Traps for the Unwary

By:

New Hampshire Bar Association

New Lawyers Committee

Copyright Notice

Eighth Edition – Revised

July 2025

By

New Hampshire Bar Association
2 Pillsbury Street, Suite 300
Concord, NH 03301-3502
www.nhbar.org

NEW HAMPSHIRE
BAR ASSOCIATION
NEW LAWYERS COMMITTEE
Equal Justice Under Law

New Lawyers Committee Members
2024-2025

Co-Chairs: Attorney Stephanie L. Tymula

Attorney Stephani J. Roundy Knights

Attorney Matthew T. Brekus

Attorney Alexandra N. Brewer

Attorney Joseph M. Dolciotto

Attorney Katheryn E. Dumais

Attorney Susanne L. Gilliam

Attorney Kevin R. King

Attorney Rebecca E. Lamarre

Attorney Haley G. Lipinski

Attorney Kate V. Lipman

Attorney Paul J. Mansur

Attorney Christopher R. Mignanelli

Attorney Cassandra A. Moran

Attorney Jessica F. Morrissey-Jeffery

Attorney Monique A. Olson

Attorney Emily E. Peterson

Attorney Laura J. Raymond

Attorney Meredith A. Young

NHBA Staff Liaisons:
Attorney Misty Griffith
Rebecca Bunyard

Traps for the Unwary

Disclaimer

This publication is intended as an aid to the practice of law in the State of New Hampshire. The material contained in this publication is intended only as a guide and does not purport to provide definitive answers. **WE MAKE NO WARRANTY, EXPRESSED OR IMPLIED**, as to whether the materials herein are correct, complete, or up to date. Although our best efforts have been made to ensure that the information is current and accurate as of the date of publication, these materials should be used only as a starting point. Cases, treatises, statutes, court rules, and other materials cited and referred to herein should always be checked to determine whether they have been repealed, reversed, distinguished, amended, or otherwise altered. This project was prepared by the New Lawyers Committee of the New Hampshire Bar Association.

This eighth edition of **TRAPS FOR THE UNWARY** is an attempt by the New Lawyers Committee of the New Hampshire Bar Association to identify some of the "traps" into which both new and experienced lawyers may fall. The process of putting this publication together is itself a study in trial and error. We believe the publication is valuable but know that it can be improved. We have been asked to expand upon our previous editions with more traps in areas of the law that many newer lawyers encounter when beginning the practice of law or changing the focus of their practice. With each addition, we add new practice areas, but of course this is not a complete overview of the areas of law that you will encounter during your practice.

We invite your comments and suggestions as to how this publication can be improved. We also invite readers to submit new traps. If this publication assists any lawyer in serving their client in a timelier and cost-effective manner or prevents any attorney from committing a potentially costly mistake, our objectives will be met.

Comments and new traps should be submitted in writing to the New Lawyers Committee at:

New Lawyers Committee
New Hampshire Bar Association
2 Pillsbury Street, Suite 300
Concord, NH 03301

TABLE OF CONTENTS

ALCOHOL, SERVICE OF, CAUSE OF ACTIONS

Service of Minor or Intoxicated Person by a Liquor Licensee

A. A cause of action against a liquor licensee, its employees or agents, is purely statutory. N.H. RSA 507-F:8. Any such action must be brought pursuant to the standards established in N.H. R.S.A. 507-F.

B. The act does not govern claims against non-liquor licensees. N.H. R.S.A. 507-F:3.

C. A plaintiff claiming that he was injured by a minor or intoxicated person who was served alcohol by a liquor licensee must prove that such service of alcohol was negligent. N.H. R.S.A. 507-F:4.

D. By contrast, a plaintiff claiming that he injured himself as a result of being served alcohol by a liquor licensee must prove that such service was reckless. N.H. R.S.A. 507-F:2 II; 507-F:5. N.H. R.S.A. 507-F:5, III, provides a non-exhaustive list of examples of specific conduct that is evidence of recklessness, including:

   a. Actively encouraging intoxicated persons to consume substantial amounts of alcohol;
   b. Serving alcohol to a person under 16 when the server knows or should have known of the person's age;
   c. Service that is so continuous and excessive that it creates a substantial risk of alcohol poisoning; and
   d. Assisting a patron into a motor vehicle, when the patron is intoxicated enough to require such assistance, and the defendant knew or should have known that the person intended to operate the motor vehicle.

