

New Hampshire Supreme Court

Attorney Discipline System



2016 Annual Report

I. OVERVIEW

In 2016, the Attorney Discipline Office (ADO) consisted of five attorneys, one paralegal (as of April), three legal assistants, and one part-time bookkeeper. Additionally, 33 attorney volunteers and 19 lay-member volunteers participated in the three committees that process attorney discipline complaints: Complaint Screening Committee (CSC), Hearings Committee (HC) and Professional Conduct Committee (PCC).

At the start of the year, Janet F. DeVito was General Counsel, James L. Kruse was Deputy General Counsel, and Brian R. Moushegian was Assistant General Counsel. Mr. Kruse retired on September 3, 2016. Mr. Moushegian became Deputy General Counsel and Mark P. Cornell began as Assistant General Counsel in September. They are referred to collectively as General Counsel or GC in this report. In 2016, Sara S. Greene and Elizabeth M. Murphy continued as Disciplinary Counsel and Assistant Disciplinary Counsel, respectively. They are referred to collectively in this report as Disciplinary Counsel or DC. Craig A. Calaman, CPA, long-time staff forensic auditor, left the office in May 2016.

II. ATTORNEY DISCIPLINE OFFICE OPERATIONS

A. Informal Proceedings

All of the rules and procedures that govern the attorney discipline system are set forth in Supreme Court Rules 37 and 37A. Grievances must be filed under oath, and must certify that a copy has been sent to the attorney. If asked, the ADO sends potential grievants the forms that fulfill those requirements. There is no form for the grievance itself. Some grievants obtain the forms from the ADO website, www.nhattyreg.org. Referrals are received from attorneys who are complying with their obligation under Rule of Professional Conduct (Rule) 8.3, and from judges, marital masters and court clerks who bring attorney behavior to our attention. In addition, the ADO receives a copy of each Overdraft Notice (ODN) that banks send to attorneys or firms holding Client Trust Accounts. In total, the ADO received 246 grievances, ODNs and referrals during 2016, slightly more than in 2015.

General Counsel conduct an initial review of the grievances to determine if they should be docketed. After reviewing the 246 grievances received in 2016, and the grievances remaining from 2015, 53 grievances were docketed as 51 cases requiring further investigation. General Counsel non-docketed 201 of the remaining grievances received and pending. Non-docketed grievances do not appear on attorneys' discipline records and are not indexed. After two years, they are destroyed.

After a case is docketed, grievances are called complaints. All docketed cases are indexed and, once they reach certain procedural milestones, are available to the public at the ADO. The respondent (attorney) is required to answer the complaint after docketing. General Counsel gathers sufficient information pertinent to the conduct in question in order to report to the Complaint Screening Committee. The work product and reports, as well as the deliberations of the CSC, are not public. General Counsel may dismiss a docketed matter with a finding of no professional misconduct without reporting to the CSC. In 2016, General Counsel dismissed 15 docketed matters, which then became public. GC also referred one matter directly to Disciplinary Counsel with the agreement of the respondent, who waived CSC review.

The CSC is comprised of five attorneys and four lay members, appointed by the Supreme Court. This Committee met 12 times in 2016. Hon. Peter H. Fauver served as CSC Chair in 2016, and Peter J. Kiriakoutsos, CPA, served as Vice-Chair.

The CSC is tasked with considering and acting on requests for reconsideration of General Counsel's decisions not to docket grievances. Out of the 201 grievances non-docketed in 2016, and two grievances non-docketed in late 2015, the CSC reviewed 38 requests for reconsideration.

The CSC also considers the reports of General Counsel's investigation of docketed complaints. In 2016, the CSC referred 39 docketed cases (from 41 grievances) to Disciplinary Counsel for further action, finding a reasonable likelihood that professional misconduct could be proven by clear and convincing evidence. The CSC dismissed 22 docketed cases with a finding of no professional misconduct, which became public at that time; and approved diversion agreements for four docketed matters, two of which became public at the successful completion of the diversion plans. In 2016, the CSC also considered eight requests to reconsider its own dismissals, and two requests to reconsider its decisions to offer diversion, all of which were denied.

B. Formal Proceedings

When a matter is referred to Disciplinary Counsel (DC), it is carefully reviewed to determine what best serves the goals of the discipline process, namely protecting the public and the integrity of the legal profession. As part of the assessment, DC meets with respondents, their counsel, witnesses (including the complainants), and NH Lawyers Assistance Program (NH LAP) representatives if issues of mental health or substance abuse are present. DC also gathers documentation from courts, banks, and third parties as well as from the respondent.

