

# **New Hampshire Supreme Court**

## **Attorney Discipline System**



## **2013 Annual Report**

## I. OVERVIEW

In 2013, the Attorney Discipline Office (ADO) consisted of four attorneys, one staff auditor who is a Certified Public Accountant, one administrator, and three legal assistants. Additionally, 32 attorney volunteers and 16 lay-member volunteers participated in the three committees that process attorney discipline complaints: Complaint Screening Committee, Hearings Committee and Professional Conduct Committee.

## II. ATTORNEY DISCIPLINE OFFICE OPERATIONS

### A. Investigations and Informal Proceedings

In March of 2013, Thomas V. Trevethick retired from his position as General Counsel, and Assistant General Counsel Janet F. DeVito was appointed General Counsel. James L. Kruse left his part time position as Assistant Disciplinary Counsel in April, and became the part time Deputy General Counsel. They are referred to collectively as General Counsel in this report.

Cases at the ADO often start with a telephone inquiry from a member of the public. General Counsel field calls from people who are unhappy in some way with their own attorney or the opposing party's attorney. If asked, the ADO mails them the instructions for filing the grievance; the form to be completed by the person who takes the grievant's oath; and the form on which the grievant certifies that a complete copy of the grievance and any enclosures has been sent to the attorney who is the subject of the grievance.

Some grievances arrive from people who have found the forms on the ADO website ([www.nhattyreg.org](http://www.nhattyreg.org)), which was launched in 2010. Others are referrals from attorneys who are complying with their obligation under Rule of Professional Conduct (Rule) 8.3, or from judges and marital masters who believe they must bring attorney behavior to our attention. In all, we received 209 grievances and referrals during 2013, a slight increase from 2012.

General Counsel review the grievances to determine if they comply with the minimum requirements for docketing, which broadly include being signed under oath, involving a New Hampshire lawyer or one who offers legal services in New Hampshire, and occurring within two years of receipt of the grievance. The usual practice is then to ask the attorney to provide a voluntary response, so that we better understand what occurred from both perspectives. This preliminary investigation has, over the years, helped eliminate unfounded grievances, so that our time can be spent more effectively on those grievances with merit. After reviewing the 209 grievances received in 2013, and the 24 grievances still pending from 2012, 46 matters were docketed for further investigation. Of the remaining grievances received and pending, decisions were made to non-docket 132 of them. Pursuant to Supreme Court Rule (Sup. Ct. R.) 37A(IV)(a)(2), the non-docketed grievances do not appear on the attorneys' discipline records and are not indexed. After two years, they are destroyed.

After a case is docketed, the grievances are called complaints. The respondent attorney is now required to respond to the complaint, and the complainant may, and usually does, submit

further comments. General Counsel's investigation includes meetings with the complainants and the respondent attorneys; reviewing pleadings, depositions and correspondence; listening to audio recordings of court hearings; and gathering other information that is pertinent to the conduct in question. At the conclusion of the investigation, General Counsel writes a report (which is not public) to the Complaint Screening Committee (CSC), summarizing the investigation. Pursuant to Sup. Ct. R. 37A(II)(a)(6), General Counsel can dismiss a docketed matter without reporting to the CSC. In 2013, General Counsel dismissed seven matters outright, and dismissed one other with a warning.

The **Complaint Screening Committee** is comprised of nine members: five attorneys and four lay members, appointed by the Supreme Court. Attorney Ronna F. Wise was appointed Chair of the CSC in 2013. This Committee met 11 times in 2013. In addition a temporary Complaint Screening Committee was appointed to handle matters for which there was not a quorum, and met three times during 2013.

The CSC considers and acts on requests for reconsideration of matters not docketed by General Counsel. Of the 132 matters non-docketed in 2013, and 11 non-docketed in late 2012, the CSC reviewed 44 requests to reconsider non-dockets. The Committee affirmed 43 of those decisions, and instructed General Counsel to docket one of them. The CSC also considers the results of investigations by General Counsel and dismisses docketed complaints with or without warnings, diverts attorneys out of the attorney discipline system when appropriate, and refers complaints to Disciplinary Counsel for further action when there is a reasonable likelihood that professional misconduct could be proven by clear and convincing evidence. The CSC referred 24 cases to Disciplinary Counsel for further action, dismissed 10 docketed cases, and dismissed one case with a warning. In addition, in 2013, the CSC reviewed one request to reconsider a General Counsel dismissal and five requests to reconsider its own dismissals, all of which were denied.

