

New Hampshire Supreme Court  
**Professional Conduct Committee**  
*a committee of the attorney discipline system*

David M. Rothstein, Chair  
Heather E. Krans, Vice Chair  
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*Osterman, David S. advs. Attorney Discipline Office - #19-006*

**PROTECTIVE ORDER  
REPRIMAND WITH MANDATORY CONDITIONS  
AND ORDER ON COSTS**

On September 15, 2020, the Professional Conduct Committee (“the Committee”) deliberated the Resubmitted Stipulation as to Facts, Violations and Sanction: Reprimand (“the Stipulation”), and the Agreement to Pay Costs of Disciplinary Matter. The Committee also deliberated the Request for Protective Order. The Protective Order is Granted.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that David S. Osterman’s conduct violated Rules of Professional Conduct 1.15; 3.3; 8.4(a); and Sup. Ct. R. 50, as stipulated.

The Committee also concluded that a Reprimand With Mandatory Conditions is appropriate. Its sanction is in accord with the purposes of attorney discipline. *See e.g., Conner’s Case* 158 N.H. 299, 303 (2009); *Richmond’s Case*, 152 N.H. 155, 159-60 (2005). The sanction is also in accord with the *ABA Standards for Imposing Lawyer Sanctions* (2005) (“Standards”).

Having approved the stipulated sanction, the Committee approved the agreement that David S. Osterman shall reimburse the Committee for all costs of investigation and prosecution of this matter.

September 23, 2020

David M. Rothstein  
David M. Rothstein  
Chair

cc: Sara S. Greene, Disciplinary Counsel  
Mark P. Cornell, Deputy General Counsel  
David S. Osterman, Esquire  
File

**NEW HAMPSHIRE SUPREME COURT  
PROFESSIONAL CONDUCT COMMITTEE**

Osterman, David S.

advs.

Attorney Discipline Office

#19-006

**STIPULATION AS TO FACTS, VIOLATIONS,  
AND SANCTION: REPRIMAND WITH CONDITIONS**

Respondent David S. Osterman, Esq., and the Attorney Discipline Office (ADO) stipulate as follows:

**A. Facts**

1. Mr. Osterman is an attorney licensed to practice law in New Hampshire. Mr. Osterman was admitted to practice in 1983.
2. Mr. Osterman was admitted to the Massachusetts Bar in October of 2008. He is currently on retired status with the Massachusetts Bar.
3. At all times material to this proceeding, Mr. Osterman practiced law at the law firm of David Osterman, Attorney at Law, located at 99 Middle Street, Manchester, NH 03101.
4. Mr. Osterman does not have a previous disciplinary history.
5. This disciplinary matter was initiated by a letter of self-report dated December 27, 2018 ("Self-Report Letter").

6. The Self-Report Letter indicated that the Osterman Law Office IOLTA account located at TD Bank (“IOLTA Account”) was not in compliance with Supreme Court Rule 50 and that the IOLTA Account had been out of trust.
7. The Self-Report Letter stated that there was an overdraft in the IOLTA Account. The overdraft resulted from check #1055, dated November 12, 2018, in the amount of \$451.60 being negotiated on December 26, 2018, when the IOLTA Account had a balance of \$283.58. This check represented a collection recovery paid to a client.
8. Mr. Osterman immediately corrected the shortfall and when the check did not clear, paid his client the \$451.60 plus \$35.00 for the anticipated NSF fee.
9. By letter dated January 3, 2019, TD Bank sent the ADO a copy of the overdraft notice that was sent to Mr. Osterman.
10. When the ADO investigated the self-report, the ADO learned that Mr. Osterman had not been reconciling the IOLTA Account in compliance with Supreme Court Rule 50.
11. In 2011 Mr. Osterman’s bookkeeper left his employment. Mr. Osterman then took over all bookkeeping tasks in 2011. Mr. Osterman originally used QuickBooks to maintain the IOLTA Account, but eventually switched to a hybrid system involving using QuickBooks and paper client ledgers. Beginning in March 2013, Mr. Osterman fell behind on his bookkeeping and errors occurred in maintaining the account.

