

**MONTANA
OFFICE OF
DISCIPLINARY
COUNSEL**

**Annual Report
2018**

Chief Disciplinary Counsel:
Michael W. Cotter

Deputy Disciplinary Counsel:
Jon G. Moog

Office of Disciplinary Counsel for the State of Montana

P. O. Box 1099
Helena, Montana 59624-1099
(406) 442-1648
Fax: (406) 442-2685

Executive Assistant:
Shelby Streib

Investigator:
Sheena M. Broadwater

Paralegal:
Susan Lightfoot

Paralegal:
Marni Sowell

ODC'S 2018 ANNUAL REPORT

THE DISCIPLINARY SYSTEM

The Montana Supreme Court has exclusive jurisdiction over the admission of members to the bar and the conduct of its members pursuant to the Montana Constitution, Article VII, Section 2(3). 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 COP meets four times per year for three-day sessions and may also schedule special sessions throughout the year to adjudicate disciplinary matters. The disciplinary system is set forth in detail in the Rules for Lawyer Disciplinary Enforcement (2018), 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

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:

Kelly J.C. Gallinger, Esq.

EXECUTIVE SECRETARY:

Patricia DeVries

MEMBERS:

Brad L. Belke, Esq.
Michael G. Black, Esq.
Jean E. Faure, Esq.
Gene Huntington
Patt Leikam
Lori Maloney
W. Carl Mendenhall, Esq.
Lois Menzies
Dan O'Brien, Esq.
Randy S. Ogle, Esq.
Heather M. Perry, Esq.
Robert J. Savage, Esq.
Nels Swandal, Esq.

OFFICE

ADMINISTRATOR:

Shelly Smith

ADMINISTRATIVE

ASSISTANT:

Georgia Lovelady

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.

During its preliminary review, ODC determines whether:

1. More information is needed from the grievant 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 ODC elects not to docket the complaint, a "pencil file" is then created. If ODC dismisses a complaint before it is docketed and the grievant 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 grievant, and the additional information is not furnished, ODC closes the file.

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 grievant's request for review of ODC's dismissal of 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 grievant 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 grievant 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 should be approved. A conditional admission may be submitted by a lawyer after the filing of a formal complaint. A conditional admission 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 grievant 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.

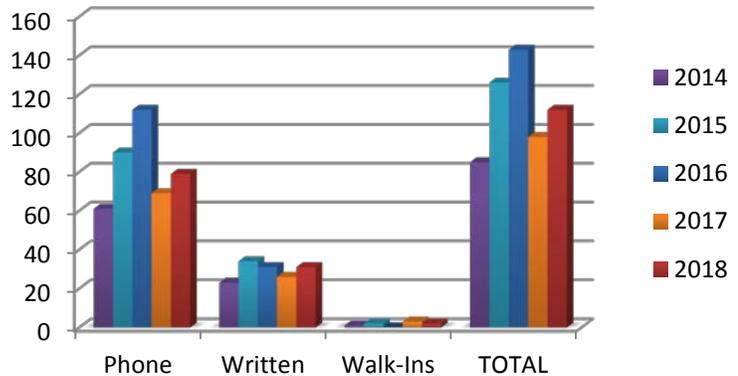
PUBLIC INQUIRIES & COMPLAINTS FILED

5-Year Annual Comparison of Inquiries

From January 1, 2018 through December 31, 2018, a total of 112 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>
2014	61	23	1	85
2015	90	34	2	126
2016	112	31	0	143
2017	69	26	3	98
2018	79	31	2	112



NEW COMPLAINTS

In 2018, ODC received 286 new informal complaints, 117 of which were screened prior to docketing, referred to as a “non-docketed complaint” or “pencil file” as described above. Of those 117 non-docketed complaints, 13 were later opened and became docketed complaints either because ODC's dismissal was appealed or the grievant provided the requested additional information. Ultimately, of the 286 new informal complaints filed, 182 were opened and docketed.

ATTORNEYS LICENSED IN MONTANA

The total number of attorneys licensed to practice law in Montana as of December 31, 2018, is 4,998. Of those, 3,184 are in-state and on active status. The remaining 1,814 are either out-of-state or lawyers whose licenses are on inactive status. Based upon the number of in-state, active attorneys, informal disciplinary complaints averaged about one (1) for every seventeen (17) attorneys over the twelve-month period; however, some attorneys were subject to multiple complaints.

