

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

STATE OF MAINE
BOARD OF OVERSEERS OF THE BAR
1989 ANNUAL REPORT

J. Scott Davis
Bar Counsel

TABLE OF CONTENTS

	PAGE
INTRODUCTION . . . . .	.1
I. GRIEVANCE COMMISSION . . . . .	.2
A. Complaints . . . . .	.2
B. Panel Meetings and Hearings. . . . .	.2
1. Case Reviews . . . . .	.2
2. Disciplinary Proceedings . . . . .	.5
a. Reprimands . . . . .	.6
b. Recommendations for Court Proceedings. . . . .	.7
C. Characterization and Area of Law. . . . .	.11
D. Source of Complaints/Size of Law Firm . . . . .	.12
E. Bar Counsel Files . . . . .	.13
II. COURT MATTERS . . . . .	.13
A. Disbarments . . . . .	.14
B. Suspensions . . . . .	.17
C. Resignations. . . . .	.19
III. FEE ARBITRATION COMMISSION. . . . .	.19
IV. PROFESSIONAL ETHICS COMMISSION. . . . .	.21
V. MISCELLANEOUS MATTERS . . . . .	.23
A. Maine Manual On Professional Responsibility. . . . .	.23
B. Amendments to the Maine Bar Rules . . . . .	.23
C. Bar Counsel's Objection, Board Review - Rule 7(e)(5). . . . .	.24
D. The Requirement To Cooperate With Bar Counsel - Rule 2(c). . . . .	.25
E. Informal Advisory Opinions. . . . .	.26
VI. CONCLUSION. . . . .	.28
VII. APPENDIX - Statistical Analysis of Disciplinary Matters and Fee Disputes; Membership Lists of Board and Commissions . . . . .	.29

1989 ANNUAL REPORT

INTRODUCTION

This document and the attached exhibits comprise the Board of Overseers of the Bar's 1989 Annual Report, for the purpose of summarizing the total operations of the Board including the office of Bar Counsel and the Board's three agencies: the Grievance Commission, the Fee Arbitration Commission and the Professional Ethics Commission. A complete listing of the membership of the Board and its commissions is included as part of the Appendix attached to this report.

By way of background, the duties and responsibilities of these three commissions are as follows:

1. The Grievance Commission reviews and may approve or modify recommendations to it by Bar Counsel (see discussion below regarding case reviews), and also conducts hearings on formal charges of misconduct, making findings and issuing its recommendations with respect thereto. The Grievance Commission may reprimand attorneys for misconduct, and in those cases where it recommends the discipline of an attorney by the Court (suspension or disbarment), shall direct that an information be filed with the Court by Bar Counsel.

2. Upon receipt by the Secretary to the Fee Arbitration Commission, and after initial review by Bar Counsel, written petitions setting forth disputes regarding legal fees paid to or charged by an attorney admitted to the bar of this State are processed by the Secretary and then heard by a three member panel of the Fee Arbitration Commission.

3. The Professional Ethics Commission renders advisory opinions to the Court, the Board, Bar Counsel, the Grievance Commission and Maine attorneys on matters involving the interpretation and application of the Code of Professional Responsibility (Maine Bar Rule 3).

I. GRIEVANCE COMMISSION

A. COMPLAINTS

A total of 236 grievance complaints alleging professional misconduct by Maine attorneys were docketed by Bar Counsel in 1989, constituting a marked increase from the respective figures for 1988 (140) and 1987 (187).

B. PANEL MEETINGS AND HEARINGS

1. Case reviews - The five panels of the Grievance Commission, each comprised of two lawyers and one non-lawyer, met on 30 occasions for the purpose of conducting case reviews, compared with 20 such meetings in 1988. This process involves

the respective panel's reviewing with Bar Counsel or Assistant Bar Counsel the contents of grievance complaint files which have been investigated by the office of Bar Counsel. It is from this review process that a panel initially determines the disposition of complaints as being 1) dismissal, 2) admonition (private non-discipline), 3) further investigation by Bar Counsel, or 4) directing Bar Counsel to file a disciplinary proceeding before the Grievance Commission. Although the attached tables indicate that the majority of the disciplinary hearings approved by the Grievance Commission were open to the public, the Maine Bar Rules do provide that in certain instances the hearing be confidential.

That is, if upon case review a panel finds probable cause for the issuance of a reprimand regarding the attorney's conduct, then the panel directs Bar Counsel to file a petition and hold a disciplinary hearing open to the public before another panel of the Grievance Commission to determine if the facts support the issuance of that reprimand. After hearing, if the panel finds that the evidence requires a disposition more severe than a reprimand, then it directs Bar Counsel to file an information with the Court seeking the attorney's suspension or disbarment, despite the fact that the initial case review panel found probable cause for a reprimand.

On the other hand, Maine Bar Rule 7(e)(2) provides that when the initial review panel does not find probable cause for a reprimand to issue, it may direct that a confidential disciplinary hearing take place either 1) to hear and determine contested facts not readily reconciled by a review of the file, or 2) because based upon that review alone it already appears that disciplinary charges should be filed before the Court seeking suspension or disbarment. Of the five complaints authorized in 1989 for a confidential disciplinary hearing, three were so directed due to the reviewing panel's determination that either from the attorney's prior disciplinary history or the seriousness of the current matter a disciplinary sanction other than a reprimand appeared to be appropriate. In the other two instances, the panel directed a confidential hearing for the purpose of deciding disputed facts from the testimony of witnesses.

