Appellate Practice & Advocacy in New Hampshire

A Continuing Legal Education Program

Tuesday, May 27, 2025

Supporting Members of the Legal Profession & Their Service to the Public and Justice System.

Copyright 2025© New Hampshire Bar Association All rights reserved.

No use except the use of forms is permitted which will infringe on the copyright without the express written consent of the New Hampshire Bar Association.

NOTE: The New Hampshire Bar Association Continuing Legal Education publications and programs are intended to assist New Hampshire lawyers. Publications are distributed and programs presented with the understanding The New Hampshire Bar Association, its committees, authors and speakers do not hereby render legal advice. The material is presented as research information to be used by lawyers in conjunction with other research deemed necessary, in the exercise of their independent professional judgment. Original and fully current sources of authority should be researched.

Appellate Practice & Advocacy in New Hampshire

Tuesday, May 27, 2025
NH Bar Association Seminar Room, Concord

Faculty Roster

Joseph D. Steinfield, Program Chair
130 Court Street
Keene, NH 03431
617-285-3937
joe@joesteinfield.com

Hon. James P. Bassett
NH Supreme Court
1 Charles Doe Drive
Concord, NH 03301-6160
603-271-2646

Doreen F. Connor
Primmer Piper Eggleston & Cramer,
PC PO Box 3600
Manchester, NH 03105
603-626-3300
dconnor@primmer.com

Timothy A. Gudas
NH Supreme Court
1 Charles Doe Drive
Concord, NH 03301-6160
603-271-2646
tgudas@courts.state.nh.us

Russell F. Hilliard
Upton & Hatfield, LLP
159 Middle Street
Portsmouth, NH 03801
603-436-7046
rhilliard@uptonhatfield.com

Christopher M. Johnson
NH Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
603-224-1236
cjohnson@nhpd.org

Elizabeth C. Woodcock
NH Attorney General's Office-DOJ
1 Granite Place South
Concord, NH 03301-6397
603-271-8478
elizabeth.c.woodcock@doj.nh.gov

Appellate Practice & Advocacy in New Hampshire

Tuesday, May 27, 2025

Faculty

Joseph D. Steinfield, Program Chair, is a member of the bar in New Hampshire and Massachusetts, has argued appeals in the New Hampshire Supreme Court, the Massachusetts Supreme Judicial Court and Appeals Court, and the First and Second Circuits. He has been an adjunct professor at Boston College and UNH Franklin Pierce Law Schools, has lectured extensively on trial advocacy and constitutional law, and writes periodically for the Concord Monitor on the Supreme Court and the law. He recently completed a three-year term as chair of the American College of Trial Lawyers Teaching Abroad Committee and in April 2024 led a one-week advocacy training program in Pretoria, South Africa. He graduated from Stevens High School (1957), Brown University (1961), and Harvard Law School (1964).

Hon. James P. Bassett was appointed associate justice of the New Hampshire Supreme Court in 2012. Prior to his appointment, he spent 27 years as a trial and appellate lawyer at Orr & Reno, PA in Concord, NH, concentrating his practice on complex commercial civil litigation, medical malpractice defense, First Amendment and Right-to-Know issues, and land use matters. Justice Bassett is a graduate of Dartmouth College (1978) and the University of Virginia School of Law (1982), and served as a law clerk for Andrew Caffrey, the chief judge of the Federal District Court in Boston. After several years of practice at the firm of Hale and Dorr in Boston, he moved to New Hampshire and became a member of the New Hampshire Bar Association in 1985. Justice Bassett is the co-chair of the Committee on the Judiciary and the Media, and co-chair of the Supreme Court's Access to Justice Commission. He is the Supreme Court's representative on the Judicial Council and the Board of the Bar Foundation. In 2016, Justice Bassett was appointed by Chief Justice John Roberts to serve as a member of the Federal Advisory Committee on Rules of Evidence, and he recently completed his second three-year term. Prior to his appointment to the bench, Justice Bassett had an active role in many non-profit organizations, serving as chair of the 2008-09 Merrimack County United Way Campaign, and as a member of boards of New Hampshire Public Radio, the Capitol Center for the Arts, the Friends of the Norris Cotton Cancer Center, and Canterbury Shaker Village. He also served on the Campaign Leadership Council for the NH Campaign for Legal Services. For more than twenty-five years, Justice Bassett was active in town government in Canterbury, sitting on many town commissions and committees, including the town conservation commission. He served on the Canterbury Board of Selectmen and the Planning Board, including several years as chair of each board.

Doreen F. Connor, a shareholder at Primmer Piper Eggleston & Cramer, PC in Manchester, is a member of the bar in New Hampshire, Maine and Vermont. She devotes half of her practice to appellate cases and has handled more than 200 Supreme Court appeals and presented more than 75 oral arguments to the court. Doreen earned her BA at Bates College in 1983 and her JD at the University of Maine School of Law in 1986. She was admitted to the American Academy of Appellate Lawyers in 2006 and the American College of Coverage and Extracontractual Counsel in 2016. She is chair of the NH Supreme Court Society, chair of the Vermont Insurance Section, and a founding member and chair of the NHBA's Appellate Law Section. Doreen has been a member of the New Hampshire Board of Bar Examiners for 25 years. Her community service

includes work as the chair of the Henniker Zoning Board of Adjustment, treasurer of the White Mt. Regional Pony Club and member of the Pats Peak Educational Foundation Board.

Timothy A. Gudas became the clerk of court for the New Hampshire Supreme Court in January 2020, following nine years as the deputy clerk to Eileen Fox. From 1997 to 2011, he practiced civil and appellate litigation at Sulloway & Hollis, PLLC. From 1996 to 1997, Tim served as a law clerk to Associate Justice Sherman D. Horton, Jr. of the New Hampshire Supreme Court. He earned his BA from Dartmouth College in 1989 and his JD from Boston College Law School in 1994. Tim is a member of the National Conference of Appellate Court Clerks, the NHBA's Committee on Cooperation with the Courts, and the NHBA's Appellate Law Section.

Russell F. Hilliard is of counsel with Upton & Hatfield, LLP in Portsmouth, NH where he focuses his practice in professional discipline, and commercial and insurance litigation. He holds degrees Rensselaer Polytechnic Institute (BS 1973, Cornell University Law School (JD 1976), and Boston University Law School (LLM Taxation 1985). He is licensed in New Hampshire, Maine and Vermont, is a fellow of the American College of Trial Lawyers, is a past-chair of the NHBA's CLE Committee, and is currently a member of the NHBA's Insurance Law Section. Russ is a past president of the NHBA and past chair of the New Hampshire Bar Foundation. He is also a former member of the American Bar Association Board of Governors, and a Uniform Law Commissioner. Russ has participated in numerous CLE panels on trial practice, insurance issues, legislative developments and professional ethics.

Christopher M. Johnson is the chief appellate defender of the N.H. Public Defender's Office in Concord. He earned his B.A. from Carleton College in 1989 and his J.D. from Harvard Law School in 1994. Between 2001 and 2012, Chris held a joint appointment as a professor at the University of New Hampshire Franklin Pierce Law School and with the N.H. Public Defender in his current position. Since 2012, he has been working solely with the Public Defender's office. Chris was a staff attorney at the Southern Center for Human Rights in Atlanta, GA (1995-2001) and, following law school, a law clerk at the New Jersey Supreme Court (1994-95). Chris is a member of the N.H. Association of Criminal Defense Lawyers and the NHBA's Appellate Law Section. He regularly participates in CLE training programs.

Elizabeth C. Woodcock is Senior Assistant Attorney General for New Hampshire and Chief of the Criminal Appeals Unit. During the period 1991 to 2008, she served as an Assistant United States Attorney handling criminal cases and appeals in Maine (1991-96), the District of Columbia (1998-2002), and Vermont (2002-08). She was a United States Supreme Court Fellow (1996-87) and Assistant Director, Department of Education Office of Legal Education (1997-98). After graduating from Bowdoin in 1976, and receiving her master's degree from Stanford in 1977, she worked in education for several years, before she obtained a law degree from University of Maine School of Law. She has participated in many legal education programs and is acknowledged as one of New Hampshire's foremost appellate lawyers.

Appellate Practice & Advocacy in New Hampshire

NH Bar Association Seminar Room, Concord, NH
May 27, 2025

Table of Contents

SUPREME COURT UPDATE – TIPS FROM THE CLERK AND OBSERVATIONS FROM THE BENCH
Attorney Timothy A. Gudas

1.1 Role and Function of Supreme Court 1.1
1.2 Appellate Process 1.5
1.3 Supreme Court Time Standards 1.19
1.4 Supreme Court Organization 1.20
1.5 Administrative Structure 1.21
Attachment 1, New Hampshire Supreme Court Disqualification Policy,
Adopted April 24, 2018, Technical Amendments Adopted May 30, 2024 ..... 1.26
Attachment 2, New Hampshire Judicial Branch Supreme Court,
Court Performance Standards 1.29

CIVIL APPEALS
Attorney Doreen F. Connor

2.1 Scope of This Chapter 2.1
2.2 Types of Appeals 2.1
2.3 The Scope of Appeal 2.11
2.4 Planning the Appeal 2.20
2.5 Commencing the Appeal 2.30
2.6 The Record on Appeal 2.39
2.7 Effect of Taking Appeal 2.41
2.8 Post-Decision Practice 2.45

CRIMINAL APPEALS
Attorney Oliver D. Bloom
Attorney Christopher M. Johnson
Attorney Elizabeth C. Woodcock

3.1 Scope of This Chapter 3.1
3.2 What is a Mandatory Appeal Versus a Discretionary Appeal? 3.2
3.3 Avenues of Review in Criminal Cases 3.3
3.4 Role of Counsel for The Defendant on Appeal 3.20
3.5 Preservation of Issues for Appellate Review 3.29
3.6 Litigating the Criminal Appeal Step by Step 3.53
3.7 Record on Appeal 3.62
3.8 Effect of Appellate Disposition 3.80

APPEALS FROM ADMINISTRATIVE AGENCIES
Attorney Russell F. Hilliard

4.1 Scope of This Chapter 4.1
4.2 Avenues of Review of Administrative Agency Decisions: Statutory and Non-Statutory 4.1
4.3 Prerequisites to Appeal: Exhaustion of Administrative Remedies 4.6
4.4 Time to Commence Appeal to Supreme Court 4.9
4.5 Procedure to Commence Appeal 4.10
4.6 Scope of Review 4.19
4.7 Effect of Appeal on Administrative Order or Decision 4.25
4.8 Costs, Interest and Attorney's Fees in Administrative Appeals 4.30
4.9 Extraordinary Writs as Means to Review Administrative Proceedings 4.33
4.10 Special Statutory Administrative Appeal Mechanisms 4.38
4.11 Judicial Review of State Agency Rulemaking: Administrative Procedure Act, RSA Chapter 541-A 4.41

MOTION PRACTICE IN THE SUPREME COURT
Attorney Timothy A. Gudas

5.1 Introduction and Overview 5.1
5.2 Motions Filed with Appeal Document 5.6
5.3 Motions Responding to Appeal Document 5.11
5.4 Motions After Acceptance of Appeal 5.14
5.5 Motions Following Supreme Court Decision 5.22

INDEX TO FORMS AND SAMPLES
Attorney Timothy A. Gudas

Index to Samples 6.1
1. Rule 8 Interlocutory Appeal Statement (sample) 6.2
2. Rule 9 Interlocutory Transfer Statement (sample) 6.13
3. Rule 10 Appeal Petition (sample) 6.19
4. Administrative Motion for Rehearing pursuant to RSA 541:3 (sample) 6.33
5. Rule 11 Petition for Writ of Certiorari (sample) 6.39
6. Rule 34 Order of Certification from Federal Court (sample) 6.48
7. Transcript Order Form (sample) 6.86
8. Rule 7-A (1) Motion to Stay (sample) 6.87
9. Rule 25 Motion for Summary Affirmance (sample) 6.99
10. Briefing Schedule (sample) 6.107
11. Brief Cover Page with Table of Contents and Table of Authorities (sample) 6.108
12. Memorandum of Law in Lieu of Brief (sample) 6.116
13. Rule 22 Motion for Reconsideration (sample) 6.124
14. Motion to Add Issue (sample) 6.142

Supreme Court Update – Tips from The Clerk And Observations from The Bench

Timothy A. Gudas, Clerk
New Hampshire Supreme Court
Concord, NH

CHAPTER 1

THE SUPREME COURT OF NEW HAMPSHIRE

This Chapter was updated by Timothy A. Gudas, Clerk of NH Supreme Court, in 2022 and again as of May 15, 2025.

1.1 ROLE AND FUNCTION OF SUPREME COURT

1.11 Establishment and Composition of the Supreme Court

New Hampshire's earliest Constitution, adopted in 1776, did not provide for an independent court system. Douglas, Judicial Review and the Separation of Powers Under the New Hampshire Constitutions of 1776 and 1784, 18 N.H. B.J. 250 (1977). Even after the adoption of the 1784 Constitution, New Hampshire courts remained creations of the legislature, and from 1790 until 1901, the legislature abolished the entire court system several times. Id. It was not until 1966, when Article 72-a was added to Part II of the New Hampshire Constitution, that the Supreme Court was effectively designated a constitutional court.

The Supreme Court consists of a chief justice and four associate justices, see RSA 490:1, each of whom is nominated and confirmed by the Governor and Executive Council for a term of office which continues during good behavior until the age of seventy. N.H. CONST. pt. II, arts. 73 and 78. In 2001, the legislature amended RSA 490:1 to provide that justices of the Supreme Court serve five-year terms as Chief Justice in declining order of seniority. In 2004, this amendment was held to violate Part II, Article 46, which provides that judicial officers be appointed by the Governor and Council, and Part I, Article 37, the separation of powers doctrine, and was, therefore, unconstitutional. In re Petition of Governor, 151 N.H. 1 (2004). The court ruled that the position of chief justice is a discrete

 Copyright © NH Bar Association

judicial office, which requires that the chief justice position be filled by executive nomination and appointment. Id. at 8-9.

1.12 **Role and Jurisdiction of Supreme Court**

"The Supreme Court of New Hampshire is the State's court of last resort and the only court performing solely an appellate function." Venhoff, New Hampshire State Court Organization Profile 1 (American Bar Association, 1982).

The Supreme Court has “general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses.” RSA 490:4. As such, it considers appeals from the Superior Court, from all divisions of the Circuit Court (the District Division, the Family Division, and the Probate Division), and from State administrative agencies. It has exclusive authority to issue writs of error, and original and concurrent authority with the Superior Court to issue writs of certiorari, mandamus, prohibition, habeas corpus, and all other writs and processes. The New Hampshire Constitution also requires the Supreme Court to consider requests for advisory opinions from either house of the General Court or the Governor and the Executive Council. N.H. CONST. pt. II, art. 74.

The Supreme Court also approves and promulgates procedural rules and forms for all State courts, and prescribes and administers canons of ethics for attorneys and judges. RSA 490:4; RSA 490:5; Nelson v. Morse, 91 N.H. 177 (1940); Petition of Governor & Executive Council, 151 N.H. 1, 7 (2004).

1.13 **Quorum Requirement**

RSA 490:7 provides that sessions of the court shall be held by at least three Supreme Court justices. If one or more justices are unable or are disqualified to sit on a case, a temporary justice or justices may be assigned in accordance with RSA 490:3. At

 Copyright © NH Bar Association

least three justices, either members of the court or temporary justices assigned in accordance with RSA 490:3, must "sit, participate, and decide" a case. In 2025, the Supreme Court adopted the following new provision as Rule 20(2): "Without limiting the authority of a single justice under Rule 21(7), a majority consisting of at least three justices, either full-time or temporarily assigned pursuant to RSA 490:3, must concur in any judgment of the court." As a result of that new provision, the court will no longer issue 2-2 decisions (i.e., "affirmed by an equally divided court") or 2-1 decisions when the court has a quorum as defined by RSA 490:7 but has fewer than five participating justices.

RSA 490:3, II, authorizes the chief justice of the Supreme Court or the senior associate justice to assign a retired Supreme Court justice to fill a vacancy due to retirement, disqualification or inability to sit of any justice. Temporary justices are selected on a random basis from the pool of retired Supreme Court justices. If no retired Supreme Court justice is available, a retired Superior Court justice, selected on a random basis, may be assigned. If no retired Superior Court justice is available, an active justice of the Superior Court may be assigned to serve as a temporary justice. If no active Superior Court justice is available, the selection of a temporary justice is made from the pool of full-time Circuit Court judges.

In 2011, the legislature adopted RSA 493-A:1-c, which prohibits a retired justice over 70 years of age from serving as a temporary justice. Legislation to allow the appointment of a retired Supreme Court justice under the age of 75 to serve as a temporary justice was considered, but did not pass, during the 2019 legislative session.

 Copyright © NH Bar Association

A retired justice over 70 years of age may serve as a judicial referee for the Supreme Court. RSA 493-A:1-a. Retired Supreme Court and Superior Court justices are occasionally appointed to serve as referees in lawyer discipline matters.

1.14 Disqualification of Justices

Supreme Court Rule 38 is the Code of Judicial Conduct. In 2011, the court adopted the current Code of Judicial Conduct, which is based on the 2007 ABA Model Code of Judicial Conduct. Rule 2.11 of the code sets forth the standard for disqualification from a case — when the judge's impartiality might reasonably be questioned. It then lists a number of circumstances in which disqualification is required, including if the judge has a personal bias concerning a party, the judge has personal knowledge of facts in dispute, or the proceeding involves a relative of the judge or the judge's spouse or domestic partner.

In addition, RSA 492:1 precludes a justice who has been concerned as a party or attorney, or who has acted as a judge in the court below, from sitting on a case. This provision precludes a Supreme Court justice from sitting on a case in which she or he sat as a trial judge. It also precludes a Superior Court justice from serving as a temporary justice on an appeal if she or he had any involvement in proceedings in the Superior Court.

Each Supreme Court justice provides the clerk with the names of attorneys, law firms, and lower court judges who potentially would be a basis for the justice to disqualify herself or himself from a case. This list is not a public document. Justices also review the parties and counsel involved in a case prior to oral argument or consideration of briefs to identify potential conflicts. Although every effort is made to identify potential disqualifications early in the appeal process, the basis for a disqualification may not be apparent from the notice of appeal or the briefs. Accordingly, a party or attorney who is

 Copyright © NH Bar Association

aware of circumstances that might be the basis for a justice to disqualify herself or himself in a particular case should file a motion for recusal in accordance with Supreme Court Rule 21A.

When a motion for recusal is filed, it is presented to the justice whose recusal is being sought for a ruling. A motion to reconsider the justice's ruling on a motion for recusal is considered by the full court. See Sup. Ct. Rule 21A.

When a justice is disqualified from a case, the justice has no further involvement in the case. The justice does not receive copies of pleadings or briefs, does not review draft opinions or orders, and does not participate in discussions or decision-making related to the case. In April 2018, the Supreme Court adopted an updated disqualification policy describing how the disqualification of a justice affects each stage of the appellate process. In May 2024, the Supreme Court made technical amendments to the disqualification policy and made it available on the Supreme Court's website. See Attachment 1, New Hampshire Supreme Court Disqualification Policy.

1.2 APPELLATE PROCESS

1.21 Types of Appeals

The majority of cases filed with the Supreme Court are appeals from final decisions of state trial courts, which are filed pursuant to Supreme Court Rule 7. Prior to 2004, the Supreme Court accepted or declined these appeals on a discretionary basis. With the exception of an appeal in a capital murder case, there was no appeal of right from a final trial court decision.

In 2004, the Supreme Court expanded the number and types of cases in which parties have a right to appellate review. Under rules adopted in 2004, most appeals from

 Copyright © NH Bar Association

final decisions of a state trial court are “mandatory appeals,” which means that they are accepted for review on the merits if they are timely and the court has jurisdiction. There are still some appeals from trial court final decisions that are not mandatory and that the Supreme Court has discretion to decide whether to grant or decline full appellate review.

a. Mandatory Appeals. To determine whether an appeal is a “mandatory appeal,” it is necessary to review the definition of “mandatory appeal” in Rule 3. A “mandatory appeal” is defined as “an appeal filed by the State pursuant to RSA 606:10 or an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court,”[1] including an appeal from an order issued pursuant to Superior Court Rule 46(c)(1) if a final decision on the merits of the entire case would be a mandatory appeal. The definition of mandatory appeal lists ten exceptions to the general definition. Six of the ten exceptions relate to criminal cases; they are all appeals from decisions in post-conviction proceedings related to a conviction or sentence. The other four exceptions from the definition of “mandatory appeal” are an appeal in a landlord-tenant or possessory action; an appeal from an order denying a motion to intervene; an appeal in or arising out of a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A), except for the first final order; and an appeal from an order denying a motion to dismiss challenging personal jurisdiction, sufficiency of process and/or sufficiency of service of process (the “personal-jurisdiction exception”). Typically, the first final order in a domestic relations matter is a divorce decree or, in the case of

[1] In 2011, the Circuit Court was established, consisting of three divisions, the district, family, and probate divisions. See RSA ch. 490-F. The Circuit Court was created to replace the district court, judicial branch family division, and probate court, and was granted the jurisdiction, powers, and duties previously conferred upon these courts. References in the Supreme Court Rules, including in Rule 3, to these former courts are deemed to refer to the three divisions of the Circuit Court. See Sup. Ct. Rule 1.

 Copyright © NH Bar Association

unmarried persons, an order establishing a final parenting plan, and under the definition and exception, such appeals generally are mandatory appeals. The personal-jurisdiction exception, which initially derived from case law, see Mosier v. Kinley, 142 N.H. 415 (1997); In re J.M., 2024 N.H. 70, ¶¶4-10, was added in 2025 as an explicit exception within Rule 3 itself.

In 2016, the court adopted Superior Court Rule 46. Paragraph (c) of the rule establishes a process for review when the Superior Court issues an order that finally resolves the case as to one or more, but fewer than all, claims or parties. When this occurs, the Superior Court may direct that its order, or a portion of its order, be treated as a final decision on the merits as to those claims or parties. The court's order doing so must explicitly refer to Superior Court Rule 46(c) and identify the order or part of the order that is to be treated as a final decision on the merits, articulate the reasons warranting such treatment and find that there is no just reason for delay as to the party or claiming being severed. Both Superior Court Rule 46(c) and Supreme Court Rule 3 indicate that such an appeal is considered a mandatory appeal under Supreme Court Rule 7, but paragraph (c)(2) of Superior Court Rule 46 allows the Supreme Court to dismiss such an appeal without prejudice if the Supreme Court finds that the Superior Court clearly erred in directing that the order be treated as a final decision on the merits. Rule 3.46(c) of the District Division Rules applicable to electronically filed civil cases is materially identical to Superior Court Rule 46(c).

b. Discretionary Appeals and Other Matters. An appeal from a final trial court order that falls into one of the ten exceptions set forth in the definition of "mandatory appeal" is considered a Rule 7 discretionary appeal. Rule 7(1)(B) makes these appeals discretionary

 Copyright © NH Bar Association

and provides that the Supreme Court may, in its discretion, decline to accept such appeals for further review.

Superior Court Rule 46 also addresses appeals related to personal jurisdiction. Paragraph (b) of the rule states that an appeal from the denial of a motion to dismiss based on lack of personal jurisdiction, or insufficiency of process or service, is governed by Supreme Court Rule 7, and is considered a discretionary appeal. Rule 3.46(b) of the District Division Rules applicable to electronically filed civil cases is materially identical to Superior Court Rule 46(b). Pursuant to those rules, if the Supreme Court declines the appeal, the appealing party is not precluded from raising the issue in an appeal filed after the trial court's final order.

In addition to discretionary appeals under Supreme Court Rule 7, there are several other types of appeals that are "discretionary" in the sense that the court reviews the merits of the issues when deciding whether to accept or decline the cases for further review. An interlocutory appeal from a lower court ruling filed pursuant to Rule 8, an interlocutory transfer without ruling by a lower court or administrative agency filed pursuant to Rule 9, an appeal from an administrative agency filed pursuant to Rule 10, and a petition invoking the court's original jurisdiction filed pursuant to Rule 11, are all discretionary matters.

1.22 **Filing of Appeals**

a. Mandatory Appeals. A party filing a Rule 7 mandatory appeal is required to complete the Rule 7 notice of mandatory appeal form. This form is fairly straightforward. The appellant is asked to provide basic case information, such as the name of the case, the trial court name and case number, and the names of other parties and counsel. The

 Copyright © NH Bar Association

appellant is also asked to set forth the issues that the appellant intends to raise on appeal. Because the appeal will be accepted regardless of the merits of the appeal (assuming that it is timely and other filing requirements have been met), the appellant is not required to explain why the appeal should be accepted.

b. Discretionary Appeals. A party filing a Rule 7 discretionary appeal must complete the Rule 7 notice of discretionary appeal form. This form is similar to the Rule 7 notice of mandatory appeal form, but it requests information about the issues involved in the appeal. It requires the appellant to set forth the standard of review and to explain the importance of the issues being raised and why the appeal should be accepted.

Interlocutory appeals and transfers, and petitions for original jurisdiction, are also considered "discretionary," because the court considers the merits of the issues and other factors bearing on the appropriateness of review in deciding whether to accept or decline the case. There are no preprinted forms for filing interlocutory appeals (Rule 8), interlocutory transfers (Rule 9), appeals from administrative agencies (Rule 10), or petitions for original jurisdiction (Rule 11). In these types of cases, the format for the appeal document is set forth in the applicable rule. The appellant, or in the case of an original petition, the petitioner, must prepare the appeal document following the outline in the applicable rule and providing the information called for by the rule. All of these rules call for the party seeking review to explain why the issues raised are important and deserving of review. When review is sought on an interlocutory basis, the party must also explain why interlocutory review is warranted.

c. Copies are Not Required. With the implementation of electronic filing in 2018, it is no longer necessary to file multiple copies of the notice of appeal form or other case

 Copyright © NH Bar Association

initiating document, such as a petition. If the case-initiating document is filed in paper (as sometimes occurs with self-represented parties), the document is scanned and saved in an electronic format and is available to the justices and court staff through the court's case management system. It is also available, via the e-filing system, to the parties in the case who are registered e-filers.

1.23 **Screening Procedure**

When an appeal document is filed with the court, it is entered into the court's case management system, which assigns a docket number. Shortly after filing, each case is reviewed by court staff to determine whether the appeal was properly filed.

a. Review for Compliance with Appeal Requirements. Each case is reviewed to determine whether it meets a number of requirements. Among the requirements are the following:

Jurisdiction. Although the Supreme Court has broad appellate jurisdiction under RSA 490:4, statutes sometimes provide for review by another court or tribunal. For example, an appeal from a Department of Labor decision in a wage-claim matter pursuant to RSA 275:51 is taken to the Superior Court. If it appears that the Supreme Court lacks jurisdiction, an order may be issued requiring the parties to address the question.

Timeliness. In almost all appeals, there is a deadline for filing an appeal with the Supreme Court. In most Rule 7 appeals, the notice of appeal must be filed within 30 days of the date on the clerk's written notice of the decision on the merits, or in a criminal case, within 30 days of sentencing. In the case of an interlocutory appeal or transfer, the appeal document must be filed within 10 days of the trial court's notice to the parties that the appeal or transfer has been approved. The appropriate period for filing a petition for writ of

 Copyright © NH Bar Association

certiorari is determined by the appeal period set forth in a substantively analogous statute or situation. Petition of Ellis, 138 N.H. 159, 160 (1993); see also Barufaldi v. City of Dover, 175 N.H. 424, 428 (2022). If it appears that an appeal was filed late, the appealing party may be required to file a memorandum addressing the timeliness of the filing.

Finality. Rule 7 provides for an appeal from a final decision (or "decision on the merits" as defined by Rules 3 and 7). It is not always clear from the notice of appeal whether the decision that the appellant seeks to appeal is a final decision, as defined. When an issue such as a determination of attorney's fees or their amount remains, a trial court decision on the substance of a claim may not be considered final. See Jesurum v. WBTSCC Ltd. P'ship, 169 N.H. 469, 482 (2016); Van der Stok v. Van Voorhees, 151 N.H. 679 (2005). In limited circumstances, a trial court decision may be considered final if the proceedings were bifurcated and the remaining issues are completely severable. See Asmussen v. Comm'r, N.H. Dep't of Safety, 145 N.H. 578 (2000); In re Guardianship of Luong, 157 N.H. 429, 437-38 (2008); see also Super Ct. Rule 46(c); Dist. Div. Rule 3.46(c). If it appears that a trial court decision may not be final, the Supreme Court may issue an order asking the parties to address the question of finality.

Mandatory versus Discretionary Nature of Appeal. Appeals filed pursuant to Rule 7 are also reviewed to determine whether the appeal is a mandatory appeal or a discretionary appeal. If a discretionary appeal has been filed on the wrong form, or fails to follow the correct format, the appellant or petitioner may be ordered to refile the appeal.

b. Procedural Motions. Because a mandatory appeal is accepted for further appellate review regardless of the merits of the appeal, Supreme Court Rule 25 prohibits other parties to the case from filing a motion for summary disposition based on the merit

 Copyright © NH Bar Association

(or lack of merit) of the appeal. Paragraph 7 of Rule 25 makes clear, however, that a party may file a motion to dismiss the appeal based upon subject matter jurisdiction, mootness, untimeliness or another issue unrelated to the merits of the appeal. Failure to preserve an issue is generally not a permissible basis for a pre-acceptance motion to dismiss.

A discretionary appeal is reviewed by the court for it to decide whether the case should be accepted for further review. This decision often considers the merits of the issues raised on appeal. For this reason, Supreme Court Rule 25 permits other parties to a discretionary appeal to file a motion for summary disposition arguing that the case does not merit further appellate review. A motion for summary disposition must be filed within 20 days of the filing of the appeal. An objection to such a motion must be filed within 10 days of the motion.

c. Review by the Court. After the period for filing a motion for summary disposition (and objection) has passed, all of the case materials in a discretionary appeal are distributed to each non-disqualified justice for review. The justices then meet to discuss the case and decide whether to accept the case for further review, whether to summarily affirm or decline the case, or whether to request additional information about the case before making a screening decision. For Rule 7 discretionary appeals and Rule 10 administrative appeals, one justice can decide that a case should be accepted; in other words, a case is summarily affirmed or declined only when all of the justices who reviewed the case believe that it should not be accepted. In the case of interlocutory appeals and transfers, and petitions for original jurisdiction, generally three justices must agree to accept a case.

 Copyright © NH Bar Association

d. Acceptance. If it is determined that a mandatory appeal was timely and properly filed, an acceptance order is issued by the clerk pursuant to Rule 21(8). (A mandatory appeal usually is not reviewed by the justices before acceptance.) Depending on whether the appeal is eligible for mediation, the acceptance order will either inform the parties of the option for voluntary mediation or notify the parties of the deadline for the next step in the appellate process, either the deadline related to preparation of the transcript, if one is necessary for the appeal, or the briefing schedule.

If the court decides to accept a discretionary appeal, it may also decide at that time whether to allow oral argument. More often the court defers a decision about oral argument until it has an opportunity to review the briefs.

After a discretionary appeal is accepted, it generally follows the same process as other appeals, i.e., an order is issued notifying the parties of the opportunity for voluntary mediation or of the deadline for the next step in the appellate process, such as preparation of the transcript or briefing.

1.24 Mediation and Prehearing Evaluation Conferences

Supreme Court Rule 12-A establishes a program for voluntary mediation of cases. Not all accepted cases are eligible for mediation, however. The rule provides that criminal appeals, domestic violence cases, and juvenile matters, among other cases, are ineligible for mediation. See Sup. Ct. Rule 12-A(2).

The Supreme Court's Appellate Mediation program is run by the Office of Mediation and Arbitration (OMA), which administers alternative dispute resolution programs for all state courts. If all parties to a Supreme Court appeal agree to mediate, the case is referred to OMA to select a mediator and schedule the mediation. Further processing of

 Copyright © NH Bar Association

the appeal is suspended for 90 days. If the case does not settle during mediation, the mediator notifies the court, and the court then resumes processing of the appeal. Until2021, all mediators in Supreme Court cases were retired full-time judges or marital masters. Under the current version of Rule 12-A, the universe of eligible appellate mediators includes "other qualified mediator[s] as determined by the supreme court in conjunction with the office of mediation and arbitration." This language authorizes experienced attorney-mediators to conduct appellate mediations.

Rule 12-B authorizes the clerk to schedule a prehearing evaluation conference at any time before oral argument or submission of the case on the briefs. The purpose of such a conference may be to discuss settlement or processing of the appeal. With the establishment of the appellate mediation program, the court has not used prehearing evaluations conferences for settlement purposes. Prehearing conferences are occasionally used in complex or multi-party cases to narrow case issues, resolve issues relating to the record on appeal, and establish a schedule for briefing and oral argument. A party may request that a prehearing evaluation conference be scheduled if the party believes that it would further one of these purposes.

1.25 **Transcripts**

The notice of appeal forms call for an appellant to indicate whether the appellant is requesting the preparation of a transcript of the trial court proceedings for the appeal. Once an appeal is accepted, and assuming that the appeal does not settle during mediation, an order will be issued requiring the appellant to pay a deposit for preparation of the transcript, unless the appellant is entitled to transcripts at State expense. Transcripts of court proceedings are prepared by eScribers, the company that the

 Copyright © NH Bar Association

Supreme Court has designated as the official transcriber of New Hampshire court proceedings. See Sup. Ct. Rules 15 and 59. eScribers prepares transcripts in an electronic format and provides them directly to the court and all parties to the case.

1.26 **Briefing**

After the transcript or certified record has been filed with the court, an order is issued setting forth the briefing schedule. The length of time that a party is allowed to file a brief depends on the nature of the case and the length of any transcripts. Typically, briefing is expedited in juvenile matters, such as an abuse or neglect proceeding or a proceeding to terminate parental rights. Briefing is also expedited in bail review matters, domestic violence cases, and civil stalking cases. The time allowed for briefing in criminal cases is generally longer than in civil cases. In both criminal and civil cases, parties are generally allowed additional time for briefing if the transcript exceeds 100 pages.

Supreme Court Rule 3 identifies and defines the briefs that may be filed. The "Opening brief" is the first brief filed; it is filed by the moving party, who is usually the appellant. The second brief is the "Opposing brief"; it is filed by the non-moving party, usually the appellee. The moving party is then permitted to file a "Reply brief." A "Reply brief" must be filed by the earlier of 20 days after the filing of the "Opposing Brief" or memorandum or 10 days before oral argument.

When a cross-appeal is filed, the clerk must determine which party will be considered the moving party for the purpose of the case. The clerk then orders the moving party to file the "Opening brief" and the non-moving party to file an "Opposing brief." The "Opposing brief" should address both the issues raised by the moving party and the issued raised by the non-moving party's cross-appeal. The moving party is

 Copyright © NH Bar Association

permitted to file an “Answering brief” to respond to the issues raised by the non-moving party in the “Opposing brief.” The non-moving party in a cross-appeal may file a “Reply brief.”

With the implementation of electronic filing in August 2018, the court changed the size limitation for briefs from a page limitation to a word limitation. Both the “Opening brief” and the “Opposing brief” are limited to 9,500 words, except in the case of a cross-appeal when the “Opposing brief” is limited to 14,000 words. See Sup. Ct. Rule 16(11). “Reply briefs” are limited to 3,000 words. In a mandatory appeal, the appellee has the option of filing a memorandum in lieu of an “Opposing brief”, which is limited to 4,000 words. See Sup. Ct. Rule 16(4)(b). If the appellee chooses to file a memorandum in lieu of a brief, the party is deemed to have waived oral argument. If the court decides to hold oral argument, however, it will permit a party who has filed a memorandum of law in lieu of a brief to be heard orally. See Sup. Ct. Rule 18(2).

When an opinion is issued in a case, copies of the briefs are posted on the judicial branch website unless the case is confidential.

1.27 **Tracking - Oral Argument versus Submission on Briefs**

Unless the court has determined at the time of acceptance that a case should be scheduled for oral argument, the court reviews a case after all the briefs have been filed to determine whether oral argument would be helpful in deciding the appeal. In the majority of cases, the court determines that oral argument should not be scheduled, and it decides the cases on the basis on the briefs.

 Copyright © NH Bar Association

If the court concludes that oral argument is unnecessary, a final order deciding the case is prepared, agreed upon, and issued. The court does not notify the parties before issuing the order that oral argument will not be scheduled. See Sup. Ct. Rule 18.

1.28 **Oral Argument.**

If the court decides that a case should be scheduled for oral argument, it also decides whether the case should be heard by a three-judge panel (3JX) or by the full court. The 3JX process has not been used since 2021.

Rule 12-D(5) sets forth the criteria that the court uses in determining whether a case should be heard by a 3JX panel. It provides that appeals involving claims of error in the application of settled law; appeals claiming an unsustainable exercise of discretion where the law governing the discretion is settled; and appeals claiming insufficient evidence or a result against the weight of the evidence, are suitable for assignment to a 3JX panel. When a case is assigned to the 3JX docket, three justices read all of the briefs, and hear a brief oral argument from the parties. Although Rule 12-D states that oral argument will be limited to 5 minutes per side, the court in 2018 increased the time allowed to 10 minutes per side.

After oral argument, the 3JX panel issues a written order deciding the case. The decision of the three-judge panel must be unanimous. If the panel cannot reach a unanimous decision, the case is referred to the full court. The panel may also refer a case to the full court in other circumstances, e.g., if the panel concludes that a formal opinion should be issued. If a 3JX panel refers a case to the full court for decision, the justices who were not on the 3JX panel read the briefs and listen to the recording of the 3JX oral argument. Usually, no additional argument is scheduled.

 Copyright © NH Bar Association

If the case is scheduled for oral argument before the full court, all of the justices read the briefs and other materials, unless one or more justices are disqualified. Each side is allowed 15 minutes of argument, with no additional time allowed in cross-appeals. The appellant may reserve 2 minutes of the 15 for rebuttal. Most cases heard by the full court are decided by a formal written opinion, although occasionally a case is disposed of by order.

Cases are generally scheduled for argument in the order in which they become fully briefed. Certain types of cases, however, are expedited and are scheduled as soon as they are briefed, such as interlocutory appeals, cases involving the status of a child, domestic violence, landlord/tenant issues, and professional conduct matters. Approximately 30 days' notice is given to parties that a case has been scheduled for oral argument, and oral argument schedules for specific days are published on the judicial branch website. Beginning in the fall of 2021, the Supreme Court has posted a list of its oral argument dates for the entire calendar year.

Oral arguments are streamed live on the judicial branch website, except for arguments in confidential cases. The recordings of oral arguments are archived on the website where they are available for review at any time.

1.29 **Decision-making Process**

If the court decides, after reviewing the briefs and other case materials, that oral argument is unnecessary to decide a case, a final order is prepared. Staff attorneys and law clerks assist the court in researching and drafting these orders.

If a case is scheduled for argument before a 3JX panel, the panel takes a tentative or "straw" vote after oral argument, and an order then is prepared setting forth the panel's

 Copyright © NH Bar Association

decision. Similarly, if a case is scheduled for oral argument before the full court, the justices take a tentative or "straw" vote after the argument so that the justice to whom the case is assigned has guidance as to how the case should be decided. Unlike the United States Supreme Court, where the chief justice assigns a case, cases are randomly assigned to the justices prior to oral argument.

With the help of law clerks, the authoring justice writes a draft opinion, which is distributed to the other justices who sat on the case for their comments. Any justice on the case may suggest changes to the draft opinion by memo or orally to the authoring justice. On regularly scheduled conference days, the justices meet to discuss the draft opinions. Although in most instances a unanimous decision is reached, if a member of the court disagrees with the majority or concurs with the result for a different reason, a dissenting or specially concurring opinion will accompany the majority opinion.

When a proposed opinion has been approved at a court conference, it is prepared in final form. Advance notice that an opinion will be issued is sent out to persons registered for the list-service. On the day of issuance, the opinion is posted on the website and sent to the parties in the case. In addition to being available on the website, all opinions of the New Hampshire Supreme Court are published in the New Hampshire Reports and are available on Westlaw and Lexis.

1.3 SUPREME COURT TIME STANDARDS

In June 2001, the Supreme Court adopted performance standards that include time standards relating to the processing of cases. The time standards are benchmarks for the court's performance at different stages of the appellate process, such as screening, briefing, and decision-making. In setting each time standard, the court

 Copyright © NH Bar Association

decided upon the average length of time that it would be reasonable to expect the court to complete that stage of the appellate process. It is important to understand that each time standard is an average for the handling of all cases during that stage of the appellate process, and, depending on the circumstances, an individual case may take more or less time to complete a stage. See Attachment 2, New Hampshire Supreme Court Performance Standards.

The time standards call for parties to be notified of the court's screening decision within 90 days of the filing of an appeal. There are also time standards relating to the filing of briefs by the parties and the scheduling of oral argument. The time standard related to disposition calls for an opinion or final order to be issued within 180 days of oral argument or submission to the court.

An analysis of all cases disposed of in 2023 showed that the Supreme Court met all of the time standards.

1.4 SUPREME COURT ORGANIZATION

1.41 Legal Staff

The Clerk of Court is assisted by two Deputy Clerks, one of whom is a lawyer and the other an administrator, and a trained staff of Court Assistants. The Clerk is responsible for preserving all court files and papers and for keeping a docket record of all matters before the court and of all petitions, appeals, or other processes presented to the court. The Clerk issues such records or other processes as the court may order and accounts for and pays to the State all fees received on behalf of the Supreme Court.

With the implementation of electronic filing, the court adopted a rule making the electronic case file maintained by the Clerk in the Supreme Court's case management

 Copyright © NH Bar Association

system the official case record for cases governed by the rule. See Sup. Ct. Supp. Rule 7. The electronic case record is available for review at the Supreme Court during business hours, unless the case is confidential.

The court also has a Reporter of Decisions, who is involved in the process of preparing opinions and decisions, and who issues and arranges for publication of the opinions rendered by the Supreme Court.

The Supreme Court employs three staff attorneys, who work for the entire court, and 11 law clerks, who are assigned to work for individual justices. The staff attorneys and law clerks assist in researching the applicable law and drafting orders and opinions.

1.5 ADMINISTRATIVE STRUCTURE

1.51 Constitutional Role and Historical Background

In addition to its role as an appellate court, the Supreme Court is responsible for the administration of all courts in the State. N.H. CONST. pt. II, art. 73-a. The text of Article 73-a states that the chief justice shall be the administrative head of all courts and that, with the concurrence of a majority of the Supreme Court justices, he shall make rules governing the administration of all courts in the State, which shall have the force and effect of law.

In 1983, the legislature enacted Chapter 383, Laws 1983, which created a state-funded unified court system, thereby eliminating the hodgepodge of municipal, county, and state funding of the judiciary that existed from the adoption of the State Constitution in 1784. As a result of this change, the Supreme Court's administrative responsibility was increased significantly. Under the unified court system, the Supreme Court is responsible for the creation and administration of a uniform classification and compensation system for

 Copyright © NH Bar Association

all nonjudicial court personnel, RSA 490:26-b, and for the preparation and submission of the Judicial Branch budget to the legislature, RSA 9:4-a.

1.52 **Court Committees**

The court has established several committees and organizations to assist it in fulfilling its administrative responsibilities, including the Attorney Discipline System, the Committee on Judicial Conduct, the Advisory Committee on Judicial Ethics, the Board of Bar Examiners, the Committee on Character and Fitness, the Advisory Committee on Rules, and the Court Accreditation Commission. Each is discussed in turn below.

The Attorney Discipline System was established to assist the court in fulfilling its role of superintendence of the legal profession. The Attorney Discipline System is made up of three separate committees that are responsible for investigating complaints of attorney misconduct, conducting hearings to determine the facts in such cases, and deciding upon or recommending discipline if an attorney is determined to have committed misconduct. The adjudicative function of the Attorney Discipline System is overseen by a twelve-member Professional Conduct Committee, which consists of volunteer attorneys and lay persons. . The Attorney Discipline Office, whose functions are listed in Rule 37(6), is a division within the Administrative Office of the Courts.

The Committee on Judicial Conduct was created by the court to inquire into and investigate alleged misconduct on the part of a judge, master, referee, court stenographer or reporter, or court clerk or deputy clerk, including any person performing the duties of a clerk. The committee consists of 11 regular members, including three judges, a clerk of court, one lawyer, and six laypersons. Some of the members are appointed by the Supreme Court and others are appointed by the Governor, House Speaker, Senate

 Copyright © NH Bar Association

President, and President of the New Hampshire Bar. There are also 11 alternate members with the same qualifications. The committee operates independently of the Supreme Court and is authorized to prepare its own budget and hire its own staff.

The court established the Advisory Committee on Judicial Ethics in 2001 to assist judges in complying with the Code of Judicial Conduct. The committee renders advisory opinions on the propriety of proposed conduct of individuals who are subject to the Code of Judicial Conduct. The committee consists of five members with expertise in the area of judicial ethics. The committee's opinions are posted on the Judicial Branch website.

The Supreme Court has jurisdiction over the examination and admission of attorneys to the New Hampshire bar. The Office of Bar Admissions, which is a division within the Administrative Office of the Courts, is responsible for receiving and processing applications for admission to the New Hampshire bar. The Board of Bar Examiners is appointed by the court to administer two examinations a year to those applying for admission to the Bar by examination. The board also oversees the Daniel Webster Scholar Honors Program at the University of New Hampshire Franklin Pierce School of Law. The seven-member Committee on Character and Fitness, established by the Supreme Court, investigates all applicants seeking admission to the bar and submits recommendations to the court about whether applicants have the moral character and fitness required for admission to the bar.

To provide for input from the public, as well as the bench and bar, the Supreme Court has established a seventeen-member Advisory Committee on Rules and has adopted procedures for amending or adding rules in all the New Hampshire courts. See Sup. Ct. Rule 51. The Advisory Committee is responsible for periodically reviewing all

 Copyright © NH Bar Association

court rules; for receiving suggestions from the public, the bench and the bar; for holding hearings and ensuring an opportunity to comment on matters before the committee; and for submitting proposed rules and amendments to the court twice annually. The procedures also provide for wide distribution of the committee's proposals, with invitations for comment, as well as for hearings before the court if it deems them desirable.

The New Hampshire Court Accreditation Commission, which was established by the legislature, see RSA 490:5-a, reviews the quality and adequacy of court facilities against prescribed standards and assists in the planning of new courthouses.

1.53 The Administrative Council

Supreme Court Rule 54 establishes the position of administrative judge for the Superior Court, and administrative judge and deputy administrative judge for the Circuit Court. By rule, the Chief Justice of the Superior Court is the administrative judge for that court. The administrative judge and deputy administrative judge for the Circuit Court are appointed by the Supreme Court.

The administrative judge for each court has general supervisory responsibility for the administration, operation, and improvement of the court. This includes exercising supervisory powers over judges, clerks, registers, and court personnel, implementing policies, orders and regulations concerning the court's internal management and operation, and supervising the court's caseflow.

Rule 54 also establishes an Administrative Council, which consists of the Chief Justice of the Supreme Court or his or her designee, the Chief Justice of the Superior Court, the administrative judge and deputy administrative judge of the Circuit Court, and the Director of the Administrative Office of the Courts. The role of the Administrative

 Copyright © NH Bar Association

Council is to facilitate communication and coordination among the courts, and to make recommendations to the Supreme Court about policies for the court system.

1.54 **Administrative Office of the Courts**

The Supreme Court created the Administrative Office of the Courts to assist the Supreme Court in exercising the expanded administrative, financial, and nonjudicial personnel management responsibilities occasioned by the implementation of the State-funded Unified Court System, The administrative staff, headed by the director, is responsible for the preparation and administration of the judicial branch budget, the establishment of standardized budgeting and accounting procedures in the State's courts, the audit of all court accounts, the administration of the uniform nonjudicial personnel classification and compensation system, centralized purchasing, information technology implementation and support, forms and records management, the conduct and design of judicial and nonjudicial education programs, and the collection and maintenance of statistics.

 Copyright © NH Bar Association

ATTACHMENT 1

NEW HAMPSHIRE SUPREME COURT

DISQUALIFICATION POLICY

Adopted April 24, 2018
Technical Amendments Adopted May 30, 2024

Identifying Potential Disqualifications

1. Each judge shall provide the clerk's office with a list of attorneys or law firms which could require the judge to disqualify him/herself from a case. This list is confidential.

2. The clerk's office will enter the names of the attorneys or law firms who could be the basis for a judge to disqualify him/herself from a case into the Supreme Court case management system (CMS).

3. As described further in this policy, the clerk's office or a staff attorney will advise a judge when an attorney or law firm on the judge's list is participating in a case, or participated in the case in the trial court or agency. Upon being advised of the potential disqualification, the judge should determine whether he/she should disqualify him/herself from the case.

4. When a judge disqualifies him/herself from a case, the clerk's office will note the disqualification in the disqualification field for the case in CMS. The disqualification of a judge from a case will be listed on the docket card in CMS, on any screening, tracking or clerk's agenda on which the case is listed, on the oral argument list if the case is scheduled for oral argument, and on the case assignment list of pending cases after oral argument.

5. If a judge does not believe that he or she is disqualified from a case, but is aware of information that may cause one or more of the parties to believe that the judge should be disqualified, the judge may have the clerk send a letter to the parties which discloses the information and invites any party who believes that the judge's disqualification is warranted to file a motion requesting that relief.

Remittal Procedure

1. A judge subject to disqualification from a case by the terms of Rule 2.11 of the Code of Judicial Conduct, may, when the basis for disqualification is not due to bias or prejudice, disclose on the record the basis for his/her disqualification and may ask the parties and their counsel to consider, outside the presence of the judge and court personnel, whether to waive disqualification.

 Copyright © NH Bar Association

2. In most cases, the clerk of court will advise the parties by letter of the basis for a judge's disqualification and advise them that the judge requests that they consider, outside the presence of the judge and court personnel, whether to waive disqualification.

3. The parties and counsel may agree to the judge's participation in the case by filing a written agreement with the clerk which complies with the requirements of Rule 2.11(C).

4. Unless a written agreement allowing participation is filed with the clerk, a judge disqualified by the terms of Rule 2.11 shall not participate in the case.

Distribution of Case Materials for Screening, Tracking, Clerk's Agenda

1. If a judge has disqualifed him/herself from a case to be discussed on a screening, tracking or clerk's agenda, the clerk's office will not distribute case materials to the judge and will list the disqualification on the agenda for the meeting.

2. If an attorney or law firm on a judge's disqualification list is involved in a case to be discussed during screening, tracking or clerk's agenda, the clerk's office will distribute case materials to the judge with an agenda indicating that the judge may be disqualified and the basis for the potential disqualification. The judge should determine whether to disqualify him/herself from the case.

3. Even if the clerk's office or staff attorney has not advised a judge of a potential disqualification, a judge should review each case to be discussed during a screening, tracking or clerk's agenda to determine whether there is a basis for disqualification.

4. When a judge disqualifies him/herself from a case on the screening, tracking or clerk's agenda, the judge shall leave the room during the discussion of the case and shall refrain from participating in any discussion of the case at a later time.

5. If a judge is not participating in a case, even if the judge is not disqualified, the judge shall leave the room during the discussion of the case and shall refrain from participating in any discussion of the case.

Oral Argument

1. Prior to scheduling a case for oral argument, the clerk's office will attempt to resolve with the pertinent judge(s) any disqualification issues that have not been determined.

2. If a judge has disqualified him/herself from a case that is scheduled for oral argument, briefs and other case materials will not be distributed to the judge, and the oral argument list will show that the judge is disqualified.

3. If a judge determines that he or she must disqualify him/herself from a case that has been scheduled for oral argument, the judge should advise the clerk's office so that the disqualification can be recorded.

 Copyright © NH Bar Association

4. A judge who has disqualified him/herself from a case shall not participate in oral argument.

5. A judge who has disqualified him/herself from a case will leave the room during any discussion of the case before or after oral argument.

6. A judge who is not participating in a case, even if not disqualified, shall not participate in any discussion of the case, and shall leave the room when the case is discussed after oral argument or during a case agenda.

Opinion/Final Order Preparation

1. Draft opinions and orders will be distributed only to the judges, including temporary judges appointed pursuant to RSA 490:3, who are participating in a case. Draft opinions will not be distributed to any judge who has disqualified him/herself from a case or any judge who is not participating in a case.

2 The agendas listing draft opinion and orders to be discussed at case conference should identify any judge who has disqualified him/herself or who is not participating in a case.

3. A judge who has disqualified him/herself from a case or who is not participating in a case shall not participate in any discussion of the case, and shall leave the room when the case is discussed during a case agenda.

4. The final order issued in the case will identify the judges participating in the decision.

5. After an opinion/final order becomes public, any judge, including a judge who disqualified him/herself from the case or who did not participate in the decision, may review the opinion/final order.

 Copyright © NH Bar Association

ATTACHMENT 2

NEW HAMPSHIRE JUDICIAL BRANCH
SUPREME COURT
COURT PERFORMANCE STANDARDS

SCREENING OF APPELLATE CASES

1. On average, parties will be notified within 90 days of the filing of notices of appeal or other appeal documents whether their cases has been accepted for review.

BRIEFING AND ORAL ARGUMENT

2. On average, appellant's brief should be filed within 60 days of the filing of the record and transcript.

3. On average, appellee's brief should be filed within 50 days of filing of appellant's brief.

4. On average, a case should be scheduled for oral argument within 180 days of the filing of appellee's brief.

5. If the court has accepted a case for review without oral argument, or if the court has granted a motion to waive oral argument, the case should be submitted to the court as soon as possible after all briefs in the case have been filed.

DISPOSITION

6. On average, an opinion or final order resolving a case should be issued within 180 days of oral argument, or, if the case is to be decided without oral argument, within 180 days of submission to the court.

7. Written dissents should be distributed within 30 days of approval of the majority opinion.

MOTIONS FOR REHEARING OR RECONSIDERATION

8. On average, motions for rehearing or reconsideration should be decided within 60 days of filing.

 Copyright © NH Bar Association

Civil Appeals

Doreen F. Connor
Primmer, Piper, Eggleston, & Cramer, PC
Manchester, NH

CHAPTER 2

CIVIL APPEALS

Doreen Connor updated this Chapter effective May 1, 2025.

2.1 SCOPE OF THIS CHAPTER.

This chapter covers civil appeals from the Superior Court, Circuit Court, including the District; Probate and Family courts and certification from the Federal Court. This chapter includes a discussion of the considerations in bringing an appeal, the procedure for bringing appeals and interlocutory transfers, motions, summary disposition, and preparation of the record.

2.2 TYPES OF APPEALS.

2.21 Appeals from Superior Court.

The Supreme Court is jurisdictionally empowered to review any and all judgments and orders issued by courts of inferior jurisdiction, including the Superior Court. N.H. CONST. pt. II. art. 73-A; RSA 490:4. Appeals may be taken from final orders in any Superior Court case, including bench trials, jury trials, and dispositive pretrial motions. See Sup. Ct. Rule 3 exceptions identified. Appeals to the Supreme Court from Superior Court decisions on the merits are perfected by filing a Notice of Appeal pursuant to Supreme Court Rule 7. Interlocutory appeals are occasionally permitted at the discretion of the trial judge. See Section 2.42c.

2.22 Appeals from District Court.

District Courts have exclusive jurisdiction over civil cases in which the claimed damages do not exceed $1,500 and title to real estate is not at issue, and concurrent

 Copyright © NH Bar Association

jurisdiction over civil actions in which the damages do not exceed $25,000. RSA 502-A:14, I, II. (Under certain circumstances the defendant may transfer an action to Superior Court for jury trial. RSA 502-A:14, III; 502-A:15.). Small claims are governed by RSA 503:1 *et seq.* A small claim is any right of action not involving title to real estate in which the damages do not exceed $10,000. While the District Court has authority to adjudicate claims in excess of $25,000, its authority to adjudicate claims using the informal procedures laid out in RSA 503 is limited to small claims. Thomas v. Crete, 141 N.H. 708 (1997).

In any civil case tried in the District Court, the trial court's findings of fact are final. RSA 502-A:14, I. Only questions of law may be raised on appeal to the Supreme Court. Id.

Supreme Court Rule 7 and District Court Rule 1.11(A) govern questions transferred following a decision on the merits. District Court Rule 1.11(B) and Supreme Court Rules 8 and 9 govern interlocutory appeals or transfers authorized by RSA 502-A:17-a. The procedure is virtually identical to appeals from Superior Court.

In an appeal from District Court, the record usually includes only the pleadings, exhibits, the court's findings of fact and rulings of law, and the docket entries. Sup. Ct. Rule 13. When a record of the proceedings has been made in the District Court transcripts thereof should be procured and filed in accordance with Supreme Court Rule 15.

2.23 **Appeals from Probate Court**.

The Probate Court has statutory and constitutional jurisdiction over several areas of family law as well as the administration of estates. Issues may reach the Supreme Court by certification prior to decision and by appeal from a decision of the Probate

 Copyright © NH Bar Association

Court.

a. Certification of Questions of Law. The Probate Court may at any time certify questions of law to the Supreme Court for instructions. RSA 547:30; see DeGrandpre, N.H. Practice: Probate Law and Procedure § 12-1 (1990). Direct certification is encouraged in many instances because it tends to be quicker and less costly than an application for instructions to Superior Court followed by an appeal to the Supreme Court. See In re Peterson Estate, 104 N.H. 508 (1963).

The issues that can be certified are diverse. DeGrandpre, supra, at 105-112. The Supreme Court has accepted transfers where the process would aid in the administration of an estate, even if the Probate Court's jurisdiction was doubtful or the issue was not technically ripe. See In re Byrne's Estate, 98 N.H. 300 (1953) (cited in In re Bunker Estate, 110 N.H. 285 (1970)). The Supreme Court will not, however, give advice if the answers will not affect distribution of an estate, resolve matters in contention, or assist the fiduciary in the performance of his or her duties. See In re Estate of Bliss, 117 N.H. 914 (1977). As an alternative to certification, counsel may consider a declaratory judgment action in Superior Court to resolve disputes concerning rights or title to property without the necessity of what is normally known as a justiciable issue. See RSA 491:22.

The Supreme Court can rule only on the questions asked by the Probate Court. RSA 547:30. Counsel's role, therefore, is to assist the Probate Court in determining which issues should be addressed; formulating the questions so that an appropriate and useful response is received; and assisting the Supreme Court in its consideration of the issues. Certification of questions of law is considered to be an interlocutory appeal by the Supreme Court and is governed by Supreme Court Rules 8 and 9. The Court

 Copyright © NH Bar Association

welcomes briefs from fiduciaries, although the fiduciary should technically not take a position favoring one group of legatees over another. In re Peterson Estate, 104 N.H. at 510.

b. Appeals from Probate Court. Persons aggrieved by actions taken by the Probate Court may appeal to the Supreme Court. Sharp distinctions are drawn between questions of law and questions of fact, however, which may have a dramatic impact on the scope of the appeal.

Since 1975, all appeals from Probate Court on questions of law go directly to the Supreme Court to be processed in accordance with the Court's rules. RSA 567-A:1; Sup. Ct. Rule 7. Any decree or order of the Probate Court may be appealed. Id. The limitation of appeals to orders that are "not strictly interlocutory" has been deleted.

Any person whose interest may be concluded by the court's action can file an appeal. An aggrieved person is one with a direct personal interest, a right in a representative capacity, or an official duty to pursue an appeal. Green v. Foster, 104 N.H. 287 (1962); see also In re Estate of Kelly, 130 N.H. 773, 777-78 (1988). The appealing party need not have participated in the probate proceedings. Sawyer v. Copp, 6 N.H. 42, 43-44 (1832). Whether a particular person's interest is sufficient is a question for the Court. DeGrandpre, N.H. Practice: Probate Law and Procedure § 13-3(a) (1990).

On appeal, the Probate Court's findings of fact are considered final unless they are so plainly erroneous that they could not reasonably be made. RSA 567-A: 4; In re Jesse F., 143 N.H. 192 (1998). To preserve issues for appeal, counsel should submit timely requests for findings of fact and rulings of law to the Probate Court.

The Supreme Court will limit its review to issues in the Notice of Appeal unless

 Copyright © NH Bar Association

for good cause shown, a motion to add issues is granted. Sup. Ct. Rule 16. With respect to appeals from the Probate Court, the Supreme Court has authority to reverse or affirm in whole or in part any order or decree of the Probate Court and enter any decree the Probate Court should have entered, remand the case for further proceeding in the Probate Court or enter any decree or order as it determines law and justice require. RSA 567-A:8.

c. Effect of Appeal. The filing of an appeal causes an automatic stay of all proceedings related to the decision appealed from. RSA 567-A:7. An additional request for a more expansive stay may be advisable in some circumstances. The Probate Court retains jurisdiction to appoint a special administrator to preserve the estate pending appeal. Id.

2.24 **Questions Certified from Federal Court**.

Certification of state law questions from federal to state courts is a practice arising from the abstention doctrine. See generally Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960). The Uniform Certification of Questions of Law Act, approved in 1967, has been judicially adopted in New Hampshire Supreme Court Rule 34.

a. Requirements of Certification. Questions may be certified by any federal court on its own motion or upon motion by any party. The federal court forwards the federal court's certification order to the New Hampshire Supreme Court. Sup. Ct. Rule 34.

There are four requirements for certifying a question of law. Sup. Ct. Rule 34. First, the question of law must arise in proceedings before the federal court, and cannot be merely advisory. Second, the question certified must be one of state law. Third, the question must be one whose answer may determine the outcome of the case, and not

 Copyright © NH Bar Association

one that is tangential. Fourth, the certified question must be one on which the state's highest court has not ruled. Sup. Ct. Rule 34. The federal courts have condemned the use of certified questions as a means to retry state law questions merely because a party--or even the court--dislikes the state court's answer. See Nieves v. University of Puerto Rico, 7 F.3d 270, 278 (1st Cir. 1993); Cantwell v. Univ. of Massachusetts, 551 F.2d 879, 880 (1st. Cir. 1977).

In addition to these criteria, federal courts have applied a number of factors in determining whether to grant a request for certification. The First Circuit announced in Cantwell v. Univ. of Massachusetts, supra, that it does not look favorably on a diversity plaintiff's attempt to seek certification. The federal court will also consider whether, based upon its own knowledge of state law and practice, it needs the state court's assistance. Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, 1397 (D.N.H. 1976), aff'd., 556 F.2d 628 (1st Cir. 1977). The federal court may also consider the delay and cost incident to the certification process.

As a practical matter, if grounds for certification are present, counsel should consider carefully whether the certified question should be answered at all and who should answer it. Particularly with novel questions of law where no helpful persuasive precedent is available, a client's interests might be better served by not forcing a harmful answer through certification. If the weight of authority elsewhere and in the New Hampshire Supreme Court leans toward your client's position, the decision to seek certification is easier.

If the question must be answered, counsel should consider whether the State or federal court is more inclined to rule in your client's favor. The State court's answer will be binding on the federal court, as well as on future State court litigation. See Tarr v.

 Copyright © NH Bar Association

Manchester Ins. Corp., 544 F.2d 14, 15 (1st Cir. 1976); see also Bonnev v. Canadian National Railway Co., 800 F.2d 274, 280 (1st Cir. 1986).

b. Procedure--Federal Court. Either party may move to certify a question of law to the New Hampshire Supreme Court, although such requests by plaintiffs in diversity cases are not favored. The motion should set forth how the question of law arose in the federal litigation and the grounds for certification. The moving party should attach a proposed certification order, setting forth a statement of relevant facts and the question(s) to be answered. Sup. Ct. Rule 34. The adverse party may file an objection and/or its own proposed order. If the court decides to certify a question on its own motion, it will generally ask the parties to submit proposed certification orders. The certification order is signed by the federal judge and forwarded by the clerk "under its official seal."

c. Procedure -- New Hampshire Supreme Court. The certification order as filed must conform to the technical requirements applicable to a Notice of Appeal. Sup. Ct. Rule 5, 6. The filing fee is to be divided equally between the parties unless the federal court orders otherwise. Sup. Ct. Rule 34. Briefs and argument on the certified question are governed by Supreme Court rules applicable to appeals from State courts. Id.

The Supreme Court may require transfer of all of the record, or of any portion it deems necessary to place the certified question in proper context. The issue of which facts are relevant provides fertile ground for argument, both before and after the certification order has issued. The Supreme Court has granted motions to transfer portions of the federal court record made by a party dissatisfied with the certification order's statement of facts.

 Copyright © NH Bar Association

The Supreme Court may refuse to answer the certified question, or may reframe or reformulate it. Compare Tarr v. Republic Corp., 116 N.H. 99 (1976) with Tarr v. Manchester Ins. Corn, 544 F.2d 14 (1st Cir. 1976).

2.25 **Extraordinary Writs**.

The extraordinary writs of prohibition, mandamus, certiorari, habeas corpus, and quo warranto are common law writs. They are of ancient origin -and as the description implies, seldom sought and rarely granted. They are not generally available as a substitute for an appeal. Currently they are used principally to challenge administrative agency decisions, discussed in more detail in Chapter 4.