CASES IN INVENTORY

In 2018, including pending cases carried over from previous years, ODC had 526 cases in inventory. Cases in inventory represent the combination of docketed and non-docketed complaints. The total open, docketed complaints was 396 (214 carried over and 182 new), and the total non-docketed complaints was 130 (32 carried over and 98 new) throughout the year.

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

	2014	2015	2016	2017	2018
TOTAL NEW COMPLAINTS	258	274	294	266	286
NON-DOCKETED COMPLAINTS					
Non-docketed Complaints Carried over from previous years	16	21	25	37	32
Complaints Screened (Not Docketed)	<u>88</u>	<u>104</u>	<u>99</u>	<u>115</u>	<u>98</u>
TOTAL NON-DOCKETED COMPLAINTS IN INVENTORY	104	125	124	152	130
DOCKETED COMPLAINTS					
Docketed Complaints Carried over from previous years	145	63	117	162	214
Complaints Docketed	<u>190</u>	<u>189</u>	<u>215</u>	<u>161</u>	<u>182</u>
TOTAL DOCKETED COMPLAINTS IN INVENTORY	359	335	252	323	396

Of the 396 open cases in inventory in 2018, ODC completed intake and investigations and made 63 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 15 reports per meeting).

In comparison, ODC completed 42 reports in four meetings in 2017 (average of 10 reports per meeting), 75 reports in four meetings in 2016 (average of 19 reports per meeting), 57 reports in four meetings in 2015 (average of 14 reports per meeting), and 77 reports in four meetings in 2014 (average of 19 reports per meeting).

At the end of 2018, there were 16 open formal cases and no cases where formal complaints were to be filed pursuant to COP's recommendation. Of the open formal cases, two (2) are awaiting determination by COP, and one (1) is awaiting determination by the Montana Supreme Court. Eight (8) cases are awaiting a formal hearing, and five (5) cases were in the litigation stage. At the end of 2018, ODC was monitoring 17 attorneys for compliance with disciplinary orders.

DISPOSITIONS OF NON-DOCKETED AND DOCKETED COMPLAINTS

<u>NON-DOCKETED COMPLAINTS</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
Closed with No Further Action	40	72	50	49	49
Dismissals by ODC	26	23	32	35	58
ODC Dismissals Appealed to COP	3	9	5	6	6
ODC Dismissals Closed	23	14	27	29	52
Total Later Docketed	17	19	22	10	2
Total Carried over to following year	21	25	19	37	31

<u>DOCKETED COMPLAINTS</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
Dismissed by ODC	180	191	158	161	109
ODC Dismissals Appealed to COP	40	38	39	44	31
ODC Dismissals Closed	172	141	110	116	78
Total Dismissals by COP, including appeals	70	43	45	34	34
ODC Dismissals Carried over to following year	14	9	7	16	4
Complaints Deferred	18	3	0	3	2
Public Sanctions or Disability Inactive Status ¹	23	19	13	23	13
Petitions for Reinstatement - DENIED	1	0	0	0	0
Petitions for Reinstatement - GRANTED	0	0	0	0	1
Total Docketed Complaints Carried Over to 2019 (214)	2	7	35	118	162

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 grievant requests review of ODC’s dismissal.

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

¹ 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 docketed cases resulting in public sanctions. Some docketed files involving the same attorney were consolidated into one formal complaint, resulting in one sanction order. The total number of public sanctions listed under the Formal Discipline section represents the total public sanctions ordered. Some sanction orders include more than one sanction.

TYPES OF ALLEGATIONS

The following are the types of allegations implicated 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.



