Basic Skills in Vermont Practice & Procedure

June 11 & 12, 2020
WEBINAR SERIES

Speakers:

Mary Ashcroft, Esq.
Eileen Blackwood, Esq.
David Casier, Esq.
Therese Corsones, Esq.
Ryan Kane, Esq.
Michael Kennedy, Esq.
James Knapp, Esq.
Kyle Landis-Marinello, Esq.
Basic Skills in Vermont Practice and Procedure
June 11 & 12, 2020
LIVE WEBINAR SERIES

Thursday June 11th
10:00am – 11:30 Vermont Professionalism Overview
Speakers: Michael Kennedy, Esq, Eileen Blackwood, Esq

1:00pm – 2:00 Administrative Law
Speakers: Ryan Kane, Esq., Kyle Landis-Marinello, Esq

Friday June 12th
10:00am – 11:30 Property and Real Estate
Speaker: Jim Knapp, Esq

12:00pm – 1:00 Civil Litigation Overview
Speakers: Therese Corsones, Esq., David Casier, Esq.

2:00pm – 3:00 Family Law
Speaker: Mary Ashcroft, Esq

NOTE: All registered attendees will receive individual access information for each of these sessions, emailed in advance, from Webex (Cisco) and Jennifer Emens-Butler.
<table>
<thead>
<tr>
<th></th>
<th>Table of Contents</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Professional Responsibility Program</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>The Professional Responsibility Board</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>The Rules of Professional Conduct</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>Bar Counsel &amp; Disciplinary Counsel</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>Assistance Panels</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td>Hearing Panels</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>Inquiries</td>
<td>2</td>
</tr>
<tr>
<td>8</td>
<td>Advisory Ethics Opinions</td>
<td>3</td>
</tr>
<tr>
<td>9</td>
<td>Complaints</td>
<td>3</td>
</tr>
<tr>
<td>10</td>
<td>Confidentiality</td>
<td>3</td>
</tr>
<tr>
<td>11</td>
<td>Complaints against Bar Counsel or Disciplinary Counsel</td>
<td>3</td>
</tr>
<tr>
<td>12</td>
<td>Screening</td>
<td>4</td>
</tr>
<tr>
<td>13</td>
<td>Non-Disciplinary Dispute Resolution</td>
<td>4</td>
</tr>
<tr>
<td>14</td>
<td>Investigations by Disciplinary Counsel</td>
<td>4</td>
</tr>
<tr>
<td>15</td>
<td>Probable Cause Review</td>
<td>5</td>
</tr>
<tr>
<td>16</td>
<td>Formal Disciplinary Proceedings</td>
<td>5</td>
</tr>
<tr>
<td>17</td>
<td>Hearings</td>
<td>6</td>
</tr>
<tr>
<td>18</td>
<td>Sanctions</td>
<td>6</td>
</tr>
<tr>
<td>19</td>
<td>Appeals</td>
<td>6</td>
</tr>
<tr>
<td>20</td>
<td>Published Decisions</td>
<td>7</td>
</tr>
<tr>
<td>21</td>
<td>Petitions for Reinstatement</td>
<td>7</td>
</tr>
<tr>
<td>22</td>
<td>Trust Accounts</td>
<td>7</td>
</tr>
<tr>
<td>23</td>
<td>Fee Disputes</td>
<td>7</td>
</tr>
<tr>
<td>24</td>
<td>Complaints against Judges</td>
<td>8</td>
</tr>
<tr>
<td>25</td>
<td>Malpractice</td>
<td>8</td>
</tr>
<tr>
<td>26</td>
<td>Disciplinary Record Checks</td>
<td>8</td>
</tr>
<tr>
<td>27</td>
<td>Current Contact List</td>
<td>8</td>
</tr>
<tr>
<td>28</td>
<td>Links</td>
<td>9</td>
</tr>
</tbody>
</table>

Complaints against attorneys should be mailed to:

Professional Responsibility Program  
32 Cherry Street, Suite 213  
Burlington, VT 05401

Questions? 802-859-3000

Please review this material before filing a complaint.
1. **The Professional Responsibility Program**

The Vermont Constitution provides the Vermont Supreme Court with the exclusive authority to discipline attorneys. In 1999, pursuant to its constitutional authority, the Supreme Court adopted Administrative Order 9. The Order, often referred to as “A.O. 9”, sets out the rules governing the establishment and operation of the Professional Responsibility Program (“the Program”). The Program’s objectives are:

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

2. **The Professional Responsibility Board**

The Professional Responsibility Board (“the Board”) is responsible for the supervision of the Program.

_The Board’s mission is to protect the public, promote confidence in the integrity of the legal profession, and assist attorneys to achieve and maintain high standards of professional responsibility._

The Board sets the Program’s policies and goals. The Board meets several times throughout the year to review the Program’s operations. The Board does not have any role in the investigation, prosecution, or adjudication of complaints.

The Board consists of seven members: 3 lawyers, 3 non-lawyers, and 1 judge. Each member is appointed by the Supreme Court. Terms are three years, with members limited to three consecutive terms. Board members are not full-time employees of the Program.

3. **The Vermont Rules of Professional Conduct**

In 1999, the Vermont Supreme Court promulgated the Vermont Rules of Professional Conduct (“the Rules”). The Rules are often referred to as “the ethics rules.” A lawyer who violates the Rules is subject to having a disciplinary sanction imposed against his or her law license.

4. **Bar Counsel & Disciplinary Counsel**

The Program employs two full-time attorneys: Bar Counsel and Disciplinary Counsel. Bar Counsel and Disciplinary Counsel are responsible for executing the Board’s mission.

Bar Counsel administers the dispute resolution program, responds to inquiries, screens complaints, and serves as the Program’s liaison to various organizations on matters related to attorney conduct and professional responsibility.

Disciplinary Counsel administers the disciplinary program and is responsible for the investigation and prosecution of all disciplinary and disability matters. Disciplinary Counsel supervises a single
deputy. The position of Deputy Disciplinary Counsel is a part-time position that must be filled by an attorney who is licensed to practice law in Vermont.

5. **Assistance Panels**

Assistance panels provide a forum to resolve complaints in a non-disciplinary manner. The Program maintains a roster of volunteers who have agreed to serve on assistance panels. The roster includes lawyers and non-lawyers alike.

When a complaint is referred to an assistance panel, three people are assigned to serve. The panel must include one non-lawyer and one member of the Board. This can be the same person.

An assistance panel may meet with the complainant and respondent-attorney, but is not required to. An assistance panel’s resolution may include conditions with which the respondent-attorney must comply. The resolution cannot include a sanction against the respondent-attorney’s law license.

If an assistance panel resolves a complaint, the Program keeps confidential the complaint and the manner in which it was resolved. If an assistance panel determines that the complaint is more appropriate for disciplinary proceedings, it may refer the complaint to Disciplinary Counsel for an investigation.

6. **Hearing Panels**

Hearing panels preside over disciplinary proceedings. There are ten standing panels. Each panel has three members. Two must be lawyers, one must be a non-lawyer. Board members cannot serve on hearing panels.

The hearing panels make findings of fact & conclusions of law, and impose sanctions. They are the Program’s equivalent of the trial courts. The Program has contracted with an attorney who provides legal advice and counsel to the hearing panels.

7. **Inquiries**

Bar Counsel responds to inquiries regarding ethics and law practice. Lawyers and non-lawyers may inquire of Bar Counsel. Inquiries are confidential and are not treated as complaints.

Inquiries are done by telephone. Bar Counsel’s role is to steer the inquirer in the proper direction. That might mean trying to resolve a dispute before a complaint is filed. It might mean referring the inquirer to the applicable Rule of Professional Conduct or to a case or opinion that relates to the subject of the inquiry. It might mean suggesting that the inquirer file an ethics complaint. It might mean referring the inquirer to another program; for example, the Vermont Bar Association or the Office of the Attorney General.

Bar Counsel provides guidance, not legal advice. An inquirer does not have a reasonable expectation that an inquiry gives rise to an attorney-client relationship between the inquirer and Bar Counsel. Bar Counsel does not share or disclose information received during an inquiry without the inquirer’s permission.

To make an inquiry, contact Bar Counsel at 802-859-3004.
8. **Advisory Ethics Opinions**

Bar Counsel does not provide written or formal advisory ethics opinions. The Vermont Bar Association has a Professional Responsibility Committee. The Committee issues advisory ethics opinions. The Bar Association and its committees are not part of the Judiciary system or the Professional Responsibility Program. To contact the Bar Association, call 802-223-2020.

9. **Complaints**

The Program reviews complaints that allege that an attorney has violated the *Rules of Professional Conduct*. A complaint must be in writing and should set out the facts that make you think that the attorney did something wrong. Complaints should focus on facts, not opinion or argument.

If you file a complaint, a copy will be sent to the attorney who is the subject of complaint. You are not required to include exhibits and attachments, but you may include whatever you think would help to clarify your complaint. You do not need to cite particular Rules of Professional Conduct. Bar Counsel and Disciplinary Counsel will review the facts that you report and will determine whether the facts support a conclusion that a rule has been violated. Please do not send originals. The Program will not return material to you once a complaint is closed.

Complaints should be sent to:

**Professional Responsibility Program**
32 Cherry Street, Suite 213
Burlington, VT 05401

To file a complaint via e-mail, send to: brandy.sickles@state.vt.us

10. **Confidentiality**

Complaints are confidential. A complaint does not become public unless Disciplinary Counsel initiates formal disciplinary proceedings against the respondent-attorney. The confidentiality applies only to employees, staff within the Program. The confidentiality does not apply to the complainant or to the respondent-attorney.

11. **Complaints Against Bar Counsel & Disciplinary Counsel**

The Program assigns conflict counsel to review complaints that are filed against Bar Counsel and Disciplinary Counsel. Mail complaints against Bar Counsel or Disciplinary Counsel to:

Deb Laferriere, Program Administrator
VT Supreme Court Professional Responsibility Board
109 State Street
Montpelier, VT 05609-0701
12. **Screening**

Bar Counsel “screens” each complaint. The screening process is intended to determine the nature of the complaint and whether Bar Counsel can resolve it through non-disciplinary dispute resolution methods. If a complaint can be resolved, Bar Counsel may either resolve it or refer it to an Assistance Panel or other dispute resolution program.

If a complaint cannot be resolved by Bar Counsel, it is either dismissed or referred for further investigation.

If Bar Counsel determines that a complaint should be dismissed, the complainant and the respondent-attorney are notified in writing. The complainant has thirty days to file a written request that the Board Chair review Bar Counsel’s decision.

If Bar Counsel refers a complaint for further investigation, the complainant and respondent-attorney are notified in writing. Disciplinary Counsel takes over responsibility for the complaint. The attorney has twenty-one days to provide Disciplinary Counsel with a written response to the complaint.

13. **Non-Disciplinary Dispute Resolution**

Some complaints can be resolved without imposing discipline against an attorney. Bar Counsel is authorized to resolve complaints or refer them to assistance panels or any other dispute resolution programs, including the Vermont Bar Association’s Committee for the Arbitration of Fee Complaints.

When a complaint is resolved in a non-disciplinary manner, no sanction is imposed against the respondent-attorney’s license and the attorney is allowed to continue to practice law. The file is closed and the Program is required to keep confidential the complaint, the fact that it was filed, and the manner in which it was resolved.

14. **Investigations by Disciplinary Counsel**

Complaints that are not resolved, dismissed, or referred for non-disciplinary resolution are referred to Disciplinary Counsel. Disciplinary Counsel investigates to determine whether formal disciplinary proceedings should be commenced against the respondent-attorney’s law license.

Disciplinary Counsel’s investigations might include contacting the complainant, contacting the respondent-attorney, reviewing documents, and interviewing witnesses. Attorneys are required to cooperate with investigations by Disciplinary Counsel. The failure to do so is grounds for the imposition of a disciplinary sanction.

At the conclusion of an investigation, Disciplinary Counsel may dismiss the complaint, refer it to an Assistance Panel for non-disciplinary resolution, or commence formal disciplinary proceedings. Disciplinary Counsel’s decision may not be appealed.
If Disciplinary Counsel dismisses a complaint or refers it to an Assistance Panel, the Program keeps confidential the complaint, the results of the investigation, and the disposition. If Disciplinary Counsel decides that the respondent-attorney should be charged with violating the Rules of Professional Conduct, the decision is subject to review for probable cause.

15. **Probable Cause Review**

Each year, one of the Program's hearing panels serves as “the probable cause panel.” If Disciplinary Counsel decides that the respondent-attorney should be charged with violating the Rules of Professional Conduct, Disciplinary Counsel must prepare an affidavit and memorandum that describes the factual basis for the decision to file charges. The material is filed with the probable cause panel. The filing is confidential.

The panel reviews the filing in order to determine whether Disciplinary Counsel’s decision is supported by probable cause. If so, Disciplinary Counsel must initiate formal disciplinary proceedings. If not Disciplinary Counsel must determine whether to dismiss the complaint or conduct further investigation.

The probable cause review is ex parte. In other words, there no hearing. The panel bases its decision on the written material submitted by Disciplinary Counsel.

16. **Formal Disciplinary Proceedings**

If a hearing panel finds that Disciplinary Counsel’s decision to charge the respondent-attorney with violating the Rules of Professional Conduct is supported by probable cause, Disciplinary Counsel must initiate formal disciplinary proceedings.

There are two ways to initiate formal disciplinary proceedings.

Disciplinary Counsel may file a *Petition of Misconduct* that sets out factual allegations and the Rules of Professional Conduct that Disciplinary Counsel alleges the respondent-attorney has violated. A petition is public and is assigned to a hearing panel. The respondent-attorney has 20 days to file a response that admits or denies the allegations. Then, the Disciplinary Counsel and the respondent-attorney have 60 days to complete discovery and prepare for a final hearing.

As an alternative to a Petition of Misconduct, Disciplinary Counsel and the respondent-attorney may initiate formal disciplinary proceedings by filing a *Stipulation of Facts*. The stipulation is public and is assigned to a hearing panel. It is a document in which Disciplinary Counsel and the respondent agree to particular facts.

When proceeding by stipulation, Disciplinary Counsel and the respondent-attorney may reserve the right to argue whether the stipulated facts constitute a violation of the rules that warrants a sanction. Or, they may join to recommend that a hearing panel make particular conclusions of law and impose a specific sanction. The panel is not required to accept the recommendations.
17. **Hearings**

At a hearing, both Disciplinary Counsel and the respondent-attorney may call witnesses and present evidence. Disciplinary Counsel bears the burden of proving a violation of the Rules of Professional Conduct by “clear and convincing” evidence. In every case, the hearing panel must issue a written decision that includes its findings of fact, conclusions of law, and, if appropriate, sanction.

A hearing panel is authorized to bifurcate the hearing. That is, the panel may hold a hearing on the issue of whether the respondent-attorney violated the Rules of Professional Conduct. Then, if Disciplinary Counsel proves the violation, the panel may hold another hearing on the issue of the sanction that should be imposed. The decision whether to bifurcate the hearing lies in the panel’s discretion.

18. **Sanctions**

If a hearing panel concludes that the respondent-attorney violated the Rules of Professional Conduct, it must impose a sanction. There are four sanctions to choose from.

1. **Admonition:** An admonition is the least severe sanction and is to be imposed only in cases involving minor misconduct, with little or no injury, and little likelihood of repetition by the respondent-attorney. An admonition sets out the conduct that violated the Rules of Professional Conduct, but does not identify the lawyer. An admonition does not prohibit a lawyer from continuing to practice law.

2. **Public Reprimand:** A public reprimand sets out the conduct that violated the Rules of Professional Conduct and identifies the lawyer. A public reprimand does not impact a lawyer’s authorization to continue to practice law.

3. **Suspension:** A suspension sets out the conduct that violated the Rules of Professional Conduct, identifies the lawyer, and prohibits the lawyer from practicing law for a fixed period of time. A suspension must be for at least one day but for no longer than 3 years.

4. **Disbarment:** A disbarment sets out the conduct that violated the Rules of Professional Conduct, identifies the lawyer, and prohibits the lawyer from practicing law for 5 years.

If a hearing panel imposes a sanction, it may also order the respondent-attorney to reimburse any money collected from the client. Also, a hearing panel may impose probation in connection with any sanction. Conditions of probation must be in writing and are monitored by Disciplinary Counsel.

19. **Appeals**

Once a hearing panel issues a decision, Disciplinary Counsel and the respondent-attorney may appeal. Appeals are direct to the Vermont Supreme Court and are governed by the Rules of Appellate Procedure. Even in the absence of an appeal from Disciplinary Counsel or the respondent-attorney, the Supreme Court may order appellate review of any hearing panel decision. If there is no appeal and the Court does not order its own review, a hearing
panel decision becomes final and has the full force and effect of an order of the Supreme Court.

20. **Published Decisions**

The Program publishes final disciplinary decisions issued by a hearing panel or the Supreme Court. Click here to review the decisions.

21. **Petitions for Reinstatement**

If an attorney is disbarred or suspended for six months or longer, the attorney must petition for reinstatement. The petition is assigned to a hearing panel. The attorney has the burden of demonstrating by clear and convincing evidence should be allowed to resume the practice of law. Disciplinary Counsel may oppose the petition.

An attorney who has been disbarred may not apply for reinstatement until five years from the date of the disbarment. An attorney who has been suspended for six months or longer may not apply for reinstatement until three months before the suspension is set to expire. An attorney suspended for fewer than six months does not have to apply for reinstatement.

22. **Trust Accounts**

Central to the Board’s mission of protecting the public, promoting confidence in the integrity of the legal profession, and assisting lawyers to achieve and maintain high standards of professional responsibility is its emphasis on a lawyer’s fundamental duty to safeguard client funds and property.

The Board maintains a list of approved financial institutions that have agreed to notify Disciplinary Counsel whenever an attorney’s trust account is overdrawn or an instrument drawn on an attorney’s trust account is presented against insufficient funds. Lawyers may not open trust accounts at institutions that are not on the approved list.

The Program has developed a trust account manual and a trust account survey. Bar Counsel regularly presents seminars on trust account management. Disciplinary Counsel has retained accounting firms that frequently conduct audits of lawyers’ trust accounts and trust accounting systems.

23. **Fee Disputes**

The Rules of Professional Conduct prohibit lawyers from charging unreasonable fees. Bar Counsel and Disciplinary Counsel review complaints that allege that a fee is unreasonable. Bar Counsel and Disciplinary Counsel do not mediate, arbitrate, or resolve fee disputes.

The Vermont Bar Association has a Committee for the Arbitration of Fee Complaints. For information on how to file a fee dispute complaint, contact the Vermont Bar Association at 802-223-2020. The Committee will not review a fee dispute if there is a complaint pending with Bar Counsel or Disciplinary Counsel.
24. **Complaints against Judges**

The Program does not oversee the judicial conduct. The Supreme Court has created a [Judicial Conduct Board](#) that investigates and prosecutes violations of the [Code of Judicial Conduct](#). [Click here](#) for information on how to file a complaint against a judge.

25. **Malpractice**

The Program does not provide legal advice or legal representation on malpractice issues. For advice on whether you have a claim for malpractice against an attorney, you must contact a lawyer. If you do not have a lawyer, the Vermont Bar Association has a lawyer referral service. The phone number is 1-800-639-7036.

26. **Disciplinary Record Checks**

The only information that the Program will disclose with respect to a lawyer’s disciplinary history is whether the lawyer has ever been reprimanded, suspended, disbarred, or formally charged with violating the Rules of Professional Conduct. With the exception of complaints that result in formal disciplinary charges and a public sanction, the Program will not confirm or deny that a complaint has ever been filed against an attorney.

If you are an attorney and need a list of complaints that have been filed against you, please call the Program Administrator at 802-828-3204. Please note: if you are an attorney and you need a Certificate of Good Standing, you need to [contact the Attorney Licensing Office](#) at 802-828-3281.
### Appendix 1 -- Current Contact List

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bar Counsel:</td>
<td>Michael Kennedy</td>
<td>802-859-3004</td>
<td><a href="mailto:michael.kennedy@state.vt.us">michael.kennedy@state.vt.us</a></td>
</tr>
<tr>
<td>Disciplinary Counsel:</td>
<td>Beth DeBernardi</td>
<td>802-859-3000</td>
<td><a href="mailto:beth.debernardi@state.vt.us">beth.debernardi@state.vt.us</a></td>
</tr>
<tr>
<td>Deputy Disciplinary Counsel:</td>
<td>Kimberly Rubin</td>
<td>802-859-3000</td>
<td><a href="mailto:kimberly.rubin@state.us">kimberly.rubin@state.us</a></td>
</tr>
<tr>
<td>Program Administrator:</td>
<td>Deb Laferriere</td>
<td>802-828-3204</td>
<td><a href="mailto:deb.laferriere@state.vt.us">deb.laferriere@state.vt.us</a></td>
</tr>
<tr>
<td>Administrative Assistant:</td>
<td>Brandy Sickles</td>
<td>802-859-3000</td>
<td><a href="mailto:brandy.sickles@state.vt.us">brandy.sickles@state.vt.us</a></td>
</tr>
<tr>
<td>Board Chair:</td>
<td>Jan Eastman, Esq.</td>
<td>802-828-3204</td>
<td></td>
</tr>
<tr>
<td>Court Administrator</td>
<td>Patricia Gabel, Esq.</td>
<td>802-828-3278</td>
<td></td>
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<tr>
<td>Vermont Bar Association:</td>
<td></td>
<td>802-223-2020</td>
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<tr>
<td>Lawyer Referral Service:</td>
<td></td>
<td>1-800-639-7036</td>
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<tr>
<td>Office of the Attorney General:</td>
<td></td>
<td>802-828-3171</td>
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<td>Attorney Licensing/Bar Admissions</td>
<td></td>
<td>802-828-3281</td>
<td></td>
</tr>
</tbody>
</table>
Appendix 2 – Links to Resources

- Professional Responsibility Program
- Policies of the Professional Responsibility Board
- Vermont Judiciary
- Disciplinary Decisions
- Vermont Bar Association
- VBA Advisory Ethics Opinions
- Attorney Licensing
- Mandatory Continuing Legal Education
- Vermont Rules of Professional Conduct
- Supreme Court Administrative Order 9
- Trust Account Manual
- Approved List of Financial Institutions
- Office of the Attorney General
- Judicial Conduct Board
- Bar Admissions
Life of an Ethics Complaint in Vermont

Complaint Filed.

- Dismissed
  - Complainant may appeal to PRB Chair

- Screened by Bar Counsel
  - Referred for Non-Disciplinary Dispute Resolution
    - Referred to an Assistance Panel
    - Resolved by Bar Counsel
  - Referred to Disciplinary Counsel for Investigation
    -Disciplinary Counsel files a request asking a hearing panel to review for probable cause Disciplinary Counsel's decision to charge the respondent with violating the rules
      - If probable cause is found, Disciplinary Counsel commences formal disciplinary proceedings by (1) filing a Petition of Misconduct that charges the respondent with violating the rules, or (2) joining with the respondent to file a Stipulation of Facts. This is the first filing that is public.

- Investigation Completed
  - Hearing Panel holds a hearing and issues a decision.
    - Either party may appeal or Supreme Court may order review on its own motion. Court issues a decision after normal appellate process.
    - If no appeal is taken & Supreme Court doesn't order review, decision is final and has the full force and effect of order of the Court.
MANAGING CLIENT TRUST ACCOUNTS

RULES, REGULATIONS, AND TIPS

This booklet has been prepared by the Vermont Professional Responsibility Program as a guide for both new and experienced lawyers who have questions about trust accounts. Our purpose is to provide you with the basic rules, highlight areas that will require your best judgment because there are no absolute rules in those areas, and dispense some practical experience provided by years of answering lawyers’ questions. Whenever you are dealing with trust accounts, please do not hesitate to call the Professional Responsibility Program if you have any questions: (802) 859-3000 or (802) 828-3204.

Revised: January 6, 2010
# INTRODUCTION

# GETTING STARTED

- Do I need a trust account? .............................................. 1
- What are some examples of client funds? .......................... 2
  - Advance fee/cost deposits ........................................ 2
  - Settlements .......................................................... 2
  - Overpayments of bills ............................................. 2
  - Escrow Funds ........................................................ 2
  - Funds Held in Other Fiduciary Capacities ....................... 2
- What does not go into a trust account? ......................... 3
  - Fully earned fees (i.e., payments of bills) ...................... 3
  - Reimbursements for cost advances ............................. 3
  - Lawyer's personal or business transactions .................. 3
- Which trust account do I use? .................................... 3
  - IOLTA (Interest on Lawyers' Trust Accounts) ............... 3
  - Individual Interest-Bearing Client Trust Account ........... 4
- How do I open an IOLTA account? ................................. 4
- What about bank fees? ............................................. 5
- How do I open an individual interest-bearing trust account? 5

# DAY-TO-DAY OPERATION & PROPER RECORDKEEPING

- What do I deposit to the trust account? ....................... 6
- How do I keep proper deposit records? ........................ 6
- How do I disburse funds from a client trust account? ...... 7
- What other records must I keep? ................................ 8

# MONTHLY ACTIVITIES

- Bank Reconciliation ............................................... 9
- Reconcile your Individual Client Transaction Summaries ..... 9
- Review Reconciled Client Balances ............................... 9

# REPORTING TO CLIENTS .............................................

# CLIENT SECURITIES AND PROPERTIES .............................

# TRUST ACCOUNT AUDITS ............................................

# FREQUENTLY ASKED QUESTIONS ....................................
INTRODUCTION

The trust accounting rules currently in effect for Vermont lawyers are found at V.R.P.C. 1.15, 1.15A, and 1.15B. The Rules impose a strict fiduciary standard that all funds received by a lawyer which belong wholly or in part to a client or third person must be maintained in an interest-bearing trust account while in the lawyer's possession. The trust account must be segregated from any lawyer funds. It must also be maintained in a financial institution authorized by law to do business in Vermont and which has filed the agreement required by V.R.P.C. 1.15B(d). Finally, the trust account must generate interest for the benefit of either the client or the Vermont Bar Foundation (VBF). The client trust account that generates interest for the benefit of the VBF is frequently referred to as an IOLTA (Interest on Lawyers' Trust Accounts) account. If you have questions about the Vermont Bar Foundation, please contact the Executive Director of the VBF, Deborah Bailey, P.O. Box 1170, Montpelier, VT 05601, Tel. (802) 223-1400, email dbailey@vtbarfoundation.org.

The trust accounting rules have been implemented in an attempt to protect both clients and lawyers. The client must feel confident when entrusting money to his or her lawyer that the funds will be maintained in a safe place, fully accounted for, and promptly remitted. The lawyer who conscientiously follows the rules is maintaining insurance against false claims of financial improprieties with client funds. This should create a "win-win" situation for both you and your clients.

GETTING STARTED

Do I need a trust account?

The purpose of a trust account is to protect the funds of clients and third parties. The Rules require a lawyer to deposit and hold in a trust account any funds belonging to a client or third person. The purpose of this requirement is to protect client funds from the lawyer's own creditors or personal financial problems. Therefore, any lawyer who expects to be handling client funds should open a trust account. A law firm may open one account for all lawyers in the firm. If you are not in private practice or your practice is of a nature that you do not expect to receive client funds, you do not need to open a trust account.
What are some examples of client funds (which are therefore required to be placed in a trust account)?

Advance fee/cost deposits

Advance fee/cost deposits are funds given to you by clients to pay for future fees and costs. These are costs you have not yet paid or fees you have not yet earned. Advance fee/cost deposits are considered client funds and must be deposited into the trust account because the client has the expectation that the funds will be safeguarded until needed. If you handle advance fee/cost deposits, you need a trust account.

Settlements

Settlements are considered client funds and must be handled in accordance with V.R.P.C. 1.15 and 1.15A. In addition, V.R.P.C. 1.5(c) requires that at the conclusion of a contingent fee matter, the lawyer must provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. [Remember that all contingent fee arrangements must be in writing. See V.R.P.C. 1.5(c)].

Overpayments of Bills

Overpayments are considered to be partially earned (the part covering the outstanding balance) and partially unearned (the overpayment portion). Overpayments must initially be deposited into the trust account. The earned portion must be withdrawn once the funds have been collected. (See the section on disbursing funds for more information about collected funds.) The unearned portion may be refunded to the client or, if the client so chooses, held in the trust account to apply to future services. Under no circumstances is it permissible to deposit client overpayments to the general business account. If you would rather not deposit the overpayment into the trust account, you can send the payment back to the client and ask that the check be reissued for the proper amount.

Escrow Funds

Escrow and other funds incident to closing real estate or personal property transactions must be deposited and held in a trust account.

Funds Held in Other Fiduciary Capacities

If you are holding funds in connection with a representation in which you’re acting as a trustee, agent, escrow agent, guardian, administrator, or executor, those funds must be deposited and held in a trust account. Be aware of the comment to Rule 1.15, which indicates that there are situations in which the applicable law of fiduciaries imposes duties upon lawyers beyond those imposed by the Rules of Professional Conduct.
What does not go into a trust account?

