

Bar Counsel's Report to the Supreme Judicial Court

Fiscal Year 2009

Executive Summary

This is a summary of the key points in the report that follows for the fiscal year that ended on August 31, 2009:

- Both the number and the median age of pending files in the Office of Bar Counsel on which petitions for discipline have not been filed decreased significantly in fiscal 2009. The number of lawyers with files over 2 ½ years old that are not in petition has also been reduced in the last year.
- The Office of Bar Counsel in fiscal 2009 filed 102 petitions for discipline including affidavits of resignation. This number exceeds the 86 petitions filed in fiscal 2007 and is only slightly less than the 106 petitions filed in fiscal 2008.
- Bar counsel's Attorney and Consumer Assistance Program screened and resolved over 85% of all telephone and written contacts with ACAP without referral for investigation. ACAP disposed of over 95% of all contacts within thirty days and over 97% within 45 days, either by resolving the inquiries or referring the matter for investigation.
- Bar counsel's ethics helpline handled 2250 calls from lawyers seeking information and assistance on issues of professional conduct.

- Bar counsel continues to provide a free monthly “trust account school,” first instituted four years ago. The program provides lawyers with training on the record-keeping requirements of Mass. R. Prof. C. 1.15.
- Bar counsel and assistant bar counsel made 58 presentations on professional conduct to law schools, bar associations, and continuing legal education organizations.
- Bar counsel’s diversion program for minor disciplinary violations went into effect in the summer of 2008 and was fully operational as of January 2009. Diversion disposes of complaints involving less serious types of misconduct without discipline by referral to an alternative educational, remedial, or rehabilitative program. A total of 80 files on 78 lawyers, 63 of whose cases involved low-level trust account record-keeping violations, were disposed of by diversion in fiscal 2009.
- Amendments to Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers addressing recommendations from the October 2005 American Bar Association report on the Massachusetts disciplinary system were approved by the Supreme Judicial Court on April 21, 2009 and took effect September 1, 2009.
- The Supreme Judicial Court approved in principle the concept of mandatory fee arbitration at the option of the client. During the spring and summer of 2009, the Office of Bar Counsel drafted proposed rules to implement this process. After review and consultation with the Board of Bar Overseers, a joint proposal was submitted by bar counsel and the Board to the Court in October 2009.

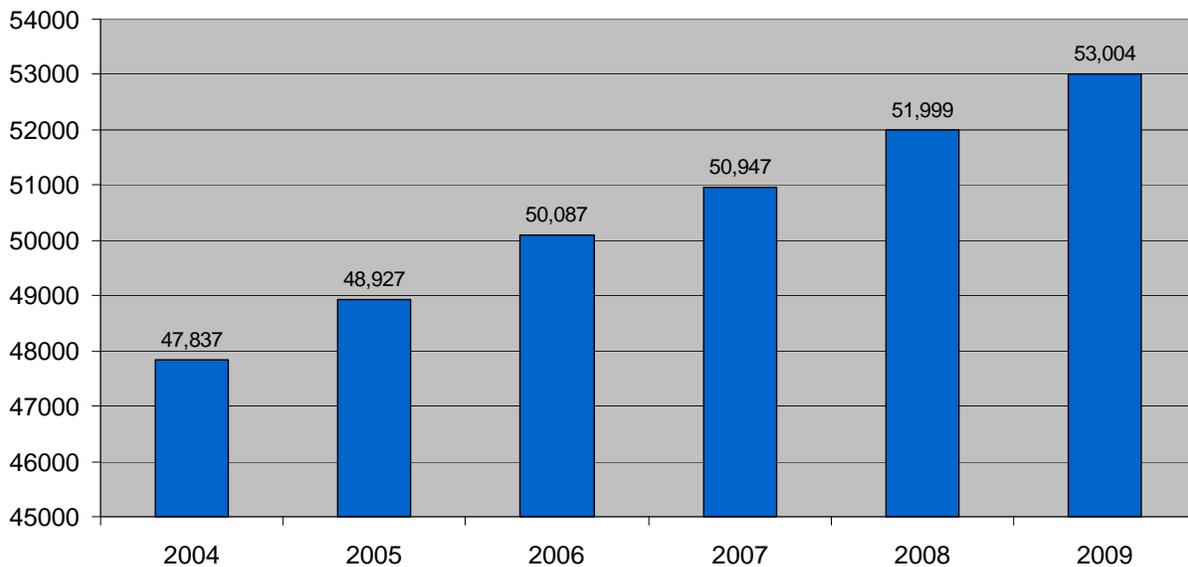
Overview

The Justices of the Supreme Judicial Court established the Board of Bar Overseers, the Office of Bar Counsel, and the Clients' Security Board by rule in 1974. The Board of Bar Overseers collects annual registration fees and uses them to fund its operations and those of the Office of Bar Counsel and the Clients' Security Board. At the close of fiscal year 2009, there were 53,004 Massachusetts lawyers registered on active status and another 10,997 lawyers on inactive status.

Table One illustrates the continued growth in the number of attorneys admitted to the bar in Massachusetts and registered for active practice over the last six years.

TABLE 1

Active Registered Lawyers in Massachusetts (2004-2009)



The bar counsel, an independent prosecutor who serves at the pleasure of the Court, investigates grievances alleging professional misconduct against lawyers, and prosecutes

formal charges against lawyers before the Board of Bar Overseers. The Board of Bar Overseers may dismiss charges, impose minor discipline, or recommend suspension or disbarment to the Court. The Board also hears petitions for reinstatement to the bar.

Fiscal Year 2009 Caseload

ACAP Contacts

In March 1999, the Office of Bar Counsel created the Attorney and Consumer Assistance Program (ACAP) to function as its intake unit. The program had its tenth anniversary in FY2009. Since its inception, ACAP has evaluated and processed a total of 60,896 matters.

ACAP carries out its critical function as gatekeeper both by addressing and attempting to resolve routine consumer concerns and facilitating investigation by bar counsel staff of matters that raise questions of significant misconduct. During FY2009, ACAP responded to 4801 inquiries. Approximately 20% of these inquiries were received in written form; the remainder came from telephone calls. A complaint form is sent immediately where serious unethical conduct might be involved.¹

In FY2009, ACAP screened and resolved without referral for investigation more than 85% of inquiries. Consistent with time standards agreed upon with the Supreme Judicial

¹ Effective September 1, 2009, the amendments to the Rules of the Board of Bar Overseers provide that a matter need not be pursued if the Office of Bar Counsel, in its discretion, determines the complaint to be frivolous, outside the Board's jurisdiction, or to involve allegations that do not warrant further action. In the middle ground between matters that do not warrant being pursued and the serious cases that are referred immediately for investigation will be the several thousand matters that the ACAP staff seeks to resolve.