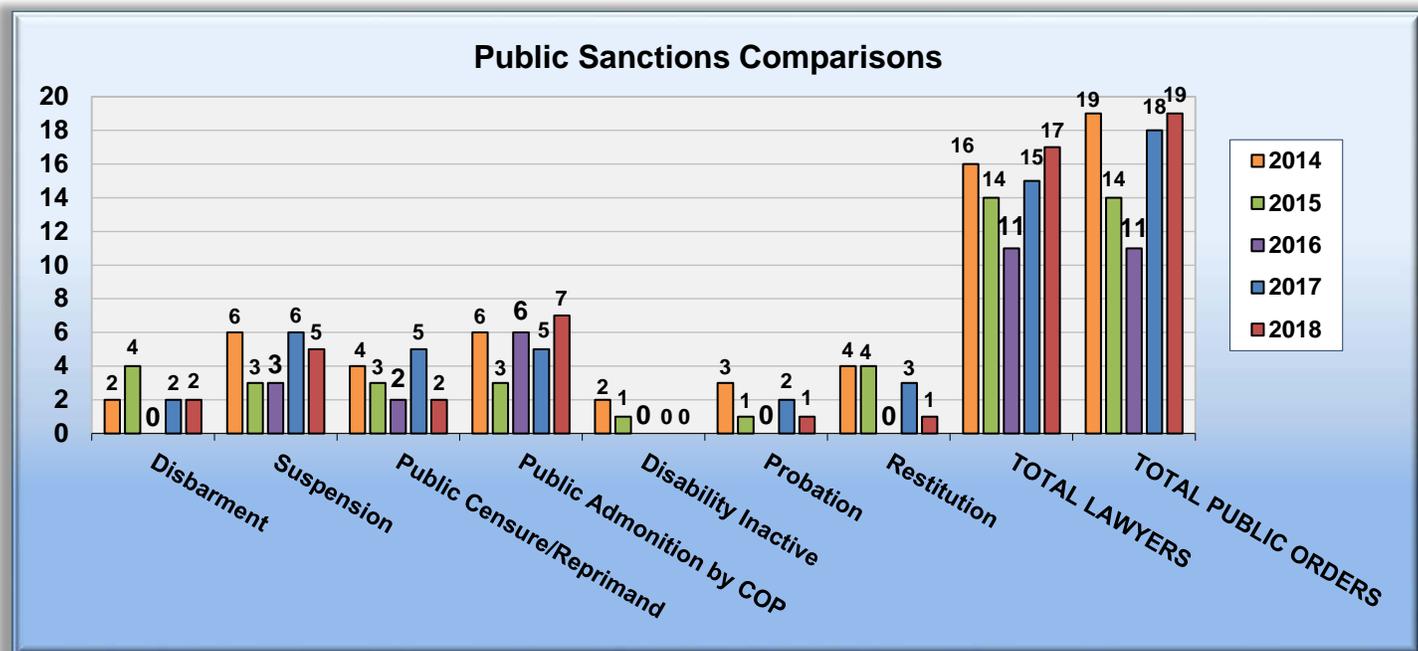
CASE PROSECUTIONS

Disciplinary Counsel appeared at 21 hearings over the course of the four (4) COP meetings held during the year, further described below with a five-year comparison. The hearings involved 18 docketed cases and 16 attorneys.

	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
Formal Hearings	7	6	8	11	8
Rule 23 Dispositional Hearings	0	0	0	1	0
Rule 26 Hearings	5	6	5	4	10
Show Cause Hearings	6	2	1	4	1
Reinstatement Hearings	1	0	0	0	2
Reciprocal Discipline Hearings	<u>0</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>0</u>
TOTAL	19	15	14	20	21

FORMAL DISCIPLINE OR PLACEMENT ON DISABILITY INACTIVE STATUS

In 2018, the Montana Supreme Court and COP imposed 24 formal disciplinary sanctions and disability inactive rulings (permanent public records) based off 16 orders for 15 Montana lawyers.² The following is a five-year comparison of public sanctions and disability inactive rulings.



² 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.

MONTANA ATTORNEYS SANCTIONED

The following Montana attorneys were publicly sanctioned in 2018, as detailed below. Public censures are given by the Supreme Court directly and admonitions are given by the COP.