As a result of those 30 meetings of panels, 130 grievance complaints were reviewed and closed by either dismissal (108) or the issuance of a confidential admonition of the attorney (22). The review of the remaining 36 complaints resulted in the authorization of Bar Counsel to initiate disciplinary hearings before another panel of the Grievance Commission. These 166 reviewed complaints compare quite consistently with the number of complaints reviewed in 1988 (168). One other matter was

reviewed by a Grievance Commission panel in 1989 reference the complaint from a U.S. District Court Judge, and the panel recommended that the Court dismiss that complaint. Although previously authorized for proceedings before the Court, eight complaints regarding one attorney were dismissed by the Board in 1989, as a result of the death of that attorney.

2. Disciplinary proceedings - In addition to the 30 case review meetings, panels of the Grievance Commission met on 15 occasions for the purpose of conducting and completing disciplinary hearings involving 17 complaints. As seen by the attached statistical table, three reprimands (involving two attorneys) were issued by the Commission, with an additional five complaints (involving three attorneys) being directed for further Court proceedings seeking suspension or disbarment of those attorneys. Although these 17 complaints disposed of through hearing represent a 53% decrease from the number (36) of complaints heard in 1988, it should be kept in mind that a vast amount of preparation, hearing and decision time was devoted by one panel of the Grievance Commission as well as Bar Counsel regarding the disciplinary proceedings in a complaint filed against three members of the same law firm. See the discussion below reference Board File Nos. 85-28, 85-29 and 85-30 at page 24.

A discussion of some of the complaints heard by the Grievance Commission in 1989 follows.

a. REPRIMANDS

Pursuant to Maine Bar Rule 7(e)(2), the Grievance Commission conducted and completed disciplinary hearings open to the public regarding 17 complaints involving 13 attorneys. As a result of those hearings, reprimands were imposed with respect to 3 of those complaints, which may be briefly summarized as follows:

1) In November a panel of the Grievance Commission reprimanded an attorney regarding his conduct in two unrelated complaints. The decision in this instance once again stressed the serious consequences that result from an attorney's failure to reply or cooperate with Bar Counsel's investigative process. This attorney was found to have neglected a client's matter by failing to notify that client as to certain post-divorce judgment motions that had been filed and then granted adverse to the interests of the client. The attorney was also found to have neglected another client's collection matters and to have failed to deliver to that client his file as requested. Violations of Maine Bar Rules 2(c), 3.1(a), 3.6(a), 3.6(a)(3) and 3.6(f) were found by the panel to have occurred as a result of "a serious organizational deficiency in Respondent's practice". The attorney was duly reprimanded on both cases with an additional urging by the panel that he seek appropriate advice

or assistance concerning those organizational difficulties. Grievance Commission File Nos. 89-S-93 and 89-S-126.

2. In November another Grievance Commission panel also reprimanded an attorney for his improper withdrawal as counsel in a client's pending litigation by merely supplying a letter to the client indicating that her case was scheduled for trial but that he would no longer be able to handle her case. He did not comply with the withdrawal provisions of Rule 89-A of the Maine Rules of Civil Procedure. His conduct in that regard was found to have been in violation of Maine Bar Rule 3.5(a)(1), and his claim that he was nevertheless ready to assist the client until new counsel was obtained was found by the panel to be unpersuasive based upon the evidence at hearing. Grievance Commission File Nos. 88-K-74.

b. RECOMMENDATIONS FOR COURT PROCEEDINGS

Discussion of certain matters heard before the Grievance Commission resulting in a recommendation for further Court proceedings is set forth below.

1. After hearing evidence on three complaints against a particular attorney, a panel of the Grievance Commission referred those complaints for proceedings by information before the Court seeking either his suspension or disbarment. The allegations included apparent inconsistencies between the schedule of assets

and liabilities filed by the attorney in his bankruptcy proceedings in Florida, the language of and affirmative allegations made in an answer filed by that attorney in a forcible entry and detainer action contemporaneously pending against him in the Bridgton District Court, and certain items advertised for sale by him during the same time period. The remaining charges related to an apparent retaliatory action filed by that respondent against another attorney as well as a related grievance against that attorney filed by the respondent with the Board of Overseers of the Bar. Grievance Commission File Nos. 88-K-67, 88-K-68 and 88-K-75. These matters proceeded to hearing before the Court by information in 1990, and the respondent attorney was disbarred for his conduct relating to the actions he had filed against the other attorney, coupled with the respondent's prior disciplinary record. Court Docket No. BAR-90-9.