Knowing what must not go into the trust account is just as important as knowing what must go into the trust account. Depositing earned fees or personal funds into a trust account can change the nature of the account and subject it to a lawyer’s creditors. The following are some types of funds that must not be deposited into the trust account.

**Fully earned fees (i.e., payments of bills)**

This is money you receive from your client that is already earned. If your client is paying the exact amount shown on your invoice, that payment does not go into the trust account.

**Reimbursements for cost advances**

“Cost advance” is generally the term used to describe funds that the lawyer has advanced out of his/her own pocket. These costs should be paid out of the general business account, not the trust account. V.R.P.C. 1.8(e) authorizes lawyers to advance court costs and expenses of litigation. When you bill the clients for these costs and they make a full or partial payment, you should deposit the funds into your general business account.

Sometimes the reimbursements for costs advanced will be paid from a settlement when it is received. Because part of the settlement belongs to the client, the settlement must be deposited into the trust account. The lawyer’s portion to cover costs and fees is then withdrawn after the settlement check clears the bank.

**Lawyer’s personal or business transactions**

Deposits related to a lawyer’s personal or business transactions must not be placed in the trust account. The trust account is designed to hold client funds, not funds relating to employees, stockholders, outside counsel, friends, businesses of the lawyer, and personal real estate transactions. Make sure trust account deposits are for your clients and connected with a representation before depositing the funds into the trust account.

Which trust account do I use?

You’ve determined that you handle client money and therefore need to open a trust account. Which type of trust account do you use?

**IOLTA (Interest on Lawyers’ Trust Accounts)**

Interest on IOLTA accounts is paid to the Vermont Bar Foundation (VBF). These types of accounts should be used if you’re going to be handling client money for a short period of time or the funds are nominal in amount.
Individual Interest-Bearing Client Trust Account

If the deposit of client funds is reasonably expected to earn a substantial amount of interest for the client, the attorney should open a separate trust account for those funds. The separate account should be set up with the client's taxpayer ID number. The lawyer, not the client, should be the signatory on the account. If the client declines the establishment of an interest bearing account for his/her benefit, then the funds should be deposited into the attorney's general IOLTA account.

How do I open an IOLTA account?

1. Decide which financial institution you want to use for the account.

V.R.P.C. 1.15A(d) defines “financial institution” to include banks, savings and loan associations, credit unions, savings banks and any other businesses or persons that accept and hold funds held in trust by lawyers.

In addition, V.R.P.C. 1.15B(a)(1) and (d) require the account to be in a financial institution that has filed an agreement with the Professional Responsibility Board “to report to the Board in the event any properly payable instrument is presented against such a trust account containing insufficient funds, irrespective of whether or not the instrument is honored.” The Board publishes a list of such financial institutions annually. You can find the list on the Vermont Judiciary website at http://www.vermontjudiciary.org/LC/MasterPages/PRB-Attytrusts.aspx. You may also call the Office of Disciplinary Counsel at (802) 859-3000 to inquire whether a specific institution is on the list.

2. Give the bank instructions that you want to open an IOLTA account.

Each financial institution has its own requirements for opening an account. Rule 1.15A(a) requires such accounts to be clearly identified as “trust” accounts. You should make sure that the pooled interest-bearing trust account bears the VBF’s tax identification number 03-0285318. In addition, you should remind the financial institution that the interest must be remitted to the VBF and that the account is one for which the institution must notify Disciplinary Counsel whenever an instrument drawn on the account is presented against insufficient funds.

3. Order checks and deposit slips.

The checks and deposit slips for your IOLTA account should be clearly labeled “Client Trust Account” or “IOLTA Account.” In addition, it is a good idea to have the checks a different color from the checks used for your general business account. Both of these details may prevent the incorrect use of the trust account in the future.

The cost of printing checks and deposit slips is your responsibility. You can make an initial deposit to the trust account in an amount sufficient to cover this cost. Your other option is to have this cost charged to your general business account. Under no circumstances should it be deducted from client funds in the trust account.
What about bank fees?

Many attorneys mistakenly believe that a bank cannot charge fees on an IOLTA account. Some of the fees incurred on an IOLTA account are deducted from the interest earned on the account and the difference is remitted to the VBF. V.R.P.C. 1.15B(a) states that "The interest or dividends accruing on this account, net of any transaction costs, . . . shall be paid over to the Vermont Bar Foundation . . . ."

To the extent that the bank imposes fees in excess of those covered by earned interest, those fees must be paid by the lawyer, not the clients. Under Rule 1.15(b), a lawyer may deposit his or her own funds into a trust account for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose.

How do I open an individual interest-bearing trust account?

1. Decide which financial institution you want to use for the account.

The requirements for individual interest-bearing accounts are the same as for IOLTAs. The bank must be on the list of approved banks as described above.

2. Give the bank instructions that you want to open an individual interest-bearing trust account.

You will need your client’s tax identification number. This is either a Social Security number or an EIN (Employer Identification Number). You should not use the tax identification number of you or your law firm. Using your own ID number will not safeguard your client’s funds.

The account should be labeled with the name of your client in care of you or your law firm. The bank statements should come to you although the bank may send a duplicate statement to your client if you wish. The attorney should be the signatory on the account.

In most banks, these accounts are very similar to savings accounts. As such, you are often limited to the number of checks and deposits you can make in a month before being charged a fee.

You may not need to order checks or deposit slips if the activity on the account is minimal. Many lawyers have their individual interest-bearing trust accounts and IOLTA accounts at the same bank. They electronically transfer client funds from the individual interest-bearing account to their IOLTA account and write checks from there, as needed. When you transfer the money into your IOLTA, it should be disbursed in a timely manner.
DAY-TO-DAY OPERATION & PROPER RECORDKEEPING

One of the most frequent questions presented to the Professional Responsibility Program relates to when a lawyer can write a check against funds deposited into a trust account. The question cannot be answered without first discussing the types of funds that must be deposited into a trust account.

What do I deposit to the trust account?

Any deposit containing client funds must be deposited directly into the trust account. No funds belonging to the lawyer may be deposited into the trust account with three exceptions: (1) receipts belonging in part to a client and in part to the lawyer; (2) funds to restore appropriate balances; and (3) funds to pay service charges or fees on the account, as provided in V.R.P.C. 1.15(b).

This simple concept, that client funds must be deposited to the client trust account and lawyer funds must never be deposited to the client trust account, gets complicated when put into practice. Your firm will receive funds from many different sources and for many different purposes. To decide if these funds must be deposited to a trust account, you need to determine if the client still has an ownership interest in any portion of the funds when you receive them.

For example:

a. If you have sent the client a billing statement for legal services performed and the client gives you a check in the amount of the billing statement, these are clearly earned fees and must be deposited to your general business account.

b. If your client gives you a cost advance to be disbursed on his/her behalf as costs related to litigation are incurred, these funds must be deposited to a client trust account.

c. If your client sends a check that contains both earned fees and a cost advance, the check must be deposited into your trust account. Once the funds have been collected, you transfer the earned fees to your general business account.

How do I keep proper deposit records?

Part of keeping proper records is identifying the client clearly, by name or file number, on the deposit slip. Each line of the deposit slip should show the client identity of the deposit items. (See example). Keep a copy of the deposit slip for your records. In addition, it is a good idea to make copies of the deposited items to back up your deposit slip. Should you forget to record the deposit in your records, the copy will be there for reference.
Sample check from client

John Doe
1325 4th Avenue
Anywhere, Vermont 00000
802-555-5555

Date November 18, 2008

Pay to the My Law Firm $5,000.00

Five thousand and no/100 Dollars

Any Bank USA
Anywhere, VT

for Attorney fees

John Doe

Sample deposit slip to trust account
You can see how the check from your client has been recorded.

<table>
<thead>
<tr>
<th>DATE</th>
<th>11/18/08X</th>
<th>Currency</th>
<th>Checks</th>
<th>Doe Check # 8687</th>
<th>Tucker</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$5,000</td>
<td></td>
<td>$3,500</td>
<td></td>
</tr>
<tr>
<td>Total Deposit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$8,500</td>
</tr>
</tbody>
</table>

My Law Firm Trust Account – Any Bank USA

$8,500.00

How do I disburse funds from a client trust account?

Funds may be disbursed only based on the understanding between you and your client. Although this may be a verbal agreement, it is preferable (mandatory in contingent fee cases) to have a written agreement acknowledging receipt of the funds and designating their purpose.

You should disburse trust account funds promptly after the entitlement to the funds is established. However, such disbursements should be made only after the deposit that created the funds has resulted in "collected funds" or has given rise to a situation in which the Rules of Professional Conduct allow you to write against funds that you reasonably believe will be collected.

When a deposited item has cleared the banking system, it becomes collected funds. Do not confuse collected funds with available funds. Often banks make funds available for withdrawal before those funds have been collected due to the
requirements set forth in Federal Reserve Regulation CC. The only items that are recognized as collected when deposited are cash and wire transfers. All other deposit items, including cashier's checks, money orders, and certified checks, will have varying times for collection; check with your bank to determine the length of time you need to wait before making a disbursement. Rule 1.15(f) addresses collected funds in Vermont, and Rule 1.15(g) sets forth certain types of non-collected funds which an attorney may treat as collected, subject to the terms and limits set forth in that rule. Rule 1.15(h) makes it clear that if an attorney relies on non-collected funds and those funds are not collected, it is the attorney's responsibility to act immediately to protect the funds of his clients and affected third persons.

**Have written evidence supporting issuance of each check**

You may never remove funds from a trust account without being able to document undisputed entitlement to those funds. If the client funds in the trust account are understood to be an advance fee deposit, such fees must be promptly removed from the trust account as soon as the fee is earned. Should a client dispute the billing, the disputed portion of the fee should remain in the trust account until the dispute is resolved. Similarly, if a client disputes a proposed settlement distribution, you are should promptly disburse the undisputed funds and retain the disputed funds in the trust account until the dispute is resolved.

Disbursements from the client trust account on behalf of a client may never exceed the amount that the client has on deposit in the trust account. If they do, you are using one client's funds on behalf of another client.

**Note:** All checks drawn on the trust account should be written to a named payee. You should not make a check payable to "cash." In addition, you should not make cash withdrawals from the trust account. All withdrawals should be made by check or by bank transfer.

**Identify checks by client**

Identify the client on the face of each check. If the check covers more than one client, show the breakdown by client and amount. Attach a breakdown to your copy of the check.

**What other records must I keep?**

Rule 1.15 provides that complete records of trust account funds and other client property must be kept for a period of six years after termination of the representation. Rule 1.15A provides that, at a minimum, the records must include the following four features:

(1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;
(2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;

(3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and

(4) a single source for identification of all accounts maintained as required in this rule.

MONTHLY ACTIVITIES

A. Bank Reconciliation

Once a month you will receive your bank statement. The account balance on the bank statement must be reconciled to the account balance shown in your check register. There is usually a form for performing the reconciliation on the back of the bank statement, or you can devise your own format. Differences between the bank statement balance and the checkbook balance should be investigated immediately and corrected either in your records or by the bank.

B. Reconcile your Individual Client Transaction Summaries

As soon as you have completed the bank reconciliation, you should make sure the individual client balances total to the reconciled check register balance. The easiest way to do this is to make a list of the clients and the balance that shows for each. When the list is complete, total the balances and compare it to the balance in your register. If every item has been posted correctly and all the math is correct, these two numbers will agree. If they do not agree, it means:

(1) you have left a client off the list; or

(2) activity during the month was not posted to the client summaries correctly; or

(3) you added or subtracted incorrectly.

Find the error and correct it immediately.

C. Review Reconciled Client Balances

Keep both the bank reconciliation and the client balance listing with your client trust records. If more than one lawyer uses the trust account, each lawyer with client funds in the account should review the balances for his or her clients. This review should be used to determine if the balance on deposit should be applied to billings for services, refunded to the client, or transferred to an individual interest-bearing account.
**Note:** If you have an employee or other person maintain the trust account records, you should review his/her monthly reconciliations. This ensures that they are being prepared and that the client records are accurate. It also emphasizes the importance of maintaining these records accurately and on a timely basis. The fact that a bookkeeper or secretary in your office was maintaining the records will not excuse you from responsibility if they are not handled properly.

**REPORTING TO CLIENTS**

You are required to report to your client whenever money is received or disbursed on your client’s behalf. Specifically, V.R.P.C. 1.15(d) states that upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. In addition, V.R.P.C. 1.15A(a)(3) provides that the trust account system must include records documenting “timely notice” to clients of all receipts and disbursements from the trust account. The reporting of this activity is not optional; it is required.

The reporting of trust account activity can be done in many different ways. The most common method is to show the activity on your client’s monthly billing statement. The information listed on the statement should include:

- The amount of your client’s money held in the trust account at the beginning of the month
- New deposits (including the source of the deposit) or other additions
- All disbursements (including the name of the payee)
- The new balance of your client’s money in the trust account at the end of the month

If the amount owed on the bill is going to be paid from the trust account unless the client objects, a statement noting this should appear on the bill.

If you are disbursing settlement proceeds to a client, a settlement statement must be prepared. (See V.R.P.C. 1.5(c)). The statement must show the amount of the settlement, attorney fees and costs, third party disbursements, and client distribution. If any funds remain in the trust account after the distribution, the balance remaining and the purpose for its retention should be noted on the statement.

You may have an occasion when you’re holding client money for a long period of time with no transactions occurring. These types of situations rarely generate billing statements or regular reporting to clients. Under V.R.P.C. 1.15(d), you are required to send a prompt accounting at the request of the client; however, it is good practice to at least send an annual accounting to your client that shows how much money is being held. This reminds your client that you are holding funds and allows you to stay in contact. If there is no specific reason to hold these funds in the trust account, they should be refunded to the client.
CLIENT SECURITIES AND PROPERTIES

Although most of the provisions of V.R.P.C. 1.15, 1.15A, and 1.15B address the handling of client funds, the rules also impose fiduciary duties on the lawyer who is holding client property other than funds. V.R.P.C. 1.15(a) provides that a lawyer shall hold client property separate from the lawyer's own property; client property other than funds must be identified as such and appropriately safeguarded. Complete records pertaining to such property must be maintained for a period of six years following termination of the representation.

TRUST ACCOUNT AUDITS

The Vermont Rules of Professional Conduct provide for trust account audits:

Rule 1.15A. Trust Accounting System

(b) A lawyer or law firm shall submit to a confidential compliance review of financial records, including trust and fiduciary accounts, by the Professional Responsibility Program's Disciplinary Counsel. The information derived from such compliance reviews shall not be disclosed by anyone in such a way as to violate the evidentiary, statutory, or constitutional privileges of a lawyer, law firm, client, or other person, or any obligation of confidentiality imposed by these rules, except in accordance with Administrative Order No. 9. A copy of any final report shall be provided to the lawyer or law firm.

(c) The Supreme Court may at any time order an audit of financial records, including trust and fiduciary accounts, of a lawyer or law firm and take such other action as it deems necessary to protect the public.

In accordance with Rule 1.15A, the Professional Responsibility Program conducts periodic audits of attorneys' trust accounting systems. Disciplinary Counsel selects a group of attorneys and/or firms whose trust accounting systems will be reviewed for compliance with the Vermont Rules of Professional Conduct. The list of attorneys is forwarded to an accountant whose firm has been retained by the Professional Responsibility Program. The firm contacts each attorney to schedule a "compliance exam." Upon completing an exam, a CPA in the firm prepares a "compliance report" that is forwarded to Disciplinary Counsel. Disciplinary Counsel reviews the report and, depending on the circumstances, works with the attorney to make any necessary changes, recommends that the attorney face formal disciplinary charges, or informs the attorney that the attorney's system complies with the Rules of Professional Conduct.

Submission to a compliance audit is mandatory under Rule 1.15A. Administrative Order No. 9, Rule 7, also provides that failure to furnish information to Disciplinary Counsel, without having a reasonable basis for refusal, is grounds for professional discipline.
FREQUENTLY ASKED QUESTIONS

What do I do with unclaimed trust account funds?

Unclaimed funds result from either a balance left in the trust account for a client you can no longer locate or from outstanding checks which you are unable to reissue. Any unclaimed trust funds must be dealt with pursuant to the Vermont Unclaimed Property Act, 27 V.S. A. §§ 1241-1270. See also VBA Advisory Ethics Opinion 1998-09.

What do I do when I issue a check that never gets cashed?

As part of your monthly bank reconciliation, you should have a list of checks that have not cleared your account. A good practice is to send letters to the payees of any checks older than six months. The letter should indicate that you issued a check that remains outstanding. Ask the payee to cash the check or to contact you for a replacement if necessary, making sure to cancel the original check. If a letter is returned unclaimed, you would handle the funds in accordance with the provisions noted above.

What do I do with an unidentified balance in the trust account?

A lawyer should be able to identify the owner of each dollar in his or her trust account. Occasionally, however, a lawyer ends up with a balance in the trust account that is not identified as belonging to a particular client. You must make a reasonable effort to identify these funds.

What should I do if I cannot obtain my client’s taxpayer identification number in order to set up a separate trust account for the client’s benefit?

Your client’s funds should remain in the IOLTA trust account until you have the correct taxpayer identification number for a separate interest-bearing account. You should document your efforts to obtain the identification number by keeping a record of telephone calls, copies of letters, etc. You should not, however, use your own or your firm’s taxpayer identification number on the separate client account pending the receipt of the client’s identification number.

What should I do if I receive an overdraft notice on my client trust account from my bank?

You should immediately contact your bank and take whatever steps are necessary to correct the deficiency in your client trust account. If necessary, you should deposit your own funds to make up any shortfall until the cause of the overdraft is determined.
**What should I do when a client wants to pay by credit card?**

You can accept credit card payments from clients. Such payments may be either advance fee/cost deposits or earned fees. If you decide to accept credit card payments for both, you must set up your accounts such that the two types of payments are not improperly commingled. This will generally require two separate merchant accounts.

The Vermont Bar Association now offers its members a credit card processing service for attorneys which correctly handles the deposits of earned and unearned fees. The program is called the Law Firm Merchant Account and is administered through Affiniscape Merchant Solutions. For more information on this program, please see [www.affiniscape.com/vtbar](http://www.affiniscape.com/vtbar).

**How long must I retain my trust account records?**

V.R.P.C. 1.15(a) requires that trust account records must be retained for a period of six years following the termination of the representation.
SYNOPSIS ONE:

The Committee revises its prior position on the propriety of an attorney representing a lender and a borrower in the same transaction. An attorney may represent a lender and a borrower in a real estate transaction if the attorney satisfies the requirements of Rule 1.7 of the Rules of Professional Conduct (the “Rules”) by concluding that: (a) the representation of the lender and borrower in the same transaction will not adversely affect the relationship with either client; (b) that the attorney’s judgment will not be materially limited by responsibilities to either client or to a third party; and, (c) that each client agrees to the dual representation after consultation. The consultation must occur sufficiently before the closing to allow either client to obtain separate representation if desired. The consultation must also include a discussion of the implications of the common representation and the risks and benefits of the common representation.

The Committee continues to believe that it is not appropriate to represent a seller and buyer in a real estate transaction.

SYNOPSIS TWO:

An attorney or law firm may form a title and escrow company to provide title and escrow services, but such services constitute law related services and the Rules apply to each attorney involved in providing these related services.

See also Advisory Ethics Opinions 90-8, 94-8, 95-03 and 95-09

FACTS:

The attorney requesting this opinion acts as a closing agent for a lending institution. The lending institution is changing its closing procedures. Under the old closing practices, the attorney was responsible for collecting and reviewing information related to the closing and for preparing the closing documents. The new procedure includes searching the title to the subject property for the lender. The attorney believes that borrowers will be asked to sign a disclosure during the closing process which will provide, in essence, that the closing attorney represents the lending institution and that the borrower may retain separate counsel if he or she chooses. The request letter does not indicate (i) when the disclosure will be presented to the prospective borrower; or, (ii) what type of report on the state of the title will be issued as a result of the title search conducted by the closing attorney; or, (iii) to whom the title report will be addressed. The closing agent’s fee, including the cost of the title search, will be posted as an expense to the borrower on the closing statement.

In a supplemental request, the attorney inquires whether a firm, or members of a firm may create a separate entity to perform title services for the firm, without the title entity being engaged in the practice of law.

OPINION ONE:

This committee has issued four prior opinions on similar subjects:

In Opinion 90-8 the Committee considered whether an attorney could represent the borrower and the lender in the same transaction. Our conclusion was that such representation constituted a conflict of interest under DR-5-105 of the Code of Professional Responsibility (the “Code”) and that the conflict of interest was of such a nature that it could not be waived effectively.

In Opinion 94-8 the Committee considered whether an attorney was free to represent only the lender in a loan transaction if the buyer/borrower was unrepresented. The Committee concluded that an attorney could do so.

In Opinion 95-03 restated the proposition that an attorney could not simultaneously represent the lender and the borrower/buyer in a single transaction. At that time, the Code was still in effect.

In Opinion 95-09 provided guidance to the lenders’ attorneys for dealing with unrepresented borrowers.

On September 1, 1999, the Vermont Supreme Court adopted the Rules and the Code’s relevance was limited to activities occurring prior to that date.
In deciding Opinion 90-8, the Committee’s intention was to provide a framework to protect the borrower/buyer by limiting the possibility of having the judgment of the borrower's/buyer’s attorney encumbered by divided loyalties. The Committee is now represented with an opportunity to reconsider its earlier position and provide a framework, consistent with the Rules, within which the borrower and lender may both be represented by the same attorney. In reaching its conclusion, the Committee has considered (1) the language of the relevant provision of the Rules; (2) the evolution of closing practices in the State of Vermont; and (3) the impact of the Vermont Supreme Court decisions in Hunter Broadcasting v. City of Burlington, 164 Vt 391 (1995) and Bianchi v. Lorentz, 166 Vt 555 (1997) and Estate of Fleming v. Nicholson, 168 Vt. 495 (1998).

Beginning in the mid-to-late 1980’s new lenders began to enter the Vermont market. In response, local lending institutions began to change closing practices to remain competitive. One of the significant changes was to reassign tasks from the lender’s employees to the borrower’s attorney, including the preparation of the closing documents. The lender would send the borrower's attorney a package of blank or partially completed documents along with a set of closing instructions detailing how the attorney should complete the forms and what was required before the closing could occur. The borrower's attorney was responsible for completing the forms, determining when the requirements of the closing instructions were satisfied and disbursing the money from the attorney's trust account.

For a time thereafter the borrower in a typical transaction would retain counsel to perform the title work and review the closing paperwork prepared by the lender’s attorney. The lender’s attorney would close the loan. Under these circumstances the borrower usually paid the attorney fees for both attorneys.

By the mid-1990's the process for closing loans had changed. The common practice involved the selection of several attorneys to close loans for a particular financial institution. Many firms developed a sophisticated process for closing loans and related purchases for lenders. These attorneys, if asked, would identify the lender as their client. The attorneys became skilled at preparing and processing the lender's real estate closing forms. Most firms would close loans for several lending institutions. Due to their greater efficiency, the same firms were able to close loans for mortgage companies and other non-bank lenders effectively. A substantial proportion of the real estate closing business flowed to these firms. In many cases the closing attorney would examine the title, provide a title report which might be delivered to both the lender and the borrower, and arrange for or issue the title insurance policy for the lender and, if desired, the buyer or owner in a refinancing. The work completed by the attorneys was not significantly different than the scope of work completed by an attorney representing the borrower, except now the lender was generally assumed to be the client. In many such cases, buyers opted to proceed without counsel.

The lender’s attorney would prepare some or all of the loan documents, which over time became standard FNMA/FHLMC forms which were essentially non-negotiable in any meaningful way. The lender’s attorney would also prepare a closing statement, checks and disburse the funds from the closing. Most of the interaction between the lender’s attorney and the borrower/buyer occurred almost exclusively at the closing table. The lender’s attorney might have five or more closings scheduled in the same day. The time available to explain the process, the documents, and most important, the nature of any title issues was limited. As a practical matter some borrowers and purchasers did not feel or understand the need for separate representation, and most closings occurred without issues. When there were significant title issues, the lender’s attorney would either work out a resolution or work with other attorneys who may have been brought into the process when the problem came to light to resolve the issues. Most issues were sufficiently resolved so that the closing could occur. Most borrowers/buyers were satisfied with the process and the closing costs related to attorney representation were generally reasonable. Problems and errors occurred but were generally resolved sufficiently satisfactorily that no "hue and cry” was raised against the process. Hundreds of millions of dollars of real estate closings occurred under these circumstances.

These changes in circumstances may not yet be universal throughout the State, but the course is set. The process of closing residential real estate transactions in Vermont is becoming more like the rest of the United States. Previously a person might stay in the same property for most of his or her life, and the characteristics of the property were important to the client. The current trend assumes that people will stay in the same property for seven to ten years. Property turns over faster, and may be more fungible than in the past. In many areas of the State, residential developments are growing in size while becoming homogenized. The individual characteristics of a specific property may not be the most important element of the transaction. It would appear that in many areas of the State, the practice of law as it relates to the typical residential real estate transaction is less a function of counseling the client about legal rights and responsibilities than about processing the paper required to close the transaction as fast and effectively as possible. The typical client in a residential closing may not be interested in meeting with his or her attorney to review the title opinion in detail. The client is often less interested in the lawyer’s counsel than the quick and inexpensive processing of the transaction.

Moreover, the Hunter, Bianchi, and Fleming decisions significantly added to pre-closing due diligence, greatly increasing costs incurred by borrowers even in routine real estate transactions. Those new burdens coupled with our decision in Opinion 90-8 have resulted in many borrowers proceeding to closing without an attorney. It is the Committee’s view that a borrower/buyer
who shares an attorney with the lender is better off than a borrower who has no attorney. The Rules now provides enough flexibility to make that possible.

There are several constants that remain in place, even as the practical process of closing a real estate transaction appears to change. There are three parties, each of whom is entitled to the separate and vigorous representation of a qualified attorney acting without outside influence. Whether the nature of the real estate closing has in fact changed to the point where it is really a paper moving exercise, or not, an attorney who chooses to represent a party in a real estate transaction is bound by the Rules.

When a lawyer represents the lender in a real estate closing and also provides services to the buyer/borrower, there is a conflict of interest. The real question is whether the conflict of interest is of such a nature that it can not be waived under the applicable Rules. At the time that Opinion 90-8 was issued, there was a significant concern that a lawyer would learn information such as permitting issues that would be relevant to the lender in underwriting the decision to make the loan. If the lawyer represented both clients the lawyer could not disclose the information to the lender without the Borrower’s consent. Permitting issues were generally regarded as being outside the scope of the title certification required by lenders. As a result of the decisions in Hunter Broadcasting, Bianchi and Fleming the requirements of title certification have been substantially broadened. Conversely, the risk of violating a client’s confidence with respect to permitting issues has been substantially reduced.

Rule 1.7 establishes the constraints on representing more than one person. The rule is stated as a prohibition. An attorney shall not represent a client if the representation of that client is adverse to the interest of another client (Rule 1.7(a)) or if the representation of the client will be materially limited by the attorney’s responsibilities to another client, a third party or the lawyer’s own interest (Rule 1.7(b)). There is an exception where the attorney makes a determination that the representation of one client will not adversely affect the representation of another client, or that the representation of the client will not be adversely affected by the attorney’s responsibilities to another client, a third party or the attorney’s own interest. Also, in each case the client(s) must consent to the representation, after “consultation.”

The essential elements of the lawyer’s assignment for the lender and borrower are similar. In each case, both clients want to be sure that (i) in the case of a purchase, the transfer documents are correct and complete; (ii) the bank loan documents are completed properly and accurately reflect the transaction as approved by the Lender and understood by the purchaser/borrower; (iii) that all closing proceeds are properly accounted for and disbursed to the correct parties; (iv) that a complete and appropriate title report is prepared and delivered to the client, and (v) that appropriate title insurance is procured for both the lender and borrower/buyer. Where the goals and desires of the two clients are similar, the conflict of interest can be waived by well informed clients.

The provisions of DR5-105 of the Code specified that an attorney could undertake multiple representation only when it was “obvious” to the attorney that the attorney could adequately represent the interests of both parties. The Committee concluded in Opinion 90-8 that it would never be obvious that the attorney could adequately represent the interest of both parties. The adoption of the Rules invokes a different test. The provisions of Rule 1.7 require that the attorney reasonably believe that the dual representation will not adversely affect the attorney’s obligation with respect to either client. The softening of the standard from “obvious” to “reasonable belief” widens the possibility that dual representation can work in the proper cases, particularly in light of the changes discussed above.

