

Board of Professional Responsibility

May 2000

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John G. Morgan
Comptroller

May 17, 2000

The Honorable E. Riley Anderson, Chief Justice
Supreme Court of Tennessee
and
Members of the Supreme Court of Tennessee
Supreme Court Building
Nashville, Tennessee 37243

Ladies and Gentlemen:

Transmitted herewith is the performance audit of the Board of Professional Responsibility,
which was requested by the Tennessee Supreme Court on December 6, 1999.

Sincerely,

John G. Morgan
Comptroller of the Treasury

cc: Ms. Cornelia A. Clark, Director
Administrative Office of the Courts

**Performance Audit
Board of Professional Responsibility**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
Purpose and Authority	1
Objectives	1
Scope and Methodology	1
Organization and Duties	2
Complaint Processing	3
SUMMARY OF RESULTS	4
ISSUES AND CONCLUSIONS	4

Performance Audit Board of Professional Responsibility

INTRODUCTION

PURPOSE AND AUTHORITY

This performance audit of the Board of Professional Responsibility was conducted pursuant to a special request by the Administrative Office of the Supreme Court of the State of Tennessee. This performance audit is intended to aid the Administrative Office in assessing the operations of the Board of Professional Responsibility.

OBJECTIVES

The objectives of the audit were based on suggestions in a December 6, 1999, memo from the Administrative Office of the Courts to the Division of State Audit. The objectives are listed in the section "Issues and Conclusions."

SCOPE AND METHODOLOGY

The board's activities and procedures were reviewed as of the period January through March 2000, including records from prior years. The audit was conducted in accordance with generally accepted government auditing standards and included

1. review of applicable Supreme Court Rules, board policies and procedures, and board meeting minutes;
2. examination of the board's records, reports, case files, billing records, and case management database;
3. review of audit reports from other states; and
4. interviews with the board chairman, board staff, staff of the Commission on Legal Education and Specialization, and the Director of the American Bar Association's National Lawyer Regulatory Data Bank.

ORGANIZATION AND DUTIES

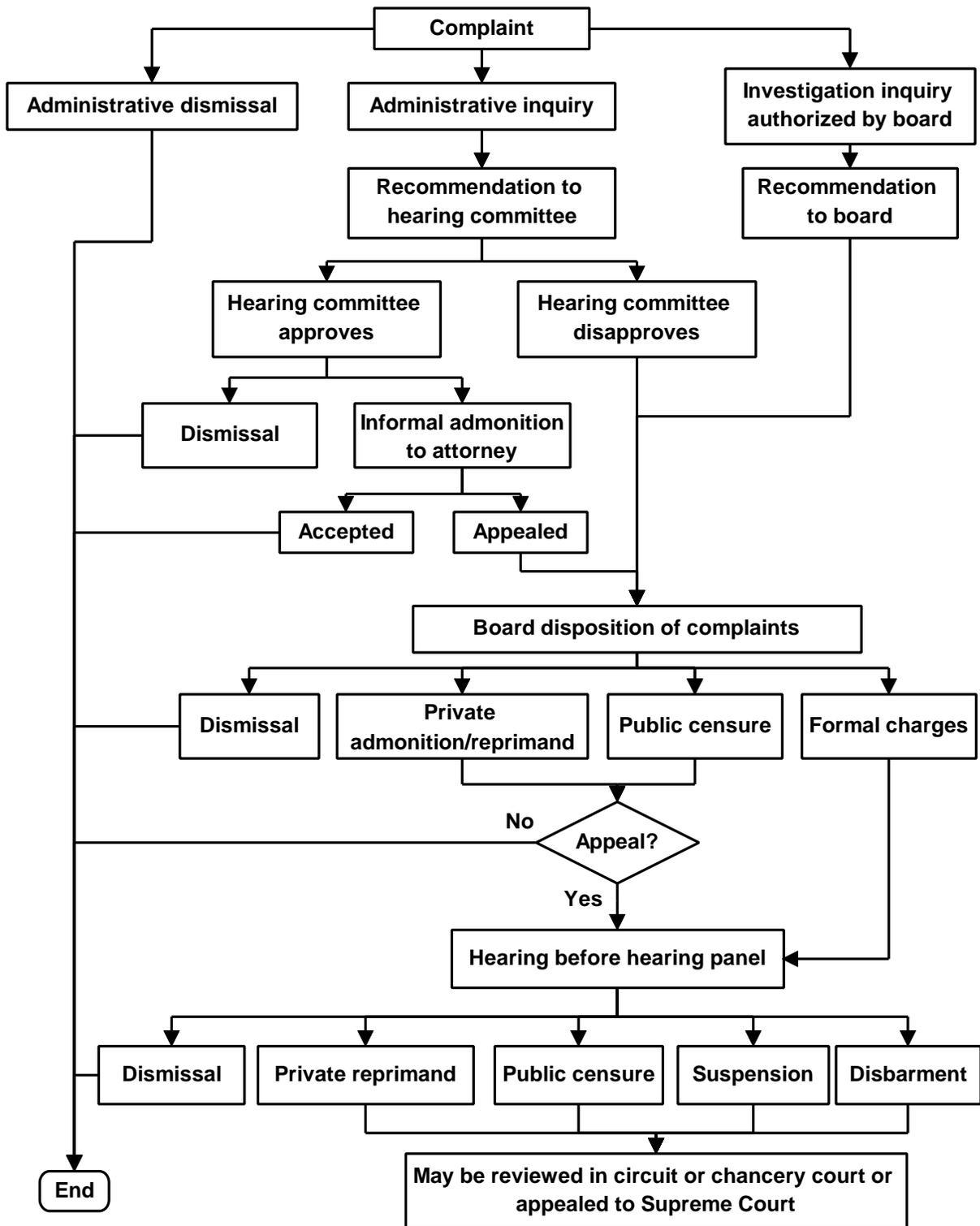
The Board of Professional Responsibility was created by Supreme Court Rule 9, Section 5.1, and designated by that body in 1976 to aid it in supervising the ethical conduct of attorneys. The 12-member board, which meets quarterly, consists of nine lawyers and three non-lawyers, each of whom may serve up to two three-year terms. Vacancies are filled by the Supreme Court, which also appoints the chair and vice-chair. The board appoints a chief disciplinary counsel and assistant disciplinary counsel. As of March 2000, there were seven assistant disciplinary counsel and eight other staff persons. Disciplinary counsel have the power and duty to investigate all matters involving alleged misconduct. The process they use is illustrated on the next page. The court retains supervisory authority and control over the board and the professional responsibility program. Board activities include pursuing complaints filed against attorneys, collecting annual attorney registration fees, publishing ethics opinions, maintaining an ethics hotline, conducting ethics seminars, monitoring attorney trust account overdraft notification, and providing professional instruction.

