

**Testimony of Brian R. Moushegian, General Counsel of the
New Hampshire Supreme Court Attorney Discipline Office, before the NH Commission on
Law Enforcement Accountability, Community and Transparency**

Background

- New Hampshire Supreme Court Rules 37 and 37A establish and set forth the Rules and Procedures of the New Hampshire Supreme Court Attorney Discipline System.
- The primary purposes of the Attorney Discipline System are the protection of the public and the preservation of the integrity of the legal system.
- The Attorney Discipline System is comprised of four parts: Attorney Discipline Office (the “ADO”), Professional Conduct Committee (the “PCC”), Hearings Committee, and Complaint Screening Committee (the “CSC”).
- The PCC (consisting of 12 members), Hearings Committee (consisting of approx. 30 members) and Complaint Screening Committee (consisting of 9 members) are comprised of volunteer lawyers and non-lawyers, while the ADO, which is funded primarily by the Supreme Court’s annual assessment of New Hampshire licensed attorneys, consists of 10 paid staff (five lawyers, one paralegal, and four support staff).
- The Attorney Discipline System has jurisdiction over all New Hampshire licensed attorneys and Non-New Hampshire licensed attorneys specially admitted to practice law in New Hampshire or, otherwise, engaged in the practice of law in New Hampshire.
- At the beginning of 2020, the number of actively licensed New Hampshire lawyers was approximately 5,575 (in addition to approximately 1,700 lawyers registered as inactive).
- Each year, the ADO receives approximately 175 to 225 matters for its review, processing and potential administrative prosecution.

Attorney Discipline Office

- The Attorney Discipline Office is responsible for the receipt, review, investigation and prosecution of lawyers who have allegedly violated the Rules of Professional Conduct.
 - It is important to note that the Rules of Professional Conduct are the universe the ADO works within. If a lawyer has not engaged in conduct that implicates the Rules of Professional Conduct, the ADO has no authority to investigate the attorney’s conduct.
- The ADO is divided into three General Counsel and two Disciplinary Counsel (all of who are lawyers).

- Among many other responsibilities, General Counsel receives, evaluates, docket, non-docket, and investigates grievances and complaints filed with the ADO.
 - General Counsel is also responsible for the administration of the ADO (e.g., preparing annual budgets, quarterly financial reports, personnel matters, etc.).
 - Disciplinary Counsel prosecutes disciplinary matters before Hearing Committee panels, the PCC, and the Supreme Court.
- Complaints filed with the ADO come from various sources.
 - Written Grievances
 - All complaints start as grievances. Grievances are investigated by the General Counsel.
 - Grievances, which can be filed by mail or online, must provide a written description of the attorney's alleged misconduct.
 - The majority of grievances are filed by members of the public (generally an attorney's client or an opposing party in a contested matter).
 - Prerequisites to the ADO's review and investigation of a grievance:
 - The grievance must be filed under oath.
 - The grievant must certify that a copy of the grievance was mailed to the attorney against whom the grievance was filed.
 - The ADO must have jurisdiction over the attorney.
 - The allegations within the grievance must implicate one or more Rules of Professional Conduct.
 - Absent certain limited exceptions, a grievance must be filed within two years of the alleged misconduct.
 - If the grievance fails to meet any one of the foregoing prerequisites, the ADO will return or non-docket the grievance, explaining the reason why such action was taken by the ADO.
 - Non-docketed grievances do not appear on attorneys' discipline records and are not indexed. After two years, the files relating to the non-docket are destroyed.

- Referrals from New Hampshire Judges and Lawyers
 - A referral is a written complaint filed by a judge or New Hampshire licensed lawyer against another lawyer in which the judge or attorney indicates that he or she does not want to be treated as a grievant.
- Malpractice suits
 - Pursuant to NH RSA 311:8 and Administrative Order 2011-004, the State courts forward copies of legal malpractice suits to the ADO.
 - The ADO will review the complaint filed in the suit and determine whether the matter should be investigated further as a disciplinary matter (i.e., do the allegations implicate the Rules of Professional Conduct).
 - Legal malpractice does not necessarily mean ethical misconduct.
- ADO Generated Inquiries
 - The ADO can, on its own initiative, open an investigation into a matter.
 - For example, the ADO learns of a newspaper article referencing the attorney's potential misconduct.
 - Unless the ADO later docketed a complaint against the attorney based on its investigation, all records of the inquiry will remain confidential.
- Complaints/Docketed Matters
 - If, based on an initial review of the matter, General Counsel determines that the potential of **clear and convincing evidence** of a violation of the Rules of Professional Conduct exists, General Counsel will docket the matter as a complaint.
 - If a matter is docketed as a complaint, and the respondent attorney has not previously submitted an answer, General Counsel will inform the respondent that he or she must file a mandatory response to the complaint within a specific number of days.
 - If the respondent attorney fails to answer a complaint it can result in violations of Rules of Professional Conduct 8.1(b) and 8.4(a) (requiring that attorneys cooperate with an investigation into a disciplinary matter).

- Once docketed, General Counsel will conduct a more thorough investigation into the matter.
 - The investigation will often include interviews with the complainant and the respondent attorney, and a review of documents outside those submitted by the parties.
 - The ADO has the power to subpoena records.

