

New Hampshire Supreme Court

Attorney Discipline System



2019 Annual Report

I. OVERVIEW

In 2019, the Attorney Discipline Office (ADO) consisted of five attorneys, one paralegal, three legal assistants, and one part-time bookkeeper. Additionally, 35 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).

Brian R. Moushegian continued as General Counsel with Mark P. Cornell as the Deputy General Counsel and Andrea Q. Labonte 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. 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 banking institutions send to attorneys or firms holding Client Trust Accounts, and a copy of lawsuits that are filed against attorneys. In total, the ADO received 186 grievances, ODNs and referrals in 2019.

General Counsel conduct an initial review of the grievances to determine if they should be docketed. After reviewing the 186 matters received in 2019, and the grievances remaining from 2018, 27 grievances were docketed as cases requiring further investigation. Two other cases were docketed later after the CSC granted requests for reconsideration. General Counsel non-docketed 154 of the remaining grievances received and pending. One grievance was dismissed and another withdrawn prior to a docketing decision. 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 dismiss the matter, forward the matter to DC for further action, or report to the Complaint Screening Committee. The work product and reports, as well as the deliberations of the CSC, are not public. General Counsel dismissed two docketed matters and forwarded two docketed matters to DC for further action upon consent of the parties involved.

The CSC is comprised of five attorneys and four lay members appointed by the Supreme Court. The CSC met 10 times in 2019. Hon. Peter H. Fauver served as CSC Chair in 2019, 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 154 grievances non-docketed in 2019, and four grievances non-docketed in late 2018, the CSC reviewed 36 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's decision to uphold a non-docket decision.

The CSC also considers the reports of General Counsel's investigation of docketed complaints. In 2019, the CSC referred 18 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 five docketed cases with a finding of no professional misconduct. In one case a request for reconsideration was filed and that case is still pending with the CSC. The remaining four cases became public upon dismissal. The CSC also approved a diversion agreement for one docketed matter and dismissed four docketed matters upon completion of the terms of diversion.

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

two 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. Disciplinary Counsel also filed a motion to close without prejudice in a case where the respondent had been suspended for two years.

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. When a NOC is issued the file becomes public. In 2019, DC issued seven Notices of Charges involving six attorneys. One attorney had two Notices of Charges issued against her for a total of seven docketed matters.

In lieu of a contested hearing, Respondents and Disciplinary Counsel may stipulate to all or part of the facts, rule violations, and sanction. Disciplinary Counsel negotiated two stipulations to facts and rules and requested that a hearing panel be appointed to decide the sanction. In seven cases, the respondents signed stipulations as to facts, rule violations, and sanction *prior to* the issuance of a NOC, and the cases were considered directly by the PCC instead of proceeding to a hearing. There was one attorney that requested he be allowed to resign while under investigation, which was forwarded to the PCC. Disciplinary Counsel requested Diversion in one case, but it was denied. The PCC approved Diversion in one case that was proposed in 2018.

At the hearings level, DC participated in seven pre-hearing conferences, two multi-day hearings on the merits, two hearings on sanction after a hearing panel found a rule violation after the merits hearing, and five hearings on sanction only.

The Hearings Committee Chair, Attorney Philip H. Utter, appoints a Hearing Panel from members of the Committee, which is comprised of 21 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, 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 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 seven times in 2019. The PCC Chair is Attorney David M. Rothstein; the Vice-Chairs are Attorney Heather E. 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 Daniel E. Will completed his term on the PCC on July 31, 2019. Bar Vice President Attorney Richard C. Guerriero, Jr. started his term on the PCC on August 1, 2019.

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. In 2019 the PCC issued protective orders in two matters and denied one request for a protective order. In addition, the PCC granted a motion for alternate service, denied one request for an annulment, dismissed three cases following compliance with diversion agreements and issued discipline in a case where the terms of diversion were not completed. 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 2019.

When the PCC determines that a sanction greater than a six-month suspension is warranted, it submits its recommendation to the Supreme Court. During 2019, the Committee submitted one recommendation for disbarment, one recommendation to approve a resignation request, three recommendations for a two-year suspension, and one recommendation for a three-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 one attorney and suspended another attorney for two years in the primary case. One matter was still pending with the PCC at the end of the year.

III. THE STATISTICS

As of January 1, 2019, 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

Underlying Legal Matters	2019	Percentage In 2019	Percentage In 2018	Percentage In 2017
Family Law	11	37%	29.7%	18.8%
Civil Suit/Litigation	8	27%	5.4%	6.3%
Criminal	2	7%	16.2%	10.4%
Trust Account Issues	2	7%	8.1%	10.4%
Patent Law	2	7%	0%	0%
Overdraft Notification	1	3%	5.4%	22.9%
Probate/Estate Planning	1	3%	13.5%	8.3%
Real Estate/Loan Modification	1	3%	2.7%	2.1%
Bankruptcy	1	3%	0%	2.1%
Other	1	3%	2.7%	10.4%
Employment/Workers Compensation	0	0%	5.4%	2.1%
Personal Injury	0	0%	2.7%	4.2%
Collection/Consumer Protection	0	0%	2.7%	2.1%
Unauthorized Practice of Law	0	0%	2.7%	0%
Criminal Charge against Attorney	0	0%	2.7%	0%
Total	30	100%		

Note: One docketed matter included two types of cases.