The statute requires the plaintiff to show either: (1) that the server knew the patron was intoxicated; or (2) that a reasonably prudent person in like circumstances would know that the patron was intoxicated. N.H. R.S.A. 507-F:4. Under RSA 507:F:4, II, a server may obtain knowledge of intoxication through more than just obvious or visible signs exhibited by the patron. Nothing about the statute's language limits the evidence contributing to that knowledge to visible manifestations exhibited by the patron. *Currier v. Newport Lodge No. 1236*, 589 F. Supp. 3d 210, 222 (D.N.H. March 9, 2022). Other factors may inform, or reasonably could inform, what a bartender knows or would know about a patron's intoxication, such as the number and type of drinks consumed, the amount of alcohol in the drinks, the timeframe and pace of consumption, and information communicated or otherwise available to the bartender about the patron. *Currier*, 589 F. Supp. 3d at 223. The statute imposes liability for what a bartender knew or a reasonably prudent bartender would have known. *Id.* at 224.

A plaintiff cannot prove negligent service solely based on a hidden quality such as BAC. Otherwise, RSA 507-F:4 would be a strict liability statute, which it is not. *Id.*, citing *In re Baldoumas Enterprises, Inc.*, 149 N.H. 736, 739 (2003) (noting that RSA 507-F:4 imposes a negligence standard and observing that "when the legislature intends to create liability for negligence instead of strict liability, it knows how to do so").

Social Host Liability

A. A "plaintiff who is injured as a result of a social host's service of alcohol may maintain an action against that social host, so long as the plaintiff can allege that the service was reckless." *Hickingbotham v. Burke*, 140 N.H. 28, 33 (1995); *see also* MacLeod v. Ball, 140 N.H. 159, 161 (1995).

B. The reckless standard articulated in *Hickingbotham* applies to plaintiffs who were themselves intoxicated. The New Hampshire Supreme Court has yet to weigh in on the appropriate standard for innocent third parties who are injured. Some lower courts have found that an innocent third party who is injured as a result of a social host's service of alcohol may maintain an action against the social host if the service was merely negligent. *See, e.g., Estate of Thompson*, No. 212-1999-CV-0084, 2001 N.H. Super. LEXIS 21 (Carroll Cnty. Super. Ct., Dec. 28, 2001) (Nadeau, J.); *Dunn v. Dutton*, No. 216-2000-CV-465 (Hillsborough Cnty. Super. Ct., N. Dt., Apr. 30, 2001) (Conboy, J.).

APPEALS

The New Hampshire Supreme Court is the primary appellate court in New Hampshire.[1] It accepts appeals from the Superior Court, Circuit Courts, and Administrative Agencies.

Generally speaking, there are two types of appeals in New Hampshire: mandatory appeals and discretionary appeals. It is important to understand the distinction between these two categories.

Most appeals are mandatory appeals. For mandatory appeals, a party may appeal as a matter of right and the Court must accept the appeal.

The Supreme Court rules define a mandatory appeal as "an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court . . . ." Sup. Ct. R. 3. However, the rules lay out several exceptions to the general definition of a mandatory appeal. The following appeals are not mandatory appeals:

1. an appeal from a final decision on the merits issued in a post-conviction review proceeding (including petitions for writ of habeas corpus and motions for new trial);
2. an appeal from a final decision on the merits issued in a collateral challenge to any conviction or sentence;
3. an appeal from a final decision on the merits issued in a sentence modification or suspension proceeding;
4. an appeal from a final decision on the merits issued in an imposition of sentence proceeding;
5. an appeal from a final decision on the merits issued in a parole revocation proceeding;
6. an appeal from a final decision on the merits issued in a probation revocation proceeding.;
7. an appeal from a final decision on the merits issued in a landlord/tenant action filed under RSA chapter 540 or in a possessory action filed under RSA chapter 540; and
8. an appeal from an order denying a motion to intervene; and
9. an appeal from a final decision on the merits, other than the first final order, issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A).

