

New Hampshire Supreme Court

Attorney Discipline System



2012 Annual Report

I. OVERVIEW

The Attorney Discipline Office (ADO) consists of four attorneys, one staff auditor who is a Certified Public Accountant, one administrator, and three legal assistants. After March 2012, there was also a temporary assistant to the staff auditor. Additionally, 34 attorney volunteers and 18 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. General Counsel

Cases at the ADO often start with a telephone inquiry from a member of the public. In 2012, General Counsel Thomas V. Trevethick and Assistant General Counsel Janet F. DeVito, referred to herein collectively as General Counsel, fielded more than a thousand calls from people who were unhappy in some way with their own attorney or the opposing party's attorney. If asked, we mail them the forms required to be attached to grievances: 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 has been sent to the attorney who is the subject of the grievance. Although grievances are usually between two and 10 pages long, there is an increasing number of grievances that arrive in three-inch binders with photos and exhibits.

Some grievances arrive from people who have found the forms on our website (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 judges and marital masters who believe they must draw attorney behavior to our attention. In all, we received 207 grievances and referrals during 2012, a slight decline from 2011.

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. Our 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 207 grievances received in 2012, 49 of them, or 24%, were docketed for further investigation. Pursuant to Supreme Court (SC) Rule 37A(IV)(a)(2), the remaining 158 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 SC Rule 37A(II)(a)(6), General Counsel can dismiss a docketed matter without reporting to the CSC. In 2012, General Counsel dismissed eight matters outright, and dismissed two others with a warning. In addition, General Counsel closed three matters without prejudice, because the attorneys had been disbarred in other cases. Four cases were referred to Disciplinary Counsel by agreement of the respondents, without a report to the CSC.

The **Complaint Screening Committee** (CSC) is comprised of nine members: five attorneys and four lay members, appointed by the Supreme Court. Attorney Martha Van Oot “retired” after completing her third three-year term as Chair of the CSC on December 31, 2012, as did other departing members Attorney David M. Rothstein and CPA Jules J. Brayman. This Committee met 10 times in 2012.

The CSC considers and acts on requests for reconsideration of matters not docketed by General Counsel. Of the 158 matters not docketed in 2012, the CSC reviewed 44 requests to reconsider. The Committee affirmed 40 of those decisions, and instructed General Counsel to docket four 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. In 2012, the CSC also considered three requests to reconsider a General Counsel dismissal and one request to reconsider its own dismissal of a matter, all of which were denied.

B. Disciplinary Counsel

Disciplinary Counsel Julie A. Introcaso left the position in September 2012 to become a Circuit Court judge. In November, Sara S. Greene became Disciplinary Counsel. James L. Kruse remained as part-time Assistant Disciplinary Counsel. 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 Lawyers Assistance Program (LAP) representatives if issues of mental health or substance abuse are alleged.

Of the matters that were referred to Disciplinary Counsel in 2012, and matters that were pending from prior years, Disciplinary Counsel issued five Notices of Charges against four attorneys. Disciplinary Counsel also filed four motions to dismiss and three motions to dismiss with a warning. Diversion was requested in one case, and approved by the Professional Conduct Committee (PCC), as were two diversion requests that were pending with the PCC at the end of 2011.

Each case is carefully considered by Disciplinary Counsel to determine what best serves the goals of the discipline process. Pursuant to Rule 37A(III)(c)(5), Respondents and Disciplinary Counsel can stipulate to all or part of the findings and sanction. In one case, the Respondent signed a stipulation as to facts, rules and sanction prior to the issuance of a Notice of Charges, and the case was considered directly by the PCC instead of proceeding to a hearing. In another case, a stipulation was filed as to facts and rule violations, with a sanction hearing following the Hearing Panel's acceptance of the stipulation. In a third case, the Respondent signed an affidavit of resignation, which was approved by the PCC and granted by the Supreme Court. Disciplinary Counsel participated in three depositions, and filed a motion for interim suspension which was resolved in mediation.