2. By his answer to the disciplinary petition, another attorney admitted some 15 different violations of the Maine Bar Rules reference the manner in which he conducted himself regarding his application for the Superior Court's approval of a settlement in the amount of \$200,000.00 on behalf of a minor child for her damages resulting from injuries sustained when struck by a school bus. At the time the attorney applied for the approval of the settlement, he requested that \$66,666.00 be paid

to him for attorney's fees, \$52,000.00 be set aside to satisfy a subrogation claim of Blue Cross/Blue Shield, \$5,000.00 be paid to the minor's parents and the remaining amount be deposited in an account for the benefit of the client. The court requested further information from the attorney, but only a portion of that information was subsequently provided to the court by the attorney. The court appointed a referee, and as a result of his investigation it was discovered that prior to the time that the attorney had filed the application with the court, the settlement draft in the amount of \$200,000.00 had actually been received by the attorney and endorsed by him and the minor's parents. Within four days after having filed the application, the attorney made disbursements from that settlement, but waited six months before he informed the court by letter of that fact. At the time of that disclosure, however, the attorney purposely failed to disclose to the court that he had also at the same time disbursed \$66,000.00 as his fees, which was not replaced in the account for the minor until some five months thereafter. After two days of disciplinary hearing in this matter, a Grievance Commission panel found probable cause for the filing of an information before the Court. Grievance Commission File No. 88-S-31. Those proceedings were filed in 1990, and the Court imposed a one-year suspension in this matter. Court Docket No. BAR-90-5.

3. Upon the advice of counsel, a client entered a conditional guilty plea pursuant to Rule 11(a)(2) of the Maine Rules of Criminal Procedure. While his related Motion to Suppress was under appellate review, that client was also arrested for operating under the influence. As a result, he telephoned his attorney for advice on the new charge, at which time the attorney informed him that the appeal had been denied and he must therefore surrender himself to the jail authorities forthwith. The client expressed concern at this point as to his need for work release approval, and was informed that the attorney would come to the jail to assist in that process. The testimony heard before a panel of the Grievance Commission in this matter indicated that the attorney never followed-up on his promised assistance regarding work release, and that the client's release on that basis was eventually obtained only after indirect assistance from other counsel, and the persistent urging of the client's girlfriend to the jail authorities. The panel directed that an information be filed before the Court, which remains pending. Board File No. 86-223; Court Docket No. BAR-90-12.

C. CHARACTERIZATION AND AREA OF LAW

Attorney conduct constituting either neglect of a client's affairs or a failure to adequately keep a client informed as to the status of those affairs remains as the most frequently complained of conduct for investigation by Bar Counsel and consideration by the Grievance Commission. As the attached statistics indicate, 103 (43%) of the 236 grievance complaints docketed in 1989 set forth allegations of conduct relating to Maine Bar Rule 3.6(a)(2) and 3.

Although there was a slight decrease as compared to 1988, it is still troublesome that issues relating to attorney misrepresentation, deceit or fraud remain as a relatively large number, 36 (15%), of the total complaints received in 1989.

Contrary to 1988, when real property areas constituted the highest number of complaints, family law has returned as the predominate category in 1989, with 54 (23%) of the 236 complaints relating to such issues. Real property matters constituted 19% of those complaints filed in 1989.

D. SOURCE OF COMPLAINTS/SIZE OF LAW OFFICE

As expected, the attached statistical tables regarding grievance complaints received in 1989 continue to demonstrate that clients filed a majority of the complaints, 149 (63%), with 16% being filed by the opposing party, and a total of 13% by a court or other counsel.

The historical trend for complaints to be filed against sole practitioners (43%) continues, representing only a slight increase compared to those received in that category in 1988 (41%). The number of complaints filed against offices comprised of two lawyers (14%), remained virtually unchanged from that of last year. According to the June 1989 information supplied to the Board from attorney registration statements, there are 614 (19%) sole practitioners and 128 (4%) two lawyer offices from a total of 3,205 resident active Maine lawyers. (Non-resident active lawyers: 134, and 25 respectively, from a total of 534 such lawyers.)

Of continuing concern to both the Board and the Grievance Commission is the fact that many (50%) of the 14 attorneys that appeared before a panel of the Grievance Commission for disciplinary hearings in 1989, were sole practitioners. Reference those hearings, all of the attorneys that were either disciplined by the Grievance Commission or referred for further

action before the Court were sole practitioners. Perhaps of the most concern is the fact that all of the matters proceeding for disciplinary action before a single justice of the Court in 1989 involved sole practitioners.

E. BAR COUNSEL FILES

Bar Counsel Files pursuant to Maine Bar Rule 5(b)(2) constitute those matters which upon initial review by Bar Counsel do not appear to allege professional misconduct. There were 148 such filings in 1989, representing a decrease (18%) in the number filed in 1988 (181). In all instances, Bar Counsel's screening and docketing of such matters is subject to review by either Grievance Commission Chairman Gerald F. Petruccelli of Portland, or Vice Chairman William F. Hufnagel of Winthrop, and through their diligent efforts 153 such matters were reviewed and dismissed in 1989.

II. COURT MATTERS

Ten discipline-related orders were issued or affirmed by the Court in 1989 in the following categories: 1) disbarments - 4; 2) suspensions - 4; 3) resignations - 2. A brief discussion of those matters is set forth below.

A. DISBARMENTS

1. As discussed in detail within the Board's 1988 Annual Report (at page 22), in April of 1989 the Law Court affirmed the 1988 disbarment of the respondent. See Board of Overseers of the Bar v. James Martin Dineen, 557 A.2d 610 (Me. 1989). A request for a petition for a writ of certiorari before the U. S. Supreme Court was denied.