These "exceptions" to the mandatory appeal definition are considered "discretionary appeals." For civil practitioners, the most common discretionary appeals will be appeals of landlord-tenant/eviction actions and family law appeals other than a "first final order" (e.g., the divorce order itself rather than post-decree motions to modify).

[1] The Superior Court hears limited appeals from town Planning and Zoning Boards and certain Administrative Agencies. In addition, a defendant convicted of a misdemeanor-level crime in Circuit Court may appeal to the Superior Court for a *de novo* trial concerning that conviction. This chapter is not intended to address such appeals to the Superior Court, but rather appeals to the Supreme Court.

Other types of discretionary appeals include interlocutory appeals, petitions for original jurisdiction, and appeals from administrative agencies. *See* Sup. Ct. R. 8-10. This chapter will address only "Rule 7" appeals (standard mandatory and discretionary appeals); the reader is advised to carefully review the Court Rules for guidance on other types of appeals.

Initiating the Appeal

To file an appeal, the appealing party must file a Notice of Appeal. The Court publishes pre-printed Notice of Appeal forms for use in Rule 7 appeals. There are two Notice of Appeal forms: one for mandatory appeals and one for discretionary appeals. These forms are available on the court website at: https://www.courts.state.nh.us/supreme/forms/index.htm.

Importantly, the Court also provides detailed instructions for each form. A helpful checklist is even included. As of 2020, all appellate filings by represented parties are made electronically through the Court's e-file system. Note that the Supreme Court utilizes its own e-file system separate from the trial courts. You must register separately to file in the Supreme Court.

The Notice of Appeal form is of utmost importance, and practitioners should complete it with care. For discretionary appeals, of course, the Notice of Appeal is the party's chance to convince the Court to accept the appeal. However, for all appeals, the Notice is critical. If the form is missing information (don't forget the filing fee!), the filing may not be accepted, which could be disastrous if close to the appeal deadline.

Additionally, the arguments made in the appellant's brief must have been presented in the Notice of Appeal. *See* Sup. Ct. R. 16(3)(b). If a claim of error is not stated in the Notice of Appeal, the argument may not be preserved. *State v. Jimenez*, 137 N.H. 450 (1993). Note, however, that the argument in the brief need not be exactly the same as the question presented in the Notice of Appeal: the "statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." Sup. Ct. R. 16(3)(b).

The clerk will issue a "docketing order" docketing the appeal one to two weeks after filing.

In a discretionary appeal, either party may move for summary disposition of the appeal (i.e., decision without briefing, argument, or a written opinion). Sup. Ct. R. 25. This typically takes the form of a motion for summary affirmance, filed by the appellee. Such a motion must be filed within 20 days of the filing of the appeal.

Mediation

The Supreme Court has its own mediation program. Most civil cases are eligible for this voluntary program. Sup. Ct. R. 12-A.

The Court will issue a mediation notice at the same time it formally accepts the appeal. Both parties must agree to participate in mediation. It is the appellant's responsibility to notify the Court of the parties' agreement to mediate.

Once a case is referred to mediation, the appeal will be stayed for 90 days. A mediation will be scheduled by the judicial branch's Office of Mediation & Arbitration, to be held at the Supreme Court building.

If no agreement to mediate is filed by the court-ordered deadline, the Court will proceed with the processing of the appeal.

Filing the Record

For appeals involving cases that went to trial or in which an evidentiary hearing was held, a transcript is usually required on appeal. The appealing party indicates in the Notice of Appeal whether a transcript is required. If you fail to request the transcript, the Court may view the trial court's findings with more deference, which could be to your client's detriment.

Following the mediation order, the clerk's office will proceed to the preparation of a transcript, if one was requested. All transcripts are prepared by a court-approved company, eScribers. The appealing party is required to pay a deposit to eScribers to prepare the transcript.

Once the transcript is complete, eScribers will transmit it to the Court directly. The parties will both receive an electronic copy, and processing of the appeal will continue.

Briefing

After the preliminary processing of the appeal is complete, a briefing order will issue.