The Supreme Court has jurisdiction to issue extraordinary writs. RSA 490:4. The Court may use these extraordinary writs to implement its general superintendence control of inferior courts. However, there are instances where the Superior Courts may also issue extraordinary writs. See Smith v. Sampson, 114 N.H. 638, 641 (1974) ("Jurisdiction to issue such a writ is expressly granted to [the supreme court] by RSA 490:4 (Supp.1973). However, there is no constitutional or statutory provision which prevents the superior court from issuing such a writ to prevent a lower court from exceeding its powers.")

While the Supreme Court has supervisory jurisdiction over the court system, see N.H. Const., pt. II, art. 73-A; RSA 490:4; see, e.g, State v. Wentworth, 118 N.H. 832, 838-39 (1978) (exercising supervisory jurisdiction to suggest that trial courts use model charge regarding burden of proof and definition of reasonable doubt), the Supreme Court will exercise its original jurisdiction only in exceptional cases:

> The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons that will be considered: When a lower court or administrative agency has decided a question of substance not theretofore determined by this court; or has decided it in a

 Copyright © NH Bar Association

> way probably not in accord with applicable decisions of this court; or has so far departed from the accepted or usual course of judicial or administrative agency proceedings as to call for an exercise of this court's power of supervision.

Sup. Ct. Rule 11.

Sample forms for extraordinary writ appeals do not exist in the court rules. Parties are advised to create their own appeal documents according to the format outlined in Supreme Court Rule 11.

a. Prohibition. The purpose of a writ of prohibition is to prevent subordinate tribunals, officers or persons "from usurping or exercising jurisdiction with which they are not vested." Smith v. Sampson, supra at 641 (quoting Hillsborough v. Superior Court, 109 N.H. 333, 334 (1969)). In recent times this writ has been successfully brought in a very few instances. The Court granted a writ of prohibition to block an unlawful order requiring the posting of a bond as a condition of appeal to the Superior Court from a landlord and tenant action in District Court, Smith v. Sampson, 114 N.H. 638 (1974), to correct a State agency's interpretation of a statute, New Hampshire Retail Grocers Ass'n v. State Tax Comm'n, 113 N.H. 511 (1973), and to vacate a sentence imposed by the Superior Court which was beyond its authority. Petition of the State of New Hampshire (State v. Langille), 139 N.H. 705 (1995).

b. Mandamus. Mandamus is an order directed to a tribunal, board or person requiring performance of a particular duty of the office. 52 Am. Jur. 2d Mandamus § 1 (1970). The remedy requested is just the opposite of the remedy requested in a writ of prohibition. In a mandamus writ, the Court orders an official to act, whereas in a prohibition writ the Court orders the official not to act. The Court will only grant a writ of mandamus where the plaintiff has a clear and apparent right to relief, and no other remedy will afford full and adequate relief. Rockhouse Mt. Property Owners Assoc. v.

 Copyright © NH Bar Association

Conway, 127 N.H. 593, 602 (1986); Guarracino v. Beaudry,118 N.H. 435 (1978). It is rare that the New Hampshire Supreme Court will accept an original Petition for Mandamus. E.g., Brouillard v. Governor and Council, 114 N.H. 541 (1974).

c. Certiorari. In theory, the writ of certiorari can be used to determine whether a tribunal has acted illegally as to matters of jurisdiction, authority or observances of law. State v. N.H. Retail Grocers Ass'n, 115 N.H. 623 (1975) (seeking petition for writ of certiorari to quash discovery order of superior court). It is most frequently used to challenge decisions by state administrative agencies. See Chapter 4.

Litigants have sought certiorari several times -unsuccessfully -- to appeal trial court decisions after the appeal period has run. See, e.g., Gallo v. Century Broadcasting, 114 N.H. 810 (1974). In State v. Peter Salvucci & Sons, Inc., 110 N.H. 502 (1970), however, the Court granted certiorari. After an unsuccessful appeal to the Supreme Court, the State was ordered to pay a judgment including interest and costs. The State brought the petition to contest the Superior Court's jurisdiction to order it to pay interest and costs, an issue it had neglected to raise in its first appeal. The Supreme Court granted the writ where the error claimed was that the court acted outside the scope of its jurisdiction. Id. at 504.

d. Quo Warranto. A writ of quo warranto is usually invoked to test the right or title to public office. 65 Am. Jur. 2d Quo Warranto § 12 (1972). Unlike the other extraordinary writs, the Attorney General, who is authorized to control the proceedings, must bring a writ of quo warranto. Attorney General ex rel. Chamberlin v. Nadeau, 110 N.H. 264, 268 (1970). There is some indication in the Chamberlin case, however, that the attorney for the realtor may control the proceedings provided the Attorney General delegates the authority. As in all of the extraordinary writs, the standard for review is

 Copyright © NH Bar Association

narrow. The only question is whether the agency or official acted illegally with respect to jurisdiction, authority or observance of the law, abused its discretion, or acted arbitrarily or capriciously. See State v. Brackett, 122 N.H. 716 (1982).

2.3 THE SCOPE OF APPEAL.

2.31 The Privilege of Appeal.

The right to seek appellate review appeal was discretionary for many years, and continues to be viewed as a privilege, despite the expanded jurisdiction for civil appeals as a matter of right from all final decisions issued after December 1, 2003.

a. Constitutional Requirements. The United States Constitution does not guarantee litigants a right of appeal in civil cases. The United States Supreme Court has held in a number of cases that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." Lindsay v. Normet, 405 U.S. 56, 77 (1972).

The New Hampshire Constitution places the court system largely within control of the legislature, N.H. CONST., pt. II, art. 4, except that the legislature may not abolish the Supreme and Superior Courts, N.H. CONST., pt. II, art. 72-a. Other than a provision requiring the Supreme Court to render advisory opinions at the request of either branch of the legislature or of the Governor and Council, there are no constitutional limitations or requirements governing what cases the Supreme Court may or must hear. In an 1861 case, the Supreme Court held that the legislature's power to alter the structure of the court system included the power to abolish provisions for appellate review. Cummings v. White Mountains R.R., 43 N.H. 114, 115 (1861).

There is at least an argument that a right to appeal is implied in Part I, Article 14 of the State Constitution, which guarantees citizens a right to "a certain remedy . . .;

 Copyright © NH Bar Association

[and to completely, and without any denial; promptly, and without delay; conformably to the laws." The Court has stated however, that the rights guaranteed by this article are not absolute, and that not every impairment of access to the courts runs afoul of this provision. Estate of Cargill v. City of Rochester, 119 N.H. 661, 665 (1979), appeal dismissed 445 U.S. 921 (1980). It seems unlikely that the Court would interpret Part I, Article 14 as granting a right of appeal in civil cases.

b. Statutes. Because appeals are not constitutionally protected, it is often said that they are a statutory privilege available only to those who strictly comply with the applicable statutes and rules of court. 16A Am. Jur. 2d Constitutional Law § 859 (1979). The statutes defining the Supreme Court's jurisdiction do not appear to require the Court to hear all cases submitted to it. RSA 490:4, 5.

The Court has in the past endorsed "the elementary rule that appeal statutes are liberally construed so as to maintain the right and doubts are resolved in favor of the right to appeal." Hallahan v. Riley, 94 N.H. 338, 342 (1947). Since 1979, however, its own rules have limited to some degree the possibility of obtaining substantive appellate review in civil cases.

c. Court Rules. In 1979 the Supreme Court made significant changes in the procedure for filing appeals. It also instituted a rule authorizing summary disposition of cases without briefing, oral argument, or written opinion "at any time, on its own motion and without notice or on such notice as it may order." Sup. Ct. Rule 25(l). An order of summary affirmance may be entered when the Court determines that no substantial question of law is presented and the Court does not disagree with the result below, when the trial court's opinion identifies and discusses the issues and the Court does not disagree, or when "other just cause exists." Id. Rule 25(1)(d) also allows the court to

 Copyright © NH Bar Association

summarily dispose of individual issues in a case brought up on appeal.

Summary dismissal may be ordered when the Court has not considered the merits, clearly lacks jurisdiction or some other "just cause for summary dismissal exists. . . ." Id. Summary reversal can be ordered when "just cause" exists therefore and an express statement thereof is issued with the order. The Court's practice is to dispose of cases summarily only if none of the justices wishes the case to go forward on briefs and oral argument for consideration on its merits. See Section 1.

Parties may not seek summary affirmance or summary dismissal under Rule 25 in a case involving a mandatory appeal. Sup. Ct. Rule 25(1). In all other appeals, a motion for summary disposition may be filed within twenty days of the entry of the appeal. Any response by an opposing party must be filed within ten days of the filing of the motion for summary disposition. Sup. Ct. Rule 25(2). Because the federal courts are reluctant to become involved in civil cases that have already been through the state courts, there has been no federal review of Rule 25 as applied to civil cases In a civil rights action brought by a criminal defendant, the United States District Court held that the New Hampshire Supreme Court had the inherent authority to adopt rules for disposing quickly of cases which present questions that have already been answered by precedent or are frivolous or insubstantial. See Silvestri v. King, No. 82-649-L (D. N.H. Mar. 17, 1983).

Since 1983 the Court has exercised discretion in the acceptance of appeal notices. Sup. Ct. Rules 7, 8, 9, 10. Beginning with appeals docketed after January 1, 2004, the Court agreed to accept all appeal notices that qualify as a “mandatory appeal.” The term “mandatory appeal” is defined as including an appeal filed by the State pursuant to RSA 606:10 and an appeal from a final decision on the merits issued

 Copyright © NH Bar Association

by a superior court, district court, probate court or family division court, other than decisions involving a post-conviction review; a collateral challenge to any conviction; sentence modification; sentence proceedings; parole revocation proceedings and probation revocation proceedings; landlord/tenant or possessory decisions; an order denying a motion to intervene and domestic relations appeals under RSA 457-461-A, other than an appeal of the first final order. Sup. Ct. Rule 3.

In an unpublished opinion, the First Circuit Court of Appeals has upheld the Supreme Court's discretion under Rule 7 to decline civil appeals without reviewing transcripts. See Vitale v. Brock, 1993 WL 279098 (1st Cir. July 22, 1993). However, in federal habeas corpus proceedings, two state prisoners successfully argued that the declination of their appeals violated due process when the declinations were made without providing the defendants with transcripts of the trial proceedings on which they assigned error and without providing the defendants an opportunity to persuade the Court to accept the appeals (beyond that provided in the notice of appeal). Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987).

As with summary disposition, in civil cases it is virtually impossible to obtain review of a Supreme Court order declining an appeal. An order summarily affirming or declining an appeal is mailed only to the parties involved. Such orders are not regarded as establishing precedent and cannot be cited as authority. Sup. Ct. Rule 25(5). These orders are, however, recorded in the Court's Decision and Order book and are available for public inspection. In practice, these provisions mean that many of the cases filed will be disposed of on the basis of the notice of appeal or equivalent appeal papers. The discussion in this chapter concerning the importance and need for care in the preparation of those papers therefore assumes a larger significance than was true

 Copyright © NH Bar Association

under the pre-1979 rules.

In 2018 with the introduction of electronic filing, the Court developed New Electronic Filing Rules.

2.32 **Scope of Review.**

The American Bar Association's Appellate Courts Standards with Commentary has identified three basic principles that define the role of an appellate court:

(1) The appellate court should ascertain only whether a factual conclusion is reasonably supported by evidence; the determination of fact issues is primarily the responsibility of the trial court.

(2) An appellate court is a court of review and not a court of original jurisdiction, and its task is to consider only whether the trial court properly decided the matters tendered to it.

(3) An appellate court should disturb a trial court judgment only when the proceeding, taken as whole, can be said to have resulted in a denial of substantial justice or involved a serious departure from established procedure.

The following survey of New Hampshire law on the scope of review should be read with these principles in mind.

The scope of review, that is, the deference shown to the trial court's decision, varies depending upon the issue presented. This overview is not complete, and you should in all cases research the particular area of law presented in your case.

a. Presumption of Correctness. As a general rule, the New Hampshire Supreme Court presumes that the trial court acted correctly. Thus, where there is no transcript of the proceedings below, the Court on appeal will presume there was

 Copyright © NH Bar Association

sufficient evidence to support the result reached. See Sup. Ct. Rule 13(3); Desaulnier v. Manchester School Dist., 140 N.H. 336 (1995); Cornforth v. Cornforth, 123 N.H. 61, 63 (1983). The Court will also presume that the trial court has properly exercised it discretion in orders granting or denying discovery and will reverse only if there has been a clear unsustainable exercise of the trial court's discretion in the management of discovery. YYY Corp. v. Gazda, 145 N.H. 53 (2000); Muder v. Bentley, 109 N.H. 71 (1968). The Court will also presume that jury instructions were understood and followed. Powell v. Catholic Medical Center, 145 N.H. 7 (2000); Rodriguez v. Webb, 141 N.H. 177 (1996); Hoyt v. Horst, 105 N.H. 380 (1964).

When reviewing a trial court verdict, the Court will assume that the verdict was based on competent evidence, Paquette v. St. Clair, 119 N.H. 404 (1979), and will review all evidence in the light most favorable to the prevailing party. Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 138 N.H. 110, 113, (1993). In the absence of specific findings, the trial court will be presumed to have made all findings necessary to support its decree. In re Lisa H., 134 N.H. 188, 195 (1991); Demers Nursing Home, Inc. v. R.C. Ross & Son, Inc., 122 N.H. 757, 761 (1982).

b. Unsustainable Exercise of Discretion. Many decisions relating to the course and conduct of a trial are left to the discretion of the trial judge, and will be reversed on appeal only if the trial court committed an unsustainable exercise of discretion. State v. Lambert, 147 N.H. 295 (2001) (explaining unsustainable exercise of discretion standard.). The Court has stated that whether the reviewing court, "sitting as trial judges, would have reached the same or a different result is immaterial. In the doubtful case . . . [the reviewing court] should defer to [the trial court's] judgment." Kierstead v. Betley Chevrolet-Buick, Inc., 118 N.H. 493, 497 (1978). The burden of

 Copyright © NH Bar Association

proof on appeal is on the party alleging unsustainable discretion. E.g., Muder v. Bentley, 109 N.H. 71, 73 (1968). To show an unsustainable exercise of discretion, the appellant has to show that the trial court's ruling was clearly untenable or unreasonable to the prejudice of appellant's case. North Country Environmental Services, Inc. v. Town of Bethlehem, 146 N.H. 348 (2001); Simpson v. Wal-Mart Stores, Inc., 144 N.H. 571 (1999); In re Brittany L., 144 N.H. 139 (1999).

The following matters have been held to be within the discretion of the trial court: an order consolidating suits, Associated Home Utilities, Inc. v. Town of Bedford, 120 N.H. 812, 815 (1980); the granting or denial of an injunction, Thompson v. New Hampshire Board of Medicine, 143 N.H. 107 (1998); Unifirst Corporation v. City of Nashua, 130 N.H. 11, 14 (1987); the granting or denial of relief from default, Belcher v. Paine, 136 N.H. 137 (1992); Rahaim v. Psaros, 122 N.H. 613 (1982); orders controlling the scope of discovery, Miller v. Basbas, 131 N.H. 332, 338 (1988); orders on the manner and timing of trial, Blevins v. Town of Bow, 146 N.H. 67 (2001); Panas v. Harakis, 129 N.H. 591, 607 (1987); whether the jury should have a view, Kallgren v. Chadwick, 134 N.H. 110 (1991); State v. Booton, 114 N.H. 750, 757 (1974), cert. denied, 421 U.S. 919 (1975); the scope of cross-examination, Saurman v. Liberty, 116 N.H. 73, 77 (1976); and the granting of a motion for new trial, Walton v. City of Manchester, 140 N.H. 403 (1995); Hodgdon v. Weeks Memorial Hospital, 128 N.H. 366, 368 (1986).

The "unsustainable exercise of discretion" standard is also applied to virtually all decisions in marital cases, including property divisions, alimony and child support, and custody of minor children. E.g., Lawlor v. Lawlor, 123 N.H. 163, 166 (1983); see also Russman v. Russman, 124 N.H. 593, 597 (1984).

 Copyright © NH Bar Association

c. Fact Findings and Verdicts. The trial court has primary responsibility for the resolution of factual disputes, which depends upon first-hand assessment of the credibility of witnesses and the persuasiveness of evidence. See e.g., Alexander v. Blackstone Realty Associates, 141 N.H. 366 (1996); State v. Field, 132 N.H. 760, 767 (1990); 93 Clearing House, Inc. v. Khoury, 120 N.H. 346, 350 (1980). Less deference will be given to the trial court's factual findings when the trial judge did not have the opportunity to observe the demeanor of witnesses at trial since the appellate court's review of the paper record will be the same as that review performed by the trial court. Hillside Assocs. of Hollis v. Maine Bonding & Cas. Co., 135 N.H. 325, 330 (1992).

A jury verdict will be upheld on appeal if it is reasonably supported by the evidence, that is, if reasonable persons could have reached the same conclusion as the jury on the basis of the evidence before them. Shaka v. Shaka, 120 N.H. 780, 782 (1980). In considering the evidence, the Court will view it in the light most favorable to the prevailing party. Bronson v. Hitchcock Clinic, 140 N.H. 798 (1996); Petrie-Clemons v. Butterfield, 122 N.H. 120, 124 (1982). A jury verdict will be set aside only if it is conclusively against the weight of the evidence (i.e. one no reasonable jury could return) or the result of mistake, fraud, or corruption. Keeler v. Banks, 145 N.H. 558 (2000); Quinn Bros., Inc. v. Whitehouse, 144 N.H. 186 (1999). Similarly, fact-findings of the trial judge in a non-jury matter will be upheld on appeal unless they are unsupported by the evidence or legally erroneous. Id.; In re Gina D., 138 N.H. 697 (1994); Vittum v. N.H. Insurance Co., 117 N.H. 1, 3, (1997).

Note, however, that the interpretation of written documents, including insurance contracts, is considered a question of law as to which the scope of review is broader, and the Supreme Court will make an independent determination. E.g., V&V Corp. v.

 Copyright © NH Bar Association

American Policyholders' Ins. Co., 127 N.H. 372, 379 (1985) (insurance policy); Moulton v. Groveton Papers Co., 112 N.H. 50 (1972) (deed); Hanslin v. Keith, 120 N.H. 361, 363 (1980) (contract); Ruel v. Hardy, 90 N.H. 240, 243 (1939) (will).

d. Questions of Law. The Supreme Court has full authority to correct errors of law, interpret or strike down State statutes and local ordinances, and apply the State and federal constitutions. In recent years, the Court has become an active interpreter of the New Hampshire Constitution using it to strike down statutes, including, for example, a statute regulating truck weights, State v. Amyot, 119 N.H. 671 (1979); zoning ordinances, e.g., Burrows v. City of Keene, 121 N.H. 590 (1981); and property tax exemptions, Felder v. Portsmouth, 114 N.H. 573 (1974); see also Opinion of the Justices, 142 N.H. 892 (1998); declare unconstitutional New Hampshire's method of funding education through local property taxes, Claremont v. Governor, 142 N.H. 462 (1997). As indicated above, the Court also considers the interpretation of written documents questions of law. In issues framed as questions of law, the Supreme Court is more likely to reconsider the trial court's opinion.

e. Harmless Error. The harmless error doctrine rests on the principle that where no injury or prejudice has occurred, there is no reason to correct the error. Ordinarily, the burden is on the party alleging harmlessness to demonstrate that the error was not prejudicial. See Gibson v. Boston, 75 N.H. 405, 407 (1910). If the error did not affect the outcome below or where the court can see from the entire record that no injury was done, the judgment will not be disturbed. McDill v. Environamics Corp., 144 N.H. 635 (2000). Thus, the Court will not reverse if the inadmissible evidence is cumulative of evidence that was properly admitted, Town of Weare v. Paquette's Estate, 121 N.H. 653 (1981), or if the Court finds that the error was cured by a timely instruction

 Copyright © NH Bar Association

to the jury, Chouinard v. Shaw, 99 N.H. 26 (1954). Similarly, the erroneous exclusion of evidence will not be considered prejudicial where other evidence established the point at issue. See Hackett v. Boston & Maine R.R., 89 N.H. 514, 519 (1938); see also Werner v. Montana, 117 N.H. 721, 732-33 (1977).

An erroneous jury charge constitutes reversible error if the jury could have been misled. Chellman v. Saab-Scania, AB, Saab Car Division, 138 N.H. 73, 80 (1993). However, the refusal to give a specific charge will not justify reversal if that charge is substantially similar to another charge that was given. Murray v. Bullard Co., 110 N.H. 220, 225 (1970).

2.4 PLANNING THE APPEAL.

2.41 Parties.

a. Interested Parties. All parties to the proceedings in the trial court are automatically deemed to be parties to any appeal to the Supreme Court. Sup. Ct. Rule 7(4). A “non-appealing” party does not have any substantive right of redress, but only a right to be heard on the appealing party’s claims. If a party expects to obtain substantive affirmative relief from the Supreme Court other than simply a denial of the appealing party's claim for relief, a cross-appeal should be filed. See Section 2.53. Case law suggests that in some cases, however, a timely motion to add questions to the notice of appeal may suffice. See In re "K", 132 N.H. 4, 16 (1989).

b. Disinterested Parties. The appealing party may notify the Supreme Court in writing of its belief that one or more of the parties below have no interest in remaining a party to the appeal, with a copy of the notice to all parties below. Upon receipt of the notice, the Supreme Court will delete the disinterested parties unless the party designated as "disinterested" notifies the Supreme Court clerk of its continuing interest

 Copyright © NH Bar Association

in the case, with a copy to all other parties. Sup. Ct. Rule 7(4).

c. State of New Hampshire. When an appeal to the Supreme Court raises issues related to the constitutionality of any New Hampshire statute, regulation, administrative procedure, or any official State conduct, and neither the State nor any of its agencies or officers were parties below, the party intending to raise those issues must, upon entry of the case in the Supreme Court, send written notice to the Attorney General, and provide him or her with a copy of the notice of appeal (or cross-appeal), interlocutory transfer statement, or petition for certiorari, or other appeal papers raising that issue. Sup. Ct. Rule 31.

d. Designation. In New Hampshire, parties to an appeal retain their trial court designations. Sup. Ct. Rule 28(1). Thus, a plaintiff in the Superior Court remains "plaintiff" in the Supreme Court, even when the defendant is appealing. In cases where a petition is filed requesting the Supreme Court to exercise its original jurisdiction, the party filing the petition is designated as plaintiff on appeal, even though that party might be the "defendant" in the litigation or administrative proceeding below. Sup. Ct. Rule 28(I).

e. Confidentiality. Parties may ask for confidential designations of parties, such as "John Doe" or "Robert H" where circumstances warrant such protection. Sup. Ct. Rule 28. This practice is common in juvenile cases. The Supreme Court reserves the option of processing and reporting its decisions under new and different names. Sup. Ct. Rule 28(3).

f. Substitution of Parties. In the event of the death of a party to an appeal, that party's general representative may be substituted upon motion of either the personal representative or any other party. If there is no personal representative, any

 Copyright © NH Bar Association

party may advise the Court of the death on the record, and the Court will then direct appropriate proceedings. Sup. Ct. Rule 29(1).

g. State or State Officials As Parties. Whenever an appeal involves the State government or one of its agencies or officials, the State should be listed as "The State of New Hampshire." The State agency's name should be preceded by the words "New Hampshire," e.g., "New Hampshire Department of Health and Human Services." A State official's title, but not the official's name, should be listed, e.g.,"Secretary of State." Where a State title is identical to that of a county or municipal official, the State official's title shall be preceded by the words "New Hampshire" to avoid confusion. Where a public officer is a party to an appeal in his or her official capacity, and the officer dies, resigns, or ceases to hold office while the case is pending, the officer's successor is automatically substituted as a party. Sup. Ct. Rule 28(2); 29(2).

h. Amicus Curiae. The Supreme Court is liberal in its consideration of requests for *amicus* status on appeal. Such status usually may be attained by filing a motion for *amicus* status, with a brief within the time allowed to the party whose position will be supported, with a certificate that the other parties have no objection. If a party refuses to consent, the prospective *amicus* may file a motion for leave to file within the time allowed for the filing of the brief of the party to be supported. The motion must concisely set forth the nature of the moving party's interest, the facts or questions of law that have not been or may not be adequately presented by the parties, and the relevancy of those issues to the disposition of the case. Sup. Ct. Rule 30. The *amicus* brief may, and probably should, be conditionally filed along with the motion for leave. An *amicus* may be allowed to participate in oral argument, on motion and in the Court's discretion; however, the general tendency is not to allow argument by an *amicus*.

 Copyright © NH Bar Association

2.42 **Appealable Orders (Final and Interlocutory).**

a. Final Order. With certain exceptions, an appeal may only be filed from a final order that disposes of a case at the trial level. Piane v. Town of Conway, 118 N.H. 883 (1978); Alexander v. Pierce, 10 N.H. 494 (1840). (But, see Superior Ct. R. 46). The rationale for this rule is that litigation should not proceed piecemeal, an interlocutory appeal will cause undue delay, and the final disposition by a trial court may render the issue moot. Arsenault v. Willis, 117 N.H. 980, 982 (1977); see also Piane v. Town of Conway, supra at 884 (trial courts' rendering of final verdicts before allowing parties to appeal is better use of judicial resources). The requirement of a final judgment or order (or appealable interlocutory order) is considered jurisdictional, and thus there can be no appeal without it even by consent of the parties. See generally 4 C.J.S. Appeal and Error § 92 at p. 246.

A final order is a formal judgment, order, or decree rendered by the trial court that shows on its face that the parties' rights have been adjudicated. It may include an injunction or declaration. The term also includes decisions on post-verdict motions, if any. Sup. Ct. Rule 3; see Section 2.51(a). An order is not generally considered "final" unless it concludes the case as to all issues and all parties. Germain v. Germain, 137 N.H. 82 (1993). Two exceptions are orders denying a motion to dismiss for lack of personal jurisdiction, and certain orders in divorce proceedings deciding property issues but not custody and support issues. These orders are considered final and must be appealed pursuant to Supreme Court Rule 7. See Mosier v. Kinley, 142 N.H. 415 (1997); Germain, supra. Most of the case law involves determinations of which rulings are not considered final appealable orders.

 Copyright © NH Bar Association

b. Non-appealable Interlocutory Rulings. An interlocutory judgment or order has been defined as one that leaves further proceedings necessary before the rights of the parties can be determined. See 4 C.J.S. Appeal and Error § 94 at p. 263-64. The following are the more common interlocutory orders that ordinarily cannot be appealed prior to the final decision on the merits: orders relating to the calendar, docket, consolidation, or the granting or denial of a continuance, see 4 C.J.S. Appeal and Error §§ 112, 115; changes of venue and other orders involving transfers; orders relating to amendments to the pleadings, unless they finally dispose of the case, Trafton v. Osgood, 74 N.H. 98 (1906); rulings on motions relating to discovery, the examination of witnesses, and compelling testimony, unless they dispose of substantial rights of a party; State v. Cote, 95 N.H. 248 (1948); an order granting a motion to dismiss or motion for summary judgment is appealable, as is an order denying a motion to dismiss where the issue is the in personam jurisdiction over the defendant, Mosier v. Kinley, 142 N.H. 415 (1997); Morel v. Marable, 120 N.H. 192, 193-94 (1980). Orders that do not decide all of the issues in the proceedings or do not conclude the matter with respect to all parties are interlocutory, Germain v. Germain, 137 N.H. 82, 84 (1993); however, bifurcated divorces may be considered final and appealable. Id. Effective January 1, 2017, Superior Court Rule 46 was amended to allow the lower court to designate an order that finally resolves a portion of a case to be treated as final for purposes of appeal.

c. Appealable Interlocutory Orders. It is occasionally necessary -- or at least helpful -- for litigants to obtain dispositive and authoritative decisions of law at an early stage in trial proceedings. There are two avenues for obtaining an authoritative Supreme Court ruling on an interlocutory basis. RSA 491:17, 502-A:17-a. Supreme

 Copyright © NH Bar Association

Court Rule 8 governs interlocutory appeals from an order or ruling issued by the trial court, and Supreme Court Rule 9 provides for interlocutory transfer of questions of law without a ruling from the trial court. The interlocutory appeal rules seek to permit swift and efficient resolution of litigation and to reduce the need for extensive discovery and burdensome proceedings in cases that could be decided by a Supreme Court decision on an issue of law.

The Supreme Court has made it clear that interlocutory appeals are not to be looked upon as routinely available, and should be limited to "exceptional circumstances." Piane v. Town of Conway, 118 N.H. 883, 884 (1978). The Court has stated that interlocutory appeals or transfers without ruling should be pursued only in those cases where the Supreme Court's decision will "materially advance termination or clarify further proceedings of the litigation." Sup. Ct. Rule 8; Guyette v. C & K Development Co., 122 N.H. 913, 918 (1982). Examples of such issues might be threshold jurisdictional questions, see Travelers Indemnity Co. v. Abreem Corp., 122 N.H. 583 (1982), and the cases involving statutory construction that will be dispositive of the merits. See Section 2.62. Interlocutory appeals will be accepted at the Court's discretion and are subject to motions for summary affirmance and summary dismissal under Supreme Court Rule 25.

2.43 **Preserving Issues for Review.**

The New Hampshire Supreme Court adheres strictly to the rule that issues will be reviewed on appeal only if they were properly presented to the trial court. As is repeated elsewhere in these materials, the time to begin thinking about your appeal is prior to trial. In order to protect the possibility of appeal, you must be careful to preserve on the record anything that might become grounds for an appeal. You must then avoid

 Copyright © NH Bar Association

inadvertently waiving issues once the case reaches the Supreme Court.

a. Presenting Issues to Trial Court. You must raise in a timely fashion any substantive issues you would want to rely on in an appeal. Daboul v. Town of Hampton, 124 N.H. 307, 309 (1983). For example, you cannot argue one theory of recovery at trial and then, after losing, argue a different theory on appeal. See Progressive Survey, Inc. v. Pearson, 120 N.H. 58, 61 (1980); Sperl v. Sperl, 119 N.H. 818 (1979). You should prepare written requests for findings of fact and rulings of law in a non-jury case, or written requests for jury instructions. Super. Ct. Rules 62, 72; Distr. Ct. Rule 3.20(D). If you anticipate an important evidentiary question, prepare a motion in limine and/or memorandum or law in advance of trial. See Klar v. Miroulas, 145 N.H. 483 (2000); State v. Staples, 120 N.H. 278, 285 (1980). If there is a possibility of appealing a verdict as unsupported by the evidence, you must move for a non-suit and/or a directed verdict, and after the verdict move for judgment notwithstanding the verdict. Allstate Ins. Co. v. Carr, 119 N.H. 851, 854 (1979); Hauser v. Calawa, 116 N.H. 676, 677 (1976). If you have prepared properly for trial, these requirements should not present problems. It can create difficulties, however, when you have taken over a case that someone else tried, and you observe sound appealable issues that prior counsel did not mention on the record.

b. Timely Objection. You must, of course, object immediately when the court or opposing counsel does something objectionable. This includes improper argument, improper admission or exclusion of evidence, erroneous or incomplete jury instructions, or any other matter. Contemporaneous objections are intended to give the trial court the opportunity to correct the proceedings prior to verdict, avoiding the need for an appeal. In Re Thayer, 146 N.H. 342 (2001). Where evidence is excluded, its proponent should make

 Copyright © NH Bar Association

an offer of proof. N.H. R. Ev. 103(b)(2). The Court has stated on numerous occasions that a litigant who sits passively by and appears to acquiesce in the proceedings will not be permitted to complain later. In Re Shannon M., 146 N.H. 22 (2001); Millis v Foutis, 144 N.H. 446 (1996); Steel v. Bemis, 121 N.H. 425, 429 (1981); Amabello v. Colonial Motors, 120 N.H. 524, 525 (1980).

c. Certification Rule. The Supreme Court has enacted a rule that requires counsel to certify in the notice of appeal that each of the issues presented was properly raised and preserved below. Sup. Ct. Rule 26(4). Like the Court's other procedural rules, this rule contains sanctions including the potential for the assessment of costs and attorney's fees or the rejection of the appeal by the Court.

d. Preserving Issues During Appeal. In order to have the Court consider fully all the issues you wish to raise, you must prepare the notice of appeal or equivalent appeal papers carefully. See Section 2.51. You are also responsible for providing the Court with an adequate record. See Section 2.6.

You must comply strictly with the Supreme Court's rules and orders concerning the format and timing of briefs, oral argument, etc. The Supreme Court will occasionally waive a rule for good cause, but it is far preferable not to be in the position of asking.

It goes without saying that if you are the appealing party and you fail to file a brief, the appeal will be dismissed. Sup. Ct. Rule 16(12); Chasan v. Chasan, 115 N.H. 613 (1975). Failure of opposing counsel to file a brief does not result in dismissal of the appeal but precludes the opposing party from participating in oral argument. Sup. Ct. R. 18(2). Opposing counsel's failure to file a brief can also result in the relief requested by the appealing party being granted. Junior Achievement v. United Way, 132 N.H. 205, 207 (1989). If you raise an issue in your notice of appeal but do not brief it, that issue will be

 Copyright © NH Bar Association

deemed waived. E.g., Brown v. Bonnin, 132 N.H. 488, 491 (1989); Daboul v. Town of Hampton, 124 N.H. 307, 309 (1983).

e. Plain Error. There is a limited exception to the general rule that issues must be preserved for appellate review. In 2004, the Supreme Court adopted a rule allowing for consideration of a plain error that affects substantial rights, even though it was not brought to the attention of the trial court or supreme court. Sup. Ct. Rule 16-A. However, the Court has stated that it uses the rule sparingly, limiting it to those circumstances in which a miscarriage of justice would otherwise result. Even if the conditions of the rule are met, the Court may exercise its discretion to correct a forfeited error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Laramie v. Stone, 160 N.H. 419 (2010).

2.44 **Evaluating Whether to Take an Appeal.**

There are a number of factors that should be taken into account before advising your client to proceed with an appeal in a civil case. The decision will depend upon the particular situation, but the following should be considered:

a. Available Issues. What issues were properly framed, presented to the trial court, and preserved by objection or motion? See Section 2.43.

b. Scope of Review. Will the Supreme Court affirm the trial court ruling unless it finds an unsustainable exercise of discretion? Are the errors you claim primarily factual ones, which the Supreme Court will be unlikely to overturn? Can you frame the issue as a question of law? See Section 2.32.

c. Prospects for Success. After reviewing applicable case law, what is your assessment of the strength of your position? Does your client's position reflect a minority position? Where are the equities and the sympathies in the case? Consider discussing and comparing your facts with attorneys involved in recent similar cases, to obtain an independent opinion.

 Copyright © NH Bar Association

d. Available Relief. If your appeal is successful, what relief could you obtain? Would the litigation be terminated? Or would your client face a new trial, on some or all issues, with the risks and expense that would entail? Can you ask the Supreme Court to order judgment for your client, or a reduction of damages, without the need for a remand?

e. Risk of Triggering Cross-Appeal. If the trial court's decision is partially in your favor, will the other side file a cross-appeal that could result in losing whatever advantage you now have? Would cross-appeals be likely to result in increased damages, an adverse ruling on evidence, or any other "downside risk"?

f. Risk of Creating Bad Law. Is this case a good vehicle for testing the legal question, or is it proof that "hard facts make bad law"? Is the question likely to recur? Is the result you are seeking one you are prepared to live with in other cases? It may be better to have no definitive answer than to have the wrong answer. If you aren't sure you want to know the Court's opinion, don't ask for it.

g. Expense. An appeal is a costly undertaking. Direct out-of-pocket expenses will include at least the filing fees and cost of the transcript. You will also spend substantial amounts of time preparing the notice of appeal, preparing or responding to a potential motion for summary affirmance (in discretionary appeals), researching and writing the brief, and preparing for oral argument. Your client may also be required to retain appellate counsel if the issue is outside trial counsel’s expertise.

h. Effect of Delay. You can anticipate that the appellate process may take six months or more if your case is accepted for briefing and oral argument. What will the effect be of this delay in obtaining a final resolution? Interest will continue to run on monetary awards. RSA 524:1-a, 524:l-b, 336:1. Would your clients rather have a final answer, even if it is not ideal? In a domestic case, how will the continued "limbo" of an appeal affect the interpersonal interaction of the parties and their children?

i. Potential Penalties. Remember that if the Supreme Court considers your appeal frivolous, dilatory, or in bad faith, either your client or you personally can be

 Copyright © NH Bar Association

assessed double costs, enhanced interest, and attorneys fees. RSA 490:14-a, Sup. Ct. Rule 23, see Section 2.84; see also Keenan v. Fearon, 130 N.H. 494 (1988).

j. Settlement Possibilities. Can the parties compromise in order to avoid the delay, cost, and uncertainties of an appeal?

2.5 COMMENCING THE APPEAL.

Discretionary Notice of Appeal pleadings require extensive work. Form 7 asks that you explain the issue; explain why the Court's acceptance criteria support acceptance of the issue and if a ground for acceptance is legal sufficiency of evidence you need to include a succinct statement of why the evidence is alleged to be insufficient as a matter of law. A Mandatory Notice of Appeal is a relatively simple matter, once you have verified the appropriate transcript orders.

2.51 Notice of Appeal (Rule 7).

In an ordinary civil case, an appeal is initiated when one party files a notice of appeal. Sup. Ct. Rule 7(1). This procedure replaced "reserved cases" in 1979, but you may still see references to reserved cases in statutes, rules and old cases.

a. Deadline for Filing. To perfect an appeal, the notice of appeal must be filed at the Supreme Court within 30 days of the date on the trial court clerk's written notice of that court's decision on the merits. Sup. Ct. Rule 7(2). It is essential to remember that the 30-day period begins to run on the date of the clerk's written notice, NOT on the date the decision was made by the trial court, NOT on the date you or your client received notice of the trial court's decision, and NOT on the date the Superior Court's order was signed, filed, or became effective. The date of the trial court clerk's notice may be the same as the date of the decision by the trial court, or one day later, or even a week or more later. It can also happen that the date on the clerk's notice may be well before the date you actually receive

 Copyright © NH Bar Association

the notice. You must, therefore, take careful note of the date on the notice, and instruct office personnel very carefully that calendar deadlines or tickler systems must reflect a period of 30 days beginning from that date, and no other. Also keep in mind that some months have 31 days -- an appeal from a notice of decision dated March 10 is due on April 9, not April 10.

A notice of appeal is deemed "filed" when it is electronically docketed by the Supreme Court and the filing fee has been paid. Sup. Ct. Electronic Filing Rule 4, 12. The Court does not favor motions for late entry. Sup. Ct. Rule 21(6). If the filing fails to comply with the technical requirements for form, it will be docketed and considered timely, but you may be assessed a penalty and instructed to file corrected papers within ten days. If you encounter a “technical failure” as defined under Rule 10, you may conventionally submit the Notice with a Motion for relief. A “technical failure” includes issues associated with the Court’s electronic filing system. A technical problem with the filer’s computer, telephone or internet service, does not constitute a “technical failure” and will not excuse untimely filing unless the Court orders otherwise.

Probably the question most commonly asked by attorneys of the Supreme Court clerk's office concerns the timeliness of appeals from trial court decisions when a post-decision motion is filed in the trial court. By changes in 1987 to the definition of "decision on the merits" in Rule 3 and the addition of a note following Rule 7(1), the Court has attempted to clarify this problem. A timely filed post-decision motion in the trial court extends the running of the appeal period, such that it does not begin until the date of the clerk's notice of the decision on the timely filed motion. On the other hand, an untimely-filed post-decision motion in the trial court does not stay the running of the appeal period unless the trial court waives the untimeliness of the post-decision motion within the appeal

 Copyright © NH Bar Association

period. The time for filing all post-decision motions is now ten days from the date of the clerk's written notice of the decision or order, as the case may be. Superior Court Rules 59-A, 73, and 74, and District Court Rule 3.21, should be consulted in this regard.

Successive post-decision motions in the trial court do not stay the running of the appeal period. Sup. Ct. R. 7(1). Thus, if a timely filed post-decision motion is denied, the appeal period begins. The filing of a second motion for post-decision relief after the denial of the first such motion will not begin the running of a new appeal period. See In Re Ellis, 138 N.H. 159, 161-62 (1993). The Supreme Court held that a motion for new trial and a successive motion for reconsideration do stay the running of the appeal period, distinguishing Petition of Ellis. See Prime Financial Group v. Masters, 141 N.H. 33, 34-35 (1996). The Court has not addressed whether Masters is still good law in light of the amendment to Rule 7.

If one is unable to master the timeliness rules, two potential avenues are available for relief. These include a motion to extend time to file an appeal document and a motion for late entry of an appeal document. Attention, however, is called to Rule 21(6), which states that these motions are not favored.

A motion to extend time to file an appeal document assumes a filing within the appeal period but without an appeal document. It is governed by the last paragraph of Rule 5(1). Such a motion requires the filing of an original, accompanied by the required entry fee.

If the appeal period has passed, the only recourse is to file an appeal document with a motion for late entry. In that case, Rule 21(6) requires that the appeal document and the required entry fee accompany the motion. The appeal document must conform to all applicable procedural rules.

 Copyright © NH Bar Association

b. Form. Before preparing the notice of appeal you should review carefully all the relevant court rules, including the 2018 Supplemental Rules for Electronic Filing. If you are still unsure as to the proper procedure or format, a call to the Supreme Court clerk's office is in order. Failure to follow the Court's requirements for procedure and format can result in the assessment of costs or, in extreme cases, in the Court refusing to accept the appeal.

The mandatory and discretionary notice of appeal forms are outlined in Supreme Court Rule 7. Sample form appears in the appendix to this section. The forms can be downloaded from the Supreme Court website. They appear under the website legend for “forms.” Notices of appeal and covers to briefs are not good places to try and improve on the Court's forms. Use the forms in their entirety and answer all questions completely. Otherwise, you will be assessed and instructed to do it over again.

If your appeal is neither a mandatory or discretionary appeal, the appeal document and appendix should have a separate front cover, similar to the cover of a brief, which should include (1) the designation "New Hampshire Supreme Court"; (2) space for the docket number, when it is assigned; (3) the title of the case; (4) the nature of the proceeding in the Supreme Court, e.g. “Appeal by Petition”; and (5) the names and addresses of counsel filing the notice. Sup. Ct. Rule 6(3). The appeal must be prepared in accordance with Supreme Court Rule 26 and the Electronic Filing rules.

In both mandatory and discretionary appeals you must attach the underlying decision that you are appealing and if appropriate the clerk’s notice answering any timely filed post-trial motion. Sup. Ct. Rule 7. In a discretionary appeal you should also submit any other pleadings and documents that the Court needs to evaluate the specific questions raised on appeal in a separate appendix. A table of contents must be included.

 Copyright © NH Bar Association

Sup. Ct. Rule 7(6). The appendix must conform to the same format rules as the appeal, including sequentially numbered pages.

Among the more common technical mistakes made in filing appeals are the following:

1. Failing to complete the transcript information sheet at the back of the notice of appeal.

2. Failing to use sequential page numbering. The notice of appeal and any appendix often contain various pleadings and documents with their own internal pagination. Once the documents have been compiled they must be renumbered sequentially prior to filing.

3. Illegible photocopied attachments. If it is impossible to make a legible photocopy of the original, have a facsimile typed and place it immediately after the illegible original with an explanatory note.

4. Failing to include or answer all information on the notice of appeal form or on the cover.

5. Failing to note in the margin which requests for findings of fact and rulings of law were granted, denied or not ruled upon by the tribunal below. Sup. Ct. Rule 6(5).

6. Failing to certify that the issues raised were properly preserved below. Sup. Ct. Rule 26(4); see Section 2.43(d).

c. Content. In a discretionary appeal, the notice of appeal presents a crucial opportunity for the skilled appellate practitioner to state affirmatively why this case presents issues of law that merit the Court's full consideration. Drafting your appeal document is akin to the arts of brief writing and oral advocacy. As an appellate advocate, you must present your case in its best light, stripped of irrelevancies. One should avoid

 Copyright © NH Bar Association

raising multiple issues, otherwise, the one or two good appeal issues may get overlooked among other less important appeal issues. Careful framing of the issues will demonstrate to the Court that you are aware of the principles of good appellate advocacy, and will help ensure that your case is accepted for briefing and oral argument.

The two-page narrative explaining the case and trial court action should be concise and clear and it should include enough substance to convince the Court that your cause is worthy of its limited time and resources.

The best place to concentrate your drafting efforts is in the section of the notice where you specify the question(s) presented for review. You should briefly and concisely state your arguments in question format in a way that will effectively communicate why an injustice would result if the Court were to turn down your client's appeal. If any question involves the sufficiency of the evidence, the question must contain a succinct statement of why the evidence is alleged to be insufficient as a matter of law. Sup. Ct. Rule 7(6)(B).

A good technique for framing these questions is to envision the headings for sections of your brief. Each question should be specific and linked with the facts. Avoid vague generalities such as "the trial court erred in instructing the jury" or "the administrative agency denied the applicant due process." Substitute instead, for example:

WHETHER THE TRIAL COURT ERRED IN FAILING TO FOLLOW THIS COURT'S RECENT DECISIONS IN INSTRUCTING THE JURY ON THE CRUCIAL ISSUE OF COMPARATIVE NEGLIGENCE.

OR

WHETHER THE ADMINISTRATIVE AGENCY DENIED THE APPEALING PARTY DUE PROCESS BY DENYING HIS COUNSEL THE RIGHT TO FILE A BRIEF DESPITE THE AGENCY'S OWN RULE PERMITTING POST--HEARING BRIEFS.

 Copyright © NH Bar Association

Avoid personal attacks on the trial judge, administrative agency, or opposing counsel, as well as rhetoric that may distract the Court from your substantive points. Your goal is to tell the Court, through the framing of the questions, that there is a significant issue of law for the Court to decide, and not merely a disappointed or disgruntled litigant seeking to remake meritless arguments rejected (or omitted) below.

After identifying each issue you are appealing, you must articulate why the Court should accept your client's appeal. The form asks that you explain why the acceptance criteria listed above support acceptance of your issues. The acceptance criteria set forth above include :

> 1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire Courts.
> 2. The decision below conflicts with a statute or with prior decisions of this court.
> 3. The decision below is erroneous, illegal, and unreasonable or was an unsustainable exercise of discretion.

d. Fees. The $250 filing fee must accompany the notice of appeal. Sup. Ct. Rules 5(1) and 49. This fee includes the $25 filing fee surcharge referenced in RSA 490:26-a and Sup. Ct. Rule 49(II). The filing fee may be waived for indigent parties. The waiver is automatic for parties represented by or through federally funded legal services programs, including the Pro Bono Referral Service and the Elderly Legal Services program, as well as New Hampshire Legal Assistance. RSA 499:18-b. The clerk should waive the fee upon request without requiring a motion and court order. See Form 14. For other indigent clients, you must file a motion for waiver of fees accompanied by a financial affidavit on Form OCC-1, which is available from any court. RSA 499:18-b; Sup. Ct. Rule 5(2); Form 15. The Court states that the fee will be waived only "in exceptional circumstances." Sup. Ct. Rule 5(2).

 Copyright © NH Bar Association

2.52 **Interlocutory Appeals**.

The procedures for interlocutory appeals and interlocutory transfers without ruling are virtually identical. Sup. Ct. Rules 8, 9. The matter is brought to the Supreme Court by an appeal statement that is the equivalent of the notice of appeal used under Rule 7. Supreme Court Rule 7 states that the trial court must sign the interlocutory appeal statement, but it is not the trial court's responsibility to prepare the statement.[1] Whenever possible, you as the appealing party should seek to assume or participate fully in the drafting responsibility so that your client's interests are protected in the crucial matters of stating the facts and framing the issue; however, the interlocutory appeal or transfer statement is ultimately a statement signed by the trial court judge and should accurately, fairly, and objectively state the case and the questions. The proposed statement is then filed with the trial court clerk for the judge's signature. Super. Ct. Rule 79; Distr. Ct. Rule 1.11(B); Prob. Ct. Rule 79. The rules do not provide a deadline for preparation of an interlocutory appeal statement, although inordinate delay may blunt your argument that the case requires an interlocutory appeal.

Like a notice of appeal, the statement must include all relevant facts and question(s) presented. It must also include an explanation of why an interlocutory decision may materially advance the litigation or is otherwise justified. Sup. Ct. Rules 8(1), 9(1); Form 3. In an interlocutory appeal, a copy of the trial court's order must be attached, together with any findings of fact and rulings of law and other material documents. The interlocutory appeal or transfer statement should indicate whether any transcript is necessary to decide the questions presented, and, if so, what transcripts are necessary.

[1] In Blanchflower, 150 N.H. 226 (2003) the Supreme Court accepted an interlocutory appeal, on appeal, after the trial court refused the parties' request for an interlocutory appeal.

 Copyright © NH Bar Association

The statement must be approved and signed by the trial court, indicating the court's approval of the interlocutory appeal. Sup. Ct. Rule 8(1) (d); see also Super. Ct. Rule 79. Whether a question of law may be transferred to the Supreme Court in advance of final decision rests in the sound discretion of the trial court. RSA 490:9; State v. N.H. Retail Grocers Ass'n, Inc., 115 N.H. 623, 626 (1975). Despite the wishes of the litigants, therefore, the trial judge has the right to determine whether or not an interlocutory appeal can proceed in a given case. There is some authority, however, for the Supreme Court to waive the signature requirement for good cause shown. Sup. Ct. Rule 1; Guyette v. C & K Development Co., 122 N.H. 913, 918 (1982); Blanchflower, 150 N.H. 226. Conversely, the trial court may transfer issues to the Supreme Court over the objection of either party. Manchester Amusement Co. v. Conn, 80 N.H. 455, 461 (1922).

Occasionally, court orders approving interlocutory transfers are made without counsel being notified of the fact or remain in limbo. When counsel has reason to believe that a request for interlocutory transfer has been overlooked or has been pending for a longer period than is reasonable, counsel should take affirmative steps to determine the status of the request.

Within ten days after the trial court clerk's notice of the signed interlocutory appeal statement, the moving party must file the original with the Supreme Court, one copy with opposing counsel, and two or three copies with the Superior Court clerk. Sup. Ct. Rules 5(1), 8(3), 9(3). The interlocutory appeal or transfer statement must comply with the Court's general rules as to format, and must be accompanied by the entry fee or a motion for waiver of fees. Sup. Ct. Rules 5, 6.

2.53 **Cross-Appeals.**

For tactical reasons, a party may choose to accept a decision of the trial court, even

 Copyright © NH Bar Association

though the relief obtained was less than the full measure anticipated. Often, however, the party making such a decision subsequently finds itself facing an appeal taken by one of the other parties to the Superior Court action. If the position to be asserted on appeal is simply that the appealing party's claims are without merit and no relief should be afforded to the appellant, no cross-appeal is warranted. But see In re "K", 132 N.H. 4 (1989). If, however, a non-appealing party has a basis for arguing that the relief that the party obtained below was insufficient (or the obligations imposed upon it were unwarranted), and wishes affirmative substantive relief, a cross-appeal must be filed.

Any cross-appeal must be filed within ten days from the date on which the first notice of appeal is docketed, and must be accompanied by the appropriate entry fee. Sup. Ct. Rule 7(5). The Court will issue a single scheduling order for the case.

2.6 THE RECORD ON APPEAL.

The record consists of the papers and exhibits filed and considered in the trial court, the transcript of proceedings, and the docket entries of the trial court or administrative agency. Sup. Ct. Rule 13(1). The appealing party has the procedural and legal responsibility to present the Court with a sufficient record to support the issues raised on appeal, including any pertinent proceedings from the trial court docket. Sup. Ct. Rule 13(3); Canty v. Hopkins, 146 N.H. 151 (2001); Bezanson v. Hampshire Meadows Development Corp., 144 N.H. 298 (1999). In the absence of a sufficient record, the decision below will be affirmed. Sup. Ct. Rule 13(3); see, e.g., Orford Teachers Assoc. v. Watson, 122 N.H. 803, 804 (1982); Brown v. Cathay Island, Inc., 125 N.H. 112, 115 (1984). Pursuant to Supreme Court Rule 13(3) the Court will not review any part of the trial court record, unless it has been provided by one of the parties in a properly organized appendix or transmitted by the trial court or administrative agency.

 Copyright © NH Bar Association

2.61 **Transcripts.**

The appealing party must complete the transcript order form at the back of the notice of appeal form. The current notice of appeal forms estimate the transcript fee at a rate of $170 for each 30 minutes of trial. Although you are no longer required to determine the exact cost of the requested transcript you must identify the date of each requested transcript and its length. Once the Supreme Court accepts a case, it issues a scheduling order addressing the payment of the estimated transcript fee. The Court sends a copy of the order directly to the transcriptionist as well as to the trial court clerk and all counsel. The order directs the appealing party to send the estimated cost of preparing the transcript to the transcriptionist. If the required payment is not received, the transcriptionist notifies the Supreme Court, and the appeal may be dismissed. Sup. Ct. Rule 15(2).

You must designate specifically for each question the proceedings to be transcribed to decide that question. Hearings on pretrial motions, for example, should be specified. "Motion to Dismiss Jurisdiction" with the date of the hearing if known. If you intend to argue on appeal that a finding or conclusion below is supported by or contrary to the evidence, the transcript must include all evidence relevant to that finding or conclusion. If you do not otherwise specify and the Court does not limit its order, all oral proceedings will be transcribed except for opening statements, medical testimony, closing arguments and jury charge. An electronic and paper copy will be transmitted to the Supreme Court with electronic copies to the parties. Sup. Ct. Rule 15(4).

There is no provision in New Hampshire Statutes or Court Rules for waiver or state payment of the transcript cost for indigent parties in most civil cases. In some cases the Pro Bono Referral Service of the New Hampshire Bar Association may be able to reimburse you for transcript costs. It may be possible, with prior approval from the trial

 Copyright © NH Bar Association

court, to bring a tape recorder and have your office prepare a transcript. If the case involves fundamental rights and no reasonable alternative exists, you may file a motion requesting a waiver. See Boddie v. Connecticut, 401 U.S. 371 (1971). Cf. Brown v. Brown, 112 N.H. 410 (1972).

2.62 **Exhibits and Pleadings.**

As discussed above, in conjunction with briefing, copies of the decision below and any pertinent pleadings and documents from the trial court must be filed in an appendix. These documents may include, but are not limited to, orders on motions (where material to the appeal), motions, and material documents such as contracts and insurance policies. If a pleading or other document is included in the notice of appeal, it need not be filed again, except that the underlying order on appeal should be reproduced in the appealing party's brief. Sup. Ct. Rule 16(3)(i).

To the extent your appeal involves trial exhibits, such as photographs, letters and depositions, you should reproduce the exhibits in the appendix to your brief. Sup. Ct. Rule 13. If the exhibits cannot be easily reproduced you will need to file a motion with the Supreme Court requesting an order to the trial court for the transmittal of these exhibits. Sup. Ct. Rule 14(3).

2.7 EFFECT OF TAKING APPEAL.

2.71 **Effect on Order Appealed From.**

There is conflicting authority as to whether and when the filing of an appeal automatically suspends or stays the order being appealed. The rule followed by a majority of jurisdictions and adopted in the Second Restatement is that the filing of an appeal does not vacate the trial court's order. See Restatement (Second) of Judgments § 13, Comment f (1982).

 Copyright © NH Bar Association

In New Hampshire, however, the appeal does appear to suspend the trial court's authority in some types of cases. In a civil action for money damages, the timely filing of a notice of appeal prevents the trial court from entering final judgment. Super. Ct. Rule 74; Dist. Ct. Rule 3.21(B); Watkins v. Boston & Maine Railroad, 80 N.H. 102, 103 (1921), but see RSA 524:1-c. No writ of execution can issue until after the entry of final judgment at the conclusion of the appeal. RSA 527:1. The same rule appears to apply to equity actions such as declaratory judgments. Super. Ct. Rule 74; R. Wiebusch, 5 New Hampshire Practice: Civil Practice and Procedure § 59.02 (1984). In a marital case, unless the trial court orders otherwise, a timely appeal prevents the final support order from taking effect, and the prior temporary order governs while the appeal is pending. Rollins v. Rollins, 122 N.H. 6, 10 (1982); Super. Ct. Rule 74; Douglas, 3 New Hampshire Practice: Family Law § 16.26 (2d ed. 1992). The family court, however, has discretion to implement the final order as new temporary orders in the event of appeal. Nicolazzi v. Nicolazzi, 131 N.H. 694 (1989).

If you are in doubt or wish to clarify what will happen during the appeal, you should ask for a specific order.

2.72 **Stays.**

An application to stay or enjoin enforcement or execution of an order pending appeal should be made to the trial court, which retains jurisdiction to preserve the status quo. E.g., Appeal of Public Service Co. of N.H., 130 N.H. 285, 297 (1988). The Supreme Court has concurrent jurisdiction to issue a stay, however pursuant to Supreme Court Rule 7-A, a motion for stay shall not be filed in the Supreme Court unless the movant has first unsuccessfully sought similar relief from the trial court.

The trial court apparently has the authority to condition a stay on the appealing

 Copyright © NH Bar Association

party providing a bond or other adequate security, although bonding is not ordinarily requested or required. Super. Ct. Rule 163.

2.73 **Trial Court Jurisdiction.**

Perfection of an appeal, as a general rule, deprives the trial court of jurisdiction of the case and transfers it to the appellate court. Rautenberg v. Munnis, 107 N.H. 446, 447 (1966). Once an appeal has been taken, the trial court has no authority to rule upon a motion for new trial. Id. A party to an appeal who concludes that further proceedings in the trial court are necessary should address a request for such relief to the Supreme Court. It will continue the appeal and remand the case to the trial court for further proceedings if it determines "from briefs or oral arguments that a remand is necessary to complete the record or to prevent injustice." Rautenberg v. Munnis, 107 N.H. at 448. For example, in Maine Bonding & Cas. Co. v. Foundation Constructors, Inc., 105 N.H. 470 (1964), the case was remanded to the trial court to permit it to receive and consider the specifications and general conditions of a construction contract that were unavailable at the time of trial but were subsequently located. See also Williams v. Babcock, 116 N.H. 819 (1976); Oleskey v. State, 112 N.H. 131 (1972). In Carbonneau v. Town of Rye, 120 N.H. 96 (1980), on the other hand, the plaintiff requested a remand on the ground of newly discovered evidence, but the Supreme Court denied the request noting that the evidence probably would not produce a different result.

During the appeal, the trial court retains jurisdiction over "collateral, subsidiary or independent matters affecting the case." Rautenberg v. Munnis, 107 N.H. at 448. For example, the trial court had jurisdiction to rule on requests previously submitted by one of the parties, where the rulings were "designed to aid in presentation on appeal . . . ." Cornwell v. Cornwell, 116 N.H. 205, 207 (1976).

 Copyright © NH Bar Association

2.74 **Settlement.**

Although an appeal has been taken, the Supreme Court's rules encourage the parties to continue negotiation efforts. The Court has adopted a formal appellate mediation program. With certain exceptions listed in the rule, most civil cases are eligible for mediation. However, all parties must agree. Sup. Ct. Rule 12-A(3). Pursuant to Supreme Court Rule 12-A, when an acceptance order is issued in a case that appears to be eligible for mediation, the clerk will provide the appealing party with a mediation form. If the parties fail to file the completed mediation form within 15 days, the case will proceed in the usual course. If a case is referred to mediation, further processing of the case will be suspended for a period of 90 days (unless extended by the mediator for an additional 30 days) to enable the parties to complete the mediation process.

Alternately, after the case has been filed with the Supreme Court, counsel may be directed to attend a prehearing evaluation conference before the Supreme Court clerk, deputy clerk, staff attorney, or a justice of the Supreme Court, or a retired justice. The possibility of settlement, the simplification of issues, and any other method of expediting the processing of the case will be considered. Sup. Ct. Rule 12-B. The clerk may order that clients attend or that lawyers bring with them written settlement authority. The conference will be followed by a "conference order." Failure to comply with the conference order or Rule 12-B may result in sanctions, including dismissal.

If settlement is reached while the case is on appeal, the case is rendered moot. See generally 5 Am. Jur. 2d, Appellate Review § 654 (1995).

Attorneys for both sides should not assume that settlement is impossible after the trial has concluded. An adverse decision by the Supreme Court on questions of law can have adversely affect your client, as well as future cases.

 Copyright © NH Bar Association

2.8 POST-DECISION PRACTICE.

2.81 The Order.

In deciding a case on appeal, the Supreme Court may affirm, reverse, vacate or modify the judgment or order on appeal. Where appropriate, it may remand the case to the trial court for further proceedings consistent with the court's decision. The Court will provide counsel of record electronic notice of the opinion's publication, 24 hours before it is published on the Court website.

Within 15 days after the opinion is issued, if no motion for rehearing is filed, the clerk of the Supreme Court forwards to the trial court a certificate of the Court's order. See Form 23. Upon filing of that certificate, the trial court reacquires jurisdiction over the case and may issue such orders of its own or conduct further proceedings as are necessary to comply with the order.

2.82 Motion for Rehearing or Reconsideration.

After the Supreme Court has rendered a decision, a party may request a rehearing or reconsideration by filing a motion. Sup. Ct. Rule 22. Such motions must be filed with the court within ten days from the date of the decision. The motion must identify the points of law or fact that you believe the court has overlooked or misunderstood, and should contain argument in support of the motion. Unless requested by the court, an answer to a motion for rehearing or reconsideration is not required. The Court may reconsider the case without re-argument, restore it to the calendar for reargument or resubmission, reaffirm its original opinion, or make whatever modification to the opinion or issue any order it deems appropriate. Sup. Ct. Rule 22(4).

2.83 Taxation of Costs.

 Copyright © NH Bar Association

The party who prevails on appeal is entitled to recover costs accrued in the Supreme Court by filing a timely request with the clerk. Sup. Ct. Rule 23. The request must be filed within 30 days after the date on the court's opinion or order. Sup. Ct. Rule 23. Costs that can be taxed are the Supreme Court filing fee, the cost of the transcript, and the actual cost of reproducing the notice of appeal, brief and appendix. Sup. Ct. Rule 23; see also Sup. Ct. Rule 17(3) (appendix to brief).

2.84 **Attorneys' Fees.**

Normally, attorneys' fees are not recoverable in civil cases unless specifically provided for by statute. Silva v. Botsch, 121 N.H. 1041, 1043 (1981). If the Supreme Court, on its own or at the request of a party, determines that an appeal was frivolous, dilatory, or in bad faith, the Court can and occasionally does award attorneys' fees plus double costs and interest at a higher rate. Sup. Ct. Rule 23; RSA 490:14-a; e.g., Wright v. Wright, 119 N.H. 102 (1979); Harkeem v. Adams, 117 N.H. 687 (1977). Note that the assessment can be levied against the offending counsel personally. See Jerry's Sport Center, Inc. v. Novick, 120 N.H. 371, 373-74 (1980). A request for attorney's fees must be filed within a reasonable time after the order, but is not strictly limited to the 30-day period for taxing costs. Silva v. Botsch, supra.

2.85 **Federal Review.**

It is rare that there will be an opportunity for review in federal court of an adverse decision in a civil case. If your case raises substantial constitutional questions, and was not decided on independent state grounds, you may be able to petition for a writ of certiorari to the United States Supreme Court. See Section 3.111; Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), reversing 109 N.H. 441 (1969). At least in the First Circuit, the federal district court will not entertain collateral challenges to state decisions in civil cases.

 Copyright © NH Bar Association

E.g., Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978); Fortune v. Mulherrin, 533 F.2d 21 (1st Cir. 1976), cert. denied 429 U.S. 864 (1976); Donnelly v. Donnelly, 515 F.2d 129 (1st Cir. 1975), cert. denied 423 U.S. 998 (1975).

 Copyright © NH Bar Association

Criminal Appeals

Oliver D. Bloom
Lothstein Guerriero, PLLC
Keene, NH

Christopher M. Johnson
NH Appellate Defender Program
Concord, NH

Elizabeth C. Woodcock
New Hampshire Attorney General's Office,
Department of Justice
Concord, NH

CHAPTER 3

CRIMINAL APPEALS

Oliver Bloom, Christopher Johnson, and Elizabeth Woodcock revised this Chapter so that its discussion of case law is current as of May 1, 2025. The 2022 version was written by Theodore Lothstein, with contributions from Stephanie Hausman and Elizabeth Woodcock.

3.1 SCOPE OF THIS CHAPTER

With respect to state court appeals, this chapter covers criminal cases appealed from Circuit Court District Division courts (referred to as "circuit court" to avoid confusion with the federal district court) and from superior courts to the New Hampshire Supreme Court (generally referred to as the "Court"). The materials cover interlocutory appeals and appeals from final judgment by the convicted defendant, the State, and juveniles. Also covered are appeals to the Court from the Sentence Review Division and the Parole Board. The chapter includes a brief summary of other potential post-conviction remedies. This chapter also addresses, in less depth, federal criminal appeals from the United States District Court to the First Circuit Court of Appeals ("First Circuit"). Please also consult Chapter Two, civil appeals, which has a lot of excellent overlapping coverage, and covers many topics that don't occur frequently in criminal appeals, such as cross-appeals.

