

New Hampshire Supreme Court

Attorney Discipline System



2017 Annual Report

I. OVERVIEW

In 2017, the Attorney Discipline Office (ADO) consisted of five attorneys, one paralegal, three legal assistants, and one part-time bookkeeper. Additionally, 31 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).

In 2017, Janet F. DeVito was General Counsel, Brian R. Moushegian was Deputy General Counsel and Mark P. Cornell was Assistant General Counsel. They are referred to collectively as General Counsel or GC in this report. 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.

II. ATTORNEY DISCIPLINE OFFICE OPERATIONS

A. Informal Proceedings

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 the ADO's attention. In addition, the ADO receives a copy of each Overdraft Notice (ODN) that banks send to attorneys or firms holding Client Trust Accounts, and a copy of lawsuits that are filed against attorneys. In total, the ADO received 219 grievances, ODNs and referrals during 2017, slightly fewer than in 2016.

General Counsel conduct an initial review of the grievances to determine if they should be docketed. After reviewing the 219 grievances received in 2017, and the grievances remaining from 2016, 48 grievances were docketed as cases requiring further investigation. General Counsel non-docketed 169 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 2017, General Counsel dismissed nine 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 2017. Hon. Peter H. Fauver served as CSC Chair in 2017, 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 169 grievances non-docketed in 2017, and five grievances non-docketed in late 2016, the CSC reviewed 33 requests for reconsideration. Two requests for reconsideration were granted and were subsequently docketed for further investigation. When the CSC denies a request for reconsideration of GC's non-docket decision, the matter is closed. Pursuant to the New Hampshire Supreme Court's opinion in *Petition of Sanjeev Lath, et. al.*, 169 NH 616 (2017), grievants do not have standing to appeal the CSC decision to uphold a non-docket decision.

The CSC also considers the reports of General Counsel's investigation of docketed complaints. In 2017, the CSC referred 24 docketed cases to Disciplinary Counsel for further action, finding a reasonable likelihood that professional misconduct could be proven by clear and convincing evidence. The CSC dismissed 14 docketed cases with a finding of no professional misconduct, which became public at that time; and approved diversion agreements for two docketed matters, one of which became public at the successful completion of the diversion plan. In 2017, the CSC also considered five requests to reconsider its own dismissals, 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 determines after her investigation that there is not a likelihood of clear and convincing evidence of a Rule violation, she files a Motion to Dismiss with the PCC. Disciplinary Counsel filed seven 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

additional case was dismissed after the PCC rejected a stipulation. One case was dismissed because the period of limitations had expired prior to the filing of the complaint.

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 2017, DC issued 16 Notices of Charges involving 10 attorneys.

Instead of having a contested hearing, Respondents and Disciplinary Counsel may stipulate to all or part of the facts, Rule violations, and sanction. In 15 cases, the respondents signed stipulations as to facts, Rule violations, and sanction *prior to* the issuance of a NOC, including one stipulation to disbarment, and the cases were considered directly by the PCC instead of proceeding to a hearing. Diversion was requested and approved in seven cases involving five lawyers, one of which was after the NOC was filed. DC filed a request for a hearing panel on sanction only in one matter following a Hearing Panel's acceptance of a stipulation to facts and Rule violations.

At the hearings level, DC participated in seven pre-hearing conferences, two multi-day hearings on the merits, and one hearing on sanction only. DC also presented one oral argument before the PCC in 2017. DC filed a Petition for Immediate Suspension with the Supreme Court in one case, which was granted.

The Hearings Committee Chair, Attorney Philip H. Utter, appoints Hearing Panel members from members of the Committee, which was comprised of 18 attorney members and 11 lay members. Although a Hearing Panel quorum consists of two attorneys and one non-attorney, the chair generally appoints three attorneys and two non-attorneys to each panel. 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.

The Hearings Committee Chair appointed 10 hearing panels in 2017 pursuant to requests following a NOC. One panel was appointed to hear a request for reinstatement by a suspended lawyer. Seven pre-hearing conferences were held. There were two multi-day hearings on the merits and one hearing on sanction only. 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 nine times in 2017. 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 David W. McGrath completed his term on the PCC on July 31, 2017. Bar Vice President Attorney Edward D. Philpot, Jr., began his term on the PCC on August 1, 2017.