During the period from November 1, 1998, to October 31, 1999, the board opened files on 1,504 complaints. In addition, board staff responded to 3,446 inquiries from attorneys seeking ethical guidance, and participated in 35 bar-sponsored ethics seminars. The board is funded primarily (92%) by annual registration fees from the approximately 15,000 active attorneys in Tennessee, with additional revenue from interest, reimbursement of costs of disciplinary proceedings, and fees and penalties. In calendar year 1999, the board collected \$1,445,193 and spent \$1,368,997, according to its financial statements audited by McMurray & Associates of Hendersonville, TN.

Supreme Court Rule 9, Section 2, divides the state into nine disciplinary districts. The Supreme Court appoints a hearing committee of five to thirty members in each district. Members may serve up to two three-year terms. A member of the hearing committee approves recommendations by a disciplinary counsel for dismissals and informal admonitions. A board-designated panel of three members of the committee conducts hearings on formal charges of misconduct of an attorney and submits its findings and judgment to the board for approval or modification. Judgements for disbarment or suspension are submitted to the Supreme Court for review and for modification if inadequate or excessive. The court also enforces, if necessary, all other decrees of hearing committees or trial courts.

Disciplinary cases that otherwise would be disposed of by private informal admonition or by private reprimand are eligible for diversion. With the consent of the disciplinary counsel and a hearing committee member, the Board of Professional Responsibility may recommend, prior to a finding of unethical conduct, that a respondent complete a practice and professionalism enhancement program at his or her own cost. Upon completion, further investigative activity in the case shall cease. In other cases, rather than face charges an attorney may be placed on disability inactive status until a determination is made of the attorney's capacity to continue to practice law.

Complaint Processing



SUMMARY OF RESULTS

Overall, the audit report concludes that the operations of the Board of Professional Responsibility are efficient, effective, and are achieving the results desired by the Tennessee Supreme Court. Areas of concern are addressed in appropriate items. One issue noted is the 12% increase in number of complaints filed with the board between 1997 and 1999. This and other factors caused a 30% increase in average case resolution time. The board plans to address this by implementing a Client Assistance Program, expected to begin in 2001. (See item 11, page 14.) Another issue is notification of the board by a court when an attorney has refused to comply with a court order or has been convicted of a felony or other serious crime. Although the Supreme Court Rules require notification by the court clerk, this has not always happened. The court may wish to amend its rules to also require judges to report when an attorney does not comply with a court order and when an attorney is convicted of a felony or other serious crime. (See items 6 and 7, beginning on page 10.) The board may also wish to include information in the complaint packet mailed out to callers listing alternative agencies that may be better equipped to handle the situation. (See item 2, page 7.) The board's responses to each of these areas of concern are included immediately following the discussion of the related items.

ISSUES AND CONCLUSIONS

The 18 items listed below in bold print are the audit objectives. Following each objective is a summary of the audit results and conclusions.

- 1. Examine whether similar infractions are punished similarly, including the issuance of public and private reprimands and censures. Additionally, examine a representative sample of closed cases in which discipline was imposed and evaluate the consistency of discipline imposed in similar types of cases.**

According to the Tennessee Ethics Handbook, Third Edition, published by the Tennessee Bar Association Young Lawyers Division, "the principal source of [ethical] guidance is the Board of Professional Responsibility of the Supreme Court of Tennessee." Tennessee's Code of Professional Responsibility, initially adopted in 1970 from the ABA Model Code of Professional Responsibility, has been changed and amended by the Supreme Court since then. The code comprises Rule 8 of the Rules of the Supreme Court. In addition, Formal Ethics Opinions issued by the Board of Professional Responsibility are binding upon the board and "constitute a body of principles and objectives upon which members of the bar can rely for guidance in many specific situations."

Tennessee Rules of Disciplinary Enforcement are contained in Rule 9 of the Rules of the Supreme Court. In addition, the American Bar Association *Standards for Imposing Lawyer Sanctions* have been approved by the board and provided to all board members, hearing committee members, and disciplinary counsel for use in analyzing matters under consideration to achieve uniformity of discipline imposed. According to standards, a sanctioning body must consider the following factors when imposing sanctions: the duty violated, the lawyer's mental state, extent of actual or potential injury caused, and aggravating or mitigating circumstances. The standards provide a model to determine sanctions, permitting flexibility and creativity, and are designed to promote consideration of all factors, the weight of the factors, and consistency of discipline. The range of possible disciplinary sanctions, from strongest to weakest, are disbarment, suspension for a specified period of time, reprimand or public censure, private reprimand, and probation. There are other related sanctions such as restitution, assessment of costs, requirement for certain CLE (continuing legal education), or appointment of a receiver. In addition, reciprocal discipline may be imposed on a lawyer who has been disciplined in another jurisdiction.

Summaries of Public Discipline imposed since 1976 have been compiled and distributed to all board members, hearing committee members, and disciplinary counsel, for use in analyzing matters under consideration and to achieve uniformity and consistency of discipline imposed in similar cases. These summaries are also available to respondent attorneys and to the general public. In addition, *Summaries of Private Reprimands* have been compiled and distributed to board members, hearing committee members, and disciplinary counsel for the express purpose of achieving uniformity of discipline imposed.

Violations of the code of ethics are directed to the board for analysis and any necessary disciplinary action. The auditor reviewed the 615 public disciplines imposed by the board for infractions of the Code of Professional Responsibility over the five-year period from October 1993 to October 1998, the most recent detailed data available. (See Table 1.) The most common discipline for all years is public censure, awarded in over one-third of all cases. An attorney is most likely to receive public censure for some violations (e.g., neglect, communications with client) and more likely to receive longer-term suspension (1 year or longer) or disbarment for others, such as criminal conviction or trust fund violations in conjunction with misrepresentation or fraud. (See Table 2.)