The order will set out the due dates of the opening brief and opposing brief, which are typically 30 days apart. The length of time allowed for filing of a brief depends on the type of case, and the length of any transcripts prepared.

Note that the briefing order does not always set out a due date for a reply brief; however, the filing of a reply brief is still permitted. The reply brief (if any) must be filed within 20 days of the submission of the opposing brief (or 10 days before the date of oral argument, whichever is earlier). Sup. Ct. R. 16(7).

Supreme Court Rule 16 describes in detail the requirements for the brief. In short, briefs contain, among other things: a cover page, table of contents, table of authorities, questions presented, statement of the case and facts, and an argument section.

Instead of a brief, the opposing party may file a "memorandum in lieu of brief," which has fewer formal requirements.

For a comprehensive discussion of the requirements of the briefs, the reader is advised to refer to "A Guide to Appellate Advocacy In New Hampshire," an essential manual authored by attorneys Lisa Wolford and Stephanie Hausman and published by the New Hampshire Bar Association.

Oral Argument

In their briefs, the parties indicate whether they are seeking oral argument. Parties can request argument before the full Court (15 minutes per side), 3JX argument before a three-justice panel (10 minutes per side), or state that they are waiving oral argument.

The Court is not bound by the parties' stated oral argument preferences (or lack thereof). The majority of cases are decided without oral argument. The rules indicate that "oral argument will probably not be held if the questions of law are not novel, and the briefs adequately cover the arguments; if the questions of law involve no more than an application of settled rules of law to a recurring fact situation; if the sole question of law is the sufficiency of the evidence, the adequacy of instructions to the jury or rulings on the admissibility of evidence, and the briefs refer to the record, which will determine the outcome." Sup. Ct. R. 18(1).

When an oral argument is scheduled, the parties will be notified approximately one month in advance. The oral argument notice will indicate a time by which counsel should check in with the clerk's office. Counsel should proceed directly to the courtroom after checking in.

Note that unlike a trial court argument, counsel table is only for counsel. Clients are not required to attend, and if they do, they should remain in the gallery.

The appellant can "reserve" a portion of its allotted time for a rebuttal (i.e., after the appellee's argument). No more than two minutes may be reserved for rebuttal – and in some cases, counsel will end up waiving their rebuttal time. If time is being reserved, counsel should notify the courtroom monitor prior to the argument and also notify the Court at the beginning of the argument itself.

The Court's oral argument notice states that "[t]he justices will refrain from asking questions during the first three minutes of each person's argument." However, it is common practice for counsel, at the beginning of her remarks, to invite the Court to ask questions at any time. Even if such an invitation is not provided, the Court routinely asks questions during the three-minute grace period.

The oral argument time limits are enforced relatively strictly. There are yellow and red lights on the counsel's lectern: the yellow light comes on with four minutes remaining in a full 15-minute argument (or at 1-minute remaining in a 3JX argument), and the red light will come one when time has expired.

For additional practice tips, the reader is again referred to the Wolford/Hausman manual, cited above. Recordings of oral arguments are posted on the Supreme Court's website and are valuable examples for first-time arguers.

Decision

Following oral argument, a decision will generally issue in 2 to 4 months. Of course, there are many exceptions. The Court's own statistics indicate that an average appeal lasts approximately 200 days from the filing of the appeal to the closing of the case.

The decision-making process in the New Hampshire Supreme Court is somewhat different than other appellate courts. The author of each opinion is decided randomly, not assigned by the Chief Justice. Almost all decisions are unanimous: dissents are rare.

If a case is to be decided without oral argument, it will be deemed "submitted on the briefs." The Court will not usually notify the parties that a case has been submitted without oral argument. The Court will simply issue an order.

Decisions will take the form of either a formal opinion or an unpublished order. Formal opinions are authored by the full court (as opposed to 3JX). If the Court conducts oral argument for a case, a formal opinion is more likely.

The losing party on appeal may file a motion for rehearing or reconsideration within 10 days of the Court's decision. It is extremely rare for a motion for reconsideration to be granted at the Supreme Court level. As such, most appellate counsel will file a motion for reconsideration only occasionally.

