

MONTANA
OFFICE OF
DISCIPLINARY
COUNSEL

Annual Report

2016

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ODC'S 2016 ANNUAL REPORT

THE DISCIPLINARY SYSTEM

The Office of Disciplinary Counsel (ODC) is part of a comprehensive lawyer regulation system established by the Montana Supreme Court. Effective July 1, 2002, the system consists of ODC and the Commission on Practice (COP). COP and ODC are under the direct supervision of the Montana Supreme Court.

ODC performs central intake functions and processes, investigates and prosecutes complaints against lawyers that are within the disciplinary jurisdiction of the Court. COP hears and makes a determination of the merits of complaints and, in appropriate cases, makes recommendations to the Court for discipline or other disposition. The disciplinary system is set forth in detail in the Rules for Lawyer Disciplinary Enforcement (2011), which can be found at www.montanaodc.org.

In general, the steps for processing a complaint are as follows.

STEP ONE:

OFFICE OF DISCIPLINARY COUNSEL

ODC receives information and complaints regarding lawyers' alleged misconduct.

Before "docketing" a complaint and assigning it a file number, ODC conducts a preliminary review of the complaint.

COMMISSION ON PRACTICE

The COP consists of nine lawyers and five non-lawyers, who are appointed by the Supreme Court to serve a four-year term.

CHAIRMAN:

Ward E. "Mick" Taleff, Esq.

VICE CHAIRMAN:

Tracy A. Axelberg, Esq.

EXECUTIVE SECRETARY:

Patricia DeVries

MEMBERS:

Brad L. Belke, Esq.
Jean E. Faure, Esq.
Kelly Gallinger, Esq.
Gene Huntington
Lori Maloney
Daniel N. McLean, Esq.
Lois Menzies
Dan O'Brien, Esq.
Rich Ochsner
Heather M. Perry, Esq.
Robert J. Savage, Esq.

OFFICE

ADMINISTRATOR:

Shelly Smith

ADMINISTRATIVE SECRETARY:

Georgia Lovelady

During its preliminary review, ODC determines whether:

1. More information is needed from the complainant or some other source before deciding whether to docket the complaint.
2. A complaint should not be further processed or summarily dismissed on its face.
3. The case should be docketed.

If, for some reason, ODC elects not to docket the complaint, it creates what it terms a “pencil file.” If ODC dismisses a complaint before it is docketed and the complainant requests review of ODC’s dismissal by a COP Review Panel, ODC docketed the file and assigns it an ODC file number (e.g., ODC File No. 14-100).

If ODC creates a pencil file because it has requested more information from the complainant, ODC closes the file if the complainant does not furnish the requested information.

For the remainder of this report, “pencil files” shall be referred to as “non-docketed files.”

If a complaint is “docketed” during the intake process (not including those that were docketed as a result of the complainant’s request for review of ODC’s dismissal in a non-docketed file), ODC may: 1) send the complaint to the lawyer against whom the complaint is made for a response; 2) send the lawyer's response to the complainant and request his or her reply to the lawyer's response; and, 3) conduct an investigation. Upon completion of this process, ODC may:

1. Dismiss the complaint if Disciplinary Counsel determines that disciplinary action is not warranted;
2. Dismiss the complaint with a letter of caution or take other corrective action, or
3. Request leave from a Review Panel of the COP to file a formal complaint.

If a docketed complaint is dismissed by ODC, the complainant has the opportunity to request review of the dismissal by a COP Review Panel.

STEP TWO:

COMMISSION ON PRACTICE REVIEW PANEL

Upon request by Disciplinary Counsel to file a formal complaint against a lawyer, a Review Panel will either: 1) approve the request; 2) refer the matter back to Disciplinary Counsel for further investigation, or 3) reject the request where disciplinary action does not appear to be appropriate.

STEP THREE:

COMMISSION ON PRACTICE ADJUDICATORY PANEL

Upon the filing of a formal complaint, the matter is assigned to a COP Adjudicatory Panel. If necessary, the Adjudicatory Panel conducts an evidentiary hearing and submits its findings, conclusions of law and recommendation to the Montana Supreme Court.

An Adjudicatory Panel may also conduct a hearing to consider whether a conditional admission submitted by a lawyer should be approved. A conditional admission may be submitted by a lawyer after the filing of a formal complaint. In a conditional admission, a lawyer admits certain allegations in exchange for a stated form of discipline.

After the filing of a formal complaint, an Adjudicatory Panel, subject to the right to request review by the Court, may impose an admonition. An admonition may be delivered privately upon certain limited circumstances.

STEP FOUR:

THE MONTANA SUPREME COURT

Except for admonitions (and in some cases probation and imposition of costs), the Montana Supreme Court issues all final orders of discipline. Before the Court makes a final determination, a lawyer may file objections to an Adjudicatory Panel's findings of fact, conclusions of law and recommendation (except when a Respondent submits a Rule 26 Conditional Admission). Also, a complainant may request that the Court review the COP's disposition of a matter.

A flow chart generally demonstrating the disciplinary process is attached as Appendix A.