Once the attorney has formed the conclusion under the first part of the test, the attorney must then consult with each client to explain the implications of the common representation and the advantages and risks involved. Disclosure should not occur at the closing table. The consultation should occur sufficiently in advance of the closing to give each client the opportunity to determine whether that party would prefer independent representation. Disclosure in a real estate matter should include a discussion of the potential different interests of borrower and lender. For example, the borrower may have a potential desire to waive what may appear to lay people as minor matters on the title or irregularities in the documents in order to close, whereas the lender may be constrained by underwriting requirements to correct the problems prior to the closing. The lender may insist that certain documents be signed as part of the closing which obligate the borrower to a course of action the borrower does not wish to take. There may come a time in a closing where the attorney learns something about the property or the borrower which should be disclosed to the lender. If the borrower client will not authorize the disclosure of the information, an irreconcilable conflict may arise and the attorney will be precluded from representing either party. It is only after such disclosures are made that a client may give an informed waiver of the conflict inherent in the dual representation.
After the disclosure, the attorney must obtain the consent to the dual representation. Prudence suggests that the conflict waiver be in writing and include the essential elements of the consultation as well. The committee has tried to list some points that could be incorporated in a waiver as a preliminary guidance. The Committee believes that each waiver should address the specific transaction and the relative sophistication of the clients. It may not always be sufficient to use a standard form.\(^1\)

Should a conflict between the two clients arise during the course of the representation, the attorney representing the two parties must withdraw from representation. The provisions of Rule 1.9 describe the circumstances in which the attorney may continue to represent one of the parties. The withdrawing attorney must be careful to consider the situation and the information that has come into the attorney’s possession and the impact of knowing the information on the party who the attorney will no longer represent. It is likely that continuing to represent one party over another in this situation will be the rare case.

This opinion does not conclude that it is appropriate for attorneys to represent both the lender and the buyer/borrower in every circumstance. The attorney’s judgment regarding the relative sophistication of the clients and the issues presented by the specific transaction is critical.

If a dispute arises between the parties about the subject of the representation, the attorney will have to withdraw from the representation and will not be able to represent either party in the dispute.

In the circumstance where a client retains an attorney for the specific transaction, either because the client is concerned about some aspect of the particular transaction or because the client wants individual representation, then the lawyer must be more careful in making the determination that the attorney “reasonably believes” that the attorney can represent the lender also. The attorney must factor into the decision the specific reasons the client retained the attorney in the first case.

In those circumstances where an attorney is interacting with an unrepresented party the Rules also allow the lawyer a broader opportunity for communication. Under the Code, the attorney was prohibited from communicating with an unrepresented person other than to encourage that person to obtain counsel. That made the process of representing the lender and closing a loan a difficult experience. The attorney could not represent the lender and interact with the borrower in any meaningful way, without going beyond the scope of the allowed communication. Under the Rules, the attorney is allowed a greater scope of communication with an unrepresented person, as long as the attorney does not misrepresent who the attorney is representing. Rule 4.3. Where an attorney is representing only a lender, and the borrower is not represented, the attorney should consider whether it would be appropriate to provide some form of written disclosure for the un-represented person(s) describing the attorney’s role.

**OPINION TWO:**

As a supplemental question, the attorney making the request asks whether the formation of a title and escrow company owned and controlled by one or more members of the firm would alter the impact of the Rules of Conduct as they apply to representing lenders and borrowers in real estate closings. To the extent the title and escrow company was owned by attorneys and provided legal services, the attorneys are bound by the Rules in providing such services, and the organization of a business separate from a law firm does not insulate the attorneys or lessen the attorneys’ obligations under the applicable provisions of the Rules.

An attorney may provide law-related services outside the practice of law. The applicable Rule is Rule 5.7 which sets out the responsibility of an attorney providing law-related services. A law related service is a service that may be performed in conjunction with and in substance are related to the provision of legal services, and which are not prohibited as unauthorized practice of law when provided by a non-lawyer. Rule 5.7(b).

The Committee is of the opinion that the closing of loans, including specifically the preparation of legal documents related to the acquisition and financing of real estate and the issuing of title reports or title insurance commitments signed by an attorney on behalf of a the title company (where the effect and purpose is to satisfy the requirements that the title to the property be marketable) generally would not fit the last part of the definition of law related services as those services constitute the practice of law. A non-lawyer would not be allowed to perform either of those services without the supervision of an attorney who would be responsible for the person’s conduct. The Committee notes that the issuing of title insurance policies is listed as a law related business in the comments to Rule 5.7 and acknowledges that employees of title insurance companies may be

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\(^1\) Guidelines for Disclosure

The attorney will be representing two parties. The attorney owes each party an equal duty of loyalty and maintaining confidentiality of the information provided by each client.

If either party provides information to the attorney that cannot be disclosed to the other party, then an irreconcilable conflict arises and the attorney must withdraw.

Such disputes may include differences as to the significance of title issues, differences as to loan conditions.
licensed to issue title insurance policies. The Committee is of the opinion that the process of searching the title and determining which matters constitute encumbrances on the title to the property constitutes the practice of law.

**CONCLUSION:**

For the reasons set forth above the Committee now concludes that an attorney may allow for the representation of the lender and the borrower/buyer when the attorney reasonably believes that (a) the representation of two parties in the same transaction will not adversely affect the relationship with either client; and, (b) that the attorney’s judgment will not be materially limited by responsibilities to either client or to a third party; and, finally each client agrees to the dual representation after consultation. The consultation must be meaningful in terms of timing by occurring sufficiently before the closing to allow either client to obtain separate representation if desired. The consultation must also include a discussion of the implications of the common representation and the risks and benefits of the common representation.

In responding to the related question, the Committee also concludes that an attorney or a law firm may form a title and escrow company to provide title and closing services, but because those services are law related services, the Rules of Conduct apply to the attorneys working in or for the title and escrow company.
“Metadata” refers to electronically stored information about electronic documents. Metadata often is included in files that are stored electronically. It may be apparent on the face of an electronic document, or may be hidden. Some metadata may be innocuous and unimportant, revealing basic information about dates an electronic file was created and edited. On the other hand, however, sensitive and confidential information, including comments reflecting attorney-client communications and tracked changes revealing work product, may also be contained in metadata embedded in electronic documents. When documents are transmitted and received electronically, tools may be available that enable the recipient to search for hidden metadata.

In this opinion, the Vermont Bar Association Professional Responsibility Section concludes that the Vermont Rules of Professional Conduct (“VRPC”) do not compel a specific answer to the question whether a lawyer can search for metadata within an electronic document prepared by and received from opposing counsel. The Section further concludes that a lawyer who receives an electronic document from opposing counsel that contains inadvertently disclosed, privileged and confidential metadata must notify the sending lawyer, with the question whether the receiving lawyer can use this information being decided by a court of competent jurisdiction. With respect to discovery practice in the litigation context, the Section concludes that, with limited exceptions relating to privileged matters, lawyers are obligated to disclose all responsive information including metadata to opposing counsel, and nothing prohibits the recipient from searching for electronic information about the history of the document or file.

Questions Presented:

The Vermont Bar Association Board of Managers has posed a series of questions to the Professional Responsibility Section about metadata.

The Board first inquires as follows about situations where a lawyer receives an electronic file from opposing counsel: (a) Can the receiving lawyer use tools in the program that created the file to mine\(^1\) for metadata?; (b) Can the receiving lawyer use more specialized tools to mine for metadata?; (c) Can the receiving lawyer engage the “track changes” function to review the history of edits made to the document; (d) Is the receiving lawyer’s responsibility different if the sending lawyer has inadvertently left the “track changes” function engaged, so that the entire history of changes to the document are exposed without any action being taken by the receiving lawyer.

The Board also inquires about disclosure of and searching for metadata during discovery in the litigation context, including whether (a) in the absence of a court order addressing discovery issues relating to metadata, lawyers or parties can mine for metadata in documents received from the opposing party during discovery; and (b) whether it is permissible for a party to remove metadata from documents before disclosing them during discovery.

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\(^1\) The Section notes that the term “mine” appears to be a pejorative characterization of the use of electronic tools to analyze electronic documents. Throughout this Opinion, the phrase “search” is used in place of the phrase “mine,” because it characterizes the search for embedded metadata in a more neutral manner.
**Analysis**

The questions presented by the VBA Board of Governors pose a number of inquiries. First, does a lawyer who sends electronic documents to opposing counsel have a duty to exercise reasonable care to avoid disclosing confidential metadata? Second, can a lawyer who receives electronic documents from opposing counsel search those documents for metadata? Third, what steps should be taken by a lawyer who becomes aware that electronic documents received from opposing counsel contain metadata? These questions have been the subject of a growing body of ethics opinions issued by the American Bar Association and various State Bar Associations. This opinion now summarizes the conclusions of these opinions and expresses its view on each.

**Potentially Applicable Provisions of the Vermont Rules of Professional Conduct**

As discussed in detail below, no provisions of the VRPC speak directly to the questions presented in this Opinion, although recently adopted VRPC 4.4(b), which becomes effective September 1, 2009, does address the obligation of a lawyer who receives inadvertently disclosed documents. The following provisions of the Rules, reprinted below in the form in effect in Vermont as of September 1, 2009, have formed the legal bases for Ethics Opinions issued by other Bar Associations reaching contradictory conclusions about the questions presented.

**VRPC 1.1 Competence:**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**VRPC 1.3 Diligence:**

A lawyer shall act with reasonable diligence . . . in representing a client.

**VRPC 1.6(a) Confidentiality of Information:**

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . . .

**VRPC 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably
diligent effort to comply with a legally proper discovery request by an opposing party;
. . . . or
(f) request a person other than a client to refrain from voluntarily giving relevant
information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely
affected by refraining from giving such information.

VRPC 4.4 Respect for Rights of Third Persons:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose
other than to embarrass, delay, or burden a third person, or use methods of obtaining
evidence that violate the legal rights of such a person.
(b) A lawyer who receives a document relating to the representation of the lawyer’s
client and knows or reasonably should know that the document was inadvertently sent
shall promptly notify the sender.

VRPC 8.4 Misconduct:

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
induce another to do so, or do so through the acts of another;
(b) engage in a “serious crime,” defined as illegal conduct involving any felony or
involving any lesser crime a necessary element of which is interference with the
administration of justice, false swearing, intentional misrepresentation, fraud, deceit,
bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of
another to commit a “serious crime”;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice . . . .

Duty of Sending Lawyer

The Bar Associations that have examined the duty of the sending lawyer with respect to
metadata have been virtually unanimous in concluding that lawyers who send documents in
electronic form to opposing counsel have a duty to exercise reasonable care to ensure that
metadata containing confidential information protected by the attorney-client privilege and the
work product doctrine is not disclosed during the transmission process. See Alabama Ethics Op.
2008-2009/4; New York City Lawyers Ass’n Ethics Op. No. 738 (2008); New York State Ethics
Op. 782 (2004). A number of other ethics opinions note that a sending lawyer has tools available
to prevent against the risk of disclosing client confidences when electronic documents are
transmitted to opposing counsel, but do not affirmatively address the scope of the sending
lawyer’s duty to take these steps. See Pennsylvania Formal Ethics Op. 2007-500; ABA Formal
Ethics Op. 06-442.
This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney-client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file. This duty has its roots in VRPC 1.1, which requires lawyers to provide competent representation; VRPC 1.3, which requires lawyers to exercise diligence; and VRPC 1.6, which requires lawyers to protect confidential client information.

The Professional Responsibility Section notes that various tools are available to comply with this duty to exercise reasonable care, including programs to “scrub” metadata from electronic documents before they are dispatched, converting electronic documents to a read-only, PDF format before transmission, or insisting on transmission of sensitive documents only on paper. The steps that should be taken by the sending lawyer in specific instances depend on the circumstances, and are beyond the scope of this opinion.

**Duty of Receiving Lawyer**

The duty of the receiving lawyer is a matter that has been the subject of substantially more disagreement.

In the following ethics opinions, various State Bar Ethics Committees have concluded that applicable rules of professional conduct prohibit a receiving lawyer from searching for metadata in documents that are received electronically. See Alabama Ethics Op. RO 2007-02; Arizona Ethics Op. 07-03; Florida Ethics Op. 06-2; New Hampshire Ethics Op. 2008-2009/4; New York City Lawyers Ass’n Ethics Op. No. 738 (2008); New York State Ethics Op. 782 (2004). The foundations for the conclusions reached in these Opinions are located in the rules of professional conduct protecting confidential information; prohibiting lawyers from engaging in conduct that is dishonest, deceitful, or prejudicial to the administration of justice; and requiring respect for the rights of others. Through various chains of inference, and based on Professional Conduct Rules drafted differently from the Rules in Vermont, these opinions conclude that a lawyer who searches for metadata is unjustifiably attempting to intrude on the confidential relationship between the opposing lawyer and client, which is conduct that is dishonest or deceitful, and prejudicial to administration of justice.

On the other hand, a series of other ethics opinions reach the opposite conclusion, finding that the Rules of Professional Conduct do not contain any prohibition, whether express or implied, on searching electronic documents for embedded metadata, and that characterization of such searching as “deceitful,” “dishonest,” and “prejudicial” is not supported by the Rules. See Colorado Ethics Op. 119 (2008); DC Ethics Op. 341 (2007); Pennsylvania Formal Ethics Op. 2007-500; ABA Formal Ethics Op. 06-442.

Reviewing the language of the Vermont Rules of Professional Conduct quoted above, the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file’s
content, including metadata.\textsuperscript{2} A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel. None of the Rules in effect in Vermont either state or imply that lawyers must refrain from thoroughly reviewing documents and information received from opposing counsel, regardless of the medium is which the document is transmitted. The Rule where such an obligation would most likely be found -- VRPC 3.4 Fairness to Opposing Party and Counsel -- is wholly silent on this issue. Neither do VRPC 4.4 Respect for Rights of Third Persons, or VRPC 8.4 Misconduct, directly address this issue. On the other hand, there is a clear basis for an inference that thorough review of documents received from opposing counsel, including a search for and review of metadata included in electronically transmitted documents, is required by VRPC 1.1 Competence, and VRPC 1.3 Diligence.

The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section’s authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review.

**Duty Imposed Upon Lawyer Who Learns Of Receipt Of Inadvertently Disclosed Privileged Information**

Answering the question whether a lawyer can search for metadata does not, however, end the analysis. The more critical inquiry arguably is whether inadvertently disclosed confidential information, including metadata, can be used by the lawyer who receives it.

Whether inadvertent disclosure of privileged information constitutes a waiver of the document’s privileged status is a question of substantive law. Different approaches have been taken by courts throughout the United States when addressing this issue, but research has not revealed any case law in Vermont addressing the impact of inadvertent disclosure of privileged documents.

Given that the attorney-client privilege is intended to protect the client, many courts have chosen to protect the privilege when inadvertent disclosure occurs, focusing on whether the client intended the disclosure to occur and whether counsel had authority to disclose. See, e.g., *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954-55 (N.D.Ill. 1982); *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995); *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933, 941 (Me. 1999). However, alternate approaches that are less protective of the attorney client privilege also have been adopted. One such approach provides that inadvertent disclosure destroys the privilege if the lawyer and client did not take adequate steps to protect confidentiality. See, e.g., *Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996). Effective September 19, 2008, the Federal Rules of Evidence were amended to add a variation of this position. Current Federal Rule of Evidence Rule 502(b) provides that, in Federal Court proceedings, inadvertent disclosure does not result in waiver of the attorney client privilege or

\textsuperscript{2} Given this conclusion, this Opinion does not separately analyze the four different mechanisms for locating metadata that are listed in the questions presented by the VBA Board of Governors.
work product protection if reasonable steps to prevent disclosure were taken by the holder of the privilege or protection, and reasonable steps were promptly taken by the holder of the privilege or protection to respond to the inadvertent disclosure. Adoption of Rule 502 arguably overruled the holdings of previous Federal Court decisions, including International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), and Federal Dep. Ins. Corp. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992), which took the blanket position that inadvertent disclosure waives the privilege, because confidentiality had been lost.

It is beyond the scope of this Ethics Opinion to address what analysis the Vermont Supreme Court should adopt on the question of inadvertent disclosure. However, the steps that lawyers should take upon learning that inadvertently disclosed privileged information has come into their possession is a matter that has been the subject of substantial discussion in the Ethics Opinions and is at the core of the inquiry posed by the VBA Board of Governors. Accordingly, this Opinion now turns to this issue.

In 1992, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 92-368. This Opinion advised that a lawyer who receives materials which appear on their face to be privileged and clearly appear not to be intended for the receiving lawyer must not look at those materials, must contact the sending lawyer, and must follow the sending lawyer’s instructions relating to those materials. Substantial debate followed issuance of this Opinion, and the ABA Ethics Committee ultimately added Model Rule of Professional Conduct 4.4(b), which provides:

A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Pursuant to amendments to the Vermont Rules of Professional Conduct promulgated on June 17, 2009, Rule 4.4(b) becomes effective in Vermont on September 1, 2009.

As explained in its Comments, the purpose behind Rule 4.4(b) is to ensure that lawyers who inadvertently disclose privileged and confidential documents to opposing counsel can take protective measure in an effort to limit or eliminate damage to their client’s interests. The Comment continues by recognizing, however, that questions including whether additional remedies may be available to the sending lawyer, and whether inadvertent disclosure leads to waiver of the privilege, depend on substantive law and are beyond the scope of the Rules.3

With the adoption of Rule 4.4(b), Vermont lawyers are subject to the obligation to notify opposing counsel if they receive documents that they know or reasonably should know were inadvertently disclosed. Whether inadvertent disclosure results in waiver of the attorney client privilege or the work product protection, and whether the receiving lawyer can review and use the inadvertently disclosed information, remain issues of substantive law.

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3 As a result of the amendment of Model Rule 4.4(b), including its clear requirements for the steps that must be taken when confidential documents are inadvertently disclosed, ABA Formal Opinion 05-437 withdrew Formal Opinion 92-368.
RULE 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties, fees or substantially reduced fees, public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.
[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Vermont Supreme Court urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render, on average per year, the number of hours set forth in this rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as divorce and family law matters.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers, and food pantries that serve those of limited means. The term “governmental organizations” includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.
[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule.

[12] The responsibility set forth in this rule is not intended to be enforced through disciplinary process.
RULE 6.2. ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.
RULE 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithsanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer’s clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession’s involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.
RULE 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

- A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.
(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.
Comment to Rule 6.5

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.
Rules That Do Not Imply to Short-Term Limited Representation Legal Services Programs

- RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS
- RULE 1.9 (a). DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

- RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE
Rules that Do Apply, Even to Short-term Limited Representation Legal Services Programs

- RULE 1.6. CONFIDENTIALITY OF INFORMATION

- RULE 1.9 (c). DUTIES TO FORMER CLIENTS

  (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

    (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

    (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.
Pro Bono Projects and Clinics

- Public Resources:

- Pro Bono and Low Bono Projects:
Vermont is joining 40 + other states offering “Free Legal Answers” programs, where low-income persons can log on to a vt.freelegalanswers.org website, type in up to three legal questions per year, and are notified by e-mail when a volunteer lawyer has answered the question on-line.

To volunteer, lawyers must be licensed in Vermont and register by logging on to vt.freelegalanswers.org, clicking the “Volunteer Attorney Registration” tab and following the prompts. You will receive an e-mail when your registration has been processed, and can log on any time after the site has been activated to review questions in the queue, and to select questions to answer at your discretion. We hope that this will be a very convenient way for lawyers to meet the aspirational goal of 50 hours of pro bono services per year set forth in Rule 6.1.

The Modest Means Program (MMP) is a reduced-fee attorney panel designed to make legal services accessible to lower and moderate income people who have too much income to be eligible for Vermont Legal Aid, but still not enough to afford full attorney’s fees.

Clients are eligible for the Modest Means Program if their income is at or below 250% of the federal poverty level—under $49,600 for a family of 4. We are partnering with Vermont Legal Aid on this project.

Possible clients will enter financial information into VLA’s online intake system. If they meet the criteria for the Modest Means Panel—up to 250% of federal poverty level—they will be redirected to the VBA’s online Modest Means Program intake system.

When you receive a referral through the Modest Means Program, this client meets the criteria for a reduced fee; however clients will be advised that you, as receiving attorney, will ask them for proof of household income.

Membership on the Modest Means Program is FREE. There is no annual fee, and no assessment against fees that you collect.

Guidelines of Professional Courtesy

In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the legal system.

A lawyer should act with candor, diligence and utmost respect.

A lawyer should act with courtesy and cooperation, which are necessary for the efficient administration of our system of laws.

A lawyer should act with personal dignity and professional integrity.

Lawyers should treat each other, their clients, the opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.

A client has no right to demand that counsel abuse the opposite party of indulge in offensive conduct. A lawyer shall always treat adverse witnesses and parties with fairness and due consideration.

In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feelings should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

A lawyer should not harass opposing counsel or counsel's clients.

Lawyers should be punctual in communications with others and in honoring scheduled appearances. Neglect and tardiness are demeaning to fellow lawyers and to the legal system.

If a fellow attorney makes a just request for cooperation, or seeks scheduling accommodation, a lawyer shall not arbitrarily or unreasonably withhold consent.

Effective advocacy does not require antagonistic or obnoxious behavior. Lawyers should adhere to the higher standard of conduct which judges, fellow attorneys, clients, and the public may rightfully expect.

Adopted by the Vermont Bar Association Membership, March 11, 1989
Vermont Practice & Procedure
An Overview of Professionalism

Vermont Bar Association
Basic Skills Program

June 11, 2020
Eileen Blackwood & Michael Kennedy
Basics

- Vermont lawyers must comply with the Rules of Professional Conduct.
- Failure to do so results in a sanction being imposed against the lawyer’s license.
- Compliance monitored & enforced by the Professional Responsibility Program
Question 1

The Professional Responsibility Program is part of:

A. The Vermont Bar Association
B. The Secretary of State’s Office of Professional Regulation
C. The Attorney General’s Office
D. The Vermont Supreme Court
Question 1

The Professional Responsibility Program is part of:

A. The Vermont Bar Association
B. The Secretary of State’s Office of Professional Regulation
C. The Attorney General’s Office
D. The Vermont Supreme Court.

The VT Constitution vests the Court with exclusive authority over attorney discipline.
Outline

1. Announcements
2. Bar Counsel’s Role
3. 7 C’s of Legal Ethics
Announcements

2. Option to request fee deferral for lawyers who report in 2020.
3. Effective July 1, 2020: 24 hours of CLE credit per cycle, including:
   - 2 in ethics
   - 1 in diversity & inclusion
   - 1 in wellness

Contact: Andy Strauss, Licensing Counsel
- Andrew.Strauss@Vermont.gov
Professional Responsibility Program

- Professional Responsibility Board
- 2 staff lawyers: bar counsel & disciplinary counsel
- Complaints and Inquiries
- Hearing panels & Assistance Panels
Bar Counsel – Ethics Inquiries

- Questions related to legal ethics and competent law practice.
- Guidance, not legal advice.
- Confidential.
- Exempt from Rule 8.3(c).
Inquiries

![Graph showing inquiries from FY 13 to FY 19]
June Inquiries

- A lawyer contacted me regarding a divorce client. The lawyer fears that the client’s spouse intends to cause physical harm to lawyer. The lawyer asked for guidance on (1) withdrawing from the representation, and (2) asking opposing counsel for information about opposing counsel’s client.

- A lawyer contacted me to discuss joint representation of multiple siblings. The siblings inherited property when a parent died and are in the process of selling the property.

- A lawyer contacted me for guidance. The lawyer represents a client who is contract negotiations with a potential business partner. The called the lawyer and asked lawyer to explain why they were taking a certain position with respect to the contract. Unbeknownst to the lawyer, the potential business partner was on the call. Lawyer soon figured it out. The potential business partner is represented by counsel. Counsel was not on the call.
June Inquiries

- A lawyer contacted me for guidance on whether to share Word documents with opposing counsel without scrubbing metadata or taking other precautions to protect against its disclosure.

- A lawyer contacted me for guidance. The lawyer concluded representing a client. There are unearned/unused funds remaining in trust. The client asked the lawyer to keep them as a token of the client’s appreciation.
Complaints

- First step: Bar Counsel
- “Screening”
- Limited Investigation
  - Resolve informally
  - Dismiss
  - Refer for non-disciplinary resolution (diversion)
  - Refer to Disciplinary Counsel for an investigation
TREND

Files Opened

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<tr>
<td>FY 19</td>
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</table>
Proposed Amendments to A.O. 9

- 1. Create a “bar assistance program” to be administered by bar counsel.

- 2. Reassign “screening” to someone other than bar counsel.
Pre-Test

- The Rules are complicated.
- Less complicated if you remember the 5 Cs.
- I’ve added 2.
Question 1 - Which C?

- A comment to the rule on this “C” says that includes Technology and Well-Being.
Question 2 – Which C?

- The “self-defense” exception to the rule on this “C” is in the paragraph that deals with “permissive disclosure.”
Question 3 - Which C?

- Nothing in the rules requires it. Still, I often urge lawyers not to be jerks to each other.
Question 4 – Which C?

- As compared to negotiations with opposing counsel, this duty is heightened when dealing with a court or tribunal.
Question 5 – Which C?

- Most complaints we receive are rooted in a failure to set reasonable client expectations. Doing so is an aspect of this “C.”
Question 6

- Reasonably expected bank charges create a safe harbor from this trust account violation.
Question 7 - Which C?

- Lateral transfers who participated personally & substantially in a matter.
Bonus- Constitutional Law

- This “C” word is not in the Rules of Professional Conduct or in the Constitution. However, Article 1, Section 2 authorizes Congress to carry it out in such a manner as Congress shall by law direct. Check your mail.

What is the “C” word?
Round 1 – Which C?

- Answers
Question 1 – Which C?

- A comment to the rule on this “C” says that includes Technology and Well-Being.

COMPETENCE
Question 2 - Which C?

The “self-defense” exception to the rule on this “C” is in the paragraph that deals with “permissive disclosure.”

▪ CONFIDENTIALITY
Question 3 – Which C?

- Nothing in the rules requires it. Still, I often urge lawyers not to be jerks to each other.

- CIVILITY
Question 4 – Which C?

- As compared to negotiations with opposing counsel, this duty is heightened when dealing with a court or tribunal.

- CANDOR
Question 5 – Which C?

- Most complaints we receive are rooted in a failure to set reasonable client expectations. Doing so is an aspect of this “C.”
Question 6

- Reasonably expected bank charges create a safe-harbor from this trust account violation.

- COMMINGLING
Question 7 – Which C?

- Lateral transfers who participated personally & substantially in a matter.

- CONFLICTS
• This “C” word is not in the Rules of Professional Conduct or in the Constitution. However, Article 1, Section 2 authorizes Congress to carry it out in such a manner as Congress shall by law direct. Check your mail.

CENSUS
The End

- https://vtbarcounsel.wordpress.com
7 C’s – They help you avoid complaints.

- Competence
- Communication
- Confidences
- Conflicts
- Candor
- Commingling
- Civility
7 C’s – They help you avoid complaints.

- So which are the most important?

- Or are there non-Cs that are more important?
Professional Responsibility Madness

- Duties to Clients
- Duties to Non-Clients
- Conflicts & Confidences
- Bracket Style
- Rules, Phrases, Concepts, Ideas
64 Team Single Elimination

CANDIDATE TO TRIBUNAL
- Frivolous Claims
- Talk 2 Represented
- Threaten Criminal
- Inadvertent Receipt
- Unrepresented
- Truthfulness
- UPL/Paralegals
- Former Employees
- Contacting Expert
- Rat Rule
- Trial Publicity
- Civility
- Social Media
- Wellness
- Prosecutors

WITHDRAWAL
- Ownership
- Joint Rep.
- Other Pays
- Screen/Impute
- Email
- Noisy
- New Job
- Prospective
- Lawyer Witness

WINNER

COMMUNICATION
- IOLTA?
- Disputed $?
- Who decides?
- Diminished
- Contingent Fees
- Bookkeeping
- Advanced Fees
- Collected Funds
- Commingling
- File Delivery
- Malpractice
- Tech Competence
- Fee Sharing
- Diligence
- Succession
Duties to Clients

▪ 2. Diligence ▪ 10. Fee Sharing
▪ 3. File Delivery/Retention ▪ 11. Com mingling
▪ 4. Trust Accounting and Bookkeeping ▪ 12. Contingent Fees
▪ 5. Diminished Capacity ▪ 13. Flat/Advanced Fees
▪ 8. Disputed Funds ▪ 16. IOLTA or not?
Here’s Why I made “Communication” the #1 Seed

- 1. Communication
- 2. Diligence
- 3. File Delivery/Retention
- 4. Trust Accounting and Bookkeeping
- 5. Diminished Capacity
- 6. Collected Funds
- 7. Tech Competence
- 8. Disputed Funds
- 9. Who Decides? Client or Lawyer?
- 10. Fee Sharing
- 11. Commingling
- 12. Contingent Fees
- 13. Flat/Advanced Fees
- 14. Malpractice Insurance
- 15. Succession Planning
- 16. IOLTA or not?
The Beginning

- What’s this got to do with communication?
Communication

- “What we have here is failure to communicate.”