## B. Formal Proceedings

Sara S. Greene continued in the position of Disciplinary Counsel. As noted earlier, James L. Kruse moved to the position of part time Deputy General Counsel. Elizabeth M. Murphy began as full time Assistant Disciplinary Counsel in May of 2013. They are referred to collectively in this report as Disciplinary Counsel. When matters are referred to Disciplinary Counsel, the files are reviewed to determine what action should be taken, including an assessment of whether the case can go forward to prosecution. As part of the assessment, they meet with Respondents, their counsel, witnesses (including the complainants), and NH Lawyers Assistance Program (NHLAP) representatives if issues of mental health or substance abuse are alleged.

Each case is carefully considered by Disciplinary Counsel to determine what best serves the goals of the discipline process. Of the matters that were referred to Disciplinary Counsel in 2013, and matters that were pending from prior years, Disciplinary Counsel issued four Notices of Charges against three attorneys. Pursuant to S. Ct. R. 37A(III)(c)(5), Respondents and Disciplinary Counsel can stipulate to all or part of the findings and sanction. In five cases involving four attorneys, the Respondents signed stipulations as to facts, rules and sanction prior

to the issuance of a Notice of Charges, and the cases were considered directly by the Professional Conduct Committee (PCC) instead of proceeding to a hearing. Disciplinary Counsel also filed two motions to dismiss and five motions to dismiss with a warning. Diversion was requested in one case and was approved by the PCC. One matter was closed without prejudice after the Supreme Court granted the respondent's request to resign.

Disciplinary Counsel also participated in four depositions, seven pre-hearing conferences, four evidentiary hearings, three sanction hearings, and three oral arguments before the PCC. In addition they filed three petitions with the Supreme Court as directed by the PCC, three briefs on behalf of the PCC, and presented oral argument at the Supreme Court in three cases. They also filed one motion for interim suspension and one petition to vacate an interim suspension.

In the event a case is not resolved by a motion to dismiss or a stipulation, Disciplinary Counsel prepares a Notice of Charges and requests the appointment of a Hearing Panel, chosen from the members of the Hearings Committee. In 2013, the **Hearings Committee** was comprised of 19 attorney members and eight lay members. The Hearings Committee Chair, Attorney James T. Boffetti, appoints members to serve on hearing panels for each matter. Although the hearing panel is required to consist of at least two attorneys and one non-attorney, panels are generally comprised of three attorney members and two lay members. After hearing evidence or reviewing stipulations, Hearing Panels make findings of fact by clear and convincing evidence, rulings of law, and recommendations as to sanction, in written reports to the PCC. Those reports are public.

The Hearings Committee Chair appointed six hearing panels involving nine cases in 2013, a slight increase from 2012. There were seven pre-hearing conferences. Two matters went to a hearing on the merits, one of which was for two days, and then had separate sanction hearings following preliminary findings of misconduct. In two matters, only hearings on sanction were held. Hearings were held at the Administrative Office of the Courts and the Attorney Discipline Office. The ADO appreciates the cooperation of the court system in providing venues for our hearings.

Following a Hearing Panel report, or to resolve motions to dismiss, the outcome of a case is the responsibility of the **Professional Conduct Committee (PCC)**, subject to approval by the Supreme Court as described below. The PCC is comprised of eight attorney members and four lay members, and met eight times in 2013. By Supreme Court Rule, the New Hampshire Bar Association Vice President serves on the PCC during his or her term as Vice President. Attorney Lisa Wellman-Ally completed her year on the Committee on July 31, 2013. Incoming Vice President Mary E. Tenn was appointed to her term on the Committee as of August 1, 2013. David M. Rothstein was appointed Committee Chair beginning January 1, 2013, following Margaret H. Nelson's retirement after serving on the Committee since 1996, the last 10 years of which she was Committee Chair. Attorney members David N. Cole, Thomas P. Connair and James R. Martin left the Committee after serving 12, 11 and 10 years respectively, and lay member Toni M. Gray left the Committee after 12 years, all but one serving as Vice-Chair of the Committee.