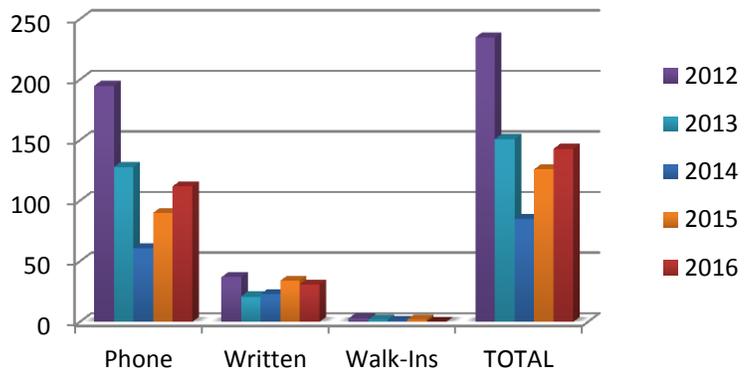
PUBLIC INQUIRIES & COMPLAINTS FILED

5-Year Annual Comparison of Inquiries

From January 1, 2016 through December 31, 2016, a total of 146 complaint packets were sent or given to the public as a result of phone, written and walk-in inquiries.

After ODC's website was developed, ODC began referring people directly to the website where they could review and download ODC's information and forms. ODC does not keep a log of those inquiries. The result of the referrals is a decrease in phone inquiries and packets mailed.

	<u>Phone</u>	<u>Written</u>	<u>Walk-Ins</u>	<u>TOTAL</u>
2012	195	37	3	235
2013	128	21	2	151
2014	61	23	1	85
2015	90	34	2	126
2016	112	31	0	143



In 2016, ODC received 291 new informal complaints, 99 of which were screened prior to docketing, referred to as a “non-docketed complaint” or “pencil file” as described above. Of those 99 non-docketed complaints, 23 were later opened and became docketed complaints either because ODC's dismissal was appealed or the complainant provided the requested additional information. Ultimately, of the 291 new informal complaints filed, 215 were opened and docketed.

ATTORNEYS LICENSED IN MONTANA

The total number of attorneys licensed to practice law in Montana as of December 31, 2016 is 3,894; 3,123 in-state attorneys and 771 out-of-state attorneys whose licenses are on active status. Based upon the number of in-state attorneys, informal disciplinary complaints averaged about one (1) for every eleven (11) attorneys over the twelve-month period; however, some attorneys were subject to multiple complaints.

CASES IN INVENTORY

In 2016, including pending cases carried over from previous years, ODC had 392 total open, docketed complaints (117 carried over and 215 new) and 101 non-docketed complaints (25 carried over and 76 new) throughout the year.

The following is a five-year comparison of the number of ODC's cases in inventory, both non-docketed and docketed.

	2012	2013	2014	2015	2016
TOTAL NEW COMPLAINTS	413	320	258	274	291
NON-DOCKETED COMPLAINTS					
Non-docketed Complaints Carried over from previous years	49	27	16	21	25
Complaints Screened (Not Docketed)	<u>139</u>	<u>98</u>	<u>88</u>	<u>104</u>	<u>99</u>
TOTAL NON-DOCKETED COMPLAINTS IN INVENTORY	188	125	104	125	124
DOCKETED COMPLAINTS					
Docketed Complaints Carried over from previous years	240	107	145	63	117
Complaints Docketed	<u>307</u>	<u>252</u>	<u>190</u>	<u>189</u>	<u>215</u>
TOTAL DOCKETED COMPLAINTS IN INVENTORY	547	359	335	252	392

Of the 392 open cases in inventory in 2016, ODC completed intake and investigations and made 75 reports and recommendations (including supplemental reviews or appeals) to the COP over the course of the four COP meetings held during the year (average of 19 reports per meeting).

In comparison, ODC completed 57 reports in three meetings in 2015 (average of 19 reports per meeting), 77 reports in four meetings in 2014 (average of 19 reports per meeting), 124 reports in four meetings in 2013 (average of 31 reports per meeting), 160 reports in four meetings in 2012 (average of 40 reports per meeting).¹

At the end of 2016, there were 19 open formal cases and no cases where formal complaints were to be filed pursuant to COP's recommendation. Of the open formal cases, five (5) were awaiting determination by COP and none were awaiting determination by the Montana Supreme Court. Ten (10) cases were awaiting a formal hearing (one of which was a continuation of a formal hearing from the previous COP meeting and one of which was held in abeyance pending the Respondent's health condition), and one case where a conditional admission was filed and was awaiting a Rule 26 hearing. Three (3) cases were in the litigation stage. One (1) informal case, involving one attorney, was awaiting a show cause hearing. At the end of 2016, ODC was monitoring 14 attorneys for compliance with disciplinary orders.

¹ The reason for the reduction in the number of reports ODC submits to a COP Review Panel for review is a result of the amendments to the Rules for Lawyer Disciplinary Enforcement effective January 1, 2011, which give ODC greater discretion to dismiss informal complaints. Recent trend has shown that less complaints dismissed by ODC are being appealed to the COP for review.