- Warden, Cool Hand Luke
Communication

▪ Most disciplinary complaints are not rooted in a lack of communication or in failure to communicate with a client.

▪ They are rooted in a failure to communication reasonable expectations to the client at the outset.

▪ At the beginning, set reasonable expectations with your clients.

▪ For instance . . .
Set Reasonable Expectations

1. The result.
2. How long it will take.
3. How much it will cost.
4. How often they’ll hear from you.

Failure to do so will come back to haunt you when a client’s unreasonable expectations aren’t met.
So, which 4 survived? And which 1 prevailed?

- 1. Communication
- 2. Diligence
- 3. File Delivery/Retention
- 4. Trust Accounting and Bookkeeping
- 5. Diminished Capacity
- 6. Collected Funds
- 7. Tech Competence
- 8. Disputed Funds
- 9. Who Decides? Client or Lawyer?
- 10. Fee Sharing
- 11. Commingling
- 12. Contingent Fees
- 13. Flat/Advanced Fees
- 14. Malpractice Insurance
- 15. Succession Planning
- 16. IOLTA or not?
Duties to Clients: Madness Voters

1. Communication
2. Diligence
3. File Delivery/Retention
4. Trust Accounting and Bookkeeping
5. Diminished Capacity
6. Collected Funds
7. Tech Competence
8. Disputed Funds
9. Who Decides? Client or Lawyer?
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11. Commingling
12. Contingent Fees
13. Flat/Advanced Fees
14. Malpractice Insurance
15. Succession Planning
16. IOLTA or not?
Duties to Clients: VT Specific Tips

- 1. Communication
- 2. Diligence
- 3. File Delivery/Retention
- 4. Trust Accounting and Bookkeeping
- 5. Diminished Capacity
- 6. Collected Funds
- 7. Tech Competence
- 8. Disputed Funds

- 9. Who Decides? Client or Lawyer?
- 10. Fee Sharing
- 11. Commingling
- 12. Contingent Fees
- 13. Flat/Advanced Fees
- 14. Malpractice Insurance
- 15. Succession Planning
- 16. IOLTA or not?
VT Specific: File Delivery & Retention

- Rule 1.16(d).
- File must be delivered upon the termination of the representation.
- End-product & important originals.
- Okay to store electronically.
- The Rules of Professional Conduct do not require lawyers to keep a copy after delivery.
VT Specific: Trust Accounting/Bookkeeping

▪ Must have one if holding funds in connection with a Vermont representation.
▪ Monthly reconciliation.
▪ Overdraft notices reported to Disciplinary Counsel.
▪ Compliance Audits.
Duties to Clients: VT Specific Tips

▪ Collected funds: Don’t disburse without them, know the exceptions.

▪ Disputed funds: in trust until dispute resolved, you don’t get to resolve the dispute on your own.

▪ No fee sharing. Exceptions: (1) proportion to work done; or (2) joint responsibility for the representation.

▪ Commingling: don’t! Exception: reasonably expected bank fees and charges.
Duties to Clients: VT Specific Tips

- **Contingent Fees**: in a writing that signed by the client at the outset of the representation.

- **Flat fees & fees paid in advance**: they go into trust until earned. Exception: written fee agreement that complies with Rule 1.5(f).

- **Malpractice Insurance**: PRB starting to look at this issue.

- **Succession Planning**: pandemic highlights its importance.
Duties to Clients: Any questions?

▪ 1. Communication
▪ 2. Diligence
▪ 3. File Delivery/Retention
▪ 4. Trust Accounting and Bookkeeping
▪ 5. Diminished Capacity
▪ 6. Collected Funds
▪ 7. Tech Competence
▪ 8. Disputed Funds
▪ 9. Who Decides? Client or Lawyer?
▪ 10. Fee Sharing
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▪ 12. Contingent Fees
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▪ 15. Succession Planning
▪ 16. IOLTA or not?
## Conflicts & Confidences

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<td>Non-Lawyer Ownership</td>
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Conflicts & Confidences: Why is withdrawal #1?

1. Withdrawing
2. ESI
3. Former Clients
4. Noisy Withdrawal
5. Screening/Imputed Conflicts
6. Prospective Clients
7. Mandatory Disclosure
8. Joint Representation
9. Other pays lawyer
10. Permissive Disclosure
11. Lawyers as Witness
12. Email
13. Changing Jobs
14. Sex with Client
15. Generally Known/Public Record
16. Non-Lawyer Ownership
Withdrawal

- So many inquiries.
- Mandatory & permissive.
- Must withdraw if continued representation will result in a violation of the rules.
- Conflict = violation.
- No communication = violation.
- On motion – start by citing only to Rule 1.16.
- Explain further in response.
- No violation if denied.
- I will never say “yes” or “no” about an attorney other than the caller.
Conflicts & Confidences – So Which 4?

- 1. Withdrawing
- 2. ESI
- 3. Former Clients
- 4. Noisy Withdrawal
- 5. Screening/Imputed Conflicts
- 6. Prospective Clients
- 7. Mandatory Disclosure
- 8. Joint Representation
- 9. Other pays lawyer
- 10. Permissive Disclosure
- 11. Lawyers as Witness
- 12. Email
- 13. Changing Jobs
- 14. Sex with Client
- 15. Generally Known/Public Record
- 16. Non-Lawyer Ownership
Conflicts & Confidences – PR Madness Votes

- 1. Withdrawing
- 2. ESI
- 3. Former Clients
- 4. Noisy Withdrawal
- 5. Screening/Imputed Conflicts
- 6. Prospective Clients
- 7. Mandatory Disclosure
- 8. Joint Representation
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- 11. Lawyers as Witness
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Conflicts & Confidences – VT Specific Tips

- 1. Withdrawing
- 2. ESI
- 3. Former Clients
- 4. Noisy Withdrawal
- 5. Screening/Imputed Conflicts
- 6. Prospective Clients
- 7. Mandatory Disclosure
- 8. Joint Representation
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- 10. Permissive Disclosure
- 11. Lawyers as Witness
- 12. Email
- 13. Changing Jobs
- 14. Sex with Client
- 15. Generally Known/Public Record
- 16. Non-Lawyer Ownership
Conflicts & Confidences – VT Specific Tips

- ESI: tech competence; discovery of ESI no different than discovery of paper.

- Former clients: the rule is one thing, the hassle is another.

- Screening/Imputed/Changing Jobs: Very strict lateral transfer rule in VT.

- Joint representation: remember the pie.
Conflicts & Confidences – VT Specific Tips

- Other pays you to represent client: must still maintain client’s confidences. No sharing with other!

- Email: BCC is not the answer; disable autocomplete?

- Sex with client: if it’s after the representation begins, terminate the representation or get disbarred.

- Public Record & Generally Known: not the same!

- Non-lawyer ownership? Maybe someday.
Conflicts & Confidences – Final Thought #1

- Ethical obligation is much broader than the privilege and covers all “information relating to the representation” no matter the source.
Conflicts & Confidences: Final Thought #2

- “You will have many opportunities to keep your mouth shut. You should take advantage of every one of them.”

- Thomas Edison
Conflicts & Confidences: Questions?

- 1. Withdrawing
- 2. ESI
- 3. Former Clients
- 4. Noisy Withdrawal
- 5. Screening/Imputed Conflicts
- 6. Prospective Clients
- 7. Mandatory Disclosure
- 8. Joint Representation
- 9. Other pays lawyer
- 10. Permissive Disclosure
- 11. Lawyers as Witness
- 12. Email
- 13. Changing Jobs
- 14. Sex with Client
- 15. Generally Known/Public Record
- 16. Non-Lawyer Ownership
Duties to Non-Clients

1. Candor to the Tribunal
2. Attorney Wellness
3. Mandatory Reporting
4. Truthfulness to Others
5. Inadvertent Receipt
6. Contacting Former Employees
7. Civility
8. Communicating with a Represented Person
9. Threatening Criminal Prosecution.
10. Social Media
11. Responsibilities of Prosecutors
12. Dealing with the Unrepresented Person
13. UPL/Paralegals
14. Trial Publicity
15. Ex Parte Communications
16. Frivolous Claims
Duties to Non-Clients: Why candor to tribunal #1?

- 1. Candor to the Tribunal
- 2. Attorney Wellness
- 3. Mandatory Reporting
- 4. Truthfulness to Others
- 5. Inadvertent Receipt
- 6. Contacting Former Employees
- 7. Civility
- 8. Communicating with a Represented Person
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- 11. Responsibilities of Prosecutors
- 12. Dealing with the Unrepresented Person
- 13. UPL/Paralegals
- 14. Trial Publicity
- 15. Ex Parte Communications
- 16. Frivolous Claims
Duties to Non-Clients: Why candor to tribunal #1?

- Most important rule?
- Outweighs duties of loyalty and confidentiality to client.
- VT Tip: your reputation for truthfulness matters.
- Remonstrate
- Remedial Action
- Including, if necessary, disclosure
- Withdrawal isn’t always enough
- Duties last until end the conclusion of the proceeding
Duties to Non-Clients: So which 4?

- 1. Candor to the Tribunal
- 2. Attorney Wellness
- 3. Mandatory Reporting
- 4. Truthfulness to Others
- 5. Inadvertent Receipt
- 6. Contacting Former Employees
- 7. Civility
- 8. Communicating with a Represented Person
- 10. Social Media
- 11. Responsibilities of Prosecutors
- 12. Dealing with the Unrepresented Person
- 13. UPL/Paralegals
- 14. Trial Publicity
- 15. Ex Parte Communications
- 16. Frivolous Claims
Duties to Non-Clients: PR Madness Votes

1. Candor to the Tribunal
2. Attorney Wellness
3. Mandatory Reporting
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Duties to Non-Clients: VT Specific Tips

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Attorney Wellness

- Officially an aspect of the duty of competence.
- 1-hour of CLE per reporting cycle effective July 1, 2020.
- Be PROACTIVE about your wellness.
- Duties to non-clients? Help others!! For no other reason than because you can!
- Be 1 of their 3 or 4 good things.
- Starfish Story
Inadvertent Receipt

- Rule 4.4(b).
- Ethical duty is to notify sender.
- Comment [2] – prompt notification so that sender can take protective measures.
- Comment [2] - whether must return, whether privilege waived, are matters of substantive law beyond the scope of the ethics rules.
- Comment [3] – choosing to return unread, even in absence of substantive legal obligation to do so, is not an ethics violation.
Former Employees

- Rule 4.2, Comment [7].

- First, with respect to current employees of a represented organization, no communication with “constituents”:
  - Who supervise, direct, or regularly consult with the lawyer on the matter,
  - Who have authority to obligate the organization on the matter; or,
  - Whose act or omission can be imputed to the organization for the purposes of civil or criminal liability.

- Second, “consent of the organization’s lawyer is not required for communication with a former constituent.”
Threatening Criminal Prosecution

- Unethical in Vermont to threaten to present, present, or participating in presenting criminal charges to obtain an advantage in a civil matter.
Civility

- Rule 1.3, Comment [1]: “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved with courtesy and respect.”
- Incivility is “corrosive to well-being.”
- Causes stress and anxiety.
- Leads to disaffection – lack of “meaning”.
- Causes burnout.
- Attorney Licensing Concerns
- Don’t Be a Jerk
Duties to Non-Clients: Questions?

1. Candor to the Tribunal
2. Attorney Wellness
3. Mandatory Reporting
4. Truthfulness to Others
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64 Team Single Elimination

Winner
The 4th Quadrant
My Cousin Vinny

1. Magic Grits
2. Jerry Gallo’s Dead!
3. The Defense is Wrong!
4. Everything that guy just said is “BS!” Thank you.
5. That’s a “BS” Question!
6. You think I’m hostile now?
7. Did you say Yutes?
8. Metallic Mint Green
9. Positraction
10. That explains the hostility.
11. She’s acceptable your honor.
12. How … do….your…clients …. plead?
13. Oh…a counteroffer!
15. You knew you could ask questions, right Vin?
16. Train at Ten after 4
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1. Candor to a Tribunal (1)
   2. Former Clients (3)
      3. Who Decides? (9)
         4. Yutes? (7)
   5. Candor to a Tribunal
      6. Who Decides?
Vermont lawyers must carry professional liability insurance.

A. True, per the Rules of Professional Conduct
B. True, by statute
C. False
D. False, but if they do and it lapses, the ethics rules require them to notify clients of the lapse.
Question 2

Last year, Vermont became the 33rd state to adopt a Comment to Rule 1.1 that makes it clear that the duty of competence includes a duty to understand the risks and benefits of ________________.
Question 3

- Rule 1.2(d) prohibits a lawyer from assisting or advising a client to engage in conduct that violates the law. In Vermont, as with a few other states, that poses issues for lawyers whose clients are involved with a particular industry.

- What’s the industry?
Rule 1.3 requires lawyers to act with reasonable diligence while representing clients. A comment to the rule suggests that the duty requires to sole practitioners:

- A. To have a succession plan
- B. To use a cloud based trust accounting system
- C. To use a cloud based practice management system
- D. To hire a bookkeeper or accountant, at least part time
Question 5

- Unlike many other states, Vermont has a rule that specifically prohibits a lawyer from presenting, participating in presenting, or threatening to present criminal charges in order to gain an advantage in a civil matter.
Question 6

- Under Vermont’s rules, a lawyer ______ disclose a client’s intent to commit suicide.

- A. Must
- B. Must not
- C. May
Question 7

- In Vermont, if a prospective client meets with but does not retain a lawyer, the lawyer’s duty of loyalty is relaxed vis-à-vis the client, but another duty is not.

- Which duty remains as stringent as if an actual attorney-client relationship had been formed?
Question 8

- In Vermont, how much of a lawyer’s own money may the lawyer keep in a client trust account?

- A. $0
- B. No more than $100
- C. No more than $500
- D. An amount necessary to cover bank fees & service charges
Question 9

- Without exception, Vermont’s rules prohibits lawyers from disbursing trust funds in reliance upon a deposit until the deposit clears and constitutes “collected funds.”

- A. True
- B. False
Question 10

- In Vermont, can a lawyer contact the opposing party’s expert without the consent of opposing counsel?

- A. Yes. The expert is not represented by opposing counsel.

- B. No. The expert is considered to be represented by opposing counsel.

- C. No. Because the rules of civil procedure prohibit it. Whether or not it’s a disciplinary violation will depend on the circumstances.
Question 11

In Vermont, which set of rules is relaxed for lawyers who provide pro bono services under the auspices of a non-profit or court approved program?

- A. Trust accounting rules
- B. Advertising rules
- C. Rules on Client Confidences
- D. Rules on Conflicts of Interest
Question 12

By rule, what must a Vermont lawyer maintain for 6 years following the termination of a representation?

- A. The client’s file.
- B. A copy of the client’s file.
- C. Records of funds or property held for the client during the representation.
- D. Copies of any advertisement that caused the client to inquire about representation.
Bonus

- Last year, the ABA updated its list of the 25 greatest legal movies of all-time. 2 of the top 3 are set in the same state.

- Name the movies and the state.
Pub Quiz

- Answers
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- Name the movies and the state.
ALABAMA

To Kill a Mockingbird

My Cousin Vinny
Pro Bono Pre-Test

- Basics
Question 1

How much pro bono work do the rules encourage Vermont attorneys to provide per year?

- A. A reasonable amount
- B. 50 hours
- C. 60 hours
- D. A meaningful amount
Question 2

True or false:

the rules exempt government & non-profit attorneys from the pro bono expectation.
Question 3

Client retains Lawyer and agrees to pay Lawyer an hourly fee. The fee agreement is reduced to a writing that is signed by Client.

The matter ends with a final order. By then, Client has paid less than 10% of the total fee and owes Lawyer for approximately 60 hours of work. Lawyer writes off the bill.

May Lawyer claim the 60 hours as pro bono?
Question 3

A. Yes, because Lawyer did not get paid.
B. Yes, if Lawyer does not continue to try to collect the bill.
C. Yes, but cannot claim the hours if Client decides voluntarily to pay.
D. No.
Question 4

Which section of the rules is relaxed for lawyers who do pro bono work at short-term legal services programs sponsored by non-profits or courts?

- A. The trust accounting rules
- B. Rule 1.1 and the duty of competence
- C. The conflicts rules
- D. All of the above
Question 5

Per the rules, a substantial majority of a lawyer’s pro bono hours should be provided to:

A. Self-represented litigants in family court
B. Persons of limited means
C. Organizations designed primarily to address the needs of persons of limited means
D. B or C.
Question 6

Per the Vermont Rules of Professional Conduct, a lawyer may:

A. not limit the scope of the representation.
B. limit the scope of the representation but may not bill for the limited services.
C. limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
D. B & C
Question 7

Rule 1.1 requires a lawyer to provide competent representation to a client. Thus, the rule prohibits a lawyer from taking a case pro bono in a subject matter area with which the lawyer is not familiar.

A. True.
B. False, as long as competence may be achieved by reasonable preparation.
C. False, the rule doesn’t apply to pro bono cases.
Question 8

What’s the term used to describe a lawyer’s act of drafting a pleading for an otherwise self-represented litigant who will submit the pleading as his or her own?
Bonus – Cheslie Kryst

- Private Practice in North Carolina.
- Also does pro bono for inmates seeking shorter sentences.
- Why did Attorney Kryst garner headlines in 2019?
Bonus – Cheslie Kryst

- A. Named Miss USA
- B. Married one of her pro bono clients after proving the client’s innocence.
- C. Wrote the final episode of *Game of Thrones*
- D. Finished a marathon on each of the 7 continents.
Answers

- Answers to the pre-test.
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GHOSTWRITING
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Professionalism, Wellness & Pro Bono

The reward from working pro bono or to increase access can benefit your own wellness.
Thought

- “Put on your own oxygen mask before helping others with theirs.”
  - Jeena Cho
Who We Are

A brief introduction to your two administratively complete-ly awesome presenters
What We’re Covering

• Overview of Various Type of Boards, Hearings, etc. (Kyle)
• Public Records Act (Ryan)
• Rulemaking (Kyle)
• Local Proceedings (Ryan)
• Contested Cases (Kyle)
• Act 250 Hearings (Ryan)
• Q & A
Overview of Administrative Bodies in Vermont

You just purchased your dream property in Vermont to start up the next big brewery – What approvals might you need?

• Local Zoning Approval
• Act 250 permit
• Discharge permit from the Agency of Natural Resources
Administrative Bodies, Continued

What if you want to add solar panel to be a net-zero brewery?

- The Vermont Public Utility Commission (PUC) regulates all utilities and energy production.
More Administrative Bodies

What if you decide to start serving food, beer, and other malt, vinous, or spirituous beverages?

• Both approval from your local municipality and
• A license from the Department for Liquor Control.

• Then you’re good to go!
Public Records Law

That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.
Vt. Const. CH I, art. VI
We’ll stop *droning* and do a hypothetical

Enjoy the voice acting skills of your presenters: Ryan will be playing the role of “bob@gmail.com” while Kyle will be responding on behalf of the Vermont Governor’s Office.
Vermont Public Records Act

Definitions

- “Public agency” or “agency” means any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State.
- “public record” or “public document” means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business. Individual salaries and benefits of and salary schedules relating to elected or appointed officials and employees of public agencies shall not be exempt from public inspection and copying.

What must Gov’t do?

- Must respond within 3 business days
- Unless, within 3 days claims exemption in writing
- Or claims “unusual circumstances” which then allows for 10 business days.
- “unusual circumstances” means to the extent reasonably necessary to the proper processing of the particular request:
  - (A) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
  - (B) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or
  - (C) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein, or with the Attorney General.
Vermont Public Records Act

What can Gov’t do?

- **1 V.S.A. § 318(d):** “a public agency shall consult with the person making the request in order to clarify the request or to obtain additional information that will assist ... in responding to the request”

- In unusual circumstances, as that term is defined a public agency may request that a person seeking a voluminous amount of separate and distinct records narrow the scope of a public records request

- Recover costs – MAYBE! But see *Doyle v. City of Burlington Police Dept.*, 2019 VT 66

Exemptions

- **1 V.S.A. § 317(c) – 42 enumerated exemptions. Includes “Records which by law are designated confidential or by a similar term.”** Vt. Leg. Council has full list of sections in Vermont Statutes that could be asserted as exemptions – Includes 253 sections!

- Common one is Litigation Exemption § 317(c)(14) – “relevant to litigation to which the public agency is a party of record.” *Wesco, Inc. v. Sorrell*, 2004 VT 102 – “relevant” does not mean “relevant”

- **Fun ones -** Information that would reveal the location of archaeological sites and underwater historic properties, Records relating to the identity of library patrons
What Costs? Copy v Inspect

- Doyle v. City of Burlington Police Dept., 2019 VT 66 – “we conclude that state agencies may not charge for staff time spent responding to requests to inspect public records pursuant to the PRA.” This includes attorney review time, time redacting confidential information, etc.

• Dissenting opinion - To the extent the redacted copy cannot be considered a new record because it does not contain any additional information beyond that contained in the original record, it then must be considered a copy—a redacted copy—of the original record, for which the cost of staff time beyond thirty minutes is collectible under § 316(c)(1). It has to be one or the other. The answer cannot be that no reimbursement for staff time is available because the requester did not seek a personal copy of the record. It makes no sense for the Legislature to authorize reimbursement for staff time reviewing, redacting, and producing records for which a copy is sought, but not for the exact same work when a person seeks only to inspect a redacted copy.

Costs

- staff time physically duplicating a record, $.33 per minute after the first 30 minutes.
- For senior-level staff time, $.57 per minute.
- other staff time, $.45 per minute.
- For photocopies, $.05 per single-sided page, $.09 per double-sided page
- For color photocopies, $1.00 per single-sided page.
- For computer-generated paper copies, $.02 per page
- For computer diskettes, $.28 each for 3.5-inch diskettes.
- $0.86 each for write-once CD w/case, $2.31 each for re-writable CD w/case.
- For audio tapes, $0.81 each.
- For video tapes, $1.69 each.
- $2.00 each for write-once DVD w/case, $4.00 each for re-writable DVD w/case.
Rulemaking
Seven Steps

- § 836. Procedure for adoption of rules
- Except for emergency rules, rules shall be adopted by taking the following steps:
  - (1) prefiling, when required;
  - (2) filing proposed rule;
  - (3) publishing proposed rule;
  - (4) holding public hearing and receiving comments;
  - (5) filing final proposal;
  - (6) responding to Legislative Committee on Administrative Rules when required; and
  - (7) filing adopted rule. (Added 1981, No. 82, § 6.)
Rule Making Process Continued

More on Rulemaking

- LCAR
- Emergency Rules
- Effect of Rules
- Is it a Rule?

*This is not ‘Nam. This is Administrative Law. There are rules.*
Some examples of local proceedings

• Zoning Boards – “Appropriate municipal panel”
• Selectboards
  • Usually legislative body but in certain instances acts in quasi-judicial capacity – Highways under Title 19 ch. 7; Condemnation; some licenses or permits; Dog barking hearings; etc.
• Board of Civil Authority - Tax Appeals
  • Schedules for listing and grieving set by statute
  • Listers’ decision appealable to BCA – holds hearing, inspection and issues decision
  • Decision appealable to State Appraiser or Superior Court (Rule 74).
Tips for Local Proceedings

Don’t Lawyer it up too much!

But know your standard of review on appeal!

• Most appeals from municipal panels (zoning boards) are heard de novo at the Environmental Division – totally new hearing, new evidence, as though nothing happened below.

• If in one of 8 or so municipalities that have elected to follow Municipal Administrative Procedures Act (MAPA) then appeal is on-the-record. MAPA requires Rules of Evidence be followed and the board issue findings of fact and conclusions of law – preserve your objections!

• Rule 74 and Rule 75 are typically on-the-record as well. Make sure you build your record.
Contested Cases

What is a contested case?

- Notice
- Discovery
- Subpoenas
- Evidence
- Standard of Proof
- Findings, Conclusions, Memos
- Ex Parte Contacts
- Zombie Permits
- Appeals & Deference
### Contested Cases, Continued

When (and how much) do you defer to state agencies?

<table>
<thead>
<tr>
<th>When to Defer</th>
<th>How Much to Defer</th>
</tr>
</thead>
<tbody>
<tr>
<td>• <em>Korrow &amp; Plum Creek</em></td>
<td>• Generally binary: either a lot or none at all</td>
</tr>
<tr>
<td>• (1) agency is statutorily authorized to provide guidance;</td>
<td></td>
</tr>
<tr>
<td>• (2) complex methodologies are applied; or</td>
<td></td>
</tr>
<tr>
<td>• (3) decision is within agency's “area of expertise”</td>
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</tbody>
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How Much to Defer to an Agency?
Act 250 Vermont’s State-wide land use permit program
Act 250

The 10 Criteria

It’s really a lot more than ten, includes considerations of:

- Air and water pollution
- Water supply
- Soil erosion
- Traffic
- Settlement patterns
- Prime Agricultural and productive forest soils
- Impacts to municipal services or public investment
- Aesthetics, historic sites, scenic and natural beauty
- Conformance with duly adopted local or regional plans
Act 250 Jurisdictional Triggers

- (i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.
- (ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.
- (iii) OR one acre of land within a municipality that has elected by ordinance, to have this jurisdiction apply.
- (iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or mobile home parks, with 10 or more units.

Hearings and Appeals

- Nine District Commissions – appointed by Governor, volunteer citizen members – hear and decide initial applications for land use permits.
- Supported by District Coordinators who issue jurisdictional opinions
- Decisions are appealable to the Vermont Superior Court, Environmental Division – de novo on issues raised in appeal. (For now!)
THANK YOU!

Kyle Landis-Marinello, Esq. & Ryan Kane, Esq.

Email

Kyle.Landis-Marinello@Vermont.gov
Ryan.Kane@Vermont.gov
Caveat: This is a brief overview of the most common administrative hearings conducted by state agencies. It is not exhaustive, either in the listing of departments or the description of each department’s jurisdiction. The overview is limited to contested individual matters and significant permit programs; rulemaking is not included.

**Agency of Agriculture, Food and Markets – V.S.A. Title 6**

The Agency of Agriculture issues permits and licenses for the production and sale of agricultural products, including dairy products, maple products, apples, seeds, and livestock. The Secretary of Agriculture, or a designated hearing officer, will conduct a fair hearing, under 3 V.S.A. chapter 25, when assessing any administrative penalties for violations of the requirements of Title 6. The Secretary acts as factfinder and will issue a final decision. Appeals from an Agency determination, both the assessment of penalties and denial or revocation of a permit or license, are generally taken, de novo, to the Superior Court. Certain decisions must be appealed to the Environmental Division of the Superior Court, namely those involving environmental standards (e.g., water quality).

**Agency of Human Services – V.S.A. Title 33 [Department for Children and Families, Department for Vermont Health Access, Department for Aging and Independent Living, Department of Mental Health]**

The Human Services Board hears appeals from programs within the AHS departments: e.g., economic services (Reach Up, food stamps, fuel assistance); health care programs (Medicaid, long-term care, Dr. Dynasaur, and related state programs); and abuse substantiations for abuse registries (includes child abuse and neglect, or abuse of a vulnerable adult). Some of these are finally decided by the Board; some are subject to review by the Secretary of Human Services. Note: The registries are separate from child protective services cases that are
handled in family court (CHINS and termination of parental rights) and from criminal proceedings for abuse or neglect. Mental health commitment cases are also handled in family or criminal court.

The Board usually delegates hearings and factfinding to hearing officers, who prepare written proposed decisions. The Board then hears argument from the parties. Decisions of the Board, or the Secretary where appropriate, may be appealed to the Vermont Supreme Court.

**Agency of Natural Resources [Department of Environmental Conservation, Fish and Wildlife Department, Department of Forest, Parks and Recreation]**

The Agency of Natural Resources, mostly through the Department of Environmental Conservation, issues permits under the Clean Air Act and the Clean Water Act and a number of state environmental laws, including wastewater and solid waste management, water supply, hazardous materials (includes underground storage tanks, used oil, all CERCLA hazmats, and any other materials found hazardous by the Secretary).

Permits are typically handled through a notice and comment process, not as contested cases. Interested parties other than the permit applicant may participate. The DEC’s Permit Handbook provides a good overview: [http://dec.vermont.gov/environmental-assistance/permits/handbook](http://dec.vermont.gov/environmental-assistance/permits/handbook)

The Agency also administers certain funds, most notably the Petroleum Cleanup Fund (10 V.S.A. § 1941 and Procedures), from which certain parties may seek reimbursement. Such requests are adjudicated initially within ANR, typically in a relatively informal manner, but may be appealed to the Environmental Division where they are subject to “de novo hearing.” 10 V.S.A. § 8504.