Court, over 97% of ACAP contacts reached final disposition within 45 days and over 95% of contacts were processed within 30 days of receipt.

The first, and often most challenging, issue faced by ACAP is to identify whether there in fact is a problem within the jurisdiction of the Board. ACAP is able to resolve many inquiries by providing information; discussing reasonable expectations and timetables in legal cases; suggesting alternative ways of dealing with the dispute; or making referrals to lawyer referral services, fee dispute resolution services, and legal services organizations. When ACAP intervenes by calling the lawyer, the result is often that the client obtains—as just a few examples— a status report along with the lawyer's renewed attention to the case, an itemized bill, or the return of the legal file and unearned retainer.

Not surprisingly, the areas of law underlying ACAP inquiries tend to remain constant from year to year. Approximately 25% of all inquiries concern lawyers' neglect, lack of diligence, or failure to return client calls. The area of law that continues to produce the most inquiries to ACAP is domestic relations, comprising over 15% of all contacts. Civil litigation and criminal defense again follow close behind, each making up approximately 13% of ACAP inquiries. Concerns involving real estate, personal injury, and trusts and estates each accounted for approximately 7% of the ACAP caseload.

More than 8% of the calls to ACAP involved questions about legal fees, a figure also consistent with past years. Mandatory fee arbitration at the election of the client, now under consideration by the Supreme Judicial Court, would be in the interests of both lawyers and clients by providing an affordable forum for resolving fee disputes and a means to address such matters outside the disciplinary system.

Complaints Docketed

The Office of Bar Counsel opened 1001 complaints against attorneys in fiscal year 2009, comparable to the 997 files opened in fiscal year 2008.

The 1001 files involved 854 attorneys: 753 of the respondent lawyers had one complaint filed against them, 78 had two complaints, and 23 had three or more complaints filed in the fiscal year. Of the 1001 complaint files opened, bar counsel initiated the investigation in 127 matters involving 119 attorneys. The legal area generating the most complaints in FY2009 continues to be real estate, with domestic relations, civil litigation, criminal defense and personal injury also producing substantial numbers of inquiries. As was also true in FY2008, the most frequently alleged infractions this past fiscal year were neglect/incompetence by the attorney or trust account violations including notices of dishonored checks.

Mandatory notices sent by financial institutions of dishonored checks drawn on attorney trust accounts resulted in the opening of 198 files on 190 lawyers. This number is a sharp increase from the 153 dishonored check files opened against 150 lawyers in FY2008 although less than the 211 notices received in FY2007.

In many instances in which checks were dishonored, the underlying cause is systemic inadequate record keeping. Very few of the dishonored checks result from bank error or other anomalous problems. It is a serious concern to bar counsel that 14 years after the Supreme Judicial Court first enacted the dishonored check notification rule, and 5 years after significant changes were implemented to the record-keeping requirements of Mass. R. Prof. C. 1.15, the number of dishonored check reports remains so high.

In an ongoing attempt to address this problem, bar counsel, in cooperation with the Boston Bar Association, continues to present a free training program on proper maintenance of trust accounts on the first Thursday of each month. The program is open to all lawyers, whether or not a BBA member, as well as to support staff. This program is further described on page 23 of this report. Lawyers seeking help with record-keeping issues might also wish to consult with the Law Office Management Assistance Program (LOMAP), discussed on page 25 and also free of charge.

Tables Two and Three report the classification of complaints opened in fiscal 2009 based on an initial assessment of the primary legal area from which the facts arose and on the nature of the misconduct alleged, if any.

TABLE 2

Classification of 1001 Complaints Received by Primary Legal Area

Administrative Law.....	11.....	1%	Industrial Accidents	11.....	1%
Bankruptcy.....	25.....	2%	Insurance.....	3.....	<1%
Civil Litigation.....	108.....	11%	Intellectual Property.....	6.....	<1%
Collections	10.....	1%	Labor.....	18.....	2%
Commercial Transactions.....	12.....	1%	Landlord/Tenant	10.....	1%
Consumer Law.....	2.....	<1%	Malpractice	5.....	<1%
Conviction of Crime	21.....	2%	Municipal Law	2.....	<1%
Corporations	13.....	1%	Personal Injury.....	68.....	7%
Criminal Defense.....	109.....	11%	Reciprocal Discipline	9.....	1%
Criminal Prosecution.....	9.....	1%	Real Estate	144.....	14%
Domestic Relations.....	130.....	13%	Small Claims.....	2.....	<1%
Escrow Accounts	2.....	<1%	Support	0.....	n/a
Estates	67.....	7%	Taxation.....	3.....	<1%
Fiduciary	13.....	1%	Torts.....	1.....	<1%
Immigration	42.....	4%	Trusts.....	9.....	1%
			No Legal Area or Unknown	136.....	14%

TABLE 3
Classification of 1001 Complaints Received by Misconduct Alleged*

Rules	Type of Misconduct	Complaints Received	
1.1	Failure to provide competent representation	140	14%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	54	5%
1.3	Neglect or lack of diligence	269	27%
1.4	Failure to communicate adequately with client	248	25%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	111	11%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	22	2%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	47	5%
1.8	Conflicts of interest: prohibited transactions with clients including business transactions, financial assistance, and preparation of instruments of which lawyer or relative is beneficiary	11	1%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	19	2%
1.14	Conflicts of interest or other violations as to client under disability	1	<1%
1.15	Trust account violations including commingling, conversion, record-keeping violations, failure to promptly pay litigation costs or client creditors or issuing dishonored checks	332	33%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	125	12%
3.1, 3.2, 3.3(b)-(e), 3.5 and 3.6	Improper trial conduct	25	2%
3.3(a), 4.1, 8.4(c), and 1.2(d)	Fraudulent or deceptive activity, including lying to clients, knowing use of false evidence or making a misrepresentation to a tribunal or third party	52	5%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	33	3%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	4	<1%
5.1 and 5.3	Failure to supervise subordinates	3	<1%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	2	<1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	24	2%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	11	1%
8.1	False statements in a bar admission or disciplinary matter	2	<1%
8.3	Failure to report professional misconduct when required	13	1%
8.4(a)	Misconduct through acts of another	5	<1%
8.4(b)	Criminal conviction or conduct of attorney	51	5%
8.4(d) and 8.4(h)	Conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction	67	7%
	No Disciplinary Violation or Summary Dismissal	98	10%