CASE NO.	ATTORNEY	DISPOSITION	ORDERED
PR 18-0035	Bjornson, David	Public Censure; Probation, 10 years	5/17/18
PR 18-0212	Cross Guns, Roberta	Public Admonition by Commission on Practice	9/18/18
PR 18-0034	Freedman, David S.	Suspension, 7 months	10/30/18
PR 18-0059	Gillespie, Richard G.	Public Admonition by Commission on Practice	5/2/18
PR 17-0459	Horton, Michael	Public Censure	5/17/18
PR 17-0633	Kleinsmith, Philip M	Disbarred	1/9/18
PR 17-0234	Kohn, Brian K	Indefinite Suspension, 7 months, effective 3/29/18; Restitution	2/27/18
PR 18-0216	Managhan, William	Public Admonition by Commission on Practice	9/18/18
PR 16-0635	McCann, Genet	Disbarred, effective 7/5/18	6/6/18
PR 17-0670	McCann, Genet	Indefinite Suspension, not less than 7 months, effective 7/5/18, concurrent with PR 16-0635	6/5/18
PR 17-0244	Mora, Jeffrey D.	Public Admonition by Commission on Practice	5/3/18
PR 18-0044	Morigeau, Joshua	Public Admonition by Commission on Practice	5/3/18
PR 17-0254	Morin, Tina L.	Public Admonition by Commission on Practice	3/6/18
PR 17-0243	Morris, Jack	Suspension, 3 months; Probation, 2 years, effective upon reinstatement	6/12/18
PR 18-0213	Seykora, James	Public Admonition by Commission on Practice	9/18/18
PR 17-0245	Wallace, Terry A.	Suspension, 7 months	10/30/18

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.

COSTS AWARDED AND COLLECTED

As a condition of lawyer sanctions and disciplinary orders, the Supreme Court often requires an attorney to pay the costs associated with their disciplinary proceeding. ODC monitors each lawyer for compliance with their disciplinary order and collects costs accordingly.

The foregoing is a five-year lookback of costs ordered by the Supreme Court and costs collected by ODC.

	2014	2015	2016	2017	2018	TOTALS
Orders Including Costs	14	9	9	11	15	
Amount Ordered	\$25,361	\$14,857	\$14,683	\$44,102	\$38,837	\$137,840
Amount Collected	\$7,360	\$8,694	\$6,147	\$16,169	\$5,197	\$43,567

ATTORNEY COMPLIANCE AND MONITORING

As noted above, ODC monitors disciplined lawyers for their compliance with disciplinary orders. Additional requirements are determined on a case by case basis, given the nature of violation and any aggravating or mitigating factors. At the close of 2018, ODC was monitoring a total of 17 lawyers. Six (6) of those lawyers are on active status, eight (8) are on probation, and eleven (11) additional lawyers are on inactive status or are suspended or disbarred.