Motion practice

Motion practice at the Supreme Court is not as common as at the trial level. Outside of motions for summary affirmance and for reconsideration (both discussed above) motions are typically procedural.

A motion to dismiss is sometimes appropriate if the notice of appeal was filed untimely, the Court lacks subject matter jurisdiction, the matter is moot, "or any other cause unrelated to the merits of the appeal." Sup. Ct. R. 25(7). There is no explicit deadline for such a motion to dismiss, but the clerk's office recommends it be filed as soon as possible, and preferably within 10 days of the appeal's filing.

One common "motion" is the Notice of Automatic Extension of Time. This allows either party to obtain an automatic extension of up to fifteen days to the briefing deadlines by filing an assented-to notice. Sup. Ct. R. 21(6-A). The notice should set out the new due dates for all briefs. The parties, collectively, may only file for two automatic extensions.

Other common motions include a motion to stay or remand (Sup. Ct. R. 7-A), motion for leave to appear as amicus curiae (Sup. Ct. R. 30), motion to add question (Sup. Ct. R. 16(3)(b)), and motion to waive oral argument (Sup. Ct. R. 18(7)). Many other motions may be appropriate, whether or not they are specifically mentioned in the rules.

The Supreme Court Clerk's Office is a valuable resource and readily accessible. Counsel may want to consult with the Clerk's Office for guidance on motion practice in unusual situations.

ATTACHMENTS

Pre-Judgment Attachments with Notice[2]

In civil and equity actions, the plaintiff may "attach" (place a judicial lien on) the defendant's real estate and personal property in order to provide security for a judgment that plaintiff may obtain. *See* RSA 511:1. In order to get an attachment prior to judgment, "the burden shall be upon the plaintiff to show that there is a reasonable likelihood that the plaintiff will recover judgment including interest and costs on any amount equal to or greater than the amount of the attachment." RSA 511-A:3. Generally, a defendant is given notice and an opportunity for a hearing before the Court considers the Petition or Motion to Attach.[2] *See* RSA 511-A:8; *see also* Super. Ct. Civ. R. 47(a); Dist. Div. R. 3.4 & Prob. Div. R. 129.

The defendant may avoid an attachment by establishing that "his assets will be sufficient to satisfy such judgment with interest and costs if the plaintiff recovers same." RSA 511-A:3. For a hearing to be scheduled, the plaintiff must first serve a Petition/Motion to Attach with Notice upon the defendant (along with the Complaint initiating the action). Then, the defendant must object within the time prescribed in the Petition. If the plaintiff's Petition/Motion to Attach is granted after the hearing, a Writ of Attachment, prepared and executed by plaintiff's counsel in accordance with the attachment order, must be recorded and/or served where appropriate. Registries require court- attested copies of the granted Petition to be recorded as part of (and attached to) the Writ of Attachment.

Although it is most common for the attachment to be obtained at the start of a lawsuit, you may make the request during the litigation.

Pre-Judgment Ex Parte Attachments[3]

In certain cases, the plaintiff may obtain an attachment "*ex parte*" (without providing notice to the defendant). To obtain an *ex parte* attachment, plaintiff must file a Petition or Motion for *Ex Parte* Attachment and be prepared to meet one of the five strict requirements set forth in RSA 511-A:8. If you are aware that defendant has counsel, plaintiff is well-advised to notify defense counsel of his/her intent to seek an *ex parte* attachment. Some Superior Court Clerks will do this for you, regardless of whether you want them to. If the attachment is granted and defendant objects within the time prescribed, the court will schedule a hearing to determine the appropriateness of the attachment. *See* RSA 511-A:3; *see also* Superior Ct. Civ. R. 47(b); Dist. Div. R. 3.4 & Prob. Div. R. 129.

---

[2] The courts have provided forms that you may wish to use as a guide to file your request for an attachment with notice in either Circuit Court or Superior Court.

[3] Circuit Court and Superior Court forms for a request for *ex parte* attachment can be accessed on the courts' website.