*Total exceeds number of complaints filed and total percentage exceeds 100% because, in many matters, more than one type of misconduct was alleged

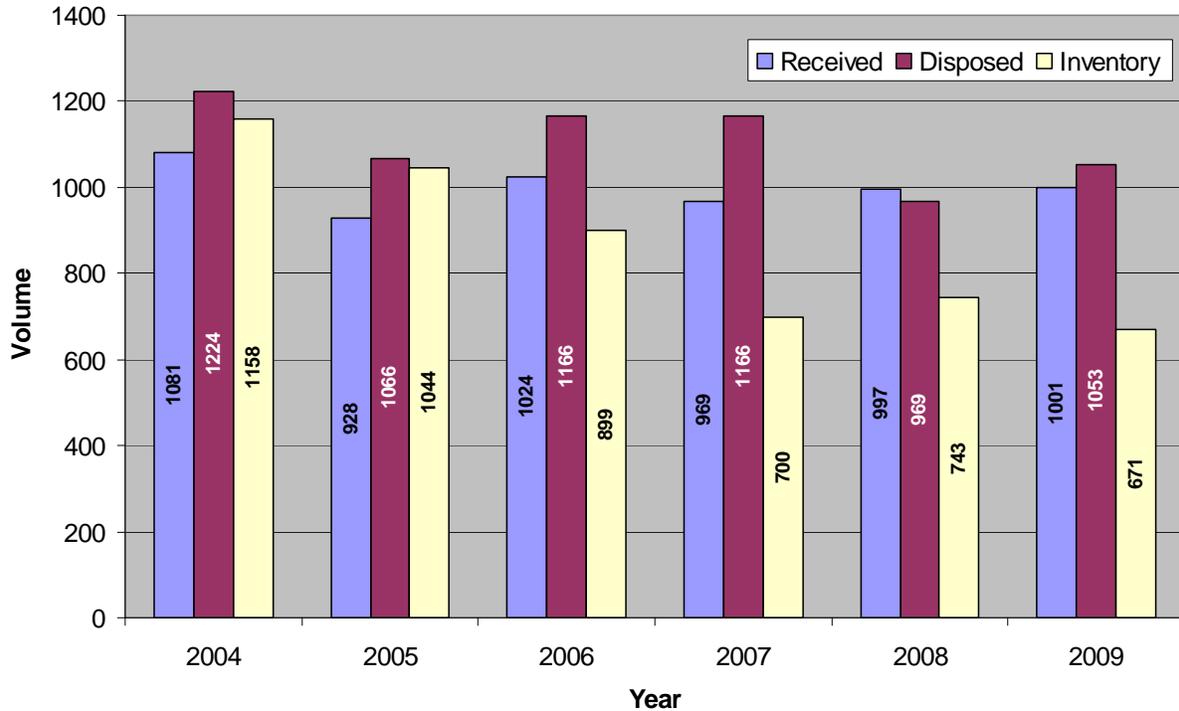
Case Processing

The Office of Bar Counsel disposed of 1053 files in FY2009 either by closing/dismissal, diversion, or discipline. While the staff continued to concentrate on reducing the remaining backlog of older files, the number of files disposed of this year still exceeded the number of files opened.

TABLE 4

Complaints: Received, Disposed, and Inventory (2004-2009)

NOTE: Numbers from past fiscal years may vary from those presented on previous annual reports due to a subsequently discovered computer programming error.



Disciplinary action was taken against 151 lawyers on 226 files; in FY2008, action was taken against 135 lawyers on 191 files. In addition, three lawyers were placed on disability status. Another 78 attorneys had their cases referred to the voluntary remedial diversion program instituted in July 2008.

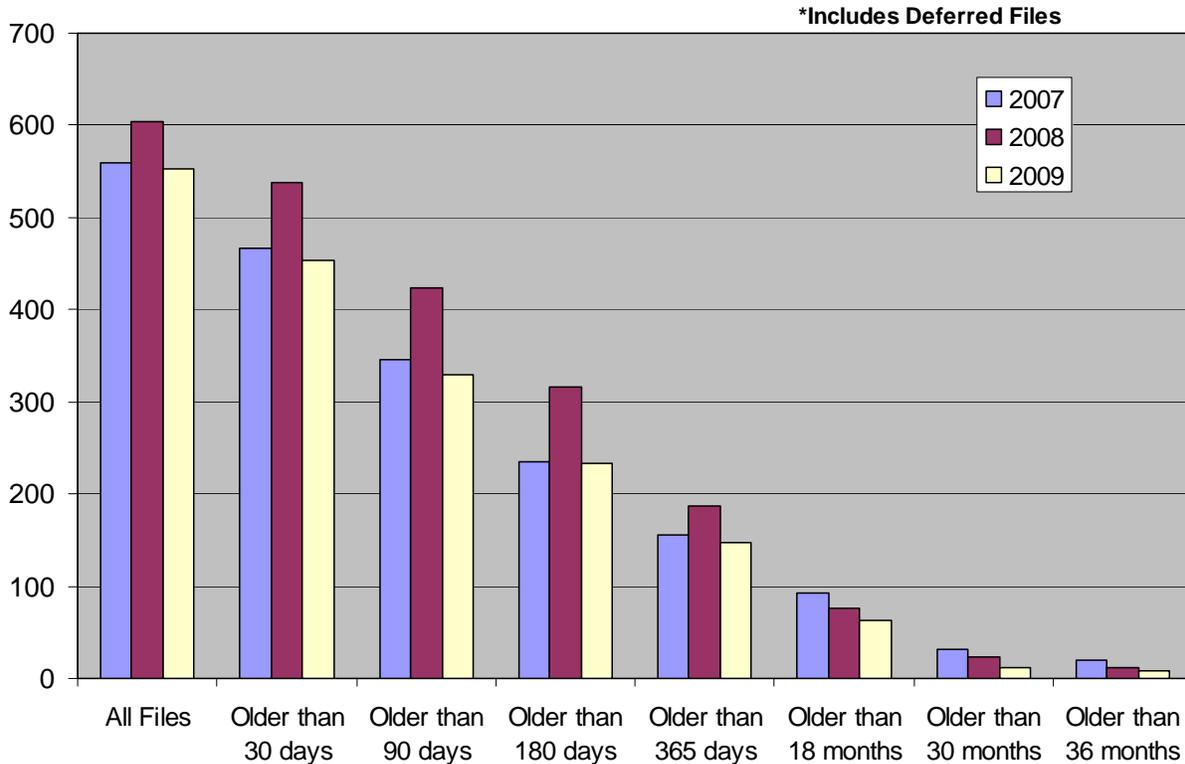
Bar counsel closed 717 files against 630 attorneys without docketing the matters as formal complaints. An additional 9 lawyers had formal complaints dismissed with a warning. The distinction between files that are designated as formal complaints and those that are not will cease to exist in the coming fiscal year under the amendments to the BBO Rules that took effect on September 1, but the fact that a complaint was dismissed with a warning will still be noted.