12. During the course of the ADO investigation, Mr. Osterman went back through his records to 2013 to find the errors that occurred since that time.
13. As a result of Mr. Osterman's review of his records, Mr. Osterman determined that he was out of trust a total of \$4,030.00, owed to six clients. The amounts owed to each client were between \$100.00 and \$1,365.00. Mr. Osterman has since refunded all six clients the full amount owed to the client.
14. After the self-report in this matter, Mr. Osterman closed his law office. The current balance in the IOLTA Account is \$10.68, consisting of \$10.00 of Mr. Osterman's funds for bank fees and \$0.68 that is not accounted for. All unearned fees were refunded to the Mr. Osterman's clients.
15. Mr. Osterman recently returned to the private practice of law and opened a new IOLTA account. Mr. Osterman is only handling flat-fee chapter 7 bankruptcy cases and his new IOLTA account is in compliance with Supreme Court Rule 50.
16. There is no evidence that Mr. Osterman intentionally misappropriated funds.
17. The parties agree that Mr. Osterman's conduct in this case violates the New Hampshire Rules of Professional Conduct, as follows:  
  
**Rule 1.15: Safekeeping Property and Supreme Court Rule 50**
18. The facts set forth above are incorporated by reference.

19. Rule 1.15 states as follows:

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, in accordance with the provisions of the New Hampshire Supreme Court Rules. The lawyer shall maintain the minimum financial records with respect to the client and third party funds as may be required by the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules. Sufficient records of all other property of clients or third persons shall be kept by the lawyer and shall be preserved for a period of six years after final distribution of such other property or any portion thereof. All client and third party property shall be identified as such and appropriately safeguarded.
- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount appropriate for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (d) Funds may be disbursed from lawyer trust accounts upon (A) (i) deposit, receipt of which is acknowledged by the receiving financial institution, of cash, bank cashier's check, certified check, or electronic transfer of funds at least equal to the sum of such disbursements, or (ii) clearance of any other form of deposit by such receiving financial institution, and (B) availability of such funds to the lawyer from the receiving financial institution.
- (e) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (f) When in the course of representation a lawyer is in possession of property in which two or more persons (one of

whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

20. Mr. Osterman's failure to properly reconcile the IOLTA Account violates Rule 1.15 and Supreme Court Rule 50.
21. Mr. Osterman's failure to properly reconcile the IOLTA Account resulted in: (1) holding funds in the IOLTA Account that Mr. Osterman was not able to identify the owner of; and (2) withdrawing funds from the IOLTA Account for clients in excess of the amount that they had in trust, resulting in the account being out of trust.

**Rule 3.3. Candor Toward the Tribunal**

22. The facts set forth above are incorporated by reference.
23. Rule 3.3 states as follows:
  - (a) A lawyer shall not knowingly:
    - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
    - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
    - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
  - (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- (c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

24. By submitting a TACC form that falsely stated that the IOLTA Account was being reconciled in compliance with Supreme Court Rule 50(2)(C)(iv), Mr. Osterman violated Rule 3.3. Mr. Osterman had an “awareness” of attendant circumstances about whether or not he was performing monthly reconciliations. He was not performing them but stated otherwise on his TACC.

**Rule 8.4(a): General Rule**

25. Having found the foregoing violation, there is clear and convincing evidence that Mr. Osterman’s conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

**C. Recommended Sanction**

26. The Attorney Discipline Office and Mr. Osterman jointly agree that a Reprimand is the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.
27. Both case law and the American Bar Association’s *Standards for Imposing Lawyer Sanctions* (2005) (“*Standards*”) support this sanction.
28. The purpose of the Court’s disciplinary power is “protecting the public, maintaining public confidence in the bar, preserving the integrity of the

legal profession, and preventing similar conduct in the future.” *Conner’s Case*, 158 N.H. 299, 303 (2009). “The sanction . . . must take into account the severity of the misconduct.” *Coffey’s Case*, 152 N.H. 503, 513 (2005).

29. Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner’s Case*, 158 N.H. at 303. The *Standards* set forth a four-part analysis for courts to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 156 N.H. 613, 621 (2007)); *Standards* § 3.0.
30. The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. See *Conner’s Case*, 158 N.H. at 303 (stating that “[i]n applying these factors, the first step is to categorize the respondent’s misconduct and identify the appropriate sanction”). Once the baseline sanction is determined, the Court then looks to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors, and whether they affect the baseline sanction. See *id.* (stating that “[a]fter determining the sanction, [the Court] consider[s] the effect of any aggravating or mitigating factors on the ultimate sanction”).
31. Under the first prong of the analysis, Mr. Osterman violated duties owed to clients and the legal system. He failed to properly account for and

- report on the maintenance and handling of his trust account. He also submitted false TACCs to the Court. *See Standards* §§ 4.1, 6.1, and 7.0.
32. With respect to Mr. Osterman's mental state under the second prong of the sanction analysis, the parties agree that Mr. Osterman's mental state was both negligent and knowing. Mr. Osterman did not actually know that he was out of trust in his IOLTA Account. However, he knew that he was failing to conduct monthly reconciliations, and thus knew that at least in this regard he was violating Rule 1.15 and Supreme Court Rule 50. When Mr. Osterman submitted his annual TACC form, he knew that his representation that he was performing the required monthly reconciliations was false.
  33. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Osterman's misconduct.
  34. Mr. Osterman's conduct caused potential injury to his clients by failing to properly reconcile the IOLTA Account. His conduct caused actual injury by failing to properly reconcile the IOLTA Account when he withdrew funds for individual clients in excess of the funds that the clients had in the account, resulting in the IOLTA Account being out of trust, putting the funds of other clients at risk.
  35. Mr. Osterman's conduct also caused actual injury or potential injury to the legal system by failing to accurately complete the annual TACC form. The integrity of the system to monitor compliance with Supreme Court Rule 50 and Rule 1.15 relies in large part upon the accuracy of TACC

forms submitted by the members of the bar. By failing to file an accurate TACC form, Mr. Osterman has damaged the integrity of this system.

36. Mr. Osterman's 1.15 rule violation implicates Section 4.1 of the *Standards*. That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.**
- 4.13 Reprimand [Public Censure] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition<sup>1</sup> [Reprimand] is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

(emphasis added).

37. Mr. Osterman's conduct in this matter, when considered under *Standard* 4.12, would call for a baseline sanction of a suspension.

38. Mr. Osterman's 3.3 rule violation implicated Section 6.1 of the *Standards*. That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the

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<sup>1</sup> The term "admonition," as used in the *ABA Standards*, is analogous to a reprimand in New Hampshire. The term "reprimand," as used in the *ABA Standards*, is analogous to a public censure in New Hampshire.

administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

- 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
- 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.**
- 6.13 Reprimand [Public Censure] is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
- 6.14 Admonition [Reprimand] is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

(emphasis added).

39. Mr. Osterman's conduct in this matter, when considered under *Standard* 6.12, would call for a baseline sanction of a suspension.
40. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.
41. In this case there is one aggravating factor present, Mr. Osterman's substantial experience in the practice of law. *See Standards* § 9.22.

42. Mitigating factors include the absence of prior disciplinary record (over a thirty-seven-year career), absence of a dishonest or selfish motive, full and free disclosure to disciplinary board, a cooperative attitude toward the disciplinary proceedings, a good reputation and character, remorse, and a good faith effort to rectify the consequences of misconduct. Mr. Osterman reviewed six years of financial records for the IOLTA Account to identify the owners of all of the funds held in the IOLTA Account. *See Standards § 9.32.*
43. The Parties agree that another mitigating factor is medical problems. Throughout the time at issue, Mr. Osterman struggled with multiple health issues, including a May 2011 leukemia diagnosis and its severe complications, a previously undiagnosed Adult ADHD impairment, uncontrolled diabetes, and cervical stenosis that has caused almost constant, painful seizures affecting his left arm. These medical problems are significant enough to constitute a physical disability as per *Standards § 9.32(h).*
44. Finally, the Parties agree that personal or emotional problems is another mitigating factor applicable in this case. *Standards § 9.32(c).* Because the mitigating factor involves the medical condition of a third-party, the details of this mitigating factor are attached in a Confidential Addendum that the Parties have filed separately, along with a Motion for Protective Order under Rule 37(20)(g).