***See* Attachments – Attachments with Notice for tips on perfecting and recording the attachment.**

Trustee Process Attachment

You can attach personal property belonging to a defendant that is held in the hands of a third-party by obtaining a trustee process attachment. This process is commonly used to attach a defendant's bank account. The same standards discussed in the Attachments with Notice and *Ex Parte* Attachments sections in this publication apply. In addition, you need to comply with the provisions of RSA chapter 512.

If you are granted a trustee process attachment, you will be required to serve the Writ of Attachment on the trustee holding the defendant's property. In addition, you will need to provide a trustee disclosure form at the time you serve the trustee.[4] RSA 512:9-d.

The trustee will be required to complete the Trustee Disclosure From within 30 days of service. RSA 512:11. If there is no objection to the Trustee Disclosure, it will determine the extent of the chargeability of the trustee. RSA 512:18-a.

If the trustee defendant denies holding any property belonging to the defendant (or less property than you expected) on the disclosure, but you believe they are wrong, you can require them (or another party) to submit to a deposition. RSA 512:13. After completing discovery, the court will hold an evidentiary hearing on the issue of chargeability. RSA 512:18-a. A party may also elect for the court to hold a jury trial on the issue of the trustee's chargeability. RSA 512:18. You should check the statute for the list of property that cannot be attached through this process. RSA 512:21.

The Writ of Attachment

The Writ of Attachment is prepared by the court on blue paper. The format of the form varies slightly for each court, and you should make sure you have a current version of the form before completing the attachment. The blue form should be attached to the back of the Petition/Motion to Attach.

When recording a Writ of Attachment at the Registry of Deeds, you will need to bring a completed photocopy of the original Writ of Attachment that is single-sided (the blue form is double sided) to provide to the Registry for recording. You will complete the blue Writ of Attachment and keep it to provide the sheriff to complete service of the recorded Writ of Attachment on the defendant.

Standards for Pre-Judgment Attachments in Federal District Court

The federal courts apply the state law requirements for obtaining a pre-judgment attachment. Fed. R. Civ. P. 64.

The United States District Court for the District of New Hampshire examined the statutory "reasonable likelihood" standard required to obtain a pre-judgment attachment and held that

the plaintiff in an attachment proceeding must make a "strong preliminary showing" with evidence that is "greater than proof by a mere preponderance of the evidence" that he or she will ultimately prevail on the merits of the case and obtain judgment for the requested amount. *See Diane Hollv Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 561 (D.N.H. 1983).

Other Issues with Pre-Judgment Attachments

Recording a *lis pendens* is insufficient on its own to perfect an attachment lien. *Topjian Plumbing & Heating, Inc. v. Bruce Topjian, Inc.*, 129 N.H. 481, 484 (1987). Excessive attachments are subject to limitation, reduction, or invalidation. RSA 511:53. Certain items are exempt from attachment, such as an automobile up to the value of $10,000.00 and tools of the debtor's occupation up to the value of $5,000.00. RSA 511:2.

Pre-judgment attachments will expire six years after the entry of judgment in the plaintiff's favor. RSA 511:55, I.

Mechanic's Liens

For a detailed explanation of "traps" related to Mechanic's Liens, please refer to the Section entitled "Mechanic's Liens" below.

Post-Judgment Real Estate Liens

New Hampshire recently enacted a procedure for obtaining a post-judgment real estate lien. *See* RSA 524:13. Any judgment obtained in New Hampshire can be secured against the defendant's real estate by recording a certified copy of the judgment and an affidavit that complies with RSA 524:13, II in the Registry of Deeds of the country where the defendant owns property as long as the judgment remains valid. <u>If the judgment expires, the post-judgment real estate lien will no longer be valid.</u>

AUTOMOBILE

Automobile Accidents/Claims

A. It is dangerous to file a Complaint for property damage alone where the same plaintiff may have incurred personal injuries arising from the accident. The doctrine of res judicata may bar any cause of action or "right to recover" on the basis that the same factual transaction in question was not plead in the initial suit. *Sibson v. Robert's Express*, 104 N.H. 192, 194 (1962); *see also Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 454 (2002); *Eastern Marine Const. Corp. v. First S. Leasing*, 129 N.H. 270, 274–75 (1987).