As a general matter, permits, permit denials, and other ANR decisions may be appealed to the Environmental Division. *Id.* ANR permits involved in renewable energy projects, however, are appealed to the Public Service Board. 10 V.S.A. § 8506. In some areas — including the Petroleum Cleanup Fund — there is an intermediate appeal to the Agency Secretary or her designee.
Agency of Education – V.S.A. Title 16

The Agency of Education licenses educators and handles disciplinary proceedings for teachers and education administrators. The Agency investigates complaints of educator misconduct and hearings are conducted before a hearing officer and prosecuted by the Agency. Appeals from the hearing officer or hearing panel can be taken to the State Board of Education. Any appeal from the State Board is de novo to the Superior Court.

The Agency also provides an impartial hearing officer for disputes over Special Education/Individualized Education Programs. Such hearings operate on an expedited timeline and are generally governed by federal regulations. The Agency provides a due process hearing and the opportunity to mediate. Appeals from Agency decisions are taken to Federal District Court.

The Department also regulates home study plans and student residency through an administrative hearing process.

A good reference for the general laws of the Department can be found at:
http://education.vermont.gov/vermont-schools/education-laws

Labor Relations Board

The Board hears state employee disciplinary matters, including grievances from the Vermont State Employees Association and various other state employees, including State College and UVM employees.

The Board also responds to charges of unfair labor practices by public sector employees (other than federal employees), unions and public sector employers, investigating such charges and issuing complaints.

The Board holds contested evidentiary hearings, before a hearing officer and a panel of the Board. Decisions may be appealed to the Vermont Supreme Court.

The Board also determines appropriate bargaining units and conducts union representation elections. It has a role in overseeing mediation of labor disputes and providing factfinding.

See http://vlrb.vermont.gov/ for more information.
Department of Labor – V.S.A. Title 21

Department of Labor administers unemployment benefits and has an administrative hearing process for disputes from employers and applicants for benefits. Initial hearing is conducted by a hearing officer without formal evidence rules. The hearing officer’s decision is appealed to the Employment Security Board, which typically does not take new evidence. The Board’s decision may be appealed to the Vermont Supreme Court. The Department also cites and prosecutes violations of Vermont’s Occupational Safety and Health code. Employers receive a citation and can contest through an administrative hearing held before a hearing officer. Petition for appeal is taken to the full VOSHA Board, on the record, and a party may appeal the Board’s determination to the Superior Court, again on the record.

Disputed claims for Workers’ Compensation are heard by a Department hearing officer in a formal evidentiary hearing. The Commissioner of Labor makes the final decision on Workers’ Compensation and a party may appeal to the Superior Court, for a de novo jury trial, or directly to the Vermont Supreme Court on a pure question of law.

Department of Liquor Control – 7 V.S.A. §§ 101 – 112

DLC issues licenses for restaurants and bars that serve alcohol and for retailers that sell wine and beer for off-premises consumption.

DLC’s Regulations are available at: http://www.state.vt.us/dlc/enforcement/regulations/
The Liquor Control Board has three members, appointed to staggered six-year terms by the Governor. The Board’s duties are set out in 7 V.S.A. § 104.
The Liquor Control Board holds hearings for license suspensions and revocations. These are contested evidentiary hearings, conducted according to relatively formal rules.

Appearance, service, and notice rules are similar to V.R.C.P.
Evidence is governed by 3 V.S.A. § 810.
P prefiled direct testimony is expressly encouraged.

Petitions for declaratory rulings on applicability of DLC statutes or rules are treated informally.
The Board’s decisions may be appealed to the Vermont Supreme Court.
The Public Utility Commission is a three-member quasi-judicial commission that supervises the rates, quality of service, and overall financial management of Vermont's public utilities: electric, natural gas, telecommunications, and private water companies. The Commission also supervises cable television companies, although federal law preempts most authority to regulate cable rates or programming. The Commission also reviews the environmental and economic impacts of proposals to purchase energy supply or build new energy facilities; monitors the safety of hydroelectric dams; evaluates the financial aspects of nuclear plant decommissioning and radioactive waste storage; reviews rates paid to independent power producers; and oversees the statewide Energy Efficiency Utility programs.

The Commission has the powers of a court and conducts a variety of contested proceedings. Some aspects of these proceedings look more like administrative hearings, such as the use of prefiled testimony; in other ways Commission proceedings are much like civil litigation in the courts, with motion practice and the availability of most discovery tools. The Commission’s Rules and General Orders are available at https://puc.vermont.gov/about-us/statutes-and-rules/current-rules-and-general-orders

The Commission uses attorney hearing officers in virtually all cases. In all but the largest cases, hearing officers may conduct every aspect of the hearings, after which the hearing officer’s recommendation may be adopted, modified, or rejected by the Commission. In larger cases, the Board takes a more active role.

Common proceedings include certificate of public good hearings (e.g., for a new generating facility), rate-setting, and approval of eminent domain requests related to utility projects. The Commission acts as a “one stop shop” for all permits for renewable energy facilities, including permits granted by the Agency of Natural Resources, which may now be appealed to the Commission rather than to the Environmental Division.

The Public Advocate at the Department of Public Service represents the public interest in Commission proceedings. Other State agencies commonly appear.

Standing rules for other interested parties are nominally similar to those in Environmental Division, but tend to be more stringently applied. See Commission Rule 2.209.

Broadly speaking, the Commission is more formal than other Vermont administrative tribunals. It tends to apply its Rules of Practice fairly stringently, particularly to attorneys. Evidence – 3 V.S.A. § 810 applies.
The Commission requires parties to file proposed findings of fact in most cases. Many PUC practitioners file them as a matter of course, even without request. Commission decisions may be appealed to the Vermont Supreme Court.

**Department of Taxes**

Virtually all taxpayer disputes, other than real estate assessment disputes, are litigated through the administrative process of the Department of Taxes. Cases usually begin when a taxpayer challenges an assessment or pays a disputed tax and requests a refund. See 32 V.S.A. §§ 5883-5886.

Contested matters are heard by a department hearing officer, with the department represented by one of its attorneys. The hearing officer holds contested evidentiary hearings. The hearing officer’s decisions are reviewed by the Commissioner and may be appealed to the Vermont Superior Court and from there to the Vermont Supreme Court.

A taxpayer must petition for refund within 3 years of filing, or within 6 months of receiving a refund alleged to be deficient.

When a taxpayer receives a notice of deficiency, the taxpayer has 60 days to petition for review. 32 V.S.A. § 5883.

Generally, an appeal under § 5883 operates to stay collection, unless the commissioner determines under § 5886(b) that collection is in jeopardy.

Property Tax Assessment appeals involve a different process, with a number of layers: first, a grievance to the town listers, then appeal to the town’s Board of Civil Authority, then appeal to the Superior Court or the Director of PVR under V.R.C.P. 74 within 30 days. 32 V.S.A. §§ 4221, 4222, 4465, 4466.

Appeal at Superior Court or Director level is nominally de novo, but with some deference to the BCA. *Mollica v. Property Valuation & Review Division, 2008 VT 60 ¶¶ 5-11.*

If appeal is taken to the Director of PVR, the Director will appoint an appraiser and hold a hearing under the APA. Hearing and appraisal are directed at setting fair market value of the property. 32 V.S.A. § 4467.

Property Tax Assessment appeals include: disagreements with listers about property valuation; disagreements involving the Current Use Program; and appeals of penalties imposed for untimely filing.

The Secretary of State’s Office has put out a Handbook concerning property tax appeal
Agency of Transportation – “VTrans” (www.aot.state.vt.us)

DMV – handles license suspensions and revocations. Hearings discussed at 23 V.S.A. § 105. Appeals go to Superior Court. The Vermont Transportation Board hears appeals and petitions relating to highways, railroads, other surface transportation facilities, and aeronautical facilities. 19 V.S.A. §§ 3-5. Seven members, appointed by Governor to three-year terms. Board is vested with power over all “regulatory and quasi-judicial functions relating to transportation” except for those that remain with the Commissioner of Motor Vehicles. 19 V.S.A. § 5.

Professional Licensing and Discipline

Medical Practice Board – part of the Department of Health: licenses and disciplines doctors and physicians’ assistants. Contested disciplinary matters are handled as contested cases before a hearing officer and subset of the Board, with review by the full Board and direct appeal to the Vermont Supreme Court.

Other professions, including nurses, dentists, real estate brokers and many others, are licensed and disciplined by professional boards attached to the Secretary of State’s Office. The Secretary of State employs attorneys who prosecute these disciplinary matters. Contested evidentiary hearings are held, with appeal to an Administrative Law Judge and to court.

Act 250 – Statewide Land Use Permits

Act 250 is Vermont’s statewide land-use law. It applies, generally, to projects affecting 10 or more acres of land or creating more than 10 housing units or lots. It also applies to all development above 2,500 feet in elevation. In towns with no zoning or subdivision regulations of their own, Act 250 applies to all development involving an acre or more. Act 250 is administered in the first instance by 9 geographically divided District
Commissions, each made up of three appointed commissioners, assisted by a district coordinator.

District Coordinators make determinations regarding whether Act 250 jurisdiction applies to a particular case (called jurisdictional opinions) as well as other determinations regarding the scope of review. These determinations by the District Coordinator may be appealed *de novo* to the Environmental Division.

Permit hearings are conducted according to rules promulgated by the Natural Resources Board, and are less formal than civil litigation.

The District Commissions hear permit applications to determine whether projects comply with 10 enumerated criteria, including water and air pollution, water supplies, erosion and groundwater, traffic, municipal services and facilities, aesthetics, historic sites, natural areas, wildlife, and a range of other concerns. The applicant must also demonstrate conformance with local and regional plans.

Act 250 permit applicants must provide early notice of their application to all adjoining landowners, the municipality, the regional planning commission, various state agencies, and sometimes others.

Any adjoining property owner and any other person with a particularized interest protected by any of the 10 criteria may be admitted as a party.

State bodies (most often the Agency of Natural Resources and the Agency of Agriculture, Food & Markets) commonly appear in Act 250 proceedings for large projects.

Decisions by District Commissions may be appealed to the Environmental Division *de novo*
Title 3: Executive
Chapter 25: Administrative Procedure

§ 800. Purpose
The General Assembly intends that:

(1) agencies maximize the involvement of the public in the development of rules;
(2) agency inclusion of public participation in the rule-making processes should be consistent;
(3) the General Assembly should articulate, as clearly as possible, the intent of any legislation which delegates rule-making authority;
(4) when an agency adopts policy or procedures, it should not do so to supplant or avoid the adoption of rules. (Added 1999, No. 146 (Adj. Sess.), § 2.)

§ 801. Short title and definitions
(a) This chapter may be cited as the "Vermont Administrative Procedure Act."
(b) As used in this chapter:

(1) "Agency" means a State board, commission, department, agency, or other entity or officer of State government, other than the Legislature, the courts, the Commander in Chief, and the Military Department, authorized by law to make rules or to determine contested cases.

(2) "Contested case" means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

(4) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(5) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

(6) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.
(7) "Practice" means a substantive or procedural requirement of an agency, affecting one or more persons who are not employees of the agency, which is used by the agency in the discharge of its powers and duties. The term includes all such requirements, regardless of whether they are stated in writing.

(8) "Procedure" means a practice which has been adopted in the manner provided in section 835 of this title, either at the election of the agency or as the result of a request under subsection 831(b) of this title.

(9) "Rule" means each agency statement of general applicability which implements, interprets, or prescribes law or policy and which has been adopted in the manner provided by sections 836-844 of this title.

(10) "Incorporation by reference" means the use of language in the text of a regulation which expressly refers to a document other than the regulation itself.

(11) "Adopting authority" means, for agencies which are attached to the Agencies of Administration, of Development and Community Affairs, of Natural Resources, of Human Services, and of Transportation, or any of their components, the secretaries of those agencies; for agencies attached to other departments or any of their components, the commissioners of those departments; and for other agencies, the chief officer of the agency. However, for the procedural rules of boards with quasi-judicial powers, for the Transportation Board, for the Vermont Veterans' Memorial Cemetery Advisory Board, and for the Fish and Wildlife Board, the chair or executive secretary of the board shall be the adopting authority. The Secretary of State shall be the adopting authority for the Office of Professional Regulation.


§§ 802. Repealed. 1981, No. 82, § 7(1).
§ 803. Repealed. 1981, No. 82, § 7(2).
§ 804. Repealed. 1981, No. 82, § 7(3).

§ 806. Procedure to request adoption of rules or procedures
A person may submit a written request to an agency asking the agency to adopt, amend, or repeal a procedure or rule. Within 30 days of receiving the request, the agency shall initiate rule-making proceedings, shall adopt a procedure, or shall deny the request, giving its reasons in writing. (Added 1967, No. 360 (Adj. Sess.), § 6, eff. July 1, 1969; amended 1981, No. 82, § 2.)

§ 807. Declaratory judgment on validity or applicability of rules
The validity or applicability of a rule may be determined in an action for declaratory judgment in the Washington Superior Court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question. (Added 1967, No. 360 (Adj. Sess.), § 7, eff. July 1, 1969; amended 1973, No. 193 (Adj. Sess.), § 3.)

§ 808. Procedure to request declaratory rulings by agencies
Each agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency, and may so provide by procedure or rule. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases. (1967, No. 360 (Adj. Sess.), § 8, eff. July 1, 1969; amended 1981, No. 82, § 3.)

§ 809. Contested cases; notice; hearing; records
(a) In a contested case, all parties shall be given an opportunity for hearing after reasonable notice.
(b) The notice shall include:
   (1) A statement of the time, place, and nature of the hearing.
   (2) A statement of the legal authority and jurisdiction under which the hearing is to be held.
   (3) A reference to the particular sections of the statutes and rules involved.
   (4) A short and plain statement of the matters at issue. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and
(c) Opportunity shall be given all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:
   (1) all pleadings, motions, intermediate rulings;
   (2) all evidence received or considered;
   (3) a statement of matters officially noticed;
   (4) questions and offers of proof, objections, and rulings thereon;
   (5) proposed findings and exceptions; and
   (6) any decision, opinion, or report.

(f) Oral proceedings or any part thereof shall be transcribed on request of any party subject to other applicable provisions of law, and upon payment by the requesting party of the reasonable costs thereof.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(h) The chair of a board, commission, or panel, a hearing officer appointed by a board, commission, or panel, or a licensed attorney representing a party before a board, commission, or panel may, whether or not specifically authorized in any other provision of law, compel, by subpoena, the attendance and testimony of witnesses and the production of books and records. Sections 809a and 809b of this title shall apply to all subpoenas issued under this subsection. Notwithstanding the provisions of section 816 of this title, this subsection shall apply to the Human Services Board, the Labor Relations Board, and the Employment Security Board. (Added 1967, No. 360 (Adj. Sess.), § 9, eff. July 1, 1969; amended 1987, No. 104.)

§ 809a. Enforcement of subpoenas; compulsion of testimony

(a) This section applies when an agency has issued a subpoena to compel a person to appear and testify or to produce documents or things, if the person:

   (1) has failed to appear or has failed to produce the subpoenaed materials, in which case any party or the agency may bring a proceeding to enforce the subpoena; or

   (2) has appeared but has refused to take an oath or affirmation authorized by law, or
has refused to testify or to answer a question, in which case any party or the agency may bring a proceeding to compel testimony by the person.

(b) A proceeding under this section shall be brought in Superior Court for the county in which the administrative proceeding is or will be held. The court shall consist of the presiding judge, sitting alone, and no jury shall be used. The proceeding shall be commenced by motion, and the motion shall be served in the manner provided for motions in civil actions. No filing fee shall be required. No answer or responsive motion is required, but such papers may be filed. The court shall schedule a hearing on the motion as soon as is reasonably practicable.

(c) In a proceeding to compel testimony, the court may order the respondent to testify and answer questions, and may impose limits on those questions or answers.

(d) In a proceeding to enforce a subpoena, if the petitioner establishes that the subpoena was properly issued, and that the person subpoenaed has failed to appear or to produce documents or things required, the court shall issue an order compelling compliance with the agency subpoena. Otherwise, the court shall vacate or modify the subpoena.

(e) In a proceeding to enforce a subpoena, after giving the respondent an opportunity to present evidence, if the court determines that the subpoena was properly issued, and that failure to comply with the agency's subpoena was without reasonable excuse, it shall assess a penalty against the respondent, to be paid to the petitioner, in an amount not to exceed $100.00 and shall also award all costs of litigation that the petitioner incurred as a result of the respondent's noncompliance, including costs of issuing new subpoenas and incurring additional expenses for expert witnesses.

(f) A person who, without reasonable excuse, fails to comply with an order of the court issued under this section may be held to be in contempt of the court. (Added 1983, No. 230 (Adj. Sess.), § 5; amended 2015, No. 97 (Adj. Sess.), § 4.)

§ 809b. Modification of subpoena or discovery order

(a) When an agency has issued a subpoena to compel testimony or the production of documents or things, or has issued a discovery order to a party, an aggrieved person may bring a proceeding to modify or vacate the subpoena or order in the Superior Court for the county in which the petitioner resides or in which the administrative proceeding is or will be held.

(b) The Court shall consist of the presiding judge, and no jury shall be used. The proceeding shall be commenced by motion, which shall be served in the manner provided for motions in
civil actions. No answer or responsive motion is required, but such papers may be filed. No filing fee shall be required. The Court shall schedule a hearing on the motion as soon as is reasonably practicable.

(c) After hearing, the Court may issue its order affirming, modifying, or vacating the subpoena or discovery order. (Added 1983, No. 230 (Adj. Sess.), § 5.)

§ 810. Rules of evidence; official notice
In contested cases:

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(3) A party may conduct cross-examinations required for a full and true disclosure of the facts.

(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. (Added 1967, No. 360 (Adj. Sess.), § 10, eff. July 1, 1969; amended 1973, No. 193 (Adj. Sess.), § 3, eff. April 9, 1974.)

§ 811. Examination of evidence by agency
When in a contested case a majority of the officials of the agency who are to render the final
decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section. (Added 1967, No. 360 (Adj. Sess.), § 11, eff. July 1, 1969.)

§ 812. Decisions and orders
(a) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified forthwith either personally or by mail of any decision or order. A copy of the decision or order shall be delivered or mailed forthwith to each attorney of record and to each party not having an attorney of record. That mailing shall constitute actual knowledge to that person or party.
(b) When a decision or order is approved for issue by a board or commission, the decision or order may be signed by the chair or vice chair on behalf of the issuing board or commission. (Added 1967, No. 360 (Adj. Sess.), § 12, eff. July 1, 1969; amended 1983, No. 190 (Adj. Sess.), § 1, eff. April 27, 1984.)

§ 813. Ex parte consultations
Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate. An agency member:

(1) may communicate with other members or employees of the agency; and
(2) may have the aid and advice of one or more personal assistants. (Added 1967, No.
§ 814. Licenses
(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases shall apply.
(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.
(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.
(d) An agency having jurisdiction to conduct proceedings and impose sanctions in connection with conduct of a licensee or former licensee shall not lose jurisdiction if the license is not renewed or is surrendered or otherwise terminated prior to initiation of such proceedings.

§ 815. Judicial review of contested cases
(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the Supreme Court, unless some other court is expressly provided by law. However, a preliminary, procedural, or intermediate agency action or ruling is immediately appealable under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.
(b) If, before the date set for court hearing, application is made to the Court for leave to
present additional evidence, and it is shown to the satisfaction of the Court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the Court may order that the additional evidence be taken before the agency upon conditions determined by the Court. The agency may modify its findings and decisions by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(c) If the final decision of an agency is expressly provided by law to be reviewable in Superior Court or in the Supreme Court, such review shall be commenced by filing a notice of appeal pursuant to V.R.C.P. 74 or V.R.A.P. 13, as appropriate. (Added 1967, No. 360 (Adj. Sess.), § 15, eff. July 1, 1969; amended 1971, No. 185 (Adj. Sess.), § 1, eff. March 29, 1972; 1997, No. 161 (Adj. Sess.), § 2, eff. Jan. 1, 1998.)

§ 816. Exemptions

(a) Sections 809-813 of this title shall not apply to:

   (1) Acts, decisions, findings, or determinations by the Human Services Board or the Commissioner for Children and Families or a duly authorized agent, and to procedures or hearings before and by the Board or Commissioner or agent.

   (2) Acts, decisions, findings, or determinations by the Employment Security Board or the Commissioner of Labor or his or her, its, or their duly authorized agents and to any and all procedures or hearings before and by him or her or it or his or her or its agents, provided further that subdivisions 802(a)(3) and (4), and subsections 802(b) and 804(a) of this title shall not apply to information made confidential under federal or State law and provided further that subdivisions 802(a)(3) and (4), and subsections 802(b) and 804(a) shall not apply to a determination of a hearing or claims examiner or appeal referee.

   (3) Acts, decisions, findings, or determinations by the Department of Labor or the Commissioner of Labor or his or her, its, or their duly authorized agents as to any and all procedures or hearings before and by the Department or Commissioner or his or her or their agents, arising out of or with respect to 21 V.S.A. chapter 5, subchapter 2, and chapters 9 and 11.

(b) Sections 809-814 of this title shall not apply to any and all acts, decisions, findings, or determinations by the Commissioner of Motor Vehicles or his or her duly authorized agents or to any and all procedures or hearings before and by him or her, or his or her agents, provided further that subsection 804(a) of this title shall not apply to decisions of that
Commissioner respecting the grant, denial, suspension, or revocation of a license or registration under Title 23.

(c) This chapter shall not be construed to apply to the Commander-in-Chief or any other officer, individual, board, or set of persons in the Military Department of this State. (Added 1967, No. 360 (Adj. Sess.), § 17, eff. July 1, 1969; amended 1981, No. 66, § 5(b), eff. May 1, 1981; 1999, No. 147 (Adj. Sess.), § 4; 2005, No. 103 (Adj. Sess.), § 3, eff. April 5, 2006; 2005, No. 174 (Adj. Sess.), § 4; 2013, No. 15, § 7.)

§ 817. Legislative Committee on Administrative Rules

(a) There is created a joint legislative committee to be known as the Legislative Committee on Administrative Rules. The Legislative Committee on Administrative Rules shall be composed of eight members of the General Assembly to be appointed for two-year terms ending on February 1 of odd-numbered years as follows: four members of the House of Representatives, appointed by the Speaker of the House, not all from the same party, and four members of the Senate to be appointed by the Senate Committee on Committees, not all from the same party. The Committee shall elect a chair and a vice chair from among its members.

(b) The Committee shall meet as necessary for the prompt discharge of its duties and may use the staff and services of the Legislative Council. The Committee shall adopt rules to govern its operation and organization. A quorum of the Committee shall consist of five members. For attendance at a meeting when the General Assembly is not in session, members of the Legislative Committee on Administrative Rules shall be entitled to the same per diem compensation and reimbursement for necessary expenses as provided members of standing committees under 2 V.S.A. § 406.

(c) The Legislative Committee on Administrative Rules may hold public hearings on a proposed or previously adopted rule on its own initiative. The Committee shall give public notice of any hearing at least 10 days in advance and shall notify the agency affected. Any public hearing shall be scheduled at a time and place chosen to afford opportunity for affected persons to present their views. As appropriate, the Legislative Committee on Administrative Rules shall consult with the standing legislative committee having jurisdiction in the area of the rule under review.

(d) In addition to its powers under section 842 of this title concerning rules, the Committee may, in similar manner, conduct public hearings, object, and file objections concerning
existing rules. A rule reviewed under this subsection shall remain in effect until amended or repealed.

(e) At any time following its consideration of a final proposal under section 841 of this title, the Committee, by majority vote of the entire Committee, may request that any standing committees of the General Assembly review the issues or questions presented therein which are outside the jurisdiction of the Committee but are within the jurisdiction of the standing committees. On receiving a request for review under this subsection, a standing committee may at its discretion review the issues or questions and act on them. The Committee's request for review shall not affect the review or review period of a final proposal. (Added 1975, No. 211 (Adj. Sess.), § 1; amended 1979, No. 59, § 12; 1981, No. 82, § 4; 1983, No. 88, § 10, eff. July 3, 1983; 2011, No. 89 (Adj. Sess.), § 2; 2013, No. 161 (Adj. Sess.), § 72.)

§§ 818 Repealed. 1981, No. 82, § 7(5).
§ 819. Repealed. 1981, No. 82, § 7(6).

§ 820. Interagency Committee on Administrative Rules
(a) For assistance in the review, evaluation and coordination of programs and activities of State agencies, the development of strategies for maximizing public input, and the promotion of consistent measures among agencies for involving the public in the rulemaking process, subject to the provisions of this chapter, an Interagency Committee on Administrative Rules is created. Members of the Committee shall be appointed by the Governor from the Executive Branch and shall serve at his or her pleasure.
(b) The duties and responsibilities of the Committee shall be those established under this section or those directed by the Governor and shall include review of existing and proposed rules of agencies designated by the Governor for style, consistency with the law, legislative intent, and the policies of the Governor. The Committee shall make reports and recommendations concerning programs and activities of designated agencies subject to this chapter.
(c) After a proposed rule is prefiled with the Committee, the Committee shall work with the agency and prescribe a strategy for maximizing public input on the proposed rule. The Committee shall evaluate the current efforts and practices of agencies for including the public in the development of proposed rules, and shall recommend an appropriate process for maximizing public input, based on the Committee's evaluation of current agency practices.
and the importance of public involvement, given the nature of the proposed rule. The Committee shall prescribe a specific strategy regarding the location, time and frequency of public hearings, and advise the agency on specific provisions of 1 V.S.A. chapter 5 and the consequences of failing to adhere to the prescribed strategy. (Added 1975, No. 211 (Adj. Sess.), § 2; amended 1981, No. 82, § 5; 1999, No. 146 (Adj. Sess.), § 3; 2001, No. 149 (Adj. Sess.), § 47, eff. June 27, 2002.)

§ 821. -830. [Reserved.]

§ 831. Required policy statements and rules
(a) Where due process or a statute directs an agency to adopt rules, the agency shall initiate rulemaking and adopt rules in the manner provided by sections 836-844 of this title.
(b) An agency shall adopt a procedure describing an existing practice when so requested by an interested person.
(c) An agency shall initiate rulemaking to adopt as a rule an existing practice or procedure when so requested by 25 or more persons or by the Legislative Committee on Administrative Rules. An agency shall not be required to initiate rulemaking with respect to any practice or procedure, except as provided by this subsection.
(d) An agency required to hold hearings on contested cases as required by section 809 of this title shall adopt rules of procedure in the manner provided in this chapter.
(e) Except as provided in subsections (a)-(d) of this section, an agency shall not be required to initiate rulemaking or to adopt a procedure or a rule. (Added 1981, No. 82, § 6; amended 1995, No. 61, § 1; 2001, No. 149 (Adj. Sess.), § 48, eff. June 27, 2002.)

§ 832. Exemptions; limitations
(a) No agency shall be required to adopt a procedure or rule:
   (1) which may result in the disclosure of information considered by statute to be confidential;
   (2) setting forth guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, in settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:
       (A) enable law violators to avoid detection;
(B) facilitate disregard of requirements imposed by law; or

(C) give a clearly improper advantage to persons who are in an adverse position to the state; or

(3) describing the content of an agency budget.

(b) Subsection 831(c) of this title does not require any agency to adopt rules:

(1) establishing specific prices to be charged for particular goods or services sold by an agency;

(2) concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;

(3) relating only to the use of a particular facility or property owned, operated, or maintained by the State or any of its subdivisions, if the substance of that rule is adequately indicated by means of signs or signals to persons who use the facility or property;

(4) concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

(c) Subsections 831(b) and (c) of this title do not require the Attorney General to adopt procedures or rules describing the content of opinions or other legal advice given to agencies.

(d) Notwithstanding subsections 831(b) and (c), when an agency receives a request to adopt a procedure or rule, it may elect to issue a declaratory ruling when it has in effect a procedure or rule, as requested, which disposes of the question presented. (Added 1981, No. 82, § 6.)

§ 832a. Rules affecting small businesses

(a) Where a rule provides for the regulation of a small business, an agency shall consider ways by which a small business can reduce the cost and burden of compliance by specifying less numerous, detailed or frequent reporting requirements, or alternative methods of compliance.

(b) An agency shall also consider creative, innovative, or flexible methods of compliance with the rule when the agency finds, in writing, such action would not:

(1) significantly reduce the effectiveness of the rule in achieving the objectives or purposes of the statutes being implemented or interpreted; or

(2) be inconsistent with the language or purpose of statutes that are implemented or interpreted by the rule; or

(3) increase the risk to the health, safety, or welfare of the public or to the beneficiaries of the regulation, or compromise the environmental standards of the State.
(c) This section shall not apply where the regulation is incidental to:

   (1) a purchase of goods or services by the State or an agency thereof; or

   (2) the payment for goods or services by the State or an agency thereof for the benefit of a third party. (Added 1985, No. 56, § 2.)