2. A four-count information was filed with the Court upon the authorization of the Grievance Commission after a full hearing in 1987 charging respondent with conduct unworthy of an attorney (sexual impropriety), making *ex parte* communications with judges and represented parties, illegal conduct, conduct involving deceit, and taking frivolous legal action. A disciplinary hearing was conducted in April of 1989 on all four counts, and an opinion and order from the Court held that the respondent had violated Maine Bar Rules 3.1(a), 3.2(f)(2), (3), 3.6(j), 3.7(a), 3.7(c)(1), and 3.7(h)(2). The Court ordered the respondent disbarred from the practice of law, but stated that he could apply for reinstatement after one year instead of the usual five years. Despite the fact that the respondent had received no previous public discipline and that none of the violations standing alone would warrant disbarment, the Court ordered

disbarment because the violations showed respondent's pattern of placing his own self-interest above the requirements of the law, and a complete unwillingness to accept the finality of litigation. The Court pointed out that, at least in one count, respondent's involvement in a piece of litigation had reached the point of a "self-destructive obsession". The Court determined that disbarment was the only possible sanction to impose for the protection of the public. Court Docket No. BAR-88-4

3. In 1988 the Court suspended an attorney under the provisions of Maine Bar Rule 7(i)(1) pending the final disposition of an information filed by the Board based upon two allegations of theft of clients' funds by that attorney. The attorney was convicted of theft in the Superior Court reference one of those matters, and after the Law Court affirmed those convictions, the disciplinary matter proceeded to final judgment whereupon the attorney was disbarred for conduct in violation of several Maine Bar Rules. See State v. Goodridge, 556 A.2d 211 (Me. 1989) The criminal convictions related to one client's matters, and in the second count of the information the Court found that in his capacity as attorney for an estate, the attorney had withdrawn estate funds, deposited them in his own accounts without the knowledge or consent of the

guardian/conservator, and borrowed money from that estate without permission of the Probate Court. The attorney had also taken steps to attempt to prevent the discovery of those transactions. The Court found that the attorney's actions were most serious, and were a violation of the most basic of fiduciary obligations, and ordered his disbarment. Court Docket No. BAR-88-16.

4. Proceedings were also initiated before the Court based upon another attorney's conviction in the U.S. District Court for having possessed with the intent to distribute marijuana in violation of Federal Law. That attorney had earlier been suspended in 1987 pursuant to Rule 7(i), and when his underlying conviction was affirmed, the disciplinary matter proceeded to final hearing. See United States v. Campbell, 874 F.2d 838 (1st Cir. 1989). The attorney's criminal conduct was found to be in violation of Maine Bar Rules 3.1(a) and 3.2(f)(2), (4) and the Court thereupon disbarred the attorney, retaining the right to consider a petition for his reinstatement filed after four years from the date of that order, July 26, 1989. Court Docket No. BAR-87-15.

B. SUSPENSIONS

1. A respondent acting as guardian for a disabled blind veteran was charged with misappropriation for having utilized his ward's credit card to purchase items for his own personal use. After the matter was discovered, the respondent made full restitution. This matter proceeded directly to Court, bypassing the Grievance Commission hearing procedure upon the Court-approved stipulation of the respondent's counsel and Assistant Bar Counsel. At hearing, the respondent publicly admitted the allegations of misconduct. He testified to the particular events which led him to his acts, and other witnesses testified that such conduct was completely out of character for the respondent.

The Court found that respondent had violated M. Bar R. 3.1(a), 3.2(f)(2), (3), (4), 3.6(f)(2)(i), (ii), and (iv). The Court further stated that although there was a public admission of misconduct and the ward's estate suffered no financial loss, the protection of the public required a suspension of three months, and ordered the attorney to pay the Board of Overseers \$500.00 towards its costs and fees. Court Docket No. BAR-88-18.

2. After a hearing open to the public before the Grievance Commission in 1988, another matter was referred to Court for suspension or disbarment. Counsel for respondent and Assistant Bar Counsel stipulated, with the agreement of the Court, that the

Court would make its determination on specified portions of the Grievance Commission hearing record. The Court found that respondent had violated Rule 3.6(a)(3) by failing to provide title insurance to a client despite having been paid and receiving repeated requests that the policy be delivered. The Court also found additional misconduct in that the respondent admitted he had failed to respond to Bar Counsel's inquiries in that matter and two unrelated matters, which failure constituted repeated violations of Rule 2(c). Although the Court found some mitigation of these offenses by virtue of marital difficulties and depression, the Court stated that even those circumstances could not excuse the failure to cooperate which is essential to the fulfillment of the regulatory function of the Board and Bar Counsel. The Court ordered a nine month suspension with the condition that respondent must petition for reinstatement and pay costs to the Board. Court Docket No. BAR-89-4.

3. Pursuant to Maine Bar Rule 7(m), Bar Counsel initiated reciprocal discipline procedures against an attorney due to his disbarment from the practice of law in the State of New Hampshire. After hearing, the Court suspended the attorney from the practice of law in the State of Maine for such period of time that he remained disbarred in New Hampshire. Court Docket No. BAR-88-9.

4. In a matter initiated by Bar Counsel under the provisions of Maine Bar Rule 7(e)(7) relating to the attorney's apparent misappropriation of client trust funds, the Court entered an order in October of 1989 temporarily suspending that attorney from the practice of law in the State of Maine. That suspension remains pending awaiting the conclusion of the investigation of the attorney's related criminal conduct. Grievance Commission File No. 89-K-148.