B. The mere occurrence of an auto accident, even a rear end collision, is not itself evidence of negligence. *Hackett v. Perron*, 119 N.H. 419, 422 (1979). Furthermore, "[t]here is no legal duty to lessen the force of a collision by operation of a car when there is not responsibility for avoiding it." *Cusson v. Beauregard*, 143 N.H. 410, 411–12 (1999). Therefore, in every motor vehicle case the plaintiff must prove some negligence with respect to the defendant's operation.

C. The statutory rules of the road (RSA chapter 265) are important with respect to establishing negligence in automobile accidents. "Traffic rules controlling rights of way are designed to prevent accidents. [The New Hampshire Supreme Court] (has) held that one should not be relieved from responsibility for injuries resulting from his negligence where such negligence consists of the violation of a statute or ordinance designed to promote safety." *Mullin v. Joy*, 145 N.H. 96, 97 (2000) (quotation and citation omitted).

D. In cases where the plaintiff has not seen the defendant's operation or otherwise cannot testify to negligence, it may be necessary for the plaintiff's attorney to read into evidence the defendant's interrogatory answers or deposition testimony or have the defendant testify in the plaintiff's case in chief. If the plaintiff intends to call the defendant at trial, the plaintiff should include the defendant's name in the plaintiff's pre-trial statement of witnesses, and it may be advisable to subpoena the defendant to assure the defendant's presence at trial.

E. Expert testimony is frequently required to prove medical causation in cases involving claims of physical injury, unless "the cause and effect are so immediate, direct and natural to common experience as to obviate any need for an expert medical opinion." *Reed v. Cnty. of Hillsborough*, 148 N.H. 590, 591 (2002).

F. In personal injury cases (not including medical malpractice) where a plaintiff claims $25,000.00 or less in medical expenses, certified medical records and bills can be introduced as evidence of the reasonable necessity of the services, diagnoses of the provider, and certain opinions of the healthcare provider, without providing expert testimony. RSA 516:29-c. The records must clearly state the facts and opinions that you want to prove, so there are times you may still require expert testimony if the records are not clear. RSA 516:29-c sets forth the requirements to use the plaintiff's medical records and bills as evidence in this manner.

G. In order for a plaintiff to claim a loss of earning capacity as part of damages in a negligence action, "there must be at least some evidence that the physical injury caused or resulted in, diminished earning capacity." *Vachon v. New England Towing, Inc.*, 148 N.H. 429, 433–34 (2002). The Plaintiff must "present (1) evidence that his earning capacity was reduced as a result of his injury, and (2) evidence of the amount which he was capable of earning before the injury and the amount he is capable of earning thereafter . . . to permit the jury to arrive at a pecuniary value of the loss." *Laramie v. Stone*, 160 N.H. 419, 428–29 (2010) (citations omitted).

H. A jury can apportion fault to a tortfeasor who previously settled with the plaintiff and was not present at trial, or any other party that contributed to the action, including those who are immune. *Nilsson v. Bierman*, 150 N.H. 393, 394-97 (2003); *see also DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793, 804 (2006).

Uninsured/Underinsured Motor Vehicle Insurance Personal Injury Claims

A. Notice of Loss/Claim Requirement

Many policies require that the uninsured motorist carrier be notified of a possible claim "as soon as practicable." Under New Hampshire Law, an insurer must show prejudice under an occurrence policy to deny coverage based on late notice. "[W]hether there has been a breach of the policy provisions requiring notice to be given 'as soon as possible' does not depend on the length of delay alone but also upon the reasons for the delay and whether the delay resulted in prejudice to the insurer. It is a combination of these three factors that determines whether there has been a substantial breach of the notice requirements of the policy." *Dover Mills Partnership v. Commercial Union Ins. Co.*, 144 N.H. 336, 338 (1999); *see also Krigsman v. Progressive Northern Ins. Co.*, 151 N.H. 643, 649 (2005).