§ 832b. Administrative rules affecting school districts

If a rule affects or provides for the regulation of public education and public schools, the agency proposing the rule shall evaluate the cost implications to local school districts and school taxpayers, clearly state the associated costs, and report them in a local school cost impact statement to be filed with the economic impact statement on the rule required by subsection 838(c) of this title. An agency proposing a rule affecting school districts shall also consider and include in the local school cost impact statement an evaluation of alternatives to the rule, including no rule on the subject which would reduce or ameliorate costs to local school districts while achieving the objectives or purposes of the proposed rule. The Legislative Committee on Administrative Rules may object to any proposed rule if a local school cost impact statement is not filed with the proposed rule, or the Committee finds the statement to be inadequate, in the same manner in which the Committee may object to an economic impact statement under section 842 of this title. (Added 2003, No. 68, § 44.)

§ 833. Style of rules

(a) Rules and procedures shall be written in a clear and coherent manner using words with common and everyday meanings, consistent with the text of the rule or procedure.

(b) (1) When an agency proposes to amend an existing rule, it shall replace terms identified as potentially disrespectful by the study produced in accordance with 2012 Acts and Resolves No. 24, Sec. 1 with respectful language recommended therein or used in the Vermont Statutes Annotated, where appropriate.

   (2) All new rules adopted by agencies shall use, to the fullest extent possible, respectful language consistent with the Vermont Statutes Annotated and the respectful language study produced in accordance with 2012 Acts and Resolves No. 24, Sec. 1, where appropriate. (Added 1981, No. 82, § 6; amended 2013, No. 96 (Adj. Sess.), § 7.)

§ 834. Periodic review of rules and forms

(a) Upon written request to an agency by the Legislative Committee on Administrative Rules,
a rule or part of a rule that has not been adopted, readopted or substantially amended during the preceding six years shall expire one year from the date of the request. However, this section does not prevent the agency from adopting the same or a similar rule during that year.

(b) The Secretary of State shall review all forms used by agencies and affecting members of the public and shall make recommendations for their simplification and consolidation. Agencies shall provide the Secretary with information reasonably requested for this purpose. The recommendations shall be sent to the agencies concerned, and to the Chairs of the Legislative Committee on Administrative Rules and of the Interagency Committee on Administrative Rules. (Added 1981, No. 82, § 6.)

§ 835. Compilation of procedures
Procedures shall be maintained by the agency in an official current compilation that is indexed by subject. Each addition, change or deletion to the official compilation shall also be dated, indexed and recorded. The compilation shall be a public record. (Added 1981, No. 82, § 6.)

§ 836. Procedure for adoption of rules
Except for emergency rules, rules shall be adopted by taking the following steps:

(1) prefiling, when required;
(2) filing proposed rule;
(3) publishing proposed rule;
(4) holding public hearing and receiving comments;
(5) filing final proposal;
(6) responding to Legislative Committee on Administrative Rules when required; and
(7) filing adopted rule. (Added 1981, No. 82, § 6.)

§ 837. Prefiling
Except for emergency rules, a rule shall be prefilled with the Interagency Committee on Administrative Rules 15 days before filing under section 838 of this title. (Added 1981, No. 82, § 6; amended 2001, No. 149 (Adj. Sess.), § 49, eff. June 27, 2002.)

§ 838. Filing of proposed rules
(a) Proposed rules shall be filed with the Secretary of State. The filing shall include the following:

1. a cover sheet;
2. an economic impact statement;
3. an incorporation by reference statement, if the proposed rule includes an incorporation by reference;
4. an adopting page;
5. the text of the proposed rule;
6. an annotated text showing changes from existing rules;
7. an explanation of the strategy for maximizing public input on the proposed rule as prescribed by the Interagency Committee on Administrative Rules; and
8. a brief summary of the scientific information upon which the proposed rule is based to the extent the proposed rule depends on scientific information for its validity.

(b) The cover sheet shall be on a form prepared by the Secretary of State containing at least the following information:

1. the name of the agency;
2. the title or subject of the rule;
3. a concise summary explaining the effect of the rule;
4. the specific statutory authority for the rule, and, if none exists, the general statutory authority for the rule;
5. an explanation of why the rule is necessary;
6. an explanation of the people, enterprises, and government entities affected by the rule;
7. a brief summary of the economic impact of the rule;
8. the name, address, and telephone number of an individual in the agency able to answer questions and receive comments on the proposal;
9. a proposed schedule for completing the requirements of this chapter, including, if there is a hearing scheduled, the date, time, and place of that hearing and a deadline for receiving comments;
10. whether the rule contains an exemption from inspection and copying of public records, or otherwise contains a Public Records Act exemption by designating information as confidential or limiting its public release and, if so, the asserted statutory authority for the exemption and a brief summary of the reason for the exemption; and
(11) a signed and dated statement by the adopting authority approving the contents of the filing.

(c) (1) The economic impact statement shall analyze the anticipated costs and benefits to be expected from adoption of the rule. Specifically, each economic impact statement shall, for each requirement in the rule:

(A) List categories of people, enterprises, and government entities potentially affected and estimate for each the costs and benefits anticipated.

(B) Compare the economic impact of the rule with the economic impact of other alternatives to the rule, including no rule on the subject or a rule having separate requirements for small business.

(C) Include a flexibility statement. The flexibility statement shall compare the burden imposed on small businesses by compliance with the rule to the burden which would be imposed by alternatives considered under section 832a of this title.

(D) Include a greenhouse gas impact statement. The greenhouse gas impact statement shall explain how the rule has been crafted to reduce the extent to which greenhouse gases are emitted. The Secretary of Administration, in conjunction with the Secretaries of Agriculture, Food and Markets, of Natural Resources, and of Transportation, and the Commissioner of Public Service shall provide a checklist which shall be used in the adoption of rules to assure the full consideration of greenhouse gas impacts, direct and indirect.

(2) In addition, each economic impact statement shall conclude that the rule is the most appropriate method of achieving the regulatory purpose and, with respect to small businesses, contain any findings required by section 832a of this title. Only employees of the agency and information either already available to the agency or available at reasonable cost shall be used in preparing economic impact statements.

(d) Any required incorporation by reference statement shall include a separately signed statement by the adopting authority:

(1) certifying that the text of the matter incorporated has been reviewed by the agency, with the name of the reviewing official;

(2) explaining how the text of the matter incorporated can be obtained by the public, and at what cost;

(3) explaining any modifications to the matter incorporated;

(4) discussing the comparative desirability of reproducing the incorporated matter in
full in the text of the rule; and

(5) certifying that the agency has the capability and the intent to enforce the rule.

(e) The adopting page shall be on a form prepared by the Secretary of State and shall contain the name of the agency, the subject of the proposed rule, an explanation of the effect of the proposal on existing rules, and any internal reference number assigned by the agency.

(f) The annotated text of the rule shall include markings to clearly indicate changed wording from any existing rule.

(g) The brief summary of scientific information shall refer to scientific studies upon which the proposed rule is based and shall explain the procedure for obtaining such studies from the agency. (Added 1981, No. 82, § 6; amended 1985, No. 56, § 3; 1999, No. 146 (Adj. Sess.), § 4; 2001, No. 149 (Adj. Sess.), § 50, eff. June 27, 2002; 2007, No. 209 (Adj. Sess.), § 1; 2015, No. 3, § 1.)

§ 839. Publication of proposed rules

(a) The Secretary of State shall publish online notice of a proposed rule within two weeks of receipt of the proposed rule. Notice shall include the following information:

(1) the name of the agency;
(2) the title or subject of the rule;
(3) a concise summary of the effect of the rule;
(4) an explanation of the people, enterprises, and governmental entities affected by the rule;
(5) a brief summary of economic impact;
(6) the name, telephone number, and address of an agency official able to answer questions and receive comments on the proposal;
(7) the date, time, and place of the hearing or hearings; and
(8) the deadline for receiving comments.

(b) The Secretary of State may edit all notices for clarity, brevity, and format and shall include a brief statement explaining how members of the public can participate in the rulemaking process.

(c) The Secretary of State shall arrange for one formal publication, in a consolidated advertisement in newspapers having general circulation in different parts of the State as newspapers of record approved by the Secretary of State, of information relating to all proposed rules that includes the following information:
(1) the name of the agency and its Internet address; 
(2) the title or subject and a concise summary of the rule; and 
(3) the office name, office telephone number, and office mailing address of an agency official able to answer questions and receive comments on the proposal.

(d) The Secretary of State shall be reimbursed by agencies making publication in accordance with subsection (c) of this section so that all costs are prorated among agencies publishing at the same time. (Added 1981, No. 82, § 6; amended 2009, No. 146 (Adj. Sess.), § F2; 2013, No. 1, § 79.)

§ 840. Public hearing and comment

(a) The agency may hold one or more public hearings for each proposed rule. A public hearing shall be scheduled if so requested by 25 persons, by a governmental subdivision or agency, by the Interagency Committee on Administrative Rules, or by an association having 25 or more members. The first hearing shall not be held sooner than 30 days following the notice required by section 839 of this title.

(b) On request, the agency shall promptly provide a copy of a proposed or final proposed rule. If the copy is mailed, it shall be sent not later than the end of the third working day after the request is received. The agency may charge for copying costs in the amount provided by law.

(c) An agency shall afford all persons reasonable opportunity to submit data, views or arguments, orally or in writing, at least through the seventh day following the last public hearing.

(d) The agency shall consider fully all written and oral submissions concerning the proposed rule, and all submissions on separate requirements for small businesses. The agency shall provide information to all individuals, who submitted written or oral comment, on the procedure for adoption of rules and how to obtain changes in the proposed rule.

(e) If requested by an interested person at any time before 30 days after final adoption of a rule, the adopting authority shall issue an explanation of the proposed rule. The explanation shall include:

(1) a concise statement of the principal reasons for and against the adoption of the rule in its final form; and

(2) an explanation of why the adopting authority overruled the arguments and considerations against the rule. (Added 1981, No. 82, § 6; amended 1985, No. 56, § 4; 1999, No. 146 (Adj. Sess.), § 5; 2009, No. 146 (Adj. Sess.), § F3.)
§ 841. Final proposal

(a) After considering public comment as required in section 840 of this title, an agency shall file a final proposal with the Secretary of State and with the Legislative Committee on Administrative Rules.

(b) The filing of the final proposal shall include all information required to be filed with the original proposal, suitably amended to reflect any changes made in the rule and the fact that public hearing and comment has been completed. Where an agency decides in a final proposal to overrule substantial arguments and considerations raised for or against the original proposal or to reject suggestions with respect to separate requirements for small businesses, the final proposal shall include a description of the reasons for the agency's decision.

(c) The Legislative Committee on Administrative Rules shall distribute a copy of the final proposal to:

   (1) the chairs of the appropriate standing committees;

   (2) each member of the appropriate standing committees who requests a copy of the filing; and

   (3) the Chairs of the House and Senate Committees on Government Operations, if the cover sheet accompanying the filing identifies a Public Records Act exemption in the rule.

(d) The chair of a standing committee that considered legislation delegating rulemaking authority and, in the case of rules that create or enlarge the scope of a Public Records Act exemption, the Chairs of the House and Senate Committees on Government Operations, may convene the committee for the purpose of considering a recommended course of action for the Legislative Committee on Administrative Rules. The chair may convene such a meeting, pursuant to 2 V.S.A. § 406, while the General Assembly is not in session. Any recommended course of action shall be filed with the Legislative Committee on Administrative Rules no later than five working days before the Committee has scheduled a review of the proposed rule. (Added 1981, No. 82, § 6; amended 1985, No. 56, § 5; 1989, No. 134 (Adj. Sess.); 1999, No. 146 (Adj. Sess.), § 6; 2001, No. 149 (Adj. Sess.), § 51, eff. June 27, 2002; 2015, No. 3, § 2.)

§ 842. Review by Legislative Committee

(a) Within 30 days of the date a rule is first placed on the Committee's agenda but no later than 45 days after the filing of a final proposal unless the agency consents to an extension of this review period, the Legislative Committee on Administrative Rules, by majority vote of
the entire Committee, may object under subsection (b), (c), or (d) of this section, and recommend that the agency amend or withdraw the proposal. The agency shall be notified promptly of the objections. Failure to give timely notice shall be deemed approval. The agency shall within 14 days of receiving notice respond in writing to the Committee. After receipt of this response the Committee may withdraw or modify its objections.

(b) The Committee may object under this subsection if:

1. a proposed rule is beyond the authority of the agency;
2. a proposed rule is contrary to the intent of the Legislature;
3. a proposed rule is arbitrary; or
4. the agency did not adhere to the strategy for maximizing public input prescribed by the Interagency Committee on Administrative Rules.

When objection is made under this subsection, and the objection is not withdrawn after the agency responds, on majority vote of the entire Committee, it may file the objection in certified form with the Secretary of State. The objection shall contain a concise statement of the Committee's reasons for its action. The Secretary shall affix to each objection a certification of its filing and as soon as practicable transmit a copy to the agency. After a Committee objection is filed with the Secretary under this subsection, or on the same grounds under subsection 817(d) of this title, to the extent that the objection covers a rule or portion of a rule, the burden of proof thereafter shall be on the agency in any action for judicial review or for enforcement of the rule to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the Legislature, is not arbitrary, and the agency did adhere to the strategy for maximizing public input prescribed by the Interagency Committee on Administrative Rules. If the agency fails to meet its burden of proof, the Court shall declare the whole or portion of the rule objected to invalid. The failure of the Committee to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness.

(c) The Committee may object under this subsection if a proposed rule is not written in a satisfactory style according to section 833 of this title.

(d) The Committee may object under this subsection if the economic impact statement fails to recognize a substantial economic impact of the proposed rule that the Committee describes in its notice of objection.

The Committee may object one time under this subsection and return the proposed rule to the agency as unacceptable for filing. The agency may then cure the defect and adopt the
rule, or it may adopt the rule without change.

(e) When an objection is made under subsection (b) of this section and has been certified by the Secretary of State, notice of the objection shall be included on all copies of the rule distributed to the public. (Added 1981, No. 82, § 6; amended 1981, No. 158 (Adj. Sess.), § 1; 1999, No. 9, § 1, eff. May 4, 1999; 2001, No. 149 (Adj. Sess.), § 52, eff. June 27, 2002.)

§ 843. Filing of adopted rules

(a) An adopting authority may adopt a properly filed final proposed rule after:

(1) The passage of 30 days from the date a rule is first placed on the committee's agenda or 45 days after filing of a final proposal under section 841 of this title, whichever occurs first, provided the agency has not received notice of objection from the Legislative Committee on Administrative Rules; or

(2) Receiving notice of approval from the Legislative Committee on Administrative Rules; or

(3) Responding to an objection of the Legislative Committee on Administrative Rules under section 842 of this title.

(b) The text of the adopted rule shall be the same as the text of the final proposed rule submitted under section 841, except that any germane change may be made by the agency in response to an objection or expressed concern of the Legislative Committee on Administrative Rules.

(c) Adoption shall be complete upon proper filing with the Secretary of State and with the Legislative Committee on Administrative Rules. An agency shall have eight months from the date of initial filing with the Secretary of State to adopt a rule unless extended by action or request of the Legislative Committee on Administrative Rules. The Secretary of State shall refuse to accept a final filing after that date.

(d) Adopted rules filed shall include:

(1) A cover sheet on a form prepared by the Secretary of State containing at least the following information:

(A) the name of the agency;

(B) the title or subject of the rule;

(C) a brief summary of any changes made since the filing of the final proposed rule, including any changes in expected economic impact;

(D) a summary of the dates on which the agency complied with the procedural
requirements of this chapter; and

    (E) a signed and dated statement by the adopting authority that the procedural
requirements of this chapter have been met and that the adopting authority approves
of the contents of the filing; and

(2) An adopting page as required by section 838 of this title; and

(3) The text of the rule.

(e) After adopting a rule, the agency shall create a file containing all papers used or created
in that action. The file shall be retained for at least one year. (Added 1981, No. 82, § 6;
amended 1983, No. 202 (Adj. Sess.), § 1, eff. April 26, 1984; 1999, No. 9, § 2, eff. May 4, 1999.)

§ 844. Emergency rules

(a) Where an agency believes that there exists an imminent peril to public health, safety, or
welfare, it may adopt an emergency rule. The rule may be adopted without having been
prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice
and hearing that the agency finds to be practicable under the circumstances. The agency
shall make reasonable efforts to ensure that emergency rules are known to persons who may
be affected by them.

(b) Emergency rules adopted under this section shall not remain in effect for more than 120
days. An agency may propose a permanent rule on the same subject at the same time that it
adopts an emergency rule.

(c) Emergency rules adopted under this section shall be filed with the Secretary of State and
with the Legislative Committee on Administrative Rules. The Legislative Committee on
Administrative Rules shall distribute copies of emergency rules to the appropriate standing
committees.

(d) Emergency rules adopted under this section shall include:

    (1) as much of the information required for the filing of a proposed rule as is
practicable under the circumstances; and

    (2) a signed and dated statement by the adopting authority explaining the nature of
the imminent peril to the public health, safety, or welfare and approving of the contents of
the rules.

(e) (1) On a majority vote of the entire Committee, the Committee may object under this
subsection if an emergency rule is:

    (A) beyond the authority of the agency;
(B) contrary to the intent of the Legislature;
(C) arbitrary; or
(D) not necessitated by an imminent peril to public health, safety, or welfare sufficient to justify adoption of an emergency rule.

(2) When objection is made under this subsection, on majority vote of the entire Committee, the Committee may file the objection in certified form with the Secretary of State. The objection shall contain a concise statement of the Committee's reasons for its action. The Secretary shall affix to each objection a certification of its filing and as soon as practicable transmit a copy to the agency. After a Committee objection is filed with the Secretary under this subsection, to the extent that the objection covers a rule or portion of a rule, the burden of proof thereafter shall be on the agency in any action for judicial review or for enforcement of the rule to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the Legislature, is not arbitrary, and is justified by an imminent peril to the public health, safety, or welfare. If the agency fails to meet its burden of proof, the Court shall declare the whole or portion of the rule objected to invalid. The failure of the Committee to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness.

(3) When the Committee makes an objection to an emergency rule under this subsection, the agency may withdraw the rule to which an objection was made. Prior to withdrawal, the agency shall give notice to the Committee of its intent to withdraw the rule. A rule shall be withdrawn upon the filing of a notice of withdrawal with the Secretary of State and the Committee. If the emergency rule amended an existing rule, upon withdrawal of the emergency rule, the existing rule shall revert to its original form, as though the emergency rule had never been adopted. (Added 1981, No. 82, § 6; amended 1995, No. 61, § 2; 2011, No. 89 (Adj. Sess.), § 1.)

§ 845. Effect of rules
(a) Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by subsections 842(b) and 844(e) of this title, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.
(b) No agency shall grant routine waivers of or variances from any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure.
The duration of the waiver or variance may be temporary if the rule so provides.

(c) Nothing in this chapter:

(1) allows rules to provide for penalties, fines or imprisonment not authorized by other law;

(2) enlarges the authority of any agency to impose requirements on any member of the public; or

(3) allows an agency by rule to require permits, licenses or fees or to define unprofessional conduct unless specifically authorized by other law.

(d) Rules adopted under this chapter shall take effect 15 days after adoption is complete or at a later time provided in the text of the rule or on its adopting page. However, an emergency rule shall take effect upon filing, or at a later time provided in the text of the rule or on its adopting page.

(e) Rules shall remain in effect until:

(1) repealed or modified by subsequent rule;

(2) limited or invalidated by a court; or

(3) repealed or modified by statute. (Added 1981, No. 82, § 6; amended 1995, No. 61, § 3; 1995, No. 186 (Adj. Sess.), § 32, eff. May 22, 1996; 1999, No. 52, § 44.)

§ 846. Remedies for procedural failures

(a) The following shall prevent a rule from taking effect:

(1) failure to file with the Secretary of State;

(2) failure to file with the Legislative Committee on Administrative Rules;

(3) failure to file with the Interagency Committee on Administrative Rules; or

(4) failure to respond to an objection of the Legislative Committee on Administrative Rules as required in section 842 of this title.

(b) The following shall not affect the validity of a rule after its adoption:

(1) inadvertent failure to make required assurances relating to an incorporation by reference; or

(2) amendment after public hearing of the text of a proposed rule in a manner that does not cause the published summary of the rule to become misleading or inadequate; or

(3) failure to certify that all procedures required by this chapter have been satisfied; or

(4) failure to meet the style requirements of section 833 of this title; or

(5) inadvertent failure to mail notice or copies of any rule.
(c) Failure to identify the creation or enlargement in scope of a Public Records Act exemption in accordance with subsection 838(b) or 841(b) of this title shall render invalid the provisions of the rule that create or enlarge the exemption.

(d) For other violations of this chapter, the Court may fashion appropriate relief.

(e) An action to contest the validity of a rule for noncompliance with any of the provisions of this chapter, other than those listed in subsections (a) and (c) of this section, must be commenced within one year after the effective date of the rule. (Added 1981, No. 82, § 6; amended 1995, No. 61 § 4; 2001, No. 149 (Adj. Sess.), § 53, eff. June 27, 2002; 2015, No. 3, § 3.)

§ 847. Availability of adopted rules; rules by Secretary of State

(a) The Secretary of State shall keep open to public inspection a permanent register of rules. The Secretary also shall publish a code of administrative rules that contains the rules adopted under this chapter. The requirement to publish a code shall be considered satisfied if a commercial publisher offers such a code in print at a competitive price and at no charge online.

(b) The Secretary of State shall publish not less than quarterly a bulletin setting forth the text of all rules filed since the immediately preceding publication and any objections filed under subsection 842(b) or 844(e) of this title.

(c) The bulletin may omit any rule if either:

(1) a commercial publisher offers a comparable publication at a competitive price; or

(2) all three of the following apply:

(A) its publication would be unduly cumbersome or expensive; and

(B) the rule is made available on application to the adopting agency; and

(C) the bulletin contains a notice stating the general subject matter of the omitted rule and stating how a copy of the rule and any objection filed under subsection 842(b) or 844(e) of this title may be obtained.

(d) Bulletins shall be made available upon request to agencies and officials of this State free of charge and to other persons at prices fixed by the Secretary of State to cover mailing and publication costs.

(e) The Secretary of State shall adopt rules for the effective administration of this chapter. These rules shall be applicable to every agency and shall include uniform procedural
requirements, style, appropriate forms, and a system for compiling and indexing rules.

§ 848. Rules repeal; operation of law
(a) A rule shall be repealed without formal proceedings under this chapter if:
   (1) the agency that adopted the rule is abolished and its authority, specifically including its authority to implement its existing rules, has not been transferred to another agency; or
   (2) a court of competent jurisdiction has declared the rule to be invalid; or
   (3) the statutory authority for the rule, as stated by the agency under subdivision 838(b)(4) of this title, is repealed by the General Assembly or declared invalid by a court of competent jurisdiction.
(b) When a rule is repealed by operation of law under this section, the Secretary of State shall delete the rule from the published code of administrative rules.
(c) (1) On July 1, 2018, a rule shall be repealed without formal proceedings under this chapter if:
       (A) as of July 1, 2016, the rule was in effect but not published in the code of administrative rules; and
       (B) the rule is not published in such code before July 1, 2018.
       (2) An agency seeking to publish a rule described in subdivision (1) of this subsection may submit a digital copy of the rule to the Secretary of State with proof acceptable to the Secretary that as of July 1, 2016 the rule was adopted and in effect under this chapter and the digital copy consists of the text of such rule without change.
(d) If the statutory authority for a rule, as stated by the agency under subdivision 838(b)(4) of this title, is amended by the General Assembly, the agency shall review the rule and make a determination whether such statutory amendment repeals the authority upon which the rule is based, and shall, within 60 days of the effective date of the statutory amendment, inform in writing the Secretary of State and the Legislative Committee on Administrative Rules whether repeal or revision of the rule is required by the statutory amendment. (Added 1983, No. 202 (Adj. Sess.), § 2, eff. April 26, 1984; amended 2015, No. 169 (Adj. Sess.), § 12.)
§ 849. Boards and commissions; retiring members

When a board or commission member, who hears all or a substantial part of a case, retires from office or completes his or her term before the case is completed, he or she may remain a member of the board or commission for the purpose of deciding and concluding the case. If the member who retires or completes his or her term is a chair, he or she may also remain a member for the purpose of certifying questions of law if appeal is taken, where such is required by law. For this service, the member may be compensated in the manner provided for active members. (Added 1983, No. 190 (Adj. Sess.), § 2, eff. April 27, 1984.)
Title 1: General Provisions
Chapter 5: Common Law; General Rights
Subchapter 1: Generally

§ 271. Common law adopted

So much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this State and courts shall take notice thereof and govern themselves accordingly.

§ 272. Equality of privilege

In cases proper for the cognizance of the civil authority and the courts of judicature in this State, citizens of the United States shall be equally entitled to the privileges of law and justice with citizens of this State.

§ 273. Eligibility to hold office

A person shall not be debarred on account of sex from holding any office or position of trust or responsibility under the State, including U.S. Senator and Representative to Congress or any county, town, city, village, town school district, or incorporated fire, lighting, or school district office.

Subchapter 2: Public Information

§ 310. Definitions

As used in this subchapter:

(1) "Deliberations" means weighing, examining, and discussing the reasons for and against an act or decision, but expressly excludes the taking of evidence and the arguments of parties.
(2) "Meeting" means a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. "Meeting" shall not mean written correspondence or an electronic communication, including e-mail, telephone, or teleconferencing, between members of a public body for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting, provided that such a written correspondence or such an electronic communication that results in written or recorded information shall be available for inspection and copying under the Public Records Act as set forth in chapter 5, subchapter 3 of this title.

(3) "Public body" means any board, council, or commission of the State or one or more of its political subdivisions, any board, council, or commission of any agency, authority, or instrumentality of the State or one or more of its political subdivisions, or any committee of any of the foregoing boards, councils, or commissions, except that "public body" does not include councils or similar groups established by the Governor for the sole purpose of advising the Governor with respect to policy.

(4) "Publicly announced" means that notice is given to an editor, publisher, or news director of a newspaper or radio station serving the area of the State in which the public body has jurisdiction, and to any person who has requested under subdivision 312(c)(5) of this title to be notified of special meetings.

(5) "Quasi-judicial proceeding" means a proceeding which is:

(A) a contested case under the Vermont Administrative Procedure Act; or

(B) a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority. (Added 1987, No. 256 (Adj. Sess.), § 1; amended 2013, No. 143 (Adj. Sess.), § 1.)

§ 311. Declaration of public policy; short title
(a) In enacting this subchapter, the legislature finds and declares that public commissions, boards, and councils and other public agencies in this State exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont Constitution.

(b) This subchapter may be known and cited as the Vermont Open Meeting Law. (Amended 1979, No. 151 (Adj. Sess.), § 1, eff. April 24, 1980.)

§ 312. Right to attend meetings of public agencies

(a) (1) All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting, except as provided under subdivision 313(a)(2) of this title. A meeting of a public body is subject to the public accommodation requirements of 9 V.S.A. chapter 139. A public body shall electronically record all public hearings held to provide a forum for public comment on a proposed rule, pursuant to 3 V.S.A. § 840. The public shall have access to copies of such electronic recordings as described in section 316 of this title.

(2) Participation in meetings through electronic or other means.

   (A) As long as the requirements of this subchapter are met, one or more of the members of a public body may attend a regular, special, or emergency meeting by electronic or other means without being physically present at a designated meeting location.

   (B) If one or more members attend a meeting by electronic or other means, such members may fully participate in discussing the business of the public body and voting to take an action, but any vote of the public body that is not unanimous shall be taken by roll call.
(C) Each member who attends a meeting without being physically present at a designated meeting location shall:

(i) identify himself or herself when the meeting is convened; and

(ii) be able to hear the conduct of the meeting and be heard throughout the meeting.

(D) If a quorum or more of the members of a public body attend a meeting without being physically present at a designated meeting location, the agenda required under subsection (d) of this section shall designate at least one physical location where a member of the public can attend and participate in the meeting. At least one member of the public body, or at least one staff or designee of the public body, shall be physically present at each designated meeting location.

(b) (1) Minutes shall be taken of all meetings of public bodies. The minutes shall cover all topics and motions that arise at the meeting and give a true indication of the business of the meeting. Minutes shall include at least the following minimal information:

(A) all members of the public body present;

(B) all other active participants in the meeting;

(C) all motions, proposals, and resolutions made, offered, and considered, and what disposition is made of same; and

(D) the results of any votes, with a record of the individual vote of each member if a roll call is taken.