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 2012, the **Hearings Committee** was comprised of 24 attorney members and 11 lay members. The Hearings Committee Chair, Attorney James T. Boffetti, appoints members to serve on hearing panels for each matter. Although the minimum required panel consists of 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 five hearing panels in 2012, a slight increase from 2011. Disciplinary Counsel appeared at two 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. Two matters went to a hearing on sanction only, based on stipulations. The fifth matter was a hearing on sanction based upon the lawyer's default in answering the Notice of Charges involving two cases that had been consolidated. Hearings were held at the 10th Circuit Court, Derry; Merrimack County Superior Court, Concord; and at the Administrative Office of the Courts. 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 final determination of the outcome of a case is the responsibility of the **Professional Conduct Committee** (PCC). The PCC is comprised of eight attorney members and four lay members, and met 10 times in 2012. By Supreme Court Rule, the New Hampshire Bar Association Vice President serves on the PCC during his or her term as Vice President. Attorney Jaye L. Rancourt completed her year on the Committee on July 31, 2012. Incoming Vice President Lisa Wellman-Ally was appointed to her term on the Committee as of August 1, 2012. Committee Chair Margaret H. Nelson "retired" after more than 20 years of service in the discipline system on December 31, 2012. Attorney members David N. Cole and James R. Martin also left the Committee after serving 12 and 10 years respectively.

The PCC considers Hearing Panel reports and the entire record in disciplinary matters. In most cases, it conducts 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. Disciplinary Counsel presented oral argument in seven cases in 2012. 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 2012, Disciplinary Counsel filed a Petition for a two-year suspension and one for a medical incapacity suspension (SC Rule 37(10)). They participated in negotiating and filing a resignation while under discipline (SC Rule 37(11)), submitted two briefs, one in response to a Respondent’s appeal of a PCC sanction, and engaged in two oral arguments.

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 the case. Among their other responsibilities, Disciplinary Counsel and staff track compliance with the 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, 2012, the caseload of the ADO included a total of 99 pending matters. There were 41 docketed matters in the investigation stage, 3 of which were docketed in 2010 and one from 2007 that was awaiting final orders from the jurisdiction in which the behavior occurred. There were 58 docketed matters that had been referred to Disciplinary Counsel by the Complaint Screening Committee (CSC) for further action, 37 of which were related to two attorneys.

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, although real estate matters and civil litigation issues showed an increase in 2012. This correlates with the types of underlying matters that were not docketed. Fifty-one percent of the non-docketed grievances concerned either family law or criminal cases.

FIGURE A

Underlying Legal Matters	2012	Percentage In 2012	Percentage In 2011	Percentage In 2010
Family Law/ Adoption	18	37%	25%	23%
Criminal	7	14.3%	13%	12%
Real Estate/Loan Modification	8	16.35%	8%	29%
Probate/ Estate Planning	2	4%	8%	5%

Personal Injury	1	2%	0%	4%
Bankruptcy	1	2%	32%	8%
Other	0	0%	6%	13%
Employment/Workers Compensation	0	0%	1%	0%
Business Law/ Contracts/ Corporate	1	2%	1%	4%
Collection/ Consumer Protection	0	0%	0%	0%
Civil Suit / Litigation	8	16.35%	6%	2%
Small Claims	2	4%	0%	0%
Misuse of Client Trust Funds	1	2%		
Total	49	100%	100%	100%

Grievances and referrals in 2012 were filed by a variety of individuals associated with the underlying legal matters, including 33% by the respondent’s client [down from 57% in 2011 and 64% in 2010]; 29% by the opposing party [up from 14% in 2011]; 12% by the courts [11% in 2011]; 12% by attorneys [up from 9%], and 2% by self-report. The remaining 8% were ADO-generated or from other sources. It is of note that the number of docketed cases originated by the opposing party doubled from 2011 to 2012, and there was a slight increase of referrals from attorneys and courts. This may be a reflection of the increasing number of *pro se* litigants, and the decreasing civility mentioned so often in the literature and press. It is worth watching in the coming year to see if the trend continues.

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. In 2012, there was a shift in the “bell” away from lawyers with 11-20 years experience, and toward a greater number of lawyers with more than 25 years of practice. This may be consistent with the “graying” of the profession in general. [One attorney had two cases docketed in 2012.]

FIGURE B

	2012	Percentage in 2012	Percentage In 2011	Percentage In 2010
1 – 5 years in practice	5	10%	11%	7%
6 – 10 years in practice	7	15%	12%	19%
11 – 15 years in practice	6	12.5%	16%	21%
16 – 20 years in practice	6	12.5%	23%	19%
21 – 25 years in practice	8	17%	14%	17%
26 – 30 years in practice	7	15%	12%	4%
31 – 35 years in practice	5	10%	5%	8%
36+ years in practice	4	8%	7%	5%
Total Attorneys	48		100%	100%

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. This differs from the data of Figure B in that the greatest number of findings remains with the 11-25 year lawyers. [Two respondents each had two cases.]

