an act for the appointment and regulating attorneys and pleadings at the bar,” October 17, 1788, State Papers of Vermont XIV, 399.
31 See In re Appeal of Jam Golf, LLC, 185 Vt. 201 (2008).
Attorneys were expressly forbidden under that act from entering into combinations to prevent another attorney from appearing in any cause, on penalty of thirty-three dollars. An attorney entering an appearance without being employed by the party, charging that non-client fees, or attempting to collect the same, would “have his name erased from the list of attorneys of said court” and become incapable of practicing before any court, until reinstated. There was also a penalty of twenty dollars for charging undue costs. Attorneys entering into agreements with sheriffs or other law enforcement office to delay a writ of execution or engineer the jailing of persons because of a writ at different times, rather than as one service, for the purpose of encouraging an additional case, or other speculating practices, would be fined sixty dollars.  

The fines changed over time, but laws prohibiting attorneys from appearing in a suit without being employed, commencing a suit in the name of an assignee to enhance costs, colluding with officers to delay execution, speculating to increase fees, and taxing or recovering unlawful costs, remained in statute. These laws were amended from time to time, but versions of them are found today in Title 13. Fees for transactions were not set by statute, but bills of costs to the recovering party for writs returnable in county court could not exceed one dollar.

The attorney’s oath changed with the adoption of the Revised Laws of Vermont (1880):

> You solemnly swear, that you will do no falsehood, nor consent that any be done in court, and if you know of any, you will give knowledge thereof to the judges of the court or some of them, that it may be reformed; you shall not wittingly, willingly, or knowingly promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney within the court, according to your best learning and discretion, with all good fidelity as well to the court as to your client. So help you God.

The oath no longer required attorneys to demean themselves.

In 1919, the legislature enacted a statute on disbarment. Complaints for disbarment were to be presented to a Justice of the Supreme Court, when the Court was not in session, and the Justice was authorized to make orders for notice to the respondent, so that the case was ready for the next session of the Court. The justices could appoint a committee to investigate the charges, and report what was found. These laws remained in effect until 1978, when they were repealed.

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35 Id. These offenses were elaborated and extended by 1840. “Restricting Cost,” in Revised Statutes of the State of Vermont, Chapter CVI (Burlington: Chauncey Goodrich, 1840), 471-473. In 1845, a statute was enacted providing for the close confinement of attorneys in suits for money collected in the capacity of an attorney and not paid over to the party, providing the court found willful and malicious act or neglect on the attorney’s part. “County Jails and Prisoners,” The Compiled Statutes of the State of Vermont, comp. Charles L. Williams, Chapter CXII, Section 22 (Montpelier: E.P. Walton & son, 1851), 575.
37 “Salaries, Fees, etc.,” General Statutes of the State of Vermont, Chapter XXXVII, Section 35 (Cambridge, Ma: Riverside Press, 1863), 735.
By that time, the Code of Professional Responsibility was in effect for six years, the 1974 constitutional amendments for four years, and the system for the regulation of attorneys had matured. The process matured.

There are no official, published records of disbarments by the Supreme Court or county courts before 1895. There is one item before that time in a county history of Windham County, noting that between 1804 and 1840, the Windsor County Bar Association recommended the disbarment of two attorneys for violating the rules against exorbitant fees, which the Court granted. The attorneys’ names were not listed in the report, however. Today, fee-setting by attorneys might raise anti-trust or consumer fraud concerns, but originally fees were set by legislation. The first act of the first legislature set attorney’s fees.

The disbarment and regulation of lawyers was not publicized in early days, perhaps to avoid embarrassing the profession. Individuals would simply move to another state, or retire. The county court records, now being processed at the State Archives, will reveal more details about that history.

2. The Vermont Bar Association Committee on Professional Conduct

The Vermont Bar Association was formed in 1878. The profession was not new, but a statewide organization was. There had been county bar associations from the beginning of the century. The first VBA constitution provided that all members of the bar who had received notice of the first meeting, and attended, were members by signing the roll and paying the admission fee. Any other member of the bar in good standing could be admitted if nominated by the committee on admissions, and elected at a regular or special meeting of the association, but not if ten members voted in the negative. That is the first indication that the bar association was not going to be open to any lawyer. This illustrates the dichotomy—lawyers were admitted to practice by the County and Supreme Courts—but they were subsequently added to the rolls of the Association only by nomination. Vermont never linked the courts with the Association, as in most other states. But the courts depended on the Association in matters of discipline more than it does today, before 1970.

The first VBA constitution required the appointment of a standing Committee on Professional Conduct, which would provide a report at each annual meeting. It also provided that, “Any member may be suspended or expelled for misconduct in his relations to the

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41 Lewis Cass Aldrich and Frank R. Holmes, History of Windsor County (Syracuse: D. Mason & Co., 1891), 188.
42 “An act regulating attorneys and their fees,” March 17, 1778, State Papers of Vermont XII, 27.
44 The present VBA Constitution gives the Board of Managers the power to admit lawyers to the association. VBA Constitution, Sec. II, https://www.vtbar.org/ABOUT%20US/History%20Mission/VBA%20Constitution.aspx
45 According to the ABA, only 14 of the 50 states and the District of Columbia have voluntary, rather than unified bar associations. http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html
46 VBA Constitution (1878), 7.
association, or in his profession, by vote of the association, on the recommendation of the committee on professional conduct.” 47 The Committee was not active for the first several years, and the first time a report of the Committee was called for, at the 1891 annual meeting, the President recognized Charles Prouty, a Newport attorney, to report to the Association. “Well, sir,” said Prouty, “I didn’t know that there was a committee, or that I was chairman, and if I knew now what sort of a report is expected to be made I would try and make it. I don’t know the scope of the committee; no member here requires to be told of his professional conduct; if there is, we had better get rid of him.” 48 Prouty went on to report that no charges of unprofessional conduct had been preferred to the committee during the past year. Year after year, the committee either made no report, or reported no activity.

In 1908, the committee proposed a Code of Ethics for the profession, but it was tabled until the following year, when it was adopted. 49 The Code was not punitive in tone, as the later Code and Rules would be. It was more ethics than a prescription for sanctions, tending toward what has recently been called “Professionalism.” The Code contained 56 paragraphs and covered subjects such as candor and fitness, a rule against disparaging members of the profession, how far an attorney may go in supporting a cause, the prohibition of an attorney from attacking his own instruments and conveyances, and the need to avoid making bold assurances to clients. The Code treated the “Duties of Attorneys to Courts and Judicial Officers” first, and began with the thought, “Bad opinion of the incumbent [judicial officer], however well founded, can not excuse the withholding of the respect due the office while administering its decisions.” It concluded that, as a rule, attorneys should “refrain from public criticism of judicial conduct, in reference to causes in which they have been of counsel, other than in courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.” It urged attorneys to sedulously avoid “[m]arked attention and unusual hospitality” to judges, as that behavior “subject both judge and attorneys to misconstructions.” 50

The code reflects its time. As expected, there was more formality in the law at that time. Lawyers were expected to be gentlemen and manners were as important to reputation as success in the courtroom. The code provided, for instance, “[w]hen an attorney has been employed in a cause, no other attorney shall accept employment as his associate, without previously ascertaining that his employment is agreeable to the attorney first employed.” 51 Discussing a lawyer’s attitude to the jury, the Code explained, “It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury’s fatigue or hunger, and uncomfortableness of their seats, or the court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court, whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards the court or opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of

47 Id., 12.
50 Id. Note: The 1909 Code appears as Appendix B in this survey.
51 Id., 318.
the jury, to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws."52 These are still good rules of practice, but today’s Rules don’t begin to address such details.

The VBA constitution was amended in 1914 to require all complaints of unprofessional conduct to be referred to the Committee, and for the Committee to investigate all complaints, “with power to caution or reprimand the offender, or prefer charges against him for disbarment.”53 This is the first specific articulation of the Committee’s authority. In 1922, the constitution was further amended to direct the committee to treat all convictions for criminal behavior involving moral turpitude by attorneys as complaints to be investigated and reported and added authority to “advise members of the profession respecting questions arising under the Code of Ethics.” The Committee reported on three convictions, but found two not to involve crimes of moral turpitude. It was the third that created a small crisis for the Association.

The Question of What to Do with Horace Graham

Horace Graham was convicted of grand larceny of state funds, in the year following his retirement as Vermont Governor, sentenced to five years at Windsor State Prison, and then pardoned by the outgoing Governor in 1920. The Committee voted three-to-two to recommend his prosecution by the Attorney General for disbarment, and that “his name should be stricken from [the] roll of attorneys of the Supreme Court.” The issue came to a head at the 1922 annual meeting of the Association. The crime had occurred when Graham was serving as Vermont Auditor of Accounts, and the Association was divided on whether he had been judged sufficiently by the criminal process and whether the pardon washed away all of his misconduct. W.B.C. Stickney had defended Graham at trial, and played the same role at the Association meeting. Harry Shurtleff was the chief inquisitor, and an advocate for referral, but many attorneys were engaged in the argument.

Fred Laird, a Montpelier lawyer, said, “if this Association is going to amount to anything, as regards discipline in lawyers, as regards setting a high moral standard, as regards making an impression upon a lawyer that he must be honest and take care of funds in his hands, and trust funds, and everything else; and then when a prominent man comes up they have got to stand up just the same as if that was a little fellow.”54 Another described a young client of his who had served time in state prison for stealing as little as $20. Graham had taken more than $25,000 from state funds for his own purposes, and had repaid most of it.

“Let those who are without sin among you cast the first stone,” argued 72-year-old Charles R. Tarbell, a South Royalton attorney, making his maiden speech before the VBA.55 The debate drew strong feelings from partisans of Graham, and those who were determined that some action be taken. When one member suggested “we proceed to vote without any further

52 Id., 320.
54 Id., 54.
55 Id., 56.
Horace Graham was well loved by many leading members of the bar, and when the proposition was put to a vote Graham escaped referral by a vote of 34 to 37. Harry Shurtleff, a Montpelier attorney who as a member of the Committee on Professional Conduct, quickly moved that the Committee “be instructed not to proceed against any member guilty of any offense less than that of Horace F. Graham.” The motion received no second, and failed.  

A few years later, the Committee also reported sending a reprimand to an attorney who had neglected to settle “for a substantial settlement collection made by him” in 1924. This is the first documented reprimand against a lawyer by the VBA.

The 1925 Committee reported that a petition for disbarment was pending against Charles Batchelder, a former Bethel attorney. He had left the state and his whereabouts was unknown. The evidence obtained by the Committee revealed several embezzlements from clients. “We believe the arm of the state should be stretched to the utmost limit to find this man; and that, when found, he should be placed upon trial for embezzlement which he is accused of. Whatever the final outcome of these accusations might be, it is demoralizing to the profession to permit an attorney of this State to act as Charles Batchelder has, and get away with it.”

As a further incentive toward good behavior, and in the spirit of its role as educator-enforcer of lawyer conduct, the Committee recommended that “a short code of ethics in parchment form, suitable for framing be prepared by the Association, and delivered to all attorneys in the State and thereafter to each successful applicant for admission to the Bar.” There is no reported disbarment of Batchelder in the Vermont Reports, but the parchment wall-hanging has continued to be made available to new attorneys since that time. Of course, the single page cannot substitute for a full set of rules of conduct.

The 1927 Committee reported that it had found no reason to disbar a member or refer his name to the Attorney General who was guilty of failing to pay taxes on theater admissions, because that crime was only a misdemeanor under federal law, and passed on another member’s conviction for selling intoxicating liquor on the ground that such an offense did not involve moral turpitude. A private reprimand followed the discovery of a collection letter threatening publicity unless payment was made. In all, however, the Committee was pleased with what it found. “The Committee congratulated the Bar of Vermont upon its high standard of Professional Ethics.”

In 1929, the Committee reported having sent a “severe reprimand” to an attorney who

56 Id., 68.
61 Id., 90.
had taken money from two collection agencies and failed to file any writ to put the claims into judgment, on account of his great carelessness and regret.\(^{62}\)

At the 1931 annual meeting, the Committee explained that it did not recommend adoption of the ABA Canon of Legal Ethics, finding the 1909 Vermont Code sufficient, and the differences between the VBA and ABA versions “trite and obvious.”\(^{63}\) One referral for disbarment was made to the Attorney General by the Committee that year, but the report gives no details.

For failing to collect and pay over clients’ funds, the Committee referred a complaint for disbarment against Alfred P. Killeen, a Bellows Falls attorney in 1935.\(^{64}\) Killeen’s name does not appear in any reported disbarment by the Supreme Court. That year the Committee also “felt called upon” to criticize an attorney for “lack of diligence rather than by unprofessional conduct,” but his name is not reported.\(^{65}\)

The business of reviewing complaints increased over time. In 1938, the Committee reported receiving 25 different complaints involving 19 attorneys, largely dealing with failures to “properly account for money collected,” treated as the result of a “tendency to procrastination,” acts committed largely with “good intentions.” Rather than referring the case, the Committee felt compelled to remind the bar of their duties in this respect.\(^{66}\) The Committee reported receiving an opinion from the ABA Committee on Unauthorized Practice, as help in deciding how to handle a complaint against a lawyer for running a collection agency, and decided he was guilty of unprofessional conduct for soliciting business under a trade name. Deane C. Davis was the chairman of the Committee that year, and finished by stating, “If by any strange mischance the next President of this Association should be tempted to reappoint the members of this committee, we most respectfully and forcefully suggest that the honors of this kind should be passed around.”\(^{67}\) Davis was reappointed chair of the Committee for several years following, until he was elected VBA President in 1943.