DISPOSITIONS OF NON-DOCKETED AND DOCKETED COMPLAINTS

<u>NON-DOCKETED COMPLAINTS</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>
Closed with No Further Action	80	38	40	72	50
Dismissals by ODC	96	33	26	23	32
ODC Dismissals Appealed to COP	19	6	3	9	5
ODC Dismissals Closed	77	27	23	14	27
Total Closed w/o COP Involvement	157	65	63	86	77
Total Later Docketed, including appeals	33	30	17	19	22
Total Carried over to following year	27	16	21	25	19
<u>DOCKETED COMPLAINTS</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>
Dismissed by ODC / Complaints Withdrawn	267	201	166	170	147
Dismissed by ODC with Letter of Caution	34	16	14	18	9
ODC Dismissals of Docketed Complaints Appealed to COP	75	51	40	38	39
ODC Dismissals Closed	225	205	172	141	110
ODC Dismissals Carried over to following year	1	12	14	9	7
Closed Without Action - Attorney Deceased	0	0	0	3	2
Dismissals by COP with Letter of Caution	5	2	1	3	0
Dismissals by COP, including appeals	86	100	69	40	45
Total Dismissals by COP	91	102	70	43	45
Complaints Deferred	9	14	18	3	0
Private Sanctions	8	1	0	0	0
Public Sanctions or Disability Inactive Status ²	24	22	23	19	13
Petitions for Reinstatement - DENIED	0	0	1	0	0
Petitions for Reinstatement - GRANTED	0	3 ³	0	0	0
Total Docketed Complaints Carried Over to 2017 (170)	1	0	3	22	144

As previously explained in this report, non-docketed complaints are complaints that have not been immediately docketed or “opened” for various reasons. Non-docketed complaints become docketed complaints when ODC determines they should be opened or if the complainant requests review of ODC’s dismissal.

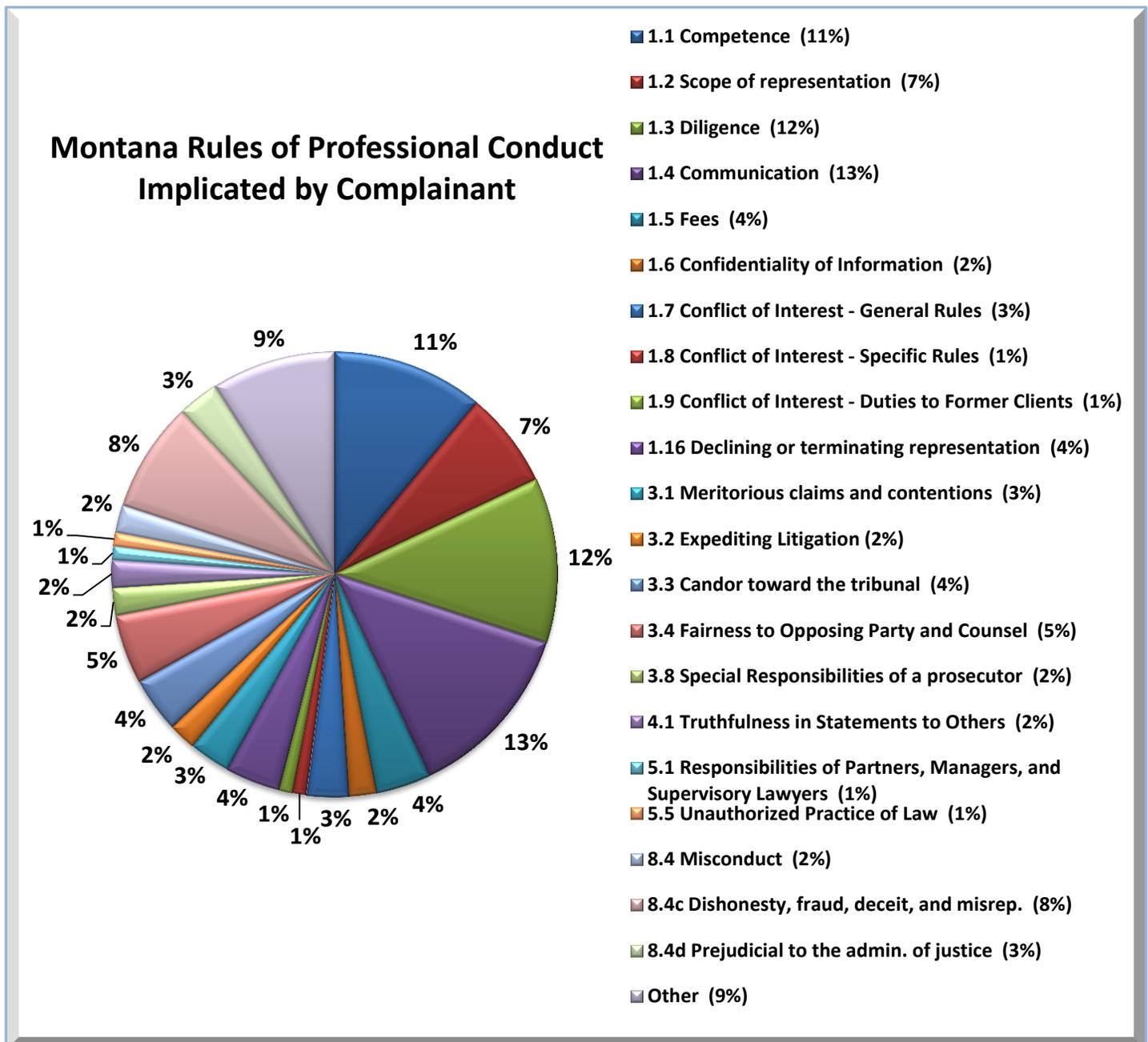
² The total number of public sanctions listed here differs from the total number of public sanctions listed under the Formal Discipline section of this report. The figure listed above represents the number of informal, docketed cases resulting in public sanctions, not the actual number of public sanctions ordered by the Supreme Court. The total number of public sanctions listed under the Formal Discipline section represents the total number of public sanctions.