 Copyright © NH Bar Association

3.2 WHAT IS A MANDATORY APPEAL VERSUS A DISCRETIONARY APPEAL?

In order to understand the overall framework for criminal appeals in state court, one must first understand the difference between a "mandatory appeal" and a "discretionary appeal." Under N.H. Sup. Ct. R. 3, mandatory appeals include appeals from "a final decision on the merits" from:

- a criminal conviction after trial and resulting sentence.
- a juvenile delinquency adjudication.
- the State's interlocutory appeal from a pre-trial ruling pursuant to RSA 606:10.

That means the Court automatically accepts the appeal. Accordingly, the notice of appeal form for mandatory appeals does not address the substance of the appeal, except for a simple listing of potential appeal issues.

Other appeals in criminal matters are discretionary appeals. These include appeals from:

- a violation of probation and resulting sentence.
- revocation of parole.
- denial of habeas corpus petition.
- denial of a post-conviction motion filed more than 10 days after judgment.

That means the notice of appeal must address the merits of the appeal, and the Court retains the discretion to accept or reject the appeal based on its

 Copyright © NH Bar Association

apparent merit. *See* Sections 3.33, 3.35, 3.37, and 3.39 for further discussion of potential discretionary appeals in criminal matters.

The First Circuit follows similar principles but refers to these two categories of appeals as "appeals as of right" versus "appeals by permission." First Circuit Rulebook, Rules 4 and 5. Federal statutes define which types of appeals are appeals as of right versus appeals by permission.

3.3 AVENUES OF REVIEW IN CRIMINAL CASES.

3.31 Direct Appeal by the Defendant from Criminal Conviction.

The most common procedure for review of a criminal case is a direct appeal by a convicted defendant from a trial-level state court to the New Hampshire Supreme Court (NHSCt), or from the United States District Court for the District of NH (USDC) to the First Circuit. The NHSCt automatically accepts direct appeals of all "final decisions on the merits" of criminal convictions and juvenile delinquency adjudications, as these matters are "mandatory" appeals. N.H. Sup. Ct. R. 3, 7(1)(A). That means that when a Notice of Appeal ("NOA") is timely filed following a criminal conviction, the Court will accept the appeal without regard to its potential merit. Accordingly, the Notice of Appeal form for use in mandatory appeals does not require or even provide opportunity for the appellant to make a showing of the merit of the appeal. More information on the form and content of NOAs can be found in Section 3.62 below.

Similar principles apply in federal court. Direct appeals that are timely filed from a final judgment of conviction after trial and sentence, or guilty plea

 Copyright © NH Bar Association

and sentence, are appeals as of right. Accordingly, the standard appeal form and required accompanying docketing statement are perfunctory and do not address the merit of the appeal. 1st Cir. Rulebook, Rules 3(c), 4(b); Local Rule 3.0.

a. Appeal from Superior Court.

A defendant may appeal from a conviction and sentence after trial, including rulings on timely-filed post-trial motions, *i.e.*, a decision on the merits. N.H. Sup. Ct. R. 3, 7. Unless the trial court allows an interlocutory appeal and the Court accepts it, a defendant may not appeal from adverse rulings on pretrial motions. *See* Section 3.33, infra, for a discussion of interlocutory appeals.

b. Special Considerations for Appeal from Convictions in Circuit Court.

If a defendant is convicted of a class B misdemeanor or violation, the sole avenue of appeal is to the NHSCt. RSA 599:1-c, II. This is a mandatory appeal. The procedure for filing a notice of appeal pursuant to RSA 599:1-c is the same as for an appeal from superior court. N.H. Sup. Ct. R. 7.

A defendant convicted of a class A misdemeanor in circuit court has a choice: she can apply for a *de novo* jury trial in superior court or appeal directly to the NHSCt. *See* RSA 599:1; RSA 592-A:2; N.H. R. Crim. Proc. 21(a)(3). However, as explained further below, the latter waives the right to a jury trial.

The effect of a *de novo* jury trial appeal is to vacate the judgment below. State v. Thompson, 165 N.H. 779, 789 (2013). This appeal should be

 Copyright © NH Bar Association

announced orally immediately following sentencing by the district court, RSA 599:1. However, a provision provides for a "Late Appeal" written petition filed within 3 days of sentencing; RSA 599:1-a; or even 30 days after sentencing in the discretion of the superior court, if the failure to appeal was the result of "mistake, accident or misfortune, and not from his own neglect." RSA 599:1-b. If the defendant changes his mind, waives jury trial, and requests the case be remanded back to district court for imposition of the district court sentence, he can then appeal to the New Hampshire Supreme Court for errors of law made by the district court. RSA 599:1.

Alternatively, a defendant convicted of a class A misdemeanor in district court can appeal directly to the NHSCt, asserting errors of law. RSA 502-A:12, II. A defendant who does so, however, waives his right to a jury trial appeal in superior court. State v. Thompson, 165 N.H. 779 (2013).

The defendant in Thompson took his appeal from circuit court to the NHSCt, lost, and then tried to appeal for a jury trial. The NHSCt held that even if Thompson had no subjective intention to waive his right to a jury trial, his decision to follow this procedure amounted to a "deemed waiver" of jury trial. *Id*. at 787. The Court reasoned that the plain language of RSA 502-A:12 gives criminal defendants the choice of an appeal to New Hampshire Supreme Court or for the *de novo* jury trial – but not both. *Id.* at 788.

 Copyright © NH Bar Association

c. Appeal by the Defendant or State from Criminal Conviction after Guilty Plea.

For a direct appeal from a criminal conviction obtained as a result of a guilty, nolo contendere, or Alford plea[1], the governing principles for appeals are very different in state court versus federal court.

In state court, direct appeals from a conviction obtained by guilty plea are rare, for several reasons. First, the Court held that the entry of a guilty plea ordinarily constitutes a waiver of a defendant's right to seek appellate review, except with respect to the legality of the ensuing sentence. State v. Parkhurst, 121 N.H. 821, 822-23 (1981). Thus, a guilty plea generally waives appellate challenges to the correctness of a pretrial ruling such as the denial of a motion to suppress. Second, most issues with respect to the reasonableness of the sentence are appealed to the Sentence Review Division, not the Supreme Court. *See* Section 3.37 below. Third, issues with respect to whether the plea colloquy satisfied basic due process requirements are generally litigated in post-conviction proceedings in state court, not on direct appeal.

In federal court, by contrast, appeals from a guilty plea and resulting conviction and sentence are very common (albeit rarely successful) and are expressly authorized by law. 18 U.S.C. § 3742(a). Unless a plea agreement includes a valid appeal waiver, the entry of a guilty plea in federal court does not preclude the defendant from appealing issues such as the denial of a

[1] In an Alford plea, the defendant asks the court to accept a quasi-guilty plea where trial is waived but the defendant does not admit guilt. North Carolina v. Alford, 400 U.S. 25 (1970); Richard v. MacAskill, 129 N.H. 405 (1987).

 Copyright © NH Bar Association

pretrial motion to suppress. *See, e.g.*, Garza v. Idaho, 586 U.S. 232, 238 (2019) ("no appeal waiver serves as an absolute bar to all appellate claims," because a "valid and enforceable appeal waiver … only precludes challenges that fall within its scope.") (Quotations omitted).

Further, the role of the United States Sentencing Guidelines in federal court sentencing presents many potential appeal issues regarding the procedural and substantive reasonableness of the sentence. *See, e.g.*, United States v. Rivera-Gerena, 112 F.4th 67, 70-73 (1st Cir. 2024) (summarizing the legal standards for procedural and substantive challenges to the reasonableness of a criminal sentence). And finally, a challenge to the validity of the plea colloquy can be made on direct appeal from USDC to the First Circuit. United States v. Ramos-Mejia, 721 F.3d 12, 14 (1st Cir. 2013).

d. Can the defendant appeal without a trial or a plea?

Occasionally, the defendant loses a pretrial motion, such as a motion to suppress, and because of the damaging nature of the evidence, a full-blown trial would be a fruitless exercise. In this case, the defendant can preserve his appellate rights with regard to the motion, and perfect his direct appeal, by submitting to a stipulated-facts bench trial, after which the trial court will find him guilty, sentence him, and allow him to file his appeal in due course. This is still a mandatory appeal. *See, e.g.*, State v. Minson, 173 N.H. 501 (2020); State v. Perez, 173 N.H. 251 (2020). As noted above, if the defendant simply pleads guilty to the charge, and then attempts to appeal an adverse pretrial ruling, he will fail.

 Copyright © NH Bar Association

3.32 Interlocutory Appeal by the Prosecution.

Appeals by the State of NH in criminal cases are governed by RSA 606:10; State v. Dukette, 145 N.H. 226 (2000). The statute allows the State to appeal from several specific categories of adverse pretrial rulings made by circuit and superior courts, on an interlocutory basis. That means the State, unlike the accused in most instances, can appeal without having to wait for a final judgment.

Thus, the prosecution will have the ability to bring an interlocutory appeal when the trial court dismisses a charge, grants a motion to suppress, prevents the State from conducting discovery to obtain needed evidence, or issues another order where there is a reasonable likelihood that the order will terminate or "cause serious impairment to" the State's case. RSA 606:10; N.H. Sup. Ct. R. 3 (making these mandatory appeals); *see, e.g.*, State v. Marquis, 175 N.H. 730 (2023) (prosecution appeals from trial court's order granting motion to suppress the accused's statements); State v. Hinkley, 174 N.H. 414 (2021) (same); State v. Mercon, 174 N.H. 261 (2021) (prosecution appeals trial court's ruling about what elements the State must prove in DUI prosecution).

State's appeals falling within the scope of RSA 606:10 are mandatory appeals. If RSA 606:10 affords the State the right to appeal, the Court automatically accepts the appeal. N.H. Sup. Ct. R. 3. The defense, by contrast, likely will have to wait until after the trial to pursue an appeal from the denial of such motions. Interlocutory appeals for the defense are discretionary. This asymmetry reflects the fact that the defendant can appeal from a guilty verdict

 Copyright © NH Bar Association

and sentencing, but the prosecution cannot appeal from an acquittal under the Double Jeopardy clause.

Before RSA 606:10, the State sought appellate review of trial court decisions by petitions for writs of certiorari or prohibition. *See, e.g.*, State v. Flynn, 123 N.H. 457, 462 (1983) (explaining that when "there is no other remedy, this court may exercise its supervisory powers and countermand, by means of a writ of prohibition, a trial court's order which is not supported by any legal authority"); Petition of N.H. Div. of State Police, 174 N.H. 176, 180 (2021) (explaining that "[c]ertorari is an extraordinary remedy that is not granted as a matter of right, but rather at the court's discretion" and "entails examining whether the court acted illegally with respect to jurisdiction, authority or observance of the law, or unsustainably exercised its direction or acted arbitrarily, unreasonably, or capriciously"). The State can still seek review by this method if the statute does not otherwise apply to the situation. *See, e.g.*, In re Petition of N.H. (State v. Fuchs), 174 N.H. 785 (2022); Petition of State of New Hampshire (State v. Milner), 159 N.H. 456 (2009); Petition of State of New Hampshire (State v. Langille), 139 N.H. 705 (1995). The Court recently held that these must be filed, not necessarily within a specific deadline like other appeals, but rather "within a reasonable period of time following the superior court's decision." In re Petition of the State, 175 N.H. 371, 378 (2022). These and other "extraordinary writs" are discussed in Chapter Two, Section 2.25 of these materials.

 Copyright © NH Bar Association

In federal court, the government can also bring certain interlocutory appeals as of right. *See, e.g.*, *United States v. Watson*, 386 F.3d 304, 308 (1st Cir. 2004) (appeal from order suppressing or excluding evidence); 18 U.S.C. § 3731 (allowing the government to appeal dismissals of indictments, grants of new trial, suppressions or exclusions of evidence, and releases from custody).

3.33 Interlocutory Appeal by Criminal Defendant.

Interlocutory appeals by defendant are discretionary appeals. Under N.H. Sup. Ct. R. 8 and 9, the trial court must approve the interlocutory appeal. In theory, there is always the option for a petition for writ of certiorari if the trial court refuses to authorize the appeal. *See, e.g.*, Petition of Miles, 175 N.H. 405 (2022).

Even when approved by the trial court, the Supreme Court does not often exercise its discretion to accept interlocutory appeals. N.H. Sup. Ct. R. 8(1), 9(1). However, an interlocutory appeal may be available under certain circumstances. *See* N.H. Sup. Ct. 8, 9. Examples generally described within Rule 8(1) include pretrial issues, resolution of which may "materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice."

RSA 491:17 authorizes the superior court, in its discretion, to transfer issues of law to the New Hampshire Supreme Court. RSA 502-A:17-a does the

 Copyright © NH Bar Association

same for circuit courts. The Court, however, exercised its supervisory powers to limit its acceptance of such appeals to cases presenting "exceptional circumstances." State v. Doyle, 117 N.H. 789, 791 (1977).

Since an interlocutory appeal is available to prevent substantial and irreparable injury to the criminal defendant, a trial court's denial of a claim of privilege or immunity would be an appropriate basis for interlocutory appeal. *See, e.g.*, State v. Burris, 170 N.H. 802 (2018) (defendant appeals from denial of claim that he was entitled to transactional immunity). Further, it is generally proper for a defendant in either state or federal court to take an interlocutory appeal from an adverse ruling on the issue of whether further prosecution is barred by double jeopardy. *See* State v. Verrill, 175 N.H. 428, 431 (2022) State v. King, 131 N.H. 173, 176 (1988); United States v. Candelario-Santana, 977 F.3d 146, 154 (1st Cir. 2020).

An interlocutory appeal may also be accepted for an issue of statutory or constitutional interpretation of general application. *See, e.g.*, State v. Dor, 165 N.H. 198 (2013) (interlocutory transfer without ruling of whether the statutory definition of a loaded firearm encompasses unloaded firearm with magazine nearby); State v. Fournier, 158 N.H. 214 (2009) (interlocutory transfer without ruling regarding whether certain statutory enactments violate Part I, Article 23 of the State Constitution); State v. Rollins-Ercolino, 149 N.H. 336 (2003) (interlocutory transfer without ruling on issue of whether vehicular assault statute has a mens rea requirement).

 Copyright © NH Bar Association

3.34 Appeals from Juvenile Delinquency Adjudications.

RSA Chapter 169-B governs the disposition of offenses committed by juveniles that would otherwise be felonies or misdemeanors if committed by an adult. RSA 169-B:1; RSA 169-B:2, IV. Unless the juvenile is certified as an adult, the district court has jurisdiction over the case and the proceedings are technically not considered criminal. RSA 169-B:2, III; RSA 169-B:3. *But see* RSA 169-B:4, III-VI (allowing court to extend jurisdiction over juvenile up to age 21). All direct appeals in juvenile cases are mandatory appeals. N.H. Sup. Ct. R. 3.

a. Statutory Appeal from Final Dispositional Order.

Following an adjudicatory hearing to determine whether the minor has committed the alleged offense, RSA 169-B:16, and a dispositional hearing, RSA 169-B:19, the district court issues a dispositional order, which must contain written findings supporting the disposition. RSA 169-B:19, V. The minor, and only the minor, may appeal the final dispositional order to the Supreme Court within 30 days of the final dispositional order. RSA 169-B:29. No other person has standing to appeal. *Id.*

Under a prior version of RSA 169-B:29 that authorized *de novo* appeals to the superior court, as opposed to the current statute that authorizes appeals from circuit court to the Supreme Court, the Court held that the juvenile could not seek *de novo* review of subsequent orders or modifications of the dispositional order. In re Cindy G., 124 N.H. 51, 59 (1983). It is likely that the Court would similarly interpret the current statute to provide no as-of-right

 Copyright © NH Bar Association

appeal of subsequent orders or modifications of the dispositional order to the Supreme Court. Where the juvenile otherwise has no statutory right to appeal, the Court may, in its discretion, treat the minor's appeal as a petition for writ of certiorari. *Id.* at 60. The appeal does not stay the dispositional order unless explicitly ordered by the district court. RSA 169-B:29.

b. Appeal from Certification Order.

Upon petition of either the State or the juvenile, a juvenile's felony case may be transferred by the district court, prior to the adjudicatory hearing, to the superior court, where the juvenile will stand trial as an adult. RSA 169-B:24. The court considers eight factors and must provide a written statement of facts and reasons for the transfer. RSA 169-B:24, I-II. The superior court must accept the district court's decision to waive its jurisdiction over the minor unless, after review of the record of the proceedings, it finds that the decision was unsupported by the evidence or erroneous as a matter of law. *See, e.g.*, Petition of the State of N.H., 175 N.H. 587, 589-90 (2023); In re Eduardo L., 136 N.H. 678, 685 (1993); State v. Holden, 119 N.H. 521, 522 (1979); State v. Smagula, 117 N.H. 663, 667 (1976).

The juvenile may appeal to the Supreme Court from the superior court's decision to accept certification. In re Erik M., 146 N.H. 508 (2001); State v. Riccio, 130 N.H. 376 (1988); In re Vernon E., 121 N.H. 836, 844 (1981). This would appear to be an interlocutory appeal and was so characterized in the Vernon E. opinion. Vernon E., 121 N.H. at 840. Because the Court "work[s] from the same record as the superior court," the Court affords "no deference to

 Copyright © NH Bar Association

that court's decision on acceptance." Erik M., 146 N.H. at 510 (quoting Eduardo L., 136 N.H. at 684). The scope of appellate review is limited to whether the district court "fairly considered" all the applicable factors of RSA 169-B:24, and whether its decision was supported by the evidence and not erroneous as a matter of law. Erik M., 146 N.H. at 510.

The State may appeal a superior court's decision to deny certification, by filing a Rule 11 petition for a writ of certiorari, over which the court has original jurisdiction. In re Petition of the State, 175 N.H. 371, 376 (2022).

c. Appeal from detention order when juvenile turns 18.

In In re A.G., No. 2024-0062, 2024 N.H. LEXIS 99 (June 14, 2024), a juvenile was detained at age 17 and the State later filed a petition to certify him as an adult and transfer the case to superior court. *Id.* at ¶ 3. The circuit court ordered the juvenile be transferred to the house of corrections upon his 18th birthday. *Id.* at ¶ 4. The Supreme Court reversed, holding that the circuit court is a court of limited jurisdiction and lacks the authority under RSA 169-B/C to detain a minor at the house of corrections. *Id.* at ¶ 4. The circuit could either continue to detain the juvenile at a minor detention facility pursuant to RSA 169-B:14 or wait until the juvenile had been adjudicated delinquent. *Id.* at ¶¶ 5-6.

d. Confidentiality.

Appeals in juvenile cases are confidential. N.H. Sup. Ct. R. 12(1)(b)(1). If disposition of the appeal requires the filing of any document that may reveal the identity of a juvenile, counsel must take appropriate steps to file the

 Copyright © NH Bar Association

document under seal. N.H. Sup. Ct. R. 12(2). When the Court dockets a juvenile case, it is captioned to mask the identity of the juvenile, *e.g.,* "In re Juvenile 2015-999." However, the briefs are confidential, so the parties may refer to the juvenile by name in their briefs.

3.35 Appeal from Parole Board or Probation Revocation Proceedings.

The defendant may appeal an order of the superior court revoking probation or a suspended sentence, *see* State v. Gibson, 146 N.H. 462 (2001), but the Court retains discretion to reject such appeals. N.H. Sup. Ct. R. 3. If the circuit court revokes probation or a suspended sentence, there is no *de novo* appeal, but the revocation is reviewable by petition for a writ of certiorari in the superior court. State v. Brackett, 122 N.H. 716, 718 (1982).

A defendant may secure review of an order of the Parole Board in either the superior court or the Supreme Court, by filing a petition for writ of habeas corpus. Bussiere v. Cunningham, 132 N.H. 747, 754-55 (1990); Martel v. Hancock, 115 N.H. 237, 237-38 (1975). The standard of review for challenging a denial of parole is daunting. The board's decision is "not subject to procedural due process protections," and will be upheld if "supported by a modicum of evidence." Bussiere, 132 N.H. at 754.

3.36 Appeals of Pretrial Bail Orders.

A district court order setting bail is appealable to the superior court. RSA 597:6-e; *see also State v. Luwal*, 175 N.H. 467 (2022) (superior court has authority to review circuit court's order revoking bail). A superior court order on pretrial bail, by contrast, is appealable to the Supreme Court. RSA 597:6-e;

 Copyright © NH Bar Association

see also State v. Furgal, 161 N.H. 206 (2010). The defendant typically initiates an expedited appeal by motion to avoid the requirement of filing a notice of appeal, acceptance, briefing and oral argument. A transcript of the bail hearing in superior court will be necessary to provide an adequate record for appellate review. The NHSCt, which controls the preparation of transcripts, can order the expedited preparation of a transcript of the entire bail hearing or of those portions necessary for review of the pretrial bail decision.

The Court's practice is to order a transcript on an expedited basis and require the parties to file memoranda addressing the propriety of the bail order. In accordance with RSA 597:6-e, III, the Court will decide the appeal promptly.

See Section 3.61 below for discussion of availability of bail pending appeal in criminal cases.

3.37 Appeal from Sentence Review Division.

The Sentence Review Division (SRD) is a three-judge panel that reviews the reasonableness of a criminal sentence imposed by the superior court, although the defendant can apply only if sentenced to the state prison. RSA 651:57-58. It can increase the sentence or decrease the sentence, but ususally the sentence remains the same. Neither the governing statutes, RSA 651:57-60, nor the Superior Court Sentence Review Division Rules, N.H. R. Crim. Proc. 29(k), set forth any procedure for, or right of, appeal from decision of the SRD. However, the defendant or the State may seek Supreme Court review of an SRD decision by a petition for writ of certiorari. N.H. Sup. Ct. R. 11; In re Guardarramos-Cepeda, 154 N.H. 7, 9 (2006); Petition of State of New

 Copyright © NH Bar Association

Hampshire (State v. Chad Evans), 150 N.H. 296, 297 (2003); Bell v. State Super. Ct. Rev. Div., 117 N.H. 474, 475 (1977).

The jurisdiction of the SRD is limited to reviewing the reasonableness of the defendant's sentence. Challenges to the constitutionality and legality of the sentence under the governing statutes must be made on direct appeal, not on appeal from the SRD. In re State, 150 N.H. 296 (2003); Petition of Turgeon, 140 N.H. 52, 53-54 (1995).

In Turgeon, the defendant argued that "the division acted illegally in upholding the trial court's sentence because the original sentence was unconstitutional and because the trial court erred as a matter of law in finding that the petitioner twice previously had been imprisoned." *Id.* at 54. The SRD upheld the sentence, and Turgeon appealed to the NHSCt. Unfortunately for Turgeon, the Court held that "[e]ven assuming that the petitioner is correct, he is not entitled to a writ of certiorari" because the division lacked jurisdiction to consider his claims in the first place. *Id.* The SRD's very narrow jurisdiction is one of the reasons why most defense lawyers ask the SRD to put their sentence review appeal on hold until the direct appeal to the Supreme Court reaches its conclusion.

In re State presented the flip side of this issue to the Court. The State, rather than the defendant, as is usually the case, appealed to the SRD seeking a harsher sentence. No one had warned the defendant at the sentencing hearing that the State could appeal the sentence. The SRD held that it could not consider the State's petition for sentence review because doing so would

 Copyright © NH Bar Association

violate due process where the defendant had not been placed on notice of the possibility of a State's appeal. In re State, 150 N.H. at 297. The Court vacated the SRD's order, holding that the SRD had acted beyond its limited jurisdiction by considering the constitutionality of the trial court's actions. *Id.* at 299.

3.38 Appeals from Denial of Extraordinary Writs.

a. Writs of Coram Nobis and Habeas Corpus.

A writ of coram nobis is, essentially, a motion for a new trial, or to vacate a guilty finding that resulted from a guilty plea. *See* State v. Jaskolka, 172 N.H. 468 (2019). While there is a statute allowing for a motion for new trial, RSA 526:1, it establishes a deadline of three years from the date of the judgment. RSA 526:4. Accordingly, a writ of coram nobis (if no longer in custody) or habeas corpus (if still in custody) would be the vehicle for a motion for new trial filed too late to meet that deadline. *Id.* at 473. A writ of habeas corpus is a more general claim that a person is being held in custody unlawfully. An appeal from the trial court's denial of one of these writs would be a discretionary appeal. These extraordinary writs, and postconviction challenges in the trial court generally, are beyond the scope of these materials.

The reader should be aware, however, that in the recent Jaskolka decision, the Court, overturning prior authority, held that circuit courts have no jurisdiction to entertain writs of coram nobis and habeas corpus. *Id.* at 473 (*abrogating* State v. Beaulieu, 115 N.H. 483, 484 (1975) and State v. Daigle, 114 N.H. 679 (1974)). Jaskolka left no doubt that these writs must be filed in the superior court, even if challenging a circuit court conviction. *Id.* The

 Copyright © NH Bar Association

Jaskolka Court had held out the possibility that a circuit court has jurisdiction to hear a motion for new trial brought under RSA 526:1. *Id.* at 472-73 (citing Favazza v. Braley, 160 N.H. 349, 353 (2010) (holding that a party cannot petition for a new trial in superior court pursuant to RSA 526:1 when the case originated in district court)). But then in 2022, the Court closed that door, reversing Favazza v. Braley sub silentio and holding that the circuit courts simply lack subject matter jurisdiction to hear a motion to vacate conviction filed beyond the 30-day time-period to appeal a conviction. State v. Graham, 175 N.H. 61, 63 (2022)

b. Certiorari Review.

Certiorari review is probably best described as the pathway for a potential appeal when there are no other options. "'Certiorari review is limited to whether the agency acted illegally with respect to jurisdiction, authority or observance of the law, whereby it arrived at a conclusion which could not legally or reasonably be made, or abused its discretion or acted arbitrarily, unreasonably, or capriciously.'" In re Guardarramos-Cepeda, 154 N.H. 7, 9 (2006) (quoting Petition of State of New Hampshire, 150 N.H. 296, 297 (2003)). The appeal deadline running from the denial of a petition for a writ of certiorari is not expressly set by any court rule, but the Court held that the rule set forth in N.H. Sup. Ct. R. 7 applies. Petition of the State of N.H. (State v. Fischer), 152 N.H. 205, 208 (2005). This would be a discretionary appeal.

 Copyright © NH Bar Association

3.39 Note on Advisory Opinions.

Unlike the United States Supreme Court, the New Hampshire Supreme Court also issues advisory opinions upon request by the Governor and Executive Council, or from either house of the legislature. N.H. N.H. Sup. Ct. R. 4. Generally, these concern the constitutionality of proposed legislation. *See, e.g.,* Opinion of the Justices (Breath Test Samples), 160 N.H. 180 (2010) (declaring unconstitutional a proposed statute to eliminate requirement that breath testing equipment capture a second sample for independent analysis); Opinion of the Justices, 128 N.H. 14 (1986) (upholding constitutionality of DWI checkpoints).

3.4 ROLE OF COUNSEL FOR THE DEFENDANT ON APPEAL.

3.41 Duty to Appeal.

An attorney who undertakes defense of a criminal matter in a NH trial court, or in United States District Court, is responsible for representing the defendant on appeal unless the appellate court relieves counsel of this responsibility. N.H. Sup. Ct. R. 32(1); 1st Circuit Rulebook, Local Rule 46.6(a). Thus, whether retained or appointed, an attorney who represents a defendant at trial has a duty to advise the defendant of his right to appeal from a conviction. If the defendant wants to appeal, even if defense counsel sees no issues to raise on appeal, counsel must prepare a notice of appeal. If counsel wishes to withdraw due to client's lack of available funds for further retained representation or believing it would be prudent to have a different lawyer on appeal or for any other reason, counsel must file a motion to withdraw in the

 Copyright © NH Bar Association

Supreme Court. (In the First Circuit, an indigent defendant can also check a box on a form to request different counsel on appeal.) Counsel must also file, if appropriate, application for court appointed counsel for an indigent defendant.

3.42 Decision Whether to Appeal.

The client, not the lawyer, decides whether to appeal to the New Hampshire Supreme Court or to the First Circuit. Later, a client may need to decide whether to continue to pursue an appeal or withdraw it. To help the client make a fully informed decision, counsel should discuss not only whether the trial court made an error, but also:

- Whether the issue the client wishes to appeal was properly preserved below.
- The standard of review on appeal, which will determine the level of deference afforded the trial court's decision.
- Whether the error was prejudicial, because the existence of error, standing alone, will not necessarily result in relief on appeal.
- Whether the court is likely to find any error harmless in view of the strength of the evidence.
- The financial cost of an appeal, and whether court-appointed counsel is available.
- Whether a successful appeal has the potential to lead to a better outcome of the proceeding as a whole.

With respect to that last factor, there are constitutional principles that prohibit prosecutorial or judicial vindictiveness after a successful appeal. State

 Copyright © NH Bar Association

v. Goding, 128 N.H. 267, 271-72 (1986). These principles substantially diminish. But do not eliminate, the possibility that a person could receive a harsher sentence after retrial following a successful appeal. So why not appeal in every case?

First, defendant must be counseled that for the vast majority of appeal issues, a victory on appeal is not the end of the proceedings, but merely the granting of a new trial. If the outcome of a new trial would likely be no different than the outcome of the underlying proceeding, the client may not want to bring an appeal. Jury trials are very stressful for client and her family, and expensive, carrying additional costs even for court-appointed clients (in state court where the court may order seeks reimbursement for counsel fees).

The most notable exceptions to this principle are a reversal of a conviction for lack of sufficient evidence, State v. Tabaldi, 165 N.H. 306 (2013) (reversal for lack of sufficient evidence bars retrial); State v. Horak, 159 N.H 576, 582 (2010), or the granting of mistrial absent manifest necessity. State v. Solomon, 157 N.H. 47, 51 (2008) (reversal under these circumstances bars retrial). In these situations, retrial after successful appeal would violate double jeopardy.

Second, if the person is serving a sentence in prison, some rehabilitative programs may not be available if the person has a pending appeal. This is an especially important consideration for people convicted of sex crimes who can have their minimum sentence reduced upon completion of a sex offender program.

 Copyright © NH Bar Association

Third, the delay occasioned by an appeal can cause a different sort of hardship, which should be discussed. If bail will be continued while on appeal (*see* Section 3.61, below), counsel should discuss with the client whether it would truly serve his or her interest to delay the commencement of sentence by a year or more . . . and then begin to serve the sentence ordered by the trial court, in the event of affirmance on appeal. A client may come to regret having brought an appeal, because in the intervening time period, he has obtained a new and better job, had a child, or otherwise experienced changed circumstances that make it an extreme hardship to serve a sentence long after the commission of the crime. Whereas, by withdrawing the appeal, the defendant can maintain some control over when he serves his sentence.

3.43 Right to court-appointed counsel on appeal.

An indigent criminal defendant, facing the possibility of incarceration, has a right to court-appointed counsel on direct appeal from a trial court to the Supreme Court, and on direct appeal from USDC to the First Circuit. *See* State v. Underwood, 110 N.H. 413, 414-15 (1970); N.H. Sup. Ct. R. 32; Douglas v. California, 372 U.S. 353 (1963); Anders v. California, 386 U.S 738, 744 (1967). Defendants charged with Class B misdemeanors or violations do not have a due process right to counsel. State v. Westover, 140 N.H. 375 (1995).

The indigent defendant does not have the right to the appointment of an attorney of his choice. State v. Mikolyski, 121 N.H. 116, 117 (1981). In the first instance, the Court will appoint the Appellate Defender. If the Appellate Defender has a conflict of interest, the court will appoint substitute counsel.

 Copyright © NH Bar Association

State v. Veale, 154 N.H. 730, 731 (2007) (abrogated on other grounds by State v. Thompson, 161 N.H. 507, 524 (2011)).

The notice of appeal in indigent cases must be accompanied by a petition for assignment of counsel, either initial or continuing, together with a current financial affidavit. The NOA must also include a motion to waive the filing fee, based on defendant's indigency and supported by the affidavit. If these forms do not accompany the filing, or are not in proper form, the Court will decline the defendant's request for appointed counsel, or in the case of the filing fee waiver, decline the appeal altogether. N.H. Sup. Ct. R. 32.

Here is the contact information for the Appellate Defender:

> Christopher Johnson, Esq.
> Chief Appellate Defender
> New Hampshire Appellate Defender Program
> 10 Ferry Street, Suite 202
> Concord, NH 03301
> 603-224-1236

On appeal from an unsuccessful collateral attack on a criminal conviction, the indigent defendant has no right under the federal or state constitution to court-appointed counsel. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); State v. Lopez, 156 N.H. 193 (2007) (following Finley under due process clause of Part I, Article 15 of state constitution). However, in state court, the defendant may file a motion for appointment of counsel, and "in cases where complicating factors exist, the trial court may in its discretion appoint counsel." Lopez, 156 N.H. at 201. "Complicating factors might include: the defendant's capability to speak for himself, the character of the proceeding, the complexity of the issues, and other circumstances which show that the

 Copyright © NH Bar Association

defendant would be treated unfairly if no counsel is appointed." *Id.* Federal judges also have the discretion to appoint counsel in post-conviction proceedings.

It is critical to explain to the defendant that a court-appointed lawyer on appeal in state court is not necessarily a free lawyer. RSA 604-A:9, I requires that a criminal defendant reimburse the state for the services of a court-appointed lawyer, upon a finding that the defendant has the ability to pay. An appeal is one of the most costly cases. The indigent defendant will be ordered to pay $2,000 to the Judicial Council for the cost of court-appointed counsel, plus the cost of the transcripts (this is the maximum fee court appointed counsel may bill under N.H. Sup. Ct. R. 47, unless a motion citing "exceptional circumstances" requests additional compensation). Note: The statute was amended so that fees can be assessed only against defendants and juveniles who were found guilty or delinquent, abrogating State v. Haas, 155 N.H. 612 (2007).

3.44 Who Decides Which Issues to Appeal?

Most attorneys recognize that it is tactically unwise to brief and argue every conceivable point on appeal. Often, a client will ask her appellate attorney to brief an issue that the attorney feels is either frivolous or, while non-frivolous, would weaken the overall persuasiveness of the brief.

The United States Supreme Court has held that while an indigent defendant has a constitutional right to counsel for at least one appeal, he has no right to compel his court-appointed attorney to present all the arguments

 Copyright © NH Bar Association

that could be made on his behalf. Jones v. Barnes, 463 U.S. 745 (1983). (The principle also holds for retained counsel, but such disagreements are probably less likely to occur in a retained counsel relationship.) If appellate counsel, as a matter of professional judgment, believes pressing certain issues would be unwise, counsel can decline client's request to brief those issues. When a defendant insists on presenting issues that counsel has chosen to exclude, the Supreme Court may grant the defendant's motion for leave to file a supplemental brief, pro se, in which he may argue those issues counsel did not brief. State v. Belton, 150 N.H. 741, 750 (2004). The First Circuit allows for a similar procedure. United States v. Duclos, 382 F.3d 62, 64 n.5 (1st Cir. 2004); *see* United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996) (the court considered issues raised in a supplemental brief submitted *pro se*); 1st Cir. Rulebook, Local Rule 46.6(c)(4).

Appellate counsel in state court may wish to send such a client a letter with the pertinent language from the Belton decision, as follows:

> We hold that, in future cases, when a criminal defendant is represented by counsel on appeal, the defendant may file a pro se motion with this court requesting permission to file a pro se supplemental brief. The motion must set forth the issues the defendant wishes to raise on appeal that are not being raised by appellate counsel and explain why the court should allow the defendant to brief those issues. We will then review the defendant's motion and decide whether the defendant may file a pro se brief.

150 N.H. at 750.

The First Circuit Rulebook addresses only the specific situation where appellate counsel files an Anders brief (see next section). The rule requires appellate counsel to:

 Copyright © NH Bar Association

> Serve a copy of the brief and motion on the defendant and advise the defendant that the defendant has thirty (30) days from the date of service in which to file a brief in support of reversal or modification of the judgment. The motion must be accompanied by proof of service on the defendant and certification that counsel has advised the defendant of the defendant's right to file a separate brief.

1st Circuit Rulebook, Local Rule 46.6(c)(4).

3.45 Non-Meritorious Appeals.

Whether in state or federal court, if an attorney determines that a defendant's potential appeal lacks merit, counsel should seek to persuade the defendant not to bring the appeal, or to abandon the appeal already filed. If the defendant chooses to pursue the appeal, however, counsel must file a notice of appeal.

From that point forward, the rules in state and federal court diverge. In the New Hampshire Supreme Court, counsel must file a brief, even if the issue is frivolous, unless the defendant agrees to withdraw the appeal. State v. Cigic, 138 N.H. 313, 318 (1994). (*See* Section 3.93, below, for how to withdraw an appeal). The Court recognized that this procedure may require counsel to assert a frivolous issue. Accordingly, the Court created an exception to New Hampshire Rule of Professional Conduct 3.1 to accommodate the procedure. *Id.*

In federal courts, including the First Circuit, the rules are very different. The first point of reference is the same: Appellate counsel must attempt to persuade client to withdraw the appeal. However, if this effort is unsuccessful, appellate counsel must file an Anders brief and otherwise comply with the applicable rules of appellate procedure. Anders v. California, 386 U.S. 738

 Copyright © NH Bar Association

(1967); 1st Cir. Local Rule 46.6(c)(4). An Anders brief summarizes the entire record and, in a sense, proves that there were no errors and that the client's conviction should be affirmed. It is an uncomfortable writing project for an advocate, to put it mildly.

3.46 Withdrawal of Counsel.

In state court, a motion to withdraw as counsel on appeal in a criminal case must state adequate grounds and must be accompanied by appropriate documents indicating that the defendant's interests will not be prejudiced. The motion must meet the following requirements:

1. A showing that new counsel has been appointed or retained to represent the defendant; or
2. The defendant's completed petition for appointment of counsel or a showing that a petition has been filed; or
3. An affidavit or signed statement from the defendant expressly stating that he does not wish to be represented by counsel but chooses to appear pro se, and that he has been advised that he may retain new counsel or apply for appointment of counsel.

N.H. Sup. Ct. R. 32(2). Regarding (c), note that the defendant does not have the right to represent himself on appeal. The Court may insist that he have counsel even if he wishes to forego counsel. Martinez v. Court of Appeal, 528 U.S. 152, 120 S. Ct. 684 (2000); State v. Thomas, 150 N.H. 327, 331-32 (2003) (adopting Martinez rule under State Constitution). Counsel must continue to participate

 Copyright © NH Bar Association

until and unless the motion to withdraw is approved by the Supreme Court. N.H. Sup. Ct. R. 32(3).

In federal court, similar rules apply during the pendency of the appeal. 1st Circuit Rulebook, Local Rule 46.5. A special case arises in federal court for court appointed counsel if the conviction is affirmed, as discussed in the next section.

3.5 PRESERVATION OF ISSUES FOR APPELLATE REVIEW.

Preservation of issues for appellate review, in the trial court and on appeal, is covered generally in Chapter Two, Sections 2.43 and 2.6–2.62 of these materials. The principles discussed there apply to criminal cases as well as civil cases.

In brief: The specific objection requirement discussed in Section 2.43 extends to all proceedings in a criminal case, including sentencing. State v. LeCouffe, 152 N.H. 148, 151 (2005); State v. Sullivan, 142 N.H. 399, 403 (1998). While exceptions are no longer required to secure appellate review, the appealing party must have made a specific objection at the trial level to the court's ruling. N.H. R. Ev. 103; State v. Spaulding, 147 N.H. 583, 590 (2002). Further, the appealing party must have made a record, establishing the facts that support its position. State v. Thiel, 160 N.H. 462, 464 (2010) ("Where a case turns upon a factual dispute and [the Court] lack[s] a record to review, [the Court] must assume that the evidence was sufficient to support the result reached by the trial court.") (Quotations omitted). Generally, "the rules of

 Copyright © NH Bar Association

preservation are not relaxed for a pro se defendant." State v. Porter, 144 N.H. 96, 100 (1999).

Appellant must not only take care to preserve the issue in the trial court, but also must ensure that the appeal documents preserve the issue. In order to properly place an issue before the Court, the issue must be in the notice of appeal or added by motion. Counsel must specifically address the issue in the brief, including an explanation of how the issue was preserved below. N.H. Sup. Ct. R. 16(3)(b); Holt v. Keer, 167 N.H. 232, 238 (2015); State v. Blackmer, 149 N.H. 47, 48-49 (2003); State v. Martin, 145 N.H. 313, 315 (2000). In addressing the issue in a brief, appellant "'shall make specific reference to the volume and page of the transcript where the issue [on appeal] was raised and where an objection was made, or to the pleading which raised the issue.'" Keer, 167 N.H. at 238 (quoting N.H. Sup. Ct. R. 16(3)(b)).

This rule is not to be taken lightly: "Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part." Keer, 167 N.H. at 238. In Keer, appellee pointed out in his brief that appellant had failed to comply with this rule and moved to strike appellant's brief. Appellant then filed a Reply brief with a supplemental appendix, attempting to bring himself into compliance with Rule 16(3)(b). Noting that appellee "did not object to the supplemental filing," and "[m]ore importantly," the issue was fully litigated before the trial court, the Court held: "To strike the Keers' brief under these circumstances would elevate form over substance." Keer, 167 N.H. at 239.

 Copyright © NH Bar Association

If trial counsel preserved a meritorious issue but failed to include it in the notice of appeal – or if appellate counsel discovers an issue for plain error review that was not included in the notice of appeal - appellate counsel may move to add the issue to the appeal. Sup. Ct. R. 16(3)(b). A Motion to Add Issue is due 20 days before the deadline for filing the brief. *Id.* This deadline can be problematic, as the process of record review and brief preparation often reveals new issues, or new ways to frame an issue, fairly late in the game. However, the Attorney General's Office has been willing in the past to assent to requests to file a motion to add issue after that deadline, and the Court has generally granted such requests, as long as the motion is filed prior to the filing of the brief.

Unfortunately, appealing parties continue to make the fundamental error of briefing issues that were not listed in the Notice of Appeal or later added by motion. This mistake will cause the court to disregard the issue, regardless of its merit. *See, e.g.*, Dupont v. N.H. Real Estate Comm'n, 157 N.H. 658, 662 (2008).

3.51 Specific preservation issues that arise in criminal cases.

a. Unrecorded Bench Conferences.

First, the typically collegial style of practice in criminal cases in both State and Federal court can often include unrecorded bench conferences. Counsel must be careful to repeat or summarize on the record any unrecorded discussions that may become important to an appeal issue. For example, in State v. Winward, 161 N.H. 533, 542 (2011), appellant attempted to raise an

 Copyright © NH Bar Association

issue relating to a question asked by the jury during deliberations. The defendant asserted in his brief that "[i]n chambers and on the record, defense counsel argued that the clear answer to the jury's question was 'no.'" *Id.* However, the Court held that the issue was unpreserved, because defendant did "not provide a citation to the record in support of this claim and the transcript does not demonstrate that the defendant ever proposed this answer to the jury question." *Id.* It appears likely that defense counsel, if his recollection was correct, was recalling an unrecorded chambers conference or other unrecorded proceeding

b. Motions to Reconsider Sometimes Required to Preserve Appellate Issue.

In certain contexts, a post-ruling motion to reconsider may be required to preserve an issue for appellate review. Dukette v. Brazas, 166 N.H. 252, 255 (2014). This principle holds that "issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration." *Id.* For example, the parties argue the admissibility of evidence on several grounds, but the trial court's order relies on a different ground not raised by either of the parties. In this instance, the losing party must file a motion to reconsider and argue why the trial court's analysis is wrong.

c. Jury instructions.

"To preserve a jury instruction issue for our review, counsel must do more than merely submit proposed instructions to the trial court...." State v. Richard, 160 N.H. 780, 785 (2010) (quotations omitted). Rather, "counsel must

 Copyright © NH Bar Association

actually make a specific objection to the court's jury instructions." *Id.* (quotations omitted); State v. Ainsworth, 151 N.H. 691, 693 (2005) (defense counsel who filed notice of self-defense, but failed to object to jury instruction that contained no reference to self-defense, waived the issue on appeal). Counsel must specifically state for the record each instruction to which he objects or bring to the court's attention the requested instruction not given, and articulate specific grounds for the objection. State v. Washburn, 170 N.H. 688, 696-97 (2018).

In other words, *a timely objection is not enough* to preserve an objection to a jury instruction. It certainly wasn't enough for Washburn. The Washburn Court reviewed a jury instruction claim only for plain error, based on the following reasoning: "Our review of the trial transcript reveals that although defense counsel objected to the State's request for a lesser-included offense instruction on the charge of possession with intent to sell, he did not argue that the instruction would violate either of the defendant's constitutional rights that he cites in his brief. Accordingly, these challenges have not been preserved for appellate review." *Id.* at 697.

d. Evidentiary issues.

A general objection will not preserve an evidentiary issue for appellate review. State v. Brinkman, 136 N.H. 716, 718 (1992) (defendant made specific objection to officer's testimony during first trial that ended in mistrial, then made general objection to similar testimony during retrial before same judge; Court held that issue was not preserved for appeal).

 Copyright © NH Bar Association

e. Motions in Limine.

Counsel should consider filing a pretrial motion in limine raising evidentiary issues likely to arise during trial. A detailed motion in limine raising a specific evidentiary issue and producing a definitive ruling by the trial court should be sufficient to preserve the issue for appeal. State v. Bennett, 144 N.H. 13, 17 (1999). "A ruling on a motion in limine is definitive when the court is sufficiently alerted to the issue, and its written order demonstrates that it considered the issue and ruled upon it." Laramie v. Stone, 160 N.H. 419, 431 (2010).

A motion in limine must cite the applicable rules of evidence and set forth the proper evidentiary analysis. State v. Bouchard, 138 N.H. 581, 584 (1994). If the trial court rules on the motion in limine prior to trial, the Court on appeal "considers only the offers of proof presented at the pretrial hearing." State v. Gordon, 161 N.H. 410, 414 (2011). The Court does so "to avoid the pitfall of justifying the court's pretrial ruling upon the defendant's response at trial to the evidence." *Id.* (quotations omitted).

Although a definitive ruling on a motion in limine preserves the issues ruled upon for appeal, what happens if a trial witness provides testimony that should not be admitted based on the trial court's ruling on the motion in limine? The answer, not surprisingly, is that the contemporaneous objection rule applies – the litigant must make a specific and timely objection to the testimony, explaining how it violates the ruling on the motion in limine. State v. Sulloway, 166 N.H. 155, 160 (2014).

 Copyright © NH Bar Association

In Sulloway, the defendant obtained a definitive pretrial ruling that limited the scope of a physician's testimony. When the physician provided testimony that went beyond what the trial court said would be allowed, however, the defendant failed to make a timely objection. The Court held that the defendant did not preserve the appeal issue, reasoning: "Here, the defendant's motion in limine preserved his objection with respect to the issues ruled upon therein, but the doctor's alleged deviation from that ruling raised a new issue not brought to the trial court's attention." *Id.* at 160.

It should be noted that strategic considerations sometimes counsel *against* filing a motion in limine. This is because a motion in limine flags the importance of a particular factual issue, provides both parties additional time to prepare their theories and arguments for admissibility or non-admissibility, and often causes a party to realize that, in order to prove or disprove the facts in dispute, an additional witness is needed.

f. Preservation of evidentiary Issues Not Raised by Pretrial Motion.

To preserve for appellate review an evidentiary issue that arises during trial, counsel must object to the evidence contemporaneously, cite all specific rules of evidence and constitutional principles implicated, and articulate why the proffered evidence violates the rules. *See, e.g.*, State v. Pepin, 156 N.H. 269, 275 (2007) (Rule 403 issue not preserved because although defendant filed motion seeking to exclude evidence, defendant did not cite that rule); State v. Gonzalez, 150 N.H. 74, 75-76 (2003) (anticipatory objection, made orally during trial before prosecutor asked questions on the disputed topic, preserved the

 Copyright © NH Bar Association

issue); State v. VanDerHayden, 136 N.H. 277, 282 (1992) (failure to specifically raise Rules of Evidence 405 and 608 waives issues on appeal); State v. Dube, 130 N.H. 770, 772 (1988) (hearsay objection does not preserve relevancy issue).

If the trial court's ruling excluded evidence, the appealing party must make an offer of proof detailing the nature of the excluded evidence, and the theory supporting its admissibility. N.H. R. Ev. 103(b)(2). If explaining the objection in open court would reveal prejudicial information, counsel should ask to argue at the bench, and on the record. N.H. R. Crim. Proc. 24(b)(5); State v. Paulsen, 143 N.H. 447, 453-454 (1999). Most lawyers will need to prepare their offer of proof meticulously, given the following:

> To satisfy this requirement, the proponent must do more than merely describe the content of proposed evidence; instead, the offer of proof must establish both the relevancy and competency of the evidence at issue. ... [m]erely telling the court the content of proposed testimony is not an offer of proof. In order to qualify as an adequate offer of proof, the proponent must, first, describe the evidence and what it tends to show, and, second, identify the grounds for admitting the evidence. The party seeking admission of the evidence also has a burden to create a sufficient record for our review on appeal, i.e., a record that sets forth the specific basis for admissibility of the proffered evidence. ... Mere conclusory assertions or speculation are not sufficient to meet that burden.

State v. Hayward, 166 N.H. 575, 586 (2014) (Lynn, J., dissenting) (citations and quotations omitted).

g. Opening and Closing Argument.

Trial counsel must object to opponent's closing argument when the objectionable statement is made, or immediately after conclusion of opponent's argument. State v. Hearns, 151 N.H. 226, 232 (2004) (objections must be made "at the time the alleged improper statement is made, or within a reasonable

 Copyright © NH Bar Association

time thereafter"; Court holds that "objections raised immediately following the opponent's closing argument are made within a 'reasonable time thereafter.'"). Counsel must specifically object to each improper comment. State v. Ross, 141 N.H. 397 (1996).

h. Constitutional issues.

Counsel must specifically invoke the pertinent provisions of the State and Federal Constitutions in the trial court, and specifically invoke the pertinent provisions in the appellate brief. State v. Dellorfano, 128 N.H. 628, 632 (1986); State v. Murray, 134 N.H. 613, 615 (1991) (defendant preserved state constitutional claim but failed to preserve federal constitutional claim because not raised at trial); *but see* State v. Tarasuik, 160 N.H. 323, 326 (2010) (constitutional issue preserved although counsel did not cite the lead case on point in his motion to suppress); State v. Demeritt, 148 N.H. 435, 439 (2002) (defendant preserved due process issue despite not saying the words "due process"). Counsel must make a detailed argument, not just an assertion. State v. Ruiz, 170 N.H. 553, 560 (2018) ("merely assert[ing], without authority or further argument, that '[t]he court erred in finding that [his] Miranda waiver was voluntary'" did not preserve constitutional issue for appellate review under either Constitution).

There are additional pitfalls for those seeking to preserve an issue under the State Constitution. Even appellate briefs that "referred extensively to state case law" have been held to fail to preserve a state constitutional claim where appellant failed to identify the specific provision of the State Constitution relied

 Copyright © NH Bar Association

upon. *See* State v. Oakes, 161 N.H. 270, 285 (2010) (citing State v. Reynolds, 124 N.H. 428, 432 (1984)). Further, citing to the correct provision of the State Constitution, but arguing the wrong legal standard, may also fail to preserve the issue under the State Constitution.

Thus, in State v. Maga, 166 N.H. 279, 282-83 (2014), the court held that Appellant had failed to preserve an issue under the State Constitution, even though Appellant cited to the applicable provision of the State Constitution. The decision reflects, as much as anything, the lack of preparation on behalf of defense counsel, who purported to argue under the State Constitution, but argued the less protective standard applied under the federal constitution. The Court analyzed only the federal issue.

To make a credible claim under the State Constitution, where federal precedent goes against defendant's position, appellant should articulate how the constitutional provision applies to the case and explain why the State Constitution provides greater protection than does the Federal Constitution. State v. Beauchesne, 151 N.H. 803, 807-808 (2005); Babiarz v. Town of Grafton, 155 N.H. 757, 761 (2007) (even where litigant cited specific provisions of state constitution, Court declines to address issue because argument is "undeveloped," and "off-hand invocations of constitutional rights supported by neither argument nor authority warrant no extended consideration").

In Beauchesne, the Court held that a litigant who makes a specific argument under the State Constitution preserves the issue for appeal even if the litigant fails to cite to the Supreme Court decision that goes against his

 Copyright © NH Bar Association

position. *Id. a*t 808. The better practice, of course, is to discuss the adverse precedent and explain why the court's reasoning is not persuasive under the State Constitution.

When appellant fails to preserve a constitutional issue and is forced to rely instead upon a rule of evidence, the result will be a much more forgiving standard of review, making affirmance more likely. *See, e.g.*, State v. Lavalee, 145 N.H. 424, 426 (2000) (confrontation violation not preserved, so case decided solely on relevancy grounds, governed by unsustainable exercise of discretion standard of review).

i. Juror issues.

All issues relating to the selection or empaneling of the jury, to questions asked by the jury during deliberations, or to allegations of improper influence on the jury must be specifically raised in the trial court. *See, e.g.*, State v. Colbert, 139 N.H. 367, 370 (1995) (claim regarding juror substitution process not preserved by objection below); State v. Ryan, 135 N.H. 587, 588 (1992) (failure to object to non-random selection of jury foreperson); State v. Cere, 125 N.H. 421, 423 (1984). There is at least one exception: the contemporaneous objection rule does not apply to a violation of the right to a 12-person jury, because the "defendant relinquishes the right to a jury of twelve only by express, personal waiver." Colbert, 139 N.H. at 370.

j. Motions to suppress evidence.

A motion to suppress must state with specificity each ground justifying suppression. State v. Hale, 136 N.H. 42, 46 (1992); N.H. R. Crim. Proc.

 Copyright © NH Bar Association

15(2)(C). However, the Court acknowledged in Hale that "there may be cases where the facts relied upon are so peculiarly within the control or knowledge of the government that the defendant is hard pressed to know of their existence and that the resolution of these matters is left in the first instance to the discretion of the trier of fact at the motion hearing." 136 N.H. at 44.

Counsel must then develop an adequate factual record at the motion hearing. State v. Roberts, 131 N.H. 512, 516-17 (1989). If trial testimony contradicts or supplements the suppression hearing testimony, counsel must move for reconsideration in order to incorporate those facts into the trial court's ruling and make those facts part of the record on appeal. State v. Vandebogart, 139 N.H. 145, 165 (1994).

Note that the preservation doctrine applies to the State, *i.e.,* the State cannot rely on a suppression theory or exception to the warrant requirement on appeal that it did not raise in the trial court. State v. Szczerbiak, 148 N.H. 352, 356 (2002) (Court refuses to consider justification for detention of defendant that State argued for first time on appeal); State v. Sterndale, 139 N.H. 445, 448 (1995) (Court refuses to consider State's argument that search was permissible under exigent circumstances exception to the warrant requirement, because State did not make that argument to the trial court).

This doctrine, however, can run into conflict with another preservation doctrine: The trial court's ruling will be affirmed if it reached the right conclusion, even if the ground actually relied upon by the trial court was legally incorrect. *See* Section 3.51(h), *supra*.

 Copyright © NH Bar Association

If the trial court denies a motion to suppress evidence because it was not filed within deadlines set by a court rule, the Court may reject the issue on that basis. State v. Knight, 161 N.H. 338, 341 (2011).

The standard of review is deferential. As more and more encounters with law enforcement are recorded, it may seem that the New Hampshire Supreme Court could replace its view of that evidence with the findings of the trial court. In State v. Marquis, 175 N.H. 730 (2023), the State argued, unsuccessfully, that recorded interview undercut the trial court's finding of custody. The Court did not directly address the contention, noting that the standard was objective and the defendant's behavior did not change the result. *Id.* at 742.

k. Impeachment by Prior Criminal Conviction.

There are some quirky preservation rules concerning the impeachment of a criminal defendant by prior conviction. If the prosecution obtains a pretrial ruling allowing it to impeach the defendant by prior conviction, the defendant may preemptively introduce the conviction during direct examination without waiving the underlying issue of the admissibility of the prior conviction. Zola v. Kelly, 149 N.H. 648, 650-61 (2003) (declining to follow Ohler v. United States, 529 U.S. 753 (2000)). However, if the defendant declines to testify altogether in the wake of the ruling allowing impeachment by prior conviction, he or she has forfeited the right to challenge the ruling on appeal. State v. Atkins, 145 N.H. 256, 257–58 (2000). Finally, in 2009, the Court overruled one of the few exceptions to its preservation rule, relating to the trial court's duty to provide a limiting instruction when the defendant is impeached by a prior conviction.

 Copyright © NH Bar Association

State v. Hebert, 158 N.H. 306, 313-14 (2009) (overruling State v. Skidmore, 138 N.H. 201 (1993)).

l. Sufficiency of the evidence.

A motion to dismiss based on insufficient evidence is not preserved unless trial counsel moved to dismiss citing lack of sufficient evidence, and obtained a ruling, on the record. State v. Gordon, 161 N.H. 410, 417 (2011). Merely stating that the evidence failed to prove an element, without using the magic words "sufficiency of the evidence," may not be enough. State v. Dilboy, 160 N.H. 135, 163-64 (2010) (defense counsel argued that evidence that defendant was suffering from withdrawal was not enough to show he was under the influence of a controlled drug; Court held that this argument failed to preserve a sufficiency of the evidence claim); State v. Zwicker, 151 N.H. 179, 192 (2004) (motion for directed verdict did not preserve issue for appellate review because defendant did not "inform the trial court of his specific reason for seeking the motion for a directed verdict").

In Gordon, the Court held that simply uttering the magic words – "sufficiency of the evidence" – is enough to preserve the issue. 161 N.H. at 418. However, two years later, in State v. Gagne, 165 N.H. 363, 370 (2013), the Court stated that a "motion to dismiss must state the specific ground upon which it is based" in order to preserve the issue for appeal, and implied in the ensuing analysis that the litigant must explain which element of the offense was not proven beyond a reasonable doubt and why. *Id.* at 370.

 Copyright © NH Bar Association

Further, a generic motion to dismiss for lack of sufficient evidence will not preserve claims that the trial court has incorrectly interpreted the meaning and scope of the statutory elements. State v. Dodds, 159 N.H. 239, 243-44 (2009). Finally, a motion to dismiss based on insufficient evidence does not preserve the claim, which should be made in a post-trial motion, that the verdict should be set aside as against the weight of the evidence. State v. Hill, 163 N.H. 394, 396 (2012).

The lesson of these precedents is to make sure that counsel moves to dismiss "for lack of sufficient evidence," clarifies that the motion goes to all elements of the offense, but then also makes any specific factual or statutory arguments that may be available. If there is a significant factual dispute underlying the issue, then counsel may also want to file a timely post-trial motion to set aside the verdict as against the weight of the evidence. And finally, for the litigant to fails to do any of these things: The Court has held that a conviction based upon insufficient evidence constitutes plain error. State v. Guay, 164 N.H. 696, 705 (2013); *see* Section 3.53 below.

m. Prosecutor's Failure to Allege All Elements in Opening Statement.

As to opening statement, if the defense seeks dismissal based on the failure of the opening statement to allege all elements of the offense, this motion must be made "immediately after the State's opening, not after the defendant's opening." State v. Guay, 130 N.H. 413, 419 (1988). Further, the defendant must "inform the Court as to which element of the offense the State had omitted." *Id.* at 420.

 Copyright © NH Bar Association

3.52 Exceptions to the Preservation Requirements.

a. Lack of Subject Matter Jurisdiction.

These issues can be raised even if not preserved. "Subject matter jurisdiction may be raised at any time in the proceedings, including on appeal, by the parties, or by the court *sua sponte*." State v. Graham, No. 2020-0506, 2022 N.H. Lexis 31, 2022 WL 905928 (March 29, 2022); State v. Demesmin, 159 N.H. 595, 597 (2010).

b. Trial court not held to the preservation rule.

For situations where the trial court reached the right decision but didn't explain which factual findings it made to arrive at the decision, the Court "assumes that trial court made all findings necessary to support its decision." State v. Michelson, 160 N.H. 270, 275 (2010). But what if the trial court did explain itself, and its reasoning was wrong? For these situations, the Court stated the general rule as follows: "We will not reverse a trial court decision . . . when it reaches the correct result and valid alternative grounds exist to reach that result." State v. Cook, 158 N.H. 708, 713 (2009) (quotations omitted); State v. Coppola, 130 N.H. 148, 153 (1987) (upholding trial court's admission of hearsay testimony based on the excited utterance exception, despite fact that trial court relied on a different, non-existent, exception to the hearsay rule).

However, this Court limited this principle to situations where the valid alternative grounds for decision are non-discretionary, such that the trial court would have had no choice but to rule on the correct ground. Thus, in State v.

 Copyright © NH Bar Association

Hayward,166 N.H. 575 (2014), in holding that the trial court erred in excluding evidence relevant to the defendant's duress defense, the Court rejected the State's argument that the trial court could have exercised discretion to exclude the evidence for a different reason. "When, as in this case, a discretionary decision is at issue and the trial court has not exercised that discretion, we may sustain the trial court's ruling on a ground upon which it did not rely only if there is only one way the trial court could have ruled as a matter of law." *Id.* at 583.

c. Supervisory Jurisdiction – Is there a Preservation Requirement?

The Court has occasionally exercised its "supervisory powers" to set forth new rules that are not necessary for the resolution of the appeal before it but will serve to "ensure the fair administration of justice." *See, e.g.*, In re Search Warrant for Medical Records of C.T., 160 N.H. 214, 226 (2010); State v. Barnett, 147 N.H. 334, 337 (2001). In one of these cases, it appears that appellant may not have preserved the claim in the trial court at all. State v. Locke, 166 N.H. 344 (2014). But considering that trial courts cannot make law, it makes sense that the Court may be more willing to waive preservation rules if the issues in a case lend themselves to the exercise of supervisory powers that will provide guidance to all courts and improve the administration of justice.

3.53 The Plain Error Rule.

In 2004, the Court relaxed its strict preservation requirements by instituting a plain error rule. N.H. Sup. Ct. Rule 16-A. This rule allows the

 Copyright © NH Bar Association

Court to consider issues not raised in the trial court or not raised in the NOA. *Id*. "The rule should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." State v. MacInnes, 151 N.H. 732, 736–37 (2005). The State, as well as the accused, may rely on the plain error rule. State v. Panarello, 157 N.H. 204 (2008).

a. Plain Error Rule – Legal Standard.

The Court modeled the rule after the federal plain error rule, as follows:

> For [the Court] to find plain error: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights.... If all three of these conditions are met, we may then exercise our discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. This rule is used sparingly, however, and is limited to those circumstances in which a miscarriage of justice would otherwise result.

State v. Mueller, 166 N.H. 65, 68 (2014).

Federal courts, including the First Circuit, apply the same four-prong rule. *See, e.g.*, U.S. v. Vega Molina, 407 F.3d 511, 521 (1st Cir. 2005). Thus, the Court looks to federal plain error analysis in applying the rule. State v. Russell, 159 N.H. 475, 489-90 (2009).

The first prong speaks for itself – all appellate review is a search for error, in this case, unpreserved error. Further, even if appellant's counsel below had affirmatively stated that that the litigant did not object to the ruling now claimed to be plain error, the doctrine may apply. The Court has twice held that "the invited error doctrine does not preclude a court from undertaking plain error review." State v. Cassavaugh, 161 N.H. 90, 99 (2010); State v. Richard, 160 N.H. 780, 788 (2010). However, where a plain error claim involves

 Copyright © NH Bar Association

the admission of evidence, the Court will consider whether the litigant's attorney had strategic reasons for not objecting to the testimony. State v. Noucas, 165 N.H. 161-62 (2013).

The second prong presents a greater hurdle, requiring appellant to show that the trial court committed plain error. "When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error." State v. Ruiz, 170 N.H. 553, 566 (2018) (quotations omitted); *see, e.g.*, State v. Prudent, 161 N.H. 320, 325-26 (2010) (Court assumes that trial court's lengthy and unsolicited instruction regarding jury nullification constituted error, but nevertheless holds it was not plain error, because law was unsettled at time of trial and appeal).

Thus, an issue of first impression cannot amount to plain error. Ortiz, 162 N.H. at 591. It probably will not be enough to show favorable precedents from other jurisdictions – to demonstrate plain error, appellant may need to show a violation of a statute or prior precedent of the Court, or of the Supreme Court. *Compare* Kelly, 160 N.H. 190, 197-98 (2010) (finding error to be plain where a settled New Hampshire precedent precluded the trial court from acting as it did) *with* State v. Lopez, 156 N.H. 416, 425 (2007) (defendant did not show plain error because only able to cite precedents from other jurisdictions that barred the cross-examination tactic at issue on appeal). Similarly, a litigant in the First Circuit will probably have to demonstrate the prior ruling violated a prior precedent of the United States Supreme Court or the First Circuit itself, not some other federal appeals court.

 Copyright © NH Bar Association

To satisfy the third prong, the appealing party "'must demonstrate that the error was prejudicial, *i.e.*, that it affected the outcome of the proceeding.'" State v. Cassavaugh, 161 N.H. 90, 101 (2010) (quoting State v. Lopez, 156 N.H. 416, 425 (2007). In both Cassavaugh and Lopez, the Court found or assumed error, but held that the third prong was not met because any error was inconsequential in relation to the strength of the State's case. Cassavaugh, 161 N.H. at 101; Lopez, 156 N.H. at 425-26. Thus, the third prong functions as a form of harmless error analysis. *See also* State v. Leroux, No. 2021-0147, 2022 N.H. LEXIS 64, 2022 WL 1633902 (May 24, 2022); State v. Guay, 164 N.H. 696, 705 (2013).