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 one case in 2017.

When the PCC determines that a sanction greater than a six-month suspension is warranted, it submits its recommendation to the Supreme Court. During 2017, the Committee filed six recommendations for disbarment, and submitted two recommendations for three-year suspensions. The Supreme Court declined to impose a disbarment in one of those cases and instead imposed a five-year suspension.

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 2017, 15 cases were monitored by the ADO. During the year, one of those cases was closed following compliance with the orders issued. In one case, Disciplinary Counsel filed a motion to impose disbarment because the respondent was not in compliance with the orders issued. The others were still being monitored at year's end.

One matter was closed without prejudice by the PCC after the Supreme Court disbarred the attorney in his primary case. One case was closed without prejudice after the Supreme Court disbarred the attorney based upon her conviction of a serious crime. Seven matters were still pending with the PCC at the end of the year.

III. THE STATISTICS

On January 1, 2017, 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.

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	2017	Percentage In 2017	Percentage In 2016	Percentage In 2015
Overdraft Notification	11	22.9%	21%	14.5%
Family Law	9	18.8%	17%	12.9%
Criminal	5	10.4%	13.25%	22.6%
Other	5	10.4%	5.5%	3.2%
Trust Account Issues	5	10.4%	2%	0%
Probate/Estate Planning	4	8.3%	13.25%	11.3%
Civil Suit/Litigation	3	6.3%	9%	19.4%
Personal Injury	2	4.2%	0%	1.6%
Collection/Consumer Protection	1	2.1%	3.75%	0%
Real Estate/Loan Modification	1	2.1%	3.75%	3.2%
Bankruptcy	1	2.1%	2%	4.9%
Employment/Workers Compensation	1	2.1%	2%	0%
Business Law/Contracts/Corporate	0	0.0%	5.5%	3.2%
Foreclosure	0	0.0%	2%	0%
Landlord/Tenant	0	0.0%	0%	1.6%
Debt Resolution/Finances	0	0.0%	0%	1.6%
Total	48	100%	100%	100%

Figure B shows the distribution of the sources of the matters docketed in 2017. Bank referrals of ODNs became the most common source of complaints in 2017.

FIGURE B

Docketed Complaint Filed By	2017	Percentage in 2017	Percentage in 2016	Percentage in 2015
Bank Referral/ODN	12	25.0%	19%	15%
Client	10	20.8%	34%	27%
Opposing Party	9	18.8%	13%	18%
Court Referral	6	12.5%	11%	18%
Self-report	5	10.4%	4%	3%
Other	5	10.4%	2%	5%
Attorney Referral	1	2.1%	17%	11%
ADO Generated	0	0.0%	0%	3%
Total	48	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. One respondent was excluded from this chart as he was not admitted to practice in New Hampshire. Attorneys practicing for 6-20 years are the source of half of the docketed complaints.

FIGURE C

	2017	Percentage in 2017	Percentage in 2016	Percentage in 2015
1 – 5 years in practice	1	2.1%	4%	9.75%
6 – 10 years in practice	8	17.0%	4%	9.75%
11 – 15 years in practice	10	21.3%	17.5%	22.5%
16 – 20 years in practice	6	12.8%	11.75%	8%
21 – 25 years in practice	5	10.6%	27.5%	11.25%
26 – 30 years in practice	8	17.0%	19.5%	13%
31 – 35 years in practice	1	2.1%	4%	8%
36+ years in practice	8	17.0%	11.75%	17.75%
Total Attorneys	47	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 had findings in multiple docketed matters, he/she is only counted once. In 2017, one attorney had 13 docketed matters with discipline imposed, one attorney had nine docketed matters with discipline imposed, and one attorney had two docketed matters with discipline imposed.

FIGURE D

	2017	% in 2017	% in 2016	% in 2015
1 – 5 years in practice	2	6.3%	12%	0%
6 – 10 years in practice	5	15.6%	20%	28%
11 – 15 years in practice	4	12.5%	4%	28%
16 – 20 years in practice	5	15.6%	12%	16.5%
21 – 25 years in practice	4	12.5%	8%	5.5%
26 – 30 years in practice	5	15.6%	16%	11%
31 – 35 years in practice	2	6.3%	8%	0%
36 + years in practice	5	15.6%	20%	11%
Total Findings	32	100%	100%	100%

The CSC considered 77 matters in 2017 with the outcomes shown in **Figure E**.