(2) Minutes of all public meetings shall be matters of public record, shall be kept by the clerk or secretary of the public body, and shall be available for inspection by any person and for purchase of copies at cost upon request after five calendar days from the date of any meeting. Meeting minutes shall be posted no later than five calendar days from the date of
the meeting to a website, if one exists, that the public body maintains or has designated as the official website of the body. Except for draft minutes that have been substituted with updated minutes, posted minutes shall not be removed from the website sooner than one year from the date of the meeting for which the minutes were taken.

(c) (1) The time and place of all regular meetings subject to this section shall be clearly designated by statute, charter, regulation, ordinance, bylaw, resolution, or other determining authority of the public body, and this information shall be available to any person upon request. The time and place of all public hearings and meetings scheduled by all Executive Branch State agencies, departments, boards, or commissions shall be available to the public as required under 3 V.S.A. § 2222(c).

(2) The time, place, and purpose of a special meeting subject to this section shall be publicly announced at least 24 hours before the meeting. Municipal public bodies shall post notices of special meetings in or near the municipal clerk's office and in at least two other designated public places in the municipality, at least 24 hours before the meeting. In addition, notice shall be given, either orally or in writing, to each member of the public body at least 24 hours before the meeting, except that a member may waive notice of a special meeting.

(3) Emergency meetings may be held without public announcement, without posting of notices, and without 24-hour notice to members, provided some public notice thereof is given as soon as possible before any such meeting. Emergency meetings may be held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body.

(4) Any adjourned meeting shall be considered a new meeting, unless the time and place for the adjourned meeting is announced before the meeting adjourns.

(5) A person may request in writing that a public body notify the person of special meetings of the public body. The request shall apply only to the calendar year in which it is made, unless made in December, in which case it shall apply also to the following year.
(d) (1) At least 48 hours prior to a regular meeting, and at least 24 hours prior to a special meeting, a meeting agenda shall be:

   (A) posted to a website, if one exists, that the public body maintains or designates as the official website of the body; and

   (B) in the case of a municipal public body, posted in or near the municipal office and in at least two other designated public places in the municipality.

(2) A meeting agenda shall be made available to a person prior to the meeting upon specific request.

(3) (A) Any addition to or deletion from the agenda shall be made as the first act of business at the meeting.

   (B) Any other adjustment to the agenda may be made at any time during the meeting.

(e) Nothing in this section or in section 313 of this title shall be construed as extending to the Judicial Branch of the Government of Vermont or of any part of the same or to the Public Utility Commission; nor shall it extend to the deliberations of any public body in connection with a quasi-judicial proceeding; nor shall anything in this section be construed to require the making public of any proceedings, records, or acts which are specifically made confidential by the laws of the United States of America or of this State.

(f) A written decision issued by a public body in connection with a quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record.

(g) The provisions of this subchapter shall not apply to site inspections for the purpose of assessing damage or making tax assessments or abatements, clerical work, or work assignments of staff or other personnel. Routine, day-to-day administrative matters that do not require action by the public body may be conducted outside a duly warned meeting, provided that no money is appropriated, expended, or encumbered.
(h) At an open meeting, the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting, as long as order is maintained. Public comment shall be subject to reasonable rules established by the chairperson. This subsection shall not apply to quasi-judicial proceedings.

(i) Nothing in this section shall be construed to prohibit the Parole Board from meeting at correctional facilities, with attendance at the meeting subject to rules regarding access and security established by the superintendent of the facility. (Amended 1973, No. 78, § 1, eff. April 23, 1973; 1979, No. 151 (Adj. Sess.), § 2; 1987, No. 256 (Adj. Sess.), § 2; 1997, No. 148 (Adj. Sess.), § 64, eff. April 29, 1998; 1999, No. 146 (Adj. Sess.), § 7; 2013, No. 143 (Adj. Sess.), § 2; 2015, No. 129 (Adj. Sess.), § 1, eff. May 24, 2016.)

§ 313. Executive sessions

(a) No public body may hold an executive session from which the public is excluded, except by the affirmative vote of two-thirds of its members present in the case of any public body of State government or of a majority of its members present in the case of any public body of a municipality or other political subdivision. A motion to go into executive session shall indicate the nature of the business of the executive session, and no other matter may be considered in the executive session. Such vote shall be taken in the course of an open meeting and the result of the vote recorded in the minutes. No formal or binding action shall be taken in executive session except for actions relating to the securing of real estate options under subdivision (2) of this subsection. Minutes of an executive session need not be taken, but if they are, the minutes shall, notwithstanding subsection 312(b) of this title, be exempt from public copying and inspection under the Public Records Act. A public body may not hold an executive session except to consider one or more of the following:

(1) after making a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage:

(A) contracts;
(B) labor relations agreements with employees;

(C) arbitration or mediation;

(D) grievances, other than tax grievances;

(E) pending or probable civil litigation or a prosecution, to which the public body is or may be a party;

(F) confidential attorney-client communications made for the purpose of providing professional legal services to the body;

(2) the negotiating or securing of real estate purchase or lease options;

(3) the appointment or employment or evaluation of a public officer or employee, provided that the public body shall make a final decision to hire or appoint a public officer or employee in an open meeting and shall explain the reasons for its final decision during the open meeting;

(4) a disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought;

(5) a clear and imminent peril to the public safety;

(6) records exempt from the access to public records provisions of section 316 of this title; provided, however, that discussion of the exempt record shall not itself permit an extension of the executive session to the general subject to which the record pertains;

(7) the academic records or suspension or discipline of students;

(8) testimony from a person in a parole proceeding conducted by the Parole Board if public disclosure of the identity of the person could result in physical or other harm to the
(9) information relating to a pharmaceutical rebate or to supplemental rebate agreements, which is protected from disclosure by federal law or the terms and conditions required by the Centers for Medicare and Medicaid Services as a condition of rebate authorization under the Medicaid program, considered pursuant to 33 V.S.A. §§ 1998(f)(2) and 2002(c);

(10) municipal or school security or emergency response measures, the disclosure of which could jeopardize public safety.

(b) Attendance in executive session shall be limited to members of the public body, and, in the discretion of the public body, its staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed.


§ 314. Penalty and enforcement

(a) A person who is a member of a public body and who knowingly and intentionally violates the provisions of this subchapter, a person who knowingly and intentionally violates the provisions of this subchapter on behalf or at the behest of a public body, or a person who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting for which provision is herein made, shall be guilty of a misdemeanor and shall be fined not more than $500.00.

(b) (1) Prior to instituting an action under subsection (c) of this section, the Attorney
General or any person aggrieved by a violation of the provisions of this subchapter shall provide the public body written notice that alleges a specific violation of this subchapter and requests a specific cure of such violation. The public body will not be liable for attorney’s fees and litigation costs under subsection (d) of this section if it cures in fact a violation of this subchapter in accordance with the requirements of this subsection.

(2) Upon receipt of the written notice of alleged violation, the public body shall respond publicly to the alleged violation within 10 calendar days by:

(A) acknowledging the violation of this subchapter and stating an intent to cure the violation within 14 calendar days; or

(B) stating that the public body has determined that no violation has occurred and that no cure is necessary.

(3) Failure of a public body to respond to a written notice of alleged violation within 10 calendar days shall be treated as a denial of the violation for purposes of enforcement of the requirements of this subchapter.

(4) Within 14 calendar days after a public body acknowledges a violation under subdivision (2)(A) of this subsection, the public body shall cure the violation at an open meeting by:

(A) either ratifying, or declaring as void, any action taken at or resulting from:

(i) a meeting that was not noticed in accordance with subsection 312(c) of this title; or

(ii) a meeting that a person or the public was wrongfully excluded from attending; or
(iii) an executive session or portion thereof not authorized under subdivisions 313(a)(1)-(10) of this title; and

(B) adopting specific measures that actually prevent future violations.

(c) Following an acknowledgment or denial of a violation and, if applicable, following expiration of the 14-calendar-day cure period for public bodies acknowledging a violation, the Attorney General or any person aggrieved by a violation of the provisions of this subchapter may bring an action in the Civil Division of the Superior Court in the county in which the violation has taken place for appropriate injunctive relief or for a declaratory judgment. An action may be brought under this section no later than one year after the meeting at which the alleged violation occurred or to which the alleged violation relates. Except as to cases the court considers of greater importance, proceedings before the Civil Division of the Superior Court, as authorized by this section and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(d) The court shall assess against a public body found to have violated the requirements of this subchapter reasonable attorney's fees and other litigation costs reasonably incurred in any case under this subchapter in which the complainant has substantially prevailed, unless the court finds that:

(1) (A) the public body had a reasonable basis in fact and law for its position; and

(B) the public body acted in good faith. In determining whether a public body acted in good faith, the court shall consider, among other factors, whether the public body responded to a notice of an alleged violation of this subchapter in a timely manner under subsection (b) of this section; or

(2) the public body cured the violation in accordance with subsection (b) of this section. (Amended 1979, No. 151 (Adj. Sess.), § 4, eff. April 24, 1980; 1987, No. 256 (Adj. Sess.), § 5; 2013, No. 143 (Adj. Sess.), § 4; 2015, No. 129 (Adj. Sess.), § 2, eff. May 24, 2016.)
Subchapter 3: Access To Public Records

§ 315. Statement of policy; short title

(a) It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the General Assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.

(b) This subchapter may be known and cited as the Public Records Act or the PRA. (Added 1975, No. 231 (Adj. Sess.), § 1; amended 2011, No. 59, § 1; 2015, No. 29, § 1.)

§ 316. Access to public records and documents

(a) Any person may inspect or copy any public record of a public agency, as follows:

(1) For any agency, board, department, commission, committee, branch, instrumentality, or authority of the State, a person may inspect a public record on any day other than a Saturday, Sunday, or a legal holiday, between the hours of nine o'clock and 12 o'clock in the forenoon and between one o'clock and four o'clock in the afternoon.

(2) For any agency, board, committee, department, instrumentality, commission, or authority of a political subdivision of the State, a person may inspect a public record during customary business hours.

(b) If copying equipment maintained for use by a public agency is used by the agency to copy
the public record or document requested, the agency may charge and collect from the person requesting the copy the actual cost of providing the copy. The agency may also charge and collect from the person making the request, the costs associated with mailing or transmitting the record by facsimile or other electronic means. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

(c) Unless otherwise provided by law, in the following instances an agency may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record: (1) the time directly involved in complying with the request exceeds 30 minutes; (2) the agency agrees to create a public record; or (3) the agency agrees to provide the public record in a nonstandard format and the time directly involved in complying with the request exceeds 30 minutes. The agency may require that requests subject to staff time charges under this subsection be made in writing and that all charges be paid, in whole or in part, prior to delivery of the copies. Upon request, the agency shall provide an estimate of the charge.

(d) The Secretary of State, after consultation with the Secretary of Administration, shall establish the actual cost of providing a copy of a public record that may be charged by State agencies. The Secretary shall also establish the amount that may be charged for staff time, when such a charge is authorized under this section. To determine "actual cost," the Secretary shall consider the following only: the cost of the paper or the electronic media onto which a public record is copied, a prorated amount for maintenance and replacement of the machine or equipment used to copy the record, and any utility charges directly associated with copying a record. The Secretary of State shall adopt, by rule, a uniform schedule of public record charges for State agencies.

(e) After public hearing, the legislative body of a political subdivision shall establish actual cost charges for copies of public records. The legislative body shall also establish the amount that may be charged for staff time, when such a charge is authorized under this section. To determine actual cost charges, the legislative body shall use the same factors used by the Secretary of State. If a legislative body fails to establish a uniform schedule of charges, the
charges for that political subdivision shall be the uniform schedule of charges established by the Secretary of State until the local legislative body establishes such a schedule. A schedule of public records charges shall be posted in prominent locations in the town offices.

(f) State agencies shall provide receipts for all monies received under this section. Notwithstanding any provision of law to the contrary, a State agency may retain monies collected under this section to the extent such charges represent the actual cost incurred to provide copies under this subchapter. Amounts collected by a State agency under this section for the cost of staff time associated with providing copies shall be deposited in the General Fund, unless another disposition or use of revenues received by that agency is specifically authorized by law. Charges collected under this section shall be deposited in the agency's operating account or the General Fund, as appropriate, on a monthly basis or whenever the amount totals $100.00, whichever occurs first.

(g) A public agency having the equipment necessary to copy its public records shall utilize its equipment to produce copies. If the public agency does not have such equipment, nothing in this section shall be construed to require the public agency to provide or arrange for copying service, to use or permit the use of copying equipment other than its own, to permit operation of its copying equipment by other than its own personnel, to permit removal of the public record by the requesting person for purposes of copying, or to make its own personnel available for making handwritten or typed copies of the public record or document requested.

(h) Standard formats for copies of public records shall be as follows: for copies in paper form, a photocopy of a paper public record or a hard copy print-out of a public record maintained in electronic form; for copies in electronic form, the format in which the record is maintained. Any format other than the formats described in this subsection is a nonstandard format.

(i) If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by the party requesting the records. An agency may, but is not required to, provide copies of public records in a nonstandard format, to create a public
record, or to convert paper public records to electronic format.

(j) A public agency may make reasonable rules to prevent disruption of operations, to preserve the security of public records or documents, and to protect them from damage.

(k) Information concerning facilities and sites for the treatment, storage, and disposal of hazardous waste shall be made available to the public under this subchapter in substantially the same manner and to the same degree as such information is made available under the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. chapter 82, subchapter 3, and the Federal Freedom of Information Act, 5 U.S.C. section 552 et seq. In the event of a conflict between the provisions of this subchapter and the cited federal laws, federal law shall govern. (Added 1975, No. 231 (Adj. Sess.), § 1; amended 1987, No. 85, § 5, eff. June 9, 1987; 1995, No. 159 (Adj. Sess.), § 1; 2003, No. 158 (Adj. Sess.), § 4; 2011, No. 59, § 2.)

§ 317. Definitions; public agency; public records and documents

(a) As used in this subchapter:

(1) "Business day" means a day that a public agency is open to provide services.

(2) "Public agency" or "agency" means any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State.

(b) As used in this subchapter, "public record" or "public document" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business. Individual salaries and benefits of and salary schedules relating to elected or appointed officials and employees of public agencies shall not be exempt from public inspection and copying.

(c) The following public records are exempt from public inspection and copying:
(1) Records which by law are designated confidential or by a similar term.

(2) Records which by law may only be disclosed to specifically designated persons.

(3) Records which, if made public pursuant to this subchapter, would cause the
custodian to violate duly adopted standards of ethics or conduct for any profession regulated
by the State.

(4) Records which, if made public pursuant to this subchapter, would cause the
custodian to violate any statutory or common law privilege other than the common law
deliberative process privilege as it applies to the General Assembly and the Executive
Branch agencies of the State of Vermont.

(5) (A) Records dealing with the detection and investigation of crime, but only to
the extent that the production of such records:

(i) could reasonably be expected to interfere with enforcement proceedings;

(ii) would deprive a person of a right to a fair trial or an impartial
adjudication;

(iii) could reasonably be expected to constitute an unwarranted invasion of
personal privacy;

(iv) could reasonably be expected to disclose the identity of a confidential
source, including a state, local, or foreign agency or authority or any private
institution which furnished information on a confidential basis, and, in the case of a
record or information compiled by criminal law enforcement authority in the course
of a criminal investigation or by an agency conducting a lawful national security
intelligence investigation, information furnished by a confidential source;

(v) would disclose techniques and procedures for law enforcement
investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecution if such disclosure could reasonably be expected to risk circumvention of the law;

(vi) could reasonably be expected to endanger the life or physical safety of any individual.

(B) Notwithstanding subdivision (A) of this subdivision (5), records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, as that term is defined in 23 V.S.A. § 2302; and records reflecting the charge of a person shall be public.

(C) It is the intent of the General Assembly that in construing subdivision (A) of this subdivision (5), the courts of this State will be guided by the construction of similar terms contained in 5 U.S.C. § 552(b)(7) (Freedom of Information Act) by the courts of the United States.

(D) It is the intent of the General Assembly that, consistent with the manner in which courts have interpreted subdivision (A) of this subdivision (5), a public agency shall not reveal information that could be used to facilitate the commission of a crime or the identity of a private individual who is a witness to or victim of a crime, unless withholding the identity or information would conceal government wrongdoing. A record shall not be withheld in its entirety because it contains identities or information that have been redacted pursuant to this subdivision.

(6) A tax return and related documents, correspondence, and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont Department of Taxes or submitted by a person to any public agency in connection with agency business.

(7) Personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency,
information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his or her designated representative.

(8) Test questions, scoring keys, and other examination instruments or data used to administer a license, employment, or academic examination.

(9) Trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by 18 V.S.A. § 4632 are not exempt under this subdivision.

(10) Lists of names compiled or obtained by a public agency when disclosure would violate a person's right to privacy or produce public or private gain; provided, however, that this section does not apply to lists which are by law made available to the public, or to lists of professional or occupational licensees.

(11) Student records, including records of a home study student; provided, however, that such records shall be made available upon request under the provisions of the Federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, as may be amended.

(12) Records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed.

(13) Information pertaining to the location of real or personal property for public agency purposes prior to public announcement of the project and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts thereof.
(14) Records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation.

(15) Records relating specifically to negotiation of contracts, including collective bargaining agreements with public employees.

(16) Any voluntary information provided by an individual, corporation, organization, partnership, association, trustee, estate, or any other entity in the State of Vermont, which has been gathered prior to the enactment of this subchapter, shall not be considered a public document.

(17) Records of interdepartmental and intradepartmental communications in any county, city, town, village, town school district, incorporated school district, union school district, consolidated water district, fire district, or any other political subdivision of the State to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action or precede the presentation of the budget at a meeting held in accordance with section 312 of this title.

(18) Records of the Office of Internal Investigation of the Department of Public Safety, except as provided in 20 V.S.A. § 1923.

(19) Records relating to the identity of library patrons or the identity of library patrons in regard to library patron registration records and patron transaction records in accordance with 22 V.S.A. chapter 4.

(20) Information that would reveal the location of archaeological sites and underwater historic properties, except as provided in 22 V.S.A. § 761.

(21) Lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list, which list may be sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in
furtherance of that magazine's continued financial viability, and is exercised pursuant to specific guidelines adopted by the editor of the magazine.

(22) [Repealed.]

(23) Any data, records, or information produced or acquired by or on behalf of faculty, staff, employees, or students of the University of Vermont or the Vermont State Colleges in the conduct of study, research, or creative efforts on medical, scientific, technical, scholarly, or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records, or information are published, disclosed in an issued patent, or publicly released by the institution or its authorized agents. This subdivision applies to, but is not limited to, research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research. This subdivision shall not exempt records, other than research protocols, produced or acquired by an institutional animal care and use committee regarding the committee's compliance with State law or federal law regarding or regulating animal care.

(24) Records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity.

(25) Passwords, access codes, user identifications, security procedures, and similar information the disclosure of which would threaten the safety of persons or the security of public property.

(26) Information and records provided to the Department of Financial Regulation by a person for the purposes of having the Department assist that person in resolving a dispute with any person regulated by the Department, and any information or records provided by a person in connection with the dispute.

(27) Information and records provided to the Department of Public Service by an individual for the purposes of having the Department assist that individual in resolving a
dispute with a utility regulated by the Department, or by the utility or any other person in connection with the individual's dispute.

(28) Records of, and internal materials prepared for, independent external reviews of health care service decisions pursuant to 8 V.S.A. § 4089f and of mental health care service decisions pursuant to 8 V.S.A. § 4089a.

(29) The records in the custody of the Secretary of State of a participant in the Address Confidentiality Program described in 15 V.S.A. chapter 21, subchapter 3, except as provided in that subchapter.

(30) All State-controlled database structures and application code, including the vermontvacation.com website and Travel Planner application, which are known only to certain State departments engaging in marketing activities and which give the State an opportunity to obtain a marketing advantage over any other state, regional, or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such State department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the State's best interests.

(31) Records of a registered voter's month and day of birth, driver's license or nondriver identification number, e-mail address, and the last four digits of his or her Social Security number contained in an application to the statewide voter checklist or the statewide voter checklist established under 17 V.S.A. § 2154 or the failure to register to vote under 17 V.S.A. § 2145a.

(32) With respect to publicly owned, managed, or leased structures, and only to the extent that release of information contained in the record would present a substantial likelihood of jeopardizing the safety of persons or the security of public property, final building plans, and as-built plans, including drafts of security systems within a facility, that depict the internal layout and structural elements of buildings, facilities, infrastructures, systems, or other structures owned, operated, or leased by an agency before, on, or after the effective date of this provision; emergency evacuation, escape, or other emergency response plans that have not been published for public use; and vulnerability assessments, operation
and security manuals, plans, and security codes. For purposes of this subdivision, "system" shall include electrical, heating, ventilation, air conditioning, telecommunication, elevator, and security systems. Information made exempt by this subdivision may be disclosed to another government entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is bidding on or performing work on or related to buildings, facilities, infrastructures, systems, or other structures owned, operated, or leased by the State. The entities or persons receiving such information shall maintain the exempt status of the information. Such information may also be disclosed by order of a court of competent jurisdiction, which may impose protective conditions on the release of such information as it deems appropriate. Nothing in this subdivision shall preclude or limit the right of the General Assembly or its committees to examine such information in carrying out its responsibilities or to subpoena such information. In exercising the exemption set forth in this subdivision and denying access to information requested, the custodian of the information shall articulate the grounds for the denial.

(33) The account numbers for bank, debit, charge, and credit cards held by an agency or its employees on behalf of the agency.

(34) Affidavits of income and assets as provided in 15 V.S.A. § 662 and Rule 4 of the Vermont Rules for Family Proceedings.

(35) [Repealed.]

(36) Anti-fraud plans and summaries submitted for the purposes of complying with 8 V.S.A. § 4750.

(37) Records provided to the Department of Health pursuant to the Patient Safety Surveillance and Improvement System established by 18 V.S.A. chapter 43a.

(38) Records that include prescription information containing data that could be used to identify a prescriber, except that the records shall be made available upon request for medical research, consistent with and for purposes expressed in 18 V.S.A. § 4622 or 9410, 18
(39) Records held by the Agency of Human Services or the Department of Financial Regulation, which include prescription information containing patient-identifiable data, that could be used to identify a patient.

(40) Records of genealogy provided in an application or in support of an application for tribal recognition pursuant to chapter 23 of this title.

(41) Documents reviewed by the Victims Compensation Board for purposes of approving an application for compensation pursuant to 13 V.S.A. chapter 167, except as provided by 13 V.S.A. §§ 5358a(b) and 7043(c).

(42) Except as otherwise provided by law, information that could be used to identify a complainant who alleges that a public agency, a public employee or official, or a person providing goods or services to a public agency under contract has engaged in a violation of law, or in waste, fraud, or abuse of authority, or in an act creating a threat to health or safety, unless the complainant consents to disclosure of his or her identity.

§ 317a. Disposition of public records

A custodian of public records shall not destroy, give away, sell, discard, or damage any record or records in his or her charge, unless specifically authorized by law or under a record schedule approved by the State Archivist pursuant to 3 V.S.A. § 117(a)(5). (Added 2007, No. 96 (Adj. Sess.), § 1.)

§ 318. Procedure

(a) Upon request, the custodian of a public record shall promptly produce the record for inspection, except that:

(1) If the record is in active use or in storage and therefore not available for use at the time the person asks to examine it, the custodian shall so certify this fact in writing to the applicant and set a date and hour within one calendar week of the request when the record will be available for examination.

(2) If the custodian considers the record to be exempt from inspection under the provisions of this subchapter, the custodian shall so certify in writing. Such certification shall identify the records withheld and the basis for the denial. A record shall be produced for inspection or a certification shall be made that a record is exempt within three business days of receipt of the request, unless otherwise provided in subdivision (5) of this subsection. The certification shall include the asserted statutory basis for denial and a brief statement
of the reasons and supporting facts for denial. The custodian shall also notify the person of his or her right to appeal to the head of the agency any adverse determination.

(3) If appealed to the head of the agency, the head of the agency shall make a determination with respect to any appeal within five business days after the receipt of such appeal. If an appeal of the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under section 319 of this title.

(4) If a record does not exist, the custodian shall certify in writing that the record does not exist under the name given to the custodian by the applicant or by any other name known to the custodian.

(5) In unusual circumstances as herein specified, the time limits prescribed in this subsection may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten business days from receipt of the request. As used in this subdivision, "unusual circumstances" means to the extent reasonably necessary to the proper processing of the particular request:

(A) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(B) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(C) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein, or with the Attorney General.

(b) Any person making a request to any agency for records under subsection (a) of this
section shall be deemed to have exhausted the person's administrative remedies with respect to each request if the agency fails to comply within the applicable time limit provisions of this section. Upon any determination by an agency to comply with a request for records, the records shall be made available promptly to the person making such request. Any notification of denial of any request for records under this section shall set forth the names and titles or positions of each person responsible for the denial of such request.

(c) (1) Any denial of access by the custodian of a public record may be appealed to the head of the agency. The head of the agency shall make a written determination on an appeal within five business days after the receipt of the appeal. A written determination shall include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial.

(2) If the head of the agency reverses the denial of a request for records, the records shall be promptly made available to the person making the request. A failure by the agency to comply with any of the time limit provisions of this section shall be deemed a final denial of the request for records by the agency.

(d) In responding to a request to inspect or copy a record under this subchapter, a public agency shall consult with the person making the request in order to clarify the request or to obtain additional information that will assist the public agency in responding to the request and, when authorized by this subchapter, in facilitating production of the requested record for inspection or copying. In unusual circumstances, as that term is defined in subdivision (a)(5) of this section, a public agency may request that a person seeking a voluminous amount of separate and distinct records narrow the scope of a public records request.

(e) A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce the record accompanied by an explanation of the basis for denial of the redacted information.

(f) If a person making the request has a disability which requires accommodation to gain
equal access to the public record sought, the person shall notify the public agency of the type of accommodation requested. The public agency shall give primary consideration to the accommodation choice expressed by the requestor, but may propose an alternative accommodation so long as it achieves equal access. The public agency shall provide accommodation to the person making the request unless the agency can demonstrate that accommodation would result in a fundamental alteration in the nature of its service, programs, activities, or in undue financial and administrative burden.

(g) The Secretary of State shall provide municipal public agencies and members of the public information and advice regarding the requirements of the Public Records Act and may utilize informational websites, toll-free telephone numbers, or other methods to provide such information and advice. (Added 1975, No. 231 (Adj. Sess.), § 1; amended 2005, No. 132 (Adj. Sess.), § 2; 2007, No. 110 (Adj. Sess.), § 1; 2011, No. 59, § 4.)

§ 319. Enforcement

(a) Any person aggrieved by the denial of a request for public records under this subchapter may apply to the Civil Division of the Superior Court in the county in which the complainant resides, or has his or her personal place of business, or in which the public records are situated, or in the Civil Division of the Superior Court of Washington County, to enjoin the public agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in section 317 of this title, and the burden of proof shall be on the public agency to sustain its action.

(b) Except as to cases the court considers of greater importance, proceedings before the Civil Division of the Superior Court, as authorized by this section, and appeals there from, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(c) If the public agency can show the court that exceptional circumstances exist and that the
agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

(d) (1) Except as provided in subdivision (2) of this subsection, the court shall assess against the public agency reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(2) The court may, in its discretion, assess against a public agency reasonable attorney's fees and other litigation costs reasonably incurred in a case under this section in which the complainant has substantially prevailed provided that the public agency, within the time allowed for service of an answer under V.R.C.P. 12(a)(1):

(A) concedes that a contested record or contested records are public; and

(B) provides the record or records to the complainant.

(3) The court may assess against the complainant reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section when the court finds that the complainant has violated V.R.C.P. 11. (Added 1975, No. 231 (Adj. Sess.), § 1; amended 2011, No. 59, § 5.)

§ 320. Penalties

(a) Whenever the court orders the production of any public agency records, improperly withheld from the complainant and assesses against the agency reasonable attorney's fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether the agency personnel acted arbitrarily or capriciously with respect to the withholding, the Department of Human Resources if applicable to that employee, shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Department, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the
administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his or her representative. The administrative authority shall take the corrective action that the Department recommends.

(b) In the event of noncompliance with the order of the court, the Civil Division of the Superior Court may punish for contempt the responsible employee or official, and in the case of a uniformed service, the responsible member.

(c) A person who willfully destroys, gives away, sells, discards, or damages a public record without having authority to do so shall be fined at least $50.00 but not more than $1,000.00 for each offense. (Added 1975, No. 231 (Adj. Sess.), § 1; amended 2003, No. 156 (Adj. Sess.), § 15; 2007, No. 96 (Adj. Sess.), § 2; 2011, No. 59, § 6.)