Bar counsel disposed of half of the files opened for investigation in under 100 days and 79% within a year of the date received, either by closing the file, diversion, imposition of a disciplinary sanction or the filing of a petition for discipline. The one-year period is the time standard agreed upon with the Court.

The following table shows the numbers of pending files not in petition, by age in days, in fiscal 2009 compared to fiscal 2008 and 2007.

TABLE 5

Age of Files Not in Petition*

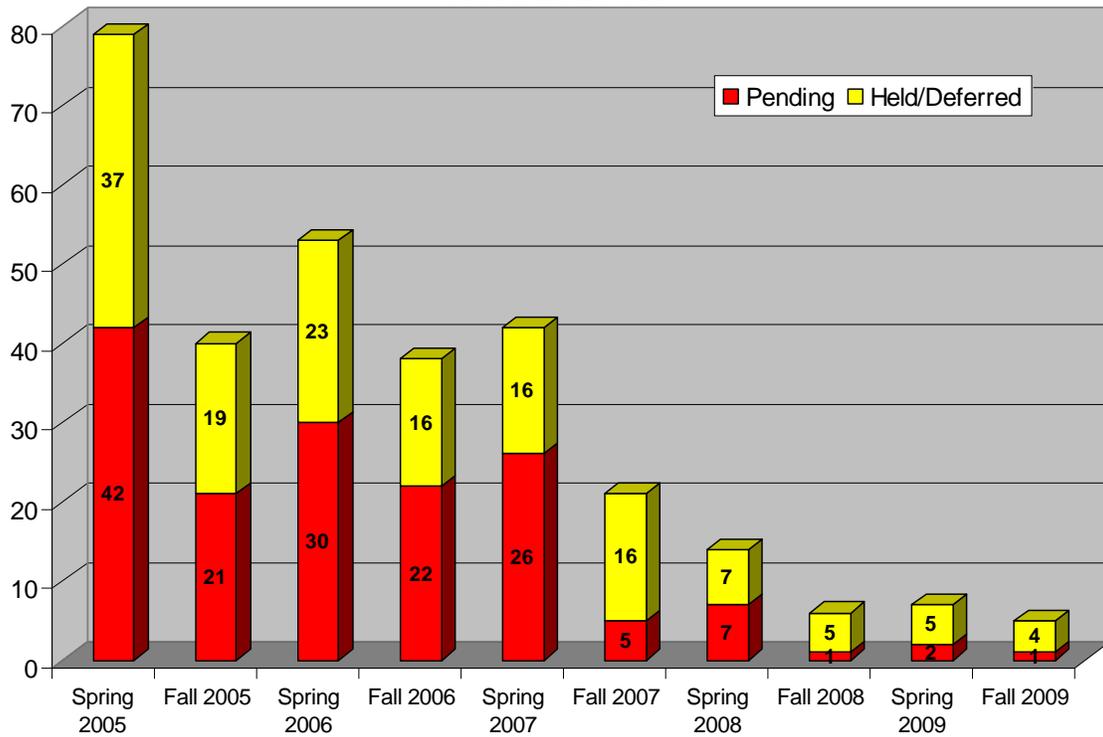


The Office of Bar Counsel has made substantial progress in reducing the time that matters remain under investigation before a petition for discipline is filed. The median age of all files pending in the Office of Bar Counsel on which petitions for discipline have not been filed decreased from 193 days in FY2008 (173 days if files deferred pending the outcome of related criminal or civil cases are omitted) to 140 days in FY2009 (126 days if deferred files are omitted). As of the end of the fiscal year, one lawyer had a pending file over 3 years old not in either petition or deferred status; the petition for discipline was filed on October 1, 2009. One other lawyer had a file over 2½ years old not in petition and not deferred.

Tables Six and Seven below provide a series of snapshots for each fiscal year since 2005 showing the number of lawyers under investigation for more than three years without a petition for discipline being filed and, for each fiscal year since 2006, showing the same statistics for lawyers under investigation for more than 2½ years.