Table 1. Disciplines by Category for 1993-1998 (summary)

Year ended	Public Censure	Suspension < 1 yr.	Suspension 1-3 yr.	Suspension >3 yr.	Disbarment
October 1994	39	14	14	5	2
October 1995	32	10	31	7	21
October 1996	41	5	25	10	12
October 1997	62	22	38	8	48
October 1998	60	27	16	36	30
Total	234	78	124	66	113

Table 2. Disciplines by Category for 1995-1998 (detail)

Infraction	Year ended Oct 1996					Year ended Oct 1997					Year ended Oct 1998				
	I	II	III	IV	V	I	II	III	IV	V	I	II	III	IV	V
Advertising and solicitation	1	0	0	0	0	1	0	1	0	1	2	0	0	0	0
Jurisdiction and disciplinary procedures						0	0	1	0	1	1	2	0	1	0
Limited liability						0	0	1	0	1					
Frivolous lawsuits	1	0	0	0	0	3	0	0	0	0	0	0	0	1	0
Neglect	10	1	4	2	0	15	2	4	0	5	11	3	3	3	4
Communic. with clients	6	0	3	1	0	8	1	3	0	4	7	3	3	3	3
Comm. with third parties	1	0	0	0	0						1	0	1	2	0
Ex-parte communications						1	1	0	0	0					
Communications w/BPR	3	0	1	1	0	7	2	2	0	1	4	4	0	3	0
General conflicts of interest	1	0	1	1	0	1	0	1	0	1	2	1	1	2	1
Conflicts from fin. or bus.	1	0	0	0	0	1	0	1	0	1	1	0	0	0	1
Fees	0	0	1	0	0	1	1	3	0	5	3	1	2	1	0
Misrepresentation and fraud	7	1	5	1	3	6	2	3	0	5	6	0	1	4	3
Trust funds	1	0	2	3	4	2	1	6	1	7	5	0	1	3	4
Return of files	1	0	1	0	0	2	0	2	0	2	2	2	0	1	2
Assist. unauth. practice	0	0	0	0	1	2	1	1	1	2	0	1	0	1	0
Fighting and violence						0	1	0	0	0	1	1	0	0	0
Sexual harassment						1	0	0	0	0	0	0	1	1	1
Criminal convictions	0	0	4	1	2	1	1	1	1	7	0	1	0	2	2
Contemptuous activity	4	0	1	0	0	4	2	1	1	0	4	0	0	2	1
Withdrawal from repr.	1	0	0	0	0	1	0	0	0	0	0	1	0	0	0
Alcoholism and drugs	0	0	0	0	1						1	2	0	0	0
Mitigating factors	1	2	1	0	0	4	4	1	2	1	4	0	0	1	0
Aggravating factors	1	1	0	0	1	1	2	2	0	4	4	1	1	1	4
Probation	0	0	1	0	0	0	1	4	2	0	0	3	2	3	3
Disregard board decision	1	0	0	0	0						0	1	0	1	1
Relationship with judges											1	0	0	0	0
Total for all categories	41	5	25	10	12	62	22	38	8	48	60	27	16	36	30

Notes:

Level I is public censure.

Level II is suspension for less than one year.

Level III is suspension for one to three years.

Level IV is suspension for longer than three years.

Level V is disbarment.

Blank lines indicate no cases in that category for that year.

Duplicates exist for lawyers cited in multiple categories.

As mentioned above, one of the four factors the sanctioning body considers is the existence of aggravating or mitigating factors. Mitigating factors may justify a reduction in the degree of discipline to be imposed. An infraction that will normally invoke public censure may be assessed a private reprimand if mitigating factors are present. Examples of these factors listed by the ABA include absence of a prior record, absence of a selfish motive, timely good faith effort to rectify consequences, cooperative attitude toward disciplinary board, interim rehabilitation, character or reputation, and remorse. According to ABA standards, private reprimands are appropriate in cases of minor misconduct; when there is little or no injury to a client, the public, the legal system, or the profession; and when there is little likelihood of repetition by the lawyer.

The auditor reviewed summaries of all private reprimands issued by the board since 1989. The summaries frequently mention mitigating factors which influenced the disciplinary counsel to recommend a private reprimand when the infraction might normally be worthy of public reprimand. In addition, the auditor performed a detailed review of five case files for details of the factors supporting the private reprimand. Although many of the violations are similar to those in which a public censure is issued, mitigating factors of each case provide support for the private reprimand. Mitigating factors found include the respondent's willingness to cooperate and comply with the board, willingness to participate in corrective programs such as fee dispute or a 12-step program, privacy of the situations, acknowledgement of his or her actions and wrongdoing, and the amount of public contact associated with the type of practice he or she has.

Based on the results of the audit work performed, discipline imposed for similar types of cases appears to be consistent. Private reprimands appear to be issued in appropriate cases and consistent with ABA standards.

2. Examine procedures by which telephone inquiries from members of the public are handled and procedures by which telephone inquiries from lawyers who call the board and/or disciplinary counsel to request advice on a specific professional responsibility issue are handled.

According to the board's December 1999 status report, there were 3,662 telephone inquiries for the 1999 calendar year. Inquiries generally fall into three categories: (1) a concern that is outside the board's responsibility, (2) a desire to register a complaint against an attorney, or (3) a request for ethical advice for a specific situation. If the inquiry falls outside the responsibility of the board, the receptionist may refer the caller to the Nashville Bar Association's free legal advice program or to some other organization that could better assist him or her. If a caller has a complaint or potential complaint against an attorney, the receptionist sends a complaint packet that includes a form to complete and return to the board because all complaints must be in writing. Lawyers who call for advice, unless they ask for a particular disciplinary counsel, are referred to anyone available.

Most inquiries from attorneys are complex. The disciplinary counsel usually explains the general rules of ethics and lets the attorney who called decide on the specific case. A caller may be referred to another disciplinary counsel who has more knowledge of the caller's geographic

area or is working on an investigation of the attorney who is the subject of the caller's concern. Having one person responding to telephone inquiries works well for uniformity. On the other hand, involving all disciplinary counsel draws on a wider range of knowledge and experience and gives all disciplinary counsel experience in providing informal opinions. The chief disciplinary counsel provides informal guidance and each disciplinary counsel learns from experience.

Procedures performed by employees appear to be adequate to address inquiries from the public and from lawyers. However, there are no written procedures governing the appropriate disposition of telephone inquiries. The addition of written policies and procedures would validate current practice and serve to ensure consistent handling of telephone inquiries. The board may also wish to include in the complaint packet sent to callers a list of alternative agencies that may be better equipped to handle the situation.

Board's Response

Disciplinary Counsel will prepare and implement an expanded information packet listing alternative agencies that may be better equipped to address consumer concerns. Written policies and procedures to ensure consistent handling of telephone inquiries and other concerns will be implemented.

3. Determine if adequate case management procedures are in place and are followed. Examine docket control and case management policies to ensure that court deadlines are met and that any board case that is also pending in a court is processed in a timely and efficient manner.