Subchapter 5: Interpreters For Judicial, Administrative, And Legislative Findings

§ 331. Definitions

As used in this subchapter:

(1) "Person who is deaf or hard of hearing" means any person who has such difficulty hearing, even with amplification, that he or she cannot rely on hearing for communication.

(2) "Proceeding" means any judicial proceeding, contested case under 3 V.S.A. chapter 25, or other hearing before an administrative agency not included under 3 V.S.A. chapter 25.

(3) "Qualified interpreter" means an interpreter for a person who is deaf or hard of hearing who meets standards of competency established by the national or Vermont Registry of Interpreters for the Deaf as amended, by rule, by the Vermont Commission of the Deaf and Hard of Hearing. (Added 1987, No. 172 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 11, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)

§ 332. Right to interpreter; assistive listening equipment
(a) Any person who is deaf or hard of hearing who is a party or witness in any proceeding shall be entitled to be provided with a qualified interpreter for the duration of the person's participation in the proceeding.

(b) Any person who is deaf or hard of hearing shall be entitled to be provided with a qualified interpreter upon five working days' notice that the person has reasonable need to do any of the following:

1) transact business with any State board or agency;

2) participate in any State-sponsored activity, including public hearings, conferences, and public meetings;

3) participate in any official State legislative activities.

(c) If a person who is deaf or hard of hearing is unable to use or understand sign language, the presiding officer or State board or agency or State legislative official shall, upon five working days' notice, make available appropriate assistive listening equipment for use during the proceeding or activity. (Added 1987, No. 172 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 12, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)

§ 333. Appointment of interpreter

(a) The presiding officer in a proceeding shall appoint an interpreter after making a preliminary determination that the interpreter is able to readily communicate with the person who is deaf or hard of hearing, to accurately interpret statements or communications from the person who is deaf or hard of hearing, and to interpret the proceedings to the person who is deaf or hard of hearing.

(b) The presiding officer shall make findings when appointing an interpreter not designated as a qualified interpreter.

(c) It shall be a rebuttable presumption that the requirements of this section are met if the
§ 333. Appointment

The appointment of an interpreter shall be as follows:

(a) The Vermont Commission of the Deaf and Hard of Hearing shall, by rule, establish factors to be considered by the presiding officer under section 333 of this title before appointing an interpreter who is not a qualified interpreter. Such factors shall encourage the widest availability of interpreters in Vermont while at the same time ensuring that the interpreter:

(1) is able to communicate readily with the person who is deaf or hard of hearing;

(2) is able to interpret accurately statements or communications by the person who is
(3) is able to interpret the proceedings to the person who is deaf or hard of hearing;

(4) shall maintain confidentiality;

(5) shall be impartial with respect to the outcome of the proceeding;

(6) shall not exert any influence over the person who is deaf or hard of hearing; and

(7) shall not accept assignments the interpreter does not feel competent to handle.

(b) Rules established by the Vermont Commission of the Deaf and Hard of Hearing pursuant to subdivision 331(3) of this title amending the standards of competency established by the national or Vermont Registry of the Deaf shall be limited to the factors set forth in subsection (a) of this section.

(c) The Vermont Commission of the Deaf and Hard of Hearing shall prepare an explanation of the provisions of this subchapter which shall be distributed to all State agencies and courts.

(d) The Department of Disabilities, Aging, and Independent Living shall maintain a list of qualified interpreters in Vermont and, where such information is available, in surrounding states. The list shall be distributed to all State agencies and courts. (Added 1987, No. 172 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 14, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)

§ 337. Review

(a) A decision, order, or judgment of a court or administrative agency may be reversed on appeal if the court or agency finds that a person who is deaf or hard of hearing who was a party or a witness in the proceeding was deprived of an opportunity to communicate effectively, and that the deprivation was prejudicial.
(b) Any person denied a qualified interpreter under subsection 332(b) of this title, may appeal the denial through the administrative appeals process for the agency involved or, where no such administrative appeals process exists, through the Superior Court in the county in which the denial occurred or in Washington Superior Court. (Added 1987, No. 172 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 15, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)

§ 338. Admissions; confessions

(a) An admission or confession by a person who is deaf or hard of hearing made to a law enforcement officer or any other person having a prosecutorial function may only be used against the person in a criminal proceeding if:

(1) The admission or confession was made knowingly, voluntarily, and intelligently and is not subject to alternative interpretations resulting from the person's habits and patterns of communication.

(2) The admission or confession, if made during a custodial interrogation, was made after reasonable steps were taken, including the appointment of a qualified interpreter, to ensure that the defendant understood his or her constitutional rights.

(b) The provisions of subsection (a) of this section supplement the constitutional rights of the person who is deaf or hard of hearing. (Added 1987, No. 172 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 16, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)

§ 339. Communications made to interpreters; prohibition on disclosure

(a) An interpreter, whether or not the interpreter is a qualified interpreter, shall not disclose or testify to:

(1) a communication made by a person to an interpreter acting in his or her capacity as an interpreter for a person who is deaf or hard of hearing or a person with limited
(2) any information obtained by the interpreter while acting in his or her capacity as an interpreter for a person who is deaf or hard of hearing or a person with limited English proficiency.

(b) There is no prohibition on disclosure under this section if the services of the interpreter were sought or obtained to enable or aid anyone to commit or plan to commit what the person who is deaf or hard of hearing or the person with limited English proficiency knew or reasonably should have known to be a crime or fraud.

(d) (1) This section shall not be construed to limit or expand the effect of section 334 of this title.

(2) This section shall not be construed to alter or affect the mandatory reporting requirements of 33 V.S.A. § 4913.

(d) As used in this section, "person with limited English proficiency" means a person who does not speak English as his or her primary language and who has a limited ability to read, write, speak, or understand English. (Added 2003, No. 142 (Adj. Sess.), § 1; amended 2005, No. 167 (Adj. Sess.), § 10, eff. May 20, 2006; 2013, No. 96 (Adj. Sess.), § 3.)
Overview (09-01, 9/1/08)

These are the rules that govern all proceedings conducted by the Vermont Human Services Board. They were promulgated by the Board pursuant to 3 V.S.A. § 3091(b).

Requests for fair hearing (09-01, 9/1/08)

A hearing may be requested by an applicant or recipient of assistance, benefits, or social services, or by a licensee or an applicant for a license, as provided at § 3091 of Title 3, or by any other individual as specifically provided by statute.

Appeals shall be commenced by communicating a request for fair hearing with the clerk of the Human Services Board. Requests shall include the name, address, and phone number of the appellant and a statement of the basis for the appeal, if known.

Any department or office in the Agency of Human Services, including contractors and delegates of any such office or department, shall respond to any clear indication (oral or written) that a person wishes to present his or her case to a higher authority by helping that person to submit a request for hearing in the form provided by this rule or by advising that person to obtain legal representation. The department or office shall promptly forward all such requests to the Board.

The Board shall mail a copy of all requests to the attorney representing the department or office that is the subject of the appeal.

Timeliness (09-01, 9/1/08)

As a general matter, timeliness for appeals is based on the statutes and/or regulations governing a particular program.

Appeals involving eligibility, benefits, coverage and financial assistance decisions by the Department of Disabilities, Aging and Independent Living; or the Economic Services Division or Health Access Eligibility Unit of the Department for Children and Families; or the Office of Vermont Health Access in cases not covered by the MCO rules shall not be considered by the Board unless the applicant or recipient has made a request for fair hearing within 90 days from the date when his or her grievance
with that office or department arose.

Appeals involving coverage of services or service disagreements by the Managed Care Organization (MCO) shall not be considered by the Board unless the applicant or recipient has made a request for fair hearing within 90 days of the initial notice of adverse action or within 30 days of notice of the MCO internal appeal decision or as otherwise provided by law.

Food Stamp cases. In Food Stamp cases, a household may also request a fair hearing at any time within a certification period to dispute its current level of benefits.

Office of Child Support. Appeals from decisions involving the Office of Child Support must be filed within 30 days from the date the appellant's grievance with that office arose.
Child Development Division. Appeals from decisions by the Child Development Division of the Department for Children and Families must be made within 30 days from the date the grievance with that department arose, unless otherwise provided by statute or regulation.

All other appeals. All other appeals must be made within 30 days from the date the grievance with the action of the affected office or department arose, unless otherwise provided by statute or regulation.

Computation of time limits. In computing any period of time prescribed or allowed by these rules, the day from which the designated period begins to run is not counted. The last day of the prescribed period shall be included, except if the last day falls on a weekend or a state or federal holiday. Weekends and all state and federal holidays are excluded only in determining the last day of the prescribed period.

1000.3 The Fair Hearing (09-01, 9/1/08)

Hearing Officer. The hearing shall be conducted by an impartial hearing officer appointed by the Board who is not involved in any way with the action in question. The hearing officer shall rule upon all motions and questions relating to the presentation of the appeal.

Right to representation. The appellant may present his or her own case or obtain representation by a friend, relative or legal counsel. Attorneys representing appellants shall file a notice of appearance with the Board and with the department or office involved in the appeal as soon as practicable.

Setting the hearing. Upon the filing of an appeal with the Board the hearing officer or the clerk shall set the date, time, and place of the hearing, or shall set the matter for a preliminary status conference. Upon setting the hearing or status conference the hearing officer or the clerk shall mail an appropriate notice to the parties and to their attorneys. The notification to the appellant shall include a copy of these rules.

Status Conferences. Status conferences, either in person or by telephone, may be held to determine factual, legal, and procedural issues, plan a hearing, consider motions, facilitate exchange of documents and information regarding witnesses, track the progress of a case, or to consider any other matter that may aid the disposition of the appeal.

Timelines. When possible, the hearing or status conference will be scheduled for a date not sooner than 7
days nor later than 30 days from the filing of the appeal. Hearings or status conferences will be scheduled consistent with any program specific statutory or regulatory requirements governing timeliness. When practicable, hearings will be scheduled at a time, date, and within a district convenient to the appellant.
Time, manner and location of hearing. The hearing officer shall rule on requests for changing the timing, manner, or location of the hearing. Such requests shall be made to the hearing officer within a reasonable time. The opposing party shall have the right to oppose such a request. In ruling on such a request the hearing officer shall include consideration of the sufficiency of the grounds for the request, the length of time appropriate for a continuance, and the degree of prejudice, if any, to the party opposing the request.

Agency review. Prior to the hearing, the commissioner or director of the department or office involved in the appeal, or his or her designee, shall review the appellant's stated grievance and determine whether or not the appellant is entitled to relief, and shall provide the appellant and the hearing officer with a rationale for its decision.

Production of documents. Prior to the hearing, or at any time when directed by the hearing officer, the department or office involved in the appeal, unless prohibited by statute or the compelling confidentiality rights of others, shall make available to the appellant all documents and records relevant to its decision. The hearing officer may at any time also direct an appellant to make available to the department or office any appropriate documents and records requested by the department or office.

Travel expenses. If the hearing or Board meeting is held outside the town of residence of the appellant, the department or office shall pay the appellant's reasonable travel expenses in accordance with and if required by existing policies and guidelines.

Subpoenas. Requests for subpoenas shall be submitted to the hearing officer, except for licensed attorneys as provided in 3 V.S.A. § 809(h).

Medical evidence. In an appeal of a department or office decision involving an appellant's medical condition the hearing officer may obtain a medical assessment other than that of the person or persons involved in making the original decision at the department’s or office’s expense from a source satisfactory to the appellant. The parties may agree to obtain and submit updated medical reports to the assessing authority. When such agreement is reached, the new assessment shall be completed as rapidly as practicable and the hearing officer may, upon being advised of the agreement by the parties, continue the matter until the new assessment is completed and reviewed by the department or office.

Motions to dismiss and other preliminary motions. Motions to dismiss and other preliminary motions,
including claims for relief due to non-compliance with these rules, may be submitted for the hearing officer's consideration prior to the time the case in chief is submitted. The hearing officer may submit any ruling on a motion to the Board prior to holding a hearing on the merits if it is likely to expedite the final resolution of the appeal.
Closed session. The proceedings (including the fair hearing, status conferences, and the meeting of the Human Service Board) shall be conducted in closed session unless the appellant is a licensee of or an applicant for a license from the department. When the appellant is a licensee of the department or an applicant for a license, the proceedings shall be public to the extent that public access does not violate confidentiality rights of people receiving department services. Where public access threatens confidentiality rights or the ability of the hearing officer to conduct the hearing, the hearing officer may take necessary steps to protect client confidentiality and the integrity of the hearing.

Telephone hearings. If deemed appropriate in the discretion of the hearing officer, and upon consideration of any objection by either party, hearings may be held by telephone, but shall otherwise be conducted in accordance with these rules.

Evidence.

Copies. Upon request, and subject to a ruling on any objection made by the affected party, a party shall promptly furnish an adverse party with copies of all documents and records that are or may become relevant to the issues raised by the appeal.

Relevance. Disputes on the question of relevance shall be resolved by the hearing officer in the first instance, subject to the Board's review on the motion of either party.

Testimony. Any party or his or her representative shall have the opportunity to produce witnesses and cross-examine adverse witnesses; to express all pertinent facts and circumstances through evidence, oral or written; to advance any arguments without undue interference; and to question or refute any testimony or evidence.

Burden of proof. The burden of proving facts alleged as the basis for decisions to terminate or reduce benefits, services or assistance, or to revoke or fail to renew a license, shall be on the office or department by a preponderance of evidence, unless otherwise provided by law. Otherwise, the burden of proof by a preponderance of evidence shall be on the appellant.

Rules of evidence. The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the hearing officer may allow evidence not admissible thereunder where, in his or her judgment, application of the exclusionary rule would result in unnecessary hardship and the
evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Records. All proceedings relating to the presentation of evidence and rulings on procedural matters shall be recorded. The evidence presented, both oral and written, and any oral or written arguments submitted in a timely manner shall constitute the exclusive record for decision. Under the supervision of the hearing officer or the Board’s clerk either party shall be given the opportunity to listen to or receive a copy of the recording of the proceeding.
Failure to appear. If neither the appellant nor his or her representative appears at the time and place noticed for the hearing, or is not available for a duly noticed telephone status conference, the Board’s clerk shall inquire by mail as to what caused the failure to appear. If no response to this inquiry is received by the Board within 7 working days of the mailing thereof, or if the hearing officer determines that no good cause has been shown for the failure to appear, the clerk may dismiss the appeal.

Recommendation by the hearing officer. After the hearing record is complete, the hearing officer shall timely, and in accordance with any applicable statutes, mail his or her findings, a recommended order, and a statement of reasons in support of that order to the Board and the parties.

1000.4 Decisions and orders by the Human Services Board (09-01, 9/1/08)

Notice of Board meeting. The hearing officer’s recommendation shall inform the parties to the appeal of the date, time and place of the Board meeting at which the hearing officer’s recommendation will be considered.

Oral argument before the Board. At its meeting the Board shall hear oral arguments in the case upon the request of either party. The argument before the board shall be recorded. Objections to facts found, or not found, by the hearing officer shall be made to the Board by written or oral motion. To the extent practicable, such objections shall be submitted to the hearing officer at least 7 days prior to the day of the scheduled Board meeting. A motion to present additional evidence must identify good cause why the evidence was not presented during the initial fair hearing.

Questions before the Board. In reaching its decision in a fair hearing, if raised by either party, or presented by the evidence, the Board will consider: 1) an act, decision, omission or delay which adversely affects the appellant; and 2) the office or department’s application of the law if the appellant is aggrieved by its application to his or her situation.

Scope of authority. The Board will reverse a decision that conforms with office or department policy only if it determines that the policy is in conflict with state or federal law. The Board will not reverse or modify a decision that is found to be in compliance with the applicable law and policy even though the Board might disagree with the results effected by that decision.
Quorum. The members of the Human Services Board constitute the hearing authority and a majority of the Board shall constitute a quorum. However, three members shall constitute a quorum at any meeting upon the written authorization of the chair.

Decision. Upon considering all of the facts and arguments in the case the Board may adopt the recommendation of the hearing officer, or reject it and reach different conclusions on the basis of the evidence at hand, or refer the matter back to the hearing officer for a continuation of the hearing or for the receipt of additional evidence. At the request of a party, or on its own motion, the Board may authorize the hearing officer to submit additional or amended findings of fact without further hearing. The Board shall approve the findings of the hearing officer and adopt them as the findings of the Board unless good cause is shown for disapproving them.
Orders. Upon deciding the case the Board shall enter an appropriate order. The order shall include a statement of the facts that the Board relied on, a statement of the reasons for its decision, and a statement of the parties' right to appeal to the Vermont Supreme Court. When the decision of the Board is unanimous, the chairperson at that meeting may sign the order on behalf of the entire Board.

Timeliness. A copy of the order will be mailed to the parties within 75 days of the Board's receipt of the request for fair hearing, unless a continuance in the case is granted or there is a program specific statutory or regulatory requirement directing another timeline by which an order shall be mailed to the parties. For example, in food stamp cases the Board shall issue its order within 60 days, and any continuance may not exceed an additional 30 days. An order of the Board issued after the expiration of any of the above time periods shall be valid notwithstanding the other provisions of this rule.

Retroactive benefits. If the Board reverses or modifies a decision, the department or office shall issue corrected benefits retroactively to the date the incorrect action was taken.

Record on appeal. The Board's order may be appealed as provided by law and as specified by the Vermont Rules of Appellate Procedure. When an appeal from a decision of the Board has been taken, the Board's clerk, at the request of either party and in accordance with Rule 10, Vermont Rules of Appellate Procedure, shall furnish the parties with a printed transcript of the proceedings.

Motions to reopen. Within 30 days of the Board's issuance of any order, a party may move the Board to reopen and reconsider that order. Motions to reopen shall be referred to the hearing officer for recommendation as to disposition in accordance with the above rules. Such motions shall be granted only upon a showing of good cause by the moving party.
§ 3090. Human Services Board

(a) The Human Services Board is created within the Agency of Human Services as the successor to and the continuation of the present Social Welfare Board. It consists of seven members. The Governor, with the advice and consent of the Senate, shall appoint members for terms of six years so that not more than three terms expire in the same biennium. The Governor shall designate the Board's Chair.

(b) The duties of the Board shall be to act as a Fair Hearing Board on appeals brought pursuant to section 3091 of this title.

(c) The Board shall hold meetings at times and places warned by the Chair on his or her own initiative or upon request of two Board members or the Governor. Four members shall constitute a quorum, except that three members shall constitute a quorum at any meeting upon the written authorization of the Chair issued in connection with that meeting.

(d) With the approval of the Governor the Board may appoint one or more hearing officers, who shall be outside the classified service, and it may employ such secretarial assistance as it deems necessary in the performance of its duties.

(e) On or before January 15 of each year, the Board shall report to the House Committees on Appropriations, on Human Services, and on Health Care and the Senate Committees on Appropriations, on Health and Welfare, and on Finance regarding the fair hearings conducted by the Board during the three preceding calendar years, including:

(1) the total number of fair hearings conducted over the three-year period and per year;
(2) the number of hearings per year involving appeals of decisions by the Agency itself and each department within the Agency, with the appeals and decisions relating to health insurance through the Vermont Health Benefit Exchange reported distinctly from other programs;

(3) the number of hearings per year based on appeals of decisions regarding:

(A) eligibility;

(B) benefits;

(C) coverage;

(D) financial assistance;

(E) child support; and

(F) other categories of appeals;

(4) the number of hearings per year based on appeals of decisions regarding each State program over which the Board has jurisdiction;

(5) the number of decisions per year made in favor of the appellant; and

(6) the number of decisions per year made in favor of the department or the Agency. (Added 1973, No. 101, § 4; 2013, No. 161 (Adj. Sess.), § 72; 2013, No. 179 (Adj. Sess.), § E.304.)

§ 3091. Hearings

(a) An applicant for or a recipient of assistance, benefits, or social services from the Department for Children and Families, of Vermont Health Access, of Disabilities, Aging, and Independent Living, or of Mental Health, or an applicant for a license from one of those departments, or a licensee may file a request for a fair hearing with the Human Services
Board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits, or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other Agency action affecting his or her receipt of assistance, benefits, or services, or license or license application; or because the individual is aggrieved by Agency policy as it affects his or her situation.

(b) The hearing shall be conducted by the Board or by a hearing officer appointed by the Board. The Chair of the Board may compel, by subpoena, the attendance and testimony of witnesses and the production of books and records. All witnesses shall be examined under oath. The Board shall adopt rules with reference to appeals, which shall not be inconsistent with this chapter. The rules shall provide for reasonable notice to parties, and an opportunity to be heard and be represented by counsel.

(c) The Board or the hearing officer shall issue written findings of fact. If the hearing is conducted by a hearing officer, the hearing officer's findings shall be reported to the Board, and the Board shall approve the findings and adopt them as the findings of the Board unless good cause is shown for disapproving them. Whether the findings are made by the Board, or by a hearing officer and adopted by the Board, the Board shall enter its order based on the findings.

(d) After the fair hearing, the Board may affirm, modify, or reverse decisions of the Agency; it may determine whether an alleged delay was justified; and it may make orders consistent with this title requiring the Agency to provide appropriate relief including retroactive and prospective benefits. The Board shall consider, and shall have the authority to reverse or modify, decisions of the Agency based on rules that the Board determines to be in conflict with State or federal law. The Board shall not reverse or modify Agency decisions that are determined to be in compliance with applicable law, even though the Board may disagree with the results effected by those decisions.

(e) The Board shall give written notice of its decision to the person applying for fair hearing and to the Agency. Unless a continuance is requested or consented to by an aggrieved person, decisions and orders concerning Temporary Assistance to Needy Families (TANF) under 33
V.S.A. chapter 11, TANF-Emergency Assistance (TANF-EA) under Title IV of the Social Security Act and medical assistance (Medicaid) under 33 V.S.A. chapter 19 shall be issued by the Board within 75 days of the request for hearing.

(f) The Agency or the appellant may appeal from decisions of the Board to the Supreme Court under V.R.A.P. 13. Pending the final determination of any appeal, the terms of the order involved shall be given effect by the Agency except insofar as they relate to retroactive benefits.

(g) A party to an order or decree of the Board or the Board itself, or both, may petition the Supreme Court for relief against any disobedience of or noncompliance with the order or decree. In the proceedings and upon such notice thereof to the parties as it shall direct, the Supreme Court shall hear and consider the petition and make such order and decree in the premises by way of writ of mandamus, writ of prohibition, injunction, or otherwise, concerning the enforcement of the order and decree of the Board as shall be appropriate.

(h)(1) Notwithstanding subsections (d) and (f) of this section, the Secretary shall review all Board decisions and orders concerning TANF, TANF-EA, Office of Child Support Cases, Medicaid, and the Vermont Health Benefit Exchange. The Secretary shall:

(A) adopt a Board decision or order, except that the Secretary may reverse or modify a Board decision or order if:

(i) the Board's findings of fact lack any support in the record; or

(ii) the decision or order implicates the validity or applicability of any Agency policy or rule.

(B) issue a written decision setting forth the legal, factual, or policy basis for reversing or modifying a Board decision or order.

(2) Notwithstanding subsections (d) and (f) of this section, a Board decision and order concerning TANF, TANF-EA, Office of Child Support, Medicaid, and the Vermont Health Benefit Exchange shall become the final and binding decision of the Agency upon its approval
by the Secretary. The Secretary shall either approve, modify, or reverse the Board's decision and order within 15 days of the date of the Board decision and order. If the Secretary fails to issue a written decision within 15 days as required by this subdivision, the Board's decision and order shall be deemed to have been approved by the Secretary.

(3) Notwithstanding subsection (f) of this section, only the claimant may appeal a decision of the Secretary to the Supreme Court. Such appeals shall be pursuant to Rule 13 of the Vermont Rules of Appellate Procedure. The Supreme Court may stay the Secretary's decision upon the claimant's showing of a fair ground for litigation on the merits. The Supreme Court shall not stay the Secretary's order insofar as it relates to a denial of retroactive benefits. (Added 1973, No. 101, § 5; amended 1989, No. 181 (Adj. Sess.); 1989, No. 219 (Adj. Sess.), § 9(a); 1993, No. 105, § 1; 1999, No. 147 (Adj. Sess.), § 4; 2005, No. 174 (Adj. Sess.), § 8; 2007, No. 15, § 6; 2007, No. 172 (Adj. Sess.), § 3; 2009, No. 156 (Adj. Sess.), § I.9; 2015, No. 172 (Adj. Sess.), § E.304.)
Section 1. Introduction.

This rule is required by 3 V.S.A. § 847(e) for the effective administration of Chapter 25 of Title 3. It applies to every agency of state government adopting rules under the Vermont Administrative Procedures Act (APA). For a fuller understanding of the rulemaking process, consult 3 V.S.A. § 801-849 and the rules of procedure of the Legislative Committee on Administrative Rules (LCAR).

Section 2. Filings.

The APA requires agencies to make filings of every new, amended, or repealed rule at least four times during the rule making process. The first filing is the Prefiling with the Interagency Committee on Administrative Rules (ICAR). This begins the rulemaking process. The second filing is the Proposed Rule with the Office of the Secretary of State. This begins the notice and public comment period. The third filing is the Final Proposed Rule, which is filed with the Office of the Secretary of State and LCAR. This signals the end of the notice and public comment period. After LCAR review, the fourth and last filing is the Adopted Rule (filed with both the Office of the Secretary of State and LCAR), which marks the beginning of the minimum 15 day period required by statute [3 V.S.A. § 845(d)] for the effective date of the rule.

For the purpose of the Rule on Rulemaking, the filing of any new rule, amendment, or repeal of an existing rule shall be described as a rule. Agencies must use the forms provided by the Office of the Secretary of State for that purpose; altered forms will not be accepted. All forms requiring the signature of the adopting authority to be filed with the Office of the Secretary of State shall be an original signature. The forms are available for download from the Office of the Secretary of State’s website. Due to compatibility issues use the forms in the formats in which they are provided. The forms include:
Proposed Rule Cover Sheet provides information about the proposed rule for the required notice.

Final Proposal Cover Sheet delineates any changes from the proposed rule.

Adopted Rule Cover Sheet, lists the procedural history of the rule and indicates that the rule has been reviewed by LCAR, has been adopted by the agency, and assigned an effective date.

Economic Impact Statement explains the expected economic impact of the rule and the impact the rule will have on greenhouse gases if it is adopted.

Scientific Information Statement identifies the scientific information upon which the rule has been based and explains the procedure for obtaining such studies and underlying research data from the agency.

Public Input Statement outlines the agency’s plan to maximize public input.

Incorporation by Reference Statement, explains the material to be incorporated, and where it can be obtained and at what cost.

Emergency Rule: Cover Sheet replaces the Proposed Rule Coversheet for Emergency Rules.

Adopting Page provides information about the type of filing submitted and whether it is a new rule, an amendment or a repeal of an existing rule and if so, what those existing rules are.

Any change(s) to the Rule on Rulemaking forms shall not occur without 30 days notice of such change(s) to ICAR and LCAR [3 VSA sec 834(b) and sec 847(e)].

If the Office of the Secretary of State finds that the filings meet the statutory requirements found in chapter 25 of title 3 of the Vermont Statutes, the rule is stamped with the date and filed. The Office of the Secretary of State will notify an agency of any defects in a filing within 3 working days from receipt.
In addition to the appropriate forms, an agency must file the text of the proposed or adopted rule and an annotated text showing changes from any existing rules. Filing a paragraph or page of a larger rule is not sufficient and a complete annotation is required. A new proposed rule need not be accompanied by an annotated text.

To the extent that a rule depends on scientific information for its validity, it shall include a brief summary of that information including reference to any scientific studies upon which the proposed rule is based, and shall explain the procedure for obtaining such studies and underlying research data from the agency.

Whenever an agency intends to adopt a rule through incorporation by reference, a copy of all incorporated materials must be filed with an Incorporation by Reference Statement form.

All filings with the Office of the Secretary of State shall arrive no later than 3:30 p.m. on the last day of the scheduled workweek.

Section 3. Public Notice.

Notices of completed filings of proposed rules received by 3:30 p.m. on the last day of the scheduled workweek will be posted online the following week. Links to the notices will be available on the Secretary of State’s APA web pages and the notices will appear in the newspapers of record the week following the posting of the online notice. Notices of proposed rules will remain posted online until two weeks after adoption of the proposed rule is complete.

When an agency learns of the need for a new hearing date or for an extension of the public comment period, the agency must notify the office of the Office of the Secretary of State and must notify by mail all individuals who have contacted the agency about the rule. The Office of the Secretary of State shall amend the notices to reflect the changes in hearing and deadline for public comment.

When a public hearing has not been scheduled, an agency shall set a deadline for public comment not less than two full weeks following the publication in the newspapers of record.
If an agency then receives a petition for a public hearing, or decides to hold a hearing on its own initiative, the agency must notify the Office of the Secretary of State so the notices may be amended to reflect the new hearing information and the deadline for public comment shall be reestablished to a date not less than seven days following the last public hearing.