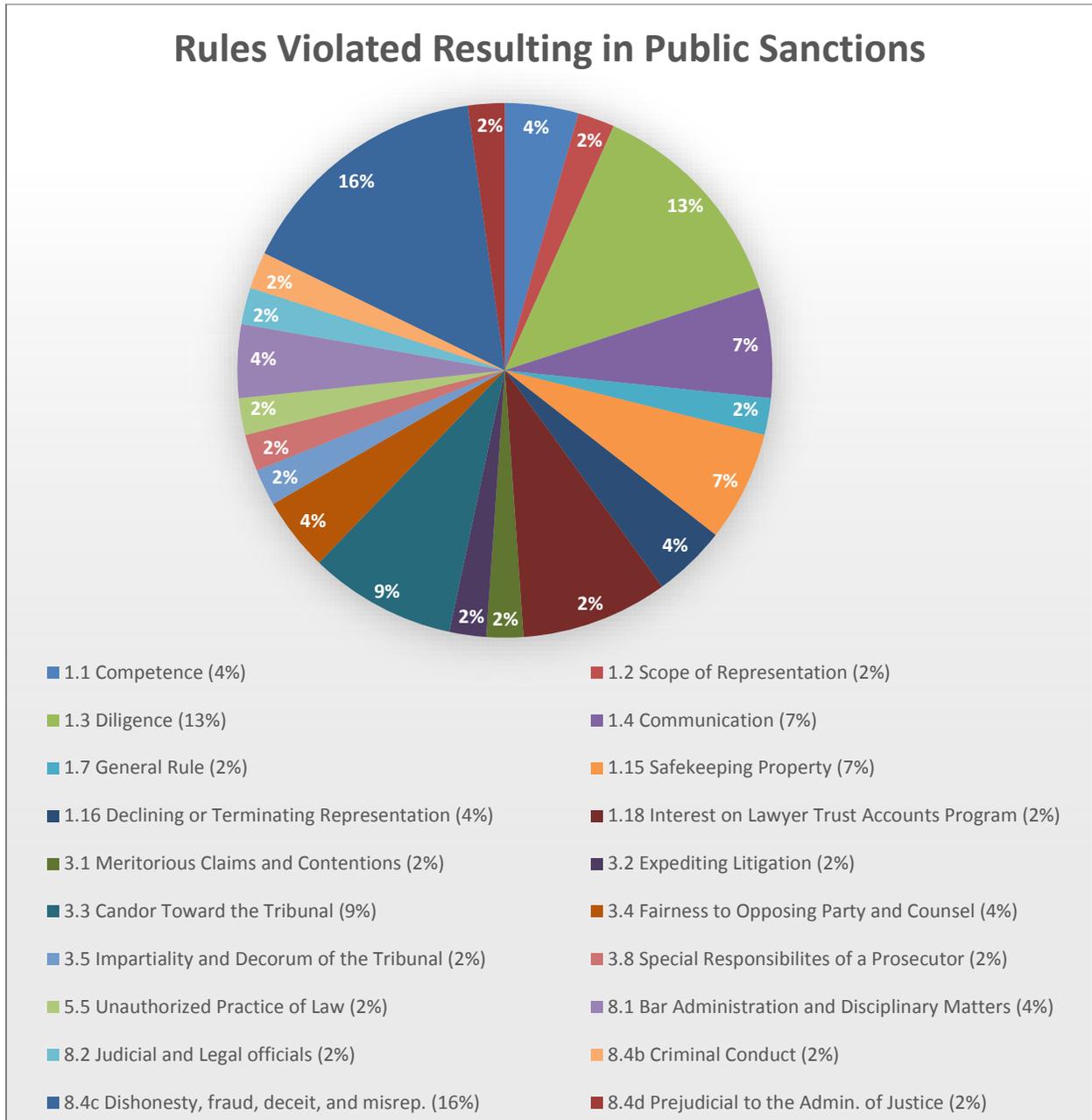
DISCIPLINE BY SUPREME COURT AND COP

The following table shows a five-year breakdown of discipline.

	Disbarment	Suspension	Public Censure	Public Admonition by COP
2014	2	6	4	6
2015	4	3	3	3
2016	0	3	2	6
2017	2	6	5	5
2018	2	5	2	7

RULE VIOLATIONS RESULTING IN PUBLIC SANCTIONS

In 2018, 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.