According to board staff, case management information is contained in a dBase database located on a server within the board office. Data entry is performed by one staff person, although all disciplinary counsel and secretaries have read-only access to the database for information. The database includes information on each case handled by board staff, including dates of various activities, code section violated, and discipline imposed. Data is organized by case number and is used to create monthly, quarterly, and annual reports of case status and progress of each disciplinary counsel. Further discussion of these reports is in item 4. The auditor did not find any written case management procedures, but did interview the data entry staff person and observed her enter case data and produce a report.

The chief disciplinary counsel reviews all incoming complaints and has the ability to immediately dismiss those he deems are frivolous. Complaints not dismissed are assigned to a disciplinary counsel and enter the administrative stage. At this time, the database manager records the date for opening the file and the disciplinary counsel assigned. After initial responses are gathered from the complainant and respondent, the disciplinary counsel decides whether to seek the approval of the board or the board chair to begin investigation. When approval is granted, the case enters the investigative stage and that date is recorded. Following investigation, if formal charges are filed the case is assigned a docket number, which becomes the case tracking number. That information and date are added to the database. Each docket number represents

one formal petition filed against a respondent, but is based on all related complaints filed against that respondent. The date of case closure is the end of the administrative stage if no investigation is initiated, or when the final order is filed with the court, in the case of charges filed.

According to the chief disciplinary counsel, staff members are very diligent to meet court deadlines and the audit found no evidence of a missed court deadline. Each disciplinary counsel has a system to monitor court deadlines so they are not missed and a process to retrieve files for review or action. This joint effort by the disciplinary counsel and the secretaries ensures deadlines are met. Based on auditor review, case and docket management procedures are in place and appear to be followed and court deadlines appear to be met. The board may wish to prepare written procedures to validate current practice and ensure consistent case management.

4. Determine if the board has criteria for self-evaluation and regularly performs that activity. Determine if similar complaints are processed within similar time constraints. Also determine procedures regarding assignment of disciplinary counsel to investigate a given complaint.

There are several items used by the board for self-evaluation. Status reports are prepared each month by the database manager showing each disciplinary counsel's activities. These reports reflect for each disciplinary counsel the number of files pending and closed during the month, number of petitions (formal charges) pending and closed during the month, and the number of files and petitions closed during the past year. Also shown is the number of days the matters have been open or pending. Summaries of the monthly status reports are provided to the board and to members of the Supreme Court.

Monthly caseload reports reflect the number of new cases opened, cases pending, and cases closed with dispositions. The reports also note cases under administrative inquiry, cases under investigation, cases with formal charges, and any reinstatements, temporary suspensions, and overdraft notice inquiries. The caseload reports reflect activity for the current month, year to date, and comparisons with the previous year to date. The reports also reflect the total new complaints, total cases resulting in new files, and total cases deemed frivolous. These reports are also provided to the board and to members of the Supreme Court. In addition to these reports, the chief disciplinary counsel performs status reviews with each disciplinary counsel quarterly and each disciplinary counsel prepares update reports of all board-recommended activities to present at the quarterly board meetings. These reports provide procedures and basis for evaluation of complaints processed and for decisions regarding caseload and assignment of complaints.

The board appears to have sufficient procedures and reports for self-evaluation and to monitor and evaluate the operations of the disciplinary counsel. For further discussion of assignment of disciplinary counsel to a case, see item 11. See item 13 for further discussion of processing similar complaints within similar timeframes.

5. To ensure the board's compliance with Rule 21, Section 7, of the Rules of the Tennessee Supreme Court determine procedures to ensure cooperation and communication between the board and the Tennessee Commission on Continuing Education.

An attorney who wants to renew his or her license must pay annual license and registration fees to the board and must meet continuing legal education (CLE) requirements. The 11-member Tennessee Commission on Continuing Legal Education and Specialization was established by the Supreme Court to monitor and operate the CLE program in Tennessee. With certain exceptions, every practicing Tennessee attorney must earn a minimum number of credit hours of CLE each year, and must file an annual report with the commission of credits received. The commission is required to report annually to the Supreme Court the number of attorneys who have reported and complied with the requirements, the number who reported and did not comply, and the number who did not report. The commission maintains a database, accessible by the board, that contains the attorney's CLE and registration (active or inactive) status.

Tennessee Supreme Court Rule 21, Section 7, states that after January 31 of each year, the commission shall report to the Board of Professional Responsibility (the board) those attorneys who have not filed the annual report with the commission or who have filed but have not complied with continuing education requirements. The commission also notifies each attorney that if he or she does not remedy the deficiency within 90 days, his or her license will be suspended. After the 90-day period expires, the commission notifies the board of those attorneys who failed to comply and whose status thereby became "inactive." Through the shared database, the board and the commission determine an attorney's ability to renew his or her license. If the registration field shows "inactive," or the CLE requirements have not been met, the board will not renew the attorney's license. The board registration staff person can change the status on the database to "inactive" for attorneys who do not pay their registration fee.

A new database, the MCLE system, has been installed at the commission and the board is waiting for its part of the system to be installed at its office. In the meantime, the board requires each attorney who wants to renew to provide a letter from the commission showing the attorney met the CLE requirements and his or her status is active. Once a year, the commission sends a list to the board of attorneys who have been suspended for not meeting CLE requirements. In return, the board sends to the commission a list of attorneys whose status became inactive for not paying registration fees.

It appears that the board is in compliance with Rule 21. There appear to be procedures to ensure cooperation and communication between the board and the Tennessee Commission on Continuing Education.

6. To ensure that any judicial determination that a lawyer has willfully refused to comply with a court order is received immediately by the board, examine procedures in place to ensure that the court immediately notifies the board of such a refusal.

Supreme Court Rule 9, Section 32, states that a court order adjudicating willful noncompliance "may be filed forthwith with the clerk of the Supreme Court." Upon receipt by

the Supreme Court of said order, “the Supreme Court will enter an order immediately suspending the lawyer from the practice of law.” Further discipline depends on the outcome of the ensuing investigation. According to the chief disciplinary counsel, there has been only one instance where the board was notified of an attorney who willfully did not comply with a court order (e.g., pay child support). Alternative procedures provide some assurance that noncompliance is not occurring outside the board’s knowledge. For example, the Court of Criminal Appeals has implemented a policy of uniformly and routinely notifying the board whenever an attorney is cited or held in contempt for non-compliance with orders and procedures established by the court. In addition, the board subscribes to a statewide clipping service to aid in receiving information when attorneys refuse to comply with court orders.