In 1939, the Committee was busy with eight complaints, three of them “of sufficient gravity” to justify further action. They held hearings in Montpelier. One involved an attorney who had represented a respondent charged with adultery and then never mentioned her admission of guilt in his defense of her divorce action, where she claimed she had not violated the marriage vows. The lawyer never revealed the deceit to the Court.\(^{68}\) In another, the attorney had invested in the property that was the subject of a lawsuit, and by that action deprived his client from getting the money he should have received. The last involved withholding of money


\(^{65}\) Id., 62.


\(^{67}\) Id., 93.

\(^{68}\) This case was handled by the Vermont Supreme Court. See In re Goodrich, 111 Vt. 156 (1940).
and failure to account, the second of two similar complaints against the same attorney in several months. The Committee filed charges in only the first matter with the Attorney General. 69

The Committee also issued its opinion in 1939 that full time State’s Attorneys should not take private cases, given the possibility of a conflict. 70 It censured an attorney for unreported misconduct in 1943, described merely as “the manner in which he dealt with clients.” 71

The Committee reported one attorney to the Attorney General in 1944 after his conviction for perjury, without recommendation. A second complaint reflected the problem of a failure to respond to the disciplinary process, presaging similar problems with challenged lawyers in the years ahead. The lawyer had failed to account for a collection award, retaining money for over two years. He didn’t answer the Committee’s letters and repeated requests for a hearing. Eventually he told the Committee this matter needed to wait until the war was over, as he was at work in a defense plant in Connecticut. Exasperated, the Committee referred the complaint to the Attorney General for appropriate action. 72 The following year, it referred another complaint for further investigation and action and issued a letter of reprimand to another attorney, for undefined misconduct. 73

Two attorneys were reprimanded in 1948, for threatening a debtor with jail and padding bills. The Committee also explained it had given opinions on the Code of Ethics, as required by the VBA constitution on conflicts of interest, adding, “Personal sacrifice of financial reward in such cases adds professional honor and dignity and elevates the profession in public esteem.” The Committee recommended adopting the schedule of uniform rates of the Commercial Law League of America, but that part of the report was not accepted. 74

The Committee explained it had met with the Supreme Court during 1950 “as to the necessary elements of some of the matters that the Committee feels should be presented to the Court for its consideration.” 75 An attorney was censured in 1952 for failing to keep to an agreement with a client. 76 In 1953, the Committee reprimanded the complainant, an inmate in the State Prison, for flagrantly misrepresenting the facts of a complaint. 77 Another censure was

69 VBA Proceedings 1939, 85-87. 
issued in 1954 for an attorney conferring with the wife in a divorce case when she was represented by counsel.78

The report of the Committee in 1960 described two complaints of conduct that stemmed from “lack of an adequately close relationship and understanding between lawyer and client,” which the Committee noted was a significant factor in most complaints.79 That year the Committee recommended the adoption of the Canons of Judicial Ethics, prepared by the ABA.

Over time, the Committee became more involved in settling disputes between clients and attorneys, getting money returned, fees adjusted, and files transferred to new counsel, becoming an arbitration panel and an advisory board, rather than exclusively a generator of formal complaints. The focus changed from discipline to correction and avoidance of problems. After the Professional Conduct Board was created by the Court in 1969, the VBA committee’s direct work on disciplinary matters ended, and the system of providing opinions on ethical issues was expanded and has continued to this day.80

The Committee members spent many hours over the years reviewing complaints, investigating them and holding hearings. They played an important role in the regulation of the profession, but they were never empowered to act, beyond referrals to the Attorney General and the occasional censure, which today would be treated as an admonishment. In all of the various reports, attorney’s names are rarely given, reflecting the closed nature of what would become a very public process, once the business of regulation became exclusively a Court function.

The Committee’s work over nearly a century also illustrates the problem of privacy in professional regulation. Many complaints are groundless. Premature publicity about them unfairly damages reputation. But what the complaints reveal about the practice of law cannot be hidden under a basket. The same problems have existed from the beginning—commingling funds of clients with those of the lawyer, missing deadlines, and disputes over fees. The lasting value of human experience extends beyond the parochial needs of the individuals involved. There must be a record of what was done, a set of principles and stories to illustrate how they will be applied. The practice of law doesn’t come with an operating manual, and no code can predict every conflict or hard question. But the sanctions others have suffered are lessons no one dares to ignore.

The Committee’s record over the 92 years of its official role as a professional grand jury consists of seven referrals to the Attorney General for disbarments and eleven reprimands or censures, plus one reprimand of a complainant. The VBA carried the process as far as it could go, but professional discipline could not remain within the filter of the Association to maintain credibility and avoid the perception of favoritism. Only the Court could take formal action.

80 The opinions from 1978 to the present are now found through the VBA website at http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/advisoryethicssite/INDEX.htm.
Before 1971, when equity and law were at last merged, suspension or disbarment involved two separate courts, so if an attorney was disbarred, he lost two offices— as an attorney-at-law and a solicitor in chancery. Between 1895 and 1970, the Court disbarred eight attorneys. The reasons, articulated in Vermont Reports, consisted of overzealousness in pursuing client’s interests, leading to conviction of a felony involving extortion;81 conviction on eleven counts of embezzlement of funds entrusted to his care by others;82 forging names of clients and others on various legal documents and diverting client’s funds to his own use;83 converting client’s funds to the attorney’s own use;84 exaction of excessive and unconscionable fees and fraud upon clients;85 perjury for the purpose of deceiving and defrauding the court of chancery;86 misconduct in prosecuting recognizances for liquor law violations as State’s Attorney;87 and fraudulently pretending to have knowledge of certain facts, offering to sell the same to the opposing attorney, to induce an offer of settlement which would not otherwise be made.88

In that time, the Court suspended nine lawyers. The suspensions were for participating in the planning and execution of a plan to entrap a libellee in a proposed divorce action in a compromising situation with a young woman hired for purpose of entrapment (one year);89 receiving a political contribution in consideration for promised support to candidate for public office (four months);90 failing to file income tax returns (four months);91 failing to file federal income tax returns with a plea of guilty (four months);92 representing one spouse in first divorce proceeding (then withdrawn) and other spouse in second divorce action (three months);93 falsely stating at court that he had not entered jury room and conversing with jurors during trial (six months);94 permitting a libellant to take an oath to libel for divorce containing a false statement that libellant had faithfully kept the marriage covenant when the attorney knew that libellant had pleaded guilty to charge of adultery, failure to know the rule of law that uncondoned adultery is a

82 In re Reiter, 127 Vt. 98 (1968).
83 In re Milne, 126 Vt. 69 (1966).
84 In re Mangan, 113 Vt. 246 (1943).
85 In re Haddad, 106 Vt. 322 (1934). Attorney’s attempted resignation denied and he was disbarred. As to what precisely he did, the Court dismissively explained, “the details of which it is not necessary to state.”
86 In re O’Brien, 93 Vt. 194 (1919). The perjury occurred in respondent’s testimony as a witness in court swearing that he had no knowledge of evidence at the time of trial, to allow for a new trial. He was accused of “knowingly, falsely, corruptly, willfully, and wickedly” lying. The use of words like “wickedly” introduces a moral element into the offense.
87 In re Jones, 70 Vt. 71 (1898).
88 In re Enright, 67 Vt. 351 (1895).
89 In re Knight, 129 Vt. 428 (1971).
91 In re Calhoun, 127 Vt. 220 (1968).
93 In re Themelis, 117 Vt. 19 (1951). The commissioner, who prosecuted, had petitioned for disbarment.
94 In re Holden, 114 Vt. 184 (1945). The attorney had been in the jury room talking to one juror, within the hearing of two others, for about five minutes, and there was no evidence he was talking about a case on trial or other litigation or anything to do with court or court procedure, but lying about it triggered the suspension. The sanction was imposed for speaking a “falsehood in court.”
bar to granting a divorce on those grounds (one year);\textsuperscript{95} defending a client before the Liquor Control Board while serving as State’s Attorney, who is charged with prosecuting violations of the liquor control law (three months);\textsuperscript{96} and attempting to collect costs of a suit for a client without ascertaining whether the settlement made provision for the costs (one year).\textsuperscript{97}

Two lawyers were censured or reprimanded by the Court in that time, one for failing to file federal income tax returns;\textsuperscript{98} the other for conversion of funds collected for a client. In the second the Court considered mitigating evidence of the Attorney’s good reputation for truth, honesty, and fair dealing; the absence of any attempt to conceal the shortage; the possibility that it was caused by his wife drawing on his bank account without his knowledge; his restitution to client; and his war activities just before and after conversion.\textsuperscript{99}

If there were disbarments, suspensions, and reprimands, private or public, they are not reported before 1895. The reason for this is unclear, although most likely these matters were regarded as confidential. In other states, where membership in the bar association is a prerequisite for maintaining a license to practice law, these affairs could be handled less publicly, without the need for court action. Full disclosure of lawyer misconduct is a feature of the later part of the 20\textsuperscript{th} century. Before then, rumor and innuendo was all that the public had available to learn why a particular office closed or an attorney moved to another state.

Only in the last decades of the 20\textsuperscript{th} century are there sanctions—disbarments and one public reprimand—based on the decisions of other state courts, reflecting the growth in the regional practice of law and the necessary linkages that seek to prevent a lawyer from fleeing a bad record and starting over after lighting out for the territory.\textsuperscript{100}

\textbf{Enright and Reinstatement}

\textsuperscript{95} In re Goodrich, 111 Vt. 156 (1940).
\textsuperscript{96} In re Wakefield, 107 Vt. 180 (1935). This suspension was justified by treating the Code of Professional Ethics adopted by the Vermont Bar Association as authority, as well as an opinion of the ABA Committee on Professional Conduct (1935). This case was prosecuted by the Attorney General.
\textsuperscript{97} In re Aldrich, 86 Vt. 531 (1913). Prosecuted by the Attorney General and State’s Attorney, who sought disbarment. In this case, a committee appointed by the Court conducted the investigation and provided a recommendation. Respondent had agreed to accept half of the recovery. The case involved multiple counts, most of them dismissed by the Court, including one in which respondent was accused of embezzling client’s funds by charging too much for his services, because he was adhering to a rule of the Orleans county bar adopting “term fees,” although the Court explained, “excessive charges cannot be justified by a rule of the bar association.” See Davis v. Farwell, 80 Vt. 166 (1907), recognizing the right of an attorney to retain client’s money as security for the payment of his fees.
\textsuperscript{98} In re McShane, 122 Vt. 442 (1961).
\textsuperscript{99} In re Paddock, 114 Vt. 207 (1945). In the midst of a trial, respondent was called to guard the Whitingham dam for two weeks, then to guard the General Electric plant at Pittsfield, Massachusetts, then to an aircraft plant, returning to his office each week to work in his law practice for a day and a half a week.
\textsuperscript{100} Mark Twain, The Adventures of Huckleberry Finn (New York: Library of America, 1982), 912 (“[I]f I knowed what a trouble it was to make a book I wouldn’t a tackled it and ain’t agoing to no more. But I reckon I got to light out to the Territory ahead of the rest, because Aunt Sally she’s going to adopt me and sivilize me and I can’t stand it. I been there before.”)
J.J. Enright was disbarred in 1895 for offering evidence to the opposing party’s attorney that would destroy his own client’s case, if he was paid $400.\textsuperscript{101} The lawyer and his client had both been sued, and Enright’s settlement offer was intended to relieve him of his exposure in the suit. His first problem was trying to be both counsel and party. Worse yet, there was no such evidence—he had made that up. The oath to do no falsehood and the obligation to be straight with the Court was an attempt to secure an “unfair and fraudulent settlement, . . . a plain violation of his oath and of his duty,” according to the decision signed by Chief Justice Jonathan Ross.\textsuperscript{102}

Two years later, he petitioned for reinstatement.\textsuperscript{103} Enright’s sole defense was an apology, “that he has realized and appreciated, to the fullest extent, and with the most intense feeling, all the grave consequences of his removal; that he has suffered greatly from loss of business and the consequent taking from him of his means of livelihood that has been the result of it; . . . that to continue his punishment would be unnecessary to his discipline, or for public example, and would be unnecessarily severe for the offense charged.” The Chief Justice was unmoved by this argument. This isn’t only about the attorney, he stated, but the protection of the Court and the community. “To restore him to the office of attorney for the reasons set forth in the petitions would, in effect, abrogate the rule requiring the applicant for admission as an attorney to establish that he is of good moral character, and furnish Mr. Enright an opportunity to repeat the commission of the same offense for which he was disbarred, and of other offenses of like character. If the present had been his original application for admission to the bar, he could not be admitted, without more being shown than what is contained in these petitions.”\textsuperscript{104} His petition was denied.

