

# New Hampshire Supreme Court

## Attorney Discipline System



2018 Annual Report

## **I. OVERVIEW**

In 2018, the Attorney Discipline Office (ADO) consisted of five attorneys, one paralegal, three legal assistants, and one part-time bookkeeper. Additionally, 36 attorney volunteers and 20 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 2018, Janet F. DeVito retired as General Counsel, and Brian R. Moushegian was appointed to her position. Mark P. Cornell became the Deputy General Counsel and Andrea Q. Labonte was hired as the 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 against whom the grievance was filed. Upon request, 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](http://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 163 grievances, ODNs and referrals in 2018.

General Counsel conduct an initial review of the grievances to determine if they should be docketed. After reviewing the 163 grievances received in 2018, and the grievances remaining from 2017, 37 grievances were docketed as cases requiring further investigation. General Counsel non-docketed 118 of the remaining grievances received and pending. One grievance was withdrawn. 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.

The CSC is comprised of five attorneys and four lay members appointed by the Supreme Court. The CSC met 11 times in 2018. Hon. Peter H. Fauver served as CSC Chair in 2018, 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 118 grievances non-docketed in 2018, and 11 grievances non-docketed in late 2017, the CSC reviewed 21 requests for reconsideration. One request for reconsideration was granted and was 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's decision to uphold a non-docket decision.

The CSC also considers the reports of General Counsel's investigation of docketed complaints. In 2018, the CSC referred 24 docketed cases to Disciplinary Counsel for further action, finding that there was a reasonable likelihood that a hearing panel could find clear and convincing evidence of a violation of the Rules of Professional Conduct. The CSC dismissed 12 docketed cases with a finding of no professional misconduct, which became public at that time; and approved diversion agreements for five docketed matters. In 2018, the CSC also considered two requests to reconsider its own dismissals, both 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 preserving the integrity of the legal profession. As part of the assessment, DC generally 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. DC filed five 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.

When DC 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 2018, DC issued three Notices of Charges involving three attorneys.

In lieu of a contested hearing, Respondents and Disciplinary Counsel may stipulate to all or part of the facts, rule violations, and sanction. In 12 cases, the respondents signed stipulations as to facts, rule violations, and sanction *prior to* the issuance of a NOC, including three stipulations to disbarment, and the cases were considered directly by the PCC instead of proceeding to a hearing. Diversion was requested and approved in three cases. The PCC also approved a stipulation in one matter, following a Hearing Panel's acceptance of a stipulation to facts, rule violations, and sanction, entered into after a NOC was issued.

At the hearings level, DC participated in 13 pre-hearing conferences, two multi-day hearings on the merits, one single-day hearing on the merits, three hearings on sanction after a hearing panel found a rule violation after the merits hearing, and one hearing on sanction only. In addition, DC participated in a one-day hearing on an attorney's request for reinstatement. DC also presented six oral arguments before the PCC in 2018. DC also filed a Petition for Immediate Interim Suspension with the Supreme Court in three cases, all of which were granted.

The Hearings Committee Chair, Attorney Philip H. Utter, appoints a Hearing Panel from members of the Committee, which is comprised of 23 attorney members and 12 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, the Hearing Panel submits a written report 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. These reports are public.

The Hearings Committee Chair appointed 2 hearing panels in 2018 pursuant to requests following a NOC. Thirteen pre-hearing conferences were held. There were two multi-day hearings and one single-day hearing on the merits, three hearings on sanction after a hearing panel found a rule violation after the merits hearing, 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 9 times in 2018. 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 Edward D. Philpot, Jr., completed his term on the PCC on July 31, 2018. Bar Vice President Attorney Daniel E. Will began his term on the PCC on August 1, 2018.

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 six cases in 2018.

When the PCC determines that a sanction greater than a six-month suspension is warranted, it submits its recommendation to the Supreme Court. During 2018, the Committee filed four recommendations for disbarment, and submitted one recommendation for a two-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.

Two matters were closed without prejudice by the PCC after the Supreme Court disbarred the attorneys in their primary cases. One case was closed after the Supreme Court imposed reciprocal discipline for the identical conduct. Four matters were still pending with the PCC at the end of the year.