If DC then determines that there is not a likelihood of clear and convincing evidence of a Rule violation, she files a Motion to Dismiss with the PCC. When Disciplinary Counsel concludes there is sufficient evidence to prosecute a matter, she prepares a Notice of Charges (NOC) and requests the appointment of a Hearing Panel by the Hearings Committee Chair. At that time, the file becomes public. In 2016, DC issued five Notices of Charges involving 13 docketed matters. The HC Chair, Attorney Philip H. Utter, appointed Hearing Panel members from the Committee, comprised in 2016 of 20 attorney members and 11 lay members. Although a Hearing Panel quorum consists of two attorneys and one non-attorney, panels are generally comprised of three attorney members and two lay members. After hearing evidence in a contested hearing, or reviewing stipulations that are filed after a NOC is issued, Hearing Panels submit written reports to the PCC, making findings of fact by clear and convincing evidence; issuing rulings of law, *i.e.*, which Rules were violated; and making recommendations as to sanction. The reports are public.

Instead of having a contested hearing, Respondents and Disciplinary Counsel may stipulate to all or part of the facts, Rule violations and sanction. In 29 cases, the respondents signed stipulations as to facts, Rules and sanction *prior to* the issuance of a NOC, and the cases were considered directly by the PCC instead of proceeding to a hearing. Disciplinary Counsel filed 11 motions to dismiss cases that had been referred by the CSC, but that DC determined did

not have clear and convincing evidence of a Rule violation. One case was dismissed after the PCC rejected a stipulation. Diversion was requested in three cases. Three diversion plans were approved by the PCC (one had been filed in 2015) and one matter was still pending with the PCC at the end of the year. Twenty-four matters were closed without prejudice by the PCC after the Supreme Court disbarred two attorneys in their primary case. An additional case was closed without prejudice after reciprocal discipline was issued in the same matter. Disciplinary Counsel reached six stipulations to disbarment; in four of them, the respondent stipulated to disbarment before a NOC was issued. All of the stipulations to disbarment were approved by the PCC. At the hearings level, DC participated in six pre-hearing conferences, one hearing on the merits, two sanction hearings, and one hearing on a motion to impose a stayed suspension. DC also presented three oral arguments before the PCC in 2016.

The Hearings Committee Chair appointed six hearing panels in 2016. DC filed a request for a hearing panel on sanction in two additional matters, following the PCC's acceptance of a stipulation to facts and rules, but the matters were disposed of by a full stipulation prior to a hearing panel being appointed. One panel was appointed to hear a request for readmission by a disbarred lawyer, and another was appointed after DC filed a petition to impose a suspended sentence. Six pre-hearing conferences were held. There was one hearing on the merits; two hearings on sanction only; and one hearing was held on a request to impose a stayed suspension. All hearings were held at the Attorney Discipline Office.

The final outcome of a case is the responsibility of the PCC, subject to approval by the Supreme Court (Court) as described below. The PCC, which is comprised of eight attorney members and four lay members, met ten times in 2016. The PCC Chair is Attorney David M. Rothstein; the Vice-Chairs are Attorney Heather Krans and lay-member Elaine Holden. By Court Rule, the New Hampshire Bar Association Vice President serves on the PCC during his or her term as Vice President. Attorney Scott H. Harris completed his term on the PCC on July 31, 2016. Bar Vice President Attorney David W. McGrath began his term on the PCC on August 1, 2016.

The PCC has the power and authority to accept diversion agreements, approve stipulations, issue protective orders, dismiss matters, and issue reprimands, public censures or suspensions not exceeding six months. The PCC considers Hearing Panel Reports, as well as the entire record, in disciplinary matters. In some 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 2016.

When the PCC determines that a sanction greater than a six-month suspension is warranted, it submits its recommendation to the Supreme Court. During 2016, the Committee filed eight recommendations for disbarment, recommended approval of one request to resign under discipline, and submitted two recommendations for three-year suspensions.

Some outcomes determined by the PCC or the Court involve monitoring the respondent attorney for a time certain following the resolution of a case. Among their other responsibilities, Disciplinary Counsel and staff track compliance with CLE requirements, office management improvement parameters, mental health therapy, and substance abuse treatment, and alert the PCC to any non-compliance with the terms of the conditions. During 2016, 15 cases were monitored by the ADO. During the year, six of those cases were closed following compliance

with the orders issued. In three cases, Disciplinary Counsel filed a motion to impose the sanction because the respondents were not in compliance with the orders issued. The others were still being monitored at year's end.