There appear to be procedures in place to receive notification of a lawyer who willfully refuses to comply with a court order. However, the Supreme Court may wish to amend its rules to require judges and court clerks to report noncompliance to the board.

Board’s Response

The board will address this issue at its quarterly meeting in June, to consider the exact text of a recommended amendment to Rule 9, requiring judges to report non-compliance with court orders and serious crime convictions.

7. To ensure that the board immediately suspends an attorney’s license when the attorney is convicted of a felony or other serious crime in any jurisdiction, examine current procedures designed to ensure the board’s immediate receipt of such information.

Supreme Court Rule 9, Section 14.7, states, “The clerk of any court in this state in which an attorney is convicted of a crime shall within ten days of said conviction transmit a certificate to this court.” The court shall enter an order immediately suspending the attorney. When an attorney has been convicted of a serious crime, either the district attorney or the prosecuting attorney should call the board, as both have an ethical duty to report. In most cases, according to the chief disciplinary counsel, the board already has a file open on the attorney and is tracking the case. When notified, the board files a formal petition to suspend the attorney’s license.

The auditor reviewed the board’s docket book from October 1996 to February 2000. The docket book contains the date the petition was filed by the board (following knowledge of a conviction) and the date the attorney was suspended. The date of the attorney’s conviction of the felony or other serious crime is in the case file. Over that three-and-a-half-year period there were 11 notifications of felony convictions, each followed by suspension of the attorney. The auditor reviewed files of 7 of the 11 cases to determine time from conviction to petition. This system appeared to work in all but one case. In that case, neither the judge, the court clerk, the assistant district attorney, the respondent, nor respondent’s counsel reported the conviction. An anonymous caller on the ethics hotline reported the conviction 19 months after it occurred. Board staff could not explain the late notification, but the attorney’s license was suspended within seven days of the board’s knowledge of the conviction. For the other six (of seven) case files reviewed, the

average time from the conviction to filing the petition by the board was 14 days. For all 11 cases, the time from the board filing the petition to suspension of the attorney's license was an average of 8.5 days, with 9 of 11 cases taking less time than that average. In one case, the time was 12 days and in the other, the time was 42 days because of a request by a Supreme Court justice for clarification of an issue.

It appears that the board promptly suspends an attorney when it receives information pertaining to the attorney's conviction of a felony or other serious crime. In all but one case that the board is aware of, the board was promptly notified and immediately suspended an attorney's license when the attorney was convicted of a felony or other serious crime. The board may wish to consider suggesting that the Supreme Court amend Rule 9, Section 14.7, to also require the judge to report the conviction of an attorney.

Board's Response

The board will address this issue at its quarterly meeting in June, to consider the exact text of a recommended amendment to Rule 9, requiring judges to report non-compliance with court orders and serious crime convictions.

8. Examine the process by which the board notifies other jurisdictions when a Tennessee-licensed attorney (who holds an additional license to practice law in another jurisdiction) is convicted of a felony or other serious crime. Also review the process whereby the board is informed of an attorney's out-of-state conviction of a felony or other serious crime.

The board uses the American Bar Association National Lawyer Regulatory Data Bank for the receipt and distribution of nationwide information relating to attorneys who are convicted of serious crimes in other jurisdictions. The data bank originated in 1968 as a voluntary means to assist with reciprocal discipline between states. Virtually all states participate in the database and the information is current. According to the director of the nationwide database, Tennessee is one of the better reporting states. States are urged to confirm information received from the data bank by contacting the originating jurisdiction. In addition, board staff communicate with the other jurisdiction(s) directly and rely on the other states to notify them.

The board appears to properly notify other jurisdictions whenever a Tennessee-licensed attorney is convicted of a felony or other serious crime and also has a process to become informed of a Tennessee attorney's out-of-state conviction of a felony or other serious crime.

9. Determine and examine procedures whereby complainants whose complaints are resolved in favor of the respondent-lawyer may challenge the board's decision.

The chief disciplinary counsel has implemented a procedure for complainants to seek review of the disposition of complaints. He receives all requests for reconsideration and reviews

the entire file to determine whether the matter should remain closed or be reactivated for further review. If the matter is reactivated, the complaint is assigned to a different disciplinary counsel for a full inquiry, development of additional information, and full reconsideration. The complainant is notified that the case has been reactivated. There are no limits as to the time or number of times a complaint may be reactivated.

During 1999, 1,192 complaints were dismissed after inquiry or investigation. In that same period, 54 of those cases (4.5%) were reactivated for additional review, inquiry, or investigation (compared to only 60 cases for the 20-month period prior to May 1999). Reactivated case decisions are included in the total dispositions along with cases that are not reactivated. The auditor reviewed the decisions of the 60 reactivated cases for the 20-month period ended May 1999, to compare the outcome of the reactivated case versus the original decision. Of the 60 cases originally dismissed, 58 (97%) were also dismissed after reactivation. The other two cases resulted in private reprimands following reactivation. There appears to be a procedure, the procedure is utilized, and the board’s initial decision is upheld in almost all cases.

10. Examine current procedures by which a new complaint is processed and determine the extent to which form letters are used to answer complaints involving different issues.

When a complaint is received in the board’s office, the receptionist date-stamps the form and forwards it to the chief disciplinary counsel. The chief disciplinary counsel assigns the case and notifies the case management secretary to open a case file and send acknowledgement letters to the complainant and the respondent. Acknowledgment letters are dated form letters produced from the case information entered in the database and are signed by the chief disciplinary counsel. One letter informs the complainant that the complaint was received, that inquiry will be made, and that confidentiality must be maintained. The letter to the respondent attorney requests a statement within ten days explaining his or her actions relating to the complaint.

The auditor selected a sample of 50 complaints received during the period 2/1/99 through 2/2/00 to determine the number of business days between receipt of the complaint and the board’s acknowledgement letters. For the 50 complaints, the number of days ranged from one to 17, although in 90% of the cases reviewed, the number was less than seven business days. The two cases of excessive days were during the case manager’s vacation and while she was training another employee. The average response time was 3.8 days from the day the complaint was received until the acknowledgment letter was sent out.

Table 3. Response Time

Time to respond	<u>1-3 days</u>	<u>4-6 days</u>	<u>7-10 days</u>	<u>> 10 days</u>
Number of complaints	27	18	3	2

Other form letters are used for notification of routine information such as an attorney’s suspension, placement on disability inactive status, disbarment, dismissal, public discipline imposed and rule(s) violated, that private discipline was imposed and rule(s) violated, and

notification that a matter is not within the board's jurisdiction. In this last case, the appropriate avenue and contact person for follow-up are included in the letter.