### **III. THE STATISTICS**

As of December 31, 2018, there were 14 grievances and 40 docketed matters pending at the ADO. Of the docketed matters, three were in the investigation stage with General Counsel, all of which were received in the last quarter of 2018. Four grievances in which the grievant filed a request for reconsideration were pending with the CSC at the end of the year. There were 17 cases pending with Disciplinary Counsel. Two cases were pending with the Hearings Committee, four cases were pending at the PCC, three cases involving two lawyers were pending with the Supreme Court and 11 cases were being monitored by the ADO for compliance with conditions in previous orders issued or as part of a diversion.

**Figure A** illustrates the types of underlying legal matters giving rise to docketed complaints in the past three years.

FIGURE A

<b>Underlying Legal Matters</b>	<b>2018</b>	<b>Percentage In 2018</b>	<b>Percentage In 2017</b>	<b>Percentage In 2016</b>
Overdraft Notification	2	5.4%	22.9%	21%
Family Law	11	29.7%	18.8%	17%
Criminal	6	16.2%	10.4%	13.25%
Other	1	2.7%	10.4%	5.5%
Trust Account Issues	3	8.1%	10.4%	2%
Probate/Estate Planning	5	13.5%	8.3%	13.25%
Civil Suit/Litigation	2	5.4%	6.3%	9%
Personal Injury	1	2.7%	4.2%	0%
Collection/Consumer Protection	1	2.7%	2.1%	3.75%
Real Estate/Loan Modification	1	2.7%	2.1%	3.75%
Bankruptcy	0	0%	2.1%	2%
Employment/Workers Compensation	2	5.4%	2.1%	2%
Business Law/Contracts/Corporate	0	0%	0%	5.5%
Foreclosure	0	0%	0%	2%
Landlord/Tenant	0	0%	0%	0%
Unauthorized Practice of Law	1	2.7%	0%	0%
Criminal Charge against Attorney	1	2.7%	0%	0%
Debt Resolution/Finances	0	0%	0.0%	0%
<b>Total</b>	<b>37</b>			

**Figure B** shows the distribution of the sources of the matters docketed in 2018. Referrals from clients became the most common source of complaints in 2018.

FIGURE B

<b>Docketed Complaint Filed By</b>	<b>2018</b>	<b>Percentage in 2018</b>	<b>Percentage in 2017</b>	<b>Percentage in 2016</b>
Bank Referral/ODN	2	5.4%	25.0%	19%
Client	15	40.5%	20.8%	34%
Opposing Party	4	10.8%	18.8%	13%
Court Referral	7	18.9%	12.5%	11%
Self-report	3	8.1%	10.4%	4%
Other	2	5.4%	10.4%	2%
Attorney Referral	4	10.8%	2.1%	17%
ADO Generated	0	0%	0.0%	0%
<b>Total</b>	<b>37</b>			

**Figure C** shows the number of years the respondent was admitted to practice in New Hampshire at the time the complaint was docketed.

FIGURE C

	<b>2018</b>	<b>Percentage in 2018</b>	<b>Percentage in 2017</b>	<b>Percentage in 2016</b>
1 – 5 years in practice	2	5.4%	2.1%	4%
6 – 10 years in practice	4	10.8%	17.0%	4%
11 – 15 years in practice	6	16.2%	21.3%	17.5%
16 – 20 years in practice	3	8.1%	12.8%	11.75%
21 – 25 years in practice	6	16.2%	10.6%	27.5%
26 – 30 years in practice	5	13.5%	17.0%	19.5%
31 – 35 years in practice	2	5.4%	2.1%	4%
36+ years in practice	9	24.3%	17.0%	11.75%
<b>Total Attorneys</b>	<b>37</b>			

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.