The PCC considers Hearing Panel reports and the entire record in disciplinary matters. In most cases, it hears oral arguments as to whether the Hearing Panel's recommendations should be affirmed, and determines whether there is clear and convincing evidence of violations of the Rules of Professional Conduct. The PCC heard oral argument in three cases in 2013. The PCC also has the power and authority to accept diversion agreements, issue protective orders, dismiss matters with or without a warning, and issue reprimands, public censures or suspensions not exceeding six months. In addition, the PCC is the administrative arm of the discipline system responsible, *inter alia*, for the hiring of the ADO professional staff and the creation of the budget.

When the PCC determines that a sanction greater than a six months suspension is warranted, it directs Disciplinary Counsel to file a Petition with the Supreme Court. Following acceptance by the Court, Disciplinary Counsel writes the brief and appears for oral argument. During 2013, Disciplinary Counsel filed one petition for a two-year suspension, one for a three-year suspension and one for disbarment. Disciplinary Counsel also submitted a Motion for Summary Affirmance in regard to an appeal filed by a respondent. Three briefs were filed with the Supreme Court, one in response to a Respondent's appeal of a PCC sanction. Disciplinary Counsel also engaged in three oral arguments held at the Supreme Court.

Due to the increased number of "alternative" outcomes in disciplinary matters, which can be ordered by the PCC or the Court, there are an increasing number of orders which involve monitoring the Respondent attorneys for up to three years following the end of a case. Among their other responsibilities, Disciplinary Counsel and staff track compliance with CLE requirements, mental health therapy, and substance abuse treatment, and alert the PCC to any non-compliance with the terms of the conditions.

### III. THE STATISTICS

On January 1, 2013, the caseload of the ADO included a total of 113 pending matters. There were 34 docketed matters in the investigation stage, five of which were docketed in 2011. There were 79 docketed matters that had been referred to Disciplinary Counsel by the CSC for further action, 37 of which were related to two attorneys. Forty one of the cases referred to Disciplinary Counsel were waiting for the completion of an audit.

**Figure A** illustrates the types of underlying legal matters giving rise to docketed complaints in the past three years. As in the past, family law and criminal matters dominated the complaints. This correlates with the types of underlying matters that were not docketed.

**FIGURE A**

<b>Underlying Legal Matters</b>	<b>2013</b>	<b>Percentage In 2013</b>	<b>Percentage In 2012</b>	<b>Percentage In 2011</b>
Family Law/ Adoption	15	33%	37%	25%
Criminal	7	15%	14.3%	13%
Real Estate/Loan Modification	7	15%	16.35%	8%
Probate/ Estate Planning	4	9%	4%	8%
Personal Injury	0	0%	2%	0%
Bankruptcy	2	4.5%	2%	32%
Other	2	4.5%	0%	6%
Employment/Workers Compensation	1	2%	0%	1%
Business Law/ Contracts/ Corporate	0	0%	2%	1%
Collection/ Consumer Protection	0	0%	0%	0%
Civil Suit / Litigation	7	15%	16.35%	6%
Small Claims	1	2%	4%	0%
Misuse of Client Trust Funds	0	0%	2%	
<b>Total</b>	<b>46</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Grievances and referrals in 2013 were filed by a variety of individuals associated with the underlying legal matters, including 30.5% by the respondent’s client (down from 33% in 2012 and 57% in 2011); 24% by the opposing party (down from 29% in 2012); 17.5% by the courts (up from 12% in 2012); 13% by attorneys (up from 12%), and 4% by non-financial self-report (up from 2%). Seven percent were ADO-generated and the remaining 4% were from other sources.

**Figure B** shows the number of years the respondent was admitted to practice in New Hampshire at the time the complaint was docketed. The duration of practice from 11 to 25 years has historically been the time of the most docketed complaints. One attorney had two cases docketed in 2013.