Based on audit work performed, initial complaints received by the board appear to be promptly and accurately acknowledged in writing by using form letters for all complaint types. In addition, form letters are used when appropriate to more efficiently handle the volume of notifications that must take place as part of complaint processing.

11. Determine procedures in place to ensure complaints received by the board are promptly and objectively investigated and resolved. Also determine procedures and criteria used to assign cases and the process by which a disciplinary counsel may be recused.

The previous item (#10) illustrates how promptly the board addresses new complaints and item #4 discusses how the board monitors active cases. However, the number of complaints received and the time to close cases are both increasing. As shown in Table 4, below, over the two year period from 1997 to 1999, the number of files closed by disciplinary counsel increased from 1,302 to 1,461 (12%), but the average number of days to close a file increased from 171 to 223 (30%). The chief disciplinary counsel attributes this to an increasingly litigious attitude on the part of complainants and their desire to have all areas of a complaint addressed. Complainants do not seem to accept board and counsel decisions as readily as in the past. This is also reflected in an increase in reactivated cases. (See item #9.)

Table 4. Case Closure Time

<i>For the month of:</i>	Dec. 1997		Dec. 1998		Dec. 1999	
	<u>Number</u>	<u>Avg. days</u>	<u>Number</u>	<u>Avg. days</u>	<u>Number</u>	<u>Avg. days</u>
Files pending	756	231	977	217	970	244
Files closed	63	143	61	174	102	190
Petitions pending	106	513	83	562	88	533
Petitions closed	4	369	5	321	6	357
Overdrafts pending	15	68	12	96	10	18
Overdrafts closed	10	40	5	17	7	27
<i>Prior 12 months activity</i>						
Files closed	1,302	171	1,400	202	1,461	223
Petitions closed	86	448	102	433	52	546
Overdrafts closed	175	32	176	31	117	38

In response to this trend, the board is planning to initiate in 2001 a Client Assistance Program, a consumer-focused intake system designed to address and mediate clients' concerns of minor problems as quickly as possible, recognizing that every matter received should not result in the opening of a complaint file. Instead, the program will seek a more effective, less bureaucratic,

resolution without opening a complaint file.

A central intake system will be developed to allow concerned individuals to speak with an experienced attorney trained in dispute resolution and interpersonal communication, and who is knowledgeable about the disciplinary process. Intake personnel will listen, gather information, inform, and, as appropriate, attempt to resolve concerns between clients and attorneys when minor problems exist. More serious complaints will result in opening complaint files. If the client's concern is a communication problem or other concern that does not rise to the level of an ethical complaint, attempts will be made to resolve the matter by mediation to the satisfaction of the client through phone calls and letters. If there is an obvious ethical violation, or if the individual specifically asks to file an ethics complaint, assistance will be given to implement the complaint.

Currently, many complaints that would be resolved by the Client Assistance Program result in opening a file, inquiring with attorneys, complainants spending considerable time and effort providing information, and ending with dismissal. The proposed program contemplates consumers and attorneys having other methods of resolving disputes and problems that are better solved outside the disciplinary system.

Experiences from other jurisdictions indicate that approximately one-third of the complaints can be resolved with the Client Assistance Program. With one-third fewer files opened, disciplinary counsel may concentrate efforts on complaints that deserve attention and potential discipline. The system will be structured to either (i) assist clients in filing ethics complaints, (ii) mediate clients' concerns to their satisfaction, and/or (iii) direct inquiries to appropriate authorities or agencies (e.g., fee arbitration, lawyer referral, legal aid). All complaints will be handled in a user-friendly manner with same-day or next-day service. If concerns that are to be mediated cannot be resolved in 10 days, then the matter is to be referred to disciplinary counsel for opening a complaint file and disciplinary inquiry.

In the area of objectivity, the chief disciplinary counsel will recuse a disciplinary counsel from a case when the counsel's impartiality might be reasonably questioned. If there is no known reason to question the counsel's objectivity but either the complainant or respondent attorney questions the counsel's objectivity, then questions would be resolved by recusal to assure no appearance of impropriety. In the history of the board, there was only one instance where the respondent attorney insisted on recusal, to dictate who handled the complaint. This request was refused.

The chief disciplinary counsel reviews each complaint received, decides whether to open a case or dismiss the complaint, and then determines which disciplinary counsel will be assigned the case. Complaint cases are usually assigned to a disciplinary counsel within four days of receipt. The chief disciplinary counsel considers many factors to determine which disciplinary counsel receives a particular complaint. Some of these factors are:

- nature of the complaint,
- geographic location,
- complexity of complaint,
- level and intensity of current caseloads,

- experience of the disciplinary counsel,
- level of skill of the disciplinary counsel,
- level of CLE seminar activities,
- level of bar-related activities,
- special expertise in various areas,
- potential conflicts,
- level of ethics inquiry activities, and
- other administrative assignments.

Although the average time required to resolve complaints is increasing, procedures appear to be in place or in the planning stage to encourage prompt, impartial investigation and disposition of complaints. The Client Assistance Program will be an integral part of this improvement. Logical criteria are used to assign cases to the disciplinary counsel to attempt to achieve even workloads. The process by which disciplinary counsel may be recused from a case or investigation appears adequate to ensure objectivity.

Board's Response

On December 10, 1999, at its quarterly meeting, the board considered implementing the Client Assistance Program described on page 14 of the audit report. Detailed information about the program was provided to Justice Birch, the Court's liaison, at the December meeting. Implementation of the program will be on the board's "open forum" agenda in June for further discussion, with members of the Court being informed of the discussion and hopefully present. The board is hopeful the Court will endorse the concept for implementation in 2001.

12. To ensure that expenses are reimbursed at the appropriate State rate, examine rates of reimbursement and compare to any standards.

Employees of the board are not state employees. Board policy 2.5, "Travel Allowance and Expense" allows for mileage reimbursement and states that "Expenses for meals, lodging, and other such expenses are reimbursed at actual cost, provided they are necessary and reasonable." The board requires a receipt for an amount greater than \$15 and uses the IRS rate for mileage reimbursement, presently 32.5 cents/mile. The majority of reimbursements are for one-day travel, usually extending beyond the normal workday hours. A reimbursed meal is allowed for travel on those days. Reimbursement for meals during one-day travel during normal working hours is not allowed.

Generally, disciplinary counsel incur travel expenses to attend hearings of responding attorneys. The audit compared the board reimbursement rates for travel expenses to the state rates published in the State of Tennessee Comprehensive Travel Regulations. These amounts are only for comparison because state travel regulations apply only to reimbursements to state employees. The state per diem rate for meals and incidentals is \$30/day, and hotel reimbursement is \$60/night for those counties where disciplinary counsel traveled. The state mileage rate was 26 cents/mile before 7/1/99 and 28 cents/mile after.