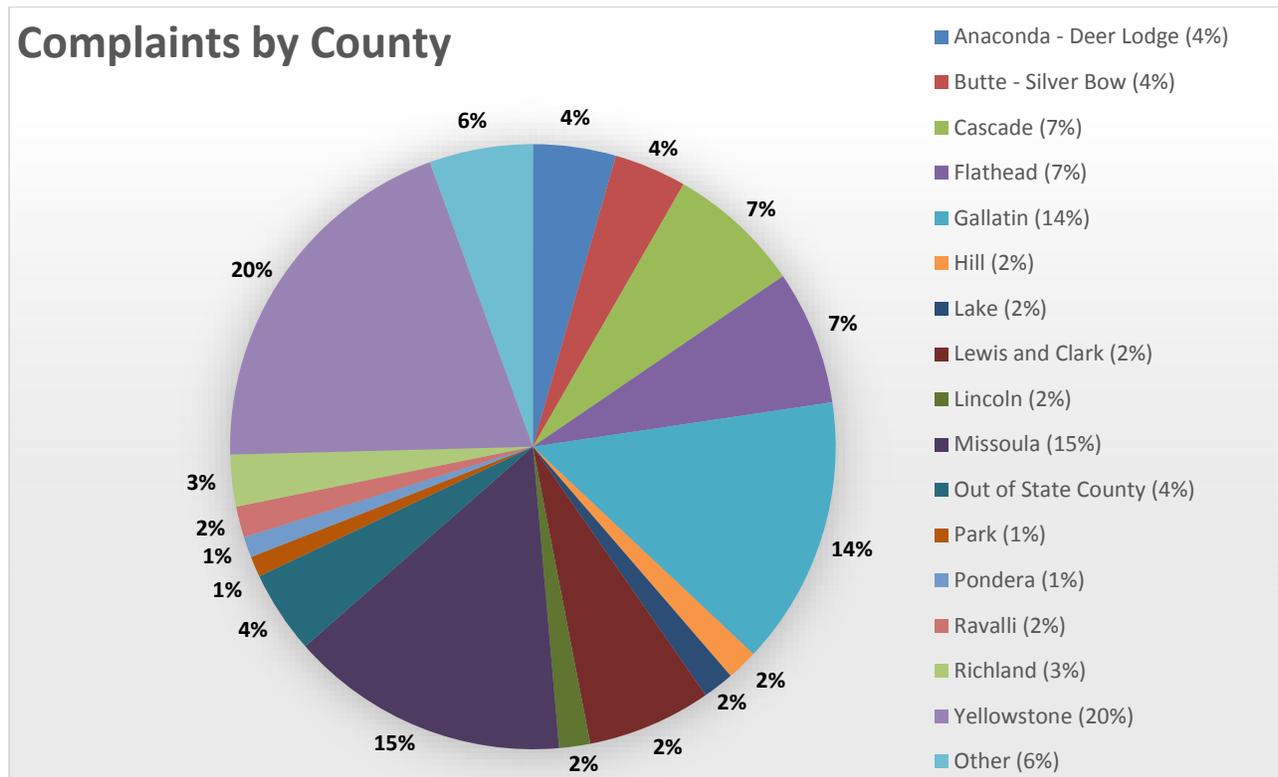
PRACTICE AREAS

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

Areas of Law	2014	2015	2016	2017	2018
Criminal Law	41%	36%	47%	47%	36%
Dependent/Neglect	0%	1%	2%	0%	1%
Family Law	16%	16%	14%	20%	25%
Civil Litigation	10%	19%	15%	11%	10%
Personal Injury-not litigated	5%	2%	0%	3%	7%
Probate	3%	4%	4%	4%	1%
Bankruptcy	2%	3%	0%	1%	2%
Real Estate	6%	2%	2%	2%	3%
Business	2%	2%	1%	4%	5%
Estate Planning	4%	1%	2%	4%	4%
Tax Law	0%	1%	1%	0%	1%
Other	8%	9%	8%	2%	5%