45. Mr. Osterman has taken a number of corrective measures to address the above medical and personal problems.
46. Mr. Osterman worked with appropriate professionals to recognize and lessen the impact of these issues on his law practice. He worked extensively with Douglas B. Johnson, Psy.d. and his physician to alleviate the impact of his ADHD through appropriate medication. Dr. Johnson also helped Mr. Osterman to understand and diminish the impact of his various medical, psychological, personal, and family issues on his law practice.
47. During the summer of 2015, after Mr. Osterman's release from the hospital, he found himself unable to focus visually on his computer screen or mentally on his caseload. Mr. Osterman sought professional assistance through the New Hampshire Lawyer's Assistance Program (NHLAP). NHLAP enlisted an attorney to assist Mr. Osterman for approximately two months until he was ready to resume handling his practice. Mr. Osterman recognized potential harm to his clients, and he took appropriate steps to protect them during his short-term disability.
48. Although not a recognized mitigating factor under the Standards, it is important to note that Mr. Osterman immediately self-reported the out of trust situation to the ADO. The Parties agree that the self-report is a significant mitigating factor in this case.
49. The parties agree that given the baseline sanction, that the mitigating circumstances outweigh the aggravating circumstances, a downward

departure to a reprimand serves the purposes of discipline and is an appropriate sanction in this case.

50. However, the parties also agree that given Mr. Osterman's failure to properly reconcile the IOLTA Account over a period of six years, conditions should be imposed to ensure Mr. Osterman understands and executes his obligations under Rule 1.15 and Supreme Court Rule 50 to avoid this result in the future.

**D. Mandatory Conditions; Procedures for  
Alleged Violation of Conditions**

51. As set forth further below, should Mr. Osterman breach a condition of this Stipulation, he agrees that a public censure is the appropriate sanction.
52. If Mr. Osterman complies with the conditions of this Stipulation, he agrees he shall be sanctioned with a reprimand.
53. Mr. Osterman agrees to comply with the following conditions during the six-month monitoring period<sup>2</sup>, which shall begin on the date the Professional Conduct Committee accepts this Stipulation:
- a. Mr. Osterman will engage in no professional misconduct during the monitoring period.
  - b. Mr. Osterman shall, for a period of six months:

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<sup>2</sup> The ADO normally requires a one-year monitoring period for trust account violations. However, in this case, Mr. Osterman has already gone through extensive efforts over months to correct his trust accounting records. The parties agree that a six-month monitoring period is appropriate in this case.

(1) submit monthly reconciliations that comply with Sup. Ct. Rule 50(2) to the ADO. The first submission shall be on the 15<sup>th</sup> day of the month following the PCC's approval of the Stipulation, and Mr. Osterman shall file with the ADO his monthly client trust account reconciliations on the 15<sup>th</sup> of each month thereafter for a period of six consecutive months.

(2) Mr. Osterman agrees to attend a two-credit CLE regarding client trust accounting in New Hampshire and will submit a certificate for his attendance to Disciplinary Counsel within 180 days of the date the Professional Conduct Committee accepts this Stipulation.

54. If it is alleged that Mr. Osterman violated any of the conditions enumerated at Paragraph 53(b) above, the following shall apply:
- a. Upon motion by the ADO, the Professional Conduct Committee may determine whether any of the conditions enumerated at Paragraph 53(b) have been violated. If it determines that a condition has been violated, the Committee may impose a public censure. If the Committee determines that no condition of this Stipulation has been violated, the Stipulation shall continue in force and effect pursuant to its terms.
  - b. Respondent may request that the Professional Conduct Committee remand the matter to the Hearings Committee so that a Hearing Panel may be appointed to decide the sole issue of whether a condition under Paragraph 53(b) of this Stipulation has been violated. During

such hearing, it shall be the burden of the ADO to demonstrate by a preponderance of evidence that a condition listed in Paragraph 53(b) has been violated.