Travel expenses for board staff for 1999 were \$17,571, less than 3% of the board's total expenses. The state would have paid \$16,416, a difference of \$1,155 (6.6%). Of the difference, \$982 (85%) is because of the different mileage reimbursement. The board paid \$6,011 in mileage

reimbursement, while the state would have paid \$5,029.

Based on a review of the travel claims for 1999, the difference between the rates of reimbursement for the board and the state is not material.

13. Examine whether disciplinary counsel resolve similar complaints within similar time periods.

This statement assumes that complaints of a similar nature exist and can be identified. Based on review of case information for issue #1, this information is difficult to quantify and compare. Every case is unique and has its own fact pattern so at the case level, or even at the infraction level, identification and comparison of similar complaints is difficult. For example, in the year ended October 1998, there were 24 cases of discipline imposed for “Neglect.” Of those 24, 11 were public censures, 3 were suspensions less than one year, 3 were suspensions of one to three years, 3 were suspensions for more than three years, and in 4 cases the attorney was disbarred. For the infraction of “Misrepresentation and fraud” there were 6 public censures, 1 suspension for one to three years, 4 suspensions for more than three years, and in 3 cases the attorney was disbarred. Factors that differentiate cases are further discussed in item 1. The case resolution time of each disciplinary counsel is presented in Table 5 below.

There is a wide range of average days to completion across the disciplinary counsel because of different experience levels, different work habits, and variation in case complexity. There is also a wide range of number of files closed. Because of the variation in fact patterns of cases and the individuality of disciplinary counsel, determination of resolution times of similar complaints cannot be determined.

Table 5. Case Resolution by Disciplinary Counsel for the Year Ended

	December 1997		December 1998		December 1999	
	Cases	Avg. days	Cases	Avg. days	Cases	Avg. days
Disciplinary Counsel #1	197	144	248	110	282	119
Disciplinary Counsel #2	165	164	211	240	286	277
Disciplinary Counsel #3	233	127	228	149	194	160
Disciplinary Counsel #4	159	246	163	290	115	312
Disciplinary Counsel #5	182	258	137	367	192	341
Disciplinary Counsel #6	189	134	218	154	266	202
Disciplinary Counsel #7	175	150	195	200	N/A	N/A
Average	186	175	200	216	223	235

Note: Disciplinary counsel #7 discontinued employment with the board during 1999.

14. Determine whether workloads among individual disciplinary counsel are comparable and that no one disciplinary counsel maintains a consistently higher workload relative to another disciplinary counsel.

The chief disciplinary counsel assigns cases and makes adjustments as necessary. Monthly and quarterly status reports compare cases carried, cases closed, petitions filed, and petitions closed. The auditor derived a means of comparison of workloads of the disciplinary counsel for the 12 months ended January 2000 and for the month of January 2000, based on monthly status reports. The comparative number considers the average number of cases and petitions carried and the total number of cases and petitions closed. The number derived for each disciplinary counsel was compared to the others to determine equity. The comparison results are in Tables 6 and 7. The values for the month of January 2000 show the results of actions taken by the chief disciplinary counsel during the prior months to better distribute workload.

Table 6. Workload Equity, Year Ended January 2000

	Files		Petitions		Workload Percent
	Pending	Closed	Pending	Closed	
Disciplinary Counsel #1	2,188	304	116	6	20%
Disciplinary Counsel #2	1,990	212	150	2	15%
Disciplinary Counsel #3	1,565	114	152	14	11%
Disciplinary Counsel #4	2,704	215	77	4	17%
Disciplinary Counsel #5	2,607	286	274	16	21%
Disciplinary Counsel #6	994	299	196	14	16%
Average	2,008	238	161	9	

Note: Disciplinary counsel #7 left the board during 1999 and did not have comparable data.

Table 7. Workload Equity, Month of January 2000

	Files		Petitions		Workload Percent
	Pending	Closed	Pending	Closed	
Disciplinary Counsel #1	146	18	9	4	16%
Disciplinary Counsel #2	150	19	15	0	16%
Disciplinary Counsel #3	180	9	11	2	18%
Disciplinary Counsel #4	193	24	6	0	20%
Disciplinary Counsel #5	178	14	25	1	19%
Disciplinary Counsel #6	77	25	18	2	11%
Average	154	18	14	1.5	17%

Note: Disciplinary counsel #7 left the board during 1999 and did not have comparable data.

The reason for the 11% on Disciplinary Counsel #3 (Table 6) is because of an unusually low number of cases carried during the first half of the year. The chief disciplinary counsel increased the counsel's caseload during the second six months of 1999 (prior to the audit) to

achieve greater equity with the other disciplinary counsel. This is demonstrated in the January workload figures in Table 7. On the other hand, Disciplinary Counsel #6 reduced her workload during 1999 by closing a large number of cases and petitions over the 12 months. The counsel has communicated with the chief disciplinary counsel regarding the reduced workload and he is expected to assign more cases to her in the upcoming months.

Analysis demonstrated that workloads are generally equitable among the disciplinary counsel. The analysis does not consider the complexity of the cases or the likely outcome of the complaint, both of which, according to the chief disciplinary counsel, he assesses on first reading of the complaint and uses to help achieve equity. Procedures to balance workloads among the disciplinary counsel are in place and appear to work successfully. There does not appear to be one disciplinary counsel who maintains a consistently higher workload relative to the other disciplinary counsel.

15. To ensure that complaints against disciplinary counsel are fairly and objectively considered, examine processes and procedures by which complaints against disciplinary counsel are currently processed by the board, process(es) by which a particular attorney is assigned to investigate complaints lodged against disciplinary counsel, and criteria considered when deciding who should investigate claims against disciplinary counsel.

According to Section 9 of Supreme Court Rule 9, a complaint against a disciplinary counsel is submitted directly to the board. Board policy 1.14 states that the complaint shall be immediately forwarded to the chairman of the board. The board chairman determines whether to dismiss or entertain the complaint. If the complaint is entertained, the chairman allows the respondent to state his position with respect to the allegations. The chairman then determines whether an investigation is needed or whether the complaint should be dismissed. If an investigation is initiated, the chairman selects the investigating attorney, who may or may not be a board staff member. There are no written criteria for the selection of the attorney. At the conclusion of the investigation, the information is presented to the chair, who recommends dismissal, private informal admonition, or prosecution of formal charges. This decision must be reviewed and approved by the board member from the respondent's disciplinary district or by the board if formal charges are recommended. Over the 24-year history of the board, there have been a total of 15 complaints filed against disciplinary counsel. No complaints were filed during 1998, two during 1999, and two in the year 2000. Of the 15 complaints, 11 were dismissed as frivolous, two were administrative dismissals prior to investigation (1992, 1999), and the other two were dismissed following investigation (1985, 1996). No formal charges have ever been filed against a disciplinary counsel.