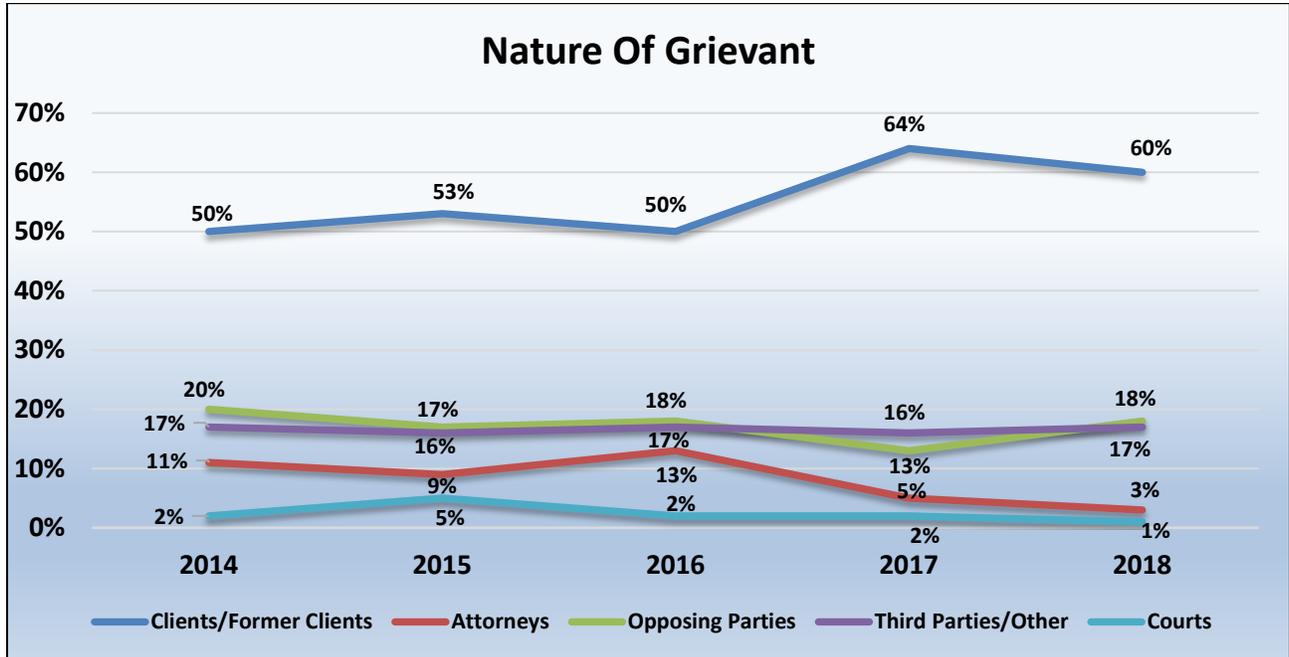
COMPLAINTS BY COUNTY

The 2018 complaints filed against lawyers resulting in docketed cases from various Montana counties as follows.



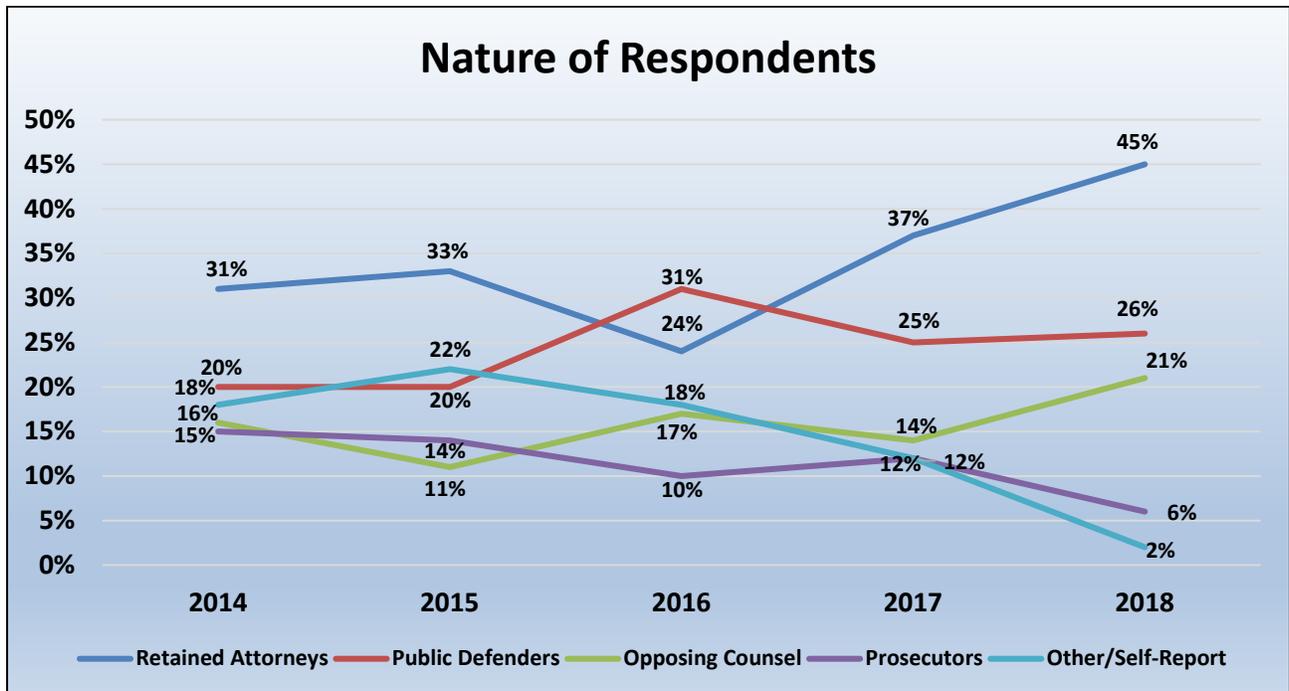
NATURE OF GRIEVANT

The following is a five-year comparison of the various types of grievant whose complaints resulted in docketed cases.