Complaint Screening Committee

- Following its investigation into the matter, General Counsel can dismiss or divert the complaint, or, more commonly, prepare and submit an investigation report to the Complaint Screening Committee.
 - The CSC consists of 9 members (5 lawyers and 4 non-lawyers).
 - The CSC generally meets once a month.
 - General Counsel's report to the CSC is considered work product and, therefore, not included in the public file. In addition, the CSC's deliberations are not open to the public and are not included in the public file.
 - The report will include General Counsel's recommendation as to whether the matter should be dismissed, diverted, or referred to disciplinary counsel.
 - The CSC will then discuss and vote on what action to take.
 - The CSC will determine whether there is a reasonable likelihood of clear and convincing evidence that the respondent attorney's conduct violated the Rules of Professional Conduct.
 - The CSC can divert the matter, dismiss the matter, or refer the matter to Disciplinary Counsel for further proceedings.
- Requests for Reconsideration
 - In instances in which General Counsel non-dockets grievances, grievants are given 10 days from the date on the correspondence notifying the grievant of the non-docket to file a request for reconsideration.
 - Upon review of the request for reconsideration, the CSC can affirm the decision of General Counsel to non-docket the complaint or

direct that the grievance be docketed as a complaint and processed accordingly.

Disciplinary Counsel

- Upon receipt of a file referred to Disciplinary Counsel, Disciplinary Counsel will review the file and conduct her own independent investigation.
- If Disciplinary Counsel determines that there is not enough evidence to meet the burden of proof (clear and convincing evidence) and further prosecute the matter, Disciplinary Counsel will file a Motion to Dismiss with the Professional Conduct Committee seeking its approval for the dismissal.
- In some cases, after investigation and discussion with the respondent and their counsel, if they are represented, but before formal charges are issued, the parties will reach a global stipulation agreeing on facts, rule violations and a proposed sanction. In such cases, a written stipulation will be forwarded to the PCC for its approval. If the proposed resolution involves a diversion or a sanction such as a reprimand, a public censure or a suspension of six months or less, the PCC can conclude the matter by approving the stipulation. If the agreed upon sanction is a suspension of greater than six months, the PCC must recommend the matter to the New Hampshire Supreme Court for its approval.
- If the parties are unable to reach a stipulation, Disciplinary Counsel will prepare a Notice of Charges that formalizes the allegations against the respondent.
- After the Notice of Charges is issued, the Notice of Charges and the ADO's file (other than work product and internal memoranda) become available for public inspection at the ADO. Up to that point, the file is confidential.
- Once the Notice of Charges is served, the respondent has 30 days to submit an Answer to Disciplinary Counsel. The Answer must be in writing and must respond specifically to each allegation and assert all affirmative defenses.
- After receiving respondent's Answer to the Notice of Charges, or if the thirty day period expires and the respondent has not filed an Answer, it is Disciplinary Counsel's responsibility to request that the chair of the Hearings Committee appoint a hearing panel.

Hearings Committee

- If a matter is submitted to the Hearings Committee, the chair of the Hearings Committee will appoint a five person panel from the pool of Hearings Committee members. There are approximately 30 members on the Hearings Committee. A hearing panel is typically comprised of three attorneys and two non-attorney members. An attorney will serve as the chair of that particular hearing panel and another attorney will be assigned as the reporter. A hearing panel must have a minimum of three panel members, with at least one non-attorney member.

- The hearing panel chair will schedule a pre-hearing conference at which Disciplinary Counsel, the Respondent, and the hearing panel chair will set up a schedule for discovery, disclosure of experts, witnesses, etc., as well as a hearing date.
- The hearing panel chair conducts the hearing. A record is assembled of all documents submitted and a stenographer is present to transcribe the proceedings. It is the responsibility of Disciplinary Counsel to present the evidence and call witnesses that will support the Notice of Charges. The respondent may present evidence and call witnesses on his or her behalf. Both parties are entitled to cross-examination.
 - As a general rule, all evidence which is deemed by the hearing panel chair to be relevant, competent and not privileged is admissible and the formal rules of evidence do not apply.
- The hearing panel may also review and accept, reject, or conditionally approve both dispositive and partial stipulations. The hearing panel is the “fact-finder” in the disciplinary process. The hearing panel makes all findings by clear and convincing evidence and must submit a written report to the PCC no more than 60 days after the close of the hearing.

Professional Conduct Committee

- The PCC acts as a reviewing body. It is comprised of 12 members (8 attorneys; 4 non-attorneys).
- Among other duties, the PCC will consider the hearing panel report, applying an appellate standard of review, and will review the entire record if the matter was heard by a hearing panel. In some cases, the PCC will request oral argument.
- The PCC has the authority to determine whether there is clear and convincing evidence of a violation of the Rules of Professional Conduct and to issue sanctions in the form of a reprimand, public censure or a suspension not to exceed six months. All sanctions may be issued with or without conditions. The PCC may issue a diversion or dismiss a matter where appropriate. The respondent or Disciplinary Counsel may file a discretionary appeal with the Supreme Court if either party is aggrieved by the PCC’s final determination.
- The PCC will make a recommendation and file its recommendation with the Supreme Court if it determines that the appropriate sanction is a suspension greater than six months or a disbarment.

Supreme Court

- The Supreme Court has the final authority to issue sanctions involving a suspension of greater than six months. Although the parties may agree on a sanction, the Supreme Court may require briefing and oral argument with respect to rule violations and the sanction. The Supreme Court retains “ultimate authority to determine whether, on the facts found, a violation of the rules

governing attorney conduct has occurred and, if so, the appropriate sanction.” See e.g., Coddington’s Case, 155 N.H. 66, 68 (2007).