**FIGURE B**

	<b>2013</b>	<b>Percentage in 2013</b>	<b>Percentage in 2012</b>	<b>Percentage in 2011</b>
1 – 5 years in practice	5	11%	10%	11%
6 – 10 years in practice	9	20%	15%	12%
11 – 15 years in practice	5	11%	12.5%	16%
16 – 20 years in practice	7	16%	12.5%	23%
21 – 25 years in practice	3	7%	17%	14%
26 – 30 years in practice	8	18%	15%	12%
31 – 35 years in practice	2	4%	10%	5%
36+ years in practice	6	13%	8%	7%
<b>Total Attorneys</b>	<b>45</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Shown in **Figure C** is the distribution of misconduct findings for the past three years, sorted by the number of years the attorney was in practice at the time of docketing the complaint. (One respondent had two cases; one respondent had three cases; and three cases involved reciprocal discipline.)

**FIGURE C**

	<b>2013</b>	<b>% in 2013</b>	<b>2012</b>	<b>2011</b>
1 – 5 years in practice	1	12.5%	0	2
6 – 10 years in practice	1	12.5%	1	1
11 – 15 years in practice	2	25%	2	2
16 – 20 years in practice	2	25%	1	2
21 – 25 years in practice	1	12.5%	2	1
26 – 30 years in practice	0	0%	1	1
31 – 35 years in practice	0	0%	2	3
36 + years in practice	1	12.5%	1	2
<b>Total Findings</b>	<b>8</b>	<b>100%</b>	<b>10</b>	<b>14</b>

The CSC processed matters in 2013 as shown in **Figure D**. The chart indicates that the CSC processed as many requests to reconsider decisions of General Counsel and the Committee, as it did completed investigations of docketed cases.

**FIGURE D**

	<b>2013</b>	<b>2012</b>	<b>2011</b>
Requests to Reconsider Matters Not Docketed (denied)	43	40	45
Matters Docketed upon Reconsideration of Non-docket	1	4	2
Requests to Reconsider General Counsel Dismissal	1	3	0
Requests to Reconsider CSC Dismissals	5	1	2
Matters Referred To Disciplinary Counsel	24	22	44
Dismissals With No Professional Misconduct	10	22	13
Dismissals With No Professional Misconduct with Warning(s)	1	10	9
Matters Closed Without Prejudice	0	3	0
<b>Total</b>	<b>85</b>	<b>105</b>	<b>115</b>

**Figure E** is a listing of the Rules of Professional Conduct that were found to have been violated in 2013, compared to 2012 and 2011. There is no particular trend to which Rules are most often violated, despite our anecdotal perception that poor client communication and an unexpected balance on a final bill are the catalysts for many of our calls.

**FIGURE E**

	<b>2013</b>	<b>2012</b>	<b>2011</b>
<b>Rule 1 Violations: Client-Lawyer Relationship</b>			
1.1 Competence	1	2	4
1.2 Scope of Representation	0	0	1
1.3 Diligence	3	4	3
1.4 Communication	4	3	2
1.5 Fees	0	0	0
1.7 Conflict	1	0	3
1.8 Other Conflict	0	0	0
1.9 Former Client	0	0	1
1.14 Client with Diminished Capacity	0	0	0
1.15 Safeguarding Client Funds	6	4	3
1.16 Terminate Relationship with Client	1	3	1
<b>Rule 2 Violations: Counselor</b>	0	0	1
<b>Rule 3 Violations: Advocate</b>			
3.3 Candor to Court	1	1	1
3.4 Fairness to Opposing Party	1	1	2
3.5 Decorum of the Tribunal	0	1	0
<b>Rule 4 Transactions with Persons other than Clients</b>			
4.1 Truthfulness in Statements to Others	0	1	0
4.4 Respect for Rights of Third Persons	0	1	2
<b>Rule 5 Law Firms and Associations</b>			
5.1 Responsibilities of Partners, Managers and . . .	0	1	0
5.3 Responsibilities Regarding Non-lawyer Assistants	1	1	0
5.5(a) Unauthorized Practice	0	3	0
<b>Rule 7 Violations: Information about Legal Services</b>			
7.1(a) Communications contain misrepresentations	0	2	0
7.5(c) Identification of lawyers in firm	0	1	0
<b>Rule 8 Violations: Integrity of the Profession</b>			
8.1(a) False Statement of Material Fact	2	1	2
8.1(b) Failure to Correct a Misapprehension	1	4	1
8.4(b) Criminal Act	0	1	1
8.4(c) Deceit	3	3	3
<b>Rule 37(9)(b) Conviction of Serious Crime</b>	0	1	1
<b>Total Violations</b>	<b>24</b>	<b>39</b>	<b>32</b>