"[U]nder the fourth prong, an appellate court has the *discretion* to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." State v. Russell, 159 N.H. 475, 490 (2009) (quotation omitted). The Court has found this standard to be met where the error implicated not just the procedural fairness of the trial, but its substantive fairness – whether the right result was reached. In practice, that has meant that the appellant must show the error may have contributed to a wrongful conviction or led the trial court to impose an illegal sentence.

Thus, in cases where the trial court's error may have allowed the jury to convict an innocent man, the Court found all four prongs were met and reversed the conviction. State v. Racette, No. 2020-0364, 2022 N.H. LEXIS 49, 2022 WL 1220714 (April 26, 2022) (finding plain error where trial court failed

 Copyright © NH Bar Association

to dismiss one of the indictments for insufficient evidence); State v. Kelly, 160 N.H. 190, 198 (2010) ("[B]ecause the trial court amended the complaint to include an act neither charged in the complaint, nor itself a criminal act, to allow the defendant's conviction to stand would seriously affect the fairness and integrity of judicial proceedings."); State v. Guay, 164 N.H. 696, 705 (2013) (finding plain error where State did not present sufficient evidence of guilt).

By contrast, in State v. Smith, 166 N.H. 40, 44 (2014), and State v. Russell, 159 N.H. 475, 490 (2009), the Court did not grant relief under the plain error doctrine even though the trial court had imposed an enhanced sentence for an element never submitted to the jury. In both cases, the Court declined to exercise its discretion to grant relief under the fourth prong, because the evidence of the element was overwhelming and not really disputed at trial. The Court reasoned: "Given the essentially uncontroverted evidence... 'the real threat then to the fairness, integrity, and public reputation of judicial proceedings would be if the defendant, despite th[at] ... uncontroverted evidence ..., were not to receive the enhanced sentence.'" Smith, 166 N.H. at 44 (quoting Russell, 159 N.H. at 492). Similarly, in State v. Saintil-Brown, 172 N.H. 110, 127-28 (2019), the Court assumed without deciding that the trial court's jury instruction was sufficiently erroneous that the first three prongs of the plain error rule were met but affirmed the conviction because the evidence of guilt was overwhelming.

 Copyright © NH Bar Association

c. Plain Error Rule – Application to Specific Types of Issues.

1. Inadmissible witness testimony.

The Court is unlikely to find plain error in the trial court's failure to *sua sponte* strike from the record inadmissible witness testimony, as it has never found such error before, and as court precedent in fact counsels trial courts to *refrain* from doing that. State v. Hanes, 171 N.H. 173, 182 (2018). However, the Court allowed for the extreme possibility that a trial court might have an obligation to *sua sponte* strike testimony "when there could be no dispute that certain testimony impaired the defendant's substantial rights and adversely affected the fairness, integrity, or public reputation of judicial proceedings…." *Id.*

2. Improper Statements in Opening or Closing Argument.

The Court has repeatedly made clear that it will not find plain error in the trial court's failure to intervene to correct or strike from the record an improper opening or closing argument, "in the absence of patently egregious circumstances." State v. Labrie, 171 N.H. 475, 489 (2019); State v. Drown, 170 N.H. 788, 801 (2018). Those circumstances have to be terrible – "any plain error must relate to the trial court having not taken affirmative steps to intervene in the parties' litigation." State v. Stillwell, 172 N.H. 591, 608 (2019) (finding no plain error even though prosecutor's "personal attacks directed to the ethics and integrity of opposing counsel were unquestionably inappropriate" and "were improper") (quotation marks omitted). In part, this reflects the Court's view that objection during argument is "the role of defense

 Copyright © NH Bar Association

counsel," as the decision not to object may be a sound trial strategy. *Id.* Of course, there may have been no strategic thinking at all, but that sort of theory is usually best developed in a post-conviction proceeding in the trial court such as a motion for new trial based on ineffective assistance of counsel.

This author believes, however, that the Court would find "patently egregious circumstances" if there was an unobjected-to appeal to ethnic or racial or religious animus. *Cf.* Leblanc v. American Honda Motor Company, 141 N.H. 579, 582 (1997) ("A mistrial or a new trial may be warranted where counsel attempts to appeal to the sympathies, passions, and prejudices of jurors grounded in race or nationality, by reference to the opposing party's religious beliefs or lack thereof, or by reference to a party's social or economic condition or status.") (Quotations omitted).

Although the case did not involve an opening statement or a closing argument, the Court's decision in Mallard v. Warden, 175 N.H. 565, 573 (2023), gives support for the view that a comment that drew no objection could still result in reversal. In Mallard, trial counsel asked a question that the Court viewed as conjuring a "powerful racial stereotype," and the Court reversed the defendant's conviction on the ground of ineffective assistance of counsel, even though the question drew no objection.

d. Plain Error Rule – What Claims have been Successful?

During the 18 years that the plain error rule has been in place, in its published criminal opinions, the Court has relied upon the rule about six times to reverse a conviction based on a substantive trial issue such as an erroneous

3.51 Copyright © NH Bar Association

jury instruction. Mallard v. Warden, 175 N.H. 565, 573 (2023); *see also* State v. Racette, 175 N.H. 132 (2022) (finding plain error where trial court failed to dismiss one of the indictments for insufficient evidence); State v. Houghton, 168 N.H. 269, 273 (2015) (trial court failed to dismiss several indictments for insufficient evidence); State v. Mueller, 166 N.H. 65, 72-73 (2014) (trial court erroneously instructed the jury that the culpable *mens rea* for felony wiretapping was purposefully, rather than willfully, and evidence of guilt was not overwhelming); State v. Guay, 162 N.H. 375, 384 (2011) (plain error to not dismiss indictment where evidence was insufficient to prove guilt); State v. Kelly, 160 N.H. 190, 198 (2010) (jury instruction impermissibly amended the indictment to defendant's prejudice and in a manner that could have brought about a wrongful conviction).

The Court has relied on the plain error rule a number of other times to vacate or correct illegal sentences. State v. Karasi, 170 N.H. 543, 548 (2018) (vacating sentences where "State concedes that the trial court's allocation of the defendant's presentence confinement credit is plainly erroneous"); State v. DePaula, 170 N.H. 139, 155 (2017) (defendant's right to double jeopardy violated by trial court's plain error in imposing consecutive sentences on two conspiracy indictments, where State argued the defendant's conduct amounted to a single conspiracy); State v. Towle, 167 N.H. 315, 326 (2015) (trial court's imposition of no contact order constituted plain error because statute did not authorize that order where court did not suspend any portion of defendant's imprisonment); State v. Charest, 164 N.H. 252, 257 (2012) (trial court

 Copyright © NH Bar Association

erroneously determined that mandatory minimum sentence applied); State v. Hancock, 156 N.H. 301, 303 (2007); State v. Matey, 153 N.H. 263, 266 (2006); State v. Edson, 153 N.H. 45, 49 (2005) (vacating sentencing court's allocation of pretrial credit); State v. Taylor, 152 N.H. 719 (2005); but see State v. Pandalena, 161 N.H. 326 (2010) (finding that trial court's sentence exceeded its statutory authority, but declining to vacate the sentence because the error was not preserved below and did not constitute plain error).

The State, as well as the accused, may rely on the plain error rule. State v. Panarello, 157 N.H. 204 (2008); *see also* State v. Perfetto, 2023 LEXIS 171 N.H. Sept. 8, 2023) (unpublished). The prosecution experienced the difficulty of meeting the plain error standard in State v. Panarello, 157 N.H. 204 (2008). In Panarello, the State appealed from the granting of a motion to suppress, arguing that the defendant's conduct fell under a "new crime exception" to the exclusionary rule. *Id.* at 207. The State had not made that argument below, so it relied on the plain error doctrine. *Id.* The Court adopted the new crime exception, and held that under the rule, the evidence should not have been excluded. *Id.* at 209. Nevertheless, the Court affirmed the trial court's decision to grant the motion to suppress. *Id.* Since the rule had not previously been examined in New Hampshire, the failure of the trial court to employ it did not constitute plain error.

3.6 LITIGATING THE CRIMINAL APPEAL STEP BY STEP.

This is a roadmap for litigating a *mandatory* criminal appeal, such as an appeal after guilty verdict and sentencing, although it will touch on differences

 Copyright © NH Bar Association

in the handling of discretionary appeals along the way. Consult Chapter Two, Sections 2.42b, 2.42c, and 2.52 of these materials for thorough handling of interlocutory appeals. The following sections should be read in conjunction with the coverage of the new electronic filing procedures and rules, and in conjunction with the overlapping content in the first two chapters of these materials. The first thing the reader needs to consult is the electronic filing rules, which require electronic filing of the Notice of Appeal and almost all other documents related to an appeal. They are found at https://www.courts.nh.gov/supplemental-rules-supreme-court-new-hampshire-electronic-filing.

Now that appeals are filed electronically, litigators and their staff must have robust pdf editing software such as Adobe Acrobat. That being said, criminal appeals often still include documents that must be filed conventionally, such as the financial affidavit for a defendant seeking court-appointed counsel and transcripts at court's expense, court-appointed counsel's billing statements, the signed withdrawal of appeal filed when the defendant decides to waive the right to appeal. *See* 2018 Supplemental Rules for Electronic Filing, Rules 6, 11, 12. But for these, as well, no copies are required, *id.*, and Rules that say otherwise are now obsolete.

3.61 Availability of Bail Pending Appeal – NHSCt.

While an appeal is pending, a criminal defendant may be released on bail except for capital offenses, first-degree murder, or certain sexual assault offenses. RSA 597:1-a. Defendants convicted of felonies are treated differently

 Copyright © NH Bar Association

than those convicted of misdemeanors. The former bear the burden of proving that they meet the criteria for release on bail pending appeal, and must overcome a presumption that they shall be detained. RSA 597:1-a, II, III. The latter are entitled to a presumption that they "shall be released" on bail pending appeal. RSA 597:1-a, IV. Practically speaking, either all or almost all defendants convicted of felonies and sentenced to the state prison are denied bail pending appeal.

a. Procedure to Obtain Bail Pending Appeal in the Trial Court.

The defendant must initially move for bail pending appeal in the trial court. The trial court must consider all factors set forth in RSA 597:2, III, including:

- whether the appeal is frivolous (see below).
- the likelihood defendant will flee.
- the length of the sentence imposed.
- danger to the community.

State v. Blum, 132 N.H. 396, 401-402 (1989).

When the trial court considers the merit of the appeal, it cannot frame the issue as determining "whether a defendant's appeal has a serious likelihood of prevailing," because the trial court is in a poor position to make that determination. Blum, 132 N.H. at 401. Instead, the trial court can only consider whether an appeal is "frivolous." An appeal is not frivolous "where there exist reasonable grounds to argue that the record contains assignable error, the type of which may result in reversal." *Id.*

 Copyright © NH Bar Association

b. Review of Denial of Bail Pending Appeal.

The trial court's denial of bail pending appeal or the imposition of a bail that the defendant is unable to meet is appealable. *See* RSA 597:6-e, III ("The person, or the state pursuant to RSA 606:10, V, may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order. The appeal shall be determined promptly.").

The Court presently has no rules governing the procedure for such an appeal. In practice, the defendant may obtain review of the trial court's bail decision by filing a motion in the Supreme Court or a notice of appeal. *See* State v. Boggs, 2017 N.H. LEXIS 251 (2017) (non-precedential opinion). The motion should set forth the facts presented to the trial judge, the arguments against the trial court's decision, and the trial court's reasons for denying bail. The Court may order the transcript of the hearing on the motion for bail pending appeal and require one or both parties to file memoranda. Bail appeals are generally expedited, with a very abbreviated schedule for the filing of memoranda. The Court generally decides such motions without further briefing or oral argument.

A federal court order ordering detention (denying bail) or denying bail pending appeal can be appealed to the First Circuit. 1st Circuit Rule 9(a)-(c).

In misdemeanor cases in which the defendant will have served a substantial portion of his sentence before his appeal can be heard, he will usually be afforded bail pending appeal. Otherwise, the denial of bail may make

 Copyright © NH Bar Association

his appeal meaningless.[2] Where the sentence imposed below was merely a fine, the Court has strongly suggested that personal recognizance bail must be granted. State v. Wheeler, 120 N.H. 496, 500 (1980).

3.62 Notice of Mandatory Appeal (N.H. Sup. Ct. R. 7).

The notice of appeal is the document that initiates an appeal from the trial court's final decision on the merits. N.H. Sup. Ct. R. 3. The Rule 7 Mandatory Appeal NOA is not a difficult document to prepare, as it requires no legal research, and contains no argument on the merits. Instead, the appellant simply provides some basic information on an appeal form, including a list of the potential issues to be litigated on appeal, and a list of the transcripts needed. The clerk's written notice of decision below, which in most cases is simply the sentencing mittimus, must be attached to the NOA. Sup. Ct. R. 7(6)(A). An official template for a Rule 7 NOA can be found online at: https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/nhjb-2296-sup.pdf..

a. Time for Filing Notice of Appeal.

In a criminal case, counsel must file a notice of appeal within 30 days from the date of sentencing or the date of the clerk's written notice of disposition of post-trial motions, whichever is later. N.H. Sup. Ct. R. 7(1).

[2] Cases decided under previous versions of the bail statute, including State v. Adams, 116 N.H. 529 (1976), and State v. Gross, 116 N.H. 527 (1976), should be considered abrogated by the very substantial changes to the bail statute since that time.

 Copyright © NH Bar Association

However, the date of the clerk's written notice of disposition of a post-trial motion is not used to calculate the time for filing the appeal if counsel filed the post-trial motion more than 10 days after sentencing. *Id.* In that case, the appeal must be filed within 30 days of sentencing, and then appellant must determine if the post-trial motion can be folded into the direct appeal or needs to be filed separately as a discretionary appeal.

The Court enforces the 30-day appeal deadline and allows late filings only upon a showing of "exceptional circumstances." N.H. Sup. Ct. R. 5(1), 5(4), 21(6) ("Motions to extend time…are not favored and shall be granted only upon a showing of exceptional circumstances."). This policy represents a change from the former, more accommodating rule, in place until 2004, that allowed late filings based on a showing of "good cause." State v. Mottola, 166 N.H. 173, 176 (2014) (recognizing that rule change abrogated cases such as Petition of the State of N.H. (State v. Fischer), 152 N.H. 205, 209 (2005)).

b. Contents of the Notice of Appeal.

The notice of appeal must comply in all respects with the technical requirements of Rules 6, 7 and 26, but simply filling out the form thoroughly will cover all the bases.

The defendant, as the moving party, must supply the transcript information requested on the transcript order form. *See* Sup. Ct. R. 15(2)(a), 59. Counsel should specifically identify hearings on pretrial motions, for example, "motion to dismiss (speedy trial)," and the date of the hearing, on the transcript request form.

 Copyright © NH Bar Association

In most Rule 7 criminal appeals, litigators request the transcript of the entire trial, "including openings, closings, jury instructions, and all recorded conferences with the trial court." This specific statement is needed under N.H. Sup. Ct. R. 15(3), which indicates that the Court will not order certain portions of record, including "opening statements, medical testimony, arguments and charge," unless specifically requested. In most criminal cases, these portions of the transcript should be requested, because they may contain appeal issues. *See, e.g.*, State v. Guay, 130 N.H. 413, 419 (1988) (defense entitled to dismissal prior to introduction of any evidence, if prosecution opening statement fails to establish a prima facie case); State v. Mussey, 153 N.H. 272, 278-79 (2006) (holding that prosecutor during closing argument engaged in improper vouching and argued facts not in evidence).

Further, request transcripts of arguments because representations made by counsel during arguments can be used against that party on appeal. For example, the prosecution may claim harmless error on appeal, in which case the defendant will want to point to the instances in closing argument where the prosecution highlighted and relied upon the supposedly inconsequential evidence. State v. Cook, 158 N.H. 708, 714 (2009) (in finding that State failed to prove erroneous admission of evidence was harmless beyond a reasonable doubt, Court notes that prosecutor twice referred to the evidence during closing argument). The prosecution, on appeal, may rely on the closing arguments for the opposite inference—that an improperly admitted piece of

 Copyright © NH Bar Association

evidence had no impact on the trial, as evidenced by the lack of reference to that piece of evidence during argument.

As another example, if the State seeks to justify the admission of a particularly controversial piece of evidence in part through the "opening the door" doctrine, then the prosecutor will want to study the defendant's opening statement to see if any arguments or insinuations were made during opening that tend to open the door in question. State v. Fecteau, 133 N.H. 860 (1991) (defendant's opening statement opened the door to testimony that was subject of defendant's appeal).

The failure to order all necessary and relevant transcripts is one of the most frequent errors made by litigants on appeal—an error that can cause substantial delay, and result in an important issue not being properly heard or even not being heard at all. When ordering transcripts, trial counsel must carefully study his or her notes and identify every hearing where representations made by counsel or evidence presented might impact the issue(s) on appeal. If in doubt, err on the side of requesting a particular transcript. For example, with respect to an evidentiary issue during trial, opposing counsel may have made easily forgotten casual representations in a pretrial hearing that cast later representations made during trial in a negative light.

On the other hand, transcripts are costly, so it makes sense to avoid ordering the transcript of a hearing that will have no bearing on the issues on appeal. For example, in many, if not most, criminal cases, it serves no purpose

 Copyright © NH Bar Association

to order the transcript of jury selection. *But see*, *e.g.,* Batson v. Kentucky, 476 U.S. 79 (1986) (racial discrimination in exercise of peremptory challenges constitutes reversible error); State v. Town, 163 N.H. 790 (2012) (error in seating juror after colloquy failed to establish juror's ability to be impartial).

What counsel must attach to the notice of appeal depends on whether it is mandatory or discretionary. In a mandatory appeal, counsel need only attach the sentencing order, and a copy of any order on a timely-filed post-trial motion. Sup. Ct. R. 7(6)(A). Note, however, that any relevant pleadings and orders must be attached as an appendix to the defendant's brief. Sup. Ct. R. 13(3). In a discretionary appeal, counsel must attach the same. Sup. Ct. R. 7(6)(B). "Any other pleadings and documents that the appealing party believes are necessary for the court to evaluate the specific questions raised on appeal and to determine whether the appeal is timely filed shall be filed as a separate appendix." *Id.*

c. Issues Raised in Notice of Appeal.

All meritorious issues should be listed in the notice of appeal. However, counsel is not obliged to brief all issues included in the notice of appeal and can add issues later discovered during review of the record, if the Court has granted a timely motion to add such question. N.H. Sup. Ct. Rule 16(3)(b). Finally, N.H. Sup. Ct. R. 26(4) requires the attorney drafting the notice of appeal to certify that each of the issues raised on appeal was properly preserved below, either by contemporaneous objection or by written motion, although the NOA form also includes the possibility of plain error.

 Copyright © NH Bar Association

d. Filing Procedure.

Counsel must file the NOA electronically as with all other appeal documents, copying the Attorney General's Office. If the lawyer handling the appeal for the State is not yet designated, as usually will be the case, add attorneygeneral@doj.nh.gov as the opposing party's email in the online filing system. Appellant will pay the $225 filing fee while filing electronically. Sup. Ct. R. 49(1)(a). An indigent defendant should file a motion for a waiver of the fee and financial affidavit at the time he files the notice of appeal. Sup. Ct. R. 5(2). Getting the financial affidavit may require a visit to the client at the state prison, and visitation times are very limited, so make sure you budget time for this within the 30-day window for filing the appeal.

3.7 RECORD ON APPEAL[3]

3.71 Procedure for Transmittal of Record.

It is the responsibility of the appealing party to present a sufficient record on appeal for the disposition of the issues raised by the appeal. N.H. Sup. Ct. R. 13(2). If the record is not sufficient, the Court may rule that appellant has failed to preserve an issue or issues. The record consists of the papers and exhibits filed and considered in the trial court, the transcript of proceedings, and a certified copy of the docket entries. N.H. Sup. Ct. R. 13(1). The responsibility is on the appealing party to ensure that all needed record materials are provided to the court. N.H. Sup. Ct. Rule 14(1). The Court's

[3] Much of the material in this section will overlap with similar content in Chapter Two of these materials, the civil appeals chapter, so this section focuses on issues specific to criminal appeals. Consult both chapters.

 Copyright © NH Bar Association

scheduling order advises that counsel must arrange with the trial court for transmittal of any exhibits necessary for the appeal, by filing a motion with the Court requesting that the trial court transfer the exhibits. N.H. Sup. Ct. R. 13(4). Items like exhibits and pleadings do not automatically get transferred to the NHSCt simply because an appeal has been filed. *Id.*

Reproduce an exhibit in the Appendix or transfer it to the court. Don't just refer to it. If appellee does not also cite to the exhibit and acknowledge that fact as true in appellee's responsive brief, and the exhibit has not been made part of the record, it's not a fact that the court can consider. That does not mean that appellate counsel should move to transfer all of the exhibits to the NHSCt, nor will such a request be warmly welcomed, especially if the exhibits include bulky or dangerous objects like drugs and guns! The best - and rule-mandated - practice is to reproduce an exhibit in an appendix to the brief, or even within the brief itself, if the exhibit is a photograph or diagram. N.H. Sup. Ct. R. 13(4) (Court will not order the transfer of exhibits that may otherwise be included in an appendix to a brief).

3.72 Preparation of Transcripts.

Once the Supreme Court accepts a case, it issues a letter stating that the appeal is accepted. The letter orders appellant (unless indigent) to pay the specified estimated cost of the transcripts to eScribers (https://escribers.net/), which prepares all transcripts for NH appellate proceedings. If the defendant is indigent, the State pays the cost of preparing the transcript. Preparation of the transcripts takes a couple of months.

 Copyright © NH Bar Association

Sometimes appellate counsel will review the transcripts and realize that something important is missing – it must have happened during an unrecorded bench conference, or a recording must have failed (check with eScribers to rule out the possibility of simple error by the transcriptionist). To make those events part of the appeal, the parties must reconstruct the record to reflect the parties' understanding - and the trial court's understanding - of what occurred. State v. Santiago, 159 N.H. 753, 756 (2010); State v. Parra, 135 N.H. 306, 308-09 (1992). Typically, the parties will agree on a joint statement, filed as a motion or stipulation, that describes what was in the missing transcript.

For a rare example of the Court reaching the merits of a substantive trial issue despite the failure of appellant to provide a trial transcript, *see* State v. Thiel, 160 N.H. 462, 464-65 (2010) (reversing trial court's ruling with respect to sufficiency of the evidence, despite lack of trial transcript, because trial court's ruling made clear there were no disputed facts with respect to the element of the offense not proven).

3.73 Review of the Record.

Read all the pleadings and orders, all the transcripts, and understand the function of all the exhibits introduced at motions hearings and trials. Think of it as a forensic project: What went wrong, that caused my client to lose? Start ruling out issues and deciding which 1, 2 or 3 issues you will brief. At appellate litigation seminars, judges almost unanimously advocate that you limit the brief to 1 or 2, *maybe* 3 issues at the most. An argument which is

 Copyright © NH Bar Association

virtually never successful is: Many minor errors were made during the trial, and taken together, they made the trial unfair or led to an unjust outcome.

Consider whether the record establishes a viable postconviction claim, such as a motion for new trial based on ineffective assistance of counsel. If so, and if it's the type that cannot or should not be litigated on direct appeal, then consider moving to stay the appeal and to remand to the trial court to litigate the post-conviction issue. The Attorney General's Office will usually assent to this. If litigation on the postconviction issue is successful, the appeal (or perhaps, part of the appeal) will become moot. If the postconviction litigation is unsuccessful, you then file two documents: A Notice of Discretionary Appeal for the postconviction issue, and a motion filed in the Court to consolidate the direct appeal with the discretionary appeal. The strategy outlined here may make it more likely that the discretionary appeal will be accepted and can be a more efficient process than sequential appeals.

3.74 Issue Selection – Standards of Review on Appeal.

The standard of appellate review is a measure of the level of deference the court affords trial court rulings. Because the outcome of the appeal may depend on the standard of review employed, appellate practitioners must carefully select the issue(s) that will receive the most favorable standard of review. *See, e.g.*, State v. Shepherd, 159 N.H. 163, 169 (2009) (Court notes that same issue may be examined as due process violation or "newly discovered evidence," but the latter has a more forgiving standard of review).

Here are some common standards of review in criminal cases:

 Copyright © NH Bar Association

a. Suppression Issues and Claims of Constitutional Violations.

Most constitutional law issues, such as whether suspect was in custody for purpose of *Miranda*, or whether a particular search or seizure violated the state or federal constitution, or whether the trial court should have granted a new trial for ineffective assistance of counsel, involve a mixed question of law and fact. In such cases, the court will not "disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law," but it reviews *de novo* the application of the law to those facts. *See, e.g.*, State v. Newton, 175 N.H. 279 (2022) (ineffective assistance of counsel); State v. Donovan, 175 N.H. 356 (2022) (applying this mixed standard to question of whether a seizure occurred under Part I, Article 19); State v. Gates, 173 N.H. 765, 770 (2020) (applying the mixed standard to the question of whether the defendant had a reasonable expectation of privacy in a particular location).

If an issue is litigated and properly preserved under the State Constitution, the general rule is that the Court will decide the issue under the State Constitution and will not reach the federal constitutional issue. *See, e.g.*, State v. Orde, 161 N.H. 260, 264 (2010); State v. Ball, 124 N.H. 226, 237 (1983). However, if the defendant has placed "significant emphasis" on federal law, the Court may decide the issue under the federal constitution in the first instance. *See, e.g.*, State v. Socci, 166 N.H. 464, 468 (2014); State v. Zidel, 156 N.H. 684, 686 (2008). And if appellant has made no effort to research the legal standards applied under the state constitution, and instead relies on federal

 Copyright © NH Bar Association

standards, the court may not reach the state constitutional issue. State v. Watson, 170 N.H. 720, 728 (2018) (where defendant's brief purports to rely on the state constitution, but then sets forth the prevailing legal standard in federal courts for a Confrontation Clause violation, a standard which had not been adopted under the State Constitution, Court construes only the federal constitution). The Court will not reach a constitutional issue at all if it can resolve the claim on a non-constitutional basis. State v. Langill, 161 N.H. 218, 224 (2010).

b. Constitutional Attack on a Statute.

If the issue on appeal is the constitutionality of a statute, an issue of law, the Court applies *de novo* review. State v. Kepple, 151 N.H. 661, 664 (2005). If appellant is undertaking a facial challenge to the constitutionality of a statute, she faces a high burden. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." State v. Furgal, 161 N.H. 206, 210 (2010).

c. Mistrial without defendant's consent.

When the trial court grants a mistrial without the consent of the defendant, and orders that the defendant may be retried, generally the defendant will bring an interlocutory appeal claiming that retrial would violate his or her right against double jeopardy. The Court has stated that it applies the unsustainable exercise of discretion standard, State v. Solomon, 157 N.H. 47, 51 (2008), but the level of deference afforded to the trial court depends on

 Copyright © NH Bar Association

the quality of the record made below. "Whether the trial court allowed counsel to comment on a proposed mistrial, considered other alternatives, or made a decision without sufficient reflection are all important factors to be considered." State v. Gould, 144 N.H. 415, 417 (1999). Thus, if the trial court failed to "exercise such prudence," the court's deference is "diminished," and it will "defer to a trial court's finding of manifest necessity only where the record affirmatively supports it." *Id.*

d. Statutory interpretation.

An appellate court is the final arbiter regarding the meaning of statutory language, so all courts apply *de novo* review to the determination of a meaning of a statute. State v. Gunnip, 174 N.H. 778, 780 (2022); United States v. Gordon, 875 F.3d 26, 32 (2017).

e. Evidentiary rulings.

The NHSCt reviews a trial court's evidentiary rulings to determine whether the court has committed an unsustainable exercise of discretion. *See, e.g.*, State v. Kornbrekke, 156 N.H. 821 (2008). "To prevail under this standard, the defendant must demonstrate that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." *Id.* In other words, the defendant must show both error, and that the error inflicted prejudice.

The First Circuit employs a similar standard for evidentiary error. United States v. Iwuala, 789 F.3d 1, 6 (1st Cir. 2015) (applying abuse of discretion standard).

f. Jury instructions (including answers to jury questions).

 Copyright © NH Bar Association

The NHSCt employs multiple standards of review for legal errors relating to jury instructions, depending on the issue implicated. For example, because a trial court must grant a defendant's requested jury instruction on a specific defense if there is "some evidence" to support the defense, the Court applies a standard that sounds plenary: Its "function in reviewing the trial court's refusal to provide a requested self-defense instruction is to search the record for evidence supporting the defendant's request." State v. Cavanaugh, 174 N.H. 1, 7-8 (2020). On the other hand, the court will apply the unsustainable exercise of discretion standard to a challenge to a jury instruction where the trial court did instruct on the issue requested by the defendant, but not in the precise wording requested by the defendant. State v. Johnson, 157 N.H. 404, 407 (2008).

In the First Circuit, "[p]reserved objections to denials of requested jury instructions are reviewed under a split standard: questions as to whether the applicable law is correctly stated are reviewed *de novo*, while questions as to whether the instruction's phrasing is unfairly prejudicial are reviewed for abuse of discretion." United States v. Florentino-Rosario, 19 F.4th 53, 534 (1st Cir. 2021) (quotations omitted); United States v. Norris, 21 F.4th 188, 194 (1st Cir. 2021) (employing the *de novo* standard to a challenge to a jury instruction defining the elements of the crime).

g. Motion to Set Aside Verdict.

"The decision regarding whether to set aside a jury verdict and grant a new trial lies within the sound discretion of the trial court." Anderson v. Smith,

 Copyright © NH Bar Association

150 N.H. 788, 790 (2004). Thus, the court applies the unsustainable exercise of discretion standard. *Id.*

h. Motion for New Trial – Newly Discovered Evidence.

The Court applies the unsustainable exercise of discretion standard to the question of whether a new trial should be granted for newly discovered evidence. State v. Etienne, 163 N.H. 57, 96 (2011).

i. Sufficiency of the evidence.

This is a question of law, so state and federal courts apply *de novo* review. State v. Collyns, 166 N.H. 514, 517 (2014); United States v. Gobbi, 471 F.3d 302, 308 (1st Cir. 2006). "To prevail upon [a] challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." Collyns, 166 N.H. at 517 (quotations omitted). Even if the defendant made the motion only at the end of the State's case, the Court will examine "the entire trial record" in making the sufficiency determination, including any evidence introduced in the defense case. State v. Shepard, 158 N.H. 743, 745 (2009) (quotations omitted).

If another appeal issue results in a ruling that certain evidence should not have been admitted, that will not improve the prospects for victory on a sufficiency claim. "In determining whether the evidence was sufficient, … [the Court] consider[s] all of the evidence, including evidence erroneously admitted." State v. Gordon, 161 N.H. 410, 418 (2011).

 Copyright © NH Bar Association

The Court applies the same standard in reviewing a trial court's granting of a motion for judgment notwithstanding the verdict (JNOV). State v. Spinale, 156 N.H. 456, 464 (2007). However, if the trial court set aside a verdict as against the weight of the evidence, the Court applies a more deferential standard of review, upholding the trial court's decision "unless it was made without evidence or constituted an unsustainable exercise of discretion." *Id.* at 466.

j. No such thing as "abuse of discretion".

And finally, remember that we don't say "abuse of discretion" in New Hampshire practice – the correct formulation, which ends up being the same standard, is "unsustainable exercise of discretion." State v. Lambert, 147 N.H. 295, 296 (2001). However, in the First Circuit, the corresponding standard of review is still called "abuse of discretion."

3.75 State constitutional law.

Enacted in 1784, New Hampshire's State Constitution safeguards fundamental civil liberties such as the right against self-incrimination and the right to be free of unreasonable searches and seizures. N.H. Const., Pt. I, Arts. 15 and 19. New Hampshire guaranteed these fundamental liberties seven years before the ratification of the Bill of Rights in 1791. There are textual differences between analogous rights provided by the State and Federal Constitutions, and differences in the scope of the rights provided. For example, the New Hampshire Constitution did not provide a constitutional right to bear arms until 1982, and it does not contain a clause guaranteeing a public trial like

 Copyright © NH Bar Association

that of the 6th Amendment, although the Court found that the right to a public trial was inherent in Part I, Article 15. State v. Turcotte, 173 N.H. 401, 409 (2020).

The 1780 Massachusetts Constitution, enacted four years earlier, served as the model for New Hampshire's Constitution. Because of the "shared history" of the Massachusetts and New Hampshire Constitutions, and the nearly "identical" language of key provisions, the Court "give[s] weight" to interpretations of the former by the Massachusetts Supreme Judicial Court. State v. Roache, 145 N.H. 45, 49 (2002). That tends to be helpful to the defense, because the Massachusetts Supreme Judicial Court, like many other courts across the country since the late 1970s, has interpreted its Constitution expansively.

In State v. Ball, 124 N.H. 226 (1983), the Court stated its inclination for deciding constitutional claims based on the State Constitution. As long as a State constitutional argument was made in the trial court, *see* Section 3.52, *supra*, appellate counsel should make special reference in the brief to the provisions of the New Hampshire Constitution that would support the position. The benefit of relying on the State Constitution is that it could support a claim of a constitutional violation where the comparable federal constitutional provision would not. If the Court finds a state constitutional violation, that decision is not reviewable by the United States Supreme Court as it rests on independent state grounds. Michigan v. Long, 463 U.S. 1032 (1983).

 Copyright © NH Bar Association

Over the last thirty years, the Court has issued numerous criminal procedure decisions that provide greater protection under the State constitution than are available under the federal constitution. These decisions cover areas ranging from search and seizure, *see e.g.,* State v. Canelo, 2139 N.H. 376 (1995) (no good-faith exception to the state constitution's exclusionary rule, rejecting authority of United States v. Leon, 468 U.S. 897 (1984)); to the right against self-incrimination, State v. Roache, 145 N.H. 45 (2002) (under N.H. Const. Part. I, Art. 15, police interrogations must cease if attorney contacts police on suspect's behalf, rejecting authority of Moran v. Burbine, 475 U.S. 412, 422 (1986)); to the determination of the voluntariness of a confession, State v. Hinckley, 174 N.H. 414, 418 (2021); to the right against double jeopardy. State v. Hogg, 118 N.H. 262, 266 (1978) (prosecution in state court after acquittal in federal court barred by Part I, Article 16 right to be free of double jeopardy, rejecting authority of Bartkus v. Illinois, 359 U.S. 121, 136 (1959)).

Because the Federal and State Constitutions are independent, the Court also may interpret a provision of the State constitution using a different interpretative methodology than that applied by the United States Supreme Court, even if the methodology may be less protective in some instances than the methodology applied by the Supreme Court. State v. Maga, 166 N.H. 279, 282-83 (2014) (Court continues to apply a different legal standard to analyze confrontation clause violations under the State Constitution, than the standard set forth by the United States Supreme Court in the landmark case of Crawford

 Copyright © NH Bar Association

v. Washington, 531 U.S. 36 (2004)). Further, because state courts and trial federal courts hold a "parallel position" with respect to interpreting the federal constitution, the Court does not view itself bound by interpretations of the federal constitution by the First Circuit. State v. Addison, 160 N.H. 792, 803 (2010); State v. Miller, 155 N.H. 246, 256 (2007).

3.76 Preparation of the Brief and Oral Argument.

There are many good resources to guide you here. Lisa Wolford and Stephanie Hausman's excellent Guide to Appellate Advocacy in New Hampshire is available for free on the Bar's website. Bryan Garner's book, "The Winning Brief" (Oxford University Press 3d. Ed. 2014) takes a very modern approach to legal writing, advocating techniques such as using a multiple-sentence syllogism to describe each issue on appeal.

Here are a few "brief" comments:

a. Tell a story in the fact statement if your case at all lends itself to advocacy through storytelling. Don't just go through a list of what each witness said, and don't limit yourself to describing things in the order that they were presented at trial. The author Richard Powers got it right when he wrote: "The best arguments in the world won't change a person's mind. The only thing that can do that is a good story." Of course, your "good story" must be presented in an ethical manner that accurately and thoroughly describes what happened in the trial court. But the bottom line is simple: If the judge reading the brief doesn't want

 Copyright © NH Bar Association

to vote in your favor after reading the Statement of Facts, you won't get the judge back with clever arguments.

b. At practically every appellate litigation seminar, justices say that the Summary of Argument really matters; it's something that they rely on. Listen to them, which means not hastily throwing it together and pasting into the brief an hour before the briefing deadline.

c. The current formatting requirements for briefs are very detailed and make some unusual choices, such as extremely wide margins. (The justices have electronic tablets that they use to read briefs, so the formatting rules are designed to make the briefs readable on a small screen, as opposed to the giant computer monitor you are probably looking at right now.). Make sure you and your staff study those rules carefully. Try to create Word styles that follow those rules to make brief preparation easier. Some of the rules are onerous: For example, the numbering of the brief must be sequential throughout, including the Addendum which is attached to the brief (so the cover is page one, and if the last page of the brief is page 34, the cover of the Addendum is page 35). This rule ensures that when the justices see a "pdf page number," that number corresponds exactly to the printed page number on the brief itself. But it is onerous because you can't number the Addendum until the brief is completely done, and you can't cite to the Addendum within the brief until the Addendum is numbered, so… learn how to do the

 Copyright © NH Bar Association

numbering within your pdf editing software as well as within your word processor software, and budget time for this.

d. You must include the standard of review in your brief for every issue, and you should argue with that standard in mind. Leaving it out, or stating the standard but then ignoring it, are bad mistakes, for which judges are not very forgiving.

e. The harmless error doctrine is the prosecution's best friend. For most issues arising in criminal appeals, the existence of error alone will not be enough to obtain a reversal because the prosecution can rely on the "harmless error" doctrine. The lead case on the harmless error doctrine is now State v. Boudreau, 176 N.H. 1, 11-13 (2023). In Boudreau, the Court re-examined the doctrine. Now to establish harmless error, "the State must prove beyond a reasonable doubt that the error did not affect the verdicts." *Id.* at 11. In determining whether the State has met its burden, the Court will examine the totality of the circumstances. In *Boudreau*, the Court set out a non-exhaustive list of factors. Thus, the State will argue to the Court that, even if the trial court erred, the inadmissible evidence or erroneous exclusion of relevant evidence did not affect the verdict, and the conviction should, nonetheless, be affirmed. *See, e.g.*, State v. Hayward, 166 N.H. 575, 585 (2014) (finding that error in exclusion of evidence of duress was not harmless); State v. Wells, 166 N.H. 73, 82-83 (2014) (any error in admission of hearsay statements was harmless error). The Court, however, will not apply the doctrine where

 Copyright © NH Bar Association

the trial court's error was "structural" in nature. *See* State v. Etienne, 163 N.H. 57, 79-80 (2011) (discussion of distinction between structural defect and trial error); State v. Ayer, 150 N.H. 14, 24 (2003); Arizona v. Fulminante, 499 U.S. 279, 308–12, 111 S. Ct. 1246, (1991). The Court has provided examples (a non-exhaustive list) of structural error not subject to harmless error analysis: "[T]he introduction of a coerced confession, the complete denial of a defendant's right to counsel, or adjudication by a biased judge...." State v. DuPont, 149 N.H. 70, 75 (2003). *See also* State v. Kousounadis, 159 N.H. 413, 429 (2009) (an erroneous jury instruction relieving the State of its burden of proving an element of the offense constitutes structural error).

f. A complete discussion of the harmless error doctrine is beyond the scope of this handbook. However, counsel should be aware of a couple of points. First, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. Etienne, 163 N.H. at 83. To successfully raise harmless error, the State must make the harmless error argument in its brief. State v. Forbes, 157 N.H. 570, 577 (2008). If the State waits until oral argument to raise harmless error, the Court will not consider the doctrine. State v. Scovill, 144 N.H. 409, 414 (1995). Second, in order to prevail, the State must prove that the error could not have reasonably affected the outcome of the case, not merely that there was sufficient evidence to convict without the erroneously admitted evidence. State v. Taylor, 141 N.H. 89, 92 (1996).

 Copyright © NH Bar Association

g. The defendant should never try to preemptively defeat harmless error in his brief, because it will needlessly flag the issue for the State. There have been appeals where the State probably should have raised harmless error, but did not do so. *See, e.g.*, State v. Morrill, 154 N.H. 547, 552-53 (2006). Accordingly, the defendant should respond to a harmless error claim either in a reply brief, or during oral argument. Note that the defendant must demonstrate prejudice to obtain relief on appeal for certain types of errors such as evidentiary error, which results in the necessity to make an argument similar to, but distinct from, a harmless error argument. *Id.* at 552-53 (example of case where defendant demonstrated prejudice, and State failed to make harmless error argument so harmless error not reached).

h. Don't prepare a Reply Brief just because the rules say you can. Look at the rules carefully and prepare a Reply Brief only if you need it to address specific infirmities in the other side's brief (inaccurate recitation of the record that matters, inaccurate description of a case holding), or an argument that you didn't address at all in your opening brief, such as harmless error. Do not use a Reply Brief to restate arguments you have already made in your opening brief.

i. For oral argument, it makes a tremendous difference whether you go first or second (appellant argues first; in criminal appeals, the appellant is usually the defendant, but not always). The person who argues first can strategically employ a particularly difficult argument or analogy that

 Copyright © NH Bar Association

opposing counsel will have to respond to on the fly. *E.g.,* if the court adopts the rule advocated for here in criminal cases, it will have the following unintended adverse effect on another area of law.... For this reason, sometimes it is best to save a couple of your favorite hypotheticals or analogies for oral argument, leaving them out of the brief. If you are arguing second, then you have the tremendous advantage of already having heard many of the judges' comments and questions, with more time to think about how to respond. Focus your argument on what the judges seem to care about, not what you care about; address what the judges seem to perceive as weaknesses in your case, rather than what you perceive to be strengths in your case.

j. Moot your oral argument with others in your firm / organization, colleagues, friends, *someone*. No matter how much you prepare, there is a good chance that a judge will ask a question that you never anticipated or thought about. But if you don't moot your argument, that description may describe just about all the questions asked by the justices!

k. Confession of Error by State. Until the time the case is "submitted" to the Court for decision, the State may confess error. After all, the prosecutor's duty is not to win, but to seek justice. If the State concludes that the defendant's appeal is meritorious, it should file a motion seeking appropriate relief (which will depend on the nature of the appeal issue).

3.79 Copyright © NH Bar Association

3.8 EFFECT OF APPELLATE DISPOSITION.

Defense counsel must be prepared to take appropriate action based on any change in the defendant's custody status resulting from the Court's disposition of his appeal. The Court's disposition is binding from the time the Court directs that a certificate of its order be forwarded to the clerk of the trial court. N.H. Sup. Ct. Rule 24(2).

3.9 Affirmance of Conviction.

Once the conviction has been affirmed, defense counsel has ten days from the date of the opinion or order of affirmance within which to file a motion for rehearing. N.H. Sup. Ct. Rule 22. If the defendant is not in custody at the time the conviction is affirmed, but his initial sentence called for incarceration, the defendant's bail may be revoked, even before the Court issues a decision on the motion to reconsider. If the defendant either does not file, or loses, his motion to reconsider, the Court will issue a mandate to the trial court clerk. If the defendant's original sentence called for incarceration, counsel should attempt to negotiate the terms of the client's surrender.

3.91 Reversal of Conviction.

If the Court reverses the defendant's conviction, the State has ten days within which to file a motion to reconsider. N.H. Sup. Ct. R. 22(2). A defendant who is in custody will generally not be released until this ten-day period passes. If the State files no motion, an incarcerated defendant can seek release on bail, pending his new trial, in the trial court. If the State files a motion to reconsider, the defendant may not be released until the motion is resolved. If

 Copyright © NH Bar Association

the case is reversed due to legal insufficiency of the evidence, or if the Court finds that retrial would violate the right against double jeopardy, the State may not retry the defendant. *See* Section 3.42. In nearly every other circumstance, reversal does not bar the State from re-prosecuting the defendant.

3.93 Obligations of Counsel After Losing Appeal.

Most criminal convictions are affirmed on appeal. For both the New Hampshire Supreme Court and the First Circuit, there is only one higher Court, the United States Supreme Court. A losing defendant in either the NH Supreme Court or the First Circuit can attempt to appeal to USSC through a petition for writ of certiorari, which is due 90 days after the entry of final judgment in the trial appellate court. The Court only accepts less than 100 of the more than 8,000 petitions filed every year.

A losing defendant who raised constitutional issues should be advised about the possibility of filing a federal habeas petition and advised about the strict deadline and long odds for success due to procedural barriers established by the Anti-Terrorism and Effective Death Penalty Act of 1994, barriers fortified by many, many adverse decisions from the United States Supreme Court further limiting collateral review.

In state court, there are no special rules governing appellate counsel's duties after affirmance of conviction and sentence on appeal. Basic professional responsibility dictates that counsel advise client of the deadline for a writ of certiorari and explain whether that process has any possibility of providing relief for client. It almost never will. It is not clear, however, that an attorney

 Copyright © NH Bar Association

appointed by the Court has the professional obligation to prepare such a petition upon request, and there is no reason to believe that the attorney will be compensated by the State of New Hampshire for the many hours spent preparing the petition.

In federal court, for a court-appointed attorney, the rules are different. First Circuit Rulebook, Local Rule 46.5. The court-appointed attorney must advise client of the procedure for filing a petition for writ of certiorari, and determine whether the client wants to file such a petition. If so, the attorney must file it "if there are reasonable grounds to do so," considering United States Sup. Ct. R. 10. That Rule describes the very narrow classes of types of appeals that the Court has traditionally considered accepting. If client elects not to file the writ, the attorney can file a motion to withdraw. If client does not respond or wants to file but the attorney cannot identify reasonable grounds to do so, attorney must file a motion to withdraw that explains the situation. The First Circuit Rulebook, Local Rule 46.6 indicates a letter of withdrawal can suffice in certain situations. In actual practice, the clerks tell us that the Court wants to see a motion to withdraw, not a letter or form withdrawal, even if the rule says a letter is sufficient.

3.82 Copyright © NH Bar Association

Administrative Appeals

Russell F. Hilliard
Upton & Hatfield, LLP
Portsmouth, NH

CHAPTER 4
APPEALS FROM ADMINISTRATIVE AGENCIES

This Chapter was updated by Attorney Laura Spector-Morgan in 2022. Russell F. Hilliard updated this Chapter effective May 15, 2025.

4.1 SCOPE OF THIS CHAPTER.

This chapter covers the methods available for obtaining review of decisions of administrative agencies, including appeals under RSA Chapter 541 and review by writ of certiorari. Included are sections covering exhaustion of administrative remedies, a step-by-step procedure for filing appeals in the New Hampshire Supreme Court, practice pointers in assessing the limited scope of review on appeal and in preparing appeal petitions, and advice on putting together the record on appeal. Also covered are the grounds and procedure for obtaining a stay of an administrative decision pending appeal, the law concerning costs and attorney's fees in administrative appeals and special statutory administrative review mechanisms.

4.2 AVENUES OF REVIEW OF ADMINISTRATIVE AGENCY DECISIONS: STATUTORY AND NON-STATUTORY.

4.2.1 RSA Chapter 541: Rehearings and Appeals in Certain Cases.

a. Procedural Statute. RSA Chapter 541 establishes uniform procedural requirements for taking an appeal to the New Hampshire Supreme Court from an order or decision of an administrative agency ("commission") when a right of appeal is "authorized by law," i.e. is specifically authorized by a separate statute, usually the agency's enabling legislation. RSA Chapter 541 cannot be invoked to create a right of appeal if none is provided for in an agency's enabling statute. Petition of Dondero, 94 N.H. 236 (1947).

b. Meaning of "Commission." RSA Chapter 541 uses the term "commission" rather than "agency." "Commission" is broadly defined as "the public

 Copyright © NH Bar Association

utilities commission, the milk sanitation board, or any state department or official concerning whose decision a rehearing or appeal is sought in accordance with the provisions of this chapter." (Emphasis added.) RSA 541:1.

Listed below are some of the major agencies for which RSA Chapter 541 appeals are authorized:

1. Public Utilities Commission - RSA 365:21;
2. Personnel Appeals Board - RSA 21-I:58, II;
3. Department of Insurance - RSA 400-A:24;
4. Public Employee Labor Relations Board - RSA 273-A:14;
5. Board of Land and Tax Appeals - RSA 71-B:12;
6. Workers' Compensation Appeals Board - RSA 281-A:43, I(c); and
7. Housing Appeals Board – RSA 679:15.

Not every order or decision issued by these agencies, however, is necessarily appealable under RSA Chapter 541; the enabling statute for each agency should be reviewed carefully to determine the circumstances under which an appeal is available. See, e.g., RSA 329:17, VIII (authorizing appeals pursuant to RSA 541 of disciplinary or nondisciplinary remedial action by Board of Medicine but not licensing decisions). See also Appeal of Doe (Bd. of Med.), 2025 N.H. 13, P8 (March 18, 2025) (statutory limitation to disciplinary or nondisciplinary remedial action precludes review pursuant to RSA chapter 541 of board's refusal to remove from its website documents relating to a license suspension that led to a voluntary license surrender).

c. Meaning of "Order" or "Decision" in RSA 541:2. When authorized by law, "any order or decision" of the agency may be appealed under RSA Chapter 541. RSA 541:2.

The terms "order" and "decision" are not defined in RSA Chapter 541. One should examine the statute authorizing an RSA Chapter 541 appeal to determine which agency orders or decisions are appealable. In addition, RSA 541-A:35 concerning the requirements of a final decision or order in a contested case should also be considered. Under that provision, a final decision must include findings of fact and conclusions of law, separately stated in writing or on the record. See In re

 Copyright NH Bar Association

Support Enforcement Officers I & II, 147 N.H. 1, 9 (2001); Appeal of City of Nashua, 138 N.H. 261, 263-64 (1994); Petition of Sprague, 132 N.H. 250, 264-65 (1989); Petition of Contoocook Valley Paper Co., 129 N.H. 528, 531 (1987). This requires an agency to do more than summarize the evidence and describe the parties' opposing views. Appeal of Nashua, 138 N.H. at 263.

There is no provision under RSA Chapter 541 for interlocutory appeal or review; therefore, one must rely on some other specific statute allowing such review or proceed by extraordinary writ. In exceptional circumstances, injunctive relief may be sought from the superior court. New Hampshire Department of Environmental Services v. Mottolo, 155 N.H. 57, 63 (2007); Thompson v. N.H. Bd. of Medicine, 143 N.H. 107 (1998).

d. Exclusive Remedy. The Supreme Court has ruled that the method specifically provided by statute for judicial review of determinations of an administrative agency is ordinarily exclusive. See RSA 541:22. The Court seldom permits use of any other procedural device, such as a writ of mandamus or petition for certiorari, if an appeal under RSA Chapter 541 is available. See Nashua v. Public Utilities Comm'n, 101 N.H. 503 (1959). However, a party may seek injunctive relief from the superior court prior to entry by an agency of a final judgment in exceptional circumstances, such as when a party raises a due process violation that fundamentally impedes the fairness of the agency proceedings. See Thompson v. N.H. Bd. of Medicine, 143 N.H. 107 (1998).

 Copyright © NH Bar Association

4.2.2 **Special Appeal Mechanisms From Specific Administrative Agencies.**

See Section 4.10, infra, for a discussion of the special appellate procedures which are established by statute for certain State and local agencies but which are not governed by RSA Chapter 541.

4.2.3 **Writ of Certiorari: A Non-Statutory Remedy.**

If no statute authorizes an appeal from an agency determination, or if the agency enabling statute limits the persons or scope of issues on appeal, the appropriate method of obtaining judicial review of agency action is by petition for writ of certiorari. Certiorari exists to remedy error "when the substantial ends of justice require such relief." Melton v. N.H. Personnel Comm'n, 119 N.H. 272 (1979). In such circumstances, the Court views itself as a "superintending power," deriving its authority from its supervisory role over the administration of justice. Id. at 277; Supreme Court Rule 11(1). See, e.g., In re McKerley Health Facilities, 145 N.H. 164 (2000) (petition for writ of certiorari proper method to challenge decision of Department of Health and Human Services Administrative Appeals Unit where no statutory appeal right); Appeal of Tamm, 122 N.H. 646 (1983) (remand to N.H. Personnel Commission as appropriate forum for hearing on dismissal of probationary employee; appellate review only available by way of petition for writ of certiorari); Appeal of Hollingworth, 122 N.H. 1028 (1982) (no statutory right of appeal from Public Utilities Commission Chairman's assessment of costs; therefore treated as petition for writ of certiorari); Taylor v. Ballot Law Commission, 118 N.H. 671 (1978) (absent statutory right of appeal decision of Ballot Law Commission, Court can correct errors of law and other abuses by writ of certiorari); Tasker v.

 Copyright © NH Bar Association

New Hampshire Personnel Commission, 115 N.H. 204 (1975) (appeal from denial of promotions not authorized by RSA 98:15; therefore, certiorari proper remedy).

In In re Petition of Whitman Operating Co., 174 N.H. 453, 458-459 (2021), the Court rejected a contention that certiorari review is available only when an administrative body acts in a judicial or quasi-judicial capacity. Observing that it had not previously so limited certiorari review, prior decisions having allowed some expansion of the conventional scope of the writ of certiorari, the Court explained that the question is less the form of the petition than whether there is an error correctable by the court, and concluded that certiorari review is available in this case because there is no statutory right of appeal and otherwise the administrative decision would be unreviewable.

In addition, certain matters of public importance requiring expeditious resolution may be appropriate for review by certiorari. For example, certiorari was determined to be an appropriate vehicle for review of questions relating to the nature of the powers granted to and the obligations imposed upon the former State Tax Commission. Hampton v. Marvin, 105 N.H. 34 (1963). When no appeal is authorized by law, the Supreme Court may treat an attempted appeal as a petition for writ of certiorari entitling the petitioner to the limited review possible under such writ. See, e.g., Petition of Lorden, 134 N.H. 594 (1991); Appeal of Hollingworth, 122 N.H. 1028 (1982); Winn v. Jordan, 101 N.H. 65 (1957).

4.2.4 **Other Extraordinary Relief.**

In addition to certiorari, both the Superior Court and the Supreme Court have jurisdiction to issue writs of prohibition and mandamus and to award

 Copyright © NH Bar Association

declaratory relief. All may be appropriate means of obtaining judicial review of administrative proceedings under limited circumstances. RSA 490:4; RSA 491:7; Supreme Court Rule 11. See Section 4.9 for further discussion of these extraordinary methods of seeking review.

4.3 PREREQUISITES TO APPEAL: EXHAUSTION OF ADMINISTRATIVE REMEDIES.

4.3.1 RSA Chapter 541 Appeals.

a. Requirement of Motion for Rehearing. Prior to taking an RSA Chapter 541 appeal to the New Hampshire Supreme Court, the appealing party must have filed a motion for rehearing with the agency, and the agency must have acted upon the motion. RSA 541:3-5; see Supreme Court Rule 10(1); Appeal of Manchester School District, 2017 WL 6629239 at *2 (2017); Appeal of SAU #16 Coop. School Bd., 143 N.H. 97 (1998) (motion to reconsider ruling of PELRB hearing officer does not satisfy requirement that motion for rehearing of PELRB decision be filed). RSA 541:4 is explicit in its requirement that "[n]o appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing." When a decision on an issue is reversed on rehearing, the newly losing party must apply for a further rehearing to satisfy the requirement. Appeal of White Mts. Educ. Ass'n., 125 N.H. 771, 775 (1984); See RSA 541:6.

b. Standing to File Motion. To have standing to appeal an administrative agency decision to the Court, a party must demonstrate that its rights may be directly affected by the decision, or in other words, that it has suffered or will suffer an injury in fact. In re: Union Telephone Co, 160 N.H. 309 (2010). As provided by RSA 541:3, any party to the agency action or proceeding or any person "directly affected" thereby, may apply for a rehearing. The general test for standing is whether the complaint alleges that the complainant suffered injury in fact. In re

 Copyright © NH Bar Association

Londonderry Neighborhood Coalition, 145 N.H. 201 (2000); Appeal of Richards, 134 N.H. 148 (1991); New Hampshire Bankers Ass'n v. Nelson, 113 N.H. 127 (1973). See also Rochester School Board v. N.H.P.E.L.R.B., 119 N.H. 45 (1979) (school board lacks standing to appeal because it failed to appear at rehearing it requested.)

c. Purpose of Motion for Rehearing. The purpose of a motion for rehearing before an agency is to "direct `attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested.'" Dumais v. N.H. Personnel Comm'n, 118 N.H. 309, 311 (1978) quoting Lambert Constr. Co., Inc. v. State, 115 N.H. 516, 519 (1975). Stated alternatively, "administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing them." Appeal of White Mountains Educ. Ass'n, 125 N.H. 771, 774 (1984).

d. Subject of Motion for Rehearing. The motion for rehearing may be made with respect to "any matter determined in the action or proceeding, or covered or included in the order." RSA 541:3.

e. Form and Content of Motion for Rehearing. The motion should be properly styled as a "Motion for Rehearing" and follow the general form of a motion, Cumberland Farms Northern, Inc. v. Pierce, 104 N.H. 489 (1963), rather than submitted in letter form. The motion must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. This requirement of inclusiveness is critically important since "[n]o appeal from any order or decision... shall be taken..." on grounds other than those included in the motion for rehearing, "unless the court for good cause shown shall allow the appellant to specify additional grounds." Id.; Appeal of Matthews, 136 N.H. 221 (1992); Appeal of Richards, 134 N.H. 148 (1991).

 Copyright © NH Bar Association

Thus, the motion for rehearing is both a procedural precondition to the appeal petition and a substantive limitation on the content of the appeal petition. For this reason, it is important that the practitioner coordinate the motion for rehearing and the petition. Accordingly, one must be prepared to re-examine the record of the agency proceedings, and to perform sufficient legal research to determine all possible grounds for appeal before preparing the motion.

f. Timing. Under RSA 541:3 a motion for rehearing must be filed within **30 days** after any order or decision. RSA 541:3. Petition by writ of certiorari is not available to cure an appeal that is otherwise defective where statutory time limits for filing a motion of rehearing are exceeded. See Appeal of Carriveau, 157 N.H. 122 (2008); In Re Petition of McHale, 120 N.H. 450 (1980).

g. Agency Action on Motion for Rehearing. RSA 541:5 requires an agency to act on a motion for rehearing within 10 days of filing. Unless a delay in action on the motion results in material prejudice to the complaining party, however, the agency's decision will ordinarily not be set aside if the agency fails to act within the required time frame. Appeal of Boston & Maine Corp., 126 N.H. 360 (1985). RSA 541:3 provides that the agency may grant a rehearing if, in its opinion, "good reason" is stated in the party's motion. See, e.g., Dumais v. N.H. Personnel Comm'n, 118 N.H. 309 (1978) (Court remanded case determining that Commission erred in failing to find good reason existed to grant rehearing); O'Loughlin v. N.H. Personnel Comm'n, 117 N.H. 999 (1977) (Court affirmed Commission's determination that no good reason existed for granting new hearing). See also RSA 541:3.

Instead of granting or denying the motion for rehearing, the agency may also suspend the administrative order or decision pending further consideration, and may set terms or conditions for the suspension. RSA 541:5.

 Copyright © NH Bar Association

4.3.2 **Certiorari Appeal.**

a. Exhaustion of Administrative Remedies. To proceed by petition for writ of certiorari, it is not necessary to apply to the agency for reconsideration of its order or decision, unless a specific statute so requires. Provided the agency considers its determination to be final, a party may proceed to file the petition. See Appeal of Golding, 121 N.H. 1055 (1981). Even if a party erroneously moves for rehearing or reconsideration of such a decision, however, the Supreme Court has held that under certain conditions a subsequent certiorari petition may still be filed. See Petition of Ellis, 138 N.H. 159 (1993). A certiorari petition may be dismissed, however, if the Court determines that the petitioner has an appropriate remedy in some other forum. See Petition of Milan School District, 123 N.H. 227 (1983).

b. Standing. The Supreme Court has held that standing to petition for certiorari should be liberally granted to any party whose rights may be directly affected by the decision of an administrative agency, in order to allow challenges to decisions that would otherwise escape review. See Melton v. N.H. Personnel Comm'n, 119 N.H. 272 (1979).

4.4 TIME TO COMMENCE APPEAL TO SUPREME COURT.

4.4.1 **RSA Chapter 541 Appeal**.

An appeal petition must be filed in the Supreme Court within 30 days after the motion for rehearing is denied, or if the motion is granted, then within 30 days after the decision on rehearing. RSA 541:6; Appeal of Concord Natural Gas Corp., 121 N.H. 685 (1981). Note that as stated in Section 4.31 Subsection a., supra, if the administrative agency reverses itself on rehearing, the newly losing party must file a motion for rehearing before pursuing appellate remedies set forth in RSA 541:6. The 30 day time period established in RSA 541:6 runs from the date the decision is issued, not the date the decision is received.

 Copyright © NH Bar Association

4.4.2 **Certiorari Review.**

Because there is no statutory provision setting a time limit for filing a petition for certiorari, the petition must be filed within a "reasonable" time. The Supreme Court will use as a guideline an analogous statutory appeal period, and in the absence of any legislative guideline, will look to all the facts and circumstances and determine whether the petitioner is guilty of unreasonable delay. See Wilson v. N.H. Personnel Comm'n, 117 N.H. 783 (1977); Appeal of Golding, 121 N.H. 1055 (1981) (each finding 30 day time periods to be "reasonable"). The 30-day time period for filing administrative appeals under RSA 541:6 can now be said to be equally applicable to petitions for writ of certiorari seeking review of administrative decisions where no statutory right to appeal exists. See King v. Hanover, 139 N.H. 752 (1995); Wentworth-Douglas Hosp. v. N.H. Dept. of Health & Welfare, 131 N.H. 364 (1988).

The New Hampshire Supreme Court has accepted petitions filed more than 30 days after the agency order issued when parties erroneously filed motions for rehearing and petitions for certiorari 30 days after the agency order disposing of those motions. Petition of Ellis, 138 N.H. 159, 160 (1993). Certiorari, however, has not been permitted to be used as a means to review agency actions when the applicable appeal period has run. Forrest v. N.H. Personnel Comm'n, 116 N.H. 203 (1976).

4.5 PROCEDURE TO COMMENCE APPEAL.

4.5.1 **Commencement of RSA Chapter 541 Appeal: The Appeal Petition**

a. Form of Petition. The proper form of an RSA Chapter 541 appeal petition is outlined in Rule 10(1) of the Supreme Court Rules.

b. Function of Petition. The practitioner should note that the very first provision of Supreme Court Rule 10 authorizes the Supreme Court, in its discretion, to "decline to accept an appeal, or any question raised therein, from an order of an

 Copyright © NH Bar Association

administrative agency, or [to] summarily dispose of such an appeal, or any question raised therein, as provided in rule 25." To increase the chances of the Supreme Court accepting the appeal, the appeal petition should set out, in a comprehensible way, the nature of the dispute and the theory of administrative error. The petition should also emphasize the reasons, outlined in Rule 10, why the Supreme Court should exercise its discretion and accept the appeal.

As a practical matter, the appeal petition should be concise and readable, giving the Court the information it needs to understand the questions presented for review. The petition should also serve as a convenient reference source for the provisions of law governing the case and the particular documents at issue.

c. Content of Petition: Statutory Requirements. The appeal petition "shall state briefly the nature of the proceeding before the commission, and shall set forth the order or decision complained of, and the grounds upon which the same is claimed to be unlawful or unreasonable upon which the petitioner will rely in the supreme court." RSA 541:7.

Supreme Court Rule 10 elaborates on these requirements and provides that the petition should contain the following elements, in the order listed. More detail regarding these requirements is set forth in Rule 10, and careful attention should be paid to it.

1. Names. The names of the parties seeking review and the names of all other parties of record. Addresses should also be included as should the names and addresses of all counsel including NH Bar identification numbers;

2. Findings and Order. A copy of the agency's findings and rulings, and a copy of the order sought to be reviewed, a copy of the motion for

 Copyright © NH Bar Association

rehearing, all objections, and a copy of the order on the motion for rehearing. The petition and any appendix must contain a table of contents;

3. Questions for Review. A specification of the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. Questions omitted or not fairly comprised within the questions presented will not be considered by the Court;

4. Constitutions, Statutes, Rules. Applicable constitutional, statutory or regulatory provisions should be presented verbatim and with proper citation. If these provisions are lengthy, their citations may be included in the petition and the text attached to it or, if longer than 5 pages, filed as a separate appendix with a table of contents;

5. Documents. The provisions of insurance policies, contracts or other documents involved in the case, set out verbatim. Again, lengthy documents may be attached or, if more than 5 pages, filed in an appendix with a table of contents;

6. Statement of Case. A concise statement of the case with appropriate reference to material facts;

7. Jurisdiction. A statement of the jurisdictional basis for the appeal; that is, the underlying statute authorizing an RSA Chapter 541 appeal, with citation to appropriate authority;

8. Statement of reasons for acceptance. A direct and concise statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect

 Copyright © NH Bar Association

a party from substantial and irreparable injury, or present the opportunity to decide, modify, or clarify an issue of general importance in the administration of justice; and

9. Preservation of issues. A statement certifying that all issues raised have been preserved for appellate review. Supreme Court Rule 10 (1).