³ One of the reinstatement petitions was granted subject to conditions, which were required to be met prior to reinstatement.

In the non-docketed complaints resulting in closure with no further action, the complainant did not respond to ODC’s request for more information.

TYPES OF ALLEGATIONS

The following are the types of allegations implicated by complainants in the complaints resulting in docketed cases. The Rules of Professional Conduct not listed either were not implicated in any complaint or made up less than one percent of the total rules implicated. Each of the rules making up less than one percent of the total are represented in the “Other” field, along with the allegations not specific enough to categorize under any particular rule.



CASE PROSECUTIONS

Disciplinary Counsel appeared at 14 hearings over the course of the four (4) COP meetings held during the year, which are further described below with a five-year comparison. The hearings involved 18 docketed cases and 14 attorneys.

	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>
Formal Hearings	12	14 ⁴	7	6	8 ⁵
Rule 23 Dispositional Hearings	0	1	0	0	0
Rule 26 Hearings	8	7	5	6	5
Show Cause Hearings	4	7	6	2	1
Reinstatement Hearings	2	1	1	0	0
Reciprocal Discipline Hearings	<u>0</u>	<u>0</u>	<u>0</u>	<u>1</u>	<u>0</u>
TOTAL	26	30	18	15	14

FORMAL DISCIPLINE OR PLACEMENT ON DISABILITY INACTIVE STATUS

In 2016, the Montana Supreme Court and COP imposed 11 formal disciplinary sanctions and disability inactive rulings (permanent public records) based off 11 orders for 11 Montana lawyers.⁶

The public sanctions and disability inactive rulings included the following.

CASE NO.	ATTORNEY	DISPOSITION	ORDERED
PR 14-0564	MORIARITY, Edward P.	Public Censure	1/12/16
PR 15-0623	PEASLEY, Judith	Public Admonition by COP	2/4/16
PR 15-0257	AKLESTAD, Bradley L.	Public Admonition by COP	3/9/16
PR 15-0264	SCHUSTER, Larry G.	Suspension, 60 days	4/12/16
PR 16-0132	STINSON, Laurence W.	Indefinite Suspension, not less than 9 months	4/12/16
PR 16-0025	EPPERSON, Mark A.	Public Admonition by COP	4/19/2016
PR 15-0654	MATT, Paul G.	Public Admonition by COP	4/19/2016
PR 15-0655	HILARIO, Mark G.	Public Admonition by COP	4/19/2016
PR 15-0626	KOHN, Brian	Indefinite Suspension, not less than 7 months	7/5/16
PR 16-0239	FREEDMAN, David S.	Public Censure	12/6/06
PR 15-0625	PARKER, John W.	Public Admonition by COP	12/30/16

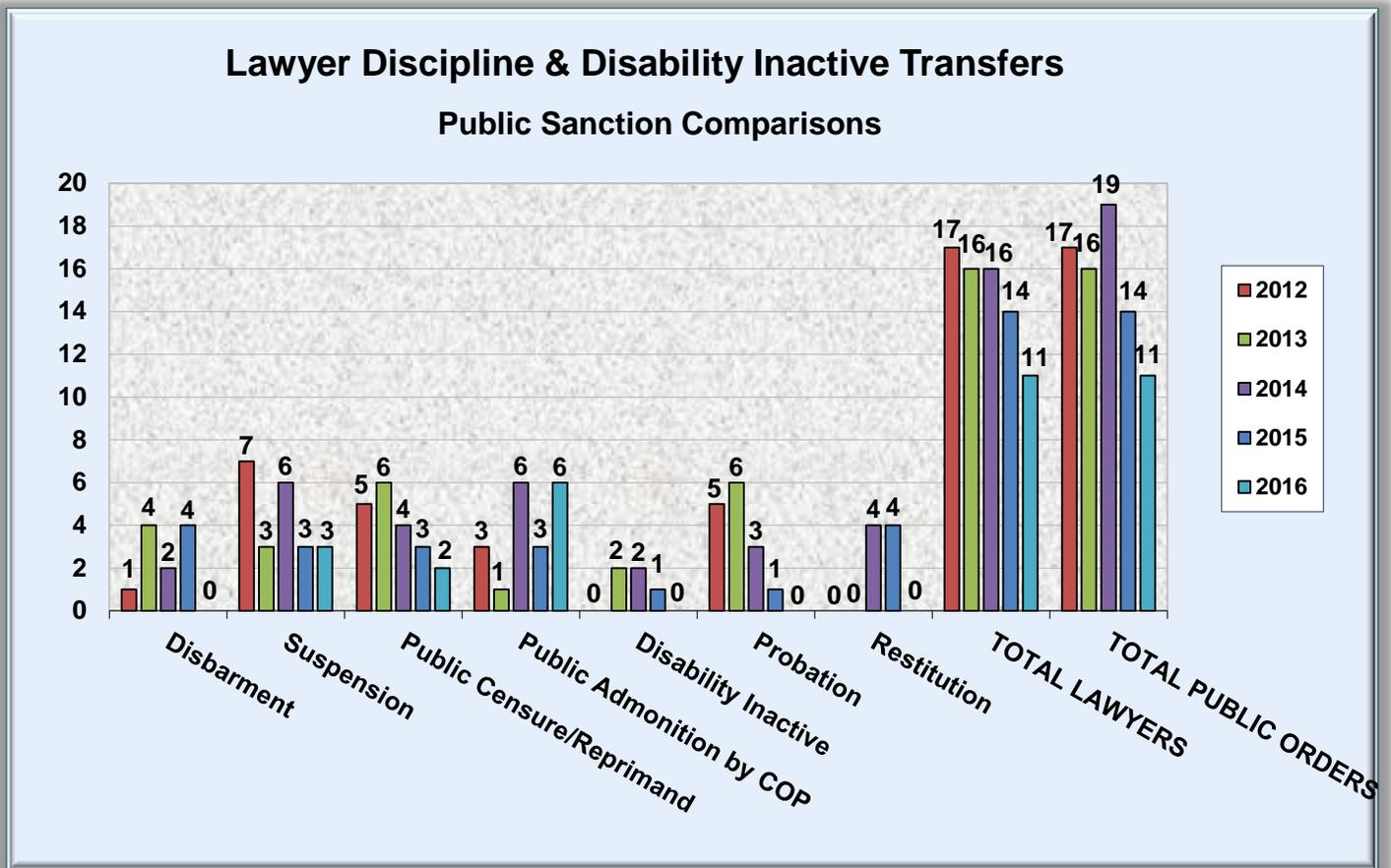
⁴ Two of the formal hearings, at which ODC appeared, were continuations from previous COP meetings.