TABLE 6

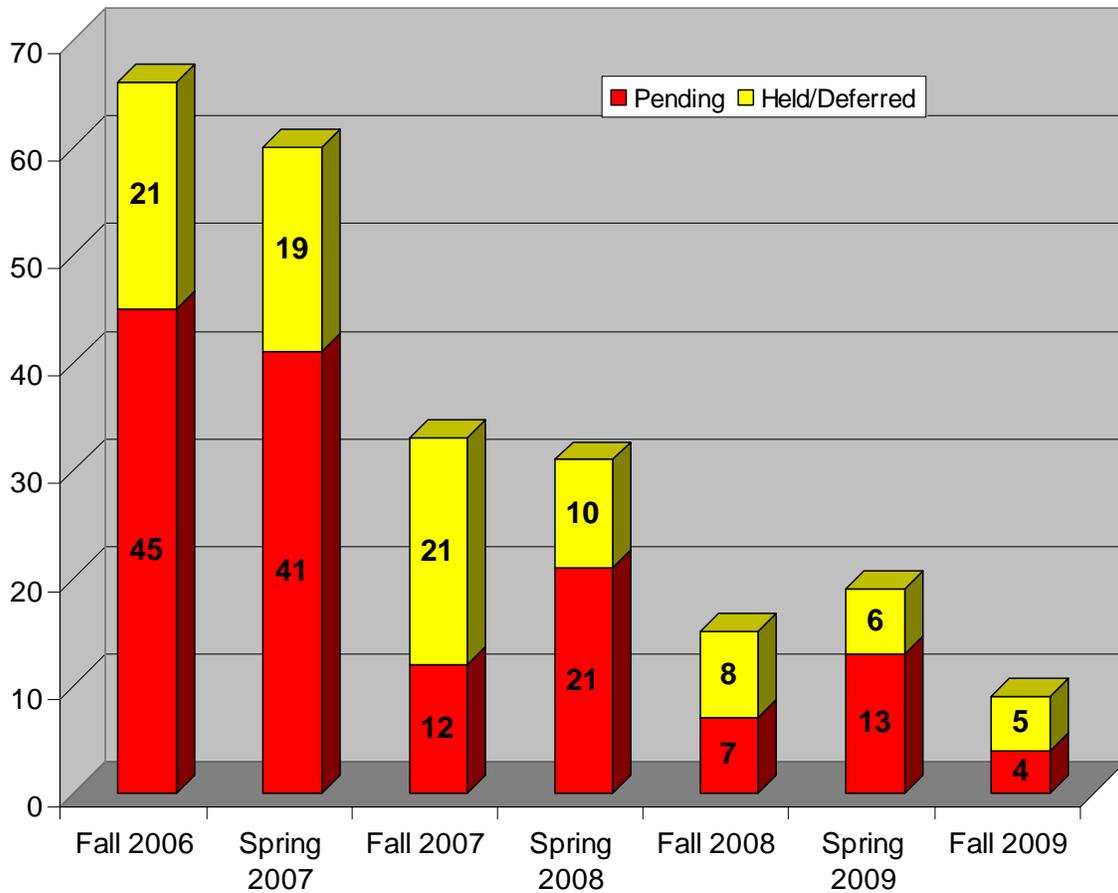
**Respondents With Pending Files Not In Petition
Over 3 Years Old***



* Corrected October 2011

TABLE 7

**Respondents With Pending Files Not In Petition
Over 2.5 Years Old***



* Corrected October 2011

Diversion

The diversion program, another recommendation from the ABA evaluation, became fully operational within the Office of Bar Counsel in early 2009. The goal is to offer education, evaluation, monitoring or counseling to lawyers to address systemic problems in their practices and to provide training in legal ethics, law practice management, and client

relations. The hope is that certain types of minor misconduct will be better addressed and more permanently remedied in this manner than by discipline.

An experienced assistant bar counsel from the ACAP staff acts as diversion coordinator. Diversion in lieu of discipline is voluntary on the part of the lawyer. A lawyer who assents to diversion signs an agreement with the Office of Bar Counsel, setting forth the lawyer's undertakings and obligations. In addition to the referrals to LOMAP on practice management problems, bar counsel may recommend diversion to Lawyers Concerned for Lawyer (LCL) or other service providers for substance abuse or mental health issues, trust account training and follow-up, fee arbitration, and substantive CLE courses. Lawyers referred to a service provider such as LCL or LOMAP also sign a separate agreement with the provider.

During the fiscal year, 78 lawyers executed voluntary diversion agreements in lieu of discipline and agreed to attend remedial programs. Of these, 63 matters arose from bar counsel's receipt of notices of dishonored checks that, upon investigation, revealed failure by the attorneys to fully comply with record-keeping requirements. Those lawyers, among other undertakings, were required to attend bar counsel's monthly trust account training and demonstrate that their trust records conformed to the requirements of Mass. R. Prof. C. 1.15. The remaining attorneys agreed to participate in an array of programs including obtaining evaluations by LCL or LOMAP, attending CLE programs, obtaining a mentor, and participating in fee arbitration.

Disciplinary Proceedings and Sanctions

There were 151 lawyers sanctioned by the Board or the Supreme Judicial Court during FY2009, an increase of 12% from FY2008. Of these, 20 attorneys received (private) admonitions, with 8 of those attorneys also required to attend a continuing legal education course. An additional 131 lawyers received public discipline: 35 lawyers were publicly reprimanded (including 5 reprimands reciprocal to actions taken in other jurisdictions), 47 received a term suspension, 12 were indefinitely suspended, 9 submitted a disciplinary resignation, and 28 were disbarred or resigned and were disbarred. Another 21 lawyers were temporarily suspended from the practice of law pending formal disciplinary proceedings. Three lawyers were placed on disability inactive status.

Tables Eight and Nine below show the primary legal area involved in the sanctions imposed in fiscal 2009 and the types of misconduct found. Consistent with FY2008, almost all lawyers disciplined had been admitted to the bar for 5 years or more; approximately 2/3 of the disciplined attorneys described themselves as solo practitioners.

TABLE 8
Classification of Lawyers Disciplined by Primary Area of Law*

Legal Area	Disbarment/ Resignation		Suspension		Public Reprimand		Admonition	
Administrative Law	0	-	0	-	0	-	0	-
Bankruptcy	1	3%	2	3%	0	-	0	-
Civil Litigation	4	11%	8	14%	3	10%	6	30%
Collections	0	-	3	5%	1	3%	3	15%
Commercial Law	0	-	2	3%	0	-	0	-
Consumer Law	0	-	0	-	0	-	0	-
Corporations	1	3%	1	2%	0	-	1	5%
Criminal Defense	1	3%	4	7%	0	-	1	5%
Criminal Conviction	6	16%	6	10%	2	7%	0	-
Criminal Prosecution	0	-	0	-	1	3%	0	-
Domestic Relations	2	5%	6	10%	2	7%	0	-
Escrow Accounts	0	-	0	-	0	-	0	-
Estates	6	16%	3	5%	4	13%	0	-
Fiduciary	1	3%	2	3%	1	3%	0	-
Immigration	1	3%	2	3%	0	-	2	10%
Industrial Accidents	0	-	1	2%	0	-	0	-
Insurance	0	-	0	-	0	-	0	-
Intellectual Property	0	-	0	-	0	-	0	-
Labor	0	-	1	2%	1	-	0	-
Landlord/Tenant	0	-	1	2%	0	-	0	-
Malpractice	0	-	2	3%	0	-	0	-
Municipal Law	0	-	0	-	0	-	0	-
Personal Injury	4	11%	6	10%	6	20%	4	20%
Reciprocal Discipline	4	11%	4	7%	0	-	0	-
Real Estate	7	19%	8	14%	5	17%	1	5%
Small Claims	0	-	0	-	0	-	0	-
Support	0	-	0	-	0	-	0	-
Taxation	0	-	0	-	0	-	0	-
Torts	0	-	0	-	1	3%	0	-
Trusts	1	3%	0	-	1	3%	0	-
Non-Legal, Misc.	8	22%	12	20%	4	13%	2	10%

*Totals exceed number of sanctions imposed and percentage exceeds 100% because some lawyers had multiple files with different primary legal areas.