C. RESIGNATIONS

Two resignations were ordered by the Court in 1989. Both of those resignations were submitted pursuant to Maine Bar Rule 7(1) while disciplinary investigation and proceedings were pending against the attorneys, including 8 unrelated grievance complaints against one of those attorneys. Court Docket Nos. BAR-88-19, and BAR-89-7.

III. FEE ARBITRATION COMMISSION

In 1989, the Board of Overseers of the Bar's Secretary to the Fee Arbitration Commission received 223 requests for petitions for arbitration of fee disputes, 72 (31%) of which were actually returned and filed, a slight increase in the number (65) received in 1988.

With 24 petitions pending at the close of 1988, the 72 new petitions created a total docket of 96 petitions in 1989. The five designated panels met on 29 occasions throughout 1989 to dispose of 53 petitions. Eighteen other disputes were either dismissed, settled or withdrawn by consent of the parties. Some of these informal resolutions were with the assistance and involvement of Bar Counsel and the Secretary. Three additional petitions were heard in 1989, but the Award and Determinations reference the respective disputes were not issued until 1990. Thus, at the end of 1989, there were 22 petitions awaiting hearing by a panel of the Fee Arbitration Commission.

As indicated in the 1988 Annual Report, the role of Bar Counsel in the fee arbitration process continues to be one of reviewing and screening petitions upon filing with the Secretary for the purpose of determining if the matters warrant the attention of the Commission, should be more appropriately addressed by the Grievance Commission, or do not in fact allege any actual fee dispute. See Maine Bar Rule 9(e)(2). To the extent that resources allowed and where warranted, Bar Counsel in 1989 also attempted to take part in promoting and assisting in the informal resolution of certain of these petitions prior to hearing by a panel.

IV. PROFESSIONAL ETHICS COMMISSION

In 1989, the Professional Ethics Commission issued eight additional formal advisory opinions bringing the total of such opinions issued by the respective advisory agencies of the Board through December 31, 1989 to 100. These opinions continue to provide valuable insight and guidance for Maine attorneys regarding ethical dilemmas relating to many issues, and may be briefly summarized as follows:

No. 93: Maine Bar Rule 3.6(j) is not violated if an attorney sends a request for release of medical records in accordance with the provisions of Title 39 M.R.S.A. Sec. 52-A directly to an employee who the lawyer knows is represented by counsel, with a simultaneous mailing to that counsel.

No. 94: Maine Bar Rule 3.6(j) will bar contact between counsel representing a party opposed to a municipality in a litigated matter and those officials of the municipality who have the responsibility of making decisions on the litigation and matters directly related to it. The rule will also bar contact with those other officials, if any, who have the responsibility of communicating municipal policy and decisions to its attorney, receiving the attorney's advice in the first instance, or directing the work of the municipality's staff in preparing for litigation. The rule does not, however, bar all communication from a lawyer to a municipal office or employee.

- No. 95: Settlement discussions of statutory claims for attorney's fees in advance of or simultaneous with settlement of the underlying action should no longer be regarded as unethical, and Opinion No. 17 is reversed.
- No. 96: If an attorney has arranged with a client that the attorney will not appear with the client at some court hearings, it is not *per se* unethical; however, the attorney would be well advised to notify the court and opposing counsel in advance of the hearing that the client will be appearing *pro se*.
- No. 97: In a divorce case, taking a mortgage on the marital homestead in order to secure legal fees would violate the provisions of Maine Bar Rule 3.7(c).
- No. 98: There is no commingling of funds in violation of the ethical rules when funds which represent legal fees owed to an attorney are deposited in the attorney's trust account, and remain undisbursed.
- No. 99: A lawyer referral service operated by a bar association may adopt a rule whereby a lawyer participant collects an administrative fee from the referred client and forwards it to the service, and also pays the service a fee if the lawyer is retained by the client. This conduct is not in violation of Maine Bar Rule 3.3(e).

No. 100: It would be unethical for an attorney to threaten to present a grievance in order to enhance the chances of a favorable settlement of a meritorious malpractice claim against another attorney; at the same time, the attorney is required to report any underlying ethical misconduct if the attorney has certain knowledge of conduct that the attorney believes clearly raises a substantial question of the other attorney's fitness to practice law.

V. MISCELLANEOUS MATTERS

A. MAINE MANUAL ON PROFESSIONAL RESPONSIBILITY

The Board's arrangement with Tower Law Books for the publication of the Maine Manual on Professional Responsibility continued to be of assistance to Maine attorneys. This publication includes: 1) membership lists of the Board and all three of its commissions, 2) all of the Maine Bar Rules with Reporter's Notes and Advisory Committee Notes reference the history of each rule, 3) the text of all Advisory Opinions with the subject matter index, and 4) the Board's Regulations.

B. AMENDMENTS TO THE MAINE BAR RULES

Effective June 1, 1989, Maine Bar Rules 7(j)(1) and (2) were amended to provide the Board with greater discretion and flexibility in situations where an attorney has been declared to be incompetent or is alleged to be incapacitated by reason of

mental illness, or addiction to drugs or alcohol. The previous language of these rules mandated that the Board offer an attorney with such a problem the opportunity to resign or to agree to a suspension only in a "case not involving misconduct". The amended rule now permits the Board in its discretion to give an attorney with such a problem the opportunity to resign or to agree to a suspension, regardless of whether the case involves misconduct. The Board has the discretion not to offer the attorney the opportunity to resign or agree to a suspension, but to instead proceed through the normal disciplinary channels.