10. The Record on Appeal. The order sought to be reviewed or enforced, the findings and rulings, or the report on which the order is based, and the pleading, evidence and proceedings before the agency constitute the record on appeal. Supreme Court Rule 10 (2). The moving party is required initially to bear the full, reasonable cost of preparing a transcript for inclusion in the record. Appeal of City of Manchester, 149 N.H. 283, 290 (1999). To request that a transcript be prepared and included in the record on appeal, the moving party should consult the administrative agency's regulations and/or RSA 541-A:31. Unless the moving party requests that a transcript be prepared, no transcript will be prepared for inclusion in the record. Absent a transcript of the proceedings below, the Supreme Court will generally assume that the evidence was sufficient to support the result reached by the administrative agency. If the appealing party fails to ensure that a transcript is prepared, the Supreme Court may not review issues that the appealing party has raised. *Cf*. Bean v. Red Oak Prop. Mgmt., 151 N.H. 248 (2004). The administrative agency is required to file the record with the clerk of the

 Copyright © NH Bar Association

Supreme Court as early as possible within 60 days after it receives the order of notice. The original papers in the agency proceeding or certified copies may be filed. RSA 541:11 permits the agency to bill the appealing party for the cost of certifying the record at a flat rate per page.

The parties may designate by stipulation filed with the clerk of the Supreme Court that no part, or that only certain parts, of the record shall be filed with the court. If any material is omitted from the record by error or accident or is misstated in the record, the parties by stipulation may provide, or the Supreme Court on motion or on its own initiative may direct, that the omission or misstatement be corrected and, if necessary, a supplemental record be prepared and filed. In lieu of the record, the parties may prepare and sign a statement of the case showing how the questions of law transferred arose and were decided, setting forth only so many of the facts as are essential to a decision of the questions presented. Supreme Court Rule 10 (2). d. Notice of the Appeal Petition. The appealing party is responsible for serving a copy of the appeal petition and any appendix to "all parties or opponents below as well as the agency involved and the attorney general." Supreme Court Rule 10(8). A certificate of compliance that notice has been properly given must be filed with the Supreme Court within three days after the docketing of the appeal. Id.

 Copyright © NH Bar Association

e. Cross Appeal. If a timely appeal is filed, any party may file a cross appeal within 10 days, provided that the party must have timely filed any required motion for rehearing with the administrative agency.

4.5.2 Commencement of Review by Certiorari.

a. Petition Form: Applicability of Supreme Court Rules. In an appeal by certiorari from the decision of an administrative agency, both Supreme Court Rule 10 ("Appeal from Administrative Agency") and Rule 11 ("Petition for Original Jurisdiction") should be consulted.

b. Function of Petition. The Court will grant certiorari "only when there are special and important reasons for doing so." Supreme Court Rule 11. These "important reasons" may include, for example, issues of first impression and agency proceedings which depart from usual, accepted practice. The petition must include sufficient documentation and argument to persuade the Supreme Court that this threshold level of importance has been met.

c. Contents of Petition. The contents of the petition are specified in Supreme Court Rule 11. In addition to the items listed in Supreme Court Rule 10, detailed above, Supreme Court Rule 11 requires the following:

1. A concise statement specifying the stage of the proceedings in the trial court or administrative agency at which the questions sought to be reviewed were raised, the manner in which they were raised, and the way in which they were passed upon by the trial court or administrative agency;

 Copyright © NH Bar Association

2. A direct and concise argument amplifying the reasons relied upon for petitioning this court to exercise its original jurisdiction and setting forth why the relief sought is not available in any other court or cannot be had through other processes;

3. The jurisdictional basis for the petition, citing the relevant statutes or cases;

4. A statement, if applicable, that every issue specifically raised has been presented to the trial court or administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading;

5. A list of all parties of record and their counsel, the addresses of all parties and counsel, and the New Hampshire Bar identification numbers of counsel for the moving party;

6. A statement as to whether a transcript of any proceedings will be necessary if the petition is accepted for further review by the court. If a transcript will be necessary if the petition is accepted, then the petition shall also contain a Transcript Order Form. Supreme Court Rule 11 (2).

Supreme Court Rule 11(3) specifically admonishes that "[t]he failure of a petition to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Rule 11 prohibits filing a separate brief in support of the petition and the Court will not consider one if filed. Moreover, the petition must contain the regulations, documents and other matters which may be

 Copyright © NH Bar Association

necessary to convince the Court to exercise its original jurisdiction. The provisions of Supreme Court Rule 10, which specify the way in which the parties may designate portions of the record and correct omissions or misstatements, should be followed in preparing the petition.

d. Multiple Cases With Closely Related Questions. If several cases involve identical or closely related questions, a single petition covering all the cases will suffice. Supreme Court Rule 11(4).

e. Notice to Parties and Agency. The moving party must serve copies of the petition to all "parties or opponents below" and to the administrative agency and, again, to the attorney general if the action is against the State. The petitioner must file a "certificate of compliance" listing the names and addresses of the persons served within three days of the date the petition is docketed in the Supreme Court. Supreme Court Rule 11(5).

f. Supreme Court Authority to Deny Petition or Require Answer. Under Rule 11, the Supreme Court may, in its discretion, deny the petition outright, accept and schedule for briefing, with or without oral argument. The Court may grant the petition and issue an order requiring that the petition be answered within a fixed time. Two or more parties may answer the petition jointly. If the petition for certiorari is granted, briefing and argument may occur in the same manner as an appeal accepted under RSA 541.

RSA 541:11 permits the agency to bill the appealing party for the cost of certifying the record at a flat rate per page.

 Copyright © NH Bar Association

g. Distinction between "Record on File" and "Record on Appeal".

Notwithstanding the failure to file certain portions of the record, the entire record of the agency's proceedings, whether filed or not, is a part of the record on appeal. Supreme Court Rule 10(6). However, while the Supreme Court may request that additional portions of the agency record be filed in its effort to resolve the appeal, it will not ordinarily review any part of the record that has not been provided to it in an appendix by a party or transmitted to it by the administrative agency. Supreme Court Rule 13(3). The moving party is responsible for ensuring that all parts of the record relevant and necessary for the Court to decide the appeal are in fact provided to the Supreme Court. Rule 13(2).

4.5.3 **Parties to the Appeal**.

Any person or corporation whose rights may be directly affected by the appeal may appear and become a party. RSA 541:8. The Supreme Court has the power to order the joinder of additional persons and corporations "as justice may require." Id. Persons and corporations joined by order of the Court shall be given "[s]uch notice as the court may order." RSA 541:10.

The Supreme Court has ruled that the administrative agency should not be named as a party defendant, except in "special and extraordinary circumstances." Appeal of Manchester Gas Co., 129 N.H. 800, 802 (1987); Melton v. N.H. Personnel Comm'n, 119 N.H. 272, 278 (1979). The Court's concern was the "impropriety of calling upon the (agency) to appear as defendants, presumably to defend their action," where the issues on appeal can be adequately addressed by the parties to the agency proceedings. Melton, 119 N.H. at 278. The same rule is

 Copyright © NH Bar Association

applicable to an appeal taken by way of a petition for writ of certiorari. Id. The proper method of captioning all RSA chapter 541 appeals is "Appeal of _____" with the name of the agency appealed from in parentheses underneath. For example:

Appeal of John Doe

(New Hampshire Personnel Appeals Board)

Although this method of captioning results in the omission of the names of some or all parties to the appeal, as when an agency or an intervenor is the appealing party, the Court has determined this to be the proper procedure. Petitions for writ of certiorari arising from administrative decisions should be captioned in a similar matter, except that rather than "Appeal of _____," the caption should be "Petition of _____."

4.6 SCOPE OF REVIEW.

4.6.1 **RSA Chapter 541 Appeal.**

a. Burden of Proof. The burden of proof on appeal "shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful." RSA 541:13. The party seeking to set aside the administrative order has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unlawful or unreasonable. In re: Union Telephone Co, 160 N.H. 309 (2010); Appeal of Dube, 138 N.H. 155 (1993).

b. Review Standard. Appealable issues are limited to errors of law or evidence that the order is clearly unjust or unreasonable. RSA 541:13. The Supreme Court thus has plenary authority to review and correct errors of law. Where no such error of law exists, however, an administrative decision may be overturned on its merits only if found to be unjust or unreasonable. In re: Lowy (NH

 Copyright © NH Bar Association

Dept. of HHS), 156 N.H. 57 (2007); Appeal of Stetson, 138 N.H. 293 (1994). When the issues presented on appeal implicate provisions of the state constitution, the Supreme Court will undertake a more intensive review. Appeal of Incorp's of Manchester Sav's Bank, 120 N.H. 129 (1980).

c. Agency Factual Findings. "[A]ll findings of the commission upon all questions of fact properly before it" are deemed "prima facie lawful and reasonable." RSA 541:13. Such factual findings will not be scrutinized or overturned on appeal provided the record contains some credible evidence to support them.

Note, however, that this presumption will not apply if the agency's findings are wholly conclusory and lacking in any specificity. In such circumstances, the Court has indicated that it will not comb lengthy administrative records in search of evidence which might support a conclusory agency finding. See Appeal of Portsmouth Trust Co., 120 N.H. 753, 760 (1980). “Rather, the administrative agency must include specific, though not excessively detailed, basic findings in support of the ultimate conclusions which in turn support the action of the administrative agency.” Id.; see also Appeal of Nashua, 138 N.H. 261, 263-64 (1994) (“[W]hen the board structures its decision solely by summarizing evidence presented by the contending parties and describing the parties’ opposing views without making specific factual findings in support of its own conclusions, it fails to meet its statutory obligation to make ‘a concise and explicit statement of the underlying facts supporting [its] findings.” (citation and quotation omitted)). The presumption of reasonableness may be overcome if the record below contains no evidence to sustain the order. Appeal of Granite State Electric, 121 N.H. 787 (1981).

d. Scope of Evidence Considered on Appeal. RSA 541:17 provides that "[a]ll evidence transferred by the commission shall be considered by the court

 Copyright © NH Bar Association

regardless of any technical rule which might have rendered the same inadmissible if originally offered in the trial of an action at law." RSA 541:17. Because administrative agencies are not bound by the technical rules of evidence, the Supreme Court need not limit its appellate consideration of the evidence to that which would be admissible at trial. See Appeal of McKenney, 120 N.H. 77, 81 (1980).

e. Application of the Review Standard by the Court.

1. Factors Promoting Deferral to Agency Decisionmaking. In preparing appeal documents, remember that administrative agencies typically function in areas of high specialization and broad public policy concerns. The Court is likely to defer to the agency's decision if it views the issue as committed to agency expertise or, alternatively, as one involving a discretionary public policy determination within the agency's jurisdiction.

Every effort should, therefore, be made to present your appeal as an agency error of law or procedure rather than as an unfair or unreasonable exercise of discretion. See, e.g., N.H. - VT Health Serv. v. Comm'n. of Ins., 122 N.H. 268 (1982) (rate making determination successfully presented as question of law).

2. Examples of Court Deference to Agency Expertise. The following are instances where the Court has deferred to an agency decision, in whole or in part, because of an agency's particular expertise. In Appeal of Gamas, 138 N.H. 487, 492 (1994), the Court not only affirmed the Compensation Appeals Board's determination, but reiterated its long history of respect and deference to administrative boards. In the area of ratemaking, the Court has recognized that specialization is required and that the judiciary must rely on the agency's expertise. See Appeal of Gas Service, Inc., 121 N.H. 797

 Copyright © NH Bar Association

(1981) (gas utility's request for tariff change denied); Appeal of Nationwide Ins. Co., 120 N.H. 90 (1980) (auto insurer's request for rate increase).

The Court has also noted the particular expertise of the Water Supply and Pollution Control Commission to determine a timetable for waste treatment, Appeal of Town of Goffstown, 121 N.H. 999 (1981); the expertise of the Public Utilities Commission to determine appropriate accounting rules for calculating rate base, Appeal of the City of Nashua, 121 N.H. 874 (1981); and the expertise of the Department of Public Works and Highways to determine and characterize highway routes of travel, Appeal of National Advertising Co., 122 N.H. 1058 (1982).

3. Examples of Court Deference to Agency Determination of Public Policy. The Court has also recognized numerous public policy areas largely committed to agency discretion. These include: decisions of the Public Utilities Commission as to what constitutes "public convenience and necessity," Appeal of McKenney, 120 N.H. 77 (1980); O'Neil v. Public Util. Comm'n, 119 N.H. 930 (1979); and decisions of the Public Employee Labor Relations Board defining the basic terms of labor-management relations, Appeal of Watson, 122 N.H. 664 (1982); Appeal of AFL-CIO Local 298, 121 N.H. 944 (1981); In re Nashua Ass'n of School Principals, 119 N.H. 90 (1979). But see Appeal of State of N.H., 138 N.H. 716, 720 (1994) (court abandons policy of deferring to PELRB on issues of law).

4. Examples of Reversible Agency Error. Reversible agency error occurs when an agency fails either to interpret correctly a controlling statute or regulation, or fails to follow proper procedure.

Reversible errors of law are extremely varied and defy categorization, examples include: the Personnel Commission's failure to interpret a Laconia State School regulation according to its plain meaning, In re Wayne H.

 Copyright © NH Bar Association

Brock, 121 N.H. 662 (1981); a PELRB finding of an unfair labor practice in the absence of any collective bargaining agreement, Bouchard v. Rochester, 119 N.H. 799 (1979); and a Public Utilities Commission expense assessment for a matter not involving the regulation of utilities, Appeal of Ass'n. of N.H. Utilities, 122 N.H. 770 (1982).

In addition, examples of prejudicial procedural error which can lead to reversal of a resulting decision include: agency failure to provide proper notice of its procedures to the public and directly affected persons, Appeal of Behavior Science Institute, 121 N.H. 928 (1981); agency failure to proceed with a quorum of commissioners, P.F. Avery Corp. v. N.H. Comm. for Human Rights, 122 N.H. 954 (1982); and agency predetermination of facts, Appeal of Lathrop, 122 N.H. 262 (1982). Importantly, the Court has determined that, where a contested case (see RSA 541-A:1, IV) turns on issues of credibility, due process requires that all fact finding members be physically present for the testimony of the parties. Petition of Grimm, 138 N.H. 42 (1994).

f. Provision for Remand and Additional Evidence. RSA 541:14 provides that new or additional evidence will be allowed only if justice requires "the reception of evidence of facts which have occurred since the hearing, or which by reason of accident, mistake or misfortune could not have been offered before the commission. . . ." RSA 541:14; see Appeal of Easton, 125 N.H. 205, 213 (1984). The agency must consider such additional evidence and then may modify its order or decision. Upon receipt of such evidence, the agency may alter, modify, amend or rescind the order or decision appealed from and shall report its action to the Court within 20 days. RSA 541:15.

 Copyright © NH Bar Association

The Supreme Court has held that, when a case is remanded, the agency must adhere scrupulously to the terms of the remand as set by the Court. Scarborough v. R.T.P. Enterprises, 120 N.H. 707 (1980).

4.6.2 **Certiorari Petition.**

a. Limited Scope of Certiorari Review. The traditional formulation of certiorari review is that the petitioner must show agency conduct or action which is: 1) illegal with respect to jurisdiction, authority, or observance of law, or an unsustainable exercise of discretion; or 2) action that is arbitrary, unreasonable or capricious. Appeal of Hollingworth, 122 N.H. 1028, 1032 (1982). See also, State v. San Giovanni (In re State), 154 N.H. 671 (2007).

It is not uncommon for certiorari review to be characterized as more limited than review pursuant to statutory authority. The standard, however, for RSA Chapter 541 review is also somewhat limited, and the scope of review applied by the courts in both situations is, in actuality, quite similar. Compare Petition of Breau, 132 N.H. 351 (1989) with RSA 541:13; Petition of Donovan, 137 N.H. 78 (1993) (Court's standard of review for appeals brought under RSA 541 and by writ of certiorari "differs only slightly").

Certiorari petitions can also be filed in the Superior Court. The scope of review of the administrative action is the same in the Superior Court as in the Supreme Court. If the petition is originally filed in the Superior Court, however, review of the Superior Court's decision on appeal to the Supreme Court, "is limited further, to determining whether the trial court could reasonably have concluded as it did." Runde v. City of Concord, 128 N.H. 175, 177 (1986).

b. Application of the Review Standard by the Court. The patterns of deference to agency decision making on appeal and of reversible agency error in certiorari cases are similar to those in RSA Chapter 541 appeals. Deferral is likely when the situation is one involving discretion committed to the agency or agency

 Copyright © NH Bar Association

expertise. See, e.g., Appeal of Gamas, 138 N.H. 487 (1994); Appeal of MacEachran, 121 N.H. 1070 (1981). Reversible error derives generally from errors of law or procedure. Petition of Grimm, 138 N.H. 42 (1993); see Petition of Gorham School Bd., 121 N.H. 878 (1981); R.S. Audley, Inc. v. State, 119 N.H. 795 (1979). Moreover, a certiorari petition will be dismissed if the Court determines that the petitioner has an appropriate remedy in some other forum. See Petition of Milan School District, 123 N.H. 227 (1983).

For these reasons, it is important to draft the petition, to the extent possible, as one which presents issues of law or procedure, rather than challenging the merits of an agency's exercise of discretion.

4.7 EFFECT OF APPEAL ON ADMINISTRATIVE ORDER OR DECISION.

4.7.1 **RSA Chapter 541 Appeals.**

a. Necessity of Stay. Two provisions of RSA Chapter 541 make it clear that a party aggrieved by an administrative decision must affirmatively seek suspension of the decision if it is not to remain in full force and effect during an appeal. See RSA 541:5; RSA 541:18. Upon the filing of a motion for rehearing of an administrative decision, the agency shall, within 10 days, either grant or deny, "or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the [agency] may prescribe." RSA 541:5. Thus, the first permissible, and perhaps necessary, step is to seek suspension of the order by the agency itself as part of the required motion for rehearing. Some authority suggests, however, that an agency may also have statutory power to modify an ultra vires order on its own. See Meserve v. State, 119 N.H. 149 (1979).

In addition, RSA 541:18 expressly provides that "[n]o appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order

 Copyright © NH Bar Association

pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension. . . ." Thus, an appeal alone, without a specific request for suspension of the order which demonstrates the grounds upon which "justice requires" suspension, does not affect the operation of the existing administrative order. See Cumberland Farms Northern, Inc. v. N.H. Milk Control Board, 104 N.H. 364 (1963); Chicopee Mfg. Co. v. Company, 97 N.H. 553 (1952).

Supreme Court Rule 7-A provides that a motion to stay an order of a lower tribunal shall not be filed in the Supreme Court unless the movant has first unsuccessfully sought similar relief in the lower tribunal. In light of this rule and RSA 541: 5 and 18, a request for stay should accompany the request for rehearing if the moving party intends to seek a stay pending appeal. This requirement may be waived upon motion in extraordinary circumstances.

b. Grounds for Stay.

1. General Rule. The New Hampshire Supreme Court elaborated upon the permissible grounds for the granting of a stay under RSA 541:18 in Union Fidelity Life Ins. Co. v. Whaland, 114 N.H. 549 (1974). The Court stated that, given the presumption of reasonableness normally accorded to administrative orders, two conditions had to be met: the applicant must show: 1) that he will suffer "irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect[;]" and 2) that the harm to him outweighs the public interest in enforcing the order for the duration of the appeal. The Court stated that the mere fact that the decision may cause injury or inconvenience is insufficient. Id. at 550.

2. Practical Application. In Union Fidelity, supra, the Court denied a petition for stay pending appeal of the Insurance Commissioner's decision not to return an insurance company's license. Despite evidence

 Copyright © NH Bar Association

that the company might be subject to greater scrutiny in other states, the order only affected the company's new, as opposed to existing, business, and the Court determined that the company had failed to make a sufficient showing of irreparable harm. As to the balancing of interests, the Court ruled that the company should bear any burden imposed by the order since the Commission's purpose is to protect citizens from a company which is "presumptively not entitled" to public confidence until the appeal has been resolved in its favor. Union Fidelity, 114 N.H at 551. Suspension was denied for similar reasons in Tilton v. Boston & Maine Railroad, 99 N.H. 503 (1955) (order of PUC authorizing railroad to discontinue service to Tilton), and in Cumberland Farms Northern, Inc. v. N.H. Milk Control Board, 104 N.H. 364 (1963) (order revoking milk distributor's license).

A common course of action adopted by the Court, however, has been to grant a conditional or limited suspension. This compromise is particularly appropriate for PUC orders reducing or denying increases in rates, because RSA 541:18 specifically provides that such orders may be suspended only upon conditions which will allow the prompt repayment of any excess rates later found to exist. Thus, the Court has determined that the public's and the utility company's interests may best be served by a continuance of present rates subject to a bond to assure repayment of any excess collected by the company. Public Serv. Co. of N.H. v. State, 112 N.H. 348 (1972); Chicopee Mfg. v. Public Serv. Co. of N.H., 97 N.H. 553 (1952); New England Tel. & Telegraph Co. v. State, 97 N.H. 555 (1952). This provision is also specifically applicable to rate decisions of the Insurance Commissioner, permitting a similar conditional suspension. N.H. - Vt. Hosp. Serv. v. Whaland, 113 N.H. 461 (1973).

 Copyright © NH Bar Association

The Court has also compromised by granting suspensions subject to expedited appeal schedules where review of the merits is required to assess claims of irreparable damage and financial loss or where necessary to ensure that the rights of the litigants and the public will be adequately protected. See City of Concord v. N.H. Water Supply Comm'n, 115 N.H. 453 (1975) (order requiring city to cover water supply reservoir): N.H. Milk Dealers Ass'n. v. N.H. Milk Control Board, 107 N.H. 150 (1966) (order eliminating price controls).

c. Procedure for Obtaining Stay. Suspension of an administrative order where the movant has unsuccessfully sought a stay at the agency level should be sought by the filing of a motion for suspension of the order pursuant to RSA 541:18 simultaneous with or prior to the appeal petition. A copy of the motion to stay filed with the lower tribunal, objection and lower tribunal order on the motion to stay must accompany the motion filed in the Supreme Court.

4.7.2 **Decisions Reviewed by Petition for Certiorari.**

As stated above, suspension of an administrative order must be affirmatively sought, or the order continues in full force and effect. Although it may be asserted that the right to seek suspension of an order exists only as an incident to statutory appeal procedures, see Blanchard v. Boston & Maine R.R., 86 N.H. 263 (1933), the Court has, in one instance, suspended an administrative order pending review of questions raised in a petition for declaratory judgment by means of a petition for a writ of certiorari. New Hampshire Ins. Co. v. Duvall, 114 N.H. 719 (1974). In that case, although the applicants, insurance companies challenging an emergency regulation issued by the Commissioner of Labor, did not have the right to an appeal under RSA Chapter 541, the Court entertained and granted a request for suspension in the form of an original petition for writ of certiorari under RSA 490:4.

 Copyright © NH Bar Association

The Court applied the same analysis as that provided for RSA Chapter 541 appeals and suspended the order subject to an expedited review schedule.

4.7.3 **Specific Statutory Provisions.**

Certain statutory administrative appeal procedures contain specific provisions governing the effect of an appeal on the operation of the underlying administrative decision. This is most often the case when the avenue of appeal is neither the normal RSA Chapter 541 procedure nor a petition for certiorari, but instead requires the aggrieved party to resort to the Superior Court or to another administrative agency or tribunal. For example, RSA 277:32 provides that a decision of the Commissioner of Labor concerning safety and health of employees "shall be suspended" pending a petition for administrative review and "may be suspended by the superior court if justice requires" pending an appeal to the superior court. See also RSA 677:9 (appeals to the Superior Court relating to zoning orders or decisions). Thus, applicable statutory appeal provisions, particularly where the appeal procedure is unusual, should be consulted to determine the effect of an appeal on the administrative order and of procedures and grounds for seeking a stay of the order.

4.7.4 **Effect of Failure to Appeal.**

When an appeal is not taken under RSA 541:6, an agency order or decision is final and not subject to further challenge. See Appeal of SAU #21, 126 N.H. 95 (1985); Parsons v. Southern New Hampshire Hydro-Electric Corp., 85 N.H. 76 (1931). This is also the case for decisions reviewable by certiorari and by other specific mechanisms and is often made explicit by statute. See, e.g., RSA 275:51, V; RSA 277:28. The administrative decision may then become res judicata as to the essential issues decided. See Day v. N.H. Retirement System, 138 N.H. 120 (1993); Morin v. J.H. Valliere Co., 113 N.H. 431 (1973).

 Copyright © NH Bar Association

4.8 COSTS, INTEREST AND ATTORNEY'S FEES IN ADMINISTRATIVE APPEALS.

4.8.1 Costs.

a. General Rule. As a general rule, costs may not be assessed against the State, its agencies or officials and employees in the absence of specific statutory authorization. The rule is based on the State's immunity from suit or liability in the conduct of official government business in the absence of a specific legislative waiver of immunity. See RSA 99-D:1. The State may not be assessed for costs unless there is a specific waiver of immunity against costs, Hayes v. State, 109 N.H. 353 (1969), and the State is not deemed to have waived immunity unless it is express or by reasonable implication. State v. Peter Salvucci, 111 N.H. 259 (1971); Holte v. Rondeau, 105 N.H. 304 (1975).

Municipalities are not, however, beneficiaries of the doctrine of sovereign immunity to the same extent as the State. See Merrill v. Manchester, 114 N.H. 722 (1974); superseded by RSA 507:B.

b. Specific Statutes. The New Hampshire Supreme Court has consistently refused to apply the statute governing costs, RSA Chapter 525 (repealed by Laws 1989, 243:3, to be replaced by court rules), to the State in a long line of precedent beginning with State v. Kinne, 41 N.H. 238 (1860). See Ranger v. N.H. Youth Dev. Center, 118 N.H. 163, 165 (1978). In Ranger, a workers' compensation appeal, the Court also found RSA 281:37-a (now RSA 281-A:44) not to constitute a valid waiver because it did not specifically refer to costs.

Similarly, costs have been consistently denied in appeals from the New Hampshire Personnel Commission (now Personnel Appeals Board) on the basis that RSA 98:15 (now RSA 21-I:58) does not expressly refer to costs and presents no basis for reasonably implying a waiver of immunity. Foote v. N.H. Personnel Comm'n, 118 N.H. 640 (1978); Jeannont v. N.H. Personnel Comm'n, 118 N.H. 597

 Copyright © NH Bar Association

(1978). Similar reasoning has been applied to unemployment compensation appeals, Vincent v. N.H. Dept. of Employment Security, 115 N.H. 485 (1975), and to property tax abatement appeals under RSA 76:17 (Supp. 1997); Tau Chapter v. Durham, 112 N.H. 233 (1972).

In addition, RSA 490:14-a, which authorizes the award to a prevailing party of double costs when an appeal to the Supreme Court is found frivolous, immaterial or intended for delay, has been found inapplicable to claims against a State agency, Proulx v. N.H. Personnel Comm'n, 116 N.H. 311 (1976), but has been used against municipalities, Burrows v. Keene, 121 N.H. 590 (1981), and against a private employer in a workers' compensation appeal. Appeal of Cloutier Lumber Co., 121 N.H. 420 (1981).

4.8.2 **Interest.**

The rules governing costs apply in a similar way to the award of interest against the State. Jeannont v. N.H. Personnel Comm'n, 118 N.H. 597 (1978). RSA 490:14-a applies to interest awards in the same manner it applies to costs in frivolous appeals. See Proulx v. NH Personnel Comm'n, 116 N.H. 311 (1976).

4.8.3 **Attorney's Fees.**

a. General Rule. The traditional rule governing attorney's fees awards in the New Hampshire courts, in the absence of a specific authorizing statute, requires all litigants to pay their own attorney's fees. Leavitt v. Hamelin, 126 N.H. 670 (1985); Silva v. Botsch, 121 N.H. 1041 (1981). A court may only award attorney's fees when permitted by statute or under certain exceptional circumstances. Scheele v. Village District of Eidelweiss, 122 N.H. 1015 (1982). In the case of State agencies, as with costs and interest, sovereign immunity will similarly bar the award of attorney's fees unless there has been a specific legislative waiver of immunity from a fee request or unless the request falls within a court-made exception to the general rule of immunity.

 Copyright © NH Bar Association

b. Specific Statutes. RSA 281-A:44 (formerly RSA 281:37-a), referred to above in connection with interest awards, authorizes an award of attorney's fees to an employee in a workers' compensation appeal. See Ranger v. N.H. Youth Dev. Center, 118 N.H. 163 (1978) (decided under prior law). The statute does not, however, effect a waiver of the State's sovereign immunity, and, therefore, does not allow for an award of attorney's fees against the State. Id. at 165. The Supreme Court has construed RSA 275:53, III as authorizing the award of attorney's fees to claimants who bring successful wage claims before the department of labor pursuant to RSA 275:51. Attorney's fees may also be authorized by the same statute in appeals of such wage claims to the superior court. See Galloway v. Chicago-Soft, Ltd., 142 N.H. 752 (1998).

c. Court-established Grounds for Attorney's Fees Awards.

1. Bad Faith or Abuse of Power. A prevailing party may recover attorney's fees if forced to litigate to enforce "a clearly defined and established right" as a result of bad faith on the part of an administrative agency, Harkeem v. Adams, 117 N.H. 687 (1977); Indian Head Nat'l Bank v. Corey, 129 N.H. 83 (1986); or an attempted abuse of power, see Funtown U.S.A., Inc. v. Conway, 129 N.H. 352 (1987); Burrows v. Keene, 121 N.H. 590 (1981). If the citizen can characterize an agency's action as forcing an unnecessary or frivolous appeal or as arbitrary, capricious, wanton, or outside the scope of its authority and responsibility, the prevailing party may fall within the Harkeem and Burrows exceptions to the general prohibition

 Copyright © NH Bar Association

against the recovery of attorney's fees. See also Griffin v. N.H. Dept. of Employment Security, 117 N.H. 108 (1977).

2. Vindication of an Important Public Interest. If a prevailing private litigant against an administrative agency can show that an important benefit has been bestowed on the public, he or she may also be entitled to an award of attorney's fees under the public interest exception set forth in Silva v. Botsch, 121 N.H. 1041 (1981), and King v. Thomson, 119 N.H. 219 (1979). In Silva, a town planning board member successfully brought suit to retain his position, and was held to have conferred a public benefit in enforcing his statutory entitlement to the position. In King, a State official successfully defended his employment and was awarded fees, at least partially upon an implied legislative directive that attorney's fees be paid. See also Claremont School District v. Governor, 144 N.H. 590, 595-99 (1999) (holding that sovereign immunity does not bar an award of attorney's fees when it does not bar the underlying suit, and that vindication of important public interest justified award).

4.9 EXTRAORDINARY WRITS AS MEANS TO REVIEW ADMINISTRATIVE PROCEEDINGS.

4.9.1 Use of Extraordinary Writs.

Supreme Court Rule 11 specifies the form and content of a petition seeking the issuance of an extraordinary writ such as certiorari, mandamus, and prohibition. Under the Rule, these writs will only be granted in exceptional cases, such as when a lower court or administrative agency "has so far departed from the accepted or usual course of judicial or administrative proceedings as to call for an exercise of this court's power of supervision." Supreme Court Rule 11. The Supreme Court's

 Copyright © NH Bar Association

original jurisdiction to issue such extraordinary writs is not ordinarily exercised if the Superior Court has concurrent jurisdiction. Labelle v. Hancock, 99 N.H. 254 (1954); see also McMichaels v. Hancock, 110 N.H. 168, 169 (1970).

4.9.2 **Writ of Mandamus.**

The issuance of a writ of mandamus is extraordinary relief which may be granted in two instances under the case law. Mandamus will lie against an officer of the government to enforce the performance of a ministerial duty and to overturn the discretionary performance of an official function when the discretion is exercised arbitrarily or in bad faith. Guy J. v. N.H. Dept. of Education, 131 N.H. 742 (1989); Guarracino v. Beaudry, 118 N.H. 435 (1978). It is available, however, only when there is a clear and apparent right to the relief requested and when no other adequate relief is available. Guarracino, supra; State Employees Ass'n v. Lang, 119 N.H. 637 (1979).

As a matter of practice, the New Hampshire Supreme Court awards relief by mandamus sparingly. If the official's action involves any degree of discretion, mandamus will be denied unless proof of bad faith or arbitrariness is clear. In Guarracino supra, the Court denied the writ, sought by the administratrix of an estate to force a medical referee to change his determination that the decedent had committed suicide, on the grounds that the decision required discretionary evaluation of facts and that sufficient proof of bad faith had not been offered. Guy J. v. N.H. Dept. of Education, 131 N.H. 742 (1989). Similarly, in Bois v. Manchester, 104 N.H. 5 (1962), mandamus did not lie to force a city building official to order a private party to cease altering certain business premises, because the governing statutes vested the official with the discretion to determine the occurrence of code violations and the party had failed to adduce proof of arbitrariness or bad faith. The Court also noted the existence of a remedy by appeal to the zoning board. See also Colby v. Broderick, 96 N.H. 316 (1950).

 Copyright © NH Bar Association

Finally, mandamus has been denied on the basis that it is unnecessary because "when the law is well settled it will be obeyed." Brouillard v. Governor and Council, 114 N.H. 541 (1974). For example, the Court has denied a petition for writ of mandamus to require the Insurance Commissioner to perform annual rate review required by statute on that basis. N.H.-Vt. Health Serv. v. Comm'n of Ins., 122 N.H. 268 (1982). In both of these cases, however, and in Guy J. v. N.H. Dept. of Education, 131 N.H. 742 (1989), the Court held the action properly maintainable as a petition for declaratory judgment.

The Court has also elaborated on the second prerequisite that no alternative form of relief be available. In SEA v. Lang, 119 N.H. 637 (1979), the Court held mandamus inappropriate to force the Personnel Commission and the Director of Personnel to increase the rate of compensation of certain classified academic employees because the Personnel rules afforded a specific administrative remedy which had not been pursued and exhausted. The Court stated that an alternative remedy is not rendered inappropriate merely because the alternative appeal route is through the administrative agency alleged to be involved in creating the inequity, because the remedy of a petition for certiorari is available if the agency's decision is unsatisfactory. Finally, the Court observed that a resulting multiplicity of individual actions is not necessarily grounds for mandamus relief.

4.9.3 **Writ of Prohibition**.

The writ of prohibition, like other extraordinary writs, is available only in the absence of other adequate remedies and when the right to relief is clear. It operates only to prohibit action which can be characterized as judicial, and not to correct legislative, executive, or ministerial action. Its normal use is to prevent

 Copyright © NH Bar Association

judicial and quasi-judicial officers from exercising jurisdiction they do not have. See State v. Superior Court, 116 N.H. 1 (1976); Hillsborough v. Superior Court, 109 N.H. 333 (1969). In New Hampshire Retail Grocers Ass'n. v. State Tax Comm'n, 113 N.H. 511 (1973), the Court held a petition for writ of prohibition an appropriate avenue of relief to seek reversal of the Commission's regulatory interpretation of a statute concerning the minimum price at which cigarettes could be sold. The Court did so, however, with the recognition that the terminology is unimportant and that although another form of extraordinary relief may be available, parties are entitled to the most convenient procedure for the settlement of their controversy. See also Petition of Mone, 143 N.H. 128, 133 (1998).

4.9.4 **Petition for Declaratory Judgment.**

RSA 491:22 provides that:

> [a]ny person claiming a present legal equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties....

Unlike other forms of extraordinary relief, declaratory relief is viewed as a broad remedy to be liberally construed to effectuate the statute's purpose of making a controversy over a legal or equitable right justiciable at an earlier stage of the controversy than it would be if pursued in an action at law or in equity. Beaudoin v. State, 113 N.H. 559 (1973). It nevertheless requires that a present right of the plaintiff be subject to an adverse claim and that the act of the defendant be sufficiently definite to constitute a genuine threat to plaintiff's interests. If there is a matter of actual controversy between the parties which is capable of conclusive judicial resolution, a declaratory judgment action will be permitted.

Declaratory relief is permitted against the State in particular in order to review the constitutionality of actions by the government and its branches. Grinnell

 Copyright © NH Bar Association

v. State, 121 N.H. 823 (1981). Declaratory judgment has been held particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of the important public interests involved therein. Guy J. v. N.H. Dept. of Education, 131 N.H. 742 (1989); Boehner v. State, 122 N.H. 79 (1982). It has, for example, been held appropriate to determine the validity of a zoning restriction allegedly exceeding the zoning authority's jurisdiction. Vlahos Realty Co. v. Little Boar's Head District, 101 N.H. 460 (1958). The plaintiffs in a declaratory judgment action, however, must have sufficient direct interest in a determination that a regulatory requirement is unconstitutional in order to have standing to seek declaratory relief. Cagan, Inc. v. N.H. Dept. of Revenue Administration, 128 N.H. 180 (1986); Silver Brothers, Inc., Co. v. Wallin, 122 N.H. 1138 (1982). Also, although RSA 491:22 is not available to obtain remedial relief but merely authorizes a declaration of the rights of litigants, the Court has permitted plaintiffs, in an action seeking to require the county to enroll certain employees in the State retirement system, to amend their pleadings on remand to make them consistent with the relief granted. State Employees Ass'n of N.H. v. Belknap County, 122 N.H. 614 (1982).

4.9.5 **Petition for Injunctive Relief.**

The Supreme Court has held that prior to the issuance of a final order by a disciplinary board, the superior court may exercise its equitable jurisdiction to stay the actions of the board in limited circumstances. Parties cannot circumvent the statutory appeal process under the guise of a petition for injunctive relief concerning issues directly related to the merits of the underlying proceeding, such as evidentiary rulings, and collateral issues that lack immediate irreparable impact. The superior court may, however, intervene prior to entry of final judgment in exceptional circumstances where a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in

 Copyright © NH Bar Association

immediate and irreparable harm to that party. Thompson v. N.H. Bd. of Medicine, 143 N.H. 107 (1998).

4.10 **SPECIAL STATUTORY ADMINISTRATIVE APPEAL MECHANISMS.**

In addition to the two major avenues of appeal from decisions of administrative agencies, certain special procedural requirements apply by statute to appeals from specific agencies. These procedural requirements must be strictly complied with in order to properly perfect an appeal of these specific types of administrative decisions. The following is a partial list of special statutory administrative appeal routes, and the agencies' enabling statutes should be consulted for further details.

4.10.1 **Department of Labor.**

Most decisions of the Commissioner of Labor or his representative relating to employment rights, benefits and compensation are subject to a statutory right of appeal to either the Superior Court or the Compensation Appeals Board. For example, appeals of workers' compensation decisions are governed by RSA 281-A:43. An appeal from the Commissioner's decision must be taken first to the Compensation Appeals Board within thirty days of the Commissioner's order, and then, any person aggrieved by that determination may appeal, pursuant to RSA 541, to the Supreme Court. RSA 281-A:50 provides a possible avenue for appeal to the Compensation Appeals Board within one year after the Commissioner's decision where an aggrieved party was prevented from appealing within the normal 30 day period through "mistake, accident or misfortune and not through the person's own neglect."

Appeals from decisions of the Labor Commissioner concerning safety and health of employees under RSA Chapter 277 and minimum wage requirements under RSA Chapter 279 are by petition to the Superior Court within 30 days or 20 days of the decision or action. RSA 277:29 and 279:16-a, respectively.

 Copyright © NH Bar Association

Appeals from decisions of the Labor Commissioner concerning claims for unpaid wages under RSA Chapter 275 must be taken to the Superior Court not more than 20 days from the date of the decision. RSA 275:51, V.

4.10.2 **Department of Employment Security.**

Decisions of the Department of Employment Security concerning claims for unemployment compensation must be appealed to the unemployment compensation appeal tribunal created by RSA 282-A:53 within 14 calendar days after the decision, unless the Commissioner finds good cause for an extension. RSA 282-A:48. Otherwise, the determination becomes final. RSA 282-A:49. The second level of appeal is to the Commissioner who must receive a request to reopen a case within 14 calendar days of the mailing of the appeal tribunal's decision. RSA 282-A:60. Appeal from a decision on a reopening request to the commissioner is to the Appellate Board, RSA 282-A:62 and must be filed within 14 days under RSA 282-A:64. This appeal is governed by sections 64-66 of RSA Chapter 282-A. A party aggrieved by the decision of the Appellate Board may request reconsideration by the Board within 20 days of the date of mailing of the Board's decision. RSA 282-A:67, I. After all of the foregoing administrative remedies have been exhausted, an interested party may appeal to the Supreme Court within 30 days after the date of mailing of the decision appealed from. RSA 282-A:67, II. See Appeal of Boudreault, 123 N.H. 332 (1983); Appeal of Miller, 122 N.H. 993 (1982). This means of judicial review is exclusive. RSA 282-A:68.

4.10.3 **Department of Revenue Administration and Local Tax Officials.**

Certain decisions of the Department of Revenue Administration concerning a tax imposed or tax matter regulated by it may be appealed at the election of the taxpayer either to the Superior Court or the Board of Tax and Land Appeals. RSA 21-J:28-b; 71-B:11. This election also applies to decisions of local assessing officials on property appraisals, property tax abatement requests, RSA 75:14

 Copyright © NH Bar Association

through 17, RSA 76:16 and 17, and current use and land use change taxes, RSA 79-A. An appeal from the Board of Tax and Land Appeals is by RSA Chapter 541. RSA 71-B:12.

Currently, under RSA 76:16-a and 17, the neglect or refusal of local officials to abate may be appealed to either forum on or before September 1 after the date of notice of tax, assuming compliance with the requirement to first submit a request for abatement to the local assessing officials by March 1.

4.10.4 **Ballot Law Commission.**

Appeals from certain decisions of the Ballot Law Commission concerning recounts under RSA 665:8 are authorized and governed exclusively by RSA 665:16. The appeal must be filed with the New Hampshire Supreme Court within 5 days after the Commission's decision is filed with the Secretary of State.

4.10.5 **Zoning Boards of Adjustment.**

Decisions of a local zoning board of adjustment must be appealed in accordance with RSA 677:2 and 677:4. Following a motion for rehearing, an appeal must be filed with the Superior Court or Housing Appeals Board within 30 days.

4.10.6 **Department of Safety.**

Appeals of motor vehicle license suspensions and revocations generally must be filed with the Superior Court within 30 days. RSA 263:76. Appeals of suspensions for violation of the implied consent law are governed by RSA 263:75.

Decisions of the Division of State Police concerning licenses of detective and security guard agencies are appealable to the Superior Court under RSA 106-F:13.

 Copyright © NH Bar Association

4.11 JUDICIAL REVIEW OF STATE AGENCY RULEMAKING: ADMINISTRATIVE PROCEDURE ACT, RSA CHAPTER 541-A.

In 1994, the Legislature substantially amended RSA 541-A, the Administrative Procedure Act, to enhance the uniformity of agency rulemaking and hearing procedures.

4.11.1 Validity of Rules.

No rule is valid or effective against any person or party, nor may it be enforced by the State for any purpose, until it has been properly filed in accordance with the provisions of RSA 541-A. RSA 541-A:22. The Supreme Court has determined, however, that an agency need not adopt a rule to do that which a statute, on its face, authorizes the agency to do. Smith v. N.H. Board of Examiners of Psychologists, 138 N.H. 548, 553 (1994). The revised rulemaking procedures are quite technical and complex in light of past New Hampshire practice and are coordinated by the Administrative Rules Division of the Office of Legislative Services, and subject to review and approval by the Joint Legislative Committee on Administrative Rules. RSA 541-A:2-23.

4.11.2 Challenges to Rules.

a. Procedural Defects. RSA 541-A:23 sets forth remedies for procedural defects in rulemaking; however, any action to contest the validity of a rule for noncompliance with RSA Chapter 541-A must be commenced within one year of its effective date.

b. Superior Court Jurisdiction. A challenge to the validity or applicability of a rule may be determined in an action for declaratory judgment in the Merrimack County Superior Court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. RSA 541-A:24. The statute requires that the agency be made a party to the action. The declaratory judgment may be rendered regardless

 Copyright © NH Bar Association

of whether the plaintiff has first requested the agency to pass upon the validity or applicability of the rule in question. See RSA 541-A:24. In addition, a rule need not be officially promulgated under RSA 541-A before it can be challenged under this section. Asmussen v. Dept. of Safety, 145 N.H. 578 (2000).

c. Supreme Court Jurisdiction. Appeal from a declaratory judgment in Merrimack County Superior Court may be taken to the Supreme Court pursuant to Supreme Court Rule 7. Any appeal from an erroneous or unreasonable interpretation of a rule which forms a basis for an agency order or decision may be taken to the Supreme Court via RSA Chapter 541 or certiorari, as appropriate.

 Copyright © NH Bar Association

Motion Practice in The Supreme Court

Timothy A. Gudas, Clerk
New Hampshire Supreme Court
Concord, NH

CHAPTER 5

MOTION PRACTICE IN THE

NEW HAMPSHIRE SUPREME COURT

This Chapter has been updated by Timothy A. Gudas, Clerk of Supreme Court effective May 15, 2025.

5.1 Introduction and Overview

a. General Considerations. Motion practice in the New Hampshire Supreme Court illustrates both the creativity and frustration of our common law tradition. Although the court regularly receives more than 150 motions per month, the court rarely discusses motions in its published decisions, so there is little developed case law to supplement the text of the rules. The court and its staff do have considerable custom and practice regarding commonly filed motions, however. The court clerk and deputy clerks can give helpful procedural and logistical guidance. You should feel free to consult them (after you have read the rules) if you are unsure how to proceed.

The court will sometimes "suspend the requirements" of its rules and usual procedures "in the interest of expediting a decision or for other good cause shown." Sup. Ct. Rule 1. Motion practice in the court provides an opportunity for you to advance your client's interests through knowledge of the court's rules and usual procedures – and through well-considered requests for the court to "suspend" them to suit the specific circumstances of your case. The discussion that follows in sections 6.2 through 6.5 regarding specific types of motions is not intended as a comprehensive overview of permissible motions; it is simply an explanation of the most commonly filed motions.

 Copyright © NH Bar Association

b. Requesting Assent of Opposing Counsel. Except for substantive motions, you must seek assent of "opposing counsel." Sup. Ct. Rule 21(5). Although Rule 21(5) does not, by its terms, require you to seek assent of self-represented parties, you should do so unless the particular circumstances of the case dictate otherwise.

If all parties assent, say so both in the body of the motion and in the caption. If you cannot obtain assent by the time you file the motion, recite briefly in the motion what efforts you made. Occasionally, you may be unable to reach opposing counsel or the self-represented party by the time you file your motion; in that circumstance, you may wish to keep trying to obtain assent even after you have filed your motion, especially if your motion is requesting the extension of a deadline that falls before, or close to, the end of the ten-day objection period.

If you are asked by your opponent to assent to a scheduling or procedural motion, it is appropriate to do so unless grant of the motion would prejudice your client's case.

The assent of all parties is a significant factor in the court's consideration of a motion, but assent does not guarantee that the court will grant your motion. The court's rules cannot be varied or waived by mere stipulation. Moreover, the court has its own interest in the timely and efficient disposition of cases, and therefore, the parties' assent to lengthy or unreasonable scheduling delays does not control.

c. Logistics of Filing. In August 2018, the court implemented electronic filing (e-filing) for appeals and other cases initiated in the court on or after that date. Initially, e-filing was initially limited to attorneys. In January 2020, the court expanded e-filing to self-represented parties and nonlawyer representatives. As a result, e-filing is now mandatory for all filers, with certain exceptions set forth in Rule 5 of the Supplemental Rules for

 Copyright © NH Bar Association

Electronic Filing. With the implementation of e-filing, the court amended various provisions of the Supreme Court Rules and also made effective the Supplemental Rules for Electronic Filing. Every pending (and future) case is governed by both the Supreme Court Rules and the Supplemental Rules for Electronic Filing. See Supp. E-Filing Rules 1, 2, and 4.

Supreme Court Rule 21 contains most of the logistical requirements for motions, but other rules supplement Rule 21 as to particular types of motions.

1. Every motion must state "with particularity" the grounds on which it is based and the order or relief sought. Sup. Ct. Rule 21(2).

2. Motions must be submitted through the e-filing system in one of the following formats only: .doc; .docx; or .pdf. The e-filing system will not accept documents or other material in any other format. Supp. E-Filing Rule 11(c). The text of your motion must be in size 13 font, and the lines of text must be spaced at a setting of 1.5. Sup. Ct. Rule 21(1). The text should be left-aligned only. The motion (including its cover page and any attachments) must have sequentially numbered pages, using Arabic numerals only (e.g., 1, 2, 3). Sup. Ct. Rules 21(1), 26(5). Except for motions filed with the notice of appeal, your motion must include the Supreme Court docket number, which may be obtained from the docketing order or a call to the clerk's office. Sup. Ct. Rule 26(8).

3. There is no page or word limit for motions, except that motions for rehearing or reconsideration of an opinion, final order, or summary decision are limited to 3,000 words. Sup. Ct. Rule 22(2). It would be a rare motion, however, which would warrant more than 3,000 words (approximately 10 or 11 pages).

 Copyright © NH Bar Association

4. A memorandum of law, affidavits, or other supporting papers may be filed with the motion. Sup. Ct. Rule 21(2). If supporting authorities can be included succinctly in the motion itself, however, a separate memorandum is not required. Do not submit copies of cited cases.

d. Objections. Objections are optional, not required. Sup. Ct. Rule 21(3). The court does not automatically grant motions merely because the opponent does not respond. If an objection is filed, it must be done within ten days from the date the motion was filed. Sup. Ct. Rule 21(3). The grounds for objection must be stated with particularity in the pleading. Sup. Ct. Rule 21(3). The procedural and format requirements for objections are the same as those for motions. If you have no objection to a motion but your position is not noted in the motion, it is courteous to advise the court promptly in writing that you do not object.

e. Replies. No reply to an objection may be filed without advance permission of the court. Sup. Ct. Rule 21(3-A). A motion for permission to file a reply must be filed within ten days of the filing of the objection, but the court may, and often does, act upon a party's motion prior to the expiration of the ten-day period for that party to seek permission to file a reply. Sup. Ct. Rule 21(3-A). Rule 21(3-A) states that any reply filed "without prior permission of the court shall not be considered by the court."

f. Oral Argument on Motions. Oral argument will not be heard on any motion unless the court invites it. Sup. Ct. Rule 21(4). The court rarely does so. But see State v. Addison, 166 N.H. 115 (2014) (motion to disqualify attorney general's office).

g. Rulings on Motions. Depending on the nature of the motion, it may be acted upon by the clerk of court, a single justice, or the full court.

 Copyright © NH Bar Association

Pursuant to Rule 21(8), the clerk is authorized to rule on motions relating to scheduling, except for motions for expedited consideration, motions to extend time to file an appeal document, and motions for late entry of an appeal document. In addition, the clerk may grant or refer to the court dispositive motions to which all parties consent, and non-dispositive motions to which no objection is filed or all parties consent. Sup. Ct. Rule 21(8).

According to Rule 21(7), a single justice may rule on all non-dispositive motions and may issue any non-dispositive order. In addition, a single justice may rule upon requests to withdraw or dismiss an appeal filed by the appellant, may dismiss an appeal pursuant to Rule 5(4) (appellant's failure to file a timely appeal), Rule 15(2) (appellant's failure to pay the transcript deposit), or Rule 16(12) (appellant's failure to file a brief), and may dismiss an appeal without prejudice upon procedural grounds (such as an improper interlocutory appeal). A single justice may also rule on a motion for reconsideration of a clerk's order. Sup. Ct. Rule 21(9).

By rule, a motion for reconsideration of a single justice order "shall be referred to the [full] court for decision." Sup. Ct. Rule 21(9). In addition, as a matter of practice rather than rule, certain motions which could be ruled on by less than the full court are often referred to the court for consideration. For example, a motion for oral argument, filed after the case has been accepted on the briefs, may be referred to the full court. Similarly, motions to remand and motions to stay the trial court's decision are sometimes referred to the full court. Motions presented to the full court for consideration are often accompanied by a staff memorandum.

 Copyright © NH Bar Association

There is no guarantee that the court will rule on a motion before it decides the underlying case. Rulings on substantive motions are frequently deferred until after oral argument. E.g., Appeal of N.H. Dep't of Envtl. Servs., 173 N.H. 282, 291-92 n.8 (2020); Appeal of Cole, 171 N.H. 403, 407 (2018); Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 532 (2009); State v. Homo, 132 N.H. 514, 517 (1989). Thus, even a well-crafted motion may not save the time and expense of briefing and arguing the case.

The court rarely publishes rulings on motions. But see State v. Addison, 166 N.H. 115 (2014) (motion to disqualify attorney general's office). Occasionally, it incorporates a motion ruling into its published decision on the merits. E.g., Cincinnati Specialty Underwriters Ins. Co. v. Best Way Homes, Inc., 175 N.H. 142, 144 n.1 (2022); N.H. Alpha of SAE Trust v. Town of Hanover, 174 N.H. 269, 281 n.6 (2021); In the Matter of Sanborn & Sanborn, 170 N.H. 458, 461 (2017); Petition of Estate of Braiterman, 169 N.H. 217, 229 (2016); Town of Bartlett v. Furlong, 168 N.H. 171, 181 (2015); Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 532 (2009); Germain v. Germain, 137 N.H. 82, 85 (1993); State v. Homo, 132 N.H. 514, 517 (1989). Unpublished decisions on motions (including motions for summary disposition) do not establish precedent and may not be cited as authority in subsequent cases, even though they may give some guidance on what the court is likely to do. Sup. Ct. Rule 25(5). The court's denial of a motion for summary disposition or dismissal also does not dispose of the underlying substantive issue. Appeal of Courville, 139 N.H. 119, 122 (1994).

5.2 **Motions Filed with Appeal Document**

a. Motion to Extend Time for Filing Appeal. The court does not favor motions to extend the time for filing an appeal. Sup. Ct. Rules 21(6), 27(2). In "exceptional

 Copyright © NH Bar Association

circumstances," however, such a motion may be warranted. Sup. Ct. Rule 21(6). It must be filed within the time originally permitted for the appeal. The motion must be filed with the clerk of the Supreme Court, along with the filing fee for the appeal, and the motion must be sent to all parties, to the trial court or agency from which the appeal will be taken and, in administrative cases, to the attorney general's office. Sup. Ct. Rules 5(1), 21(6), 26(2). The trial court or agency does not have authority to extend the appeal period.

b. Motion for Late Entry of Appeal. If you are in the unenviable position of filing a late appeal, it must be accompanied by a motion for late entry. This motion essentially asks the court to waive a deadline that has already expired. The motion must be accompanied by the complete appeal document and the filing fee. Sup. Ct. Rule 21(6).

As with motions to extend time to file an appeal, motions for late entry are "not favored" and must demonstrate "exceptional circumstances." Sup. Ct. Rules 21(6), 27. No court or agency other than the Supreme Court may permit late entry of an appeal document. The most common reason for filing such a motion is inaccurate calculation of the 30th day following the clerk's written notice of the trial court's decision, particularly in months with 31 days. Because that mistake is fairly common, and because the "FAQ" section of the Supreme Court's website cautions against that particular mistake, the mistake does not, by itself and without more, amount to "exceptional circumstances."

Nevertheless, once an appellant has missed the appeal deadline for whatever reason, a motion for late entry is the appellant's best hope of salvaging the appeal. It is much wiser than the usual alternative – hoping that the court and the opposing party do not recognize the untimeliness, and then filing a motion for reconsideration in response to the court's order dismissing the appeal as untimely.

 Copyright © NH Bar Association

c. Motion for Waiver of Filing Fee. The court will waive the filing fee in "exceptional circumstances." Sup. Ct. Rule 5(2). Fees are normally waived for indigent appellants, including parties represented by court-appointed counsel or New Hampshire Legal Assistance and cases handled through the Pro Bono Referral Program. See RSA 499:18-b.

To have a fee waived, a motion for waiver must be filed with the appeal document. The motion should be accompanied by an affidavit of assets and liabilities or a Request for a Lawyer, which is primarily used in criminal, termination of parental rights, involuntary admission, and other cases in which the appellant has a constitutional or statutory right to court-appointed counsel. Assent of opposing parties is not required. If the court should deny the motion in whole or in part, it will then give the appellant an opportunity to pay the filing fee.

d. Request for Continued Appointment of Counsel. In criminal, termination of parental rights, involuntary admission, and other cases in which the appellant has a constitutional or statutory right to court-appointed counsel, the attorney appointed by the trial court is responsible for the case through the filing of the appeal document and until successor counsel is appointed. Sup. Ct. Rules 32(1)-(3), 32-A(1)-(3). In order for any counsel to be paid for handling the appeal beyond that point, you must file a current Request for a Lawyer showing your client's continued financial eligibility. Sup. Ct. Rules 5(2), 32(4), 32-A(4). If, as is generally the case, the appellant requests both appointment of counsel and waiver of the filing fee, a current Request for a Lawyer is sufficient for both purposes. If you seek to withdraw and have new counsel appointed, a motion requesting that relief must be filed, with the name of the new counsel identified in the motion.

 Copyright © NH Bar Association

e. Motion for Stay of Appealed Decision. A timely filed notice of appeal pursuant to Supreme Court Rule 7 stays the entry of final judgment in the Superior Court in a civil case. Superior Ct. Rule 46. A similar rule generally applies in other noncriminal matters arising from trial courts. See Family Div. Rule 1.31; Probate Div. Rule 74; District Div. Rule 1.11. In domestic relations matters, however, certain trial court orders are effective upon issuance notwithstanding a party's filing of an appeal. See Family Div. Rule 2.29. An order issued by an administrative agency is not stayed by the filing of a motion for rehearing or the filing of an appeal. RSA 541:18.

Except in "extraordinary circumstances," a specific request for stay of a decision that is not stayed by operation of law should be addressed in the first instance to the trial court or agency. Sup. Ct. Rule 7-A(1) and Comment. However, the Supreme Court does have concurrent authority to stay the appealed decision. If the trial court or agency has already denied a motion to stay the appealed decision, then the motion for stay filed in the Supreme Court must "be accompanied by a copy of the request for similar relief filed with the lower tribunal, any objection filed thereto, and the lower tribunal's order denying such relief." In addition, any motion to stay must be accompanied by a copy of the order or judgment which the motion seeks to have stayed.

f. Motion Requesting Expedited Treatment. The court may put a case on an expedited track, with an abbreviated briefing schedule and priority for oral argument. Sup. Ct. Rule 18(6). If your case falls within a category given priority or expedited treatment by statute (such as juvenile matters), there is no need to file a motion requesting expedited treatment. If, however, you have other compelling reasons, you should file a motion alerting the court to those reasons and specifically asking for expedited treatment. See,

 Copyright © NH Bar Association

e.g., Public Serv. Co. v. Shannon, 105 N.H. 67 (1963). The court has been known to decide cases within days, when the situation called for it. The normal wear and tear on the parties stemming from the delay inherent in the appellate process will not, however, justify giving an appeal priority and taking it out of the usual case-handling procedures. In addition to juvenile cases (including termination of parental rights, abuse and/or neglect, adoption, CHINS, and guardianship of minor), the court generally expedites cases involving bail issues, domestic violence cases, civil stalking cases, interlocutory appeals, certified questions, requests for advisory opinions, and attorney discipline cases.

g. Motion to Assign the Appeal to a Three-Justice Panel. The court may decide as part of the screening process of a discretionary appeal to assign the appeal (if accepted) to a three-justice panel for summary process (3JX) under Supreme Court Rule 12-D. If the appealing party wishes to take advantage of that process, a motion so indicating should be filed along with the discretionary appeal document. In a mandatory appeal, the motion should be filed with your brief, but only if you believe that the statement in your brief concerning oral argument, see Sup. Ct. Rule 16(3)(h), does not fully set forth your position. The Supreme Court has not used the 3JX process since 2021.

h. Motion for Recusal. A motion to recuse a justice should be filed with the notice of appeal if the appealing party knows of recusal grounds at that time. Sup. Ct. Rule 21A. A nonappealing party should file a motion within twenty days after the appeal's filing date. Failure to file a timely motion "shall be deemed a waiver of the [party's] right to request recusal" later. Sup. Ct. Rule 21A.

By rule, a motion for recusal "shall: (1) be made in writing, (2) state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for

 Copyright © NH Bar Association

recusal together with the facts alleged in support thereof and, if applicable, citations to any pertinent provision of Supreme Court Rule 38, The Code of Judicial Conduct, (3) contain a verification by affidavit of any facts upon which the motion is grounded, unless the facts are apparent from the record or from the papers on file in the case, or are agreed to and stated in a writing signed by the parties or their attorneys, (4) except for good cause shown, be filed with the court [within the time set forth above], and (5) certify the date or dates when the movant first became aware of the facts set forth in the motion." Sup. Ct. Rule 21A.

Where a conflict is obvious (i.e., the judge formerly represented one of the parties in the case, or ruled on the matter while on the trial bench, see RSA 492:1), the justice will typically recuse himself or herself from the case without a motion and as soon as the conflict is brought to his or her attention.

5.3 **Motions Responding to Appeal Document**

a. Motion for Summary Affirmance. Except in a mandatory appeal, the nonappealing party may file a motion seeking summary affirmance of the lower tribunal's ruling within twenty calendar days of the appeal filing, with limited exceptions. Sup. Ct. Rule 25(2), (6). The motion should address why the case falls within one of the categories set forth in Rule 25(1), for which summary affirmance is warranted. Those reasons are: "(a) no substantial question of law is presented and the supreme court [should] not disagree with the result below, or (b) the case includes the opinion of the trial court, which identifies and discusses the issues presented and with which the supreme court [should] not disagree, or (c) the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court [should] not

 Copyright © NH Bar Association

find the decision unjust or unreasonable, or (d) other just cause exists for summary affirmance."

You should not file a motion for summary affirmance merely to parrot the reasoning and conclusion of the appealed decision or to point out obvious shortcomings of the appeal document, such as the appellant's decision to forego a transcript in a discretionary appeal concerning the sufficiency of the evidence. In contrast, a well-written motion for summary affirmance can be helpful in the court's screening process by providing additional procedural or contextual information not contained in the appeal document, by narrowing or more clearly framing the issue(s) presented in that document, or by persuading the court that the issues raised are not worthy of acceptance and briefing. Even if a motion for summary affirmance does not result in the requested relief, it may cause the court to decline the appeal in whole or in part. If you decide to file a motion, make it focused, succinct, and brief.

The appealing party is not required to file an objection or any other response to a motion for summary affirmance. Do not file one if it will merely repeat what was contained in the appeal document, because that will be of no assistance to the court. However, if the motion appears persuasive and you can succinctly refute the arguments in support of summary affirmance, an objection should be considered. If an objection is filed, it must be done within ten days from the day the motion was filed. Sup. Ct. Rule 25(2).

b. Motion for Summary Reversal. Motions asking the court to summarily reverse or vacate the appealed decision are rarely filed and even more rarely granted. Such motions should be reserved for the truly unusual case, e.g., the trial court acted on a matter in which (by clear binding authority) the trial court or agency had no jurisdiction. A

 Copyright © NH Bar Association

motion for summary reversal should normally be filed with the discretionary appeal document. The logistics are the same as for motions for summary affirmance.

c. Motion to Dismiss Appeal. The Supreme Court clerk's office reviews each new appeal document for any problems with timeliness, finality, jurisdiction, and noncompliance with Supreme Court Rules. The party opposing the appeal may, however, file a motion to dismiss to bring such deficiencies to the court's attention, especially if they are not obvious from the appeal document. The most common grounds for dismissal by the court are untimeliness, lack of final order (improper interlocutory appeal), or lack of jurisdiction. Sup. Ct. Rule 25(1), (7); e.g., Germain v. Germain, 137 N.H. 82, 83-84 (1993) (untimely); State v. Homo, 132 N.H. 514, 517 (1989) (lack of jurisdiction). A motion to dismiss on grounds of mootness can be filed at any point in the appellate process, whenever the case becomes moot. A motion to dismiss should not be used to argue that the appealed decision was correct on the merits or that the issues set forth in the notice of appeal were not preserved. Such arguments should be advanced in a motion for summary affirmance (in a discretionary appeal) or in the appellee's brief.