Processes and procedures for investigating complaints against disciplinary counsel appear proper, although the low number of complaints and investigations and lack of formal proceedings make analysis difficult. There do not appear to be written criteria for the board chair to use to designate the attorney to investigate claims. However, the avenue through the board chair appears to encourage fair and objective consideration.

16. Ensure that disciplinary counsel are properly supervised while conducting investigations of complaints against a licensed attorney. Examine processes and procedures currently in place to ensure that disciplinary counsel are reporting on a regular basis to the chief disciplinary counsel or a board member and that a supervisor is regularly apprised of the progress of a given complaint.

There are several ways that the chief disciplinary counsel supervises the work of the disciplinary counsel. Each disciplinary counsel receives a monthly Status Report of matters assigned and number of days pending. All disciplinary counsel prepare their own quarterly Status Review reports and submit them to the chief disciplinary counsel. This report identifies matters needing priority and action to close each, with a suggested completion date. The chief disciplinary counsel consults with each disciplinary counsel and performs follow-up work to ensure the disciplinary counsel meets the deadlines. Each disciplinary counsel prepares a Quarterly Board Report and presents it at the board meeting. This gives the status and activity of all pending formal charges or other board actions authorized by the board. The chief disciplinary counsel also consults with staff on ways to improve their efficiency when cases are taking too long to resolve.

It appears that the disciplinary counsel are reporting on a regular basis to both the chief disciplinary counsel and to the board members on their work and that the disciplinary counsel are adequately supervised.

17. Determine whether salaries paid to disciplinary counsel are similar to or competitive with the salaries of other state-employed attorneys in similar positions.

The board's disciplinary counsel are not state employees, as noted above in item 12. The board sets disciplinary counsel's salaries comparable to the salary scales of assistant district attorneys general and district public defenders. By statute, the salaries of district public defenders are equal to the salaries for district attorneys general. As of January 1, 1999, the starting salary for public defenders was \$28,421, and after five years the salary was \$42,620. Pursuant to the board's goal to follow typical law firm/private enterprise models, the board maintains a policy that individual salaries are not known to other staff members. Comparison of salaries of disciplinary counsel to that of public defenders and district attorneys is subject to variance because in many instances district attorneys and public defenders are employed without being given full credit for each year licensed, as is the case with disciplinary counsel. When the board hires a new attorney, the board gives credit for a certain number of years licensed, not necessarily the actual number of years. Then the board looks at the rate at which attorneys with similar experience and credited years are hired in the private industry. The board prefers a salary derived in this manner rather than a preset entry level or minimum salary for the disciplinary counsel positions. The board also gives merit raises based on criteria such as the number of cases closed, the attorney's competence and ability to deal with co-workers and complainants, the attorney's willingness to take on work, and his or her eagerness to learn.

The audit compared the total actual salaries of all disciplinary counsel (not including the chief disciplinary counsel) to salaries (as set forth in statute) of an equal number of public defenders with similar years of experience. See Table 8.

Table 8. Salary Comparison

	<u>Disciplinary Counsel</u>	<u>Public Defenders</u>	<u>Difference</u>	<u>Percent of Public Defenders Salaries</u>
Total Salaries	\$396,547	\$460,884	\$64,337	86.0%

The comparison showed the total salaries of the disciplinary counsel (not including the chief disciplinary counsel) were 86% of the total salaries of public defenders with similar years of service. However, it should be noted that this percentage calculation is based on public defenders' salaries as set forth in statute, which may not always reflect individual public defender's actual salaries.

18. Examine rates assessed by disciplinary counsel and any differences in the rate charged for one service as opposed to another. Compare with rates assessed by other similarly employed state lawyers. Determine whether rates are consistent, specifically detailed, and justified.

According to Rule 9, Section 24.3, of the Rules of the Tennessee Supreme Court, in the event a judgment results from formal proceedings, "the Board shall assess against the respondent attorney the costs of the proceedings, including court reporters' expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing committee in the hearing of the cause, and the hourly charge of disciplinary counsel in investigating and prosecuting the matter." The rule sets the rates at \$30/hour for investigative time incurred prior to the filing of formal proceedings and \$80/hour in connection with formal proceedings. All activities performed after the formal proceedings have been instigated are charged at the \$80/hour rate. Disciplinary counsel keep detailed records on the activities related to a case and input these into a computer program, Timeslips, which is used to bill the respondent attorney.

The hourly rate used depends on whether or not a complaint will result in formal proceedings against the respondent attorney. The chief disciplinary counsel reviews all new complaints and prepares a "Summary of Complaints" for the secretary to enter into Timeslips. The program is designed to automatically bill \$30 an hour for all activities, although only those cases that result in disciplinary action will actually be billed. If a complaint is not dismissed and formal charges are filed, a docket number is assigned to the complaint and includes all similar complaints filed against the responding attorney. Most dockets have multiple complaint files. The rate for each complaint file under a docket number is assessed by Timeslips at \$80/hour. After disciplinary action has been taken, Timeslips creates a bill from all the file numbers under the docket number. The following are added to the bill: charges for room rental fees for the hearing, printing and press release, subpoena fees, research fees by banks, deposition fees for expert witnesses, fees for witness travel, and the fees for the court reporter.

The auditor reviewed 14 dockets and related billing forms from the last three years from the various categories: active files, unpaid disciplinary fee files, reinstatements, and attorneys on disability inactive status. For all dockets reviewed, rates appear to have been applied properly and only allowable charges for related fees were added to the bills. All charges against the respondent attorney appear to be specifically detailed, justifiable, and consistent from one case to another.

The audit compared rates assessed by the board with rates assessed by the Administrative Procedures Division of the Department of State. According to State Audit legal staff, this is the best agency for comparison. The Attorney General's Office bills for expenses related to representation but does not bill for hours worked. The Administrative Procedures Division does not do investigative work, but formal proceedings are billed at \$40/hour for state agencies and hearings, and \$80/hour for a hearing against an outside (e.g., metro) agency. It appears that the board is assessing fees at a rate comparable with the state.