TABLE 9
Classification of Lawyers Disciplined by Type of Misconduct*

Rules	Type of Misconduct	Disbarment/ Resignation		Suspension		Public Reprimand		Admonition	
1.1	Failure to provide competent representation	4	3%	12	8%	3	2%	3	2%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	4	3%	13	9%	3	2%	5	3%
1.3	Neglect or lack of diligence	8	5%	20	13%	6	4%	7	5%
1.4	Failure to communicate adequately with client	12	8%	19	13%	8	5%	8	5%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	4	3%	1	<1%	1	<1%	2	1%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	0	-	1	<1%	0	-	1	<1%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	1	<1%	2	1%	4	3%	0	-
1.8	Conflicts of interest: prohibited transactions with clients including business transactions, financial assistance, and preparation of instruments of which lawyer or relative is beneficiary	1	<1%	2	1%	5	3%	3	2%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	0	-	0	-	1	<1%	2	1%
1.14	Conflicts of interest or other violations as to client under disability	0	-	0	-	0	-	0	-
1.15	Trust account violations including commingling, conversion, record-keeping violations, failure to promptly pay litigation costs or client creditors or issuing dishonored checks	25	17%	15	10%	12	8%	2	1%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	4	3%	7	5%	2	1%	2	1%
3.1, 3.2, 3.3(b) -(e), 3.5, 3.6, and 3.8	Improper trial conduct	0	-	2	1%	0	-	0	-
3.3(a), 4.1, 8.4(c), and 1.2(d)	Fraudulent or deceptive activity, including lying to clients, knowing use of false evidence or making a misrepresentation to a tribunal or third party	4	3%	6	4%	0	-	0	-
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	5	3%	8	5%	1	<1%	0	-
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	0	-	2	1%	0	-	0	-
5.1 and 5.3	Failure to supervise subordinates	0	-	1	<1%	0	-	0	-
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	0	-	0	-	0	-	0	-
5.5	Unauthorized practice of law or assisting in unauthorized practice	3	2%	4	3%	0	-	2	1%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	0	-	0	-	1	<1%	1	<1%
8.1	False statements in a bar admission or disciplinary matter	1	<1%	3	2%	1	<1%	0	-
8.3	Failure to report professional misconduct when required	0	-	4	3%	0	-	0	-
8.4(a)	Misconduct through acts of another	1	<1%	0	-	0	-	0	-
8.4(b)	Criminal conviction or conduct of attorney	13	9%	11	7%	2	1%	0	-
8.4(d) and 8.4(h)	Conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction	9	6%	12	8%	3	2%	1	<1%

*Totals exceed number of sanctions imposed and percentage exceeds 100% because more than one rule was violated.

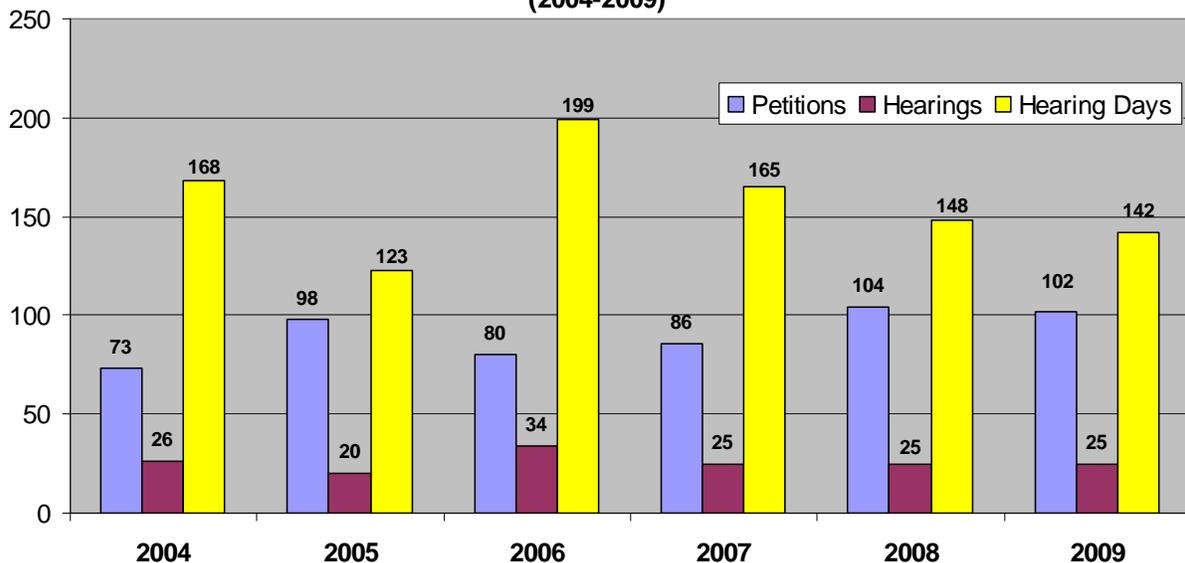
The Office of Bar Counsel filed 102 petitions for discipline (including affidavits of resignation) seeking public sanctions. This number is only slightly less than the 106 petitions filed in FY2008, which represented an increase of 23% from FY2007. In addition, 18 petitions for reciprocal discipline (petitions based on public discipline in another jurisdiction in which the attorney is also admitted) were filed directly with the Court, an increase from the 10 filed in FY2008.

A total of 142 hearing dates were held before hearing committees, the Board, and the Court. Evidentiary hearings were conducted in 25 cases, with 46 days of evidentiary hearings. Bar counsel filed 46 post-hearing requests for findings and rulings or appeal briefs, including 7 briefs to the full bench of the Supreme Judicial Court.

The table below provides a comparison of number of petitions filed, matters heard, and hearing dates for this year and the preceding five years.