III. THE STATISTICS

On January 1, 2016, there were 30 grievances and 136 pending docketed matters at the ADO. Of those, 40 docketed matters were in the investigation stage with General Counsel, three of which were docketed in 2014 and 37 of which were docketed in 2015. Six cases were pending with the CSC for consideration, and one diversion case was being monitored by General Counsel. There were 89 cases pending with Disciplinary Counsel, of which 23 were related to a request for disbarment filed with the Court. Three cases were pending with the Hearings Committee, five cases were pending at the PCC, one case was pending with the Supreme Court and six cases were being monitored by Disciplinary Counsel for compliance with conditions in previous orders issued.

Although there were 53 grievances docketed in 2016, there were 51 docket numbers. In one matter, three similar complaints were combined into one docket number.

Figure A illustrates the types of underlying legal matters giving rise to docketed complaints in the past three years. The Overdraft Notification Rule was effective July 1, 2015.

FIGURE A

Underlying Legal Matters	2016	Percentage In 2016	Percentage In 2015	Percentage In 2014
Overdraft Notification	11	21%	14.5%	
Family Law	9	17%	12.9%	47%
Criminal	7	13.25%	22.6%	9%
Probate/ Estate Planning	7	13.25%	11.3%	7%
Civil Suit / Litigation	5	9%	19.4%	9%
Business Law/ Contracts/ Corporate	3	5.5%	3.2%	4%
Other	3	5.5%	3.2%	7%
Collection/Consumer Protection	2	3.75%	0%	0%
Real Estate/Loan Modification	2	3.75%	3.2%	7%
Bankruptcy	1	2%	4.9%	4%
Employment/Workers Compensation	1	2%	0%	2%
Trust Account Issues	1	2%	0%	0%
Foreclosure	1	2%	0%	0%
Personal Injury	0	0%	1.6%	2%
Landlord/ Tenant	0	0%	1.6%	2%
Debt Resolution/Finances	0	0%	1.6%	0%
Total	53	100%	100%	100%

Figure B shows the distribution of the sources of the matters docketed in 2016. Clients remain the most common source of complaints.

FIGURE B

Docketed Complaint Filed By	2016	Percentage in 2016	Percentage in 2015	Percentage in 2014
Client	18	34%	27%	38%
Bank Referral/ ODN	10	19%	15%	
Attorney Referral	9	17%	11%	15.5%
Opposing Party	7	13%	18%	15.5%
Court Referral	6	11%	18%	15.5%
Self-report	2	4%	3%	4.5%
Other	1	2%	5%	11%
ADO Generated	0	0%	3%	0%
Total	53	100%	100%	100%

Figure C shows the number of years the respondent was admitted to practice in New Hampshire at the time the complaint was docketed. Attorneys practicing for 16-30 years are the source of more than half of the docketed complaints.

FIGURE C

	2016	Percentage in 2016	Percentage in 2015	Percentage in 2014
1 – 5 years in practice	2	4%	9.75%	7%
6 – 10 years in practice	2	4%	9.75%	20%
11 – 15 years in practice	9	17.5%	22.5%	16%
16 – 20 years in practice	6	11.75%	8%	13%
21 – 25 years in practice	14	27.5%	11.25%	20%
26 – 30 years in practice	10	19.5%	13%	7%
31 – 35 years in practice	2	4%	8%	4%
36+ years in practice	6	11.75%	17.75%	13%
Total Attorneys	51	100%	100%	100%

Shown in Figure D 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. If an attorney has multiple docketed matters he/she is only counted once. One attorney had six docketed matters with discipline imposed, and two attorneys had two docketed matters with discipline imposed.

FIGURE D

	2016	% in 2016	% in 2015	% in 2014
1 – 5 years in practice	3	12%	0%	0%
6 – 10 years in practice	5	20%	28%	0%
11 – 15 years in practice	1	4%	28%	0%
16 – 20 years in practice	3	12%	16.5%	25%
21 – 25 years in practice	2	8%	5.5%	25%
26 – 30 years in practice	4	16%	11%	50%
31 – 35 years in practice	2	8%	0%	0%
36 + years in practice	5	20%	11%	0%
Total Findings	25	100%	100%	100%

The CSC considered 113 matters in 2016 with the outcomes shown in **Figure E**. Warnings are no longer issued due to a 2015 Supreme Court Rule change. Three grievances were referred to DC as one docketed matter.