**Disbarment of a State’s Attorney**

State’s Attorney Joseph C. Jones was disbarred in 1897 for failing to prosecute a large number of cases for trafficking in intoxicating liquor, causing the State to lose the opportunity to claim bail forfeitures because of his failure to serve the defendants in a timely manner.\textsuperscript{105} Compounding the problem, he lied to the Court about the situation, “intentionally omitting to state frankly and fairly what had been done in those suits.”\textsuperscript{106} Jones defended by claiming that he was answerable only to the voters, not the Court, as an elected prosecutor, but the Court was unmoved.

Responding to Jones’s claim that he should be entitled to a jury trial, Judge Laforrest Thompson, writing for the Court, stated, “it is manifest that the object of admission to the bar is to bring to the [administration] of justice a class of high-minded men, of such education and training, and such mental and moral qualifications, as can and will aid in determining the rights and duties of all litigants, under all circumstances, according to law, so that the administration of the law may be pure, clean, and enlightened, and thereby every one obtain his exact rights and privileges. When one so admitted, by his conduct as an attorney, or as an individual, shows

\begin{footnotes}
\item[101] In re Enright, 67 Vt. 351 (1895).
\item[102] Id. at 352.
\item[103] In re Enright, 69 Vt. 317 (1897).
\item[104] Id. at 319.
\item[105] In re Enright, 69 Vt. 317 (1897).
\item[106] Id. at 78.
\end{footnotes}
himself unworthy of his high calling, and disgraces the office, it is the duty of the Court, empowered to admit, to withdraw the rights and privileges conferred by the admission. It does this, not primarily as a punishment to him, but to protect the administration of justice.”107

The Court recognized the gravity of its decision. Thompson wrote, “The charges touch the fidelity and integrity of the respondent, and show him to be unworthy to minister at the altar of justice, and that under the law it is the duty of this court to withdraw from him the right which it granted by admitting him to the bar of this state. It is never other than a sad and painful duty for a court to be obliged to render such a judgment against one of its once accredited officers.”108

How the system worked in 1913

Attorney William R. Aldrich was charged with champertous undertakings in 1913 for attempting to collect costs in a suit that weren’t part of the settlement. He was suspended from the practice of law for one year.109 The decision discloses the way disciplinary matters were handled in that time. G.H. Flint, the opposing attorney, reacting to the attempt to collect costs, filed a complaint about Aldrich with the Supreme Court, but later Flint wrote the Chief Justice and asked that the complaint be withdrawn. Aldrich then wrote the Chief a letter “saying, among other things, that he had no intention of doing any act that would bring discredit upon his profession.” The Chief put the letters into an envelope and had them sent to the Clerk of Orleans County. Ten years passed before the matter was brought to the Supreme Court’s attention. As was the custom, the Court sent the papers to a committee of lawyers, who concluded they could make no presentment of wrongdoing based on claims of champerty in the charging of fees, but they noted that Aldrich’s conduct in attempting to collect costs when none were awarded was open to criticism. Recognizing that disbarment was an “immoderate” penalty, the Court could not let Aldrich off, and “merely to express disapproval or censure would be to treat lightly matters vitally affecting the integrity of the profession and the interests of society,” leading to the one year suspension.110

Wakefield

107 Id. at 87. Judge Henry Start dissented, expressing his belief that the case should be returned to the commissioners for evidence of custom and usage by State’s Attorneys. Judge Laforrest Thompson, who wrote the majority opinion, agreed with Start that it should be recommitted, but acknowledged that disbarment was the decision of the majority, and stated that he would abide by the ruling.

108 In re Jones, 70 Vt. at 87.

109 In re Aldrich, 86 Vt. 531 (1913).

110 Id. at 536.
Frederick W. Wakefield was suspended from practice for three months in 1939, for a conflict of roles.\textsuperscript{111} Wakefield was Chittenden County State’s Attorney, charged with enforcing the criminal laws of Vermont, including those relating to intoxicating beverages. He also appeared as defense counsel for Eugene Gosselin before the Vermont Liquor Control Board, at a hearing where Gosselin’s second class license was at risk, as he had sold sherry and port when he was only authorized to pour lighter alcoholic beverages. The Board complained to the Attorney General, and the Supreme Court sanctioned Wakefield for a “gross violation of the ethics of the profession.” The defense that this was common practice among prosecutors held no water; such a mixture of roles was unethical and improper. Wakefield had violated the Vermont Code of Ethics. The Supreme Court relied in part on an opinion of the ABA Committee on Professional Conduct to justify its decision.

\textbf{Goodrich}

In 1940, Ernest F. Goodrich was suspended for one year for representing a woman in a divorce case who denied violating the marriage oath, after defending her paramour and herself in a criminal case where she had pled guilty to a charge of adultery.\textsuperscript{112} The attorney had notarized her affidavit stating her innocence, and the divorce was granted on grounds of desertion by the husband. The lawyer never mentioned the conviction to the Court during the divorce, but after the facts were presented explained that the only way the judge in the criminal court would assign her counsel was if she pled guilty, which was a lie. Later the attorney admitted knowing it was a lie. Justice Olin Jeffords, writing for the Supreme Court, relied in part on the oath an attorney takes when admitted to practice, that “You solemnly swear that you will do no falsehood, nor consent that any be done in court.” This course of conduct, evidenced by the false statement in the libel and during the trial “tended to pervert and obstruct justice. There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it necessary, under any circumstances, for him to practise, or permit to be practised, a fraud on the court.”

Goodrich defended by claiming ignorance of the effect of the adultery on the right to obtain a divorce, but this didn’t carry much weight as to liability. He had practiced for eleven years, and if he didn’t know that rule of law that was gross negligence. But it did help in mitigation of the sanction. Suspension, not disbarment, was the chosen penalty. It was also important that he had apologized, justifying the Court’s leniency.\textsuperscript{114}

\textbf{Themelis and Suspension}

In 1951, an attorney was suspended for three months for representing one spouse in a divorce action, which was dismissed, and then the other spouse in a subsequent divorce action against his previous client, as well as five other conflicts of representation.\textsuperscript{115} The 1949 adoption by the VBA of the ABA’s Canons was relied on for authority. What’s interesting about the decision is the way the Court handled the defenses made by the respondent. He said it was

\textsuperscript{111} In re Wakefield, 107 Vt. 180 (1935).
\textsuperscript{112} In re Goodrich, 111 Vt. 156 (1940).
\textsuperscript{113} Id. at 159.
\textsuperscript{114} Id. at 160.
\textsuperscript{115} In re Themelis, 117 Vt. 19 (1951).
inadvertence that led to his conduct, and justified his actions by showing that the second divorce action was also dismissed, that he had the consent of both spouses, and even a decision of the trial court to allow him to continue in the case. Justice Walter Cleary, writing for the Court, agreed that consent might work to justify dual representation in a civil matter, but not with divorce. That the cases were dismissed, he concluded, did not justify the wrong. “Other interests than those of the parties are involved. Such cases often affect the rights of children, innocent and helpless victims of their parents' selfishness and sin. The attorney's duty to the court and to the public at large must be considered. The due and orderly administration of justice, the honor and purity of the profession, the protection of clients, the dignity and reputation of the court itself are all endangered.” “Mere disapproval or censure,” wrote Cleary, “would be to treat lightly matters vitally affecting the integrity of the profession and the interests of society.” In this case, “where the respondent's zeal outran his discretion, . . . it is time that a salutary lesson be given to the end that fidelity and loyalty may be duly recognized and appreciated, and that lapses therefrom may receive proper condemnation.”

The trial court’s ruling, however, helped the respondent avoid disbarment.

**Fayette and the Question of Authority**

Frederic Fayette, a prominent Vermont attorney and politician, was convicted by the U.S. District Court of accepting $3,000 as a political contribution in exchange for a promise that the donor would be appointed postmaster at St. Johnsbury. The Committee on Professional Conduct of the VBA investigated and recommended a public reprimand and, “[c]onsistent with the then prevailing policy,” the Vermont Attorney General adopted the Committee’s report. During the process of review, the Vermont Supreme Court issued two other lawyer discipline decisions, which changed the A.G.’s position on the issue. Relying on those cases, the A.G. asked the Committee to reconsider its decision, but the Committee refused, leading the Supreme Court to resolve the conflict.

One of the cases that led the A.G. to change his view was *In re Calhoun* (1968), where the Court ruled that failing to file federal income tax returns qualifies as professional misconduct, as it demonstrated a failure to perform a legal duty and tended to discredit the legal profession, violating the lawyer's duty to “uphold with strict fidelity” the profession. During the investigation of that case, the Committee worried about the effect of a recent decision that suggested disbarment was the exclusive choice for a finding of misconduct. The Court used *Calhoun* to clarify that ruling, recognizing that it could “adjust the penalty to what it finds to be the measure of culpability.”

*Calhoun*’s “strict fidelity to the profession” illustrates the inherent dilemma of lawyer discipline. It is one thing to uphold the law, but too great a dependence on protecting the profession reflects professional narcissism or guildism, which has been a complaint against professional regulation generally. Protecting the profession is the least of the values sought to be achieved in professional discipline. It’s the public that needs protecting.

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116 Id., 117 Vt. at 23-25.
In deciding whether Fayette should be sanctioned and if so by what sanction, the high Court recognized that misbehavior by a lawyer can include conduct as a candidate for public office, recognizing that “a lawyer bears a burden of responsibility that is uncommon to the ordinary citizen.” The duty extends beyond the lawyer-client relationship. Fayette violated the “letter and spirit of accepted standards of professional conduct,” and for that he was suspended from the practice of law for four months. For authority, the Supreme Court quoted the Canons of Professional Ethics of the American Bar Association, which had been adopted by the Vermont Bar Association in 1949, also citing a draft amendment of the Canons from 1968.

The *Fayette* decision recognizes mitigating factors can affect the severity of the sanction. It deferred to the VBA Committee’s conclusion that “retribution has been harsh and continuing,” which “tempered” the Court’s decision not to disbar the respondent, along with recognition that Fayette obtained no advantage from his actions, as he had to return the money and suffer the humiliation and public scorn that came with the conviction. In hindsight, this showing of compassionate mitigation seems atonal. To say one has suffered enough should not counterbalance the necessary enforcement of a law of professional conduct, and shows one of the risks in any effort to adjust a sanction based on what the lawyer did after being caught. For the process to be respected, these considerations would be better left out of the deliberations or at least the report of those deliberations, because they suggest a protectionist attitude toward the profession. The Court, through its various decisions on professional discipline, often shows its love and respect for lawyers. The same tendency is shown in many professional boards and commissions, and is a fundamental flaw in the process.

*Calhoun* and *In re Knapp* (1968), issued the same year—the cases that inspired the clarification in *Fayette*—both involved lawyers who had failed to file federal income tax returns. Each era of attorney misconduct cases reveals the culture of the period. In the 1990s, it’s marijuana and cocaine. In recessionary times, it’s trust funds that create the trouble.

*Knapp* is interesting for its explanation of process. As was its practice, the Supreme Court appointed a “three-man committee of the bar” to make findings and report them to the Court. The committee released its report, but left the decision on whether the actions constituted professional misconduct to the Court. It used the report to consider mitigation, which included serious illnesses of the respondent and his wife, but stepped back from that evidence by denying any “retreat from the standards of conduct . . . because of family problems or physical difficulties.” The per curiam decision firmly explains, “It is the responsibility of this Court to fulfill its obligation to take action to inspire and maintain public confidence in the bar admitted to practice before it, as well as to protect the public from persons unfit to serve as attorneys.” The Court then suspended Knapp from practice for four months, the same sanction that was approved in *Calhoun*. This would suggest that the Court was working on a standard sanction for similar violations, but in another income tax evasion decision, entitled *In re McShane*, issued the same year, the sanction was limited to censure and reprimand. The only explanation for a lighter penalty is the finding that there was “no bad faith or evil intent on the part of the respondent.”

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119 In re Fayette, 127 Vt. at 490.
120 In re Knapp, 127 Vt. 222 (1968).
121 Id. at 223-224.
He was blamed for his “carelessness.” There must be differences in the fact patterns, but they are not shown in the reported decisions.

The decision in *Knapp* found inspiration from a comment made by Chief Justice James Holden, in his dissent in a 1966 decision, *In re Monaghan*, a ruling on the admission of an attorney: “Attorneys are officers of the court appointed to assist the court in the administration of justice. Into their hands are committed the property, the liberty and sometimes the lives of their clients. This commitment demands a high degree of intelligence, knowledge of the law, respect for its function in society, sound and faithful judgment and, above all else, integrity of character in private and professional conduct.”

4. The Professional Conduct Board

The Vermont Supreme Court created the Professional Conduct Board for the purpose of enforcing the Code of Professional Responsibility, enacted in 1971. The PCB’s record of actions from 1990 to 1999 appears at the Department of Libraries website, and describes 149 cases. Other cases from 1971 to 1990 are reported in *Vermont Reports*. In the 28 years of its existence, the PCB’s work with the Supreme Court resulted in 12 disbarments, 16 suspensions, 34 public reprimands, and 143 private admonitions. The process of professional discipline had changed, once the VBA’s role was over. In 1973, the Supreme Court directed the PCB to sever charges against one attorney from those pending against two others, declare a mistrial against that attorney, and withhold any hearing until the other two cases were finished. The gentlemen’s club was no longer in charge, and the Court would exercise complete power over its appointed commission. In *State v. Hohman* (1980), the Court referred questions about the ethical propriety of a State’s Attorney’s conduct to the PCB. In 1988, the Court answered a certified question by the PCB of the propriety of extrajudicial statements by a lawyer in a criminal investigation. Three years later, the high court denied a motion to quash a subpoena filed by a respondent, ruling that an attorney is not entitled to a statement of charges against him before an investigative subpoena is issued, but also agreeing that prior to the issuance of a subpoena the PSB must show the factual basis, beyond conjecture and suspicion, that an ethical standard has been violated; demonstrate how relevant the information is to the investigation; and prove that the demand is not too indefinite or overbroad. By its statement, the Court amended the Code in accord with this procedure.