⁵ One of the formal hearings was a continuation from a previous COP meeting, and another formal hearing at which ODC and Respondent's counsel appeared was continued on motion.

⁶ Some lawyers received multiple sanctions for their misconduct in a disciplinary matter. In addition, some lawyers were disciplined more than once during the calendar year in separate disciplinary matters.

The specifics of some of these matters may be found in the public records held at the Clerk of the Montana Supreme Court. The information may also be found in the Annotations to the Montana Rules of Professional Conduct, which may be purchased from the State Bar of Montana.

The following is a five-year comparison of public sanctions and disability inactive rulings.



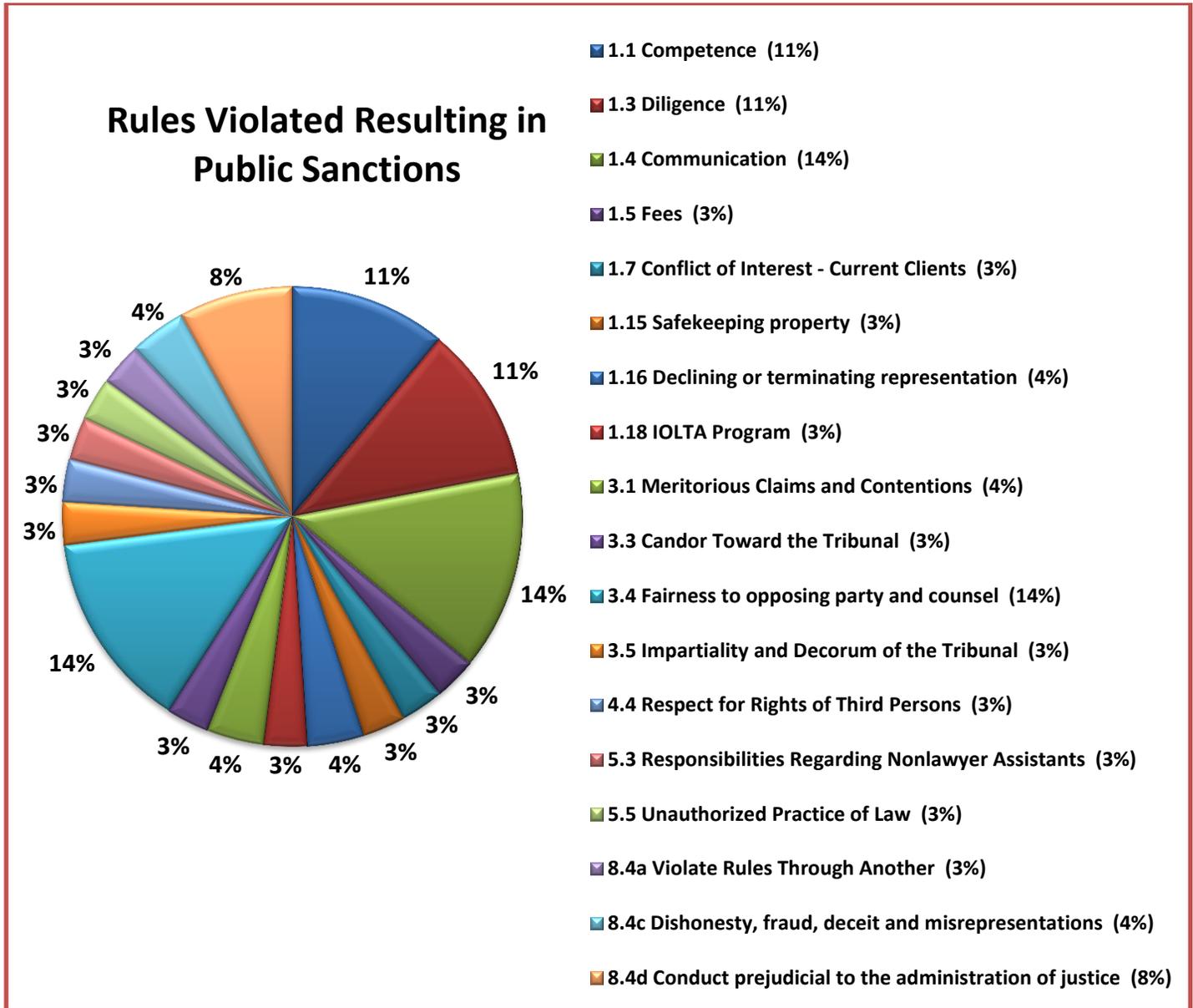
An admonition by COP given publically is a form of discipline established by the revised Rules for Lawyer Disciplinary Enforcement adopted by the Montana Supreme Court and made effective January 1, 2011.