C. BAR COUNSEL'S OBJECTION, BOARD REVIEW- RULE 7(e)(5)

In a complaint involving 3 attorneys which was discussed in the Board's 1988 Annual Report (at page 41), after three days of testimony in 1989, a Grievance Commission panel found no violation by any of the attorneys reference allegations of conflict of interests and breach of the attorney's duty of loyalty to a client. The panel found that the attorneys had received from one client the "worst kind of information" about another client, but that the communication was a "secret" within the terms of Maine Bar Rule 3.6(1)(1) and (5). Based upon the confines of Rule 3.6(1), the attorneys were found to have taken reasonable steps under Rule 3.5(a)(2) to avoid prejudice to the

affected client by assisting him to obtain other counsel. In its thorough 20-page decision of November 20, 1989, the panel dismissed the complaint against each attorney. In what is believed to be the first occasion for its implementation, Bar Counsel invoked Rule 7(e)(5) and filed an objection with the Board as to the panel's dismissal of those complaints. Briefs were prepared and filed by Bar Counsel, Respondents' counsel and the hearing panel. Oral argument was conducted by counsel before the Board on February 28, 1990, and on March 12, 1990 the Board affirmed the panel's decision. Board File Nos. 85-28, 85-29 and 85-30.

D. THE REQUIREMENT TO COOPERATE WITH BAR COUNSEL - RULE 2(c)

As mentioned earlier in the context of matters heard both by the Grievance Commission and the Court, it has already been noted that an attorney's failure to respond or properly cooperate with Bar Counsel's investigation of grievance complaint warrants discipline.

In State of Maine v. James Horton, 561 A.2d 488 (Me. 1989), the Law Court held that an attorney's election to provide criminally inculpatory information to the Board of Overseers was voluntary, and that his statements should not be suppressed in a later criminal prosecution reference that same conduct. Under Rule 2(c), the attorney has a duty to cooperate with the Board's

investigation of a grievance complaint, but if that lawyer invokes his privilege against self-incrimination, communication to the Board of that decision constitutes a sufficient response to the Board's inquiry to comply with Rule 2(c). The good faith exercise of the constitutional privilege constitutes "good cause", excusing any other response to the Board's inquiry. Where the attorney does not initially claim the privilege and instead provides the Board with information, that attorney may not belatedly assert the privilege in a related criminal prosecution.

E. INFORMAL ADVISORY OPINIONS

In addition to the formal advisory opinions discussed above with respect to the Professional Ethics Commission, informal advisory opinions are provided by Bar Counsel and Assistant Bar Counsel to Maine attorneys on a daily basis, comprising approximately 20% of their daily operations. These opinions are provided both in writing and over the telephone depending upon the issues involved and the preference of the inquiring attorney, and normally relate to an attorney's inquiry as to whether professional conduct, usually prospective in nature, is appropriate under the Maine Bar Rules. It is the perception of both the Board and office of Bar Counsel that such opinions


continue to provide great guidance to attorneys and are of assistance in avoiding potential future grievances. Such opinions, however, are limited by both Advisory Opinion No. 67, as well as Board Regulation 28, to conduct regarding the inquiring attorney or that attorney's law firm, and may not be provided regarding inquiries as to the propriety of another attorney's conduct. Those matters are required to be processed through the normal grievance complaint processes.

VI. CONCLUSION

From the above discussion as well as a review of the attached statistical tables, the continued unsparing public service of the Board and its three commissions is well demonstrated.¹ As the nature and scope of the Board's responsibilities and operations grow, these commissions continue to respond by addressing the needs of the public and the legal profession.

As a result, the Fee Arbitration Commission, the Grievance Commission and the Professional Ethics Commission have all greatly contributed to the diligent regulating, advisory and arbitration aspects of the Board's public service responsibilities.

Respectfully submitted,



Dated: August 13, 1990

J. Scott Davis
Bar Counsel
Board of Overseers of the Bar
Whitten Rd., P.O. Box 1820
Augusta, Maine 04332-1820
Telephone: 207-623-1121

¹ A complete listing of the membership of the Board and its commissions is included as part of the Appendix attached to this report.

VII. APPENDIX

STATISTICAL ANALYSIS OF DISCIPLINARY MATTERS
AND FEE DISPUTES

GRIEVANCE COMMISSION 1989
COMPLAINT AND HEARING SUMMARY
January 1, 1989 to December 31, 1989

I. COMPLAINTS REVIEWED - 175

ACTION:

Dismissals:	108
Admonitions:	22
Disciplinary Hearings Authorized:	
confidential:	5
open to the public:	25
authorized to proceed	
directly to court:	6
Complaints dismissed by Board	
due to death of attorney:	8
Recommended for dismissal	
by Federal Court:	1

II. DISPOSITIONS AFTER HEARING - 17 complaints

A. CONFIDENTIAL HEARINGS - 1 complaint

ACTION:

Dismissals:	0
Admonitions:	1
Reprimands Authorized:	0
Informations to be filed with Court:	0

B. HEARINGS OPEN TO THE PUBLIC - 16 complaints

ACTION:

Dismissals:	6
Admonitions:	2
Reprimands Issued:	3
Informations directed to be	
filed with Court:	5