There is no rule establishing a specific deadline to file a motion to dismiss. Ideally, in a mandatory appeal, a motion to dismiss should be filed within ten days of the filing of the appeal document, and in a discretionary appeal, it should be filed within the twenty-day deadline for motions for summary disposition under Rule 25(2).

d. Other Responsive Motions. If you have a specific response to an appeal document, target the caption and body of your motion accordingly. For example, if the appeal document omits a crucial pretrial ruling (in your favor) on one of the questions presented, or claims there was "no evidence" and omits a key exhibit, you may file an

 Copyright © NH Bar Association

appropriately-captioned motion submitting the missing document. This is much more important in a discretionary appeal, which the court will screen for acceptance or declination, than it is in a mandatory appeal, which the clerk will accept as long as the notice of appeal was timely filed and is otherwise compliant with Supreme Court Rules.

e. Court Orders to Show Cause or to File Brief Memorandum. If the initial review of the appeal document by the clerk's office raises questions as to whether an appeal is untimely or interlocutory or has other jurisdictional defects, the clerk or a single justice will issue a "show cause" or "file brief memorandum" order giving the appealing party a chance to demonstrate why the appeal should not be dismissed. E.g., Germain v. Germain, 137 N.H. 82, 83-84 (1993). The court may give any nonappealing party an opportunity to comment or respond. Needless to say, the appealing party should pay close attention and respond promptly to such an order. Sometimes, the question can be easily resolved by submitting trial court pleadings and orders that were not included with the appeal document. In other instances, the order provides an opportunity for the appellant to research a threshold issue of appellate procedure that had not previously been considered. The formatting requirements for a brief memorandum are contained in Supreme Court Rule 21(10), as modified by Rules 11 and 12 of the Supplemental Rules for Electronic Filing.

5.4 **Motions after Acceptance of Appeal**

a. Motion to Reconsider Order Assigning Case to a Three-Justice Panel. Upon acceptance of a discretionary appeal, or after briefing of any type of appeal, the court may assign the case to a three-justice panel pursuant to Supreme Court Rule 12-D. Either party may move for reconsideration of such an order. Sup. Ct. Rule 12-D(7). The motion

 Copyright © NH Bar Association

should explain why the appeal is not suitable for summary procedure, using the criteria set out in Rule 12-D(5).

b. Request for Settlement Conference. You may request a prehearing evaluation or scheduling conference pursuant to Rule 12-B. Such conferences are rarely held.

c. Motion by Prospective Amicus Curiae. If all parties consent to participation by an *amicus curiae*, the *amicus* may simply file its brief at the same time as the party whose position it is supporting, accompanied by the written consents. Sup. Ct. Rule 30. The State or its political subdivisions do not need the parties' consent to appear as *amicus*. Sup. Ct. Rule 30(3); e.g., Rousseau v. Eshleman, 129 N.H. 306 (1987). If one or more parties refuse consent, the amicus should file a motion for leave to appear, which may be accompanied by the proposed brief. Sup. Ct. Rule 30(2). The motion must "concisely state the nature of the movant's interest, the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." Sup. Ct. R. 30(2). The party that refused consent may file an objection within ten days.

d. Motions to Consolidate. To consolidate two or more cases involving the same parties or identical issues, a motion to consolidate must be filed under each docket number. These should be filed as soon as possible, commonly when the second appeal is filed. If the related cases are at different stages, counsel may need to file a motion to hold the more advanced case in abeyance while the laggard catches up, so that they can be briefed and argued together. Particularly if all counsel agree, the court appreciates such efforts to reduce confusion and duplicated effort for parties and the court itself.

 Copyright © NH Bar Association

e. Matters Relating to the Record. In Rule 10 administrative appeals, the court typically orders the administrative agency to file a certified copy of the administrative record. If anything is omitted from, or misstated in, the record provided by the administrative agency, the parties may correct the error by stipulation. Alternatively, the court may order the error to be corrected and, if necessary, order the preparation of a supplemental record. Sup. Ct. Rule 10(5).

In most Rule 7 appeals, the trial court record is not automatically transferred to the Supreme Court, and the Supreme Court does not *sua sponte* order its transfer. Thus, unless a party takes appropriate action to ensure that the record is before the Supreme Court either by filing an appendix pursuant to Rule 13(3) or by filing a motion pursuant to Rule 13(4), the record may not be before the Supreme Court to be considered. Sup. Ct. Rule 13(2). The court prefers to receive the relevant portions of the record (including relevant trial exhibits) in the appendices to the parties' briefs. If a party believes that providing a copy in an appendix of any papers or exhibits filed below would be impracticable or inadequate for appellate review, the party must file a motion with the Supreme Court on or before the date established for filing the party's brief, requesting that the Supreme Court order the trial court to transmit the papers or exhibits in question to the Supreme Court. The motion "shall designate the papers and exhibits in question and shall show cause why providing a copy in an appendix would be impracticable or inadequate for appellate review." Sup. Ct. Rule 13(4). It is not permissible for the appealing party to arrange directly with the trial court for the transfer of materials to the Supreme Court. Sup. Ct. Rule 13(5).

 Copyright © NH Bar Association

The record on appeal does not normally include facts, exhibits, or other materials that were not presented to the trial court or agency, or evidence concerning events occurring after the trial. See Lake v. Sullivan, 145 N.H. 713, 717 (2001) ("On appeal, we consider only evidence and documents presented to the trial court."). If later events are critical to your case, consider filing a motion pursuant to Rule 7-A(2) to remand the case to the trial court for reconsideration in light of the new facts, or a motion for permission to expand the record to bring those facts into the appeal. Do not simply include them (and rely on them) in your brief.

A situation might arise where a document was considered by the lower court but not admitted as an exhibit and thus did not become part of the trial court's file. If such a document is critical to your appeal, and you can establish that it was presented to and considered by the lower court, consider filing a motion to expand the record.

f. Motion to Extend Briefing Schedule. The court's briefing order sets the due dates for all briefs. Unless the scheduling order states otherwise, any party may obtain an automatic extension of no more than fifteen days by filing an assented-to notice. Sup. Ct. Rule 21(6-A)(a). The notice must set out the new due dates for all briefs. A maximum of two assented-to notices may be filed by the parties collectively. Following two notices, no additional extensions will be granted absent a showing of "extraordinary circumstances." Sup. Ct. Rule 21(6-A)(b).

A motion must be filed to request an extension of more than fifteen days or when the parties do not assent to the extension. Sup. Ct. Rule 21(6-A)(c). The motion should be filed as early as the need becomes apparent, with a simple and nonargumentative

 Copyright © NH Bar Association

explanation. If you have not received a ruling on your motion to extend and the filing deadline is nearing, call the clerk's office to inquire.

If you miss the filing deadline, you are permitted to file a motion for late entry of a brief. The motion should contain a detailed explanation of the facts giving rise to the late filing, should be accompanied by the brief, and should be filed as promptly as possible after the missed deadline. There is no guarantee, however, that such a motion will be granted.

g. Motion to Add Question. The court will not consider any question on appeal that was not raised in the appeal document, unless the question is "subsidiary" to one raised in that document. Sup. Ct. Rule 16(3)(b). The only permissible way for a party to brief and argue an issue that does not fall within that category is to file a motion to add a question. Sup. Ct. Rule 16(3)(b); e.g., Town of Bartlett v. Furlong, 168 N.H. 171, 181 (2015); Appeal of Toczko, 136 N.H. 480, 487 (1992). According to Rule 16(3)(b), the motion must be filed at least twenty days before the appealing party's brief is due, and unless the party intends to argue "plain error" under Rule 16-A, the motion should be filed only if the added question was raised and preserved below. E.g., State v. Jimenez, 137 N.H. 450 (1993); Samyn-D'Elia Architects v. Satter Cos., 137 N.H. 174 (1993). A motion to add a question may be filed only by a party who filed an appeal document, including a cross-appeal. Sup. Ct. Rule 16(3)(b). If the party seeking to add a question has missed the deadline to file the motion (i.e., twenty days before the brief is due), the motion should be filed no later than the due date of the brief and should include a request for waiver of the twenty-day provision in Rule 16(3)(b).

 Copyright © NH Bar Association

h. Motion to Expand Word Limitation of Brief. Rule 16(11) provides that briefs shall not exceed 9,500 words, exclusive of the table of contents, tables of cases, statutes, and other authorities, and any addendum. Briefs in cases assigned to a three-justice panel have the same word limit. Sup. Ct. Rule 12-D(6). It is possible to request permission (in advance) to exceed the limit. However, such motions are granted only in exceptional cases. Sup. Ct. Rule. 16(11). It is far preferable to subject your brief to a stringent second (or third) editing that clarifies and focuses your argument.

i. Motion to Strike Brief. Occasionally, a party may seek to strike an opponent's brief in whole or in part, if, for example, the brief goes beyond the record in the case. See Flaherty v. Dixey, 158 N.H. 385, 387 (2009) (granting motion to strike). The court rules indicate that a party may move to strike the opposing side's brief for failure to comply with the requirements for briefing, such as failing to specify where in the record each question presented was raised below. Sup. Ct. Rule 16(3)(b). In the only reported case on point, however, the court denied such a motion as inappropriate, stating that the remedy or sanction for such an error was a matter between the court and the party in noncompliance. Knox Leasing v. Turner, 132 N.H. 68, 74-75 (1989); but see Mahmoud v. Irving Oil Corp., 155 N.H. 405, 406-07 (2007) (Supreme Court on its own motion decided to strike the appellant's brief and dismiss the appeal for noncompliance with Rule 16). An appellant's motion to strike a portion of the appellee's brief, on the ground that a question briefed by the appellant was not waived below, was similarly unsuccessful. Appeal of Courville, 139 N.H. 119, 122 (1994). Instead of filing a motion to strike, it may be a more successful strategy to address the substantive question or perceived procedural error in your own brief (or reply brief) or at oral argument.

 Copyright © NH Bar Association

j. Errata. If, after filing your brief, you discover typographical errors that are substantive in nature or incorrect case citations (for example), the appropriate corrective measure is to refile the brief as corrected, along with a motion that identifies the error in the original brief, indicates its location, and sets forth the corrected text.

k. Motion for Additional or Divided Argument Time. In accordance with Rule 18(3), oral argument before the full court is normally limited to 15 minutes per side. If your case presents compelling reasons for a longer argument, you should file a motion asking for additional time before the case is scheduled. A mere statement in the brief that additional time for oral argument is requested is rarely sufficient. Such motions are not granted as a matter of course.

If there are multiple parties or amici, you may (preferably with the assent of all parties) request additional or divided argument time. Consider carefully, however, whether the advantages of multiple oralists will outweigh the difficulties of saying anything useful in fewer than fifteen minutes.

l. Motion to Continue or Reschedule Oral Argument. The court discourages motions to continue or reschedule oral argument, and may deny them even if opposing counsel assents. If you have a vacation planned or expect to be tied up in a lengthy trial, notify the court well in advance and ask that your case not be scheduled during that period. In the event of a scheduling conflict, you might consider the following options in lieu of moving for a continuance: (1) if all parties agree that the case can fairly be decided without oral argument, ask to waive the argument (see below); or (2) if the conflict does not affect the entire argument week, try to swap with another case on a different day or session. If all affected parties agree to a swap, notify the court in writing with copies to all

 Copyright © NH Bar Association

counsel. If you only need to swap within the same session, for example to accommodate a short hearing in another court, the clerk's office will assist you. If you have a conflict between a Supreme Court argument and a trial or hearing in another New Hampshire court, the Supreme Court clerk's office can put your argument first or last in a session, and, if need be, assist in persuading the other court to make appropriate adjustments to its schedule.

m. Stipulation to Waive Oral Argument. If all parties agree to submit the case on briefs, file a stipulation with the court to that effect. The stipulation must be filed at least ten days before the scheduled argument, and it may be filed even before argument has been scheduled. Sup. Ct. Rule 18(7). The court does not grant waivers automatically.

If one party wants oral argument of a case that has been scheduled for oral argument, a motion by the other party to have the case decided on briefs is unlikely to be successful, but the motion may be filed up to twenty days before the scheduled argument. Sup. Ct. Rule 18(7). The court may also dispense with oral argument on its own motion. Sup. Ct. Rule 18(1). Indeed, most cases are decided without oral argument.

n. Motion to Add Supplemental Authorities. If you need to add supplemental authorities (such as a new on-point United States Supreme Court decision) before oral argument, you may do so by written notice or, if you are the appealing party, by reply brief. Sup. Ct. Rule 16(7). After oral argument, you must file a motion for leave to add supplemental authorities. Sup. Ct. Rule 16(7); see Petition of Estate of Braiterman, 169 N.H. 217, 229 (2016); Lovejoy v. Linehan, 161 N.H. 483, 490 (2011).

o. Other Motions. The court rules permit a wide variety of motions to meet particular situations, including the following: request by a person who is otherwise

 Copyright © NH Bar Association

obligated to e-file in the case to be excused from the e-filing requirement (Supp. E-Filing Rule 5); request for confidentiality (sealing) of the Supreme Court case record or a portion of the case record (Sup. Ct. Rule 12(2)(b)(1) and Supp. E-Filing Rule 16(d)); request for waiver of the appellate mediation fee on the basis of indigence (Sup. Ct. Rule 12-A(5)); request for extension of the appeal-processing stay relating to the parties' agreement to participate in appellate mediation (Sup. Ct. Rule 12-A(6)); request to withdraw a mandatory criminal appeal (Sup. Ct. Rule 21B); request to substitute, as a party, the personal representative of a party who dies while the appeal is pending (Sup. Ct. Rule 29); request for admission pro hac vice (Sup. Ct. Rule 33(1) and Supp. E-Filing Rule 20); and request for a party to be represented on appeal by a nonlawyer (Sup. Ct. Rule 33(2)). If after perusing the rules you cannot find anything that seems to address your particular situation, consult with the clerk's office for the procedure to follow.

5.5 **Motions following Supreme Court Decision**

a. Motion for Reconsideration or Reargument. After the court has rendered a decision disposing of the appeal, either party may move for rehearing or reconsideration. Sup. Ct. Rule 22. The motion must be filed within ten days from the date of the opinion, dismissal, or summary decision. Sup. Ct. Rule 22(2). The motion must identify the points of law or fact that you believe the court overlooked or misunderstood and should set forth an argument in support of the motion.

Unless requested by the court, no response to a motion for reconsideration is required. If an objection is filed, it must be done within ten days from the date the motion was filed. Sup. Ct. Rule 22(3). The court may reconsider the case without reargument, restore it to the calendar for reargument or rebriefing, reaffirm its original decision, modify

 Copyright © NH Bar Association

the decision, or issue any order it deems appropriate. Sup. Ct. Rule 22(4); e.g., Simpson v. Calivas, 139 N.H. 1, 4 (1994); Rousseau v. Eshleman, 129 N.H. 306 (1987). Motions for reconsideration are infrequently granted and should not be filed as a matter of course.

b. Motion for Taxation of Costs. The prevailing party may file a motion for taxation of costs, with an itemized listing, within thirty days of the final order. Sup. Ct. Rule 23. The allowable costs are limited to the entry fee, the actual costs of reproducing and binding the notice of appeal, the actual costs of reproducing and binding the brief and any appendices, and the cost of transcript preparation. Sup. Ct. Rules 17(3), 23. With the implementation of e-filing, some of these costs (i.e., those relating to reproducing and binding documents) are no longer incurred in the first place. The court has the authority to award double costs if, after accepting an appeal, it finds the appeal frivolous or in bad faith. RSA 490:14-a; but see Indorf v. Indorf, 132 N.H. 45, 48 (1989).

c. Motion for Attorney's Fees on Appeal. The court may award attorney's fees when authorized by statute or by contract; in addition, in extraordinary cases, the court may award appeal-related attorney's fees to a prevailing party if the appeal is deemed by the court to have been frivolous or in bad faith. Sup. Ct. Rule 23; e.g., Keenan v. Fearon, 130 N.H. 494 (1988); but see, e.g., Harrington v. Metropolis Property Management Group, Inc., 162 N.H. 476, 481 (2011); Appeal of Courville, 139 N.H. 119, 122 (1994). Motions for attorney's fees are not strictly governed by the deadline for submitting your taxation of costs, but must be filed within a reasonable time. Silva v. Botsch, 121 N.H. 1041 (1981).

d. Motion to Exceed Maximum Fee. In appeals involving court-appointed counsel, a motion must be filed if counsel's fee request exceeds the maximum fee set by court rule. Sup. Ct. Rules 47(2), 48(2). Although the applicable rules provide that the

 Copyright © NH Bar Association

motion must be filed and granted before the excess charges are incurred, the Supreme Court's practice is to defer the review of both fees and motions concerning fees until it has issued a final decision. Thus, while counsel's motion should be filed promptly during the pendency of the appeal, the court is unlikely to rule on it prior to a final decision. Motions to exceed the fee cap are not routinely granted. Rule 47(2) and Rule 48(2) both state that "[o]nly upon an express, written finding of good cause and exceptional circumstances by the court will the maximum fees be exceeded or will additional fees be authorized."

 Copyright © NH Bar Association

Index to Forms/Samples

CHAPTER 6

Index to Samples

This Chapter has been updated by Timothy Gudas, Clerk of NH Supreme Court

1. Rule 8 Interlocutory Appeal Statement (sample)
2. Rule 9 Interlocutory Transfer Statement (sample)
3. Rule 10 Appeal Petition (sample)
4. Administrative Motion for Rehearing pursuant to RSA 541:3 (sample)
5. Rule 11 Petition for Writ of Certiorari (sample)
6. Rule 34 Order of Certification from Federal Court (sample)
7. Transcript Order Form (sample)
8. Rule 7-A(1) Motion to Stay (sample)
9. Rule 25 Motion for Summary Affirmance (sample)
10. Briefing Schedule (sample)
11. Brief Cover Page with Table of Contents and Table of Authorities (sample)
12. Memorandum of Law in Lieu of Brief (sample)
13. Rule 22 Motion for Reconsideration (sample)
14. Motion to Add Issue (sample)

The following New Hampshire Supreme Court forms are among those available at https://www.courts.nh.gov/our-courts/supreme-court/forms:

Rule 7 Notice of Mandatory Appeal
Instructions for Filing a Rule 7 Mandatory Appeal
Rule 7 Notice of Discretionary Appeal
Instructions for Filing a Rule 7 Discretionary Appeal
Motion to Waive Filing Fee
Affidavit of Assets and Liabilities
Request for a Lawyer
Motion for Authorization to Obtain Services Other than Counsel
Attorney's Statement
Appellate Mediation Agreement

 Copyright © NH Bar Association

Filed
File Date: 1/24/2020 12:17 PM
Merrimack Superior Court
E-Filed Document

STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

CASE NO. 217-2019-CV-00650

THE PLYMOUTH VILLAGE WATER & SEWER DISTRICT, RESOURCE MANAGEMENT, INC., CHARLES G. HANSON, and 3M COMPANY

Plaintiffs,

v.

ROBERT R. SCOTT, AS COMMISSIONER OF THE NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

Defendant.

PARTIES' JOINT INTERLOCUTORY APPEAL STATEMENT

The Parties submit this joint interlocutory appeal statement pursuant to Supreme Court Rule 8 and Superior Court Rule 46, as well as this Court's order of January 16, 2020. Plaintiffs, The Plymouth Village Water & Sewer District ("PVWSD"), Resource Management, Inc. ("RMI"), Charles G. Hanson, and 3M Company, (collectively the "Plaintiffs") and the Defendant, Robert C. Scott, as Commissioner of the Department of Environmental Services ("Defendant") all join in this statement, preserving all of their positions and arguments related to the issues raised in this case.

PARTIES OF RECORD

Plaintiffs:

The Plymouth Village Water & Sewer District
227 Old N. Main Street
Plymouth, NH 03264

Counsel:

Terri L. Pastori, NH Bar No. 12136
Beth A. Deragon, NH Bar No. 16347
Pastori Krans, PLLC
70 Commercial Street, Suite 203
Concord, NH 03301

Copyright © NH Bar Association
This is a Service Document For Case: 217-2019-CV-00650
Merrimack Superior Court
1/27/2020 11:01 AM

Resource Management, Inc. 1171 NH Route 175 Holderness, NH 03245	Terri L. Pastori, NH Bar No. 12136 Beth A. Deragon, NH Bar No. 16347 Pastori Krans, PLLC 70 Commercial Street, Suite 203 Concord, NH 03301
Charles G. Hanson 121 Dane Road Center Harbor, NH 03226	Terri L. Pastori, NH Bar No. 12136 Beth A. Deragon, NH Bar No. 16347 Pastori Krans, PLLC 70 Commercial Street, Suite 203 Concord, NH 03301
3M Company 3M Center St. Paul, MN 55133 And 11 Paper Trail Tilton, NH 03276	Mark C. Rouvalis, NH Bar No. 6565 Joseph A. Foster, NH Bar No. 838 Michael J. Quinn, NH Bar No. 5584 McLane Middleton, Professional Association 900 Elm Street, P.O Box 326 Manchester, NH 03105 Nessa Horewitch Coppinger (*admitted pro hac vice)* D.C. Bar No. 477467 Beveridge & Diamond 1350 I Street, NW, Suite 700 Washington, DC 20005
Defendant:	Counsel:
Robert R. Scott, As Commissioner of the New Hampshire Department of Environmental Services 29 Hazen Drive Concord, NH 03301	K. Allen Brooks, NH Bar No. 16424 Christopher G. Aslin, NH Bar No. 18285 The State of New Hampshire Office of the Attorney General 33 Capitol Street Concord, NH 03301

 Copyright © NH Bar Association

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs brought this action in the Merrimack County Superior Court challenging the rulemaking process engaged in by Defendant pursuant to the Administrative Procedure Act, RSA 541–A, that resulted in promulgation of administrative rules (the "Final Rules") establishing Maximum Contaminant Levels ("MCLs") and Ambient Groundwater Quality Standards ("AGQS") for four substances known as perfluorooctanoic acid ("PFOA"), perfluorooctanesulfonic acid ("PFOS"), perfluorononanoic acid ("PFNA") and perfluorohexanesulfonic acid ("PFHxS"). Plaintiffs alleged these Final Rules violate Part I, Article 28-a of the New Hampshire Constitution, RSA 541-A:25 (Unfunded State Mandates), RSA 485 (New Hampshire Safe Drinking Water Act), due process rights under RSA 541-A, the New Hampshire Constitution, Part 1, Arts. 12 and 15, and the United States Constitution, U.S. CONST. Art. XIV. Plaintiffs sought declaratory relief and temporary, preliminary and permanent injunctive relief.

The Defendant answered that the Final Rules were properly enacted pursuant to the standards set forth in RSA 541-A (the Administrative Procedure Act) and so the Final Rules were enforceable, and that promulgation of the Final Rules did not violate Plaintiffs' due process rights. In addition, Defendant averred that the Final Rules do not constitute an unfunded State mandate under Part I, Article 28-a of the New Hampshire Constitution or under RSA 541-A:25. Defendant also argued that each of the Plaintiffs failed to establish imminent or irreparable harm and were therefore not entitled to injunctive relief.

The Parties submitted extensive briefing, which included portions of the rulemaking record in support of the Parties' respective positions, a stipulated chronology, as well as exhibits

6.4 Copyright © NH Bar Association

and affidavits. By order dated October 1, 2019, the Court set a briefing schedule, and a hearing on the Plaintiffs' Motion for Temporary and Preliminary Injunctive Relief on October 18, 2019. The Parties did not conduct any fact discovery before the October 18 hearing or the issuance of the Superior Court's decision.

On November 26, 2019, the Court granted the Plaintiffs' Motion for Preliminary relief. The New Hampshire Department of Environmental Services ("NHDES") is preliminarily enjoined from implementing the Final Rules for violation of the cost-benefit requirement of RSA 485:3, I (b). The Court rejected the remainder of the Plaintiffs' challenge to the Final Rules. The Court found the Final Rules do not constitute an unfunded mandate pursuant to Part I, Article 28-a of the New Hampshire Constitution or RSA 541-A:25, that Defendant gave adequate notice pursuant to RSA 541-A, and that the Final Rules constituted a "logical outgrowth" of draft rules issued for public comment during the rulemaking process. The Court stayed the effective date of its preliminary injunction until December 31, 2019.

Following the Superior Court's Order, the Defendant filed a motion for expedited partial reconsideration. The motion asserted that, even if the Court were correct that NHDES did not comply with the cost-benefit consideration provisions of RSA 485:3, I (b) required to establish an MCL, NHDES did not need to do so to enact an AGQS, and that the Final Rules relating to AGQS should be excluded from the injunction. Plaintiffs objected, *inter alia,* on the basis that Senate Bill 309 modified RSA 485:3 and RSA 485-C:6 to require NHDES to conduct a cost-benefit analysis for both MCLs and AGQS, and that Defendant's publications and procedure in adopting the Final Rules treated MCLs and AGQSs coextensively, The Superior Court denied

6.5 Copyright © NH Bar Association

the motion, citing to the legislative history of the relevant statutes and an affidavit of NHDES' Sarah Pillsbury, Ex. 2, Reconsideration Denial, at 2.[1]

As a consequence of these rulings, Defendant's enforcement of the Final Rules is preliminarily enjoined. Each party now seeks interlocutory review by the New Hampshire Supreme Court of those issues on which they received an adverse ruling from the Superior Court. For the record, neither side agrees with the arguments set forth by the other party. Specifically, Plaintiffs dispute the assertions made by the Defendant and argue that the Defendant's arguments are not sufficient to allow what they consider to be unlawfully promulgated rules to go into effect. In turn, the Defendant disputes the assertions of the Plaintiffs and argues that insufficient grounds existed for the issuance of a preliminary injunction. Given this substantial difference of position among the Plaintiffs, the Defendant, and the trial court, the Supreme Court's decision will materially advance and clarify further proceedings in this litigation.

STATEMENT AS TO NECESSITY OF TRANSCRIPT

The Parties agree that transcripts from the hearing held on October 1, 2019, the preliminary hearing held on October 18, 2019, and a status conference held on December 6, 2019, are necessary to determine the issues raised on appeal.

QUESTIONS PRESENTED FOR APPEAL

Both the Plaintiffs and the Defendant propose questions for appeal. The party that proposed the question is indicated in parentheses.

1. Whether the Final Rules violate Part I, Article 28-a (Unfunded State Mandates) of the New Hampshire Constitution under the Supreme Court's decision in *City of Concord v. State*, 164 N.H. 130 (2012) and if not, whether the Supreme Court should revisit that decision (Plaintiffs);

[1] In its Reconsideration Denial, the Superior Court also granted PVWSD's motion to correct a statement in the Court's Order, thereby striking the statement on page 7 of the Order that "[Plymouth Water District] appears to concede that, prior to enactment of the new rule by DES, it already monitored and treated for PFAS." *Id.* at 3, fn. 1.

6.6 Copyright © NH Bar Association

2. Whether the Final Rules violate RSA 541-A: 25 (Unfunded State Mandates), which the Plaintiffs assert has broader restrictions on agency power than Part I, Article 28-a of the New Hampshire Constitution (Plaintiffs);

3. Whether the Final Rules violate the rulemaking notice and process requirements of RSA 541-A because they do not constitute the logical outgrowth of the draft rules published for public comment (Plaintiffs);

4. Whether it was error for the Trial Court to issue a preliminary injunction with respect to the AGQS on the basis that NHDES failed to adequately consider costs and benefits where such requirements do not appear in RSA ch. 485-C (the Groundwater Protection Act) (Defendant);

5. Whether the Trial Court committed error when it issued a preliminary injunction with respect to both the MCL and the AGQS based on a conclusion that NHDES did not undertake adequate consideration of the costs and benefits to affected parties (Defendant); and,

6. Whether the record fails to support a showing of harm sufficient to support a preliminary injunction with respect to either the MCL or the AGQS (Defendant).

A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND AN INTERLOCUTORY TRANSFER WILL MATERIALLY ADVANCE AND CLARIFY FURTHER PROCEEDINGS IN THE LITIGATION

In its decision enjoining the enforcement of the Final Rules, the Court observed that "the legal issues raised by Plaintiffs' challenge are complex, the importance of public health is paramount and the expense imposed by the proposed rule is significant." Order at 23. Although it enjoined the rules at issue, it provided the parties with the opportunity to "seek immediate review of this decision in the New Hampshire Supreme Court." *Id.* The Parties agree that this lawsuit (and appeal) raise complex and novel issues of significance to each Plaintiff and the public generally.

Plaintiffs' assert a substantial basis exists for a difference of opinion as to whether Defendant adequately complied with the notice and comment requirements in RSA 541-A and adequately performed the consideration of costs and benefit mandated by RSA 485:3, 1(b). The

6.7 Copyright © NH Bar Association

New Hampshire Supreme Court has not reviewed RSA 541-A's notice and comment requirements, including the requirements of RSA 485:3, 1(b), nor has the Supreme Court reviewed the "logical outgrowth" doctrine developed under the federal Administrative Procedure Act. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C.Cir. 2005). Guidance from the New Hampshire Supreme Court on these novel issues of New Hampshire law will materially advance and clarify further proceedings in this litigation, and in many other rulemaking contexts.

Moreover, Plaintiffs' assert a substantial basis exists for a difference of opinion as to whether the Final Rules constitute an unfunded mandate in violation of the New Hampshire Constitution Part 1, Art. 28-a and/or RSA 541-A:25. The Supreme Court has not issued opinions on the issue of unfunded mandates under Part I, Article 28-a of the New Hampshire Constitution in the context of agency rulemaking. Further, the Supreme Court has not previously considered the unfunded mandate prohibitions contained in RSA 541-A:25. This appeal presents the opportunity to re-examine case law under the New Hampshire Constitution, as well as to address the statutory provision for the first time. Accordingly, guidance from the New Hampshire Supreme Court on these issues of first impression under New Hampshire law will materially advance and clarify further proceedings in this litigation.

Defendant asserts a substantial basis exists for a difference of opinion related to whether the facts of the case and the relevant legal standards and requirements support the issuance of a preliminary injunction for either the MCL or the AGQS. To the extent the preliminary injunction of the MCL remains in place, public water systems will not have to test for PFOA, PFOS, PFNA, or PFHxS and be subject to the remediation requirements of the statute. In addition, the AGQS governs what must occur at contamination sites. To the extent the preliminary injunction of the AGQS remains in place, there will be no AGQS for PFNA or

6.8 Copyright © NH Bar Association

PFHxS and the AGQS for PFOA and PFOS will revert to the previous limit of 70 parts per trillion combined.[2]

LIST OF EXHIBITS

A Table of Contents setting forth the exhibits is included with the separate appendix accompanying this joint interlocutory appeal statement.

APPROVAL OF TRANSFER OF QUESTIONS OF LAW

The undersigned hereby approves the transfer of the question of law presented for appeal to the New Hampshire Supreme Court in accordance with Superior Court Rule 46 and Supreme Court Rule 8.

January 24, 2020

Date:_____

Richard B McNamara

Honorable Richard B. McNamara

Richard B. McNamara
Superior Court Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/27/2020

[2] For purposes of this statement only, the Plaintiffs take no position as to whether previously enacted rules, intended to be superseded by the Final Rules, are re-activated as a result of the Court's injunction, or otherwise remain in place. The Plaintiffs expressly reserve the right to challenge the position.

6.9 Copyright © NH Bar Association

Respectfully submitted,

THE PLYMOUTH VILLAGE WATER & SEWER DISTRICT, RESOURCE MANAGEMENT, INC., AND CHARLES G. HANSON

By their Attorneys,

PASTORI | KRANS, PLLC

Dated: January 24, 2020 By: */s/ Terri L. Pastori*

Terri L. Pastori, NH Bar #12136
tpastori@pastorikrans.com
Beth A. Deragon, NH Bar #16347
bderagon@pastorikrans.com
70 Commercial Street, Suite 203
Concord, NH 03301
(603) 369-4769

3M COMPANY

By its Attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: January 24, 2020 By: */s/ Mark C. Rouvalis*

Mark C. Rouvalis, NH Bar #6565
Mark.Rouvalis@mclane.com
Joseph A. Foster, NH Bar # 838
Joseph.Foster@mclane.com
Michael J. Quinn, NH Bar # 5584
Mike.Quinn@mclane.com
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
Telephone: (603) 625-6464

 Copyright © NH Bar Association

BEVERIDGE & DIAMOND

Dated: January 24, 2020 By: */s/ Nessa Horewitch Coppinger*

Nessa Horewitch Coppinger (*admitted Pro Hac Vice*)
D.C. Bar #477467
ncoppinger@bdlaw.com
1350 I Street, NW, Suite 700
Washington, DC 20005
Telephone: (202) 789-6053

GORDON J. MACDONALD,
ATTORNEY GENERAL

Dated: January 24, 2020 By: */s/ K. Allen Brooks*

K. Allen Brooks, NH Bar. #16242
K.Allen.Brooks@doj.nh.gov
Senior Assistant Attorney General
Christopher G. Aslin, NH Bar # 18285
Christopher.Aslin@doj.nh.gov
Senior Assistant Attorney General
Environmental Protection Bureau
NH Department of Justice
33 Capital Street
Concord, NH 03301-6397
Telephone: (603) 271-3679

CERTIFICATE OF SERVICE

Undersigned counsel certifies that the foregoing Joint Interlocutory Appeal Statement has been served via the Court's electronic filing system to all parties of record.

/s/ Mark C. Rouvalis
Mark C. Rouvalis

115521\15331264.v1
115521\15343383.v1

 Copyright © NH Bar Association

ADDENDUM TO JOINT INTERLOCUTORY APPEAL STATEMENT

Table of Contents

Page

1. Order on Plaintiffs' Petition for Preliminary Injunctive Relief (Nov. 26, 2019) ……..... 12

2. Order Denying State's Motion for Reconsideration (Dec. 16, 2019) …..… 35

 Copyright © NH Bar Association

POSTED

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

2018-0604

No. 215-2017-CV-51

RECEIVED

OCT 30 2018

NH SUPREME COURT

John C. Rankin and Mary Anne Rankin, Plaintiffs

v.

South Street Downtown Holdings, Inc., Defendant

&

South Street Downtown Holdings, Inc., Third Party Plaintiff

v.

TruexCullins and Partners Architects and
Wagner Hodgson Landscape Architecture, Third Party Defendants

INTERLOCUTORY TRANSFER STATEMENT

(a) Parties of Record

Plaintiffs John Rankin and Mary Rankin
48 Berrill Farms Lane
Hanover, NH 03755

Counsel: Michael Noonan, Esq.
Bar #8214
Shaheen & Gordon PA
PO Box 997
Dover, NH 03821

Defendant South Street Downtown Holdings, Inc.
4 Currier Place, Suite 305
Hanover, NH 03755

Counsel: Andrew Dunn, Esq.
Bar # 696
Devine Millimet & Branch PA
111 Amherst Street
Manchester, NH 03101

Third Party Defendant TruexCullins and Partners Architects
209 Battery Street, Suite 201
Burlington, VT 05401

Counsel: Kenneth Walton, Esq.
Bar #18726
Lewis Brisbois Bisgaard & Smith LLP
One International Place, 3rd Floor
Boston, MA 02110

Third Party Defendant Wagner Hodgson Landscape Architecture
7 Marble Avenue
Burlington, VT 05401

Counsel: William Staar, Esq.
Bar #16526
Morrison Mahoney LLP
1001 Elm Street, Suite 304
Manchester, NH 03101

Copyright © NH Bar Association

(b) Statement of Facts

On March 15, 2015, the plaintiff, John Rankin ("Rankin"), after patronizing a business at the premises of 70 South Main Street in the Town of Hanover, fell on what he alleges to be "an inadequate and dangerous ramp or partial stair on his path from the business's door to the sidewalk," which he alleges "did not meet applicable building codes." The entire "South Street Block" was renovated between 2002 and 2009 and was substantially completed by January 2009. South Street had retained project architect TruexCullins and landscape architect Wagner Hodgson to serve as design professionals for the renovation project. South Street alleges that both architectural firms were involved in the design of the area of the property where Rankin alleges he tripped and fell. South Street denied the allegations in Rankin's complaint. On May 30, 2017, South Street brought third party actions against the architects, seeking indemnity and/or contribution. On December 5, 2017, third party defendant Wagner Hodgson filed a motion to dismiss, asserting as grounds therefore that all claims against Wagner Hodgson are time barred because the plaintiff filed suit outside of the eight-year repose period.

No transcript is necessary to decide the question if accepted by the New Hampshire Supreme Court.

(c) Statement of Question

Does RSA 508:4-b ("the statute of repose") as amended in 1990 apply to and bar third party actions by a property owner defendant (in a premises liability action) for indemnity and/or contribution against architects involved in the design of the improvement to real property which the injured plaintiff alleges was dangerous and did not meet applicable building codes?

Copyright © NH Bar Association

(d) Statement of the Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why an Interlocutory Transfer May Materially Advance the Termination or Clarify Further Proceedings of the Litigation, Protect a Party from Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify, or Clarify an Issue of General Importance in the Administration of Justice

The court finds that a substantial basis exists for a difference of opinion as to whether the current version of New Hampshire's Statute of Repose as amended in 1990 applies to indemnity and/or contribution claims arising out of a deficiency in the creation of an improvement to real property. First, the current applicable version of the statute does not include the terms indemnity or contribution, while the previous version, as passed in 1965, did include the terms indemnity and contribution. Second, other jurisdictions have interpreted similar statutes in different ways. At least 25 states and the District of Columbia have a statute of repose that expressly includes a bar on bringing indemnity and/or contribution claims within the statutory period,[1] 2 states have a statute that expressly excludes indemnity and/or contribution claims from their respective statute of repose,[2] at least 4 state appellate courts have interpreted their respective statute of repose to include actions for indemnity and/or contribution,[3] at least 1 state appellate court has interpreted its statute of repose to exclude actions for indemnity and/or contribution,[4] and approximately 14 states have not yet decided whether their respective statute of repose extends to actions for indemnity and/or contribution.

RSA 508:4-b (1990), commonly referred to in New Hampshire as the Statute of Repose, sets an absolute time limitation on actions arising out of deficiencies in the creation of improvements to real property. The current version of the statute provides in relevant part:

> [e]xcept as otherwise provided in this section, all actions to recover damages for injury to property, injury to person, wrongful death or economic loss arising out of any

[1] Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Iowa, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, Ohio (deemed unconstitutional on other grounds), Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.
[2] Arkansas and Nevada.
[3] Florida, Georgia, Tennessee, and Washington.
[4] Indiana.

 Copyright © NH Bar Association

> deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

RSA 508:4-b, I (amended 1990). The statute then sets forth two exceptions: (1) that the statute does not apply to "actions involving fraudulent misrepresentations, or to actions involving the fraudulent concealment of material facts upon which a claim might be based"; and (2) that the statute does not apply to "actions arising out of any deficiency in the design, labor, materials, planning, engineering, surveying, observation, supervision, inspection or construction of improvements which are for nuclear power generation, nuclear waste storage, or the long-term storage of hazardous materials." RSA 508:4-b, V. The statute does not expressly include or exclude actions for indemnity or contribution by its terms.

The prior version of RSA 508:4-b, as enacted in 1965, provided:

> No action to recover damages for injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, may be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

RSA 508:4-b (prior version—eff. July 27, 1965 and ruled unconstitutional in 1990).

The court has also concluded that resolution of the issue presented will clarify further proceedings for the litigants and for other future litigants similarly situated. The question presented directly addresses whether the third party defendants should be dismissed from the case. The case is currently before the Grafton County Superior Court on Wagner Hodgson's motion to dismiss on the grounds that the action is barred by the Statute of Repose. If the court interprets the statute of repose to include actions for indemnity and/or contribution, then Wagner Hodgson would be dismissed as a third party defendant to the suit and then presumptively TruexCullins would then also be dismissed

Copyright © NH Bar Association

from the case on the same grounds. If the court did not read the statute to include actions for indemnity and/or contribution, then Wagner Hodgson's motion to dismiss would be denied and Wagner Hodgson and TruexCullins would remain parties to the pending suit. If the parties were forced to continue to litigate in a case in which they do not belong, then the parties would suffer financially.

The court understands that regardless of the trial court's decision, the aggrieved party would file an interlocutory appeal. In order to clarify further proceedings and determine which parties should remain in the current action, the court has decided to transfer the issue to the New Hampshire Supreme Court.

Dated: 10/15/18

Lawrence A. MacLeod, Jr.
Presiding Justice

Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2017-CV-51

John C. Rankin and Mary Anne Rankin, Plaintiffs

v.

South Street Downtown Holdings, Inc., Defendant

&

South Street Downtown Holdings, Inc., Third Party Plaintiff

v.

TruexCullins and Partners Architects and
Wagner Hodgson Landscape Architecture, Third Party Defendants

TABLE OF ATTACHMENTS

1. Current and Applicable Version of RSA 508:4-b (as amended 1990)
2. Prior Version of RSA 508:4-b (effective 1965)

Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-_____

In re: Conservation Law Foundation, Inc. Appeal

RULE 10 APPEAL FROM ADMINISTRATIVE AGENCY
(NEW HAMPSHIRE WASTE MANAGEMENT COUNCIL)

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

By its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

K. Allen Brooks, N.H. Bar #16424
Senior Assistant Attorney General
Joshua C. Harrison, N.H. Bar #269564
Assistant Attorney General
Department of Justice
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3679

 Copyright © NH Bar Association

TABLE OF CONTENTS

Page

I. Parties....3

II. Decisions Being Appealed....4

III. Questions Presented....4

IV. Provisions of Relevant Statutes and Other Documents Related to the Questions Presented....4

V. Provisions of Insurance Policies, Contracts, or Other Documents....5

VI. Statement of the Case....5

VII. Jurisdictional Basis of Appeal....11

VIII. Reasons for Acceptance....12

IX. Statement that Issues Have Been Raised and Preserved....13

X. Appendix.... Filed Concurrently

6.20 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 Term

No. 2022-____

In re: Conservation Law Foundation, Inc. Appeal

PETITION FOR APPEAL PURSUANT TO RULE 10 FROM THE NEW HAMPSHIRE WASTE MANAGEMENT COUNCIL

NOW COMES the State of New Hampshire Department of Environmental Services by its attorneys the New Hampshire Office of the Attorney General and respectfully petitions this Honorable Court to grant an appeal, pursuant to RSA 541 and N.H. Supreme Court Rule 10, to review the decisions of the New Hampshire Waste Management Council ("Waste Council") in the above captioned matter.

I. PARTIES

Appellant: The New Hampshire Department of Environmental Services ("Department")
29 Hazen Drive
Concord, New Hampshire 03301
P.O. Box 95, Concord, New Hampshire 03302-0095

Represented by: K. Allen Brooks
Senior Assistant Attorney General. N.H. Bar #16424
Joshua C. Harrison
Assistant Attorney General. N.H. Bar #269564
33 Capitol Street, Concord, New Hampshire 03301

Appellee: Conservation Law Foundation, Inc. ("CLF")
27 North Main Street
Concord, New Hampshire 03301

Represented by: Thomas F. Irwin, Esq., N.H. Bar #11302
Heidi Trimarco, Esq., N.H. Bar #266813

Other Party: North Country Environmental Services, Inc. ("NCES")[1]

[1] The Department anticipates that NCES will also file a request for appeal.

6.21 Copyright © NH Bar Association

1855 VT Route 100
Hyde Park, Vermont 05655 (Business Address)

581 Trudeau Road
Bethlehem, New Hampshire 03574 (Facility Address)

Represented by: Bryan K. Gould, Esq., N.H. Bar #8165
Cooley A. Arroyo, Esq., N.H. Bar #265810
Morgan G. Tanafon, Esq., N.H. Bar #273632
Cleveland, Waters, and Bass, P.A.
Two Capital Plaza, 5th Floor
P.O. Box 1137
Concord, New Hampshire 03302-1137

II. DECISIONS BEING APPEALED

1. State of N.H. Waste Management Council "Final Order on Appeal," in Docket No. 20-14 WMC, dated May 11, 2022.
2. State of N.H. Waste Management Council "Order on State of New Hampshire Department of Environmental Services' Motion for Reconsideration," in Docket No. 20-14 WMC, dated November 3, 2022.

III. QUESTIONS PRESENTED

1. Whether the Hearing Officer erred when he decided whether the permit properly addressed "need" as a matter of law because the determination of whether a proposed facility satisfies a "need" is a factual one.

2. Whether the Hearing Officer erred when he determined that RSA 149-M:11, III(a) and V preclude NHDES from finding that a proposed facility satisfies a "need" unless the proposed facility will only operate during a period of capacity shortfall.

IV. PROVISIONS OF RELEVANT STATUTES AND OTHER DOCUMENTS RELATED TO THE QUESTIONS PRESENTED

Statutes

N.H. RSA 21-M:3	(Appendix Pages 624-626)
N.H. RSA 21-O:9	(Appendix Pages 627-628)
N.H. RSA 21-O:14	(Appendix Pages 629-631)
N.H. RSA 149-M:11	(Appendix Pages 632-633)

6.22 Copyright © NH Bar Association

Other Documents

CLF's Petition for Appeal dated November 9, 2020 (Appendix Pages 3-19);

Waste Council Final Order on Appeal dated May 11, 2022 (Appendix Pages 20-39);

Department's Motion for Reconsideration dated May 31, 2022 (Appendix Pages 40-46);

Waste Council Order on State's Motion for Reconsideration dated November 3, 2022 (Appendix Pages 57-69).

Waste Council Transcript from February 18 and 22, 2022 Hearing (Appendix Pages 70-623).[2]

V. PROVISIONS OF INSURANCE POLICIES, CONTRACTS, OR OTHER DOCUMENTS

Not applicable to this appeal.

VI. STATEMENT OF THE CASE

The Department brings this appeal to determine whether the Waste Council, through its Hearing Officer, erred in determining as a matter of statutory interpretation that RSA 149-M:11, III(a) and V prohibit the Department from granting a solid waste facility permit to a facility that proposes to operate prior to a projected shortfall in capacity despite the Waste Council finding as a factual matter that the Department acted reasonably in granting the Permit with respect to the capacity need requirements of RSA 149-M:11, III(a) and V.

[2] Supreme Court Rule 10 requires that if the moving party in an appeal seeks that a transcript "be prepared and include[d] [in] the record of appeal, the moving party should consult the administrative agency's regulations and/or RSA 541-A:31." N.H. Sup. Ct. R. 10. RSA 541-A:31 provides that "[u]pon the request of any party or upon the agency's own initiative, such [hearing] record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs of such transcription." RSA 541-A:31, VII. With respect to transcripts, the Waste Council rules provide that "[t]he council, upon request of a party, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript. Any transcript so prepared shall be made available to the council for copying at the council's expense." N.H. Admin. R. Env-WMC 205.05(b). The transcript included with this petition for appeal was produced following the Waste Council's Final Order on Appeal using a qualified stenographer at Department expense and will be shared with the Waste Council.

6.23 Copyright © NH Bar Association

On March 24, 2020, the Department received an application for a Type I-A Modification to a Solid Waste Management Facility Permit from NCES to expand their solid waste facility in Bethlehem, New Hampshire and operate for approximately six years, through December 2026. Following a robust review of the application, which included a public hearing and comment period, the Department granted NCES its Type I-A Permit Modification on October 9, 2020, Permit No. DES-SW-SP-03-002 ("Permit"). The Permit authorized NCES to expand its existing facility by 1.24 million cubic yards of airspace and conditioned the Permit on NCES operating the facility until December 31, 2026. The expansion is known as Stage VI. As part of its review and its permit issuance, the Department created a 48-page Application Review Summary, which detailed the Department's review of the permit application.

On November 9, 2020, CLF appealed the Permit to the Waste Council arguing, among other things, that the Department's issuance of the Permit was unlawful and unreasonable because it does not satisfy the substantial public benefit criteria in RSA 149-M:11, III(a). CLF Notice of Appeal, A3-19. Following many prehearing pleadings and orders, the Waste Council held a two-day hearing on February 18 and 22, 2022. The Waste Council heard testimony from a witness for CLF and then from a panel of Department witnesses from the Waste Management Division who testified about their role and their capacity need analysis performed under RSA 149-M:11, III(a) and V. These provisions of RSA 149-M:11 require the Department to assess many factors and determine what the total projected New Hampshire generated waste will be over a 20-year planning period and then to determine the total amount of remaining capacity at existing and permitted landfills to identify whether a shortfall in capacity occurs over the 20-year planning period. Specifically, RSA 149-M:11, III and V read as follows, in relevant part:

> III. The department shall determine whether a proposed solid waste facility provides a substantial public benefit based upon the following criteria:

6.24 Copyright © NH Bar Association

(a) The short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire, which capacity need shall be identified as provided in paragraph V.

…

V. In order to determine the state's solid waste capacity need, the department shall:

(a) Project, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period. In making these projections the department shall assume that all unlined landfill capacity within the state is no longer available to receive solid waste.

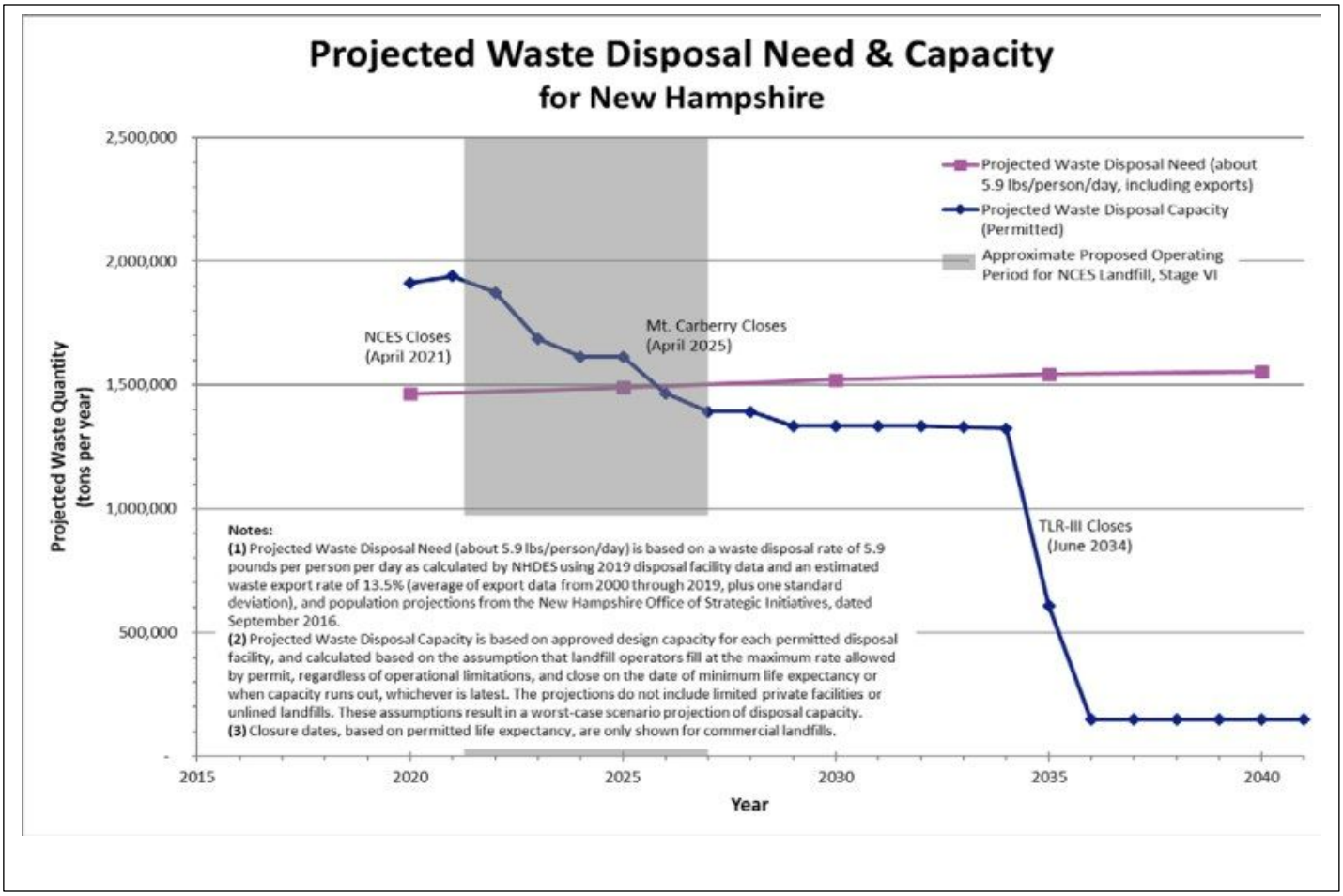
…

(d) Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need.

RSA 149-M:11, III(a) and V. The Department is able to produce the results of this analysis on a chart that demonstrates the amount of landfill capacity over the 20-year planning period compared against the projected total New Hampshire generated waste over that time. The Department also positions the proposed facility's operating life onto the chart to further evaluate short- and long-term need and capacity need consistent with RSA 149-M:11, III(a) and V. The Department's evaluation of these results regarding when and by how much a shortfall occurs is a consideration in the RSA 149-M:11 public benefit determination and the focus of this appeal.[3] Below is the chart produced by the Department for the review of the subject permit application for the proposed expansion of NCES Stage VI.

[3] RSA 149-M:11 requires the Department to take into account multiple other competing factors such as location, size, and type of proposed facility as well as the concerns of the public and the host community. *See* RSA 149-M:11, III and RSA 149-M:11, IV.

6.25 Copyright © NH Bar Association



During the hearing, the Department referred to its Application Review Summary, which contained its capacity shortfall projections and this chart, and testified that when reviewing the application and completing the RSA 149-M:11, V capacity shortfall projection analysis, the Department determined that a shortfall would occur in approximately 2025. As the Waste Council found and the chart demonstrates, NCES Stage VI would begin operating around 2021 and operate through the end of 2026. The Waste Council heard testimony, rationale, and argument regarding the NCES Stage VI proposal and the reasonableness of the Department's capacity need determinations.

During deliberations, the Hearing Officer posed multiple questions to the Waste Council consisting of both narrow questions of fact the Hearing Officer needed to make rulings of law

Copyright © NH Bar Association

and then more general questions regarding the reasonableness of the Department's decision. Waste Council Hearing Transcript, A428-554.

The Waste Council, with respect to RSA 149-M:11, III(a) and V, deliberated and made the following unanimous decisions on the issues before them that are relevant to this Rule 10 Petition for Appeal:

(1) "DES did measure the short and long-term capacity requirements of the [State.]" *Id*. at Day 2 Page 87 Lines 13-23; Page 88, Lines 1-7, A514-515.

(2) "DES acted reasonably [in its] measurement of the short and long-term capacity needs required by [RSA 149-M:11, III(a)] in issuing the permit." *Id*. at Day 2 Page 92 Lines 10-23, A519.

(3) "DES was lawful in finding the capacity need during the life [of the permit.]" *Id*. at Day 2 Page 99 Lines 9-20, A526.

(4) "DES acted reasonably in issuing [the] permit to help address the capacity needs during the life of the permit." *Id*. at Day 2 Page 109 Lines 14-23, A536.

As such, the Waste Council determined that the Department acted reasonably with respect to RSA 149-M:11, III(a) and V analysis and public benefit determination. The Waste Council upheld the Permit with respect to CLF's other remaining challenges as well. *See* Final Order on Appeal, A20-39.

On May 11, 2022, the Hearing Officer issued the Waste Council's Final Order on Appeal, which accepted the Waste Council's votes and decisions. However, without overturning the Waste Council's determinations on the reasonableness of the Department's capacity need determinations, the Hearing Officer decided as a matter of law that the Department acted *unlawfully* with respect to its determination that the proposed Stage VI facility satisfied a capacity need because the Permit authorized operation of the facility prior to the identified shortfall in capacity point. The Hearing Officer determined, relying on the term "satisfies" in RSA 149-M:11, V(d), that "[i]t is impossible for a proposed facility to satisfy a capacity need

6.27 Copyright © NH Bar Association

beyond the scope of said facility's lifespan because said facility cannot accommodate capacity need during a period when it is not operating." Final Order on Appeal, page 11, A30. Further, the Hearing Officer stated that "[a]s the only way a proposed facility can satisfy a need is by operating, a proposed facility can only provide for a capacity need during the breadth of its lifetime." *Id*. at 11-12, A30-31. Ultimately, the Hearing Officer concluded that:

> if a proposed facility operates for a period without any shortfall, then [the Department] cannot lawfully find there to be a capacity need thereby meeting the requirement of the (a) criteria when determining substantial public benefit…The record reflects that the NCES Facility would operate for a period without capacity need, and capacity need is a requisite element for finding substantial public benefit under the (a) criteria. Accordingly, NHDES acted unlawfully when it determined that the NCES Facility would provide a substantial public benefit based on the capacity need of the state and the NCES Facility's ability to accommodate waste generated in New Hampshire.

Id. at 14-15, A33-34. To support his interpretation, the Hearing Officer relied upon the present-tense form of the verb "satisfies" in RSA 149-M:11, V(d). The Hearing Officer provided the following rationale:

> The word 'satisfies' is a present-tense verb, through which 'the proposed facility' (the subject) acts upon 'that need' (the object): this language imposes a present-action relationship between the proposed facility and the capacity need. The use of the word 'satisfies' in this context results in two implications: first, a proposed facility must have a present effect on capacity need, and second, it is not enough for a proposed facility to just affect capacity need—the proposed facility must 'satisfy' it to some degree.

Final Order on Appeal, at 10, A29. Essentially, the Hearing Officer's Final Order on Appeal required a strict 1:1 temporal relationship between facility operation and capacity shortfall that the statute does not contemplate or require.

The Department filed a Motion for Reconsideration on May 31, 2022 that was limited to the Hearing Officer's determination that the Department had acted unlawfully with respect to the capacity need analysis. Department's Motion for Reconsideration, A40-46. CLF objected to the Department's Motion for Reconsideration. CLF Objection to Department's Motion for

6.28 Copyright © NH Bar Association

Reconsideration, A47-56. In the Department's Motion for Reconsideration, the Department recognized that much of the Hearing Officer's Final Order on Appeal is not without merit and is well-taken but argued against the Hearing Officer's interpretation of the word "satisfies" to imply a strict temporal relationship between operation and capacity shortfall and the resulting conclusions that followed. *Id*. The Department argued that the statute does not contemplate or require such a strict relationship and that much of the statute involves language that requires looking into the future and beyond the present impact to determine substantial public benefit and that the Hearing Officer's interpretation would render the other requirements and necessary considerations of RSA 149-M:11, III meaningless. The Department further argued that the question of whether a proposed facility providing capacity at a certain point in time can satisfy a capacity shortfall elsewhere in the 20-year planning period, is a question of fact not law. As identified above, the Waste Council had considered this factual question and determined the Department acted reasonably in issuing the Permit.

On November 3, 2022, the Hearing Officer denied the Department's Motion for Reconsideration reaffirming his initial Final Order on Appeal. Order on State's Motion for Reconsideration, A57-69.

VII. JURISDICTIONAL BASIS OF APPEAL

This appeal is filed pursuant to RSA 21-O:14, III and RSA 541. Specifically, RSA 21-O:14, III provides that "[a]ny party aggrieved by the disposition of an administrative appeal before any council established by this chapter may appeal such results in accordance with RSA 541." RSA 21-O:14, III. RSA 541:3 provides that

> Within thirty days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant

6.29 Copyright © NH Bar Association

> such rehearing if in its opinion good reason for the rehearing is stated in the motion.

RSA 541:3. In turn, RSA 541:6 provides that "[w]ithin thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court." RSA 541:6. As provided herein, the Department received the Waste Council's Final Order on Appeal on May 11, 2022 and timely filed a motion for reconsideration. On November 3, 2022, the Waste Council issued its order denying the Department's motion for reconsideration.

VIII. REASONS FOR ACCEPTANCE

This appeal raises issues fundamental to the permitting of landfills in the State of New Hampshire pursuant to RSA 149-M. The three parties to the appeal all arrived at different conclusions with respect to implementation of the relevant statutory sections. In fact, the Waste Council members and the Hearing Officer also seemed to have reached different conclusions with respect to the statute's application. The issues in the case implicate both significant environmental impacts of statewide importance and, potentially, a very significant cost on the regulated community.

The Hearing Officer's interpretation of RSA 149-M:11, III(a) and V introduces a strict temporal relationship that is not contemplated by statute and is based upon factual determinations that the Waste Council rather than the Hearing Officer is obligated to make. The result of the Hearing Officer's strict interpretation removes necessary Department discretion and evaluation of a permit application.

The Supreme Court's acceptance of this appeal is necessary to determine whether RSA 149-M:11, III(a) and V requires the strict temporal relationship the Hearing Officer concludes, which negates the valuable Department discretion involved in these complex issues, or whether the Department may reasonably utilize its discretion, as the Waste Council found, to determine

 Copyright © NH Bar Association

that an applicant's proposed capacity may satisfy a capacity need even though an applicant may propose to operate its facility during periods in which no shortfall is identified. Accordingly, the Department respectfully requests that the Supreme Court of New Hampshire accept this appeal.

IX. STATEMENT THAT ISSUES HAVE BEEN RAISED AND PRESERVED

The issues presented within this petition for appeal were timely presented to the Waste Council and have been properly preserved for appellate review by motions, objections, and motions for reconsideration.

6.31 Copyright © NH Bar Association

WHEREFORE, the Department respectfully requests that this Honorable Court:

A. Grant this Rule 10 Petition for Appeal;

B. Reverse the decision of the Waste Management Council's May 11, 2022 Final Order and November 3, 2022 Order on Reconsideration to the extent they conclude that the Department acted unlawfully;

C. Find that RSA 149-M:11, III(a) and V do not require the Department to restrict permitting of proposed solid waste facility's to only times during which a capacity shortfall is projected; and

D. Grant such other and further relief as justice may require.

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

By its attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY M. GALDIERI
SOLICITOR GENERAL

Date: December 5, 2022

/s/ Joshua C. Harrison
Joshua C. Harrison, N.H. Bar #269564
Assistant Attorney General
Environmental Protection Bureau
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3679
Joshua.C.Harrison@doj.nh.gov

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the court's electronic filing service and via e-mail, to Conservation Law Foundation, Inc., through its attorneys, Tom Irwin, Esq. and Heidi Trimarco, Esq., at 27 North Main Street, Concord, New Hampshire 03301, and to North Country Environmental Services, Inc., through its attorneys, Cleveland, Waters and Bass, P.A., Bryan Gould, Esq., Cooley Arroyo, Esq., and Morgan Tanafon, Esq., at 2 Capital Plaza, P.O. Box 1137, Concord, New Hampshire 03302-1137.

Date: December 5, 2022

/s/ Joshua C. Harrison
Joshua C. Harrison

6.32 Copyright © NH Bar Association

STATE OF NEW HAMPSHIRE
WORKERS COMPENSATION APPEALS BOARD

Elba Hawes

v.

Asplundh Tree Expert, LLC

MOTION FOR REHEARING

NOW COMES the claimant Elba Hawes, by and through his attorneys Douglas, Leonard & Garvey, P.C., and respectfully moves for rehearing, stating as follows:

1. The Compensation Appeals Board (CAB) should grant rehearing because its decision is unjust, unreasonable and erroneous as a matter of law. The CAB's decision is based on unreasonable and erroneous factual findings, including findings that Mr. Hawes suffered injuries when his workday was "done" and that he was returning home to "rest for the next day's early shift." In fact, Mr. Hawes' workday was not done when he suffered his injury: he was traveling home to rest in order to return to work later the same day. The CAB made further unreasonable and erroneous factual findings where the CAB held that Asplundh somehow did not expose Mr. Hawes to increased street risks on November 1, 2019, notwithstanding that Asplundh's alteration of his schedule that day unquestionably required him to travel the roads to a significantly greater extent than he otherwise would have done. The CAB also made legal errors, erroneously holding that the New Hampshire Supreme Court has not recognized a "mutual benefit" exception to the "coming and going" rule notwithstanding that the Supreme Court has repeatedly done so. The CAB's factual and legal errors contributed to its erroneous decision denying Mr. Hawes's workers' compensation benefits, warranting rehearing.

2. The CAB made unreasonable and erroneous findings of material fact, finding that Mr. Hawes suffered his injuries when he "was driving home as he normally would when the workday was done and he had punched out." Decision at p. 3. Contrary to the CAB's finding, Mr. Hawes' workday was not "done," under the uncontested facts. The employer originally scheduled Mr. Hawes to work 7:00 a.m. to 4:00 p.m. on November 1, 2019, but after Mr. Hawes had already begun his workday, Asplundh changed his schedule, requiring him to suspend his workday at noon and return to resume it at 8:00 p.m. Requests for Findings of Fact 2 and 6. Mr. Hawes would have worked an additional four (4) hours on November 1, 2019—from 8:00 p.m. until midnight---after the CAB unreasonably found his workday to be "done," but for his motor vehicle accident. Mr. Hawes' workday was not "done" and noon. His workday was only interrupted, for the benefit of Asplundh.

3. The CAB made a further erroneous and unreasonable factual finding where the CAB found that "Mr. Hawes was not required *by the nature of his employment* to go home and rest for the next day's early shift." Decision at p. 4 (italics in original) (underlining added). Again, Asplundh did not instruct Mr. Hawes to return to work early the next day—November 2, 2019. On the contrary, Asplundh demanded that Mr. Hawes return to work later the same day. The CAB further acted unreasonably by finding that the nature of Mr. Hawes' employment somehow did not require him to go home and rest before returning later in the day. Asplundh had Mr. Hawes perform heavy physical labor the morning of November 1, 2019, then required him to return at 8:00 p.m. that night to resume performing heavy physical labor throughout the night. The CAB therefore should have found that the nature of Mr. Hawes' employment required him to go home and rest in the interval between his two (2) shifts on November 1, 2019 (7:00 a.m.—noon, followed by 8:00 p.m.—midnight), as his employer directed him to do.