Disbarments Under the PCB

There were twelve disbarments in those years, based on the following conduct: representing conflicting interests, obtaining a signature to a deed through misinformation and exaggerated threat of litigation, use abuse of office as an executor, and dealing with a

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122 In re McShane, 122 Vt. at 433.
123 In re Monaghan, 126 Vt. 53, 68 (1966).
125 In re Diamond, 134 Vt. 609 (1976).
represented party; filing a lawsuit and then allowing the statute of limitations to run out, significantly injuring the complainant; lying to clients and the court, settling a lawsuit without client’s authority, submitting false evidence to the client, and representing a party in private practice in the same matter he handled as a prosecutor; for conviction of six felonies in connection with his wrongful misappropriation of client trust funds; acts of fraud, deceit, misrepresentation, neglect of client matters, failure to carry out contracts with clients, conduct prejudicial to the administration of justice, wrongful commingling of client and personal funds, failure to safeguard client funds, among other conduct; embezzling $408,260 from his law firm; misappropriation of client funds and conviction of interstate transfer of stolen goods and structuring a transaction to avoid currency reporting laws; and conviction of mail fraud. In four cases, the reported decision named the attorney, cited a Rule, gave no explanation of what conduct had inspired the action, and acknowledged the resignation of the attorney, striking his name from the rolls. While these were not called disbarments, the effect is the same. Since that time, retirement has not substituted for formal sanctions for misconduct, even if that leads to resignation (or retirement).

Suspensions Under the PCB

Sixteen lawyers were suspended by the PCB: for failing to comply with a court order for child support and spousal maintenance (six months’ suspension); for a pattern of dishonesty, deceit, and misrepresentations to the Court and clients, acting without authority, failing in his obligations of diligence and loyalty, and lying to clients, courts and other counsel (three years); for a strong pattern of neglect over a number of years with an unprecedented number of clients, misappropriation of client funds, and back dating legal documents (three years); abandoning a client and leaving Vermont, and refusing to respond to a petition of misconduct (at least six months); for a reciprocal suspension by the Massachusetts Supreme Court (three years retroactive)(reasons not specified); willfully disclosing and using confidential information from one client to the advantage of another and the first client’s detriment (three months); abandoning his practice (six months concurrent with emergency suspension); being arrested in New Jersey in the process of purchasing cocaine (two months); failing to file

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129 In re Wright, 131 Vt. 473 (1973).
131 In re Karpin, id., No. 41 (1992); In re Karpin, 162 Vt. 163 (1993).
132 In re Mitiguy, id., No. 59 (1993); In re Mitiguy, 161 Vt. 626 (1994).
133 In re Palmisano, id., No. 105 (1996); see In re Palmisano, 161 Vt. 624 (1994)(for suspension).
134 In re Abel, id., No. 117 (1997).
135 In re Thompson, id., No. 138 (1999).
136 In re Hunter, id., No. 139 (1999).
137 In re Dibbern, 150 Vt. 655 (1988); In re Stevens, 148 Vt. 633 (1987); In re Gobin, 146 Vt. 650 (1986); In re O'Boyle, Jr., 146 Vt. 649 (1985).
139 In re Wysolmerski, id., No. 112 (1997).
140 In re Hunter, id., No. 110 (1996).
143 In re Lichtenberg, id., No. 61 (1993); In re Lichtenberg, 161 Vt. 614 (1993).
144 In re Strassenberg, id., No. 58 (1993); In re Strassenberg, 161 Vt. 573 (1993).
Vermont income tax returns for three years (six months);\textsuperscript{146} conviction of two counts of failure to file Vermont income tax returns for two years (four months);\textsuperscript{147} being arrested in New Jersey in the process of purchasing six and seven grams of cocaine for distribution to friends (six months);\textsuperscript{148} maintaining insufficient records of trust account resulting in invasion of trust (six months);\textsuperscript{149} communicating with opposing counsel’s client without authorization and disparaging opposing counsel to the client (six months);\textsuperscript{150} recklessness in dealing with witnesses aligned with opposing parties, refusing to provide an itemized bill (six months);\textsuperscript{151} and failing to respond to bar counsel’s requests for information on an investigation of possible misuse of trust account (report is unclear how long).\textsuperscript{152}

While disbarment was recommended in one case by the PCB, for filing seven appellate briefs that fell below the minimum standards of competency, the Supreme Court imposed an “indefinite term of not less than six months.”\textsuperscript{153}

Reprimands Under the PCB

Thirty-four public reprimands were issued by the Court between 1971 and 2000. The offenses and sentences were: for cultivating felonious amounts of marijuana and conviction of misdemeanor cultivation (two months);\textsuperscript{154} violating disciplinary rules relating to trust accounts and failing to report a disciplinary violation by another attorney;\textsuperscript{155} failing to file divorce paperwork in a timely manner, neglecting another divorce case by taking nearly seven months to have the spouse served, failing to complete closing statement or prepare a deed (with two years’ probation);\textsuperscript{156} neglecting a legal matter and failing to pay client funds in a timely manner, as well as failing to respond to requests from Bar Counsel;\textsuperscript{157} failing to inform client an appeal was dismissed, losing client’s right to pursue an appeal, filing a series of continuances without informing his client, and engaging in street fighting with another client;\textsuperscript{158} failing to issue a final title insurance policy and file a mortgage, prepare a closing statement, or file client’s income tax returns (with one year probation);\textsuperscript{159} advising client’s wife, without notice to her lawyer, to grant his client an unlimited power of attorney over her financial assets (with six months’ probation);\textsuperscript{160} making a false representation to a court;\textsuperscript{161} failing to arrange for substitute counsel

\textsuperscript{146} In re Free, id., No. 34 (1992); In re Free, 159 Vt. 625 (1992).
\textsuperscript{147} In re Taft, id., No. 31 (1992); In re Taft, 159 Vt. 618 (1992); In re Massucco, id., No. 32 (1992); In re Massucco, 159 Vt. 617 (1992).
\textsuperscript{149} In re Bailey, id., No. 21 (1991); In re Bailey, 158 Vt. 636 (1992).
\textsuperscript{150} In re Illuzzi, id., No. 20 (1991).
\textsuperscript{151} In re Rosenfeld, 157 Vt. 537 (1991).
\textsuperscript{152} In re Bailey, id., No. 16 (1991); In re Bailey, 157 Vt. 424 (1991).
\textsuperscript{153} In re Shepperson, id., No. 84 (1995).
\textsuperscript{154} In re Doherty, id., No. 71 (1994). This appears to be the only case on record where the Court increased the recommended penalty (public reprimand) to a suspension. Although the court more often than not accepts the recommended sanction, there are more instances where the court has reduced the proposed penalty.
\textsuperscript{155} In re Anderson, id., No. 145 (1999).
\textsuperscript{156} In re Bailey, id., No. 144 (1999).
\textsuperscript{157} In re Butterfield, id., No. 143 (1999).
\textsuperscript{158} In re Andres, id., No. 140 (1999).
\textsuperscript{159} In re Nawrath, id., No. 136 (1999).
\textsuperscript{160} In re [name missing], id., No. 132 (1999).
\textsuperscript{161} In re Bridge, id., No. 129 (1998).
for a client;\textsuperscript{162} mishandling client funds and improperly communicating with a represented party;\textsuperscript{163} ignoring multiple letters from bar counsel asking for cooperation and ignoring requests from incarcerated, out-of-state client asking about disbursements of client funds;\textsuperscript{164} misrepresenting facts to a trial court;\textsuperscript{165} failing to protect his client’s interest in a partition action and knowingly misleading the client as to the status of his case;\textsuperscript{166} appearing in court under the influence of alcohol (reciprocal with Mass.; three years’ probation);\textsuperscript{167} failing to return property to his client after client terminated relationship and failing to provide requested accounting to substantiate bill for legal services;\textsuperscript{169} failing to close small probate estate over a significant period of time (with six hours of CLE on time management);\textsuperscript{170} failing to supervise staff leading to his secretary’s embezzlement of thousands of dollars from attorney trust account;\textsuperscript{168} conviction of marijuana cultivation, a misdemeanor;\textsuperscript{171} demonstrating a continuing pattern of neglect of clients and disregard of requests from bar counsel for necessary information;\textsuperscript{172} failing to file all claims on behalf of her clients (with one year probation);\textsuperscript{173} representing client’s husband in a divorce matter, advising client to disregard a court order, and making false statements to the court;\textsuperscript{174} initiating lawsuit in the name of complainant without authority to do so, misrepresenting to court and opposing litigants that he represented complainant, and contacting represented party without consent of counsel;\textsuperscript{175} representing buyers and sellers in a real estate transaction without explaining risks of multiple representation, altering executed deed without permission or knowledge of client, and thereby destroying client’s right of first refusal;\textsuperscript{176} neglecting client’s interests while representing one client in a post-divorce visitation and another in the preparation of a will;\textsuperscript{177} revealing a client’s confidence to opposing counsel;\textsuperscript{178} changing fee agreement from contingency to hourly without permission or knowledge of client, and thereby destroying client’s right of first refusal;\textsuperscript{179} failing to provide file after withdrawing from representation, misrepresenting the status of case to client and failing to provide a requested accounting (with one year probation);\textsuperscript{180} advising a client to fail to pay a judgment and behaving in an angry, rude, belligerent and unprofessional manner toward a judge and opposing counsel;\textsuperscript{181} failing to turn over interest accrued on client’s trust funds (based on a New Jersey

\textsuperscript{162} In re Decato, id., No. 125 (1998).
\textsuperscript{163} In re Wool, id., No. 131 (1999).
\textsuperscript{164} In re Blais, id., No. 118 (1997).
\textsuperscript{165} In re Lancaster, id., No. 103 (1995).
\textsuperscript{166} In re Wenk, id., No. 101 (1995).
\textsuperscript{167} In re Cummings, id., No. 97 (1995).
\textsuperscript{168} In re Warren, id., No. 96 (1995).
\textsuperscript{169} In re McCarty, id., No. 90 (1995); see also, In re McCarty, 162 Vt. 535 (1994).
\textsuperscript{170} In re Heald, id., No. 85 (1995).
\textsuperscript{171} In re Martin, id., No. 83 (1995).
\textsuperscript{172} In re Doherty, id., No. 71 (1994); In re Doherty, 162 Vt. 631 (1994).
\textsuperscript{173} In re Hunter, id., No. 69 (1994); In re Hunter, 163 Vt. 599 (1994).
\textsuperscript{174} In re Billewicz, id., No. 65 (1994); In re Billewicz, 161 Vt. 631 (1994).
\textsuperscript{175} In re Robinson, id., No. 65 (1993); In re Robinson, 161 Vt. 605 (1994).
\textsuperscript{176} In re Free, id., No. 65 (1993); In re Free, 161 Vt. 602 (1994).
\textsuperscript{177} In re Morrisette, id., No. 60 (1993).
\textsuperscript{178} In re McCarty, id., No. 56 (1993).
\textsuperscript{179} In re Pressly, id., No. 52 (1992); In re Pressly, 160 Vt. 319 (1993).
\textsuperscript{180} In re Bucknam, id., No. 28 (1992); In re Buckham, 160 Vt. 355 (1993).
\textsuperscript{181} In re Williams, 157 Vt. 660 (1991).
Supreme Court decision); misuse of client funds; personally guaranteeing debt of client to creditor and creditor’s counsel; withdrawing funds from trust account for personal expenses, repaying the fund, then reporting himself to PCB (with ten year probation); one instance of violating the Code (without specific conduct being shown in the report); entering into a business transaction with a client without consent and full disclosure of their differing interests; and conduct involving dishonesty or deceit and engaging in conduct prejudicial to the administration of justice.