FIGURE E

	2016	2015	2014
Requests to Reconsider Matters Not Docketed (denied)	38	35	21
Matters Docketed upon Reconsideration of Non-docket	0	0	2
Requests to Reconsider CSC Dismissals (denied)	8	1	2
Requests to Reconsider Diversion Plans	2		
Cases Referred upon Reconsideration of CSC Dismissals	0	1	
Matters Referred To Disciplinary Counsel	39	33	10
Dismissals With No Professional Misconduct	22	10	12
Dismissals With No Professional Misconduct with Warning	0	1	5
Diversion	4	1	
Total	113	82	52

Figure F is a listing of the Rules of Professional Conduct violations found in 2016. (Some matters resulted in multiple Rule violations.) The most common Rule violation found was 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation). The second most common was 1.15 (Safekeeping Property) followed by 1.1 (Competence) and 1.3 (Diligence).

FIGURE F

	2016	2015	2014
Rule 1: Client-Lawyer Relationship			
1.1 Competence	12	4	0
1.2 Scope of Representation	3	1	0
1.3 Diligence	11	8	0
1.4 Communication	8	7	0
1.5 Fees	4	1	0
1.7 Conflict	4	5	0
1.8 Other Conflict	2	2	0
1.15 Safekeeping Property	13	2	4
1.16 Terminate Relationship with Client	2	1	0
Rule 2: Counselor			
Rule 3: Advocate			
3.1 Meritorious Claims and Contentions	2	1	0
3.2 Expediting Litigation	2	0	0
3.3 Candor to Court	10	1	1
3.4 Fairness to Opposing Party	10	1	0
Rule 4: Transactions with Persons other than Clients			
4.1 Truthfulness in Statements to Others	0	2	1
4.4 Respect for Rights of Third Persons	1	0	0
Rule 5: Law Firms and Associations			
5.3 Responsibilities Regarding Non-lawyer Assistants	3	2	1
5.5(a) Unauthorized Practice	2	2	0

	2016	2015	2014
Rule 7: Information about Legal Services			
Rule 8: Integrity of the Profession			
8.1(a) False Statement of Material Fact	0	0	0
8.1(b) Failure to Correct a Misapprehension	10	1	0
8.4(b) Criminal Act	5	2	0
8.4(c) Dishonesty, Fraud, Deceit, or Misrepresentation	15	6	2
8.4(d) Influence of Government Official	1	0	0
Supreme Court Rule 50	9	1	0
Total Violations	129	50	9

Figure G 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 G

	2016	2016	2015	2014
Rule 1	59	45.75%	62%	44.5%
Rule 2	0	0%	0%	0%
Rule 3	24	18.5%	6%	11.1%
Rule 4	1	.75%	4%	11.1%
Rule 5	5	4%	8%	11.1%
Rule 7	0	0%	0%	0%
Rule 8	31	24%	18%	22.2%
Sup. Ct. R. 50	9	7%	2%	0%
Total	129	100%	100%	100%

The PCC made the determinations and findings shown in **Figure H** in 2016. The PCC considers the Rule(s) violated, and balances mitigating and aggravating factors, when deciding the outcome of a case.

FIGURE H

	2016	2015	2014
Closed Without Prejudice	25	3	2
Dismissal	10	5	6
Approved Diversion by Agreement	3	1	1
Approved Stipulation to Facts, Rules and Reprimand	4	4	0
Approved Stipulation to Facts, Rules and Public Censure	3	4	0
Approved Stipulation to Facts, Rules and 6 Mo. Suspension	2	2	0
Approved Stipulation to Facts, Rules and 6 Mo. Suspension, Stayed	3	0	0
Approved Stipulation to Facts, Rules and 1 Yr. Suspension	0	1	0
Approved Stipulation to Facts, Rules and 18 Mo. Suspension	0	1	0
Approved Stipulation to Facts, Rules and 2 Yr. Suspension	0	0	1
Approved Stipulation to Facts, Rules and 3 Yr. Suspension	1	0	0
Approved Stipulation to Facts, Rules and Disbarment	6	1	0

	2016	2015	2014
Sanction issued after a Hearing:			
Public Censure	0	0	2
6 mo. Suspension	1	0	0
Recommend 2 yr. Suspension	0	1	0
Recommend Disbarment	2	1	0
Recommendation to Approve Request to Resign Under Discipline	1	4	3
Recommendation to Deny Request to Resign Under Discipline	0	1	0
Grant Motion for Protective Order	1	1	0
Deny Motion for Protective Order	1	0	0
Deny request for further hearing	0	1	0
Extension of Stayed Sanction	1	0	0
Dismissal following compliance with diversion or monitoring	4	3	3
Annulment Granted	2	5	0
Act on Reciprocal Discipline	6	3	5
Request for readmission closed without action	1	2	0
Request for readmission forwarded to Hearings Committee	1	0	0
Request for readmission to be considered when reimbursement is completed	1	0	0
Total	78	44	23