Figure B shows the distribution of the sources of the matters docketed in 2019. Referrals from clients became the most common source of complaints in 2019.

FIGURE B

Docketed Complaint Filed By	2019	Percentage in 2019	Percentage in 2018	Percentage in 2017
Client	7	23%	40.5%	20.8%
Opposing Party	6	20%	10.8%	18.8%
Court Referral	6	20%	18.9%	12.5%
Attorney Referral	4	13%	10.8%	2.1%
Self-report	3	10%	8.1%	10.4%
ADO Generated	2	7%	0%	0%
Bank Referral/ODN	1	3.5%	5.4%	25.0%
Other	1	3.5%	5.4%	10.4%
Total	30	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.

FIGURE C

	2019	Percentage in 2019	Percentage in 2018	Percentage in 2017
1 – 5 years in practice	3*	14%	5.4%	2.1%
6 – 10 years in practice	1	5%	10.8%	17.0%
11 – 15 years in practice	3**	14%	16.2%	21.3%
16 – 20 years in practice	1	5%	8.1%	12.8%
21 – 25 years in practice	4	19%	16.2%	10.6%
26 – 30 years in practice	1	5%	13.5%	17.0%
31 – 35 years in practice	4	19%	5.4%	2.1%
36+ years in practice	4	19%	24.3%	17.0%
Total Attorneys	21	100%		

*One attorney had 4 cases docketed against him, but is only counted once.

**One attorney had 6 cases docketed against her, but is only counted once.

The CSC considered 65 matters in 2019 with the outcomes shown in **Figure D**.

FIGURE D

	2019	2018	2017
Requests to Reconsider Matters Not Docketed (denied)	34	20	31
Matters Docketed upon Reconsideration of Non-docket	2	1	2
Requests to Reconsider CSC Dismissals (denied)	1	3	5
Matters Referred to Disciplinary Counsel	18	24	24
Dismissals with no Professional Misconduct	5	12	14
Diversion Proposed	1	0	0
Diversion Completed, Case Closed	4	2	1
Total	65	62	77

Figure E is a listing of the Rules of Professional Conduct violations found in 2019. (Some matters resulted in multiple Rule violations.) The most common Rule violation found was Rule 1.15. The second most common violation was of Rule 1.1. All matters necessarily also include a violation of Rule 8.4(a), which is not calculated in the percentage.

FIGURE E

	2019	2018	2017
Rule 1: Client-Lawyer Relationship			
1.1 Competence	5	6	12
1.2 Scope of Representation	1	1	3
1.3 Diligence	3	6	12
1.4 Communication	3	8	17
1.5 Fees	2	2	17
1.6 Confidentiality	1	1	0
1.7 Conflict	1	4	0
1.8 Other Conflict	1	0	0
1.9 Conflict – Former Client	0	1	0
1.14 Client with Diminished Capacity	0	0	1
1.15 Safekeeping Property	9	7	25
1.16 Terminate Relationship with Client	0	0	16
1.19 Disclosure of Information to the Client	0	0	1
Rule 2: Counselor			
Rule 3: Advocate			
3.1 Meritorious Claims and Contentions	2	1	3
3.2 Expediting Litigation	0	0	1
3.3 Candor to Court	3	5	15
3.4 Fairness to Opposing Party	2	1	8
3.5 Impartiality and Decorum of the Tribunal	1	0	0
Rule 4: Transactions with Persons other than Clients			
4.1 Truthfulness in Statements to Others	1	2	3
4.4 Respect for Rights of Third Persons	0	0	2
Rule 5: Law Firms and Associations			
5.3 Responsibilities Regarding Non-lawyer Assistants	1	0	17
5.4 Professional Independence of a Lawyer	0	0	13
5.5(a) Unauthorized Practice	2	0	11
Rule 7: Information about Legal Services			
7.1 Communications Concerning a Lawyer’s Services	0	0	12
Rule 8: Integrity of the Profession			
8.1(a) False Statement of Material Fact	0	1	0
8.1(b) Failure to Correct a Misapprehension	1	0	4
8.4(b) Criminal Act	1	1	0
8.4(c) Dishonesty, Fraud, Deceit, or Misrepresentation	4	6	9
8.4(d) Influence of Government Official	0	0	2
Supreme Court Rule 50	6	3	15
Total Violations	50	56	219

The PCC made the determinations and findings shown in **Figure F**. 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 F