An admonition may be imposed by COP privately when the attorney’s right to privacy outweighs the public’s right to know.

The COP’s decision to impose an admonition or to close a hearing may be, at the request of a party of or member of the public, subject to review by the Montana Supreme Court.

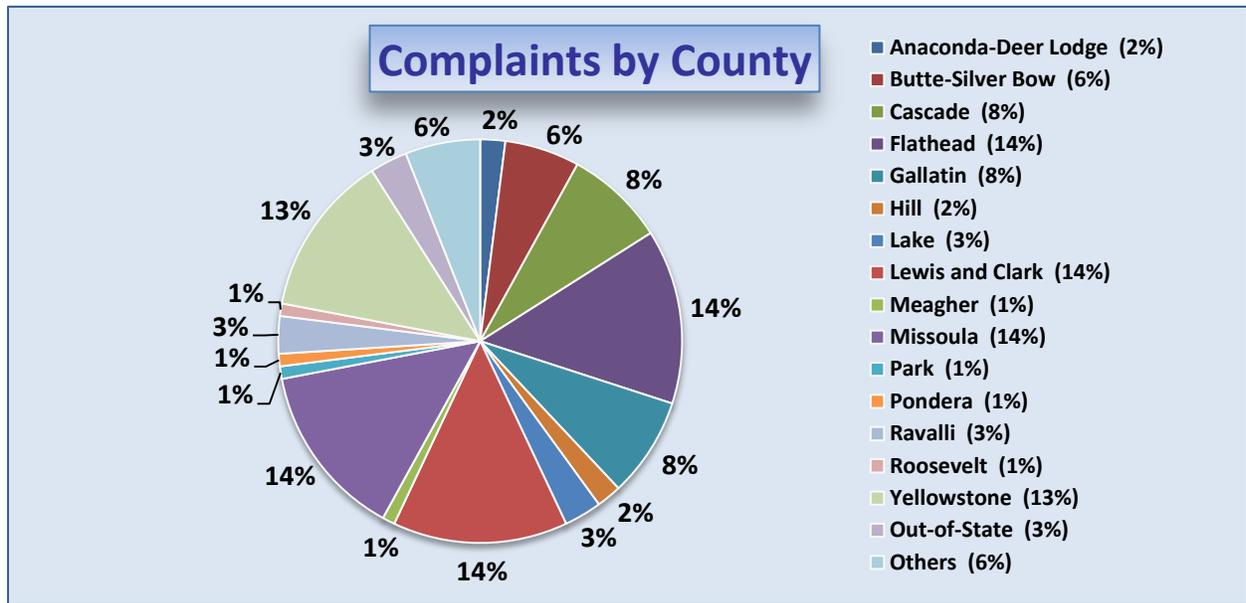
RULE VIOLATIONS RESULTING IN PUBLIC SANCTIONS

In 2016, the Rules of Professional Conduct that were determined to have been violated resulting in the public sanctions are as follows. The percentage represents a comparison of which rules were violated most frequently.



COMPLAINTS BY COUNTY

Complaints that resulted in docketed cases in 2016 were filed against lawyers from the various counties as follows.