Figure I shows the number of docketed complaints that were concluded by the attorney discipline system, arranged by the year the complaint was docketed. Matters were concluded by the Complaint Screening Committee (24); General Counsel (15); the PCC (48); and the Supreme Court (17). Another matter was closed by the ADO following compliance with conditions in an Order issued by the Supreme Court.

FIGURE I

Year Complaint Docketed	Concluded 2016	Concluded 2015	Concluded 2014
2008	1	0	0
2009	1	0	2
2010	6	2	0
2011	24	1	6
2012	2	5	10
2013	10	12	13
2014	12	19	4
2015	31	14	
2016	18		
Total	105	53	35

IV. AUDITS

Before leaving the ADO, the staff forensic auditor, Craig A. Calaman, CPA, completed three audits and conducted one client trust account compliance review during 2016. Mr. Calaman worked with General Counsel to review Overdraft Notifications, to determine if they required further investigation, and continued to respond to attorney requests for information about trust accounting compliance and software. A detailed financial review and two compliance reviews were completed by outside forensic accountants in 2016.

V. OTHER

Staff attorneys served as faculty in a variety of educational programs in 2016, including both the June and December Practical Skills Ethics Workshops; a presentation to the UNH Law School Professional Responsibility class; the NH LAP training program; a presentation to the members of the Public Protection Fund Board; the Annual Ethics Program; and the Problems and Pitfalls of Lawyer Trust Accounting.

The ADO had two interns from the UNH Law School in 2016. Common tasks of law student interns include conducting legal research, participating in interviews of complainants and respondents, drafting pleadings, and submitting written and oral reports to the CSC.

VI. ATTORNEY DISCIPLINE MATTERS AT THE SUPREME COURT

Pursuant to Supreme Court Rule 37(9), General Counsel must notify the Court when lawyers have been indicted or convicted of serious crimes, and may file petitions for interim suspension or disbarment as appropriate in those cases. In 2016, General Counsel notified the Supreme Court that three lawyers had been convicted of crimes. Disciplinary Counsel notified the Court of a conviction by the respondent in a reciprocal discipline case.

General Counsel also filed six requests for reciprocal discipline stemming from discipline in other jurisdictions. The Supreme Court disbarred one attorney, and remanded two to the PCC for issuance of a public censure. Four reciprocal matters were pending with the Supreme Court at the end of the year, including one that was filed in 2015 and had not yet concluded in its original jurisdiction.

After reviewing matters filed by the PCC, the Supreme Court issued a one-year suspension; two three-year suspensions; allowed one attorney to resign during a discipline matter pursuant to Supreme Court Rule 37(11); and disbarred nine attorneys. The Court also remanded one case to the PCC following a request for readmission and accepted an appeal of a PCC six-month suspension. Both of those cases were pending at year's end. The Supreme Court also closed one matter after the time period for monitoring conditions expired.

In an uncommon case, the Supreme Court accepted a Petition for Certiorari filed by a grievant whose grievance had not been docketed, and whose request for reconsideration was denied by the Complaint Screening Committee. Deputy General Counsel Moushegian, the grievant, and respondent's counsel filed briefs near the end of the year. The decision, to be made on the briefs, had not been issued at the end of 2016.

VII. CONCLUSION

As of December 31, 2016, there were 18 grievances and 84 docketed matters pending at the ADO. Of those, 12 docketed matters were in the investigation stage with General Counsel, all of which were docketed in 2016. Four cases were pending with the CSC for consideration, and two diversion cases were being monitored by General Counsel. There were 31 cases pending with Disciplinary Counsel. Five cases were pending with the Hearings Committee, 22 cases were pending at the PCC, two cases were pending with the Supreme Court and six cases were being monitored by Disciplinary Counsel for compliance with conditions in previous orders issued.

The ADO disposed of many of its older cases during 2016. The “clearance rate” of grievances and docketed cases was greater than 100% as the staff worked to dispose of the backlog and process new cases promptly. The attorneys of the ADO are dedicated to fulfilling the mandate of the attorney discipline system, to protect the public and the integrity of the profession, in a timely and efficient manner.