FIGURE C

	2012	% in 2012	2011	2010
1 – 5 years in practice	0	0%	2	1
6 – 10 years in practice	1	10%	1	1
11 – 15 years in practice	2	20%	2	2
16 – 20 years in practice	1	10%	2	5
21 – 25 years in practice	2	20%	1	1
26 – 30 years in practice	1	10%	1	3
31 – 35 years in practice	2	20%	3	1
36 + years in practice	1	10%	2	0
Total Findings	10	100%	14	14

The CSC processed matters in 2012 as shown in **Figure D**. The chart indicates that the CSC processed almost as many requests to reconsider decisions of General Counsel and the Committee [48] as it did completed investigations of docketed cases [57]. The percentage of requests to reconsider decisions not to docket has risen from 19.7% in 2010 to 27.8% in 2012. [One case referred to Disciplinary Counsel had two attorney respondents.]

FIGURE D

	2012	2011	2010
Requests to Reconsider Matters Not Docketed (denied)	40	45	27
Matters Docketed upon Reconsideration of Non-docket	4	2	0
Requests to Reconsider General Counsel Dismissal	3	0	0
Requests to Reconsider CSC Dismissals	1	2	0
Matters Referred To Disciplinary Counsel	22	44	38
Dismissals With No Professional Misconduct	22	13	28
Dismissals With No Professional Misconduct with Warning(s)	10	9	10
Matters Closed Without Prejudice	3	0	5
Total	105	115	108

Figure E is a listing of the Rules of Professional Conduct that were found to have been violated in 2012, compared to 2011 and 2010. 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

	2012	2011	2010
Rule 1 Violations: Client-Lawyer Relationship			
1.1 Competence	2	4	1
1.2 Scope of Representation	0	1	1
1.3 Diligence	4	3	3
1.4 Communication	3	2	3
1.5 Fees	0	0	1
1.7 Conflict	0	3	4
1.8 Other Conflict	0	0	2
1.9 Former Client	0	1	0
1.14 Client with Diminished Capacity	0	0	1
1.15 Safeguarding Client Funds	4	3	2
1.16 Terminate Relationship with Client	3	1	0
Rule 2 Violations: Counselor	0	1	0
Rule 3 Violations: Advocate			
3.3 Candor to Court	1	1	1
3.4 Fairness to Opposing Party	1	2	1
3.5 Decorum of the Tribunal	1	0	0
Rule 4 Transactions with Persons other than Clients			
4.1 Truthfulness in Statements to Others	1	0	0
4.4 Respect for Rights of Third Persons	1	2	0
Rule 5 Law Firms and Associations		0	2
5.1 Responsibilities of Partners, Managers and . . .	1	0	0
5.3 Responsibilities Regarding Non-lawyer Assistants	1	0	0
5.5(a) Unauthorized Practice	3	0	0
Rule 7 Violations: Information about Legal Services			
7.1(a) Communications contain misrepresentations	2	0	0
7.5(c) Identification of lawyers in firm	1	0	0
Rule 8 Violations: Integrity of the Profession			
8.1(a) False Statement of Material Fact	1	2	1
8.1(b) Failure to Correct a Misapprehension	4	1	2
8.4(b) Criminal Act	1	1	0
8.4(c) Deceit	3	3	3
Rule 37(9)(b) Conviction of Serious Crime	1	1	0
Total Violations	39	32	29

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

	2012	2011	2010
Rule 1	41%	56%	65%
Rule 2	0%	3%	0%
Rule 3	8%	10%	7%
Rule 4	5%	6%	0%
Rule 5	13%	0%	7%
Rule 7	8%	0%	0%
Rule 8	23%	22%	21%
Rule 37(9)(b)	2%	3%	0%
Total	100%	100%	100%

The PCC made the determinations and findings shown in **Figure G** in 2012. 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

	2012	2011	2010
Closed Without Further Action	0	0	1
Closed Without Prejudice	2	8	2
Dismissal	2	1	1
Dismissal w/ Warning(s)	4	3	4
Diversion by Agreement	3	1	0
Remand to Hearings Committee (not closed)	0	1	1
Stipulation to Facts or Facts and Rules	2	0	0
Stipulation to Facts, Rules and Reprimand	3	4	2
Stipulation to Facts, Rules and Public Censure	0	2	5
Misconduct after a Hearing on the Merits			
Reprimand	1	0	0
Public Censure	1	1	0
Public Censure with Conditions	2	0	0
6 mo. Suspension	5	2	4
Recommend 2 yr Suspension Stayed 1 yr	1	0	0
Recommend 2 yr Suspension	1	2	0
Recommend 3 yr Suspension Stayed 3 yrs	0	0	1
Recommend Disbarment	0	3	1
Recommendation to Deny Motion for Reinstatement	0	1	0
Recommendation to Grant Motion for Reinstatement	0	1	0