- c. If a Hearing Panel determines that a condition has been violated, the Panel may impose a public censure. If the Hearing Panel determines that no condition of the Stipulation has been violated, the Stipulation shall continue in force and effect pursuant to its terms. The PCC shall review the decision of the Hearing Panel.

55. If a new grievance or referral is filed against Mr. Osterman during the monitoring period, thus implicating the condition at Paragraph 53(a), the following shall apply:

- a. So long as a grievance or referral is filed within the monitoring period (“the subsequent proceeding”), and the alleged misconduct occurred, at least in part, during the monitoring period, a public censure may be imposed at such time as there is a finding of misconduct in the subsequent proceeding, even if such finding occurs beyond the monitoring period.
- b. Pending the final resolution of the subsequent proceeding, the matter underlying this Stipulation shall not be closed.
- c. If the conditions of Paragraph 53(b) have been met, Mr. Osterman will not have to continue to comply with those provisions while the subsequent proceeding is pending.

56. The Respondent shall bear all costs associated with compliance and enforcement of the terms and conditions of this Stipulation.
57. Nothing herein shall be construed to limit prosecution of any new or referral involving conduct of Respondent occurring during the monitoring period.

#### **E. Costs**

58. Subject to the PCC's approval of Mr. Osterman's Stipulation, Mr. Osterman agrees to pay the costs incurred by the ADO in the investigation and enforcement of this disciplinary matter. See Supreme Court Rule 37(19). His agreement to pay the costs incurred by the ADO is the subject of a separate agreement signed by Mr. Osterman.

#### **F. Effect of Stipulation**


59. Mr. Osterman understands that this Stipulation represents a recommended disposition, and that the PCC may accept, reject, or conditionally accept the Stipulation pursuant to Rule 37A(III)(aa)(1).
60. Mr. Osterman acknowledges that the admissions of misconduct and the proposed disposition contained in this Stipulation are freely, knowingly, and voluntarily submitted; that he is not entering this Stipulation as a result of any threats, coercion, or duress, or of any promises or inducements not set forth in the Stipulation
61. Mr. Osterman was initially represented by counsel in reaching this Stipulation and he is fully aware of the consequences of the Stipulation.
62. Mr. Osterman knowingly and intelligently waives his right to a hearing.

**G. Hearing on Stipulation**


63. If the Professional Conduct Committee has questions or concerns regarding this Stipulation, the Parties request that the Professional Conduct Committee permit the Parties to appear and address the Stipulation. See Rule 37A(III)(aa)(3)(A) (“Either party may request to appear before the reviewing body to address the stipulation, or the reviewing body may, in its discretion, direct the parties to appear before it to address the stipulation.”)

Respectfully submitted,


Dated: August 11, 2020

  
\_\_\_\_\_  
David S. Osterman, Esquire  
Respondent

Dated: ~~9/8~~ 9/10/2020 2020  
EM

  
\_\_\_\_\_  
Mark P. Cornell, Esquire  
Deputy General Counsel

Dated: 9/8/ 2020

  
\_\_\_\_\_  
Sara S. Greene, Esquire  
Disciplinary Counsel

NEW HAMPSHIRE SUPREME COURT  
PROFESSIONAL CONDUCT COMMITTEE

*a committee of the attorney discipline system*

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David M. Rothstein, Chair  
Heather E. Krans, Vice Chair  
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Barbara J. Guay, Legal Assistant

*Osterman, David S. - #19-006*

**ORDER**

On September 23, 2020, the Committee issued a Reprimand With Conditions. Disciplinary Counsel has indicated that there have been no further complaints docketed by the Attorney Discipline Office since the September 23, 2020 Order was issued. Mr. Osterman has complied with the terms and conditions of the Committee's Order.

Upon consideration, the matter is closed.

August 24, 2021

/s/ David M. Rothstein  
David M. Rothstein  
Chair

Distribution:

Mark P. Cornell, Deputy General Counsel  
Sara S. Greene, Disciplinary Counsel  
David S. Osterman, Esquire  
File