Admonitions Under the PCB

The reasons for the 73 admonitions issued between 1971 and 1999 included: neglecting two cases entrusted to the attorney; misrepresenting to a court the reason for filing a motion to withdraw in a divorce case; participating in a PCB proceeding against a client whom respondent had represented; neglecting to disburse some proceeds in three separate closings, in part due to inadequate secretarial staff; entering into a business transaction with a client without disclosing his personal conflicting interests and without obtaining an informed consent from the client; failing to attend to case file or research legal issues involved, and failing to inform clients their claim was meritless; failing to read legal documents before signing them and inadequately researching a client’s assets before filing a bankruptcy petition; wrongfully failing to return a file because of a fee dispute; failing to complete the settlement of a client’s case in a timely manner and failing to respond to a client’s requests for a copy of the file; not diligently attending responsibilities to respond to bar counsel; failing to research the proper statute of limitations and not actively pursuing a client’s work-related injury in the proper federal forum, plus neglecting to file a client’s proposed final divorce order and actively pursuing his client’s worker’s compensation claim for 17 months; neglecting to file pleading on time, appear at hearing, follow the rules of civil procedure, giving opposing counsel adequate notice that he would not attend a deposition, and complying with discovery requests; speaking to opposing counsel’s client about an issue without his consent and without authorization of law; writing a represented party without authority of opposing counsel; continuing to represent a client in a suit in which lawyer was also named as a party in a separate matter and neglecting to complete work as promised; engaging in discourteous and undignified conduct by swearing at opposing counsel; neglecting a legal matter entrusted to him by inexcusably delaying filing and failing to communicate with his clients; writing letters that included misleading representations; neglecting representation of a client’s worker’s compensation claim; communicating ex parte with a judge regarding a pending matter in which respondent was not counsel of record; failing for a period of months to fulfill a promise to draft a proposed order and ignoring repeated requests of Bar Counsel for information; incurring a minor overdraft in a trust account and failing to balance account for several years; repeatedly failing to communicate with clients and failing to consult with them before changing litigation strategy; accepting a retainer but neglecting to pursue a client’s child support case and repeatedly failing to communicate with her; publicly disclosing that another lawyer was under

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188 In re Illuzzi, Jr., 138 Vt. 621 (1980).
investigation by bar counsel; neglecting a post-divorce matter by failing to attend a hearing and failing to order a transcript, resulting in dismissal of the appeal; acquiring a personal interest in clients’ case through billing practices; placing an ad identifying lawyer as specializing in divorce and family law; failing to consult with client in regard to strategies and decisions; sending a letter to opposing attorney’s client without knowledge or consent; violating confidential settlement by sending a letter published in a New England journal; neglecting an estate for three years and failing to communicate with the executor; divulging confidential information in a motion to withdraw of client’s intent to perjure himself at trial; failing to properly maintain IOLTA account and depositing his own funds in the account to cover overdrafts; investing in real estate transactions with a client without discussing the conflict of interests; failing to maintain proper records of disbursements of fund in trust account leading to trust monies being paid for bank service charges; neglecting the interests of clients in a foreclosure action; recording a telephone conversation without informing the other party to the call he was doing so; directing contacting complainant’s clients; proposing a settlement in a legal malpractice claim that included not reporting the problem to the PCB; negligently managing trust accounts and supervising employees; negligently handling an estate as administrator, not timely filing documents, and causing the diminution of the estate; failing to complete contract of employment with clients within a reasonable period of time; neglecting client’s interests by dual representation; failing to file a deed for recording for two and a half years despite requests to do so; representing buyers and sellers in a real estate transaction without explaining potential conflict and negligently drafting a deed to convey a life estate not intended by buyers; representing a bank in a collections matter which created conflicts with former clients; misrepresenting himself to prospective buyers of condominiums as counsel for the leading bank, which was not true; neglecting duties as fiduciary and attorney of two estates causing beneficiaries additional expense; filing negligence case against driver on behalf of passenger where there was no evidence of negligence on the driver’s part; disclosing the existence of a confidential PCB investigation; suggesting that settlement of malpractice suit include not reporting to PCB; neglecting to communicate with clients on the status of their case; failing to comply with court order to pay child support to ex-wife and being held in contempt; advertising “and associates” when there were none; discussing settlement with opposing corporate party at corporate party’s request without opposing counsel’s knowledge or consent; using obscene language when speaking with prosecutor in court; failing to file current use release for 19 months after real estate closing, and failing to respond to bar counsel and to opposing counsel; neglecting a case for over a year and failing to communicate with client about the status of the case; failing to deliver corrected mortgage deed and final title insurance policy to bank despite repeated requests or to make arrangements to do so when leaving private practice; neglecting to pursue payment of insurance policies and final accounting in estate for seven years; communicating directly with spouse and children of client at parental visit although they were represented by counsel; failing to file an itemized bill in a timely manner and negligently keeping records resulting in double billing; corresponding directly with opposing counsel’s client without authorization; wrongfully deducting fees from worker’s compensation case from complainant’s fee paid for criminal case; failing to pursue modification of visitation rights after accepting retainer; writing a vicious and threatening letter threatening a counterclaim without a good faith basis in fact; striking a client in anger outside courtroom; neglecting client’s request to re-negotiate a note, resulting in damage to the client; failing to follow valid court order in contested divorce by withholding executed deed; entering into contingency agreement in a worker’s compensation case which yielded a fee in
excess of State’s guidelines; ignoring client’s case for six years; and communicating directly with former client represented by counsel in a malpractice action against respondent.189

5. The Professional Responsibility Board

The Professional Responsibility Board was created in 1999 to replace the Professional Conduct Board, at the same time that the Code was replaced by the Rules of Professional Conduct. The Board’s jurisdiction goes beyond the discipline of lawyers, and includes resolution of disputes against lawyers through dispute resolution, and assistance to “attorneys and the public by providing education, advice, referrals and other information designed to maintain and enhance the standards of professional responsibility.”190 At the time the new Board was constituted, there was a significant backlog of cases, which was dramatically reduced with appointment of Bar Counsel to review and refer cases and Disciplinary Counsel to litigate them.

The PRB has been keeping track of its work since 1999. In that time, according to the latest reports, the board has reviewed and ruled on 162 disciplinary matters, including those for which no action is recommended.191 Its work has contributed to disbarments of 18 attorneys, 44 suspensions, 36 public reprimands, and 68 private admonitions. Not all disbarments, suspensions, or reprimands were ordered by the Supreme Court, in cases where a stipulation has ended the conflict or, in the case of admonitions, where Disciplinary Counsel has made the final decision, without appeal to the Court. The PRB’s record over the last 13 years reveals processing of a greater caseload and more disciplinary decisions than under any former system.

Disbarments Under the PRB

Under the Rules, as administered by the Professional Responsibility Board (PRB), 18 lawyers have been disbarred. These are the reasons: neglecting a legal matter by failing to pursue an accident claim and allowing the statute of limitations to run; allowing the interest in securing a two million dollar fee take precedence over an obligation to further clients’ interest and lying under that that clients agreed to the fee;192 conviction of hindering apprehension or prosecution by attempting to induce witness to withhold and change testimony in a criminal prosecution of client (reciprocal from New Hampshire disbarment);193 federal conviction of mail fraud and embezzlement of a trust fund;194 misappropriation of hundreds of thousands of dollars of client funds (disbarment with resignation, on consent):195 conviction of a federal crime of interstate transmission of stolen property relating to misappropriation of client funds;196 failing to

192 In re O’Meara, 67 A.3d 280 (2013).
193 In re Pellenz, Id., No. 151; Supreme Court E.O. 2012-088.
194 In re Ruggiero, 179 Vt. 636 (2006).
196 In re Sinnott, 891 A.2d 896 (2005).
cooperate in a mentoring program following failing to pursue an accident claim before the statute of limitations ran;\textsuperscript{197} conviction of mail fraud based on misuse of client funds;\textsuperscript{198} abandoning clients, misrepresentations to the court, and failing to respond to disciplinary counsel;\textsuperscript{199} conviction of embezzlement, mail fraud, and tax evasion, in Maine (six months and a day; resignation accepted);\textsuperscript{200} continuing to engage in misconduct while suspended from practice based on federal criminal fraud convictions;\textsuperscript{201} embezzling over $400,000 from the law firm;\textsuperscript{202} misappropriating clients’ funds and making materially false statements in final accounting as executor of estate;\textsuperscript{203} making misrepresentations to clients, accepting private employment in a matter in which substantial responsibilities were previously undertaken as a public employee, submitting a false affidavit, and attempting to shift blame to others;\textsuperscript{204} conversion of client’s funds to his own use;\textsuperscript{205} representing conflicting interests, obtaining a signature to a deed through misinformation and exaggerated threat of litigation, use of office of executor for benefit of his relatives, and dealing directly with a party with knowledge the party had an attorney;\textsuperscript{206} commingling and misappropriation of client funds and making false statements in sworn response to Disciplinary Counsel’s trust account management survey;\textsuperscript{207} indictment for conspiracy to defraud, interstate transportation of stolen money, and making a false tax return;\textsuperscript{208} and misappropriating client funds and other misconduct (a reciprocal disbarment after Hawaii Supreme Court disbarred attorney).\textsuperscript{209}

Suspending Under the PRB

There were 44 suspensions during the 2000 to 2013 period. Lawyers were suspended for failing to file a quitclaim deed for the marital property awarded to the client clear of her ex-husband’s interests (two years);\textsuperscript{210} failing to cooperate with Disciplinary Counsel’s investigation, ignoring two letters requesting a response to a complaint filed by another lawyer;\textsuperscript{211} failing to account for retainers, refund advance payments not earned, represent clients in a diligent manner, and neglecting a client’s case (one year plus reimbursement of retainers);\textsuperscript{212} neglecting two cases resulting in dismissal and barring of claims, deceiving one client by failing to disclose dismissal of his case and leading him to believe the case would soon go to trial (four months);\textsuperscript{213} neglecting five client matters and failing to file claims in court prior to expiring statute of

\textsuperscript{197} In re Bailey, 174 Vt. 447 (2002).
\textsuperscript{198} In re Hunter, 171 Vt. 635 (2000).
\textsuperscript{199} In re Singiser, PRB Decision Summary No. 6.
\textsuperscript{200} In re Frattini, PRB Decision Summary No. 26 (2001).
\textsuperscript{201} In re Burgess, 169 Vt. 533 (1999). In 1998, an attorney was disbarred, for no specified reasons, after he resigned from practice. In re: Thompson, 170 Vt. 580 (1998).
\textsuperscript{202} In re Abell, 166 Vt. 620 (1997).
\textsuperscript{203} In re Mitiguy, 161 Vt. 626 (1994).
\textsuperscript{204} In re Karpin, 162 Vt. 163 (1993).
\textsuperscript{205} In re Bernstein, 137 Vt. 431 (1979).
\textsuperscript{206} In re Wright, 131 Vt. 473 (1973).
\textsuperscript{207} In re Harwood, 2006 VT 15.
\textsuperscript{208} In re Daly, Supreme Court E.O. 2006-143; PCB Decision Summary No. 87 (2006).
\textsuperscript{209} In re Lichtenberg, Supreme Court E.O. 2006-012; PCB Decision Summary No. 89 (2006).
\textsuperscript{211} In re Wenk, id., No. 14 (2000).
\textsuperscript{212} In re Wool, id., No. 18 (2001).
\textsuperscript{213} In re Sunshine, id., No. 28 (2001).
limitations, as well as making misrepresentations to clients (five months);\textsuperscript{214} neglecting a personal injury case and failing to keep the client reasonably informed (six months plus one year probation, concurrent with an earlier sanction);\textsuperscript{215} engaging in simple assault, disregarding his probate case, and violating a court order (three years);\textsuperscript{216} engaging in conduct prejudicial to the administration of justice by failing to supplement a petition for admission with the fact that he was a defendant in a consumer fraud complaint and was subject to an inquiry from the New York Committee on Professional Standards (three years);\textsuperscript{217} entering into fee agreements that led to a federal investigation and conviction of submitting false information to the Social Security Administration stating his fees complied with the law when he knew they did not (three years);\textsuperscript{218} failing to respond to a complaint and to a petition of misconduct, after a significant disciplinary history (30 days);\textsuperscript{219} filing a false affidavit in connection with an application to appear pro hac vice (30 days);\textsuperscript{220} intentionally hiding his client’s life insurance benefits in his own name to prevent attachment by known creditors (90 days);\textsuperscript{221} failing to file state income tax returns, making a false statement on his licensing statement, and failing to cooperate with disciplinary counsel (three years);\textsuperscript{222} creating a fictitious fee agreement and forging client’s signature on it, creating a promise which did not in fact exist (30 months);\textsuperscript{223} failing to respond to a petition of misconduct (30 days, following 90 days of probation);\textsuperscript{224} purposefully avoiding or misleading three different clients, reporting progress of cases that did not exist and billing for work not done (three years);\textsuperscript{225} engaging in serious criminal activity, extortion and felonious stalking (one year);\textsuperscript{226} possessing and cultivating marijuana (three months plus one year probation);\textsuperscript{227} for drafting misleading correspondence and making false statements (three months);\textsuperscript{228} failing to inform the Court why a suspension of one year shouldn’t be imposed on attorney after an identical suspension in Massachusetts;\textsuperscript{229} failing to cooperate with the attorney disciplinary system in the investigation of an over-draught in a trust fund as well as failing to communicate with a client and refusing to return his papers (six months, to run concurrently for each offense);\textsuperscript{230} impeding a public officer (two years);\textsuperscript{231} failing to attend a client’s pretrial post-conviction hearing and respond to a motion for summary judgment (two months);\textsuperscript{232} neglect of five client matters (five months);\textsuperscript{233} conviction of simple assault (indefinite, immediate);\textsuperscript{234}