TABLE 10

**Comparison of Petitions, Hearings, and Hearing Days
(2004-2009)**



Of the petitions pending during the fiscal year and not deferred, 33 matters (including 3 conviction cases) were awaiting evidentiary hearing at the end of the fiscal year. Another 5 cases had evidentiary hearings either in progress or concluded and awaiting hearing reports; 9 cases (8 disciplinary cases and one reinstatement) were on appeal to the Board.

In addition to petitions for discipline, there were also 9 petitions for reinstatement filed during FY2009 by suspended or disbarred attorneys. After hearing, 7 lawyers (some of whom had petitions pending at the start of the fiscal year) were reinstated to practice and 6 lawyers were denied reinstatement. Following short suspensions, 6 lawyers were reinstated to practice without petition or hearing.

Considerable staff resources were also devoted to issues relating to the closing of lawyers' practices following suspension, disbarment, death or disability. In 8 matters where commissioners were appointed pursuant to Supreme Judicial Court Rule 4:01, § 14 or § 17(2), the staff at the Office of Bar Counsel worked closely with the commissioners in returning files to clients, notifying courts and opposing counsel, and ensuring proper disbursement of trust funds. In numerous other matters, the staff helped suspended or disbarred attorneys to accomplish these tasks themselves.

Full Bench Decisions

The Justices issued six full court opinions on bar discipline cases:

- *Matter of Angwafo*, 453 Mass. 28 (2009), imposing a one-month suspension for an attorney's conduct, in her own domestic relations matter, in misrepresenting in a motion for child support and continued health insurance coverage that she was married to the defendant when she was not; "powerful"

mitigating circumstances where the respondent was the victim of abuse by the defendant.

- *Matter of Balliro*, 453 Mass. 75 (2009), holding that six-month suspension was appropriate sanction for attorney who, after being assaulted by her then-boyfriend, acted knowingly when she testified falsely at his criminal trial as to how she received her injuries; substantial mitigating factors found in her “dysfunctional psychological state, brought about by the domestic abuse.”

- *Matter of Johnson*, 452 Mass. 1010 (2008), finding that an attorney’s financial difficulties and gambling, rather than medical or psychological problems, caused her to misappropriate client funds and thus there was no mitigation warranting a reduction from presumptive sanction of indefinite suspension.

- *Matter of Mitrano*, 453 Mass. 1026 (2009), in a reciprocal discipline proceeding, holding that the other state’s disciplinary board presented sufficient notice of the theft charge and sufficient evidence of misappropriation as to warrant reciprocal discipline of disbarment.

- *Matter of Ngobeni*, 453 Mass. 233 (2009), finding that reciprocal discipline under Supreme Judicial Court Rule 4:01, § 16, may be imposed on an attorney who resigned from practice in another jurisdiction while disciplinary charges were pending against him there, even though he did not admit to misconduct when he resigned.

- *Matter of Osagiede*, 453 Mass. 1001 (2009), holding that the hearing committee did not improperly consider either propensity evidence or national origin and imposing presumptive sanction of indefinite suspension for intentional misuse of trust funds.

Related Activities and Other News of Note

Rules Changes

S.J.C. Rule 4:01 and the Rules of the Board of Bar Overseers

The Supreme Judicial Court approved comprehensive amendments to S.J.C.

Rule 4:01 and the Rules of the Board of Bar Overseers, effective September 1, 2009.

The amendments to both sets of rules can be found on the Board's website,

<http://www.mass.gov/obcbbo/highlit.htm#amend>. Included among the revisions are:

- Numerous general administrative changes including an amendment giving bar counsel discretion not to open frivolous complaints, an amendment requiring bar counsel to notify a complainant in writing of the reasons for not investigating a complaint or closing a file, and amendments formally adding diversion as an approved disposition;
- changes to the procedures for administering admonitions and conducting hearings on contested admonitions;
- changes to the Board rules on prehearing conferences and prehearing motions;
- changes to deposition and discovery practice;
- changes giving the Court discretion as to the additional term of suspension imposed for unauthorized practice of law by suspended or disbarred attorneys; and
- changes to reinstatement procedure, including revisions bifurcating the reinstatement questionnaire into a public section and an impounded section for tax and other confidential information; revisions allowing suspended or disbarred attorneys to apply for reinstatement three months in advance of the expiration of the specified or minimum term of loss of license; and revisions allowing lawyers serving a suspension of a year or less to have six months, instead of three months, to apply for automatic reinstatement.

Most of the amendments stem from the American Bar Association *Report on the Lawyer Regulation System of Massachusetts* issued by the ABA Standing Committee on Professional Discipline. As part of a system-wide effort to improve the administration of justice, the Justices had invited the ABA committee to assess the bar discipline system in the Commonwealth. The rule changes implement certain of the recommendations contained in the committee report.

Massachusetts Rules of Professional Conduct

Effective July 1, 2009, the Supreme Judicial Court amended Rule 8.5 of the Massachusetts Rules of Professional Conduct concerning disciplinary authority and choice of law in disciplinary proceedings. The comments have also been revised.

Consistent with the amendments enacted in 2002 to the ABA model rule, Mass. R. Prof. C. 8.5(a) has now been expanded to add that a lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services here. This authority existed already in S.J.C. Rule 4:01, § 1(1), but is now repeated in Mass. R. Prof. C. 8.5(a). In addition, new Rule 8.5(b) (previously reserved) is a choice-of-law provision setting forth the factors to be considered in identifying which jurisdiction's rule governs the conduct in question when more than one jurisdiction is involved. The Massachusetts version of Rule 8.5(b) differs significantly from the ABA model rule as to conduct not before a tribunal, with the Massachusetts rule defaulting to rules of the jurisdiction in which the lawyer's principal office is located while the model rule defaults to the jurisdiction in which "the lawyer's conduct occurred."

Proposed Massachusetts Rules for Fee Arbitration

At the request of the Supreme Judicial Court, the staff at the Office of Bar Counsel during 2009 drafted proposed procedural rules to implement the possible adoption of mandatory fee arbitration at the option of the client. After conferencing with the Board of Bar Overseers, a joint Board and bar counsel proposal was submitted to the Court in October 2009. The proposal follows the format of the ABA

Model Rules for Fee Arbitration but incorporates aspects of fee arbitration rules in other jurisdictions and the views of bar counsel and the Board.