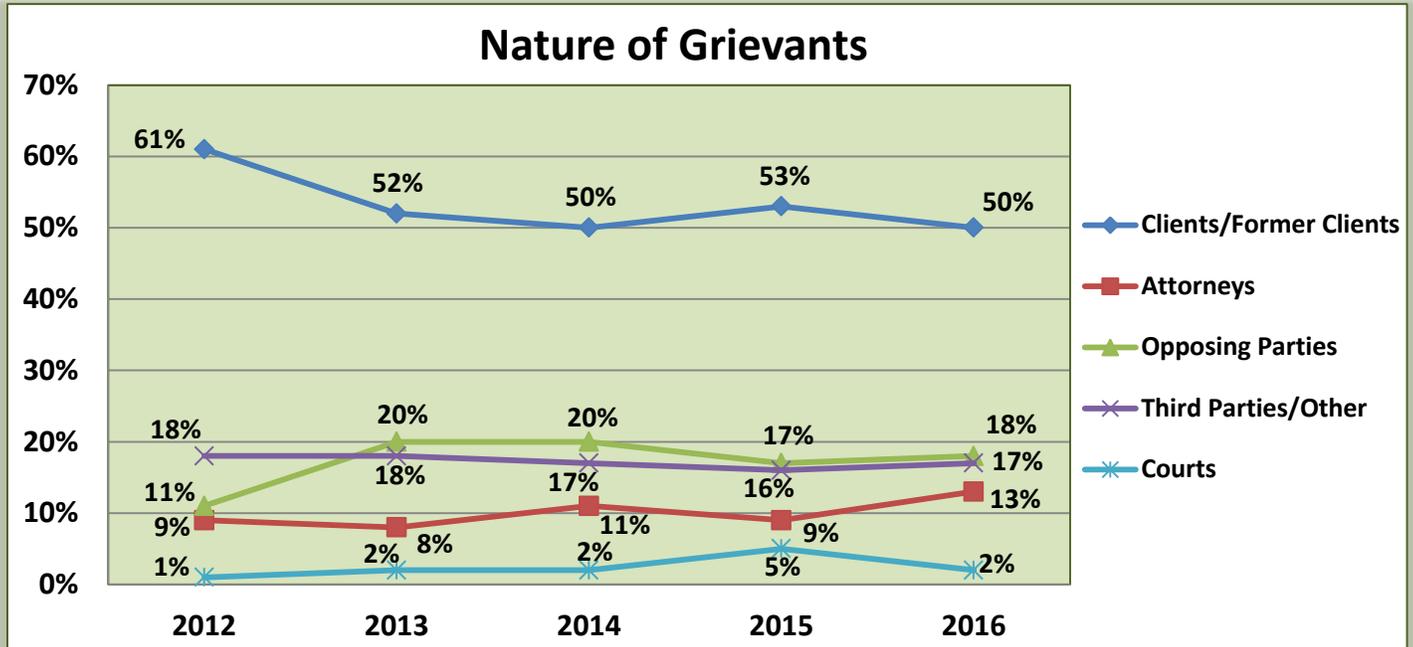
PRACTICE AREAS

The following is a five-year comparison of the various areas of practice in which docketed cases involved.

Areas of Law	2012	2013	2014	2015	2016
Criminal Law	49%	50%	41%	36%	47%
Dependent/Neglect	1%	1%	0%	1%	2%
Family Law	14%	15%	16%	16%	14%
Civil Litigation	15%	9%	10%	19%	15%
Personal Injury-not litigated	2%	4%	5%	2%	0%
Work Comp	1%	0%	1%	0%	1%
Landlord/Tenant	1%	2%	2%	2%	2%
Probate	1%	7%	3%	4%	4%
Bankruptcy	2%	1%	2%	3%	0%
Real Estate	6%	2%	6%	2%	2%
Business	1%	1%	2%	2%	1%
Tax	1%	0%	0%	0%	0%
Administrative Law	0%	1%	0%	2%	1%
Estate Planning	0%	1%	4%	1%	2%
Immigration Law	0%	1%	0%	1%	1%
Other	7%	5%	8%	9%	8%

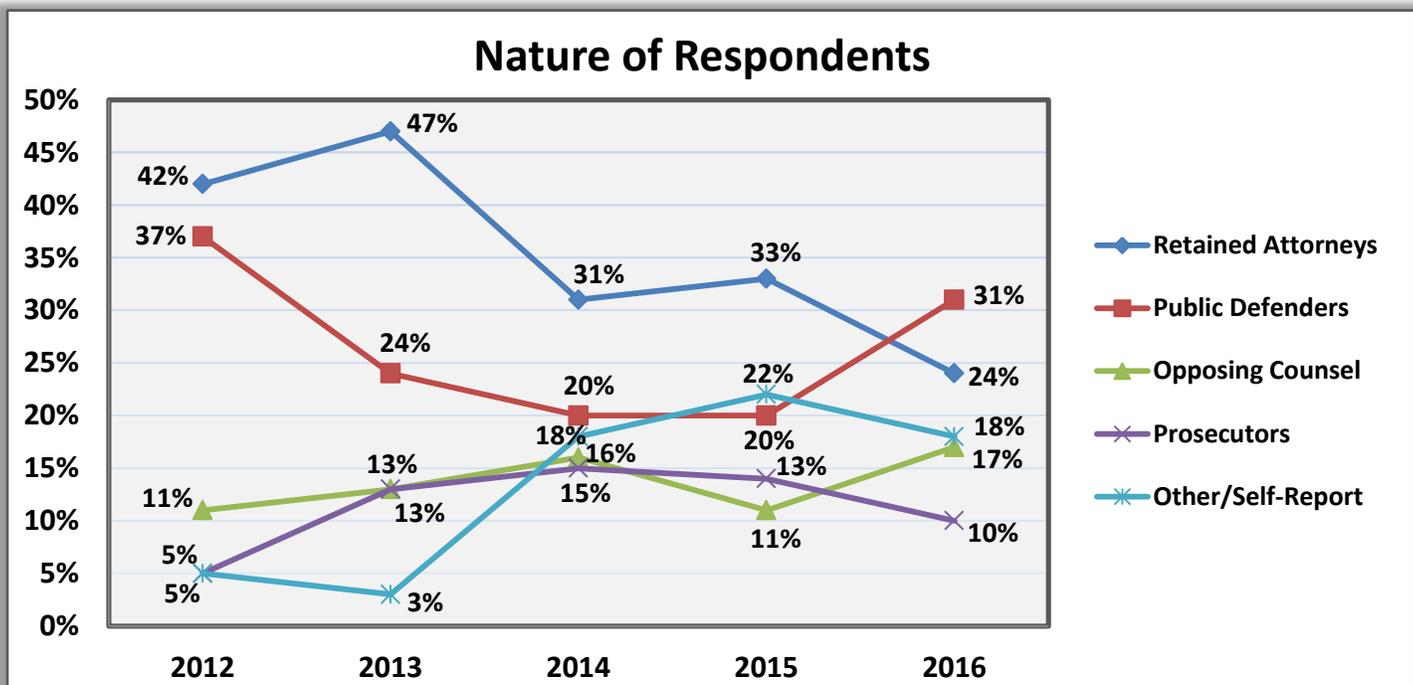
NATURE OF GRIEVANTS

The following is a five-year comparison of the various types of complainants whose complaints resulted in docketed cases. Three attorneys self-reported.