III. Grievance Complaints docketed and reviewed

A. Complaints pending review at start of period:	61
B. New complaints docketed or submitted for rereview:	236
C. Total complaints docketed or activated:	297
D. Total complaints reviewed or closed	175
E. Complaints pending investigation and review at end of period:	122

IV. Matters before Supreme Judicial Court

A. Matters pending at start of period:	7
B. New informations or resignations filed:	9
C. Total Court pleadings docketed:	16
D. Dispositions:	
1. Disbarments:	4 (Including 1 imposed in 1988, and affirmed by Law Court in 1989)
2. Suspensions:	4
3. Resignations:	2
4. Reprimands:	-
5. Dismissals	-
Total dispositions:	<u>10</u>
E. Matters pending at end of period:	6

V. Total disciplinary matters pending at end of period

A. Grievance Commission:	
1. Complaints to be investigated and reviewed:	122
2. Complaints awaiting Grievance Commission disciplinary proceedings:	-35
B. Maine Supreme Judicial Court:	
1. Pending informations:	6
2. Complaints authorized for information but not yet filed	5
C. Federal District Court:	1
TOTAL:	<u>169</u>

1989 GRIEVANCE COMPLAINTS - CHARACTERIZATION

	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
1. Trust Violation	8	3
2. Conflict of Interest	36	15
3. Neglect	103	43
4. Relationship w/Client	14	6
5. Misrepresentation/Fraud	36	15
6. Excessive Fee	7	3
7. Interference w/Justice	21	9
8. Improper Advertising/ Soliciting	5	2
9. Criminal Conviction	1	1
10. Personal behavior	1	1
11. Willful failure to cooperate	0	--
12. Medical Incapacity	0	--
13. Incompetence	4	2
14. No Jurisdiction	0	--
15. Conduct Unworthy of Attorney	0	--
16. Other	0	--
	<hr/>	<hr/>
TOTAL	236	100

1989 GRIEVANCE COMPLAINTS - AREA OF LAW

	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
A. Family	54	23
B. Juvenile	--	--
C. Criminal	28	12
D. Traffic	--	--
E. Probate/Wills	18	7
F. Guardianship	--	--
G. Commercial	12	5
H. Collections	10	4
I. Landlord/Tenant	1	1
J. Real Property	45	19
K. Foreclosure	--	--
L. Corporate/Bank	1	1
M. Torts	27	11
N. Administration	2	1
O. Taxation	1	1
P. Patent/Trademark	1	1
Q. Immigration	--	--
R. Antitrust	--	--
S. Environment	--	--
T. Contract/Consumer	3	1
U. Labor	--	--
V. Worker's Comp	2	1
W. Other/None	22	9
X. Bankruptcy	6	2
Y. Municipal	<u>3</u>	<u>1</u>
	236	100

1989 GRIEVANCE COMPLAINTS

<u>SOURCE OF COMPLAINT</u>	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
1. Client	149	63
2. Other Party	38	16
3. Lawyer or Judge	31	13
4. Board or Staff	18	8
	<u>236</u>	<u>100</u>

TOTAL COMPLAINTS BY SIZE OF LAW OFFICE

1. Sole Practitioner	101	43
2. 2	34	14
3. 3-6	68	29
4. 7-10	12	5
5. 11 or more	18	8
6. Government and Other	3	1
	<u>236</u>	<u>100</u>

TOTAL COMPLAINTS BY AGE OF ATTORNEYS

1. 24-29	2	1
2. 30-39	70	30
3. 40-49	95	40
4. 50-59	35	15
5. 60+	34	14
	<u>236</u>	<u>100</u>

<u>YEARS OF PRACTICE IN MAINE BAR</u>	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
1. 40-61 years	8	4
2. 30-39 years	22	9
3. 20-29 years	23	10
4. 10-19 years	105	45
5. 2-9 years	73	31
6. Less than 2 years	5	1
	<u>236</u>	<u>100</u>

COMPLAINTS BY COUNTY

1. Androscoggin	22	9
2. Aroostook	14	6
3. Cumberland	81	34
4. Franklin	2	1
5. Hancock	8	4
6. Kennebec	24	10
7. Knox	2	1
8. Lincoln	4	2
9. Oxford	3	1
10. Penobscot	27	11
11. Piscataquis	1	1
12. Sagadahoc	3	1
13. Somerset	8	4
14. Waldo	0	0
15. Washington	3	1
16. York	31	13
17. Out of State	3	1
	<u>236</u>	<u>100</u>

1989 BAR COUNSEL FILES

<u>CHARACTERIZATION</u>	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
1. Conspiracy	5	.7
2. Disagreement over conduct of case	2	.2
3. Habeas Corpus	14	2.0
4. Inquiry Only	--	--
5. Insufficient information	9	1.3
6. Lack of Professionalism	16	2.3
7. Malpractice	9	1.3
8. Personal Life	--	--
9. Request for legal assistance	88	91.5
10. Other	5	.7
TOTAL	<u>* 148</u>	<u>100</u>

Bar Counsel Files pending at start of period:	80
--	----

New Bar counsel Files docketed:	148
---------------------------------	-----

Total Bar Counsel Files on docket:	<u>228</u>
------------------------------------	------------

Bar Counsel Files reviewed by Grievance Commission Chairman or Vice Chairman during period:	<u>158</u>
---	------------

Bar Counsel Files pending at end of period:	70
--	----

* Includes 5 matters original docketed as Bar Counsel Files, and later transferred to formal complaint status prior to December 31, 1989.