	2012	2011	2010
Recommendation to Approve Resignation	1	0	0
Grant Protective Order	6	3	8
Deny Protective Order	0	1	0
Motion to Reconsider	2 granted 3 denied	1 granted 1 denied	0
Annulment	1 granted 1 denied	2 granted	0
Reciprocal Discipline	3	1	2
Total	44	39	37

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 2012, 2011 and 2010. Matters were concluded by the Complaint Screening Committee (21); General Counsel (13); the PCC (20); and the Supreme Court (3). [No 2006 cases remained.]

FIGURE H

Year of Complaint	Concluded 2012	Concluded 2011	Concluded 2010
2005	0	0	1
2007	2	1	2
2008	1	3	8
2009	5	8	29
2010	12	31	19
2011	24	13	0
2012	13		
Total	57	56	59

IV. Audits

The Committee's Auditor, Craig A. Calaman, CPA, completed seven audits during 2012, and five were in progress at year's end. Because of the large amount of audit work pending during the second half of 2011, the ADO was granted approval to hire a temporary Audit Assistant. The hiring process for that position was completed in March 2012. That and other steps proved successful in addressing the backlog of audit work.

In addition to the audits performed relating to the complaints pending in the attorney discipline system, Mr. Calaman has assisted law enforcement agencies with prosecutions related to the audits performed for the ADO.

Mr. Calaman performed audit work for the Cheshire County Attorney's Office relating to criminal charges brought against a non-attorney. This work was supplemental to, and stemmed

from, a forensic audit of an attorney which was completed in a prior year. In addition, he assisted the Hillsborough County Attorney's Office with an audit relating to criminal charges brought against an attorney, which included testifying before the Grand Jury.

Mr. Calaman also completed three client trust accounting compliance audits, with one in progress at year's end. 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.

V. Other

Staff attorneys served as faculty in a variety of educational programs in 2012, including the New Hampshire Bar Association's Professionalism Day and both Practical Skills Workshops; a continuing legal education program on Avoiding the Problems & Pitfalls of Lawyers' Trust Accounting; and presentations to Professional Responsibility and Character and Fitness classes at the University of New Hampshire School of Law. The ABA Ethics & Professional Responsibility Committee invited and funded Disciplinary Counsel Julie Introcaso's presentation at a seminar on Ethical Dilemmas Posed by Lateral Hiring at its Midwinter Meeting. General Counsel Trevethick served on the NHBA Delivery of Legal Services Committee, as well as the Full and Reduced Fee Subcommittee.

Two interns from the University of New Hampshire School of Law provided assistance to the ADO in 2012, one for scholastic credit and one as a volunteer. Common tasks of the interns include providing legal research, participating in interviews of complainants and Respondents, drafting documents and reports, and giving presentations to the CSC. It is a valuable service to the ADO and a useful experience for the 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. General Counsel also notifies the Court of lawyers who have been indicted or convicted of serious crimes, pursuant to SC Rule 37(9), and often files petitions for interim suspension or disbarment as appropriate in those cases.

VI. Attorney Discipline Matters at the Supreme Court

In 2012, the Supreme Court issued a resignation order, an incapacity order, declined an appeal of a PCC decision, reinstated one attorney, remanded a case for further hearing, and disbarred two attorneys. In addition, reciprocal discipline matters (from other jurisdictions) were as follows: five disbarments, one six month suspension with three months stayed, one matter remanded to the PCC for imposition of a Public Censure, and one matter remanded to the PCC for recommendation of discipline. In cases involving serious crimes, the Court issued one

disbarment and one immediate interim suspension. There were six matters pending at year's end: one appeal of a PCC decision, one reciprocal discipline matter, and one matter in which Disciplinary Counsel, on behalf of the PCC, filed a Petition requesting a sanction greater than six months suspension. There were also two matters related to pending criminal charges against attorneys and one pending petition for interim suspension.

VII. Conclusion

As of December 31, 2012, there were 113 open matters at the ADO. Of those, 34 matters were in the investigation stage with General Counsel. There were 79 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 held 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. Four matters had had hearings, but the Hearing Panel report had not yet been issued. As mentioned, six were pending at the Supreme Court. 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 stands ready and willing to answer questions from members of the bar and the public regarding the Rules and the process used to enforce them, as we strive to uphold our dual responsibilities to protect the public and maintain the integrity of the profession.