**Figure F** illustrates violations of the Rules (by category) as a percentage of total violations. All matters necessarily also include a violation of Rule 8.4(a), which is not calculated in the percentage.



**FIGURE F**

	<b>2013</b>	<b>2012</b>	<b>2011</b>
Rule 1	64%	41%	56%
Rule 2	0%	0%	3%
Rule 3	8%	8%	10%
Rule 4	0%	5%	6%
Rule 5	4%	13%	0%
Rule 7	0%	8%	0%
Rule 8	24%	23%	22%
Rule 37(9)(b)	0%	2%	3%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

The PCC made the determinations and findings shown in **Figure G** in 2013. As is clear by the number of differing descriptions, the PCC tailors each outcome to most appropriately suit the type of misconduct and the balancing of mitigating and aggravating factors, rather than having a “one size fits all” approach to sanctions.

**FIGURE G**

	<b>2013</b>	<b>2012</b>	<b>2011</b>
Closed Without Prejudice	1	2	8
Dismissal	3	2	1
Dismissal based on Statute of Limitations	1		
Dismissal w/ Warning(s)	4	4	3
Diversion by Agreement	1	3	1
Remand to Hearings Committee (not closed)	1	0	1
Stipulation to Facts or Facts and Rules	1	2	0
Stipulation to Facts, Rules and Reprimand	2	3	4
Stipulation to Facts, Rules and Public Censure	0	0	2
Stipulation to Facts, Rules and 6 Mo. Suspension	1		
Stipulation to Facts, Rules and 2 Yr. Suspension	1		
Stipulation to Facts, Rules and 3 Yr. Suspension	1		
Stipulation to Facts, Rules and Disbarment	1		
Misconduct after a Hearing on the Merits			
Reprimand	0	1	0
Public Censure	1	1	1
Public Censure with Conditions	0	2	0
6 mo. Suspension	1	5	2
Recommend 2 yr Suspension, 1 yr. stayed	1	1	0
Recommend 2 yr Suspension	0	1	2
Recommend 3 yr Suspension Stayed 3 yrs	0	0	0
Recommend Disbarment	0	0	3
Recommendation to Deny Motion for Reinstatement	0	0	1

	<b>2013</b>	<b>2012</b>	<b>2011</b>
Recommendation to Grant Motion for Reinstatement	0	0	1
Recommendation to Approve Resignation	0	1	0
Grant Protective Order	4	6	3
Deny Protective Order	0	0	1
Motion to Reconsider	1 granted	2 granted 3 denied	1 granted 1 denied
Extension of Suspended Sentences	3		
Dismissal following compliance with diversion	2		
Annulment	2 granted	1 granted 1 denied	2 granted
Approval of Motion to Vacate Stay	1		
Reciprocal Discipline	3	3	1
<b>Total</b>	<b>37</b>	<b>44</b>	<b>39</b>

**Figure H** shows a breakdown of the number of docketed complaints that were concluded by the attorney discipline system, arranged by the year the complaint was docketed, for the years 2013, 2012 and 2011. Matters were concluded by the Complaint Screening Committee (11); General Counsel (8); the PCC (15, including a reciprocal matter); and the Supreme Court (11, including reciprocal matters).