FIGURE D

	<b>2018</b>	<b>% in 2018</b>	<b>% in 2017</b>	<b>% in 2016</b>
1 – 5 years in practice	1	7%	6.3%	12%
6 – 10 years in practice	2	14%	15.6%	20%
11 – 15 years in practice	1	7%	12.5%	4%
16 – 20 years in practice	2	14%	15.6%	12%
21 – 25 years in practice	1	7%	12.5%	8%
26 – 30 years in practice	3	21%	15.6%	16%
31 – 35 years in practice	1	7%	6.3%	8%
36 + years in practice	3	21%	15.6%	20%
<b>Total Findings</b>	<b>14</b>			

The CSC considered 66 matters in 2018 with the outcomes shown in **Figure E**.

FIGURE E

	<b>2018</b>	<b>2017</b>	<b>2016</b>
Requests to Reconsider Matters Not Docketed (denied)	20	31	38
Matters Docketed upon Reconsideration of Non-docket	1	2	0
Requests to Reconsider CSC Dismissals (denied)	3	5	8
Requests to Reconsider Diversion Plans (denied)	0	0	2
Cases Referred upon Reconsideration of CSC Dismissals	0	0	0
Matters Referred to Disciplinary Counsel	24	24	39
Dismissals with no Professional Misconduct	12	14	22
Diversion Completed, Case Closed	2	1	4
<b>Total</b>	<b>62</b>	<b>77</b>	<b>113</b>



**Figure F** is a listing of the Rules of Professional Conduct violations found in 2018. (Some matters resulted in multiple Rule violations.) The most common Rule violation found was Rule 1.4. The second most common violation was of Rule 1.15. All matters necessarily also include a violation of Rule 8.4(a), which is not calculated in the percentage.

FIGURE F

	2018	2017	2016
<b>Rule 1: Client-Lawyer Relationship</b>			
1.1 Competence	6	12	12
1.2 Scope of Representation	1	3	3
1.3 Diligence	6	12	11
1.4 Communication	8	17	8
1.5 Fees	2	17	4
1.6 Confidentiality	1	0	0
1.7 Conflict	4	0	4
1.8 Other Conflict	0	0	2
1.9 Conflict – Former Client	1	0	0
1.14 Client with Diminished Capacity	0	1	0
1.15 Safekeeping Property	7	25	13
1.16 Terminate Relationship with Client	0	16	2
1.19 Disclosure of Information to the Client	0	1	0
<b>Rule 2: Counselor</b>			
<b>Rule 3: Advocate</b>			
3.1 Meritorious Claims and Contentions	1	3	2
3.2 Expediting Litigation	0	1	2
3.3 Candor to Court	5	15	10
3.4 Fairness to Opposing Party	1	8	10
<b>Rule 4: Transactions with Persons other than Clients</b>			
4.1 Truthfulness in Statements to Others	2	3	0
4.4 Respect for Rights of Third Persons	0	2	1
<b>Rule 5: Law Firms and Associations</b>			
5.3 Responsibilities Regarding Non-lawyer Assistants	0	17	3
5.4 Professional Independence of a Lawyer	0	13	0
5.5(a) Unauthorized Practice	0	11	2
<b>Rule 7: Information about Legal Services</b>			
7.1 Communications Concerning a Lawyer’s Services	0	12	0
<b>Rule 8: Integrity of the Profession</b>			
8.1(a) False Statement of Material Fact	1	0	0
8.1(b) Failure to Correct a Misapprehension	0	4	10
8.4(b) Criminal Act	1	0	5
8.4(c) Dishonesty, Fraud, Deceit, or Misrepresentation	6	9	15
8.4(d) Influence of Government Official	0	2	1
Supreme Court Rule 50	3	15	9
<b>Total Violations</b>	<b>56</b>	<b>219</b>	<b>129</b>

The PCC made the determinations and findings shown in **Figure G**. The PCC considers the Rule(s) violated, and balances mitigating and aggravating factors, when deciding the outcome of a case. If an attorney had findings in multiple docketed matters, he/she is only counted once. Effective July 1, 2018, the PCC no longer acts on requests for reciprocal discipline. Those matters are now handled directly by the Supreme Court.