FIGURE E

	2017	2016	2015
Requests to Reconsider Matters Not Docketed (denied)	31	38	35
Matters Docketed upon Reconsideration of Non-docket	2	0	0
Requests to Reconsider CSC Dismissals (denied)	5	8	1
Requests to Reconsider Diversion Plans (denied)	0	2	0
Cases Referred upon Reconsideration of CSC Dismissals	0	0	1
Matters Referred To Disciplinary Counsel	24	39	33
Dismissals With No Professional Misconduct	14	22	10
Diversion Completed, Case Closed	1	4	1
Total	77	113	82

Figure F is a listing of the Rules of Professional Conduct violations found in 2017. (Some matters resulted in multiple Rule violations.) The most common Rule violation found was Rule 1.15. The second most common violations were of 1.4, 1.5, and 5.3. The significant increase in violations of Rules 1.16, 5.3, 5.4, 5.5(a), and 7.1 is primarily attributable to two attorneys who had 22 cases between them.

FIGURE F

	2017	2016	2015
Rule 1: Client-Lawyer Relationship			
1.1 Competence	12	12	4
1.2 Scope of Representation	3	3	1
1.3 Diligence	12	11	8
1.4 Communication	17	8	7
1.5 Fees	17	4	1
1.7 Conflict	0	4	5
1.8 Other Conflict	0	2	2
1.14 Client with Diminished Capacity	1	0	0
1.15 Safekeeping Property	25	13	2
1.16 Terminate Relationship with Client	16	2	1
1.19 Disclosure of Information to the Client	1	0	0
Rule 2: Counselor			
Rule 3: Advocate			
3.1 Meritorious Claims and Contentions	3	2	1
3.2 Expediting Litigation	1	2	0
3.3 Candor to Court	15	10	1
3.4 Fairness to Opposing Party	8	10	1
Rule 4: Transactions with Persons other than Clients			
4.1 Truthfulness in Statements to Others	3	0	2
4.4 Respect for Rights of Third Persons	2	1	0

Rule 5: Law Firms and Associations			
5.3 Responsibilities Regarding Non-lawyer Assistants	17	3	2
5.4 Professional Independence of a Lawyer	13	0	0
5.5(a) Unauthorized Practice	11	2	2
Rule 7: Information about Legal Services			
7.1 Communications Concerning a Lawyer's Services	12	0	0
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	4	10	1
8.4(b) Criminal Act	0	5	2
8.4(c) Dishonesty, Fraud, Deceit, or Misrepresentation	9	15	6
8.4(d) Influence of Government Official	2	1	0
Supreme Court Rule 50	15	9	1
Total Violations	219	129	50

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

	2017	2017	2016	2015
Rule 1	104	47.5%	45.75%	62%
Rule 2	0	0.0%	0%	0%
Rule 3	27	12.3%	18.5%	6%
Rule 4	5	2.3%	.75%	4%
Rule 5	41	18.7%	4%	8%
Rule 7	12	5.5%	0%	0%
Rule 8	15	6.8%	24%	18%
Sup. Ct. R. 50	15	6.8%	7%	2%
Total	219	100.0%	100%	100%

The PCC made the determinations and findings shown in **Figure H** in 2017. The PCC considers the Rule(s) violated, and balances mitigating and aggravating factors, when deciding the outcome of a case.

FIGURE H

	2017	2016	2015
Closed Without Prejudice	2	25	3
Dismissal	9	10	5
Approved Diversion by Agreement	5	3	1
Approved Stipulation to Facts, Rules and Reprimand	5	4	4
Approved Stipulation to Facts, Rules and Public Censure	6	3	4
Approved Stipulation to Facts, Rules and 6 Mo. Suspension	1	2	2