**FIGURE H**

<b>Year of Complaint</b>	<b>Concluded 2013</b>	<b>Concluded 2012</b>	<b>Concluded 2011</b>
2007	0	2	1
2008	1	1	3
2009	2	5	8
2010	3	12	31
2011	10	24	13
2012	18	13	
2013	11		
<b>Total</b>	<b>45</b>	<b>57</b>	<b>56</b>

#### IV. AUDITS

The Committee's Auditor, Craig A. Calaman, CPA, completed five audits during 2013. Mr. Calaman also completed two client trust account (CTA) compliance reviews, and reviewed 11 financial self-reports from attorneys who had made errors in their CTA accounting. As he has done in the past, Mr. Calaman responded to numerous requests for information about completing the annual trust accounting compliance certificates, as well as assisting lawyers with questions concerning trust accounting issues throughout the year. With General Counsel, he was a guest lecturer at a UNH School of Law class on the accounting requirements and ethics of running a law practice.

## V. OTHER

Staff attorneys served as faculty in a variety of educational programs in 2013, including the New Hampshire Bar Association's Professionalism Day and both the June and December Practical Skills Ethics Workshops; a continuing legal education program on Ethics in the Age of Social Media; and presentations to Professional Responsibility classes at the UNH School of Law. Disciplinary Counsel also made a presentation to the PCC about NHLAP Agreements.

One intern from the UNH School of Law spent a term at the ADO in 2013 for scholastic credit. Common tasks of interns include conducting legal research, participating in interviews of complainants and respondents, drafting documents and reports, and giving presentations to the CSC. It is valuable for the ADO and a useful experience for law students.

When an attorney is suspended, whether for disciplinary or administrative reasons; disbarred; incapacitated; or is otherwise no longer able to practice; and has no other attorney in his or her office; General Counsel requests that the Supreme Court appoint an attorney to conduct an inventory of the (former) attorney's files. Although not responsible for the inventory itself, General Counsel seeks possible attorneys for the appointment and offers guidance as needed during the process.

## VI. ATTORNEY DISCIPLINE MATTERS AT THE SUPREME COURT

General Counsel notifies the Court of lawyers who have been indicted or convicted of serious crimes, pursuant to Sup. Ct. R. 37(9), and may file petitions for interim suspension or disbarment as appropriate in those cases. In 2013, General Counsel notified the Supreme Court about three lawyers who had been indicted for serious crimes. In two of those cases, General Counsel requested an immediate interim suspension, which was granted by the Court. The other matter was stayed pending the outcome of the underlying charges. General Counsel also filed four petitions for reciprocal discipline matters (from other jurisdictions). The Supreme Court issued one disbarment, one two-year suspension, one three-month suspension, and one remand to the PCC for imposition of a Public Censure. One Lawyer's reciprocal suspension was vacated and he was reinstated.

In response to petitions filed by Disciplinary Counsel on behalf of the PCC, the Supreme Court disbarred one attorney, issued one two-year suspension, one two-year suspension (stayed), and one three-year suspension. One case, which was appealed by the respondent, was remanded to the PCC for further deliberations. The Supreme Court also declined one appeal filed by a respondent, and vacated two interim suspensions. The Court also granted another interim suspension, held one in abeyance, and vacated two interim suspensions.

There were six disciplinary matters pending at the Court at year's end: one reciprocal discipline matter, and five matters related to pending criminal charges against attorneys.

## VII. CONCLUSION

As of December 31, 2013, there were 135 open matters at the ADO. Of those, 36 matters were in the investigation stage with General Counsel. There were 99 pending cases that had been referred to Disciplinary Counsel. Of those, 45 cases involving nine respondents could not go forward for the following reasons: they were undergoing an audit; the lawyer had left the jurisdiction; they were awaiting the disposition of a criminal or civil case; they were awaiting pending disposition of a prior disciplinary case against the same Respondent; or they were awaiting disposition by another jurisdiction. Two cases were held in abeyance by the PCC for sanction hearings, which would depend on the Respondent's compliance with conditions in a third case. Three matters involving two respondents were scheduled for hearings. Two cases were waiting for the PCC to issue an order. The rest were in various stages of investigation by Disciplinary Counsel to determine if formal charges would be issued or if some other outcome would be more appropriate.

The Attorney Discipline Office continues to be willing to answer questions from members of the bar and the public regarding the Rules of Professional Conduct and the process used to enforce them. We take seriously our dual responsibilities to protect the public and maintain the integrity of the profession.