	2019	2018	2017
Closed Without Prejudice	2	3	2
Dismissal	2	6	9
Remand Case to Hearing Panel for Sanction Hearing	0	1	0
Reject Stipulation and Remand Case to Disciplinary Counsel	2	2	0
Approved Diversion by Agreement	1	4	5
Rejected Diversion by Agreement	1	0	0
Approved Stipulation to Facts, Rules and Reprimand	6	5	5
Approved Stipulation to Facts, Rules and Public Censure	0	2	6
Approved Stipulation to Facts, Rules and Public Censure Stayed	1	0	0
Approved Stipulation to Facts, Rules and 6 Mo. Suspension	0	0	1
Approved Stipulation to Facts, Rules and 2 Yr. Suspension	1	0	0
Approved Stipulation to Facts, Rules and 2 Yr. Suspension Stayed	1	0	0
Approved Stipulation to Facts, Rules and 3 Yr. Suspension	0	0	2
Approved Stipulation to Facts, Rules and Disbarment	1	3	2
Sanction issued after Motion to Impose Stayed Sanction:			
Reprimand	1	0	1
3 Mo. Suspension Stayed	1	0	0
6 Mo. Suspension	0	0	1
Recommend Disbarment	0	0	1
Sanction issued after a Hearing:			
Reprimand	2	1	0
Public Censure	1	1	0
6 Mo. Suspension	0	0	1
Recommend 2 yr. Suspension	1	1	0
Recommend 3 yr. Suspension	1	0	0
Recommend Disbarment	0	1	1
Recommendation to Approve Request to Resign Under Discipline	1	0	0
Recommendation to Deny Request to Resign Under Discipline	0	1	0
Grant Motion for Protective Order	2	1	1
Deny Motion for Protective Order	1	0	1
Grant Motion for Alternate Service	1	0	0
Deny Request for Reconsideration	1	1	0
Extension of Stayed Sanction	0	0	2
Dismissal/Closed Following Diversion or Monitoring	5	10	0
Annulment Denied	1	0	1
Request for reinstatement forwarded to Hearings Committee	0	1	1
Recommendation to approve reinstatement with conditions	1	0	0
Total	38	46	48

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. In two matters, the ADO is conducting the inventory in-house.

Staff attorneys served as faculty in a variety of educational programs in 2019, including both the June and December Practical Skills Ethics Workshops; a presentation to the UNH Law School Professional Responsibility class; New Hampshire Bar Association's 13th Annual Ethics CLE, and the Grafton County Bar Association's semi-annual Ethics CLE. Staff attorneys also published an article in the New Hampshire Bar News entitled "Beware of Fictitious Cashier's Checks." In addition, staff attorneys 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. The Court amended the rules to create an additional position for standing members of the Rules Committee specifically for a designee of the ADO. Currently, Disciplinary Counsel Sara Greene sits on the Rules Advisory Committee as the ADO designee.

Additionally, the ADO updated its website to make it more user friendly. A search field for rule violations was added along with additional information related to compliance with orders. A booklet entitled "New Hampshire Attorney Discipline Office Client Trust Account Guidelines" was also developed and posted to the website.

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 2019, General Counsel notified the Supreme Court that one lawyer had been indicted for a serious crime. That case is still pending with the Supreme Court. In addition, staff attorneys sought four interim suspensions during 2019. Three of them were granted and the fourth was allowed to continue practicing law subject to certain conditions.

General Counsel also filed two requests for reciprocal discipline stemming from discipline in other jurisdictions. The Supreme Court suspended one attorney for three months, stayed and the other attorney for four months, partially stayed Supreme Court also issued reciprocal discipline on two reciprocal discipline petitions filed in 2018 issuing a 15-month suspension and a three month suspension, stayed.

After reviewing matters filed by the PCC, the Supreme Court disbarred two attorneys, allowed one lawyer to resign under discipline, and suspended three lawyers for two years. The Court denied one request for reinstatement and reinstated one lawyer with conditions. A third request for reinstatement following reciprocal discipline (FitzGerald) was filed with the Supreme Court and was still pending at the end of the year. Disciplinary Counsel presented oral argument in front of the Supreme Court in one matter. Two matters involving PCC recommendations and one criminal indictment matter were pending at year's end.

VI. CONCLUSION

As of December 31, 2019, there were 17 grievances and 32 docketed matters pending at the ADO. Of the docketed matters, four were in the investigation stage with General Counsel, all of which were received in the last five months of 2019. Three grievances and one docketed matter in which the grievant filed a request for reconsideration were pending with the CSC at the end of the year. There were 13 cases pending with Disciplinary Counsel, seven cases were pending with the Hearings Committee, one case was pending at the PCC, two cases were pending with the Supreme Court and four cases were being monitored by the ADO for compliance with conditions in previous orders issued or as part of a diversion.