NATURE OF RESPONDENTS

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



OTHER MATTERS

ODC has hired a part-time Grievance Examiner to expedite the intake and investigation of informal grievances and to assist with the backlog from 2018.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

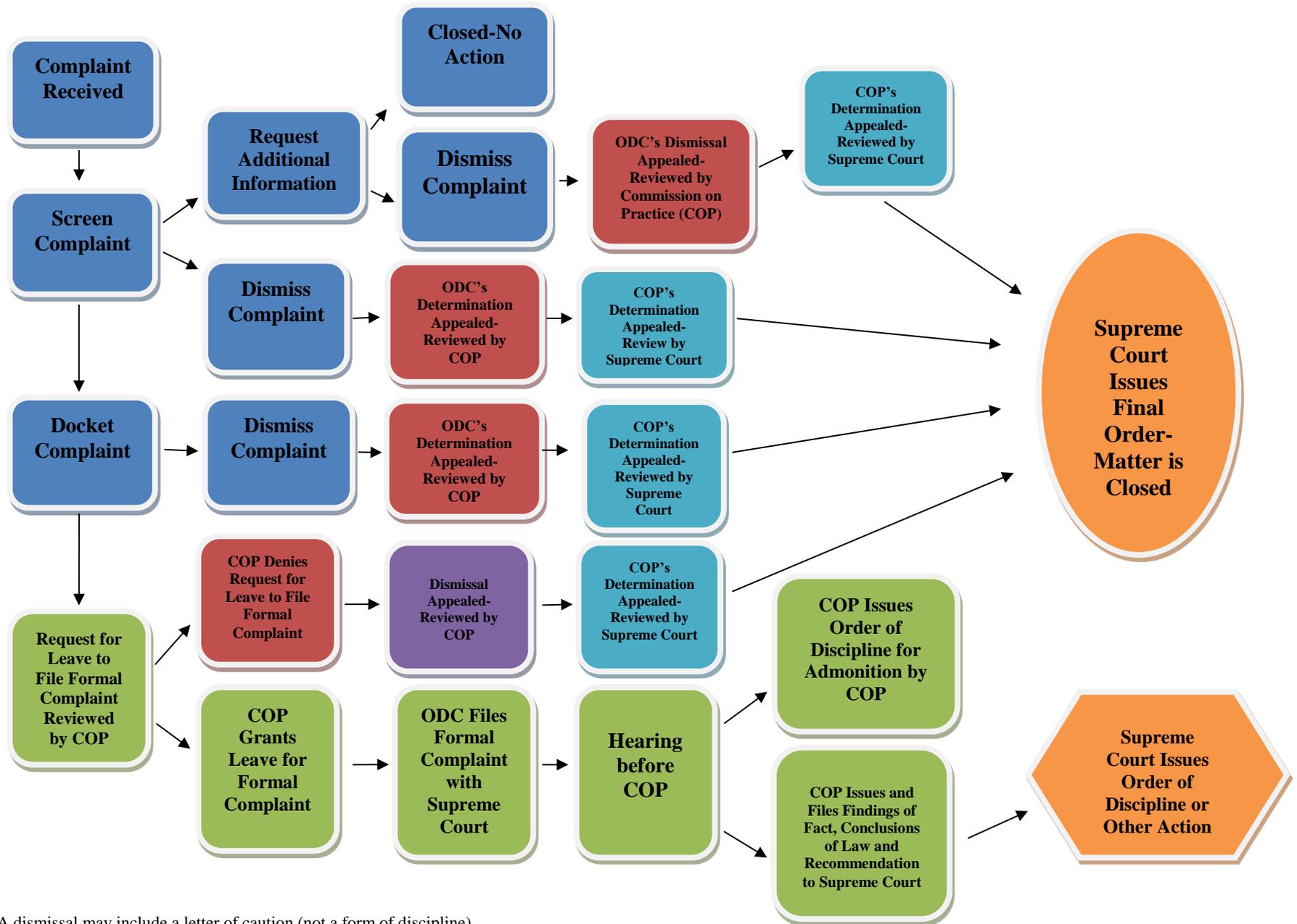
OFFICE OF DISCIPLINARY COUNSEL



Michael W. Cotter
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