4. In addition, the CAB acted unreasonably, and committed error, by failing to find that Asplundh's directive to Mr. Hawes on November 1, 2019, subjected him to "increased street risks." Decision at p. 4. As Mr. Hawes testified, he would only have traveled the 3-hour round-trip between his home in Groveton, New Hampshire, and the job site once in a normal workday when he was scheduled to work from 7:00 a.m. until 4:00 p.m. Asplundh's directive that Mr. Hawes return home to rest at noon so he could return to work at 8:00 p.m. that night subjected Mr. Hawes to an additional 90 minutes on the road that day, however. Indisputably, Asplundh's directive required Mr. Hawes to travel the roads on November 1, 2019, to a significantly greater extent than he otherwise would have traveled them that day, thereby subjecting him to increased street risks. The more a person must travel the roads, the greater the street risks the person faces. Moreover, it is beyond dispute that Mr. Hawes would not have suffered his injuries if Asplundh had not interrupted his normal schedule, instructing him to go home to rest at noon so he could return to work at 8:00 p.m. Mr. Hawes would have been working at the job site at the time of the accident, not traveling the roads, if Asplundh had not altered his schedule.

5. The CAB committed patent error where it found that the New Hampshire Supreme Court has not adopted "a pure 'mutual benefit' exception to the 'coming and going' rule. " Decision at p. 4. In fact, the Supreme Court has repeatedly recognized such an exception. N.E. Telephone Co. v. Ames, 124 N.H. 661, 664 (1984) ("we hold that the activity of the defendant was of mutual benefit to herself and to the plaintiff, and thus arose in the course of employment."). Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1992) (emphasis supplied) ("personal activities are compensable if they are 'reasonably to be expected and 'not forbidden,' or if they confer a 'mutual benefit on the employee and the employer.").

6. Asplundh unquestionably acted for its own benefit where it instructed employees such as Mr. Hawes "go home and rest" so they could return to work later the same day to work through the night for Asplundh.

7. Because Mr. Hawes suffered injury in the course of performing an activity of mutual benefit to Asplundh and himself, and because the New Hampshire Supreme Court has held that "personal activities are compensable…if they confer a 'mutual benefit on the employee and the employer," the CAB erred by failing to find Mr. Hawes' injuries compensable.

8. The CAB committed additional error where it failed to apply the "special errand" exception" notwithstanding that working through the night constituted a special duty for Mr. Hawes and traveling home in the middle of the day to prepare to return to work that night subjected Mr. Hawes to special travel risks. Henderson v. Sherwood Motor Hotel, 105 N.H. 443, 445 (1964).

9. The CAB committed further error where it reasoned that an employee somehow does not suffer a work-related injury where the employee suffers injury carrying out the employer's "unenforceable suggestion," in this case traveling home to rest so the employee could return to work later the same day. Decision at p. 3. No principle exists in New Hampshire workers' compensation law that employees can only recover workers' compensation benefits for injuries suffered while performing acts their employers force them to do. The CAB's erroneous reasoning flies in the face of the New Hampshire Supreme Court's pronouncement that "personal activities are compensable if they are 'reasonably to be expected and 'not forbidden,' or if they confer a 'mutual benefit on the employee and the employer." Cook, 135 N.H. at 154. The CAB's reasoning likewise ignores the principle that RSA 281-A should be construed liberally "to give the broadest reasonable effect to its remedial purpose" and further ignores the principle that all doubts

should be resolved in favor of the injured worker "when construing the statute." Appeal of Cote, 139 N.H. 575, 578 (1995).

10. Not only do the New Hampshire Supreme Court's Henderson and Cook decisions support the compensability of Mr. Hawes' injuries, but so do the decisions of other courts applying the "special errand" exception to the "coming and going" rule to find compensability in circumstances where an employee suffers injury while traveling between work and home before the workday is done at the employer's request or for the employer's benefit. Carbone's Case, 993 N.E.2d 1240 (Mass. App. Ct. 2013) (holding that "an employee's injuries from a risk of the street are compensable, rather than barred by the going and coming rule, when the employee's authorized activity at the time of the injury benefited the employer," and further noting that "the common thread throughout the categories of exceptions to the going and coming rule is the employer's authorization of an activity that furthers its business interest thereby exposing an employee to a street risk."); Slone-Nissan v. Workers' Compensation Appeals Board (Zeyl), 820 A.2d 925, 927 (Pa. Commw. Ct. 2003) (employee's injuries traveling home to change his clothes were compensable because "claimant was to return to the workplace" after changing his attire); Green v. Workers' Comp. Appeals Bd., 187 Cal.App.3d 1419, 1424-25 (Cal.Ct.App. 1986) (holding compensable under the special mission exception to the "coming and going" rule injuries that employee suffered while traveling home to change his clothes in order to attend a trade show for the employer that night because the employee's "trip was undertaken at the employer's request and was for the benefit of the employer."); McClure v. Gen. Motors Corp., 289 N.W.2d 631, 633 (Mich. 1980) ("when on a given day an employee, in obedience to the employer's direction to deviate from 'the regular normal working schedule' and to enter upon an interrupted and irregular

schedule, including a mandatory period of 'swing run' inactivity, is injured, his injuries are suffered 'out of and in the course of the employment.'").

11. For the foregoing reasons, the CAB should grant rehearing, find Mr. Hawes' November 1, 2019, injuries compensable, and award him temporary total disability benefits for the period beginning November 2, 2019, and continuing through February 9, 2020.

Respectfully submitted,

ELBA HAWES
By his attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

Dated: March 24, 2021

By: /s/ Benjamin T. King

Benjamin T. King, NH Bar #12888
14 South Street, Suite 5
Concord, New Hampshire 03301
(603) 224-1988
benjamin@nhlawoffice.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically served to all counsel of record on this date.

/s/ Benjamin T. King
Benjamin T. King

STATE OF NEW HAMPSHIRE

SUPREME COURT

APPEAL OF ALEXANDER SCOTT

(NEW HAMPSHIRE RETIREMENT SYSTEM)

#2019-0654

RECEIVED
SUPREME COURT
2019 NOV -7 P 1:44

PETITION FOR WRIT OF CERTIORARI

Parties and Counsel:

Party Seeking Review:

Alexander Scott:

Counsel
Russell F. Hilliard, Esq.
NHBA #1159
Upton & Hatfield, LLP
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com

All other Parties:

New Hampshire Retirement System

Counsel
Michael A. Delaney, Esq.
NHBA #10504
McLane Middleton, PA
900 Elm Street; PO Box 326
Manchester, NH 03105
(603) 625-6464
Michael.delaney@mclane.com

Copyright © NH Bar Association

Orders Appealed From and Requests for Reconsideration.

1. NHRS Decision dated July 9, 2019
2. Request for Reconsideration dated August 7, 2019
3. NHRS's Objection to Request for Reconsideration dated August 22, 2019
4. NHRS Decision dated October 8, 2019

Alexander Scott herewith petitions that a writ of certiorari issue to the New Hampshire Retirement System concerning Scott's request that, *inter alia*, as an Attorney appointed by the Attorney General pursuant to RSA 7:16-a, I, he was an official appointed for a fixed term, and his tenure at the Department of Justice between February 2017 and November 2017 did not require mandatory membership in the New Hampshire Retirement System.

I. DECISION BELOW

On July 9, 2019, the Board of Trustees of the New Hampshire Retirement System (hereinafter "NHRS") decided that Alexander Scott (hereinafter "Scott") should have been restored to service when he became an Attorney for the Department of Justice (hereinafter "DOJ") and directed staff to recoup $37,002.78 in annuity payments paid during the time Scott was restored to service, and it decided that the Petitioner no longer qualified for Group II death benefits pursuant to RSA 100-A:12. On October 8, 2019, NHRS denied Scott's motion to reconsider and this appeal follows. The decisions below are appended to this Petition.

II. QUESTIONS PRESENTED

1. Did NHRS commit plain legal error when it ruled that Scott should have been re-enrolled in the retirement system when he became an Attorney for the DOJ pursuant to RSA 7:16-a, I, where it is undisputed Scott was an appointed official, his appointment commenced on February 6, 2017, and, by operation of law, his appointment

Copyright © NH Bar Association

had to end on or before February 6, 2020, thereby creating a fixed term exempting him from mandatory enrollment in the NHRS? *See*, RSA 100-A:3, I(a) (NHRS membership optional for officials appointed for a fixed term).

2. Did the NHRS commit plain legal error when it ruled that Scott no longer qualified for Group II death benefits where it is undisputed that Scott was a Group II member, that he retired as a Group II member on or after the date indicated in RSA 100-A:12,II, and that he was married on the date of his retirement, thereby entitling his spouse to the death benefits provided for under RSA 100-A:12, II?

III. STATUTES AND REGULATIONS AT ISSUE

A. RSA 100-A:3, I(a) Membership.

I. (a) Any person who becomes an employee, teacher, permanent policeman, or permanent fireman after the date of establishment, working in a position for an employer under this chapter as determined by common law standards, shall become a member of the retirement system as a condition of employment. ***In addition, employees appointed to an unclassified position with no fixed term on or after July 1, 2011 shall become members of the retirement system as a condition of employment, if they are receiving benefits from the retirement system***. Any retirement benefit collected by such an unclassified employee shall be suspended during the period of employment. ***Membership in the retirement system shall be optional in the case of elected officials, officials appointed for fixed terms***, employees appointed to an unclassified position with no fixed term prior to July 1, 2011, or those employees of the general court who are eligible for membership in the retirement system. Elected officials and officials appointed for fixed terms shall, however, be eligible for membership in the retirement system only under the following conditions:
(1) The office held is a full-time position with eligibility for the same fringe benefits as other full-time employees of the employer;
(2) The office held is the primary occupation of the person holding the office;
(3) The base rate of annual compensation for the office held is at least $15,000, and requires at least 1,700 hours of employment; and
(4) The official satisfies the condition under subparagraphs (1)-(3) by using only one elected or appointed office to qualify.
(5) Notwithstanding subparagraph (4), an official who concurrently holds the offices of town clerk and tax collector for the same employer, and who is eligible for the same fringe benefits as other full-time employees of the employer, may satisfy the conditions under subparagraphs (2)-(3) by using both offices to qualify. Such official shall be

Copyright © NH Bar Association

allowed to continue membership in the retirement system if already enrolled, if the hours and salary of the combined offices meet the requirements for membership.
(b) Any employee who is currently an employee of the general court who works on a full-time basis and who is eligible for other state benefits, but whose salary was or is calculated on a per diem basis shall be eligible to exercise those buy-back provisions set forth in RSA 100-A:3, VI(a), (b), and (c) for such previous service, only if the employee is currently a member in the retirement system.
(c) [Repealed.]
(d) The option in subparagraph (a) shall not be available in the case of any newly created positions for unclassified employees or officials whether appointed with fixed terms or with no fixed terms nor in the case of any newly appointed positions created by political subdivisions after July 1, 2011.

(emphasis added).

B. RSA 100-A:12, II Benefits Upon Member's Death After Retirement-Group II Members.

> II. Upon the death of a group II member who has retired on or after April 1, 1987, or ***upon the death of a group II member who has filed an application for retirement benefits with the board of trustees after January 1, 1991***, there shall be paid to the person nominated by the member by written designation filed with the board, if living, otherwise to the retired member's estate, in addition to the amount payable under RSA 100-A:11 a lump sum of $3,600 if the member retired before July 1, 1988, and ***if the member is married on the date of such member's retirement, there shall be paid to such surviving spouse an allowance to continue until the spouse's death or remarriage equal to 50 percent of the member's service, ordinary disability, or accidental disability retirement allowance payments***. For any person who is a group II member as of June 30, 1988, and who retires on or after July 1, 1988, the lump sum payment shall be $10,000. For any person who becomes a member of group II on or after July 1, 1988, and on or prior to July 1, 1993, the lump sum payment shall be $3,600. It is the intent of the legislature that future group II members shall be included only if the total cost of such inclusion can be terminally funded.

(emphasis added).

C. RSA 7:16-a, I Temporary Classification

I. In the event of a vacancy in the office of assistant attorney general, the attorney general may downgrade such office to the position of attorney I, II or III in his discretion for the purpose of filling the same with a person lacking sufficient experience

Copyright © NH Bar Association

to qualify for the office of assistant attorney general. Said position, when downgraded, shall entitle the person holding the same to all the rights and privileges of the classified state system except that the persons holding the same shall serve at the pleasure of the attorney general; ***and provided, that no later than the expiration of 3 years from the initial date of employment, the person holding such position shall either be nominated and confirmed in the office of assistant attorney general as provided in RSA 7:16 for the unexpired term or shall be discharged***. In the event that said person is discharged, the attorney general may fill the vacancy in the office of assistant attorney general for the unexpired term as provided in RSA 7:16 or may again downgrade the position to attorney I, II, or III.
(emphasis added).

IV. STATEMENT OF THE CASE

Scott was the long time Police Chief in Claremont, New Hampshire and retired as such on February 3, 2017. On February 6, 2017, Scott accepted an appointment as an Attorney for the DOJ. Scott accepted this appointment only after receiving written assurances from the DOJ that the appointment was a fixed term appointment to a position that was created on or before July 1, 2011, having sought these assurances based on advice provided to him by NHRS.

In February 2018, NHRS notified Scott that it had determined that his employment with DOJ was subject to mandatory NHRS participation. NHRS ordered the recoupment of $37,002.78 in annuity payments made to Scott and determined that he no longer qualified for Group II death benefits.

Scott appealed this determination and, after hearing, the NHRS Board of Trustees, on July 9, 2019, accepted the recommendation of the Hearings Examiner and ruled that Scott's appeal be denied. Scott timely moved for reconsideration and that request was denied by the NHRS on October 8, 2019. This appeal follows.

V. STATE OF PROCEEDINGS IN THE ADMINISTRATIVE AGENCY

The issues sought to be reviewed by means of this Petition were raised and argued before the NHRS.

6.43 Copyright © NH Bar Association

VI. TRANSCRIPT

A hearing was held on these matters on April 3, 2019 at the NHRS offices in Concord, New Hampshire. At the hearing, Scott was represented by Attorney Russell Hilliard, and NHRS was represented by Attorney Michael Delaney. Testimony was received from Scott; and Brandon Adams, NHRS Senior Employer Compliance Officer. A transcript of this hearing will help clarify the underlying facts and outline the positions of the parties.

VII. REASONS FOR ISSUING THE WRIT OF CERTIORARI

The decisions of NHRS below constitute plain legal error. RSA 100-A:3 requires mandatory enrollment with NHRS for employees appointed to an unclassified position with no fixed term on or after July 1, 2011 if they are receiving benefits from the retirement system. The law provides, as an exception to the general rule of mandatory enrollment, that enrollment "shall be optional in the case of...officials appointed for fixed terms...". RSA 100-A:3, I(a). It is undisputed in this case that Scott's employment with the DOJ started with his appointment effective February 6, 2017, and his appointment had to end, by operation of law, on or before February 6, 2020. It is also undisputed that Scott's appointment could only be made to fill a vacancy in the position of Assistant Attorney General which NHRS agrees is a position that qualifies for optional membership as a fixed term appointee. There is no dispute that Scott was an appointed official. Since Scott's appointment had a definitive start date, and, by operation of law, a definitive end date, he was as an official appointed for a fixed term. NHRS ruled, however, that the exception is somehow not applicable because despite the three-year limit for an appointment under RSA 7:16-a, I, an employee's tenure in the position is not a "term." The NHRS, thus, reads the exception out of the statute and this Court is urged to correct this plain legal error.

It is also undisputed in this case that Scott was a Group II member, that he retired as a Group II member on or after the date indicated in RSA 100-A:12, II, and that he was

6.44 Copyright © NH Bar Association

married on the date of his retirement. Scott fully vested and retired from his Group II position at the Claremont Police Department, entitling his spouse to the death benefits guaranteed her under RSA 100-A:12, II. Under no reasonable interpretation of the statute can Scott's employment at DOJ for roughly nine months in 2017 divest his spouse of this benefit. RSA 100-A:12, II. This plain legal error should be reversed.

VIII. JURISDICTIONAL BASIS

The jurisdictional basis for this petition is RSA 490:4.

Respectfully submitted,
Alexander Scott
By his Attorneys,

UPTON & HATFIELD, LLP,

Dated: November 7, 2019

Russell F. Hilliard; NHBA #1159
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com

 Copyright © NH Bar Association

CERTIFICATION

I hereby certify that the requisite copies of the foregoing were forwarded this 7th day of November, 2019 to Attorney Michael A. Delaney, McLane Middleton, P.A., 900 Elm Street; PO Box 326, Manchester, New Hampshire, 03105-0326 representing the NHRS Staff; George P. Lagos, Executive Director, NHRS; Gordon J. MacDonald, Esq., Attorney General; and to Diana L. Crichton, Esq., Hearings Examiner, New Hampshire Retirement System.

Jeanne S. Saffan for
Russell F. Hilliard

Copyright © NH Bar Association

APPENDIX

Table of Contents 9

New Hampshire Retirement System's Board of Trustees' Decision dated July 9, 2019 10

Alexander Scott's Request for Reconsideration dated August 7, 2019 28

New Hampshire Retirement System's Objection to Request for Reconsideration dated August 22, 2019 33

New Hampshire Retirement System's Board of Trustees' Decision dated October 8, 2019 40

Copyright © NH Bar Association

RECEIVED
JAN 11 2023
NH SUPREME COURT
2023-0013
POSTED

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Private Jet Services Group, LLC,
Plaintiff

v.

Case No. 20-cv-1015-SM
Opinion No. 2023 DNH 003

Tauck, Inc.,
Defendant

CERTIFICATION ORDER

Pursuant to Rule 34 of the Rules of the Supreme Court of New Hampshire, the United States District Court for the District of New Hampshire hereby certifies the following question of New Hampshire law, which may be determinative of causes pending before it and as to which there appears to be no controlling precedent in the decisions of the Supreme Court:

> Whether, under New Hampshire's common law, a Force Majeure clause that protects only one party to a contract should be deemed a relinquishment of the other party's right to interpose the common law defenses of impossibility, impracticability, or frustration of commercial purpose, on the theory that the clause represents the parties' implicit allocation of the risks identified in the Force Majeure clause to that other (unprotected) party or, alternatively, whether the common law contract defenses of impossibility, impracticability, or frustration of commercial purpose are so fundamentally related to contract formation and purpose that they remain viable unless expressly waived.

 Copyright © NH Bar Association

Statement of Relevant Facts

The material facts are undisputed and set forth in the attached order in Private Jet Services Group, LLC v. Tauck, Inc., No. 20-cv-1015, 2022 DNH 123 (Sept. 30, 2022). In short, the relevant facts are as follows. Private Jet Services Group ("PJS") is a New Hampshire-based private aircraft booking agent. It brings this breach-of-contract action against Tauck, Inc., a Connecticut-based provider of high-end domestic and international guided tours. In general, the parties' contracts contemplated that PJS would provide, and Tauck would use, a dedicated aircraft to conduct a minimum of fifty (50) tours of New Zealand per season. PJS alleges that Tauck breached those contracts in each of two seasons. Only the circumstances relating to the 2020 tour season are relevant to the question posed.

I. The Contracts.

In 2017, Tauck was looking for an aircraft charter agent to arrange air transportation for the New Zealand portions of its Australia/New Zealand tours. Tauck and PJS eventually reached an agreement and, in January of 2018, the parties executed an "Air Charter Services Blanket Purchase Agreement" (the "BPA") (document no. 21-3). That contract established the general terms under which Tauck would book and pay for air

6.49 Copyright © NH Bar Association

transportation, as well as any charges associated with each such booking. The contract also included an agreed-upon cancellation policy.

Attached to the BPA is Exhibit C, which sets out the "standard terms and conditions" of the parties' contractual relationship. One of those provisions - the "Force Majeure" clause - provides that PJS is not responsible for "delays, losses or damages of any kind caused, in whole or in part by Force Majeure, acts of war, terrorism, adverse meteorological conditions, mechanicals, air traffic control delays or other unforeseeable circumstances." Id. at 9.

The BPA also contemplated that before Tauck actually booked any aircraft through PJS, the parties would execute one or more "Statements of Work" which would address the details of the parties' relationship, payment terms, and scheduling with respect to particular flight operations. PJS and Tauck executed the Statement of Work (document no. 21-4) in May of 2018. Among other things, the Statement of Work provides that "Tauck must guarantee a minimum of 50 tours per year" and, if it operates fewer than 50 tours, it must pay to PJS an agreed-upon sum for each "missed" tour. The Statement of Work also amends the terms of the Force Majeure clause in the BPA and provides as follows:

6.50 Copyright © NH Bar Association

> **Force Majeure:** The definition of Force Majeure in the Blanket Purchase Agreement 2017-3746 that governs this Statement of Work shall be modified to include Acts of God, events of nature, epidemics, [acts of] civil or military authority, strikes (other than with respect to Supplier) or labor disputes (other than with respect to Supplier), travel advisories of the Department of State of the United States of America, war, warlike activity, acts of terrorism and/or domestic or international violence of any nature either directly affecting the area where this Contract is to be performed or causing disruption of travel to or from the area, or due to adverse market reaction to any of the foregoing events of Force Majeure.

Id. at 3 (emphasis supplied). As an aside, the court notes that the parties agree that the "Force Majeure" provisions of the BPA, as amended by the Statement of Work, extend protection exclusively to PJS should it be unable to perform its contractual obligations due to one or more force majeure events; those provisions do not apply to Tauck.

II. The 2020 Tour Season.

In 2020, Tauck's ability to conduct its tours in New Zealand was undermined by the global COVID-19 pandemic. From January 1 through March 19, 2020, Tauck operated, and PJS arranged air travel for, 23 tours in New Zealand. On March 20, 2020, however, New Zealand closed its borders to foreign travelers through (and beyond) the remainder of that year. At that point, Tauck was not permitted to operate any of its

6.51 Copyright © NH Bar Association

remaining 2020 tours in New Zealand and all were cancelled. In total, Tauck says it refunded nearly $5 million to customers for those cancelled trips.

Given those circumstances, PJS and Tauck attempted, but were unable, to resolve their differences with respect to their relative obligations under the contracts. Nor were they able to amend the contracts to each party's satisfaction. On May 28, 2020, Tauck invoked the "Adverse Economic Conditions" provision contained in the Statement of Work and cancelled the parties' contracts in their entirety.

Under the terms of the Statement of Work, the contracts between the parties would then terminate at the end of the 2020 tour season and, absent legal excuse, Tauck remained obligated to pay PJS "for all flights flown" as well as all other obligations for which "Tauck is otherwise committed to by this Agreement." Statement of Work, Section 6, at 3. That, says PJS, means Tauck still must honor (and pay for) its guarantee of a minimum of 50 tours for the 2020 season. Because Tauck operated only 23 tours in 2020, PJS says it is entitled to payment for the remaining 27 tours it was promised, notwithstanding Tauck's inability to actually operate those tours due to New Zealand's border closure.

6.52 Copyright © NH Bar Association

The contract terms are weighted in favor of PJS. According to PJS, that was both intentional and understood by the parties, because PJS was making a significant up-front expenditure to secure the necessary dedicated aircraft, and it needed to be assured that it would have a guaranteed stream of income from Tauck to cover those sunken costs. Consequently, PJS sees the annual 50 tour minimum as, in essence, a guaranteed annual minimum payment without which, PJS says, it would not have entered into the contracts with Tauck.

Tauck concedes that it may not seek to escape its contractual liability by invoking the contracts' Force Majeure provisions. Nevertheless, it contends that neither it nor PJS ever contemplated the scope and duration of the pandemic's economic impact. Nor, more specifically, did either party imagine that New Zealand might close its borders to all non-citizens - a first in the country's history. So, because the events in question were unanticipated by the parties, and because nothing in the parties' contracts prevents it from invoking common law contract defenses, Tauck says it may properly invoke the doctrines of impossibility and frustration of purpose to excuse performance of its obligations under the 2020 contract, including the requirement that it conduct a minimum of 50 tours.

6.53 Copyright © NH Bar Association

There is no New Hampshire decision directly on point. What seems unresolved under New Hampshire common law is whether, by agreeing to the Force Majeure clause as written, Tauck waived its otherwise available contract defenses. That is to say, it is not clear under New Hampshire common law whether a force majeure clause protecting just one of the parties necessarily (albeit by implication) allocates the risks of such force majeure events to the other party, thereby depriving that party of otherwise-available common law defenses, like impossibility of performance and frustration of purpose.

As noted above, the Force Majeure clause, as specifically worded, protects only PJS from liability should a referenced event occur. That clause does not protect Tauck, but neither does it expressly deprive Tauck of recognized common law defenses like impossibility of performance or frustration of purpose. The clause may, under New Hampshire law, <u>implicitly</u> operate to deprive Tauck of those defenses, but no clear statement on that point can be found. A critical question then arises under New Hampshire's common law:

> [W]hether a force majeure clause should be deemed a relinquishment of a party's right to argue impracticability or frustration, on the theory that such a clause represents the integrated expression of the parties' desires with respect to excuses based on supervening events; or whether such a clause either in

6.54 Copyright © NH Bar Association

> general or as specifically worded in this case covers any different ground from the defenses of impossibility or frustration of purpose.

N. Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986) (Posner, J.) (cleaned up). That is, impossibility and frustration of purpose defenses may remain available contract defenses unless the contract documents explicitly provide otherwise.

Whether the common law defenses of impossibility and/or frustration of purpose remain available to Tauck under the circumstances presented in this case is a dispositive question of New Hampshire law, with regard to which the Supreme Court of New Hampshire must be accorded deference by this Court. Accordingly, the Justices of the Supreme Court of New Hampshire are respectfully requested to settle this fundamental and dispositive legal question according to New Hampshire law.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

January 9, 2023

6.55 Copyright © NH Bar Association

cc: Steven M. Gordon, Esq.
Olivia F. Bensinger, Esq.
Timothy J. McLaughlin, Esq.
James J. Armillay, Jr., Esq.
Jeffrey Ment, Esq.
Michael F. Merra, Esq.

Attachment: Private Jet Services Group, LLC v. Tauck, Inc., 2022 WL 4613027, 2022 DNH 123 (Sept. 30, 2022)

6.56 Copyright © NH Bar Association

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Private Jet Services Group, LLC,
Plaintiff

v.

Case No. 20-cv-1015-SM
Opinion No. 2022 DNH 123

Tauck, Inc.,
Defendants

O R D E R

Private Jet Services Group ("PJS") is a New Hampshire-based private aircraft booking agent. It brings this breach-of-contract action against Tauck, Inc., a Connecticut-based provider of high-end domestic and international guided tours. In general, the parties' contracts contemplated that PJS would arrange for, and Tauck would use, a dedicated aircraft to conduct a minimum of fifty (50) tours of New Zealand per season. PJS alleges that Tauck breached those contracts in each of two seasons. First, during the 2019 tour season, PJS says Tauck employed its services for only 48 tours - two fewer than the parties' agreed-upon minimum. Next, PJS says Tauck breached the parties' agreements during the 2020 tour season by using PJS's services for only 23 tours - 27 fewer that the 50 tour seasonal minimum. PJS claims that it is owed roughly $265,000 in damages

6.57 Copyright © NH Bar Association

for the 2019 tour season and nearly $1.7 million in damages for the 2020 season.

Tauck denies that it breached either of the parties' contracts and says that it is excused from performing under those contracts, either because PJS breached first, or because its performance was rendered impossible by external events. With respect to the 2019 season, Tauck blames PJS for having failed to provide the agreed-upon aircraft for the first eight tours, and says that failure amounts to a material breach. With respect to the 2020 season, Tauck says the global COVID-19 pandemic and New Zealand's related executive decision to close its borders to all foreign travelers precluded contract performance.

The contracts are governed by, and must be interpreted in accordance with, New Hampshire law. Additionally, the parties seem to agree that at least with respect to Count Two (relating to the 2020 tour season), there are no genuinely disputed material facts, and that claim can be resolved as a matter of law. Each party has moved for summary judgment - PJS solely on Count Two of the complaint; Tauck on both counts. For the reasons discussed, those motions are denied, albeit without prejudice.

6.58 Copyright © NH Bar Association

Background

I. The Contracts.

In 2017, Tauck was looking for an aircraft charter agent to arrange air transportation for the New Zealand portions of its Australia/New Zealand tours. Tauck and PJS eventually reached an agreement and, in January of 2018, the parties executed an "Air Charter Services Blanket Purchase Agreement" (the "BPA") (document no. 21-3). That contract established the general terms under which Tauck would book, and pay, for air transportation, as well as any charges associated with each such booking. The contract also included an agreed-upon cancellation policy. The BPA makes plain that "PJS does not own or operate aircraft." Id. at para. 12. Instead, PJS "acts as agent for its clients in negotiating and facilitating transportation with licensed air carriers." Id. (The court makes note of this because the parties engage in a fairly lengthy debate over whether PJS purchased or merely invested in a dedicated aircraft for Tauck's exclusive use in New Zealand.)

Attached to the BPA is Exhibit C, which sets out the "standard terms and conditions" of the parties' contractual relationship. One of those provisions - the "Force Majeure" clause - provides that, "PJS is not responsible" for delays, losses or damages of any kind caused, in whole or in part by

6.59 Copyright © NH Bar Association

Force Majeure, acts of war, terrorism, adverse meteorological conditions, mechanicals, air traffic control delays or other unforeseeable circumstances. Id. at 9. Because the parties recognized that weather, staffing, or mechanical issues might lead to occasions on which PJS would be unable to arrange for the dedicated aircraft at the appropriate tour location or at the time Tauck needed it, the BPA also includes a section entitled "Contingency Management & Interruption." In that section PJS declares that it is its "policy" to "have a minimum of two contingency plans in place for every flight." But "PJS may arrange for alternative transportation only with the express written authorization from [Tauck]." See BPA, Section 20.

The BPA also contemplated that before Tauck actually booked any aircraft through PJS, the parties would execute one or more "Statements of Work" which would address the details of the parties' relationship, payment terms, and scheduling with respect to particular flight operations. PJS and Tauck executed the Statement of Work (document no. 21-4) in May of 2018. Its term ran from January 13, 2019, through January 14, 2023, and applied to "2019-2022 Tauck Australia-New Zealand Grand Tour (NZ portion only) and 2019-2022 Tauck New Zealand Spotlight Tour." Id. at 1. The Statement of Work describes three different routes for which PJS would provide air transportation, all of

6.60 Copyright © NH Bar Association

which were within New Zealand: Wellington to Blenheim; Blenheim to Manapouri; and Queenstown to Auckland. It also obligated PJS to provide Tauck with a dedicated Embraer 145 LR Regional Jet with 44 passenger seats for use in Tauck's New Zealand tours. Id.

For purposes of this litigation, three provisions of the Statement of Work are relevant:

> **Contract Minimums (Guarantee):** Tauck must guarantee a minimum of 50 tours per year. In the event of a shortfall in the number of tours operated in any Season, Tauck will pay to Supplier the 50 tour minimum price for the applicable Season as set forth on Table 1 of this Agreement. By way of example, if Tauck operates 48 tours in the 2020 Season, Tauck will owe Supplier an additional payment of $125,866 (50 tour minimum less 48 tours operated = 2 tour penalty x USD $62,933 per tour = USD $125,866).
>
> **Force Majeure:** PJS is not responsible for delays, losses or damages of any kind caused in whole or in part by Force Majeure, acts of war, terrorism, adverse meteorological conditions, air traffic control delays or other unforeseen circumstances.
>
> * * *
>
> The definition of Force Majeure in the Blank Purchase Agreement 2017-3746 that governs this Statement of Work shall be modified to include Acts of God, events of nature, epidemics, [acts of] civil or military authority, strikes (other than with respect to Supplier) or labor disputes (other than with respect to Supplier), travel advisories of the Department of State of the United States of America, war, warlike activity, acts of terrorism and/or domestic or international violence of any nature either directly affecting the area where this Contract is to be

6.61 Copyright © NH Bar Association

performed or causing disruption of travel to or from the area, or due to adverse market reaction to any of the foregoing events of Force Majeure.

Adverse Economic Conditions: In the event that:

a. During the Term, if the Dow Jones Industrial Index as published daily by the Wall Street Journal sustains a 30% decrease within a period not to exceed 75 calendar days (a "Market Correction"); and

b. That either Party exercises its rights in this Section 6 by providing the other party with written notice within 14 days of such Market Correction;

c. Then the Agreement will automatically terminate at the later of (i) the end of the current Season and (ii) 180 calendar days from the date that written notice is received by the receiving party.

Nothing contained In this Agreement shall be construed as to relieve Tauck from its obligation to pay Supplier for all flights flown or which Tauck is otherwise committed to by this Agreement.

Id. at 3, 5 (emphasis supplied). As an aside, the court notes that the parties agree that the "Force Majeure" provisions of the BPA, as amended by the Statement of Work, extend protection from Force Majeure events only to PJS; they do not apply to Tauck.

Additionally, the BPA contains an acceleration clause which provides that: "Upon written notice of cancellation, all flights not yet flown will be cancelled, and PJS will immediately be due

6.62 Copyright © NH Bar Association

any outstanding charges pursuant to this Agreement, including all applicable cancellation fees as set forth within this Agreement, and all other outstanding charges to flights already flown, but not yet paid by Customer." Id. at 1.

II. The 2019 Tour Season.

In the spring of 2018, Tauck provided PJS with its anticipated 2019 schedule of New Zealand tours. The schedule was ambitious. Tauck would operate 72 tours (22 more than the minimum required), beginning on January 13, 2019. A few months later, however, PJS informed Tauck that it was having difficulty securing an Air Operator Certificate for the Embraer aircraft. The parties agreed to replace that aircraft with an ATR-72 Turboprop. On December 11, 2018, PJS notified Tauck that the required final audit (clearance) of the ATR-72 was scheduled for January 11, just a few days before the start of Tauck's 2019 tour season. Then, on January 3, 2019, PJS informed Tauck that the ATR-72 aircraft had been damaged and was not expected to be in service until at least the third week in January. As it turned out, the aircraft audit was not completed until February 6, 2019, and inspectors did not approve the aircraft for flight until February 7, 2019, approximately three weeks after the date on which PJS was obligated to arrange the first scheduled flight for Tauck.

6.63 Copyright © NH Bar Association

Because of the mechanical issues with the ATR-72, it was unavailable for eight of the tours operated in January. Accordingly, Tauck availed itself of its rights under the BPA and elected to contract with a different air carrier (Alliance Air) to provide air transportation for those tours. It appears that Air Alliance had provided air transportation services to Tauck previously and Tauck simply continued (or re-established) its relationship with Alliance into January of 2019. For its part, PJS agreed to refund the monies Tauck already paid for those eight tours. PJS insists, however, that those flights do not count toward Tauck's contractual obligation to operate a minimum of 50 tours with PJS.

Tauck notes that, "Despite PJS inability to perform, Tauck still conducted a total of 55-57 tours during the 2019 tour season: 48 tours with PJS, and 7-9 with Alliance Air." Defendant's Memorandum in Support of Summary Judgment (document no. 22-1) at 6-7. Thus, says Tauck, it would have met the 50 tour minimum with PJS but for PJS's own failure to perform under the contract by neglecting to provide the ATR-72 Turboprop for use during those eight tours in January. According to Tauck, PJS "breached" the parties' agreement with respect to those eight tours by failing to provide the specified ATR-72 Turboprop

6.64 Copyright © NH Bar Association

in a timely manner, and Tauck cannot possibly be held liable for any of PJS's alleged damages arising from that failure.

PJS has a different perspective, saying that the contracts "required" it to have a "minimum of two contingency plans in place for every flight to quickly recover from a mechanical" delay, which it had in place. See BPA at Section 20. Moreover, says PJS, consistent with that obligation, it offered to "sub-service" the January flights, either through Air Chathams or Air New Zealand. See Deposition of Greg Raiff, Chief Executive Officer of Private Jets Services (document no. 23-2) at 63, 66-67. Thus, it argues, it was never in breach of the parties' contracts. And, although Tauck decided to exercise its contractual option to decline the alternate flight arrangements offered by PJS and, instead, use a different air carrier while the ATR-72 Turboprop was unavailable, PJS asserts that Tauck remained obligated to meet the annual 50 tour minimum. Because Tauck operated only 48 tours with PJS that season, PJS asserts it is still entitled to payment for the two "un-booked" tours.

III. The 2020 Tour Season.

In 2020, Tauck's ability to conduct its tours in New Zealand was undermined by the global COVID-19 pandemic. From January 1 through March 19, 2020, Tauck operated, and PJS

6.65 Copyright © NH Bar Association

arranged air travel for, 23 tours in New Zealand. On March 20, 2020, however, New Zealand closed its borders to foreign travelers through (and beyond) the remainder of that year. At that point, Tauck was not able to operate any of its remaining 2020 tours in New Zealand and all were cancelled. Tauck refunded pre-payments that its customers had made. In total, Tauck says it "refunded $4,925,000 to customers for trips to New Zealand." Affidavit of Philip Crosby, Tauck's Chief Financial Officer/Treasurer (document no. 24-7) at para. 24.

Given those circumstances, PJS and Tauck attempted but were unable to resolve their differences with respect to their relative obligations under the contracts, nor were they able to amend the contracts to each party's satisfaction. On May 28, 2020, Tauck invoked the "Adverse Economic Conditions" provision contained in the Statement of Work and cancelled the parties' contracts in their entirety:

> Please be advised that a Market Correction has occurred and that Tauck hereby exercises its rights under Section 6 of the SOW to terminate the Agreement (including the Blanket Purchase Agreement and the SOW). This letter constitutes written notice of termination given pursuant to Section 6.b of the SOW.

Letter from Tauck to PJS dated May 28, 2020 (document no. 21-32). Under the terms of the Statement of Work and, in

6.66 Copyright © NH Bar Association

particular, the Adverse Economic Conditions provision, the contracts between the parties would terminate at "the end of the [2020] season" and, absent legal excuse, Tauck remained obligated to pay PJS "for all flights flown" as well as all other obligations for which "Tauck is otherwise committed to by this Agreement." Statement of Work, Section 6, at 3. That, says PJS, means Tauck still must honor (and pay for) its guarantee of a minimum of 50 tours for the 2020 season - notwithstanding Tauck's inability to actually operate those tours. Because Tauck operated only 23 tours in 2020, PJS says it is entitled to payment for the remaining 27 tours it was promised.

The contract terms appear to be weighted in favor of PJS. According to PJS, that was both intentional and understood by the parties, because PJS was making a significant up-front expenditure to secure the necessary dedicated aircraft, and it needed to be assured that it would have a guaranteed stream of income from Tauck to cover those sunk costs. As discussed more fully below, PJS sees the annual 50 tour minimum as, in essence, a guaranteed annual minimum payment without which, PJS says, it would not have entered into the contracts with Tauck.

6.67 Copyright © NH Bar Association

Tauck concedes that it may not seek to escape its contractual liability by invoking the contracts' Force Majeure provisions. See, e.g., Defendant's Memorandum in Opposition (document no. 24-1) at 16 ("PJS and Tauck included Force Majeure language that protected both PJS and its air carrier . . . There is no disagreement that there is no similar language in either the BPA or the SOW protecting Tauck."). Nevertheless, it contends that neither it nor PJS ever contemplated the scope and duration of the pandemic's economic impact. Nor, more specifically, did either party imagine that New Zealand might close its borders to all non-citizens - a first in the country's history. Consequently, says Tauck, it may properly invoke the common law contract doctrines of impossibility and frustration of purpose to excuse performance of its obligations under the 2020 contract, including meeting the 50-tour minimum commitment.

Discussion

I. The 2019 Tour Season.

As noted above, Tauck (but not PJS), moves for summary judgment on Count One of the complaint. In support that motion, Tauck asserts that PJS's inability to provide the ATR-72 Turboprop for the first eight trips of the 2019 tour season amounts to a material breach of the parties' contracts.

6.68 Copyright © NH Bar Association

> PJS breached the terms of the SOW by failing to have the aircraft ready by January 13, 2019 as required by the SOW. PJS's breach forced Tauck to seek out another air carrier (Air Alliance) for the January 2019 tours. . . . PJS's claim under Count I is essentially an attempt to foist upon Tauck a penalty for PJS's own breach of the SOW. Here, PJS should not be permitted to allege that Tauck breached the contract when PJS itself was the cause of Tauck operating only 48 tours with PJS in the 2019 season.

Defendant's Motion for Summary Judgment (document no. 22) at 2. Because PJS breached the Statement of Work, Tauck argues, it cannot now seek damages for Tauck's alleged breach.

PJS counters that its conduct did not amount to a breach of contract and, even if it did, Tauck waived that breach by failing to invoke the remedy provisions of those contracts in a timely manner.

> PJS does not dispute that it was unable to obtain authorization to fly the dedicated aircraft until after the first nine tours of 2019. However, the delay in receiving authorization does not constitute a material breach for two reasons. First, PJS offered to subservice the flights pursuant to Section 20 of the BPA. Second, Tauck waived the terms of Section Two and Three of the SOW – which appear to be the terms it is alleging PJS breached – by not invoking the remedies provided in those provisions.

Plaintiff's Opposition Memorandum (document no. 23) at 15).

6.69 Copyright © NH Bar Association

Turning to PJS's first argument - that it did not breach the parties' agreements - the relevant section of the BPA provides as follows:

> **Contingency Management & Interruption.** PJS' policy is always to have a minimum of two contingency plans in place for every flight to quickly recover from a mechanical, weather, or other Force Majeure. . . . When unforeseen interruptions occur, PJS's dedicated client service team will work with Customer to analyze all contingency options available, and if necessary, to reposition the closest suitable aircraft. PJS may arrange for alternative transportation only with the express written authorization from Customer. If the aircraft is unable to complete any portion of the Itinerary due to adverse weather, operational, or mechanical reasons, Customer shall be notified immediately and PJS shall credit to Customer all proposed charges with respect to the canceled charter flight legs. Flights operated on a delayed or subcontracted basis will not be credited.

BPA, Section 20 (emphasis supplied). In short, then, if the ATR-72 Turboprop was not available due to weather, operational, or (as in this case) mechanical reasons, PJS represented that its "policy" was to "work with [Tauck] to analyze all contingency options available (including two plans it would have in place)," but would only arrange alternate transportation "with the express written authorization" of Tauck. "If the aircraft is unable to complete any portion of the itinerary, PJS shall credit [Tauck] all proposed charges with respect to the cancelled charter flight legs."

6.70 Copyright © NH Bar Association

For its part, Tauck could either accept alternate transportation proposed by PJS (and pay PJS as usual), or it could secure its own transportation (and receive a credit from PJS for the charges associated with the cancelled PJS flight). PJS says it complied with the "requirements" of Section 20 by offering Tauck an option to use a similar aircraft from either Air Chathams or Air New Zealand. As was its apparent contractual right, however, Tauck declined those offers and chose, instead, to arrange flights through a different air carrier: Air Alliance.

The parties plainly anticipated that there might be occasions on which the ATR-72 Turboprop would not be available and PJS would endeavor to offer options or "alternative transportation" for Tauck's consideration. PJS appears to have followed its policy under Section 20 of the BPA by having two contingency plans and offering to arrange alternative transportation. But it does not follow either that Tauck failed to "operate a tour" with respect to those occasions on which PJS could not deliver the ATR-72, or that PJS is entitled to be paid

6.71 Copyright © NH Bar Association

with respect to those operated tours for which it could not provide the ATR-72.[1]

Tauck's argument in support of summary judgment on count one is vague and undeveloped, providing little more than the claim that PJS materially breached because the aircraft was not ready on January 13, 2009, as required by the first paragraph of the Statement of Work ("Term: January 13, 2019 - January 14, 2023"). An argument could be made - though Tauck does not make it - that PJS breached the "Dispatch Reliability" provision of the Statement of Work. See Id. at Section 2. But, anticipating such an argument, PJS asserts that Tauck never timely invoked the remedy provisions of that section and, therefore, waived any claim that PJS breached. In response, Tauck has remained silent.

The court is unwilling to resolve Tauck's motion on grounds not addressed by Tauck. See, e.g., Pollack v. Goodwin & Assocs.

[1] As noted above, the Statement of Work provides that, "Tauck must guarantee a minimum of 50 tours per year. In the event of a shortfall in the number of tours operated in any Season, Tauck will pay to Supplier the 50 tour minimum price." One unresolved question is whether that obligates Tauck to simply operate 50 "Tauck tours" (regardless of the air carrier involved, if the ATR-72 is unavailable) or whether it obligates Tauck to operate a total of 50 tours with the ATR-72 or PJS's "alternate" services.

6.72 Copyright © NH Bar Association

Hosp. Servs., LLC, No. 20-CV-825-SM, 2021 WL 3773408, at *5 (D.N.H. Aug. 25, 2021) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the [framework] for the argument, and put flesh on its bones. A litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace. While it is conceivable that viable arguments might support the [defendant's] position – the court offers no opinion on that point – at this juncture, [defendants] have failed to develop arguments concerning most of [plaintiff's claims].") (citations and internal punctuation omitted). See generally Int'l Tape Co. v. Technicote, Inc., 2000 WL 33667076 at *3 (D.N.H. April 21, 2000) (discussing why courts should be reluctant to embrace legal arguments that have not been presented by the parties). See also Coons v. Indus. Knife Co., 620 F.3d 38, 44 (1st Cir. 2010).

At this juncture, Tauck has not carried its burden to establish either that no material facts are genuinely disputed, or that it is entitled to judgment as a matter of law. At first blush it might seem evident that PJS is not entitled to payment for cancelled flights due to its own inability to provide the reserved aircraft for that flight. But the decisive question might be phrased somewhat differently: e.g., did Tauck obligate

6.73 Copyright © NH Bar Association

itself to pay PJS for 50 tours, even if PJS could not provide the reserved aircraft with respect to some number, or even all, of those 50 tours, if Tauck decided to reject alternatives offered by PJS and instead arrange its own air transport? And, it might be argued that under these contracts Tauck contracted to operate a minimum of 50 tours during the season using PJS, but "operate" refers to extending to PJS the opportunity to provide transportation for a particular tour according to the contract terms. That is, once PJS is presented with the opportunity, that tour "counts" toward the minimum, even if PJS cannot perform and Tauck elects to use alternative carriers.

The parties do not adequately engage on these potentially dispositive issues (which may involve genuinely disputed material facts) and the record is not sufficiently developed to permit summary judgment. See e.g. Foundation for Seacoast Health v. HCA Health Servs. of New Hampshire, Inc., 157 N.H. 487, 501 (2008), citing N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 139 (2001) ("The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language."). The court must, then, necessarily deny Tauck's motion for summary judgment on Count One of the complaint.

6.74 Copyright © NH Bar Association

II. The 2020 Tour Season.

Despite the closure of New Zealand's border, one might speculate that it was not "impossible" for Tauck to have conducted tours within New Zealand in 2020 - albeit tours that would have been available only to citizens of New Zealand and/or non-citizens who were already in the country when the borders were closed. In other words, while Tauck plainly could not operate its tours as contemplated after the border closure, it is not entirely clear that Tauck's ability to conduct any tours was rendered impossible or unlawful by the pandemic-related border closure. See e.g. Bower v. Davis & Symonds Lumber Co., 119 N.H. 605, 609 (1979) ("The impossibility doctrine requires that there be complete and permanent impossibility.") See generally 14 Corbin on Contracts § 74.1 (2021).

In any event, on this record, Tauck's stronger argument is that it is excused from performance under the common law doctrine of "frustration of purpose" or "commercial frustration." The New Hampshire Supreme Court has described the doctrine as follows:

> The doctrine of commercial frustration assumes the possibility of literal performance but excuses performance because supervening events have essentially destroyed the purpose for which the contract was made. Under the doctrine, a contract is to be considered subject to the implied condition that

6.75 Copyright © NH Bar Association

> the parties shall be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist without default of either of the parties.

Gen. Linen Servs., Inc. v. Smirnioudis, 153 N.H. 441, 443 (2006) (citations and internal punctuation omitted) (emphasis supplied). See also Perry v. Champlain Oil Co., 101 N.H. 97, 98-99 (1957) ("Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or shortly will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.") (quoting Restatement of Contracts, § 288).

Generally speaking, then, the common law doctrine of commercial frustration provides that a party is entitled to relief from its contractual obligations when:

(1) the principal purpose in contracting has been substantially frustrated,

(2) the frustration was caused by a supervening event that was not in fact contemplated by the parties, and

(3) the risk of the event occurring was not allocated by contract or otherwise.

6.76 Copyright © NH Bar Association

14 Corbin on Contracts § 77.3 (emphasis supplied).

A. The Contracts' Principal Purpose.

In arguing that Tauck cannot invoke the doctrine of commercial frustration to avoid its contractual obligations, PJS focuses not on the overarching purpose of the contracts as a whole, but rather on the narrower purpose of the "contract minimum" provision set forth in section 10 of the Statement of Work. Accordingly, PJS argues that:

> [T]he purpose of the Contract Minimum provision of the Agreement has not been frustrated by COVID-19. The purpose of that provision was to provide a safety net for PJS in its purchase of the dedicated aircraft. COVID-19 has not altered the purpose of that provision. If anything, COVID-19, coupled with Tauck's refusal to pay, has provided a greater need for that safety net.

Plaintiff's Opposition Memorandum (document no. 23) at 23 (emphasis supplied). But, the proper focus is not on the intended purpose of individual provisions of the contracts. Rather, it is on the "purpose" of the contracts viewed as a whole.

Viewed in their entirety, the contracts' overarching purpose is plain: PJS was to arrange air transportation services for two of Tauck's identified seasonal tours of New Zealand.

6.77 Copyright © NH Bar Association

So, for example, the Statement of Work required PJS to provide a dedicated, 44-seat Embraer 145 LR Regional Jet (later amended to an ATR-72 Turboprop) for use in Tauck's "Australia-New Zealand Tour" and its "New Zealand Spotlight Tour." Statement of Work at 1 (emphasis supplied). It also obligated PJS to provide a "level of service and quality consistent with the expectations of Tauck and Tauck's guests" and imposed on PJS the obligation to take immediate corrective action to resolve any identified shortcomings. Statement of Work at Section 3 (emphasis supplied). The Statement of Work also acknowledges that "this Aircraft, Crew, and all personnel will be dedicated to, and specifically configured and wrapped for Tauck." Id. at Section 7. See also Id. at Section 10 (obligating PJS to provide an aircraft with a Tauck "full wrap aircraft decal," aircraft interior designed to Tauck's specifications; "two dedicated tour concierge and one Program Manager positioned in New Zealand"; and in-flight catered meals for Tauck's customers); Plaintiff's Opposition Memorandum (document no. 23) at 23 (acknowledging that the overarching "purpose of the Agreement was for PJS to provide Tauck a dedicated aircraft for its New Zealand tours." Id. at 23.

Given the record, the objective manifestation of the parties' intent, as expressed in both the BPA and Statement of

6.78 Copyright © NH Bar Association

Work, is unmistakable: PJS was to provide Tauck with a dedicated, "wrapped" aircraft (and attendant services) for Tauck's exclusive use in conducting two specified seasonal tours within New Zealand. The principal purpose was not, as PJS suggests, to merely provide Tauck with an aircraft that it could use as it pleased - say to deliver air cargo. See, e.g., Plaintiff's Opposition Memorandum (document no. 23) at 23. ("Tauck could have chosen to use the aircraft PJS provided for whatever purpose it deemed fit."). And, the contracts' principal purpose was plainly frustrated when New Zealand closed its borders and Tauck was no longer permitted to bring its touring customers into the country. Thus, Tauck has established the first of three essential elements of the common law doctrine of commercial frustration. It falters, however, in establishing the remaining two.

B. Contemplation of the "Supervening Event."

Pointing to the Force Majeure clause of the BPA (as amended by the Statement of Work), PJS strenuously argues that the parties anticipated the "possibility of epidemics or governmental advisories that could prevent travel." Plaintiff's Memorandum in Support of Summary Judgment (document no. 21-1) at 7. That is correct in the sense that PJS protected itself from such risks, and Tauck did not. Given the contract language, PJS

6.79 Copyright © NH Bar Association

at least anticipated that an epidemic (or "epidemics") might occur in the future, and/or that civil authorities might take action in a manner that could materially affect its ability to perform its contractual obligations. That is, that epidemics and the exercise of civil authority might make it economically inadvisable or impractical or even impossible to conduct the contemplated tours of New Zealand. It is also apparent that, in consultation with each other, the parties negotiated the Force Majeure terms explicitly. PJS protected itself from risks associated with epidemics and the exercise of civil authority, while Tauck did not. Tauck might have protected itself as well but, for reasons satisfactory to it, it did not. Importantly, however, it is not unarguably clear as a matter of New Hampshire law that the COVID-19 pandemic, or closure of the New Zealand border were "in fact" contemplated by the parties.

C. Was the Risk Allocated by the Contracts?

Here, the terms of the amended Force Majeure clause may have implicitly (but certainly not explicitly) assigned the risk of adverse events materially affecting contract performance related to epidemics, and the exercise of civil authority, to Tauck. As noted, the language of the clause was actively negotiated (Tauck even suggesting that PJS include protection from "epidemic" events). Tauck could have protected itself, in

6.80 Copyright © NH Bar Association

addition to excusing PJS's performance, if Force Majeure events occurred. What is not clear under New Hampshire law, however, is whether by agreeing to the Force Majeure clause as written, Tauck waived its otherwise available contract defenses. That is to say, it is unclear under New Hampshire common law whether a Force Majeure clause protecting just one of the parties necessarily allocates (by implication) the risks of such events to the other party to the extent of depriving that party of otherwise-available common law defenses, like impossibility of performance or frustration of purpose.

The record discloses no obvious reason why Tauck would assume the risk of the Force Majeure events listed. But, as Judge Posner noted, "a promisor might want his promise to be unconditional, not because he thought he had superhuman powers but because he could insure against the risk of nonperformance better than the promisee, or obtain a substitute performance more easily than the promisee." N. Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 276 (7th Cir. 1986) (citing Field Container Corp. v. ICC, 712 F.2d 250, 257 (7th Cir. 1983) and Holmes, The Common Law 300 (1881)). And, as PJS argues, Tauck was aware of PJS's substantial investment risk and perhaps was motivated to obtain PJS's services by extending broad protection to PJS while assuming broad risk itself.

6.81 Copyright © NH Bar Association

Tauck suggests in passing that an "epidemic" does not a "pandemic" make, so a Force Majeure event in the nature of a pandemic was not a risk assumed by it, implicitly or otherwise. But the Force Majeure clause includes a "catchall" phrase covering "other unforeseen circumstances." When a catchall provision is included in a Force Majeure clause it is limited to "things of the same kind or nature as the particular matter mentioned." Tommy Hilfiger Retail, Inc. v. North Conway Outlets, LLC, 2000 WL 1480450 (D.N.H. February 14, 2000) (citing URI Cogeneration Partners L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996)). A pandemic, in colloquial expressions, is an epidemic that travels across multiple countries or continents – spreading over and infecting large geographic areas. There can be little doubt that the COVID-19 pandemic, as it threatened New Zealand, was a "thing of the same kind or nature" as an epidemic, and within the Force Majeure clause event described as "epidemics." And, of course, the exercise of civil authority by the government of New Zealand in closing the nation's borders falls comfortably within the event described in the clause following "epidemics": "[acts of] civil or military authority." See e.g. Rudolph v. United Airlines Holdings, 519 F. Supp. 3d 438 (N.D. Ill. 2021) (government ordered border closure due to COVID-19 pandemic falls comfortably within the definition of a Force Majeure event

6.82 Copyright © NH Bar Association

and the event was the proximate cause of air carrier's inability to perform contract for transportation).

It seems likely, then, that a bare, conventional analysis would result in finding Tauck liable to perform, and unable to invoke the common law excuses of impossibility or frustration. But the amended Force Majeure clause poses a quirksome impediment.

As noted above, the Force Majeure clause, as specifically worded, protects only PJS from liability should an event occur. It does not explicitly deprive Tauck of recognized common law defenses like impossibility of performance or frustration of purpose. The clause may, under New Hampshire law, implicitly operate to deprive Tauck of those defenses, but no clear statement on that point can be found in New Hampshire precedent. A critical question then arises under New Hampshire's common law:

> whether a force majeure clause should be deemed a relinquishment of a party's right to argue impracticability or frustration, on the theory that such a clause represents the integrated expression of the parties' desires with respect to excuses based on supervening events; or whether such a clause either in general or as specifically worded in this case covers any different ground from [the defenses of impossibility or frustration of purpose].

6.83 Copyright © NH Bar Association

N. Indiana Pub. Serv. Co., 799 F.2d at 277. That is, impossibility and frustration of purpose defenses may remain available contract defenses unless the contract documents explicitly provide otherwise.

Given the uncertainties in New Hampshire's common law, the court cannot rule as a matter of law in favor of either PJS or Tauck with respect to Count 2.

Conclusion

For the foregoing reasons, PJS's motion for partial summary judgment as to Count Two (**document no. 21**) is denied, albeit without prejudice. Tauck's motion for summary judgment on both Count One and Count Two (**document no. 22**) is likewise denied, without prejudice.

The court will schedule a case management hearing in the coming weeks at which counsel will be afforded the opportunity to be heard on whether the court should certify the following, or other, question(s) to the New Hampshire Supreme Court:

> Whether, under New Hampshire's common law, the Force Majeure clause as written (protecting only PJS) should be deemed a relinquishment of Tauck's right to interpose the common law defenses of impossibility, impracticability, or frustration of commercial

6.84 Copyright © NH Bar Association

purpose, on the theory that the clause represents the parties' implicit allocation of the identified risks to Tauck.

Written memoranda of law are welcome but not required.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

September 30, 2022

cc: Counsel of Record

 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
https://www.courts.nh.gov

Court Name: **New Hampshire Supreme Court**

Case Name: **John Doe #1, et al. v. New Hampshire Department of Health and Human Services, et al.**

Case Number: **Not yet assigned**

TRANSCRIPT ORDER FORM

INSTRUCTIONS:
1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court Rule 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. Parties will be provided with an electronic copy of the transcript in PDF-A format. A paper copy of the transcript may also be prepared for the court.

PROCEEDINGS TO BE TRANSCRIBED
(Please confirm dates with Trial Court)

PROCEEDING DATE (List each day separately, e.g. 5/1/11; 5/2/11; 6/30/11)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	LENGTH OF PROCEEDING (in .5 hour segments, e.g.1.5 hours, 8 hours)	RATE (standard rate unless ordered by Supreme Court)	DEPOSIT
03/18/2024	**Motion hearing**	**Schulman, J.**	**0.5 hours**	X $170.00	$ **85.00**
				X $170.00	$
				X $170.00	$
				X $170.00	$
				X $170.00	$
				X $170.00	$
				TOTAL DEPOSIT	**$ 85.00**

PROCEEDINGS PREVIOUSLY TRANSCRIBED

PROCEEDING DATE (List date of each transcript volume)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	NAME OF TRANSCRIBER	DO ALL PARTIES HAVE COPY (YES OR NO)	DEPOSIT FOR ADDITIONAL COPIES
04/18/2023	**Case management conferenc**	**Schulman, J.**	**eScribers**	**Yes**	TBD
07/11/2023	**Case management conferenc**	**Schulman, J.**	**eScribers**	**Yes**	TBD
11/09/2023	**Case management conferenc**	**Schulman, J.**	**eScribers**	**Yes**	TBD

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you will be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-____

Contoocook Valley School District, et al.

v.

State of New Hampshire, et al.

EXPEDITED MOTION TO STAY TRIAL COURT'S NOVEMBER 20, 2023 MERITS ORDER AND FEBRUARY 20, 2024 POST-TRIAL MOTIONS ORDER

The defendants, by and through counsel, the New Hampshire Attorney General's Office, hereby move to stay the trial court's November 20, 2023 merits order and February 20, 2024 post-trial motions order.[1] In support thereof, the defendants state as follows:

1. In *Londonderry School District SAU #12 v. State*, 154 N.H. 153, 161 (2006), this Court held that the General Court had to define "the substantive content of a constitutionally adequate education in such a manner that the citizens of this state can know what the parameters of that educational program are." This Court instructed that the definition of this "educational program" had to be "sufficiently clear to permit common understanding and allow for an objective determination of costs." *Id.* at 162. This Court further held that "[w]hatever the State identifies as comprising constitutional adequacy it must pay for." *Id.*

2. Following *Londonderry*, the General Court passed RSA 193-E:2-a, which contains "the specific criteria and substantive educational program that deliver[s] the opportunity for an adequate education." RSA 193-E:2-a, I(a). RSA 193-E:2-a defines the "educational program" the State has agreed to pay for to be only the "minimum standards

[1] The trial court's November 20, 2023 merits order is attached hereto as Exhibit A;
The defendants' motion to stay is attached hereto as Exhibit B;
The defendants' motion for reconsideration is attached hereto as Exhibit C;
The plaintiffs' objection to the defendants' motion to stay is attached hereto as Exhibit D;
The plaintiffs' objection to the defendants' motion for reconsideration is attached hereto as Exhibit E;
The trial court's February 20, 2024 post-trial motions order is attached hereto as Exhibit F.

6.87 Copyright © NH Bar Association

for public school approval" for the areas identified in RSA 193-E:2-a, I that have been adopted by the state board of education through administrative rules. *See* RSA 193-E:2-a, IV(a) ("The minimum standards for public school approval for the areas identified in paragraph I shall constitute the opportunity for the delivery of an adequate education"); RSA 193-E:2-a, VI(a) ("'Minimum standards for public school approval' mean the applicable criteria that public schools and public academies shall meet in order to be an approved school, as adopted by the state board of education through administrative rules.").

3. The Board of Education has promulgated minimum standards for public school approval in N.H. Admin. R. CHAPTER Ed 306. Only specific regulations within N.H. Admin. R. CHAPTER Ed 306 correspond to the areas the General Court has detailed in RSA 193-E:2-a, I. *See, e.g.*, N.H. Admin. R. Ed 306.37 (English/Language Arts and Reading); N.H. Admin. R. Ed 306.43 (Mathematics); N.H. Admin. R. Ed 306.31 (Arts Education).

4. The General Court enacted RSA 198:40-a to fund "the opportunity for an adequate education as defined in RSA 193-E:2-a." RSA 198:40-a, I. In other words, the General Court did not pass RSA 198:40-a to fund everything a school district or school might need or desire to operate. It passed RSA 198:40-a to fund the specific educational program the General Court defined in RSA 193-E:2-a, I, and as defined further in the specific regulatory provisions applicable to the areas identified in RSA 193-E:2-a, I. RSA 198:40-a, II provides the formula for how that funding is determined. RSA 198:40-a, III specifies that "[t]he sum total calculated under paragraph II shall be the cost of an adequate education."

5. The plaintiffs have challenged only a component part of the funding methodology contained in RSA 198:40-a, II as unconstitutional under Part II, Article 83 of the New Hampshire Constitution. Specifically, the plaintiffs contend that the base amount of $4,100 per pupil contained in RSA 198:40-a, II(a) is unconstitutional.

6. The trial court rejected the defendants' argument below that the plaintiffs could not press this challenge as a matter of law because RSA 198:40-a, III specifies that

6.88 Copyright © NH Bar Association

the sum total calculated under paragraph II shall be "the cost of an adequate education" as defined in RSA 193-E:2-a. (Exhibit A at 5-6.)

7. The trial court's merits order also failed to construe RSA 193-E:2-a, I and the specific N.H. Admin. Ed. 306 rules applicable to the areas identified in it to determine what items the General Court intended to pay for through RSA 198:40-a.

8. Instead, the trial court decided what items should be included in a constitutionally adequate education based predominately on the witness testimony of school districts. Many of the items the trial court identified are not part of the "educational program" the General Court defined and agreed to pay for under RSA 193-E:2-a as a matter of law. In doing so, the trial court overstepped its authority to construe the law and stepped into the role of the legislature defining for itself what a constitutionally adequate education should encompass.

9. As a result, the trial court's merits order does not read like an adjudication of the constitutionality of a statute based on the evidence and arguments presented by the parties and the established rules and principles governing such constitutional and statutory analyses, including that a legislative act like RSA 198:40-a is presumed constitutional and that what the legislature intended to fund through RSA 198:40-a must be discerned through an interpretation of the statute. *See, e.g.*, *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021) ("In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except on inescapable grounds."); *T.P. v. B.P.*, 171 N.H. 601, 603 (2018) (explaining that "the intent of the legislature" is "expressed in the words of the statute considered as a whole"). Rather, the trial court's merits order reads much like a legislative committee report crafted after a lengthy legislative hearing,[2] where the trial court is not interpreting the law, but is instead

[2] The trial court essentially concedes as much in footnote 16 of its merits order when it states "the process underlying the 2008 [Joint Committee] Report—a process Dr. Greene endorses—is strikingly similar to the Court's experience in presiding over the trial in this matter: i.e., considering substantial data from diverse sources and viewpoints in order to determine an appropriate amount of base adequacy aid." Exhibit A at 31. This admission is startling for at least two reasons. First, it reflects that the trial court believed its role was to sit as a substitute for a legislative committee, to craft its own committee report, and to impose the results of that report on the State. Second, it fails to acknowledge that trial courts are

6.89 Copyright © NH Bar Association

engaged in one-sided legislative factfinding, adopting allegedly "conservative" monetary figures provided by plaintiff school district witnesses, applying percentage discounts of its own creation, blending figures using teacher-to-student ratios to calculate its own per-pupil teacher cost, and ultimately forming a new estimated base adequacy figure.