Approved Stipulation to Facts, Rules and 6 Mo. Susp. Stayed	0	3	0
Approved Stipulation to Facts, Rules and 1 Yr. Suspension	0	0	1
Approved Stipulation to Facts, Rules and 18 Mo. Suspension	0	0	1
Approved Stipulation to Facts, Rules and 3 Yr. Suspension	2	1	0
Approved Stipulation to Facts, Rules and Disbarment	2	6	1
Sanction issued after Motion to Impose Stayed Sanction:			
Reprimand	1	0	0
6 Mo. Suspension	1	0	0
Recommend Disbarment	1	0	0
Sanction issued after a Hearing:			
Reprimand	0	0	0
Public Censure	0	0	0
6 Mo. Suspension	1	1	0
Recommend 2 yr. Suspension	0	0	1
Recommend Disbarment	1	2	1
Recommendation to Approve Request to Resign Under Discipline	0	1	4
Recommendation to Deny Request to Resign Under Discipline	0	0	1
Grant Motion for Protective Order	1	1	1
Deny Motion for Protective Order	1	1	0
Deny request for further hearing	0	0	1
Extension of Stayed Sanction	2	1	0
Dismissal following compliance with diversion or monitoring	0	4	3
Annulment Denied	1	0	0
Annulment Granted	0	2	5
Act on Reciprocal Discipline:			
Recommend No Action Taken	1	0	0
Public Censure	1	4	1
Public Censure w/ Conditions	1	0	0
6 Mos. Suspension	0	1	0
Recommend Disbarment	2	1	2
Request for readmission closed without action	0	1	2
Request for reinstatement forwarded to Hearings Committee	1	1	0
Total	48	78	44

IV. AUDITS

The ADO no longer has a staff auditor. Compliance reviews are currently performed by outside forensic auditors. In 2017, four compliance reviews were conducted. All of the compliance reviews were initiated after receipt of an overdraft notice from bank referrals.

See Supreme Court Rule 50(1)(C)(iv).

V. OTHER

When a solo practitioner is disbarred, suspended, incapacitated or dies, the ADO will recommend to the Supreme Court the appointment of an attorney to inventory the solo practitioner's files and IOLTA accounts. The ADO then locates and provides to the Supreme Court the names of attorneys who have agreed to be considered for appointment. If the Supreme Court appoints an attorney, the ADO provides guidance to the appointed attorney on how to conduct the inventory.

Staff attorneys served as faculty in a variety of educational programs in 2017, including both the June and December Practical Skills Ethics Workshops; a presentation to the UNH Law School Professional Responsibility class; and a CLE on Cybersecurity.

The staff attorneys also attended continuing legal education programs and conferences, including the National Organization of Bar Counsel (NOBC) mid-year meeting, the New Hampshire Bar Association Midwinter Meeting, a Lawyer Assistance Program seminar on succession planning, the ABA 43rd National Conference on Professional Responsibility, the NOBC annual meeting, and the NOBC litigation skills training conference.

The ADO had two interns from the UNH Law School in 2017. 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 2017, General Counsel notified the Supreme Court that three lawyers had been charged with serious crimes. In addition, the Supreme Court disbarred two lawyers who had been convicted of serious crimes and allowed one convicted attorney to resign from the bar after acknowledging that he did not have a defense to disbarment. Disciplinary Counsel notified the Court of a conviction of the respondent in a reciprocal discipline case, who was subsequently disbarred. After DC filed a Motion to Impose a disbarment of a lawyer who did not comply with conditions, the PCC recommended, and the Court issued, a disbarment.

General Counsel also filed six requests for reciprocal discipline stemming from discipline in other jurisdictions. The Supreme Court disbarred one attorney, issued one five-year suspension, and remanded three cases to the PCC for issuance of public censures. In one matter, the Supreme Court found that there was no corresponding New Hampshire Rule of Professional Conduct violated and declined to impose reciprocal discipline.

After reviewing matters filed by the PCC, the Supreme Court suspended a lawyer for three years (in 13 consolidated cases), and disbarred four attorneys. The Court remanded one case to the PCC following a request for reinstatement. One recommendation for a three-year suspension was pending at year's end.

VII. CONCLUSION

As of December 31, 2017, there were 25 grievances and 57 docketed matters pending at the ADO. Of those, ten docketed matters were in the investigation stage with General Counsel, all of which were docketed in 2017. Eleven cases were pending with the CSC for consideration. There were 14 cases pending with Disciplinary Counsel. Eight cases were pending with the Hearings Committee, seven cases were pending at the PCC, one case was pending with the Supreme Court and 15 cases were being monitored by the ADO for compliance with conditions in previous orders issued.

The ADO closed many of its older cases during 2017. 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.