BAR COUNSEL FILES

REPORTING PERIOD	<u>1989</u>	<u>NUMBER</u>	<u>PERCENT OF TOTAL</u>
A. Family		24	35.5
B. Juvenile		-	-
C. Criminal		35	51.8
D. Traffic		-	-
E. Probate/ Wills		17	2.5
F. Guardianship		1	.1
G. Commercial		1	.1
H. Collections		3	.4
I. Landlord/Tenant		-	-
J. Real Property		20	2.9
K. Foreclosure		-	-
L. Corporate / Bank		-	-
M. Torts		14	2.2
N. Administration		6	.6
O. Taxation		-	-
P. Patent/Trademark/Copyright		2	.2
Q. Immigration		-	-
R. Anti-trust		-	-
S. Environment		-	-
T. Contracts/Consumer		-	-
U. Labor		-	-
V. Workers Comp.		2	.2
W. Bankruptcy		-	-
X. Municipal		4	.7
Y. Other/None		<u>19</u>	<u>2.8</u>
	TOTALS	<u>148</u>	<u>100</u>

FEE ARBITRATION COMMISSION
PETITION SUMMARY
January 1, 1989 through December 31, 1989

PETITIONS:

Pending at start of period:		24
Docketed during period :		72
Sub-total:		<u>96</u>
Dismissed, settled, withdrawn:	18	
Heard and closed:	53	
Heard and awaiting awards:	3	
Total petitions pending hearing at close of period:		22

PANEL MEETINGS:

Panel IA:	(York)	4
Panel IB:	(Cumberland)	9
Panel II:	(Androscoggin, Franklin Lincoln, Oxford & Sagadahoc)	5
Panel III:	(Kennebec, Knox, Somerset & Waldo)	6
Panel IV:	(Aroostook, Hancock, Penobscot, Piscataquis, & Washington)	5 —
TOTAL:		29

Petitions docketed:

1987:	65
1988:	57
1989:	72

Board and Commission Members

BOARD OF OVERSEERS OF THE BAR:

Chadbourn H. Smith, Esq. of Bar Harbor, Chairman (until October 31, 1990)

Peter B. Webster, Esq. of Portland, Vice Chairman (until October 31, 1991)

Diane S. Cutler of Bangor (until October 31, 1991)

Donald H. Marden, Esq. of Waterville (until October 31, 1990)

Richard A. McKittrick, Esq. of Camden (until October 31, 1991)

Roger S. Elliott, Esq. of Saco (until October 31, 1992)

Susan R. Kominsky, Esq. of Bangor (until October 31, 1992)

Marc V. Schnur of Islesboro (until October 31, 1992)

Barbara E. Chesley of Durham (until October 31, 1991)

GRIEVANCE COMMISSION:

Gerald F. Petrucceili, Esq. of Portland, Chairman

William F. Hufnagel, Esq. of Winthrop, Vice Chairman

Jon S. Oxman of Auburn

Roger S. Elliott, Esq. of Saco

Marc V. Schnur of Islesboro

Craig A. McEwen of Brunswick

Kathryn Monahan Ainsworth, Esq. of South Portland

Donald A. Leeber, M.D. of Portland

Lawrence Hadley of Bar Harbor

David B. Soule, Jr., Esq. of Wiscasset

John P. Foster, Esq. of Eastport

Susan R. Kominsky, Esq. of Bangor

Robert E. Mittel, Esq. of Portland

Charles H. Abbott, Esq. of Auburn

Charles A. Harvey, Jr., Esq. of Portland

Carroll Lee of Bangor

Louise P. James of Portland

PROFESSIONAL ETHICS COMMISSION:

Hugh G. E. MacMahon, Esq. of Portland, Chairman

G. Curtis Webber, Esq. of Auburn

Sandra Hylander Collier, Esq. of Ellsworth

Robert S. Hark, Esq. of Lewiston

H. Cabanne Howard, Esq. of Augusta

Gordon H. S. Scott, Esq. of Augusta

John M. R. Paterson, Esq. of Portland

Nathan Dane, III, Esq. of Bangor

FEE ARBITRATION COMMISSION:

M. Donald Gardner, Esq. of Portland, Chairman
Joan C. LaBrique, Esq. of Saco
Frederick W. Pape, Jr. of South Portland
Peter W. Schroeter, Esq. of Saco
Bruce E. Leddy, Esq. of Portland
Joan McGorrill of Portland
Roger R. Therriault, Esq. of Bath
Lee Young of Auburn
Peter M. Garcia, Esq. of Lewiston
Gregory J. Farris, Esq. of Gardiner
Doris Hayes of Augusta
Stephen G. Morrell, Esq. of Bangor
Frank Bean, III of Bar Harbor
Patricia S. Curtis of Bar Harbor
John M. Daigle of Portland
James E. Patterson, Esq. of Ellsworth
Richard S. Ladner of Lisbon Falls

BAR COUNSEL:

J. Scott Davis, Esq.

ASSISTANT BAR COUNSEL:

Karen G. Kingsley, Esq.

JUDICIAL LIAISON:

Associate Justice David G. Roberts

SPECIAL CONSULTANT

John W. Ballou, Esq.