NATURE OF RESPONDENTS

The following is a five-year comparison of the various types of attorneys who had a complaint filed against them, which resulted in a docketed case.



OTHER MATTERS

On February 28, 2017, the undersigned submitted his resignation as Chief Disciplinary Counsel to Chief Justice McGrath, which is effective at the close of business on June 30, 2017. The Court is in the process of selecting a new Chief Disciplinary Counsel.

Since ODC opened its doors on July 1, 2002, there have been only two Disciplinary Counsel (not counting Deputy Disciplinary Counsel). The first, Timothy B. Strauch, served for about three years. The second, the undersigned, has served for almost twelve years.

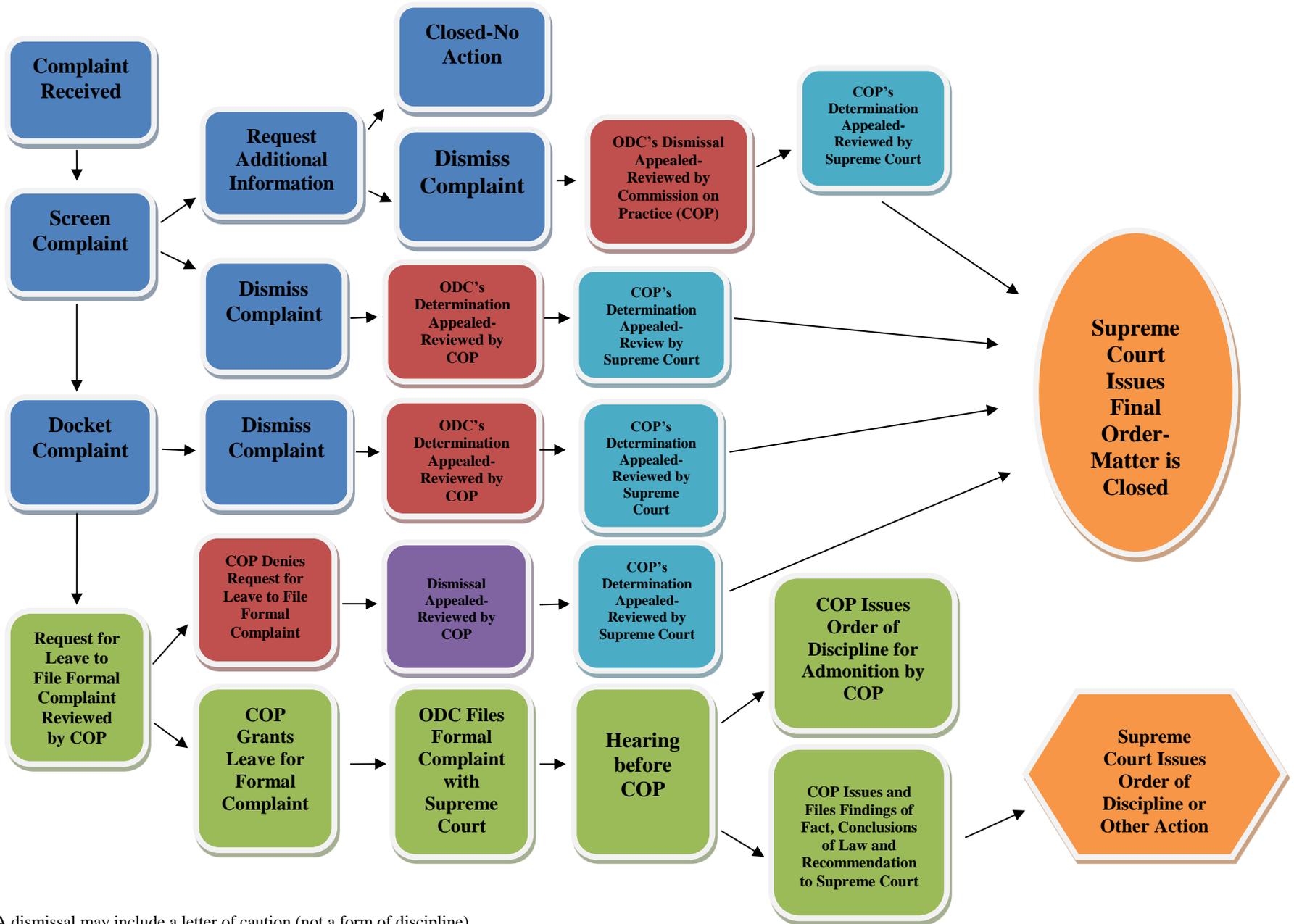
RESPECTFULLY SUBMITTED this 12th day of May, 2017.

OFFICE OF DISCIPLINARY COUNSEL

By: 
Shaun R. Thompson
Chief Disciplinary Counsel

Appendix A

ODC Complaint Process



*A dismissal may include a letter of caution (not a form of discipline).

*Where required by Supreme Court Order, ODC monitors conditions/requirements until completed.

* Blue-Actions by ODC; Green-Formal Complaint Process; Red- Action by COP's Review Panel; Purple-2nd Review by COP Review Panel; Light Blue-Action by Supreme Court; Orange-Final Actions taken by Supreme Court