FIGURE G

	2018	2017	2016
Closed Without Prejudice	3	2	25
Dismissal	6	9	10
Remand Case to Hearing Panel for Sanction Hearing	1	0	0
Reject Stipulation and Remand Case to Disciplinary Counsel	2	0	0
Approved Diversion by Agreement	4	5	3
Approved Stipulation to Facts, Rules and Reprimand	5	5	4
Approved Stipulation to Facts, Rules and Public Censure	2	6	3
Approved Stipulation to Facts, Rules and 6 Mo. Suspension	0	1	2
Approved Stipulation to Facts, Rules and 6 Mo. Susp. Stayed	0	0	3
Approved Stipulation to Facts, Rules and 1 Yr. Suspension	0	0	0
Approved Stipulation to Facts, Rules and 18 Mo. Suspension	0	0	0
Approved Stipulation to Facts, Rules and 3 Yr. Suspension	0	2	1
Approved Stipulation to Facts, Rules and Disbarment	3	2	6
Sanction issued after Motion to Impose Stayed Sanction:			
Reprimand	0	1	0
6 Mo. Suspension	0	1	0
Recommend Disbarment	0	1	0
Sanction issued after a Hearing:			
Reprimand	1	0	0
Public Censure	1	0	0
6 Mo. Suspension	0	1	1
Recommend 2 yr. Suspension	1	0	0
Recommend Disbarment	1	1	2
Recommendation to Approve Request to Resign Under Discipline	0	0	1
Recommendation to Deny Request to Resign Under Discipline	1	0	0
Grant Motion for Protective Order	1	1	1
Deny Motion for Protective Order	0	1	1
Deny Request for Reconsideration	1	0	0
Deny Request for Further Hearing	0	0	0

Extension of Stayed Sanction	0	2	1
Dismissal\Closed Following Diversion or Monitoring	10	0	4
Annulment Denied	0	1	0
Annulment Granted	0	0	2
Act on Reciprocal Discipline:			
Recommend No Action Taken	0	1	0
Public Censure	2	1	4
Public Censure w/ Conditions	0	1	0
6 Mos. Suspension	0	0	1
Recommend Disbarment	0	2	1
Request for readmission closed without action	0	0	1
Request for reinstatement forwarded to Hearings Committee	1	1	1
<b>Total</b>	<b>46</b>	<b>48</b>	<b>78</b>

#### IV. 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 2018, including both the June and December Practical Skills Ethics Workshops; a presentation to the UNH Law School Professional Responsibility class; and various CLE programs for the New Hampshire Bar Association, the New Hampshire Women's Bar Association, the Tri-State Defense Lawyers Association, and the New Hampshire Association of Criminal Defense Lawyers. In addition, staff attorneys also participated in Meetings of the Rules Advisory Committee to provide the ADO's views on proposed amendments to the New Hampshire Rules of Professional Conduct and changes to Supreme Court Rules 37 and 37A.

#### V. 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 2018, General Counsel notified the Supreme Court that three lawyers had been convicted of a serious crime. The Supreme Court subsequently disbarred all three lawyers. In addition, staff attorneys sought and obtained three interim suspensions during 2018.

General Counsel also filed three requests for reciprocal discipline stemming from discipline in other jurisdictions. The Supreme Court suspended one attorney for six months and one day, while the other two matters were pending at the Supreme Court at the end of the year.

After reviewing matters filed by the PCC, the Supreme Court disbarred three attorneys, including one attorney for failing to satisfy conditions of his prior discipline, allowed one lawyer to resign under discipline, and suspended a lawyer for three years in one case. The Court reinstated one lawyer after previously imposing an interim suspension. One recommendation for a disbarment against an attorney with two separate matters was pending at year's end.

## **VI. CONCLUSION**

As of December 31, 2018, there were 14 grievances and 40 docketed matters pending at the ADO, compared to 18 grievances and 84 docketed matters pending on December 31, 2017. Of the docketed matters, three were in the investigation stage with General Counsel, all of which were received in the last quarter of 2018. Four grievances in which the grievant filed a request for reconsideration were pending with the CSC at the end of the year. There were 17 cases pending with Disciplinary Counsel. Two cases were pending with the Hearings Committee, four cases were pending at the PCC, three cases involving two lawyers were pending with the Supreme Court and 11 cases were being monitored by the ADO for compliance with conditions in previous orders issued or as part of a diversion.