\textsuperscript{214} In re Blais, id., No. 31 (2002).
\textsuperscript{215} In re Blais, id., No. 48 (2002).
\textsuperscript{216} In re Andres, id., No. 52 (2003).
\textsuperscript{217} In re Daly, id., No. 49 (2003).
\textsuperscript{218} In re Harrington, id., No. 53 (2003).
\textsuperscript{219} In re Heald, id., No. 54 (2003).
\textsuperscript{220} In re Levine, id., No. 63 (2004).
\textsuperscript{221} In re Rice, id., No. 64 (2004).
\textsuperscript{222} In re Heald, id., No. 67 (2004).
\textsuperscript{223} In re Griffin, id., No 76 (2005).
\textsuperscript{224} In re Griffin, id., No. 98 (2007).
\textsuperscript{225} In re Colburn, id., No. 102 (2007).
\textsuperscript{226} In re Van Aelstyn, id., No. 112 (2008).
\textsuperscript{227} In re Davis, id., No. 117 (2008).
\textsuperscript{228} In re McCarty, 2013 VT 47.
\textsuperscript{229} In re Macero, 190 Vt. 552 (2011).
\textsuperscript{230} In re: Hongisto, 188 Vt. 553 (2010).
\textsuperscript{231} In re Neisner, 189 Vt. 145 (2010).
\textsuperscript{232} In re Andres, 177 Vt. 511 (2004).
\textsuperscript{233} In re Blais, 174 Vt. 628 (2002).
\textsuperscript{234} In re Andres, unreported (2001).
failing to pay child support and spousal maintenance after marital dissolution;\textsuperscript{235} misappropriate of client funds by loaning those funds to another client;\textsuperscript{236} acting without clients’ approval, binding clients to unauthorized agreements, lying to clients about the status of their cases, and making false statement to other lawyers and the courts (three years);\textsuperscript{237} filing three complaints with the Judicial Conduct Board about a judge with reckless disregard of obvious facts and basic legal principles (18 months),\textsuperscript{238} failing to respond to client requests for information or to respond to bar counsel, failing to respond to a petition of misconduct (six months);\textsuperscript{239} failing to return client handling matters when incompetent (preparing inadequate and incomprehensible legal briefs) and failing to compete a tutorial program (six months);\textsuperscript{240} engaging in the cultivation and use of illegal drugs with misdemeanor conviction (two months);\textsuperscript{241} disparaging opposing counsel and contacting opposing party without permission of party’s attorney (six months);\textsuperscript{242} failing to file state income tax returns resulting in criminal charges (six months, plus probation);\textsuperscript{243} attempting to receive cocaine (two months);\textsuperscript{244} possession of cocaine and lessening public confidence in the legal profession (six months);\textsuperscript{245} responding to client’s request for itemized statement of charges with threat to increase the amount charged, advising client in child custody dispute that judge will not hold it against her if she withholds weekend visitation from noncustodial parent, and offering expert in child custody case waiver of liability in exchange for retraction of her testimony without first obtaining clients’ authorization of waiver (six months, reinstatement conditions on passing multi-state professional responsibility exam and demonstration of office management skills);\textsuperscript{246} and for unwillingness or inability to disclose fully transactions in client trust account which has been commingled with person funds (suspension until conditions satisfied, including cooperation with investigation and demonstrates fitness to return to the practice of law).\textsuperscript{247}

A few attorneys were the subject of interim suspensions. These involve finding the attorneys posed a serious harm to the public,\textsuperscript{248} and one involving possession of child pornography.\textsuperscript{249}

Reprimands Under the PRB

\textsuperscript{235} In re Taylor, 171 Vt. 640 (2000).
\textsuperscript{236} In re Hunter, 167 Vt. 219 (1997).
\textsuperscript{237} In re Wysolmerski, 167 Vt. 562 (1997).
\textsuperscript{238} In re Illuzzi, 165 Vt. 598 (1996).
\textsuperscript{239} In re Bates, 165 Vt. 548 (1996).
\textsuperscript{240} In re Shepperson, 164 Vt. 636 (1996).
\textsuperscript{241} In re Doherty, 162 Vt. 631 (1994). In this case, the Court rejected as mitigating factors the deferred sentence, in light of respondent’s failure to appreciate the seriousness of his conduct or to be remorseful for engaging in a serious violation of the criminal laws.
\textsuperscript{242} In re Illuzzi, 160 Vt. 474 (1993). See also, In re Illuzzi, 159 Vt. 155 (1992)(remand after correction of Professional Conduct Board for adopting a second hearing panel report that had not been submitted to respondent).
\textsuperscript{243} In re Free, 159 Vt. 625 (1992).
\textsuperscript{244} In re Mayer, 159 Vt. 621 (1992).
\textsuperscript{245} In re Berk, 157 Vt. 524 (1991).
\textsuperscript{246} In re Rosenfeld, 157 Vt. 537 (1991).
\textsuperscript{248} In re: Xavier a/k/a Rockwell, PCB Decision Summary No. 146 (2011); In re Simendinger, id., No. 154 (2012); In re MaGill, id., No. 155 (2012).
\textsuperscript{249} In re Smith, id., No. 162 (2013).
Reprimands are public sanctions, involving no penalty beyond the publication of the offense and the sanction. The PRB issued 36 reprimands between 2000 and 2013, for failing to file three bankruptcy petitions for more than 20 months;\(^{250}\) failing to disclose a romantic relationship with the opponent of the firm’s client;\(^{251}\) failing to put a contingent fee agreement into writing;\(^{252}\) charging an unreasonable fee where the fee had nothing to do with the work performed (and no work of value was performed);\(^{253}\) commingling of client and personal funds in a trust account;\(^{254}\) failing to file required probation reports imposed by the Supreme Court every 60 days and failing to cooperate with Disciplinary Counsel in investigating four other complaints; undertaking products liability case with no experience or expertise, neglecting it and causing it be dismissed (transferred to inactive status for four months, with two year probation if reactivated);\(^{255}\) neglecting an estate matter that caused the heirs to experience unnecessary stress, anxiety and emotional turmoil and charging of excessive fees; neglecting a client matter for several months, resulting in its dismissal and failing to keep the client informed of the case’s status (two years’ probation);\(^{256}\) borrowing money from two different clients without advising either client that his interests in the loan differed from their interests; taking no action as a public defender on two incarcerated clients and failing to communicate with them about the status of their case (with one year probation); holding escrowed funds in client’s file rather than depositing them in his trust account; making discourteous and inappropriate remarks about a judge in pleadings, comparing her to a crack cocaine user;\(^{257}\) failing to take any action for nine months after denial of an appeal and conclusion of contempt proceedings and failing to communicate with client during a critical period of time;\(^{258}\) engaging in contemptuous conduct before a tribunal during a sentencing hearing;\(^{259}\) neglecting three matters in three different court by failing to comply with a magistrate’s order, failing to request oral argument in the Supreme Court or to attend status conference in Superior Court;\(^{260}\) co-mingling client funds by depositing his own funds in trust account to maintain positive balance and failing to reconcile trust accounts;\(^{261}\) attempting to introduce prejudicial evidence in a criminal case contrary to court’s previous ruling;\(^{262}\) negligently failing to take any action over a four-year period to close an estate and to respond to the executrix’ requests for information;\(^{263}\) and knowingly and negligently failing to secure a written contingency fee agreement in a personal injury case and attempting to charge an unreasonable fee of 12% of recovery over the chief counsel’s standard one-third, for doing no more than facilitating communications as local counsel (plus one year’s probation);\(^{264}\)

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\(^{250}\) In re Scholes, 54 A.3d 520 (2012).

\(^{251}\) In re Strauss, 190 Vt. 170 (2011).

\(^{252}\) In re Fink, 189 Vt. 470 (2011).

\(^{253}\) In re Sinnott, 176 Vt. 596 (2004). Note that in this case, the Supreme Court could not find that the use of a retainer was itself a violation of the Code, the complainant having complained that it made termination of a relationship difficult.

\(^{254}\) In re Farrar, 183 Vt. 592 (2008). The hearing panel agreed with Respondent that a private admonition, probation, and writing an article about proper handling of client trust funds was sufficient; the Court felt otherwise.

\(^{255}\) In re Goldberg, PRB Decision Summary, No. 34 (2002).

\(^{256}\) In re Massucco, id., No. 39 (2002).

\(^{257}\) In re Andres, id., No. 75 (2005).

\(^{258}\) In re Farrar, id., No. 82 (2005); see In re Farrar, supra.

\(^{259}\) In re Duckman, id., No. 103 (2007).

\(^{260}\) In re Buckley, id., No. 118 (2008).

\(^{261}\) In re Sheredy, id., No. 121 (2009).

\(^{262}\) In re Pannu, id., No. 126 (2011).

\(^{263}\) In re MaGill, id., No. 148 (2012).

\(^{264}\) In re Fink, id., No. 130 (2010).
neglecting an estate as administrator and failing with cooperate with disciplinary investigation;\textsuperscript{265} failing to promptly investigate a partner’s mishandling of client accounts, and failing to investigate partner’s activities and take steps to protect client funds and property;\textsuperscript{266} failing to pursue client’s case, respond to client’s inquiries, and keep client informed over a three year period despite 83 phone calls, most of which were not returned;\textsuperscript{267} permitting a bank to make automatic withdrawals from trust account without notice to respondent, resulting in misuse of client funds and inadequate accounting of disbursements (plus one year probation);\textsuperscript{268} improperly presiding at a town board meeting during which the board considered the merits of a matter in which Respondent had served as private counsel (two months);\textsuperscript{269} neglecting a legal matter, disregarding the duty to a client, failing to pay client requested funds to the client, and failing to respond to requests from bar counsel;\textsuperscript{270} failing to prepare for client’s refinancing by improperly preparing settlement statement, failing to issue final title insurance policy, failing to timely file tax returns, and failing to maintain a complete and accurate account of client funds;\textsuperscript{271} making a false statement in court that he had permission of the Attorney General to represent his friend in a DUI hearing;\textsuperscript{272} mishandling a negligence case by failing to respond to requests to admit;\textsuperscript{273} failing to maintain complete records and account for client funds, sending motions directly to opposing parties (skipping their attorney) and failing to deliver client’s funds as required (public reprimand plus 18 months’ probation);\textsuperscript{274} sending letters to the wife of a man living with the attorney’s estranged wife and offering to help the woman get a divorce at no cost to her and great expense to her husband;\textsuperscript{275} failing to respond to multiple requests by bar counsel for information over 12 months, coupled with failure to respond to client for a similar period;\textsuperscript{276} moving to suppress client’s breath test based on an allegation that client’s request for an independent blood test had been denied, even though attorney knew it had not been denied;\textsuperscript{277} failing to return clients’ property after termination of legal representation (with six months’ probation);\textsuperscript{278} neglecting duties as administrator of an estate, including failing to petition to open the estate, notify interested parties, file necessary pleadings, maintain the real property, and market and sell the same;\textsuperscript{279} turning over financial matters to a bookkeeper without proper oversight, resulting in embezzlement of client trust account funds;\textsuperscript{280} deceit and misrepresentation of clerk, neglect of legal matters and joint representation of parties with diverse interests;\textsuperscript{281} advising client to deny access to children to other parent in violation of court order, failing to submit information to the other parent and court as required by court order,

\textsuperscript{265} Id., No. 149 (2012).
\textsuperscript{266} In re Anderson, 171 Vt. 632 (2000).
\textsuperscript{267} In re Carroll, id., No. 73 (2005).
\textsuperscript{268} In re Toscan, id., No. 126 (2009).
\textsuperscript{269} PRB Decision Summary, No. 19.
\textsuperscript{270} In re Butterfield, 170 Vt. 592 (2000).
\textsuperscript{271} In re Nawrath, 170 Vt. 577 (2000).
\textsuperscript{272} In re Bridge, 168 Vt. 633 (1998).
\textsuperscript{273} In re Decato, 168 Vt. 579 (1998).
\textsuperscript{274} In re Wool, 169 Vt. 579 (1999).
\textsuperscript{275} In re Warren, 167 Vt. 259 (1997).
\textsuperscript{276} In re Blais, 166 Vt. 621 (1997).
\textsuperscript{277} In re Lancaster, 166 Vt. 602 (1997).
\textsuperscript{278} In re McCarty, 164 Vt. 604 (1995).
\textsuperscript{279} In re Heald, 163 Vt. 640 (1995).
\textsuperscript{280} In re Martin, 163 Vt. 633 (1995).
\textsuperscript{281} In re Cummings, 164 Vt. 615 (1995).
making false statement of fact to the court, and failing to obey a court order; misrepresenting status of civil suit, attempting to unilaterally alter fee agreement, wrongfully demanding reimbursement of expenses, negligently failing to provide expenses accounting, and failing to release clients’ file (mitigated by absence of intention to cheat clients and absence of inadequate representation or overcharging (with one year probation and completion of multistate professional responsibility exam)); knowingly disclosing information a client expressly ordered counsel not to disclose, creating emotional distress in the client; and representing one client when the interests of another client could impair his judgment, failing to provide both clients with full disclosure of possible effects of dual representation, and altering fully executed legal documents.

Admonitions Under the PRB

Private admonitions, the least of the penalties for lawyer misconduct, usually go unreported by the Supreme Court, but in 2009, the high court issued two formal opinions, explaining the ruling, without naming the attorney. One opinion explained that misleading a potential witness as to whether two lawyers were recording a telephone interview constituted a false statement of material fact or law to a third person, but did not rise to a violation of the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In another private admonition addressed in an opinion, failing to promptly and fully comply with discovery was treated as a violation of the rule but the subject of only an admonition, as there was no substantial harm to the client, the legal system, or the profession, and the attorney had no prior disciplinary record. The reported decision does not explain how long the delay actually was, but concluded that the attorney’s lack of organization to manage large and complex litigation, in a one-person office, and the lack of organization of his client’s records, contributed to the problem. Counting those two, there were 68 admonitions issued between 2000-2013.