Ethics Helpline and CLE Presentations

In addition to the ACAP program and CLE presentations, the Office of Bar Counsel answers questions from the bar three afternoons each week in an effort to assist attorneys in avoiding preventable ethical problems or in resolving minor difficulties. Assistant bar counsel in FY2009 received approximately 2250 calls on the ethics helpline. The complex nature of many of the questions asked demonstrates the bar's increased awareness and insight into matters of professional responsibility.

As previously described, in a continuing effort to assist lawyers with the trust account record-keeping requirements of Mass. R. Prof. C. 1.15 and to reduce the number of complaints raising record-keeping issues (whether from notices of dishonored checks or from clients or other affected parties), bar counsel conducts a free one-hour "trust account school" held monthly at the Boston Bar Association. An assistant bar counsel who concentrates on handling dishonored check notices and outreach to the bar on record keeping presents these programs. In FY2009, 126 attorneys and their bookkeepers attended the class in Boston, and the assistant bar counsel also presented an additional trust account program to the Worcester Bar.

Trust accounting is included as well in a wide-ranging full-day program on ethics and law office management offered twice a year in Boston by the Office of Bar Counsel and MCLE. Materials on trust accounts, including a comprehensive booklet

prepared by the IOLTA Committee, are also available at the Office of Bar Counsel website, <http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.15>.

Bar counsel staff made 58 additional presentations on professional conduct to law schools, bar associations, and continuing education organizations. These topics included ethical issues in elder law, domestic relations, estate planning, real estate, law office management, conflicts of interest, reciprocal discipline proceedings, and criminal law. Staff from the Office of Bar Counsel and Board of Bar Overseers also continue to teach professional responsibility and to serve on bar association, court-appointed and other law-related committees and boards including the Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct, the Board of Directors of Lawyers Concerned for Lawyers, the Mass. Bar Law Practice Management Section Council, the Mass. Bar Fee Arbitration Board, the Greater Boston Legal Services Board of Directors, a law school alumni/ae Board of Directors, and Inns of Court committees.

Website Update

The website maintained by the Office of Bar Counsel, www.mass.gov/obcbbo, provides information to the bar and the public on the functions of the Board of Bar Overseers and Office of Bar Counsel, as well as explanations of how to file complaints and on the disciplinary process. The site includes disciplinary decisions since 1999, links to all pertinent rules, and a collection of articles by staff on ethical issues. In addition, a news section includes updates on matters of interest relating to

professional responsibility and the disciplinary process, descriptions of and links to rule changes, and synopses of new disciplinary decisions and other ethics-related cases. The office address and registration status of Massachusetts attorneys can also be obtained through a link to the website of the Board of Bar Overseers, <http://massbbo.org/bbolookup.php>.

The Board's website also includes information provided by active status attorneys as to whether or not they carry malpractice insurance. The information was added following a 2006 Supreme Judicial Court order amending S.J.C. Rule 4:02 to require that lawyers certify in their annual registration statements whether or not they are covered by professional liability insurance. Statistics for FY2009 (the third full year that the requirement has been in effect) suggest that 78% of active status lawyers in private practice maintain malpractice insurance.

LOMAP

Another proposal by the Office of Bar Counsel that is now fully operational is the independent law office management assistance program under the auspices of Lawyers Concerned for Lawyers. The Office of Bar Counsel and the Board assisted LCL in 2006 to obtain approval from the SJC for funding this program through registration fees. Modeled on similar programs in a number of other jurisdictions, the LOMAP program, www.masslomap.org, was established by LCL in 2007. Attorney Rodney Dowell was hired as director.

The mission of LOMAP is to assist Massachusetts attorneys in establishing professional office practices and procedures in order to increase their ability to deliver high quality legal services, strengthen client relationships, and enhance their quality of life. LOMAP provides this assistance through its consulting services, reference materials, educational programs, and referrals. Approximately 90% of the attorneys assisted by LOMAP seek its services voluntarily but the Office of Bar Counsel also refers lawyers to the program for assistance, either in addition to discipline, in lieu of discipline as part of the diversion program, or simply because the attorney might find it helpful.

LOMAP is now entering its third year of operation. During the second year, another attorney was added to the staff as a law practice advisor, allowing the program to increase substantially its ability to provide core services. These include consultations at attorneys' offices, including follow-ups, and telephone and email consultations. During the last full year, LOMAP provided substantive services to approximately 165 clients, more than double the number from the previous year. Many other attorneys received assistance with a single issue by telephone or email, with the number of such requests continuing to rise.

In an effort to make its services widely available to attorneys in the Commonwealth, LOMAP maintains a website, www.masslomap.org, and a quarterly e-newsletter and blog, www.masslomap.blogspot.com. LOMAP also provides resources requested by attorneys, including standardized fee agreements, law practice management books in the LOMAP reference library, and materials and advice on how to start a law firm. LOMAP has also created a "Start-up Kit and Checklist" for

attorneys opening up their first law office. Both LOMAP attorneys also make frequent educational presentations on law office management through MCLE, bar associations, Inns of Court, and attorney networking groups.

Facilitating Continuous Improvement

The Office of Bar Counsel remains committed to fairness in all dealings with both lawyers and consumers, while carrying out its mission of preserving and enhancing the integrity and high standards of the bar and protecting the public from unethical conduct by attorneys.

The Office of Bar Counsel expects to work with the bar to ensure public confidence in the disciplinary process. Hallmarks of mutual success in this endeavor include the outstanding cooperation that ACAP receives from attorneys in resolving client concerns before complaints become necessary, as well as the bar's use of bar counsel's ethics helpline before questions become problems.

Adding LOMAP to the longstanding services provided by LCL and the use of other diversion programs are yet another means of intervening before a lawyer makes mistakes that put a client's interests and his or her own license at risk. Public information on whether an attorney is covered by malpractice insurance, available since 2006, is a service to consumers that makes clients better informed in choosing a lawyer. The Supreme Judicial Court's decision to consider mandatory fee arbitration at the election of the client is another positive move that could decrease the numbers of complaints filed and improve the public perception of the bar.

In the coming year, the new rule allowing bar counsel discretion not to open frivolous complaints should provide relief to the bar from the obligation to respond to such complaints and free up bar counsel's time for more serious matters. Bar counsel expects that the other rule changes that went into effect in September 2009 will assist bar counsel, the Board, and lawyers in improving and expediting the fair resolution of disciplinary matters.