10. And even then, the trial court expressed the view that this new estimated figure is *unconstitutional*, not based on any evidence presented by the parties, but because the evidence the plaintiffs presented was *insufficient* to reach an actual, constitutional figure. (Exhibit A at 54 ("Although the evidence demonstrates that a base adequacy aid level of $7,356.01 would be constitutionally insufficient, the Court cannot set a higher threshold at this time. Such a step is precluded by the limitations of the evidence presented at trial, as well as the involvement of certain policy considerations.").)

11. The trial court's merits order then declares RSA 198:40-a, II(a) facially unconstitutional, requires the General Court via injunction to set a base adequacy amount that exceeds $7,356.01 per pupil, and grants the plaintiffs' request for attorney's fees.

12. The trial court's merits order is erroneous in several legal and factual respects and constitutes an egregious violation of the separation of powers.

13. The defendants timely moved to reconsider this merits order on separation of powers grounds, (Exhibit C), and to stay it, (Exhibit B).

14. The defendants requested the stay from the trial court for three reasons.

15. First, the defendants asserted that, absent a stay, the trial court's merits order declaring RSA 198:40-a, II(a) facially unconstitutional will go into effect immediately and render the Executive Branch unable to fund adequacy grants for schools. Adequacy grants for schools would not be able to resume until the General Court amends the statute or revises the statutory school funding mechanism, which this

---

manifestly ill-equipped to perform the legislative function and that the data and witness testimony at trial did not come from "diverse" sources or viewpoints. It came only from school district plaintiffs. The many different viewpoints of members of the public who disagreed with the plaintiffs as a matter of policy, or who had different data to share or different viewpoints of the existing data to offer, did not have an opportunity to present that information to the trial court.

6.90 Copyright © NH Bar Association

Court has historically given its co-equal branches of government the necessary time to do in similar contexts. *See, e.g.*, *Londonderry School District SAU #12*, 154 N.H. at 163; *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476-77 (1997). The defendants also suggested that the General Court may choose not to modify the statute while this case is pending reconsideration and appeal and might instead await further guidance from this Court regarding what remedial action, if any, it should ultimately take. The defendants therefore argued that a stay of the trial court's declaratory judgment order is necessary to prevent irreparable harm to New Hampshire's school funding system and to permit the Executive Branch to continue funding schools in accordance with the existing education funding formula until this matter is finally resolved on the merits, and the General Court has sufficient time to resolve any constitutional infirmities that may exist after appeal.

16. Second, the defendants asserted, both in their motion to stay and their motion for reconsideration, that the injunction contained in the trial court's merits order violates the separation of powers principles embodied in Part I, Articles 30 and 37 because it materially impairs the lawmaking power of the General Court. "The legislative and the judiciary are coordinate departments of the state government; and it is the policy of the law that each, when acting within the scope of its authority, shall be supreme in the exercise of the powers committed to it, and that neither shall be subject to the control or supervision of the other." *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). New Hampshire thus follows "the rule which exempts the legislature from the control of the court." *Id.* at 542; *see Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Court properly denied the injunction as it had no power to interfere with proposed legislative action.").

17. The General Court has the plenary power and authority to solve the education funding issue identified in the trial court's merits order in a myriad of ways, including by altering the definition of an adequate education or by creating an entirely new funding model for education. The General Court does not have to amend RSA 198:40-a, II to conform it to the monetary figure the trial court has identified and that the trial court has asserted is itself likely an unconstitutional figure. The General Court also

6.91 Copyright © NH Bar Association

cannot be enjoined from conducting its own legislative study of the cost of an adequate education and endorsing a number produced from that process that may be different than the threshold figure the trial court has identified. *See City of Toledo v. State*, 154 Ohio St. 3d 41, 47 (Ohio 2018) (explaining that the "prevailing rule . . . under a tripartite form of government" is that "a court cannot enjoin the legislature from passing a law" even if "such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law") (internal quotations omitted).

18. The defendants asserted that the trial court's injunction essentially required the General Court to pursue legislation that meets or exceeds the trial court's preferred threshold figure. By doing so, the trial court has not merely interpreted the law; it has now set education fiscal policy for the State and is requiring the other co-equal branches of government to manage to that court-imposed policy on threat of civil contempt. The defendants argued that this result violates the separation of powers set forth in Part I, Article 37, and the speech and debate clause contained in Part I, Article 30. *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 292 (2005) (explaining that Part I, Article 30 protects "the legislature and individual legislators from incurring liability for 'any act generally done in a session of the [legislature] . . . in relation to the business before it" including voting on proposed legislation) (internal quotations omitted).

19. Finally, the defendants asserted that any litigation related to attorney's fees is premature at this juncture and should be stayed until the appeal in this matter has concluded. The defendants have preserved numerous issues for appeal in this relatively undeveloped area of the law, any one of which could result in the trial court's merits order being reversed. If that occurs, the plaintiffs will not be entitled to any attorney's fees.

20. On February 20, 2024, the trial court issued an order denying the defendants' motion to stay and for reconsideration. (Exhibit F.) In denying the motion for reconsideration, the trial court gave the defendants' separation of powers argument cursory treatment and leaned on this Court's *Claremont* jurisprudence to justify its

6.92 Copyright © NH Bar Association

unprecedented injunction. (Exhibit F at 7.) In doing so, the trial court permitted an unprecedented injunction against two other co-equal branches of government to go into effect and abandoned the historic deference this Court has provided to its co-equal branches of government to resolve identified deficiencies in this area of the law in an orderly way to avoid governmental chaos and adversity.

21. In denying the motion for reconsideration, the trial court made clear the separation of powers violation it was imposing: "By setting a base adequacy aid funding threshold, the Court did not intend to suggest that the legislature cannot enact meaningful changes to the education funding scheme. Rather, the Court's intention was to ensure that if the legislature maintains the existing scheme in substantial part, the legislature will not repeat the constitutional violations of the past by funding base adequacy aid at a level the plaintiffs have already proven to be unconstitutional." (Exhibit F at 8.)

22. The trial court explained that: "[T]he threshold merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action. If the legislature's response to the Base Adequacy Aid Order falls short of the threshold, an aggrieved party may seek prompt declaratory relief without the need for further protracted litigation." (Exhibit F at 8-9). In other words, future legislation containing a lower figure will not come to the court with a presumption of constitutionality, as this Court's precedents require, but will be prejudged as unconstitutional and swiftly struck down because the legislature failed to follow the trial court's "minimum guidelines."

23. This injunction in no uncertain terms "subject[s]" the General Court "to the control or supervision" of the trial court, *Sherburne*, 72 N.H. at 541, a result that violates the separation of powers under our State Constitution.

24. The trial court further attempted to clarify that its injunction order "must not be construed as exposing legislators to civil contempt proceedings" because it "merely establishes clear, minimum guidelines by which courts can swiftly measure future legislative action." (Exhibit F at 8.) But if that were the case, then the trial court should have vacated the "injunction" and allowed merely its declaratory ruling to stand because an "injunction" is not merely guidance; an injunction is "[a] court order

6.93 Copyright © NH Bar Association

commanding or preventing an action," Black's Law Dictionary at 855 (9th Ed. 2009), and, unlike advisory guidance, is enforceable through contempt proceedings.[3]

25. The trial court's post-trial motions order is also silent on whether *executive branch* officials would be subject to contempt proceedings for not complying with the order, even though "[p]ursuant to Part II, Article 56, the executive branch may expend public funds only to the extent, and for such purposes, as they have been appropriated by the legislature." *N.H. Health Care Ass'n v. Governor*, 161 N.H. 378, 387 (2011). Executive branch officials who expend public funds "for any other purpose than that for which they were appropriated, or expend any money or make any contract or bargain, or in any way bind the state in excess of the amount voted by the legislature," RSA 9:19, "shall be *personally liable* for the amount of the excess expended, contracted, or bargained above the appropriation," RSA 9:20 (emphasis added).

26. Instead, the trial court reaffirmed its injunction order and, in denying State's request for a stay pending appeal, took the extraordinary additional step of *directing* "the State" to make payments to public schools consistent with its previously chosen figure of $7,356.01 per pupil pending appeal, (Exhibit F at 10), which the trial court itself recognized in its merits order as "an increase of $537,550,970.95 in base adequacy aid to New Hampshire Schools." (Exhibit A at 1.) This new post-trial directive is clearly injunctive, and not merely guidance, and was entered without any inquiry into what economic impact it would have on the operations of State government and the public as a whole, nor any consideration of whether the executive branch could legally follow the order.

27. This new post-trial directive also results in an enormous, unconstitutional appropriation of taxpayer dollars. The trial court has the power and authority to interpret the law and declare a statute unconstitutional. It has no power to rewrite the fiscal policy of the State and force the other branches of government to pay for it.

[3] Moreover, the superior court lacks the authority to issue advisory opinions. *See Piper v. Meredith*, 109 N.H. 328, 330 (1969) ("The Superior Court has no jurisdiction to give advisory opinions.").

6.94 Copyright © NH Bar Association

28. As this Court recognized early on in the seminal case of *Merrill v. Sherburne*, 1 N.H. 199, 208-09 (1818),

> [T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. In other words that the union of these two powers is tyranny; or, as Mr. Madison observes, may justly be 'pronounced the very definition of tyranny' or in the language of Mr. Jefferson, 'is precisely the definition of despotic government.'

29. The Department of Education is required to make the next and last adequacy payment to school districts by April 1, 2024 for Fiscal Year 2024. It needs to have the adequacy calculation done by March 15, 2024 to ensure checks can issue on April 1, 2024. Thus, by March 15, 2024, the trial court's order could result in the State having to pay either an estimated additional $446,000,000, or an estimated additional $133,821,568, depending on how the payment statutes are ultimately interpreted,[4] and further assuming that state officials or employees will actually implement the order in the absence of a legislative appropriation.

30. If the trial court's order requires the State to pay an additional estimated $446 million, either as a one-time payment or under the distribution schedule set forth in RSA 198:42 while an appeal is pending, such a payment would exhaust the surplus in the education trust fund (approximately $182 million), and counsel for the defendants understand that the general fund has no projected surplus at this time capable of covering the remainder.

31. Counsel for the defendants understand that accessing the so-called rainy day fund, *see* RSA 9:13-e [Revenue Stabilization Reserve Account], or incurring a significant budget deficit could result in an immediate change to the State's credit outlook from a positive to a negative downgrade, and a negative downgrade could severely impact the fiscal condition of the State going forward. It is also not clear whether the rainy day fund could even be accessed mechanically before March 15, 2024.

[4] While executive branch officials will have to interpret the statutes in the first instance absent a stay, any definitive determination on how these statutes operate would have to come from this Court.

6.95 Copyright © NH Bar Association

32. The trial court did not consider any of these factors in issuing its extraordinary order. No precedential decision from this Court endorses such an extreme and rash approach in Part II, Article 83 cases, particularly while the appellate process remains open and available to the State. Rather, this Court's previous education funding decisions have appropriately stayed or deferred final judicial action so the other co-equal branches of government could resolve whatever constitutional defects exist in an orderly manner. And lower court decisions in this area should be appropriately deferential to this Court's review process, which may result in the reversal, in whole or in part, of the trial court's merits order.

33. The defendants are also likely to succeed on the merits of their argument that the trial court's injunction order and subsequent direction to "the State" to immediately start paying millions of additional, unappropriated dollars to public schools pending appeal violates the separation of powers by dictating what the educational fiscal policy of the State should be pending appeal, by appropriating millions of taxpayer dollars in an unconstitutional manner, and by threatening to impair the operations of State government.

34. The State will also suffer irreparable harm if the trial court's orders are not stayed. If this Court reverses the trial court in whole or in part, even if it concludes solely that the trial court erred in picking a new funding figure and requiring the State to pay that amount pending appeal, and one or more state officials acquiesce to the trial court's direction, millions of dollars in unrecoverable taxpayer funds will have been lost.

35. Additionally, the trial court's suggestion that the extraordinary and unprecedent remedy it imposed is justified because, "with each passing school year, another class of public school children is permanently deprived of the fundamental right to a constitutionally adequate education," (Exhibit F at 10), is unsupported by the record. None of the plaintiffs in this case are students, and the trial court cited to no evidence in the trial record to support this statement. Indeed, every plaintiff school district conceded at trial that it provides a constitutionally adequate education to their student populations, if not an education that exceeds constitutional adequacy. The trial court's merits order

6.96 Copyright © NH Bar Association

contains no factual findings to the contrary. (*See generally* Exhibit A.) Consequently, this case is not about students receiving an education below the constitutional floor that Part II, Article 83 and this Court's *Claremont* jurisprudence requires. Rather, the dispute in this case, though of constitutional magnitude, is purely economic and concerns solely the issue of whether the State should be paying more than it currently pays municipalities under RSA 198:40-a, II(a) so presumably the municipalities can lower the amounts they are required to raise and invest in their public schools through local taxes.

36. The issue presented is thus one of resource allocation, not one of actual harm to students.

37. Consequently, the irreparable harm that will result from the trial court's orders to the State alone justifies staying them.

38. This irreparable harm also shows definitively that the balance of the equities weighs in the defendants' favor and that the public interest is furthered by a stay pending appeal.

39. Finally, it makes little sense for the parties to brief and litigate the attorney's fees issue in the trial court while this matter remains pending on appeal with this Court. Attorney's fees litigation can be significant and complex and a pending appeal, if decided in the defendants' favor, would require reversal of the grant of attorney's fees. Moreover, the defendants cannot effectively engage in discussions to settle the attorney's fees issue until they know definitively whether attorney's fees have been properly awarded. Thus, the attorney's fee award portion of the trial court's decisions should similarly be stayed pending appeal.

40. Opposing counsel has been contacted for their assent to this motion and has indicated that they oppose it.

41. The defendants intend to file their notice of appeal in this matter within 30 days of the trial court's February 20, 2024 order on post-trial motions, or on or before March 21, 2024.

6.97 Copyright © NH Bar Association

WHEREFORE, the defendants respectfully request that this Court enter an order:

A. Resolving this motion on an expedited basis on or before March 13, 2024;

B. Staying in full the trial court's November 20, 2023 merits order and February 20, 2024 post-trial motions order pending the outcome of the appeal of this matter; and

C. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

STATE OF NEW HAMPSHIRE, DEPARTMENT OF EDUCATION, GOVERNOR CHRISTOPHER T. SUNUNU, AND COMMISSIONER FRANK EDELBLUT

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: February 28, 2024

By: /s/*Anthony J. Galdieri*

Anthony J. Galdieri, Bar # 18594
Solicitor General
Samuel R.V. Garland, Bar # 266273
Senior Assistant Attorney General
New Hampshire Dept. of Justice
1 Granite Place South
Concord, NH 03301
(603) 271-3650
anthony.j.galdieri@doj.nh.gov
samuel.r.v.garland@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to stay was sent via the Court's electronic filing system to counsel for all parties of record.

Date: February 28, 2024

/s/*Anthony J. Galdieri*

6.98 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

State of New Hampshire

v.

Anna Barbara Hantz Marconi

Docket No. 2024-0707

ASSENTED-TO MOTION FOR SUMMARY AFFIRMANCE
(ASSENT BY STATE, NOT PURPORTED INTERVENOR)

Anna Barbara Hantz Marconi, with the assent of the State of New Hampshire, respectfully requests summary disposition of the appeal filed by purported intervenor Brok-Alan Woodward-Griffith. As found by the Superior Court, Woodward-Griffith has no standing to intervene in this criminal case. This Court should summarily affirm the Superior Court order for the reasons detailed below:

1. Brok-Alan Woodward-Griffth filed an appearance and a motion to intervene in *State of New Hampshire v. Anna Barbara Hantz Marconi*, 217-2024-CR-1167, a criminal prosecution in Merrimack County Superior Court. Hantz Marconi, the accused in that case, moved, with the assent of the State, to strike Woodward-Griffith's pleadings from the record on the grounds of lack of standing.

2. The Superior Court (Honigberg, J.) denied Woodward-Griffith's motion to intervene. *See* Order on Mot. to Intervene, *State v. Anna Barbara*

6.99 Copyright © NH Bar Association

Hantz Marconi, 217-2024-CR-117 (December 10, 2024), attached. The Superior Court construed the Motion to Strike as an objection to the Motion to Intervene and concluded "that there is only one possible ruling on the Motion to Intervene and no hearing is necessary." *Id.* The Court agreed with Hantz Marconi that "the general rule is that members of the public have no right to intervene in criminal matters, and Mr. Griffith does not fit into any recognized exception." *Id.* The Court added that "[p]ending and future filings by Mr. Griffith should not be accepted into the file, except for a possible motion for reconsideration of this Order should Mr. Griffith submit one." *Id.*

3. Woodward-Griffith then filed a Motion to Reconsider. The Superior Court denied Woodward-Griffith's motion for reconsideration, explaining:

> The motion does not identify anything significant that the Court overlooked or misapprehended. Instead, the motion repackages with different emphases the arguments made in the original motion to intervene. That Mr. Griffith believes getting into the case as an intervenor may help him in an unrelated civil dispute does not justify allowing him into the case as an intervenor. Further, to the extent Mr. Griffith wants the Court [to] make public what is currently confidential, the motion says nothing that would justify unsealing grand jury materials, see N.H. R. Crim. P. 50(c)(3)(A) (grand jury materials presumptively confidential); or allowing Mr. Griffith access to such materials, see N.H. R. Crim. P. 50(e) (procedure for seeking access to confidential documents or information).

Order on Mot. to Reconsider Denial of Intervention, *State v. Anna Barbara Hantz Marconi*, 217-2024-CR-117 (December 30, 2024), attached.

6.100 Copyright © NH Bar Association

4. On December 19, 2024, Woodward-Griffith filed a Notice of Appeal to this Court.

5. On December 30, 2024, this Court issued an order regarding Notice of Docketing and Mandatory E-Filing.

6. Hantz Marconi, with the assent of the State, but not Woodward-Griffith, now moves for summary affirmance of the Superior Court order and dismissal of Woodward-Griffith's appeal.

LAW AND ARGUMENT

7. New Hampshire Sup. Ct. R. 25(2) provides that, "[e]xcept in a mandatory appeal, a party may move for summary disposition of a docketed case by filing a motion for summary reversal or affirmance within 20 days of the filing of the appeal."

8. This Court has said that the right to intervene is a matter of the trial court's discretion. *See Snyder v. New Hampshire Sav. Bank*, 134 N.H. 32, 34 (1991). This Court will not overturn the trial court's decision unless it is an unsustainable exercise of discretion. *See Brzica v. Trs. of Dartmouth College*, 147 N.H. 443, 446 (2002).

9. This Court has further explained that for "a court to hear a party's complaint, the party must have standing to assert the claim," *G.E. v. Comm'r, N.H. Dep't of Revenue Admin*, 154 N.H. 457, 461 (2006), and that "a party's standing is a question of subject matter jurisdiction, which may

6.101 Copyright © NH Bar Association

be addressed at any time." *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008).

10. "As a general proposition, 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" *Petition of Lath*, 169 N.H. 616, 622 (2017) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Even victims, those most affected by a criminal disposition, have "no right to intervene in the criminal case of the accused" or "to appeal the substantive rulings of the trial court." *Lath*, 169 N.H. at 622 (cleaned up, quotations and citations omitted).

11. "Generally, a non-party has no right to intervene in a criminal case" and "[t]here is no procedural rule that allows for such intervention." *In re Rubenzer*, No. 2015-0037, 2015 N.H. LEXIS 157 (Sep. 24, 2015) (non-precedential opinion cited as such, per Rule 12(d)(3)). *See also Rullo v. Rullo*, 121 N.H. 299, 300 (1981) (explaining that estate, which alleged that criminal defendant had engaged in trespass and negligence, "had no opportunity or right to intervene in the [defendant's] criminal case").

12. Thus, under New Hampshire law, Woodward-Griffith has no general right to intervene in the criminal case pending in Merrimack County Superior Court.

13. Nor does Woodward-Griffith's intervention fall within two exceptions identified in *Rubenzer*. This is not an instance where "courts 'sometimes permit the press to intervene in a criminal case where a

6.102 Copyright © NH Bar Association

decision to close criminal proceedings to the public may affect its First Amendment Rights.'" *Rubenzer* at *5-6 (quoting *United States v. Carmichael*, 342 F.Supp.2d 1070, 1072 (M.D. Ala. 2004)). Nor is it an instance where "third parties may be allowed 'to intervene in a criminal trial to challenge a request for production of documents on the ground of privilege.'" *Rubenzer* at *6 (quoting *Carmichael*, 342 F.Supp.2d at 1072).

14. The Superior Court correctly concluded that Woodward-Griffith has no standing to intervene. Since it was not an unsustainable exercise of discretion for the Superior Court to recognize that Woodward-Griffith has no standing to intervene in this criminal case, Hantz Marconi respectfully requests this Court grant her motion for summary affirmance.

15. Counsel for Justice Hantz Marconi communicated with Assistant Attorney General Joe Fincham regarding this motion. Attorney Fincham assents to this motion on behalf of the State.

WHEREFORE, Hantz Marconi, with the assent of the State, respectfully requests that the Court grant this motion for summary affirmance of the Superior Court orders and dismiss Mr. Woodward-Griffith's appeal.

6.103 Copyright © NH Bar Association

Dated this 8th day of January, 2024.

Respectfully submitted,

/s/ Richard Guerriero
Richard Guerriero
N.H. Bar # 10530
Oliver Bloom
N.H. Bar # 277555
Lothstein Guerriero, PLLC
Chamberlain Block
39 Central Square, Suite 202
Keene, NH 03431
(603) 352-5000

CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that the Office of the New Hampshire Attorney General, Assistant Attorney General Joseph Fincham, and Brok-Alan Woodward-Griffith are registered e-filers in the Court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service. Paper copies and PDF copies are also being are also being conventionally mailed and emailed to Assistant Attorney General Daniel Jimenez and to Mr. Brok-Alan Woodward-Griffith.

/s/ Richard Guerriero

6.104 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack County | Merrimack Superior Court

State v. Anna Barbara Hantz Marconi

217-2024-CR-01167

ORDER ON MOTION TO INTERVENE

The Court has before it the Motion to Intervene (Doc. 21) filed by Brok-Alan Woodward-Griffith, and the Defendant's Motion to Strike Doc. 21 and other filings submitted by Mr. Griffith (Doc. 22). The State concurs in the relief requested in the Motion to Strike.

As the Court understands the current situation with Mr. Griffith's filings, the only one that has been accepted into the file is the Motion to Intervene itself. The others are pending a decision on the Motion to Intervene.

The Court construes the Motion to Strike to be an objection to the Motion to Intervene. Having reviewed both, as well as the cases and other authorities cited therein, the Court concludes that there is only one possible ruling on the Motion to Intervene and no hearing is necessary.

As explained by the Defendant in the Motion to Strike, the general rule is that members of the public have no right to intervene in criminal matters and Mr. Griffith does not fit into any recognized exception. Accordingly, Mr. Griffith's Motion to Intervene (Doc. 21) is DENIED.

The Defendant's request that the Court strike the Motion to Intervene is DENIED, because his attempt to intervene should be part of the record. Pending and future filings by Mr. Griffith should not be accepted into the file, except for a possible motion for reconsideration of this Order should Mr. Griffith submit one.

So ordered.

December 10, 2024
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 12/10/2024

This is a Service Document For Case: 217-2024-CR-01167
Merrimack Superior Court
12/10/2024 12:45 PM

Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack County | Merrimack Superior Court

State v. Anna Barbara Hantz Marconi

217-2024-CR-01167

ORDER ON MOTION TO RECONSIDER DENIAL OF INTERVENTION

Brok-Alan Woodward-Griffith moves for reconsideration of the Court's Order denying him intervenor status. See Doc. 23 (Order dated 12/10/2024); Doc. 24 (Motion for Reconsideration). The motion for reconsideration is DENIED.

The motion does not identify anything significant that the Court overlooked or misapprehended. Instead, the motion repackages with different emphases the arguments made in the original motion to intervene. That Mr. Griffith believes getting into the case as an intervenor may help him in an unrelated civil dispute does not justify allowing him into the case as an intervenor. Further, to the extent Mr. Griffith wants the Court make public what is currently confidential, the motion says nothing that would justify unsealing grand jury materials, see N.H. R. Crim. P. 50(c)(3)(A) (grand jury materials presumptively confidential); or allowing Mr. Griffith access to such materials, see N.H. R. Crim. P. 50(e) (procedure for seeking access to confidential documents or information).

So ordered.

December 30, 2024
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 12/30/2024

This is a Service Document For Case: 217-2024-CR-01167
Merrimack Superior Court
12/30/2024 3:33 PM

Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0479, Leatrice Oram v. University System of New Hampshire & a., the clerk of court on November 26, 2024, issued the following order:

Transcript having been filed in the clerk's office, Leatrice Oram's brief must be filed on or before December 26, 2024. The opposing brief or memorandum of law must be filed on or before January 27, 2025.

NOTE: Your brief must not exceed 9,500 words. See Rule 16(11). If you are the appealing party, you must submit a copy of any decision(s) being appealed with your brief in compliance with Rule 16(3)(i). If you are not the appealing party and you choose to file a memorandum in lieu of a brief, it must not exceed 4,000 words.

An appealing party is responsible for providing the court with the necessary record to decide the appeal. Failure to do so may result in dismissal of the appeal. For information about how to provide the court with the record, review Rule 13 carefully. If you intend to file an appendix to your brief, review Rule 17.

This order is entered pursuant to Rule 21(8).

Timothy A. Gudas,
Clerk

Distribution:
Joseph D. Steinfield, Esq.
John-Mark Turner, Esq.
Christopher N. Cole, Esq.
File

 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0353

State of New Hampshire

v.

Armando Barron

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

BRIEF FOR THE DEFENDANT

Thomas Barnard
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 16414
603-224-1236
(15 minutes oral argument)

 Copyright © NH Bar Association

TABLE OF CONTENTS

Page

Table of Authorities 3

Questions Presented.....9

Statement of the Case 11

Statement of the Facts.....12

Summary of the Argument 25

Argument

I. THE COURT ERRED BY DENYING BARRON'S MOTION TO STRIKE FOR CAUSE POTENTIAL JUROR B.S. 26

II. THE COURT ERRED BY GIVING A FALSE-EXCULPATORY-STATEMENT INSTRUCTION WITH RESPECT TO BARRON, BUT NOT WITH RESPECT TO MITCHELL. 48

III. THE COURT MAY HAVE ERRED BY REDACTING PORTIONS OF MITCHELL'S VIOLENCE RISK ASSESSMENT PRIOR TO DISCLOSING IT TO BARRON.....63

Conclusion.....67

 Copyright © NH Bar Association

TABLE OF AUTHORITIES

Page

Cases

Bell v. State,
870 So.2d 893 (Fla. Dist. Ct. App. 2004).....40

Brecht v. Abrahamson,
507 U.S. 619 (1993).....66

Carratelli v. State,
961 So. 2d 312 (Fla. 2007).....39

Appeal of Cover,
168 N.H. 614 (2016).....61

Cozzie v. State,
225 So. 3d 717 (Fla. 2017).....39

Deicher v. City of Evansville,
545 F.3d 537 (7th Cir. 2008).....55

Fowler v. State,
544 S.W.3d 844 (Tex. Crim. App. 2018).....51

Hamilton v. State,
547 So. 2d 630 (Fla. 1989).....45

Hardin v. Ski Venture, Inc.,
50 F.3d 1291 (4th Cir. 1995).....51

Holmes v. South Carolina,
547 U.S. 319 (2006).....52

In re "K",
132 N.H. 4 (1989).....61

 Copyright © NH Bar Association

Kazadi v. State,
223 A.3d 554 (Md. 2020) ..... passim

Kim v. Walls,
563 S.E.2d 847 (Ga. 2002) 39, 43, 44

Kyles v. Whitley,
514 U.S. 419 (1995) 65, 66

Lore v. City of Syracuse,
670 F.3d 127 (2d Cir. 2012) 54

Noel v. Artson,
641 F.3d 580 (4th Cir. 2011) 60

Opinion of Justices,
41 N.H. 550 (1860) 33

People v. Johnson,
730 N.E.2d 932 (N.Y. 2000) 40

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 33

S.D. v. N.B.,
___ N.H. ___ (June 29, 2023) 65

State v. Addison,
165 N.H. 381 (2013) 34, 46

State v. Afshar,
171 N.H. 381 (2018) 32

State v. Boudreau,
175 N.H. 806 (2023) 66

State v. Braunreiter,
185 P.3d 1024 (Mont. 2008) 40, 43, 44, 45

 Copyright © NH Bar Association

State v. Bruneau,
131 N.H. 104 (1988) 53, 57, 60

State v. Cere,
125 N.H. 421 (1984) ..... passim

State v. Clark,
174 N.H. 586 (2021) 37

State v. Coleman,
544 A.2d 194 (Conn. App. Ct. 1988) 56, 57

State v. Cross,
128 N.H. 732 (1986) 33, 36, 37, 38

State v. Dana,
175 N.H. 27 (2022) 49, 50, 57, 58

State v. Evans,
150 N.H. 416 (2003) ..... passim

State v. Fischer,
143 N.H. 311 (1999) 57

State v. Girard,
173 N.H. 619 (2020) 64, 65

State v. Hayward,
166 N.H. 575 (2014) 51

State v. Huihui,
334 P.3d 776 (Haw. 2014) 51

State v. Lang,
795 S.W.2d 598 (Mo. Ct. App. 1990) 45

State v. Laurie,
139 N.H. 325 (1995) 65

 Copyright © NH Bar Association

State v. Mack,
500 A.2d 1303 (Conn. 1985).....54

State v. Munroe,
173 N.H. 469 (2020).....31

State v. Newton,
175 N.H. 279 (2022).....65

State v. Parry,
174 N.H. 50 (2021).....50, 61

State v. Roman,
___ N.H. ___ (Dec. 28, 2023) 52

State v. Shepherd,
159 N.H. 163 (2009).....65

State v. Soulia,
174 N.H. 225 (2021).....passim

State v. Stewart,
692 S.W.2d 295 (Mo. 1985) 39

State v. Stillwell,
172 N.H. 591 (2019).....61

State v. Tabaldi,
165 N.H. 306 (2013).....46

State v. Town,
163 N.H. 790 (2012).....34, 39

State v. Weir,
138 N.H. 671 (1994).....37

Twining v. State,
198 A.2d 291 (Md. 1964).....36

 Copyright © NH Bar Association

United States v. Garza,
574 F.2d 298 (5th Cir. 1978) 55, 56

United States v. Salerno,
108 F.3d 730 (7th Cir. 1997) 54

United States v. Sellers,
566 F.2d 884 (4th Cir. 1977) 54, 56

United States v. Tsarnaev,
595 U.S. 302 (2022) 33

Wearry v. Cain,
577 U.S. 385 (2016) 65

In re Winship,
397 U.S. 358 (1970) 31, 32

Constitutional Provisions

New Hampshire Constitution,
Part I, Article 15 ..... 31, 33, 64

New Hampshire Constitution,
Part I, Article 21 32

New Hampshire Constitution,
Part I, Article 35 ..... 32, 52

United States Constitution,
Sixth Amendment 33, 52, 64

United States Constitution,
Fourteenth Amendment 31, 33, 52, 64

 Copyright © NH Bar Association

Statutes

RSA 500-A:12.....33, 38

Court Rules

New Hampshire Rule of Evidence 401 64

Federal Rule of Evidence 403.....54, 56

Other Authorities

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012).....61

50A C.J.S. Juries (Aug. 2023 update) 33

Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 Iowa L. Rev. 413 (1989) 54

 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2024-0418

Edwin Valdez-Aguilar

v.

Commissioner, New Hampshire Department of Corrections

MEMORANDUM OF LAW FOR THE COMMISSIONER OF THE NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS

The Commissioner of the New Hampshire Department of Corrections (NHDOC), by and through counsel, the Office of the Attorney General, files this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b).

Appellant, Edwin Valdez-Aguilar, appeals from an order of the Coos County Superior Court (*Bornstein, J.*) granting the Commissioner's motion to dismiss. This Court should affirm as the superior court did not err in granting the Commissioner's motion and dismissing the case.

STATEMENT OF THE CASE AND FACTS

Edwin Valdez-Aguilar is a NHDOC inmate. App.3-5.[1] In late 2022, Mr. Valdez-Aguilar received a disciplinary report (often referred to as a

[1] "App." refers to the Commissioner's appendix filed with this brief.

6.116 Copyright © NH Bar Association

"D" report). *Id.* This report found that Mr. Valdez-Aguilar, while working in hobbycrafts, had built a magazine rack with a false bottom intended to conceal contraband. Appellant's Addendum.[2] Through investigation it was determined that Mr. Valdez-Aguilar had effectively been commissioned to manufacture this magazine rack to allow other inmates to conceal contraband and that the magazine rack was so used, having been discovered with a large quantity of drugs inside. *Id.* Mr. Valdez-Aguilar was provided a hearing with relation to this disciplinary report, following which the hearing officer found Mr. Valdez-Augilar to have committed the alleged actions and imposed discipline. *Id.* The discipline imposed was 75 hours extra duty assignments and 75 days loss of canteen, recreation, electronics, and visits. *Id.* The hearing office also imposed 15 days of punitive segregation and 75 days loss of phone privileges. *Id.* But, these later two punishments were suspended rather than imposed. *Id.*

More than a year later, in January of 2024, Mr. Valdez-Augilar initiated a civil action against the Commissioner of NHDOC by filling a complaint in superior court. App.3-5. The plaintiff's complaint raised a number of issues associated with this 2022 disciplinary report. *Id.* He requested monetary damages and removal of the disciplinary infraction at issue from his file. *Id.*

The Commissioner filed a motion to dismiss. App.6-11. This motion argued that Valdez-Aguilar failed to state a claim upon which relief can be granted because prisoners have no cause of action for violations of

[2] "Appellant's Addendum" refers to the documents filed as part of Mr. Valdez-Aguilar appellate brief.

6.117 Copyright © NH Bar Association

internal facility policy, nor do they have a due process right in their placement or security classification level. *Id.* The motion also pointed out that Valdez-Aguilar's factual allegations related to his PAR status do not allege a violation of NHDOC's administrative rules and he does not raise, nor would he be entitled to raise, any abuse of process or malicious prosecution claim. *Id.* The motion explained how Valdez-Aguilar's claim of error related to the combining of the investigative and prosecutorial functions failed both on procedural and substantive grounds. *Id.* Finally, the motion pointed out that, in addition to failing to state a claim, Valdez-Aguilar failed to plead sufficient facts to allege any constitutional tort for damages. *Id.*

The superior court granted the Commissioner's motion to dismiss "for the reasons set forth in the motion." App.12-13. Valdez-Aguilar filed a motion to reconsider, which was denied. App.14.

ARGUMENT

I. THE ORDER GRANTING THE COMMISSIONER'S MOTION TO DISMISS WAS NOT ENTERED IN ERROR.

"In reviewing the trial court's grant of a motion to dismiss, [this Court's] standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Plaisted v. LaBrie*, 165 N.H. 194, 195 (2013) (internal citation omitted). This Court must test "the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief" then

6.118 Copyright © NH Bar Association

the motion was improperly granted. *Id.* In this case, the Commissioner's motion to dismiss was appropriately granted because Plaintiff Valdez-Aguilar did not state a claim upon which relief could be granted. *See Kennedy v. Titcomb*, 131 N.H. 399, 402 (1989) (explaining that a court may "dismiss an action sua sponte where the allegations contained in a [complaint] do not state a claim upon which relief can be granted").

Tort claims for monetary damages against the State must generally be brought pursuant to RSA 541-B's waiver of sovereign immunity. *See Laramie v. Stone*, 160 N.H. 419, 436-37 (2010). Mr. Valdez- Aguilar's complaint makes five allegations; none of them allege a viable claim under RSA 541-B as he does not articulate how a state officer or employee failed to "follow the appropriate standard of care" and how this failure resulted in the property damage[3] he alleges. RSA 541-B:1, II-a(a).

First, Mr. Valdez-Aguilar alleges he was put on PAR status and taken to a higher security level during the investigation. App.3-5. This is not a violation of NHDOC policy. *See* N.H. Admin. R. Cor 410.03. PAR status is specifically designed for use during an ongoing investigation. *Id.* Further, Mr. Valdez-Aguilar alleges he lost his property due to his

[3] To any extent Mr. Valdez-Aguilar's complaint can be read to allege violations of a liberty interest rather than a property interest, these are also not viable claims. "[P]risoners do not have due process liberty interests in their placement or classification while incarcerated." *Mader v. Sanders*, 67 F. App'x 869, 871 (6th Cir. 2003) (citing *Moody v. Daggett*, 429 U.S. 78, 88. n.9 (1976)); *see also Pratt v. N.H. Dep't of Corr.,* No. 05-CV-367-SM, 2007 WL 3342378, at *5 (D.N.H. Nov. 7, 2007) ("[I]t is well established that inmates do not have a protected liberty interest in parole, classification status, or housing status."). Neither does a failure to follow internal policies and procedures amount to a federal constitutional cause of action. *See Elwell v. Correia*, 578 F. Supp. 3d 259, 263 (D.N.H. 2022) (collecting cases).

6.119 Copyright © NH Bar Association

classification as a C-4 resident and not as a result of the PAR status placement. App.3-5.

Second, Mr. Valdez-Aguilar alleges he did not receive a PAR notice every seven days as required. App.3-5. NHDOC residents on PAR status are entitled to a meeting every seven days. N.H. Admin R. Cor 410.03(g). This meeting needs to be documented on the PAR form. *Id.* To the extent Mr. Valdez-Aguilar's allegations can be read to allege a violation of these administrative rules, he still fails to allege how this constitutes a failure to follow an "appropriate standard of care" related to a "duty owed" to him and also does not allege that this failure resulted in the complained of property damage. RSA 541-B:1, II-a(a).

Third, Mr. Valdez-Aguilar alleges that the same individual, Investigator Ward, conducted the investigation and authored the disciplinary report. App.3-5. Mr. Valdez-Aguilar points to no NHDOC policy or procedure this violates.[4] Furthermore, as with the PAR allegations above, Mr. Valdez-Aguilar does not make any allegation of a causal connection between the alleged policy violations and his property damage caused by his C-4 classification.

Mr. Valdez-Aguilar's fourth allegation is that it was never discovered who built the magazine rack in question and that he had no knowledge that it was built or being used to transport contraband. App.3-5. This allegation is directly contradicted by the record and the finding of the

[4] To the extent the plaintiff claims this is a violation of a state or federal constitutional right, it is not. Courts have routinely recognized that prosecutors can also serve an investigative function. *See, e.g., Belcher v. Paine*, 136 N.H. 137, 144 (1992); *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 (1st Cir. 1995).

6.120 Copyright © NH Bar Association

hearing officer that "you did build a magazine rack with a different purpose without permission. The purpose for the item was to hide contraband." Appellant's Addendum. Regardless, this allegation does not allege actionable negligence.

The final allegation made by Mr. Valdez-Aguilar is that, when his classification was upgraded to C-4, he lost a substantial amount of personal property. App.3-5. NHDOC has extensive administrative rules governing the classifications process. *See* N.H. Admin. R. Chapter Cor 400. As part of these rules, an administrative review evaluation is conducted after every PAR status placement. N.H. Admin. R. Cor 410.03(i). Such an administrative review evaluation can result in a change in the resident's classification level. N.H. Admin. R. Cor 410.06. Even accepting Mr. Valdez-Aguilar's allegation that his status was so changed, he advances no allegations that the procedures for making this change were not followed or that some negligence on the Department's part caused him harm. And, as noted in footnote 3, he does not have a protected liberty interest in his classification level.

To state a claim against the Department, the plaintiff had to plead facts capable of showing that the Department owed him a duty of care, it breached that duty of care, and the breach caused his damages. The plaintiff's complaint does not do this. It does not allege sufficient facts to meet the essential elements of a claim against the State. As such, the superior court did not err in granting the Commissioners motion to dismiss.

6.121 Copyright © NH Bar Association

CONCLUSION

For the reasons stated above, the Commissioner of the New Hampshire Department of Corrections respectfully requests this Court affirm the superior court's order granting the Commissioner's motion to dismiss.

By filing this memorandum of law, the Commissioner waives oral argument. If the Court schedules argument, Mary A. Triick will present argument on behalf of the Commissioner.

Respectfully Submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF
CORRECTIONS

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Date: January 22, 2025

/s/ Mary A. Triick

MARY A TRIICK,
N.H. Bar #277277
Senior Assistant Attorney General
Office of the Attorney General
1 Granite Place, South
Concord, New Hampshire 03301
(603) 271-0447

6.122 Copyright © NH Bar Association

Certificate of Compliance

This memorandum complies with the word limitation set out in Supreme Court Rule 16(4)(b), by containing less than 4,000 words, exclusive of the signature block and certifications.

January 22, 2025 */s/ Mary A. Triick*
MARY A. TRIICK

Certification of Service

I hereby certify that copies of the foregoing were served via the court's e-file system and conventionally to pro se defendant at the following address.

Northern Correctional Facility - 79130
138 East Milan Rd.
Berlin 03570

January 22, 2025 */s/ Mary A. Triick*
MARY A. TRIICK

6.123 Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0488

Appeal of Jacob Solomon Mason, et al.

On *Certiorari* Review Pursuant to Supreme Court Rule 11 from a Final Decision of the New Hampshire Department of Health and Human Services, Administrative Appeals Unit Docket Nos. 2022-0657, -0658, -0659, -0660, and -0661

PETITIONERS' AND THE AREA AGENCIES' JOINT MOTION FOR REHEARING OR RECONSIDERATION

Dean B. Eggert (#746)
Elizabeth E. Ewing (#269009)
WADLEIGH, STARR & PETERS, PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140
deggert@wadleighlaw.com
eewing@wadleighlaw.com

 Copyright © NH Bar Association

Michael P. Flammia*
Christian B.W. Stephens (#278930)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
(617) 342-6800
mflammia@eckertseamans.com
cstephens@eckertseamans.com

*Admitted *pro hac vice*

Attorneys for Petitioners-Appellants Jacob Solomon Mason, Kayode Mason, Matthew Halle, Cheryl Hoitt, Tyler Jerome, Tammy Jerome, Richard Jerome, Daevon Soto, and Venus Barreto

Tracy M. Culberson (#16430)
NICHOLSON LAW FIRM
58 North State Street
P.O. Box 4137
Concord, NH 03302
(603) 856-8441
tracy@nicholson-lawfirm.com

Attorney for Petitioners-Appellants Timothy Douglas McDonald and Office of Public Guardian

-- and --

Michael A. Delaney (#10504)
Rebecca S. Walkley (#266258)
MCLANE MIDDLETON, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
(603) 625-6464

Attorneys for the Area Agencies – The Moore Center, Inc. and Lakes Region Community Services

 Copyright © NH Bar Association

Petitioners and the Area Agencies (collectively, "Movants") respectfully move for rehearing or reconsideration. Sup. Ct. R. 22.[1]

The Court's December 19, 2024, slip opinion ("Decision") overlooks the State's legal obligation under RSA 171-A to ensure that Petitioners are safely transitioned to alternative, "Settings Rule"-compliant placements via a "person-centered" planning and transition process funded by DHHS. Jacob Solomon Mason and Tyler Jerome—severely disabled New Hampshire citizens who remain at JRC—and their alarmed and desperate families/guardians responsible for their safety and care, and the Area Agencies, require resolution of this critical issue to provide certainty concerning all parties' respective legal obligations, finality to this dispute, and a physically safe path forward.

1. The Decision.

The Decision determines that: (1) Petitioners lawfully invoked their administrative appeal rights based on the non-renewal and termination of the Area Agencies' provider contracts with JRC, "which was predicated upon BDS's decision to cease funding" for Petitioners' services, slip op. at 9-10 (¶¶25-26); and (2) "RSA chapter 171-A prohibits BDS from using state funds to pay for services that do not comport with the federal Settings Rule," 42 C.F.R. §441.301, *id.* at 1 (¶1).

2. The State's Duty to Safely Transition Petitioners Remains a Critical, Undecided Issue.

The nature and extent of the State's legal obligation to ensure—and therefore fund—Petitioners' safe transitions to alternative, qualified

---

[1] Abbreviated terms appear in prior briefing and/or the Court's ruling.

6.126 Copyright © NH Bar Association

providers remains a primary, disputed issue in these proceedings and must be adjudicated to fully resolve the present controversy and preserve Jacob and Tyler's health and safety.

A. Movants Raised and Preserved this Issue.

Petitioners invoked the administrative appeal process in 2022, in part, because DHHS failed to offer them any alternative placement *before* informing the Area Agencies that funding for their services would soon end. Petitioners specifically objected in their appeal filings that "no alternative service provider, let alone an appropriate alternative service provider, has agreed to serve [them]." *See* JM.10 (Mason Notice of Appeal); TJ.12 (same-Tyler). "Without [p]roviding any alternatives," Petitioners appealed, they had "no other option but to live with th[eir] famil[ies]"—who were, and remain, incapable of providing the intensive care they require—or be institutionalized, *and* Petitioners would be denied the benefits of developmental disability services and assistance—to which they were, and remain, unquestionably eligible and entitled, *see* JM.8-10; TJ.10-12, and which are constitutionally protected property interests. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Petitioners thus appealed not only the State's purported inability to continue funding their services at JRC—an issue the Decision addresses—but also the State's determination that it could legally cease funding for their services *before transitioning them to an appropriate alternative setting*, as DHHS also alleged was required. From the outset, therefore, Petitioners have maintained that CMS's and DHHS's positions regarding the use of federal and state funding for JRC, respectively, do not absolve

6.127 Copyright © NH Bar Association

DHHS of its duty to ensure Petitioners' safe transitions to alternative providers "[r]egardless of [f]unding [a]vailability." JM.9; TJ.11.

Likewise, the Area Agencies have maintained throughout that "DHHS had and has an affirmative legal obligation to fully fund Petitioners' services until an appropriate alternative service provider is identified." *E.g.,* Area Agencies' Brief at 11-18. The Decision acknowledges "that DHHS is responsible for providing appropriate services to individuals with developmental disabilities" and the State's denial of "an affirmative obligation to pay for [Petitioners'] services at JRC," slip op. at 9 (¶25), 12 (¶35), but does not address the specific issue of payments to JRC *pending, and to enable, transitions to alternative providers*. This nuanced issue requires further application of the Decision's holding that RSA 171-A incorporates the Settings Rule to the facts of this case.

B. Two Petitioners Still Face Irreparable Harm.

Three Petitioners have been transitioned from JRC "to other qualified providers." Slip op. at 7 (¶16). Jacob and Tyler, however, remain. *Id.* After several years, the State has still failed to offer Jacob—the Petitioner with the most challenging and significant needs—*any* alternative placement. Tyler is exploring a potential transition opportunity which will not be completed until the Spring, at earliest. The alternative provider cannot take Tyler immediately and needs to hire/train staff, prepare/open a home, and develop a care plan for Tyler, who requires ongoing transition and support services in the meantime.

Jacob, Tyler, and their families/guardians will be directly and irreparably harmed absent a further ruling ensuring that funding for Jacob

6.128 Copyright © NH Bar Association

and Tyler's critical services continues until they are safely transitioned to an appropriate alternative provider. Jacob and Tyler's severe disabilities; numerous failed placements, hospitalizations, and arrests; and severe risks to themselves and their caregivers, families, and the general public—including Jacob's dangerous sexual behaviors with women/minors and Tyler's violent physical attacks—caused DHHS Commissioner Shibinette to conclude that funding must continue because Petitioners not only "present a danger to themselves and others" but also to "society as a whole." Petitioners' Brief at 13-16. The record supports her conclusion.

C. There Remains a Live Controversy.

The events which have occurred following the Court's Decision alone illustrate the need for rehearing or reconsideration on the particular issue of transition funding. The day after the Decision, DHHS advised the Area Agencies that funding for Petitioners' ongoing services—including transition services—would end by January 8, 2025, if not sooner. *See* **Exhibit 1**. The State thus interprets the Decision to greenlight the immediate termination of all of Petitioners' services, though Tyler and Jacob have not been relocated.

In response, JRC advised DHHS that it cannot provide services to Jacob and Tyler without payment and they must be discharged when funding ends. *See* **Exhibit 2**. The Area Agencies confirmed that no alternative placement is available for Tyler until Spring, at earliest, and for Jacob at all; and that absent continued funding, both men must likely be institutionalized. *See* **Exhibit 3**.

6.129 Copyright © NH Bar Association

Quite simply, Petitioners face the same life-or-death dilemma that first prompted their 2022 administrative appeals, with the State refusing to pay for Petitioners' ongoing services, but at the same time having failed to safely transition Tyler or Jacob to alternative placements. Because this core dispute between the parties remains, relief from the Court is critical to ensure a final, just outcome in this unique case and preserve Jacob and Tyler's lives.

Since the Decision, the State has taken divergent, irreconcilable positions concerning what role, if any, it has in Petitioners' ongoing transitions. These inconsistencies further highlight the need for clarity from the Court as to the State's ongoing legal obligations in the wake of the Decision. Specifically, DHHS claims it "has worked closely with the involved area agencies for years attempting to transition these individuals to appropriate alternative service providers," and provides vague affirmations to "continue to work diligently to assist with the transition process for Mr. Mason and Mr. Jerome." DHHS Mot. to Reconsider Jan. 6, 2025, Order Granting Mot. To Enforce Stay (Jan. 7, 2025) ("DHHS Mot. To Reconsider"), at 4-5; *accord* **Exhibit 1** (stating DHHS will "continue to partner with" the Area Agencies, Petitioners, and (unidentified) "providers for a successful transition."). The State, however, has never addressed how Petitioners will get transitioned when none of the professionals helping them transition will be paid and if—as is the case for Jacob—there is nowhere for them to go. Without State funding, there can be no services *or* transitions for Petitioners.

Following the Decision, DHHS has simply off-loaded all responsibility for Petitioners' care, instructing JRC to "work with" the Area

 Copyright © NH Bar Association

Agencies to figure out a solution, *see* **Exhibit 4**—an impossibility without ongoing State funding and involvement. As was the case in 2022, the State again improperly seeks to downshift financial responsibility for Petitioners' ongoing services and transitions to the Area Agencies, *see id.*, despite the Decision correctly noting that the Area Agencies "use funds dispensed by DHHS" to ensure needed developmental disability services are provided. Slip op. at 8 (¶22); RSA 171-A:18, I, II.

Likewise, the State declares in its last filing that it has "no obligation to pay for services at JRC beyond the point where the currently lawful appropriation is exhausted" and that "[t]he responsibility of finding an appropriate placement for Petitioners does not lie with DHHS." DHHS Mot. To Reconsider, at 4, 6. These statements are fully inconsistent with its claimed ongoing supportive role and He-M 504.04 (eff. Jun. 28, 2023) which makes BDS directly responsible for provider agencies. The State plainly needs direction from the Court as to what it must do as much as the guardians need relief from the Court for their family members.

D. DHHS's Settings Rule Obligation to Safely Transition Petitioners.

No party (nor the Commissioner) had the benefit of this Court's Decision when the issue of transition funding was previously raised. Movants should be permitted to address, given the Decision, whether the Legislature's incorporation of the federal Settings Rule in RSA 171-A:2, I-b and A:18, II imposes not only a duty on the State to *cease* funding for individuals in noncompliant settings, but also a corresponding duty to *provide* funding to transition individuals to compliant settings.

6.131 Copyright © NH Bar Association

The Settings Rule, as the Court observed, was promulgated by CMS in 2014 to promote HCBS and permit disabled individuals to avoid institutionalization. *See* slip op. at 3 (¶3). The precise deadline for compliance with the Rule is disputed and remains unresolved but did not occur until, at earliest, March 17, 2023. *Id. Cf.* Petitioners' Brief at 21 (discussing CMS's September 2023 retroactive extension of this deadline); Petitioners' Supplemental Brief at 12-13 (discussing another retroactive extension granted in September 2024).[2]

Before March 17, 2023—including when these appeals were taken—even noncompliant providers could be paid with both state and federal funds, as DHHS has conceded, *see* Petitioners' Brief at 19, so that critical services could continue until individuals were either transitioned to alternative settings or their current settings became compliant. Indeed, noncompliant providers were permissibly paid with both state and federal funds for at least nine years (2014-2023) while the States worked to implement the Settings Rule. *See id.*; slip op. at 3 (¶3). *See also* 42 U.S.C. §1396n(c)(2)(a) (States must, as a condition of participation in a Medicaid waiver program, "provide[] assurances" to CMS including that "necessary safeguards…have been taken to protect the health and welfare of individuals provided services under the waiver").

The Settings Rule, the requirements of which the Court has deemed fully incorporated into RSA 171-A, is multifaceted. While the State has exclusively focused on the unavailability of state funding due to the

---

[2] The Commissioner could not consider the subsequent CMS-approved extensions of the March 17, 2023 deadline because they did not yet exist. Nor does the Decision address them.

6.132 Copyright © NH Bar Association

allegation that JRC is not a HCBS setting under subsections (c)(4)-(5) of the Settings Rule, slip op. at 9-10 (¶26), it has failed to recognize, let alone implement, the requirements of subsections (c)(1)-(2) and (c)(6) which are germane to the present dispute, and must be considered.

Most significantly, DHHS disregards the Settings Rule requirement that the State "comply with the terms of" the State's "approv[ed] transition plan," *see* 42 C.F.R. §441.301(c)(6)(v), which is New Hampshire's Statewide Transition Plan (STP). Based on "[t]he legislature's explicit incorporation of the requirements set forth in 42 C.F.R. § 441.301 into RSA chapter 171-A," slip op. at 11 (¶31), the straightforward application of the Decision necessarily requires DHHS to "comply with" the CMS-approved STP as required by 42 C.F.R. §441.301(c)(6)(v). The Decision, however, does not address this issue.

The State's STP delineates the process to be followed when a service provider such as JRC is unable to meet Settings Rule criteria and a participant needs to be relocated. *See* JM.484-485. That process entails, among other requirements, written notice from DHHS to the participants/guardians including the reason(s) for relocation, the options available, how an individualized transition plan will be developed and implemented, and expectations regarding critical services and supports to be provided during the transition. *See* JM.485. The Area Agencies then hold meetings "to develop an individualized transition plan for the relocation of the participant, facilitated by the service coordinator/case manager." *Id.* The transition "[p]lan must be approved by [the] participant and/or guardian" and, thereafter, "is implemented" by the participant's "Service Coordinator and services providers, as appropriate." *Id.* It is this Settings Rule-mandated

 Copyright © NH Bar Association

process that remains ongoing for Tyler and Jacob, but which DHHS seeks to walk away from before it is completed. DHHS's failure to complete the process by March 17, 2023 or inability to find alternative placements does not excuse these obligations.

Since RSA 171-A incorporates the Settings Rule requirements such that Petitioners must be relocated, logically DHHS must "comply with" the STP as the Settings Rule also requires, and which delineates that precise relocation process. Indeed, DHHS developed the STP with CMS to specifically meet the Settings Rule's requirements. *See, e.g.,* JM.400-401 (STP Executive Summary) ("The following Statewide Transition Plan describes the steps New Hampshire proposes to take to assure Medicaid-funded HCBS sites in New Hampshire achieve full and ongoing compliance with the HCBS settings requirements"), JM.487 (similar). The STP is therefore important because it constitutes both CMS's and DHHS's interpretation of the Settings Rule as applied in New Hampshire. It was also developed following CMS requests that the State ensure "all needed services and supports will be available to beneficiaries at the time of relocation", "the state will have adequate time to relocate beneficiaries if necessary", and impacted individuals are afforded "an informed choice among alternate settings." Petitioners' Brief at 20-21.

The Decision should be partially reconsidered to clarify that DHHS must honor its Settings Rule-required duties incorporated into RSA 171-A, as delineated by the STP, to "[r]elocate any participants if [a] site will not meet the HCBS expectations by the transition deadline" by way of a "transition plan" that is "individualized based on the needs of the participant." *See* JM.484. This interpretation is fully consistent with the

6.134 Copyright © NH Bar Association

State's yet-unfulfilled March 2022 "commitment" to CMS to transition Petitioners to compliant settings. *See* JM.956. It would also fully and equitably resolve this matter. *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 594 (1999) (describing this Court's inherent, "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation.").

Neither the Settings Rule nor the STP implementing it in New Hampshire support DHHS's current, post-Decision position that it has "no obligation" to pay for services necessary to safely transition Petitioners to an appropriate, Settings Rule-compliant placement. *See* DHHS Mot. To Reconsider, at 4, 6. But even assuming DHHS' position had merit, the critical question of first impression that still remains unadjudicated is how to reconcile two seemingly competing requirements under the same law (*i.e.*, the Settings Rule/RSA 171-A requirements (i) regarding the characteristics of HCBS settings versus (ii) those requiring compliance with a state's approved transition plan) as applied to the unique facts of this case.

E. DHHS's Settings Rule Obligation to Ensure "Person-Centered" Transitions.

DHHS also falsely and without evidence criticizes Petitioners' guardians by claiming that the transition process has been "delayed," in part, "based on…feedback from the guardians" and "concerns" raised by them concerning proposed placements. *See* DHHS Mot. To Reconsider, at 4-5. Again, DHHS ignores the Settings Rule's core requirements of a "person-centered planning process" which an individual or their guardian leads, *see* 24 C.F.R. §441.301(c)(1), and which results in a "person-centered service plan" reflecting, *inter alia*, "what is important to the

 Copyright © NH Bar Association

individual with regard to preferences for the delivery of [] services and supports," *id.* at §441.301(c)(2).

In its ceaseless efforts to terminate Petitioners' funding, DHHS has not only willfully blinded itself to their intense clinical needs but also its own legal responsibilities under the Settings Rule—which is one and the same as New Hampshire law, as DHHS successfully argued to this Court. Simply put, DHHS cannot selectively ignore inconvenient portions of the Settings Rule, while relying on it to terminate funding. It is thus incumbent on the Court, as final arbiter of New Hampshire law, to settle the nature and extent of DHHS's legal obligation to safely transition Petitioners to alternative placements under RSA 171-A.

F. Institutionalization Constitutes Discrimination.

Lastly, the State's termination of funding for Jacob and Tyler before transitions are completed will result in their removal from suburban residential group homes and unnecessary institutionalization. *See* **Exhibit 3**. This result would defeat the Settings Rule's very purpose and violate Petitioners' federal rights. *See* Petitioners' Brief at 45 (citing authorities, including *Olmstead*, holding that the unjustified institutionalization of persons with disabilities constitutes unlawful discrimination under the ADA and that States must serve disabled individuals in the most integrated setting appropriate to their needs).

G. Partial Reconsideration, Further Briefing and Argument, or Remand Is Warranted.

Movants request that the Court issue a mandate consistent with this Motion, further ordering that DHHS has a duty to provide Jacob and Tyler with Settings Rule-compliant placements through the person-centered

6.136 Copyright © NH Bar Association

approach and that the Court's stay orders shall remain intact and extended with ongoing funding until DHHS completes the required transition and relocation process.

If the Court requires further briefing or argument to address the breadth of the Settings Rule, pursuant to Sup. Ct. R. 22(4), Movants ask in the alternative that the Court order further briefing and argument regarding the remaining, core disputed legal issue: *viz.*, whether the State has a continuing funding obligation—even at a noncompliant setting—when done in aid of an ongoing, Settings Rule-required transition, and the nature of that obligation.

Finally, if the Court deems the State's most recent baseless assertions about Petitioners' cooperation with transition to raise untried factual issues, or if the intent of the Decision is to preserve the Petitioners' appeal and due process rights, then Movants request that the Court retain jurisdiction but remand Jacob and Tyler's appeals—with the Court's stay orders intact and extended, subject to completion of transitions—so that all factual and legal issues can be determined, first, by a neutral arbiter (not the Commissioner) and, if ultimately necessary, by this Court on a fully-developed factual record.

Copyright © NH Bar Association

Respectfully submitted,
Petitioners-Appellants,

JACOB SOLOMON MASON, KAYODE MASON (individually and as guardian of Jacob Solomon Mason), MATTHEW HALLE, CHERYL HOITT (individually and as guardian of Matthew Halle), TYLER JEROME, TAMMY JEROME (individually and as co-guardian of Tyler Jerome), RICHARD JEROME (individually and as co-guardian of Tyler Jerome), DAEVON SOTO, and VENUS BARRETO (individually and as guardian of Daevon Soto),

By their attorneys,

/s/ Dean B. Eggert

Dean B. Eggert (#746)
Elizabeth E. Ewing (#269009)
WADLEIGH, STARR & PETERS, PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140
deggert@wadleighlaw.com
ewing@wadleighlaw.com

Michael P. Flammia*
Christian B.W. Stephens (#278930)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
(617) 342-6800
mflammia@eckertseamans.com
cstephens@eckertseamans.com
*Admitted *pro hac vice*

Copyright © NH Bar Association

TIMOTHY DOUGLAS MCDONALD
and OFFICE OF PUBLIC GUARDIAN
(individually and as guardian of Timothy
McDonald),

By their attorney,

/s/ Tracy M. Culberson

Tracy M. Culberson (#16430)
NICHOLSON LAW FIRM
58 North State Street
P.O. Box 4137
Concord, NH 03302
(603) 856-8441
tracy@nicholson-lawfirm.com

-- and --

THE MOORE CENTER, INC. &
LAKES REGION COMMUNITY
SERVICES,

By their attorneys,

/s/ Michael A. Delaney

Michael A. Delaney (#10504)
Rebecca S. Walkley (#266258)
MCLANE MIDDLETON, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105
(603) 625-6464
michael.delaney@mclane.com
rebecca.walkley@mclane.com

Dated: January 10, 2025

Copyright © NH Bar Association

CERTIFICATE OF RULE 22(2) COMPLIANCE

The undersigned hereby certifies that this motion contains 3,000 words and, therefore, complies with the word limit of Sup. Ct. R. 22(2). Counsel relied upon the word count of the computer program used to prepare this motion.

Dated: January 10, 2025

/s/ Dean B. Eggert
Dean B. Eggert

Copyright © NH Bar Association

CERTIFICATE OF SERVICE AND RULE 22(1) COMPLIANCE

I hereby certify that on January 10, 2025, I served, pursuant to Sup. Ct. R. 22(1), a copy of this motion on all counsel of record via the Supreme Court's electronic filing system, including opposing counsel/the attorney general, as follows:

Mary A. Triick, Esq.
Senior Assistant Attorney General
Office of the Attorney General
Civil Bureau
1 Granite Place, South
Concord, NH 03301-6397
Mary.A.Triick@doj.nh.gov

Counsel for The New Hampshire Department of Health and Human Services, Bureau of Developmental Services

I further certify that on January 10, 2025, I served, pursuant to Sup. Ct. R. 22(1), a copy of this motion and notice of its filing upon the clerk of the agency from which the appeal was taken, via first class mail and electronic mail, as follows:

Department of Health and Human Services
Office of Legal and Regulatory Services
Administrative Appeals Unit, Attn: Clerk
Main Building
105 Pleasant Street, Room 121C
Concord, NH 03301
dhhs.aau@dhhs.nh.gov

/s/ Dean B. Eggert
Dean B. Eggert

Copyright © NH Bar Association

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of Warren Jackson and Jean Marie Jackson

2024-0242

MOTION TO ADD A QUESTION

NOW COMES Respondent, Jean Marie Jackson, by her attorneys, Primmer Piper Eggleston & Cramer, PC, and respectfully moves to amend her Mandatory Appeal by adding one additiona1 question. Pursuant to Supreme Court Rule 163b, in support thereof, Petitioner states as follows:

1. Pursuant to New Hampshire Supreme Court Rule 16(3)(b), an appealing party may file a motion to add a question to their appeal provided they do so at least twenty (20) days prior to the due date of the moving party's brief.

2. A briefing schedule has not yet been issued in this case, as the transcripts necessary to decide the issues on appeal have not been prepared. The transcripts have not yet been ordered as the parties recently attempted to resolve their disputes by voluntary mediation.

3. Because no briefing order has been issued, neither party will be prejudiced by the addition of an additional issue.

4, The issue, which the Petitioner seeks to appeal, became apparent to her as she was preparing for voluntary mediation.

5. Petitioner seeks to add, the following ninth appeal issue:

Copyright © NH Bar Association

Did the Family Court err in not ordering alimony for the October 2020-June 2021 timeframe during which time Petitioner had the capacity to pay, having earned in excess of $76,429.72 and Respondent had demonstrated a need for alimony?

WHEREFORE, for the reasons set forth above, Petitioner respectfully requests the Court grant her Motion to add Appeal Issue No. 9 as set forth above.

Respectfully submitted,

Jean Marie Jackson
By Her Attorneys,

Primmer Piper Eggleston & Cramer, PC

Dated: 10/16/24

By: */s/ Doreen F. Connor*
Doreen F. Connor, NHBA 421
PO Box 3600
Manchester, NH 03105
(603) 626-3300
Dconnor@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was this day forwarded to all counsel/parties of record via the Court's electronic filing system.

/s/ Doreen F. Connor
Doreen F. Connor

6746081.1

 Copyright © NH Bar Association