The admonitions are largely done by Disciplinary Counsel (although there is one instance in 2012 of an admonishment by a Hearing Panel), and include: selling a computer to a non-lawyer containing client information, disclosing secrets of one client to another client without disclosing the first client’s name (but with enough clues to reveal who that was), failing to complete service in 60 days leading to dismissal; communicating with an adverse represented party without permission of opposing counsel; failing to disclose to defense counsel or the court that prosecutor’s deputy had previously represented the defendant in a related matter; failing to communicate with a client over three year period, giving false information about the status of the

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282 In re Robinson, 161 Vt. 605 (1994).
286 In re PRB Docket No. 2007-46, 187 Vt. 35 (2009). In this case, one attorney attempted to distract the witness by making a statement about the speakerphone while the other attorney falsely stated she wasn’t recording the conversation. The attorneys escaped harsher punishment as it was an isolated instance of deception, there was no injury to the client, little damage to the public trust, the legal system, or the profession, there was no personal gain, and no suggestion of a likelihood of repetition. The opinion by signed by Justice Skoglund, separate concurring opinions by the remainder of the court.
case in court when lawyer hadn’t filed the law suit; failing to comply with PCB counsel’s request for information, a condition from an alternative dispute resolution (with six months’ probation); neglecting a foreclosure action entrusted to him; failing to explore defenses to collection action with client, acting without diligence or promptness, and failing to file an opposition to a summary judgment motion; spending client funds for personal use and attempting to double agreed-upon hourly rate retroactively; making rude and unjustified comments about another lawyer’s youth and inappropriately handling the transfer of a file and claim of an attorney’s lien (with an 18 month probationary period); failing to return a client’s calls on a six-month overdue post-divorce matter and failing to keep her client reasonably informed; failing to comply with an agreement reached with an Assistance Panel (18 months’ probation); sending written solicitations for legal work not identified as advertising material; failing to comply with a client’s reasonable request for an accounting of a fee; filing pleadings containing intemperate language which was unprofessional, uncivil, and intended only to harass and embarrass the opposing party and her counsel; interviewing a municipal employee against whom he knew he might bring a tort action, after assuring the employee he was not liable and then using incriminating statements in a suit against the employee individually; completing a real estate closing, withholding tax funds, and then forgetting to file the tax withholding for seven months until the client brought the error to his attention; placing an ad in the Yellow Pages saying the lawyers in his firm were “experts” in areas of law, “thereby impermissibly comparing their services to those of other lawyers,” and making a misleading statement that could not be proven; neglecting for several years to resolve benefit issues in a worker’s compensation case and failing to communicate with the client; failing to maintain adequate trust accounting practices resulting in overdraft and failing to keep her own funds separate from her client’s funds (plus one year’s probation); failing to disburse checks following a real estate closing, resulting in late fees and interest accruing in the clients’ account; failing to act with reasonable diligence and promptness in handling an application for a building permit and failing to keep client informed of her status in that matter; using law office letterhead indicating he had associates when in fact he did not; being discourteous to an acting judge during a status conference; threatening to report a matter to the State’s Attorney if settlement demand in a civil dispute was not met; requesting a person other than a client to refrain from voluntarily giving relevant information to opposing counsel; neglecting client matters, failing to communicate adequately, and deceiving a client, with mitigating circumstances (one year probation); engaging in false and misleading advertising in an ad that describe her and her partner as the county’s premiere criminal defense firm, a “statement which she cannot factually establish”; failing to file a notice of appearance or comply with court’s scheduling order; revealing confidential juvenile information in the course of a cross examination; disbursing funds erroneously assumed to have been wired to her client trust fund after a real estate closing; purposefully avoiding 14 phone calls over a four month period; soliciting a legal opinion of a judge when opposing counsel not present on matters pending before that judge; failing to record mortgages and pay money due in four separate real
estate closings; taking insufficient steps to obtain and review the complete records of a case and failing to advise client of statute of limitations; neglecting to collect $10,000 deposit held by realtor, resulting in disbursing more funds than collected and so using other client’s funds in trust account without authority; failing to promptly obtain a mortgage discharge after a real estate closing, completing the task some seven years later after telling his client he would resolve the clouded title issue; misrepresenting that client-husband had signed a repayment plan to the Bankruptcy Court; indicating to the trial court that he had a letter documenting the date of a discovery request when he didn’t have it; failing to reconcile his trust account and for sloppy bookkeeping; neglecting to further litigation diligently due to lack of experience in complex matter and ceasing work on a case pending receipt of client communication; failing for seven years to make timely reconciliation of client trust account; representing both victim and defendant in same criminal prosecution; failing to communicate with client and neglecting her property tax adjustment; using client funds in IOLTA accounts in one bank to the benefit of clients whose funds were not in those accounts and using client funds without authority to do so; failing to provide a written title opinion to client nearly six months after closing and failing to respond to client’s emails, phone calls, and letter requesting contact; failing to do any work on a case, to make appointments with client, and co-operate with investigation by Disciplinary Counsel; failing to deposit client funds in a client trust account; providing opposing counsel with an edited resume of an expert without expert’s knowledge; memorializing agreements created after the fact several years later; failing to act with reasonable diligence on behalf of an executor of an estate for two years to prepare a final accounting and obtain a tax clearance; failing to promptly attend to a worker’s compensation case; letting four months pass before updating a client on the status of an eviction and failing to reply to numerous requests for information; and failing to promptly identify a concurrent conflict of interest and simultaneously representing criminal defendants when one was the complaining witness against the other.288

In those years, there were cases that were dismissed without action, including an accusation of causing another to communicate with an adverse party;289 missing a court date due to calendaring error, which was seen as not a lack of reasonable diligence or promptness;290 a single act of negligence that did not violate rules absent some compounding factor such as failure to communicate with the client or take remedial action;291 failing to communicate and co-operate with Disciplinary Counsel; an accusation of improper disbursement of trust funds when client’s check was not honored causing insufficient balance (vacated when facts based on mistaken understanding of what had occurred);292 failing to co-operate with Disciplinary Counsel;293 and a dismissal without prejudice after information indicating that charges could not be proven by clear and convincing evidence.294

6. Reflections on the Fall

289 Id., No. 50.
290 Id., No. 81.
291 Id., No. 92.
292 Id., No. 150.
293 Id., No. 127 (2010).
294 Id., No. 132 (2010).
Reading through all of the reported disciplinary cases is plainly depressing. Too often we see names of good people we know and respect, and reports of sanctioned conduct that we ourselves have occasionally committed—late discovery, for instance, not returning phone calls (although perhaps not to the extreme as those who have been sanctioned), not keeping track of everything—and the experience cannot help but fill any attorney with dread. We are all guilty of something, and there is no point in trying act superior to those who have fallen. We can sympathize with them for their pain, suffering, and embarrassment, as we would for most who do wrong, because we know there is a thin line that separates us from each other. None will disagree with the prayer of contrition: we have left undone those things which we ought to have done, and we have done those things which we ought not to have done. As Chesterton is reported to have said, “Children are innocent, and love justice, while most adults are guilty, and love mercy.”

We are members of a profession, schooled in and dedicated to knowing the difference between right and wrong, and licensed to advise others on the difference. When we violate the law, we know it.

The record, taken as a whole, is a fascinating, if horrible, reflection on the Vermont bar. Lawyers get busy and neglect important things, like trust accounts, client calls, and court orders. There is some consolation in the relative low number of sanctions compared to the large number of lawyers. But there is no denying there are lawyers who step way over the line, are too zealous or take risks to favor their client’s interests or harm them. Some just steal. Some are disloyal to their clients. Some behavior is so obviously wrong it’s stunning the attorney didn’t try to avoid or correct it.

As lawyers, we are constantly exposed to trauma, anxiety, fear, and the guilt of making a mistake. All the esteem and advantage within the office of attorney--the privileges, the power, the financial rewards--come at a high price. We develop obsessive-compulsive habits. We exhaust ourselves, to the point where performing even the slightest unpleasant task becomes impossible. Each can lead to self-destructive tendencies, although the regular failure of lawyers to ignore calls from Bar Counsel, letters from Disciplinary Counsel, and even notices of hearings—leaving a pile of letters unopened—requires some greater analysis. Janet Malcolm’s study of psychiatry relates the stories of two eminent men who threw their careers away crossing the line that separates physician and patient by entering into intimate relationships with those who had trusted them to act as professionals. She suggests that in some professionals there is an “underlying sense of guilt, an abiding sense of moral deficiency,” which is a natural reaction to being “idolized, idealized, lionized, and worshipped,” and defines such career suicide as the way this guilt handles success. Every fall is a tragedy. A lawyer who dips into his trust fund to pay for a vacation crosses the line. It is a form of fiduciary incest. A lawyer who lies to a client or a court or an opposing counsel hides the truth because confronting it is intolerable. There must be sanctions. Otherwise, there would be no order.

Aristotle should have the last word. In Book 7 of Nicomachean Ethics, he writes about incontinence. In this context, it means doing wrong, knowing it is wrong, because of a failure of

moral strength. Why this happens varies from person to person. Some believe there will be no penalty, because they will not be found out. Some are sleep walking, some drunk, some just stupid, but they all know where the line is drawn. Mencken described a Puritan as one who has a haunting fear that somewhere someone, may be happy. A lawyer is one who fears there’s something more left to be done. The life of the law isn’t logic, it’s anxiety.

Appendix 1: Judicial Regulation

The first Code of Judicial Ethics was adopted by the Vermont Supreme Court on December 13, 1965, based on a recommendation by an advisory committee appointed earlier that year. The Court added one additional canon to the four-paragraph draft, prohibiting broadcasting, televising or photographing court proceedings. The present Code of Judicial Conduct was adopted on May 8, 1994, and amended in 2000. The program is administered by the Judicial Conduct Board.

Over that period, judges have been suspended for: serving on a nonprofit board that had business with the county, from both adjudicative and administrative functions (six months) and knowingly making false, deceptive and misleading statement under oath at a hearing, under oath (one year). The JCB recommended a suspension of a judge for an incident involving a reporter’s request to attend an in camera conference, but the Supreme Court refused to sanction the judge for what the Court deemed a truthful response. A complaint that a judge inaccurately explained the reasons for television in the courtroom to the jury did not result in a mistrial, although a complaint was brought by jurors. The JCB’s recommendation of suspension for a judge who failed to render a final order in a divorce was denied, and the case remanded, when the court found the investigation incomplete.

Judges have been publicly reprimanded for violating the resign-to-run provision of the Code of Judicial Conduct by becoming a candidate for probate judge while serving as an assistant judge and for purchasing advertisements supporting candidates for public office.

An assistant judge was convicted of three counts of false swearing, and her appeal, based on a claim of prosecutorial misconduct and other errors, was denied. A justice of the Supreme Court was found guilty of judicial misconduct for failing to disqualify or recuse himself in matters in which his impartiality might reasonably be questioned and for participating in ex parte

299 In re Boardman, 186 Vt. 176 (2009).
304 In re Hodgdon, 189 Vt. 254 (2011).
305 In re Steady, 161 Vt. 636 (1994).
communications concerning pending or impending proceedings. A superior judge was found guilty of unspecified judicial misconduct, and allowed to retire, thereby avoiding any sanction, in 1981.

No judges have been removed from office by impeachment. There are no reported cases of judicial misconduct prior to 1981. From 1778 to 1974, judges and justices were elected by the legislature. If there were a problem, an election would cure it. While it is purely speculative, at least one long-serving judge of the Supreme Court was not reelected, in 1880, in part because of allegations of his arrogance and partisanship.

Since 1974, judges have had to be retained every six years by a vote of the Joint Assembly of the Legislature. In that time, two judges were not retained. The reasons for the votes are not a matter of record.

Appendix 2: The 1909 Code of Ethics of the Vermont Bar Association

PREPARED AND SUBMITTED BY THE COMMITTEE ON PROFESSIONAL CONDUCT OF THE ASSOCIATION, 1908: PROPOSED “CODE OF ETHICS”

1. Respect for Judicial Officers.—The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, can not excuse the withholding of the respect due the office while administering its functions.

2. Criticisms of Judicial Conduct.—Attorneys should, as a rule, refrain from public criticism of judicial conduct, in reference to causes in which they have been of counsel, other than in courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.

3. Using Personal Influence on the Court.—Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorneys to misconstructions and should be sedulously avoided. A self-respecting independence in the discharge of the attorney’s duties, which at the same time does not with hold the courtesy and respect due the judge’s station, is the only just foundation for cordial personal and official relations between Bench and Bar. All attempts to gain special personal consideration and favor of a judge are disreputable.

4. Defending the Courts against Popular Clamor.—Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney’s duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. Candor and fairness.—The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other, and all agreements between counsel respecting a cause or matter in-litigation or dispute should be scrupulously adhered to. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence; knowingly misquoting the language of a decision or text-book; knowingly misquoting the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel; offering evidence

309 “James Barrett,” Frank Fish, in Walter Hill Crockett, Vermont The Green Mountain State V (New York: Century Publishing Co., 1926), 123-124. Fish described this “fault of arraying himself on one side of the case” along with “a spirit of intolerance which found expression in sharp words of correction and reproof which stung the unfortunate victims of his wrath.” Id., 124.
which it is known the court must reject as illegal, to get it before the jury, under the guise of arguing its admissibility; and purposely concealing or withholding in the opening argument, positions intended finally to be relied on, in order that Opposite counsel may not discuss them, is unprofessional conduct. In argument as to admission of evidence, and of other questions of law, counsel should carefully refrain from aside remarks and sparring discourse, to influence the jury. Personal wrangling between counsel should be avoided.

6. Attorneys owe to the courts and the public whose business the courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he should explain his absence.

7. The practice by attorneys of the ceremony of rising and standing while the judges enter and take seats upon the Bench should obtain in all courts of record.

8. Upholding the Dignity of the Profession.—An attorney should strive at all times to uphold the honor, maintain the dignity, and promote the usefulness of the profession.

9. Disparaging Members of the Profession.—An attorney should not speak slightingly or disparagingly of his profession, or pander in any way to unjust prejudices against it; and he should refrain at all times, and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

10. How Far an Attorney May Go in Supporting a Client’s Cause.—An attorney “owes entire devotion to the interest of his client, Warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability”, to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. It is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney’s office does not destroy man’s accountability to his Creator or lessen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client’s sake.

11. Exposing corrupt Attorneys.—Attorneys should "Fearlessly expose before the proper tribunal corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

12. Attitude of State’s Attorney toward Innocent Prisoner.—An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, forswears himself. The state’s attorney should not press for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a nolle prosequi, a public prosecutor should submit the case, without argument. –

13. Defending One Whom Advocate Believes to Be Guilty.—An attorney cannot reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and honorable means to present such defenses as the law, of the land permits, to the end that no one may be deprived of life or liberty but by due process of law.

14. Maintaining Harassing Litigation.—An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party or to work oppression and wrong.

15. It is bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. He should avoid all unnecessary communication with jurors, even as to matters foreign to the cause, during the trial. –

17. General Rules as to Professional and Unprofessional Advertising.—Newspaper advertisements and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they are
conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is unprofessional.

18. Newspaper Discussion of pending Litigation. The publication of newspaper discussions by an attorney as to the merits of pending or anticipated litigation is unprofessional.

19. Where Attorney Becomes Witness for his Client. — Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client, as to any matter.

20. Stirring up Litigation. — Except where ties of blood relationship or trust make it an attorney’s duty, it is unprofessional to volunteer advice to bring a lawsuit.

21. Confidential Communications. — Communications and confidences between client and attorney are the property and secrets of the client, and cannot be divulged except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

22. Accepting Adverse Retainers. — The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client’s interests, in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material, in a subsequent suit, as the basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such case.

23. Attacking His Own Instruments or Conveyances. — An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere scrivener and was not consulted as to the facts, and unknown to him, the transaction amounted to a violation of the law, he may assail it on that ground in suits between third persons, or between parties to the instrument and strangers.

24. What influences an Attorney May Use. — An attorney openly, and in his true character, may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

25. Representing Conflicting Interests. — An attorney can never represent conflicting interests in the same suit or transaction. An attorney represents conflicting interests within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

26. Ill-Feeling and Personalities Between Advocates. — Clients and not their attorneys are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

27. It is not proper to allude to, or comment upon, personal history, or mental or physical peculiarities or idiosyncracies of opposing counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

28. Right of Attorney to Control the Incidental Matters of the Trial. — As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing - the opposing attorney or party to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposing attorney or party when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, cross interrogatories, and the like, the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.
29. Where an attorney has more than one regular client, the oldest client, in the absence of some agreement, should have the preference of retaining the attorney, as against his other clients in litigation between them.

30. Making Bold Assurances to Clients.—The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

31. Promptness and Punctuality.—Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client.

32. Disclosing Adverse Influences.—An attorney is in honor bound to disclose to the client at the time of retainer, all the circumstances of his relation to the parties or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.

33. Expressing a Candid Opinion as to the Merits of a Client’s Cause.—An attorney should endeavor to obtain full knowledge of his client’s cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

34. Where an attorney, during the existence of a relation, has lawfully made an agreement which binds his client, he cannot honorably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.

35. Dealing with Trust Property.—Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled with his private property or used by him, except with the client’s knowledge and consent.

36. Business Dealings with the Client.—Attorneys should as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought to refrain from bargaining about the subject matter of their litigation, so long as the relation of attorney and client continues.

37. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after advising frankly with the client, it should be left to his determination.

38. Keeping Agreements with the Client.—Important agreements affecting the rights of clients, should, as far as possible be reduced to writing, but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing.

39. An attorney should use his best efforts to prevent his clients from doing those things which the attorney himself will not do, particularly with reference to their conduct towards courts, officers, jurors, witnesses and suitors.

40. Taking advantage of Opposite Counsel without' Notice to Him.—An attorney should not ignore known customs or practice of the Bar or of a particular court, even when the law permits, without giving opposing counsel timely notice.

41. An attorney should not attempt to compromise with the opposite party, without notifying his attorney, if practicable.

42. In any matter, controversy or action, where the opposite parties are represented by attorneys, the attorneys of the respective parties shall confer and negotiate with each other and not with the clients.
43. When attorneys jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively; in which event, it is his duty to ask to be discharged.

44. When an attorney has been employed in a cause, no other attorney shall accept employment as his associate, without previously ascertaining that his employment is agreeable to the attorney first employed.

45. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney.

46. Suing a Client for a Fee.—In general it is better to yield something to a client’s dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

47. Fixing the Amount of the Fee.—Attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client’s ability to pay can never justify a charge for more than -service is worth; though his poverty may require a less charge in many instances and sometimes none at all.

48. Elements to be Considered in Fixing the Fee.—In fixing fees the following elements should be considered: 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2nd. Whether the particular case will debar the attorney’s appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3rd. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefits resulting from the services. 5th. Whether the compensation be contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the profession is a branch of the administration of justice and not a mere money-getting trade.

49. Contingent Fees.—Contingent fees may be contracted for; but certain compensation is to be preferred.

50. Compensation for Services Rendered to Another Attorney.—Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances; and where the circumstances make it proper to charge, the fees should generally be less than in cases of other clients.

51. Treatment of Witnesses and Parties to the Cause. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony it should be done without vilification or unnecessary harshness.

52. Attitude Toward Jury.—It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury’s fatigue or hunger, and uncomfortableness of their seats, or the court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court, whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards the court or opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of the jury, to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws.

53. All propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.
54. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenseless and oppressed.

55. The lawyer should study the law with the constant purpose to do what he can to amend and perfect it.

56. The enumeration of the foregoing duties shall not be construed to deny the existence of other duties equally imperative, though not specifically mentioned herein.

Respectfully submitted, JOHN G. SARGENT, ELMER JOHNSON, SHERMAN R. MOULTON, Committee on Professional Conduct

Appendix 3: I

The Hymn

All Mankind Fell in Adam’s Fall

Lazarus Spengler

All mankind fell in Adam’s fall,
One common sin infects us all;
From sire to son the bane descends,
And over all the curse impends.

Through humankind corruption creeps
And them in dreadful bondage keeps;
In guilt they draw the infant breath
And reap its fruits of woe and death.

From hearts depraved, to evil prone,
Flow thoughts and deeds of sin alone;
God’s image lost, the darkened soul
Seeks not nor finds it heavenly goal.

But Christ, the second Adam, came
To bear our sin and woe and shame,
To be our life, our light, our way,
Our only hope, our only stay.

As by one man all mankind fell
And, born is sin, was doomed to hell,
So by one Man, who took our place,
We all received the gift of grace.

We thank you, Christ; new life is ours,
New light, new hope, new strength, new powers:
This grace our every way attend
Until we reach our journey’s end.
Hymn # 363 from **Lutheran Worship**
Author: Louis Bourgeois
Tune: Wenn Wir In Hochsten Noten Sein
1st Published in: 1524
An Archival View of Vermont Legal History:  
The Vermont State Archives & Records Administration 
Court Records Project

I. The court records project
   1. Preservation, public access, and publicity for archival court records
   2. Caledonia, Lamoille, Orleans and Franklin Counties
   3. County court, supreme court, and court of chancery within each county
   4. Funded by National Historic Publications and Records Commission
   5. 2011-2014: web exhibit, Guide to Vermont Court Records at end of project

II. Archival court records
   1. Result from legal, administrative processes of court system
   2. Three functional record types: dockets, record books, case files
   3. Case files include miscellaneous court administrative documents
      a. Financials, jury venires, jail reports, bar admissions, probation reports,
         correspondence, inquests, bills not found, inquests

III. Archival processing
   1. Basic preservation: protective covering for fragile documents, climate-
      controlled storage in acid-free folders ands boxes
   2. Records arranged chronologically for each court, by county
   3. Case files are unfolded and arranged in docket order by court term
   4. Court descriptions and box lists entered in searchable VSARA database
      http://vermont-archives.org/research/database/series.asp

IV. Historical value
   1. Detail lives and experiences of diverse cross-section of Vermonters
   2. Chronicle150 years of legal, economic, social change in Vermont
   3. Preserve records related to persisting legal rights
   4. Document continuing legal, economic, and social issues
V. A sampling of Vermont court cases*

1. Chancery court cases
   a. Unique injunction cases
      ii. Hubbard Hastings v. JBW Butterfield. Caledonia County Chancery Court, June 1877 #36, Box CACH-00009.
      v. Reformed Presbyterian Church of Craftsbury v. United Presbyterian Church of Craftsbury. Orleans County Chancery Court, March 1909 #317, Box ORCH-00024.
      vi. Elijah S. Cowles v. Black River Bobbin Co. Orleans County Chancery Court, Sept. 1911 #381, Box ORCH-00024.
   b. Water rights
      i. HA Waterman v. Orange and Abijah Buck. Lamoille County Chancery Court, Dec. 1891 #14, Box LACH-00006; also Lamoille County Supreme Court, August 1892 #2, Box SUPR-LA-00004.
   c. “Eldercare” foreclosure
      i. Sarah Ball v. Daniel Ball & James Trefren. Caledonia County Chancery Court, June 1885 #31, Box CACH-00014.
      ii. Pamela Young v. Orrin Young. Caledonia County Chancery Court, June 1887 #38, Box CACH-00014.
      iii. Robert Whitcomb v. Truman Whitcomb & Dorcas Whitcomb. Lamoille County Chancery Court, April 1886 #10, Box LACH-00006.
      iv. Anna Morrill v. Orrin and Sarah Morrill et als. Lamoille County Chancery Court, Dec. 1891 #2, Box LACH-00006.

2. Divorce and child custody
   i. Pever v. Pever. Caledonia County Supreme Court, Sept. 1809 New Entry #60, Box SUPR-CA-00003.
   ii. Micah Hashal v. Betsey Hashal. Caledonia County Supreme Court, Feb. 1819 New Entry #1, Box SUPR-CA-00006.
iii. Betsy Farnsworth v. Samuel Farnsworth. Orleans County Supreme Court, March 1827 New Entry #3, Box SUP-OR-00003.

iv. Aaron Gray v. Fanny Gray. Caledonia County Supreme Court, Oct. 1880 #25, Box SUPR-CA-00019.

v. Eva Whitmore v. George H. Whitmore. Lamoille County Court, June 1909 #1154, Box LACC-00018.

vi. Lamora Whittier v. FH McFarland. Lamoille County Supreme Court, October 1906 #81, Box SUPR-LA-00005.

vii. In re Walter E. King. Lamoille County Supreme Court, August 1893 #10, Box SUPR-LA-00005.

viii. In re Eulalia M. Chesley. Caledonia County Supreme Court, May 1894 [no #], Box SUPR-CA-00022.

3. Pauper law

   i. Elmore v. Calais. Lamoille County Supreme Court May 1859 #17, Box SUPR-LA-00002.

4. Prohibition-related cases

   i. Remonstrances against granting of liquor licenses. Caledonia County Court Miscellaneous, June 1833 and Dec. 1840, Boxes CACC-00026 and CACC-00031.

   ii. State v. Giscomo Bardelli. Caledonia County Supreme Court, Oct. 1905 #1893, Box SUPR-CA-00023.

   iii. State v. G. Ceruti. Caledonia County Court, Dec. 1909 #2596, Box CACC-00074.

   iv. GF Cerutti v. Guisto Oliosi. Caledonia County Court, Dec. 1920 #4009, Box CACC-00082.

5. Penal reforms and the beginning of probation

   i. Caledonia County Court Probation Officer Reports, Elisha May, 1900-1917 Miscellaneous, Boxes CACC-00066 - CACC-00080.

* Note that citations are to courts, docket numbers, dates, and locations of manuscript case files in the state archives court records series. There may be printed reports for some cases, but these have not been consulted or cited.

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Vermont State Archives & Records Administration   http://vermont-archives.org/
From:

UNCOMMON LAW, ANCIENT ROADS, AND OTHER RUMINATIONS ON VERMONT LEGAL HISTORY

Paul S. Gillies

Vermont Historical Society
Barre and Montpelier
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