B. Time Limitation on UIM claim

Some uninsured motorist policies contain a specific time limitation on when an action against the insurer must be brought. This can sometimes become an issue if suit against the tortfeasor is filed close to the statute of limitations. Just because the suit against the tortfeasor is timely does not mean that a subsequent action against the UIM insurer is timely if the policy contains a specific time limitation. *See Zannini v. Phenix Mut. Fire Ins. Co.*, 172 N.H. 730 (2019). Practitioners with potential underinsured motorist claims should request a copy of their client's full insurance policy and review for any applicable time limitations.

C. Permission to Settle

The standard uninsured motorist policy requires any claimant to obtain written consent from the company before entering into a settlement with "any person or organization who may be legally liable." *Charest v. Union Mutual Ins. Co.*, 113 N.H. 683, 688 (1973). An insurer need not show prejudice to enforce a consent to settlement provision within its policy. *Steven v. Merchants Mutual In. Co.,* 135 N.H. 26, 28–29 (1991). If a claimant settles

with a tortfeasor without written consent of the uninsured motorist carrier, the uninsured motorist benefits will likely be waived.

RSA 264:15, V requires all settlement documents for bodily injury which may be the subject of an uninsured motorist claim to include the following language: "WARNING– IF YOU SIGN THIS RELEASE YOU MAY FORFEIT YOUR RIGHT TO UNINSURED MOTORIST INSURANCE BENEFITS FROM YOUR OWN AUTOMOBILE INSURANCE POLICY. CONSULT WITH YOUR INSURANCE AGENT, YOUR AUTOMOBILE INSURANCE COMPANY, OR YOUR ATTORNEY BEFORE SIGNING."

An insurer's consent to settle a claim with the insurer of a third-party tortfeasor does not preclude the insurer from contesting its liability to provide underinsured motorist coverage. *Estate of Day v. Hanover Ins., Co.*, 162 N.H. 415, 418 (2011).

D. Legally Entitled to Recover Uninsured Motorist Benefits

A claimant is not legally entitled to recover uninsured motorist benefits against his/her insured if the action against the uninsured motorist is barred. Therefore, when a claimant is not able to bring a claim against the tortfeasor because of a statutory bar such as the Fireman's Rule or because the tortfeasor is a co-employee, the claimant cannot recover uninsured motorist benefits. *Matarese v. N.H. Municipal Assoc. Property-Liability Ins. Trust, Inc.*, 147 N.H. 396, 402 (2002*); Estate of Libby v. State Farm Mut. Auto. Ins. Co*., 147 N.H. 616 (2002).

E. Coverage Available

There is no uninsured motorist coverage available when the amount of uninsured motorist coverage under a policy equals the tortfeasor's amount of liability coverage. *Allstate Ins. Co. v. Armstrong*, 144 N.H. 170, 172 (1999). An injured party is not entitled to the compensation from the liability and underinsured motorist benefits from the same policy. *Wyatt v. Maryland Casualty Co.*, 144 N.H. 234, 240 (1999).

A caveat or exception to this rule took effect on January 1, 2015. Specifically, pursuant to RSA 259:117, an injured party is entitled to compensation from the uninsured motorist coverage if the amount of the tortfeasor's liability insurance is the same or greater than the injured party's uninsured motorist limits but the tortfeasor's available liability insurance is reduced by payments to others injured in the same crash.

F. "Stacking" of Policies

In New Hampshire, stacking is generally allowed. *State Farm Mut. Auto. Ins. Co. v. Holyoke Mut. Ins. Co.,* 150 N.H. 527, 529 (2004). However, insurers are free to limit their liability and prevent "stacking" through clear and unambiguous language. *United Servs. Auto. Ass'n v. Wilkinson*, 132 N.H. 439, 445 (1989). Many insurers now include some form of anti-stacking language in their policies. However, a careful review of the actual polic(ies) is necessary because this varies wildly from insurer to insurer.

Medical Payments Coverage

A. Required Coverage

All motor vehicle liability policies for private passenger automobiles in New Hampshire must have medical payments coverage of at least $1,000 per person injured in a crash. RSA 264:16. Medical payments coverage is first-party no fault insurance that provides reimbursement to insureds for out of pocket medical expenses.

B. Coordination of Care

The insured, exclusively, shall have the right to choose whether to "submit a claim for medical expenses under either medical payments coverage or a health insurance policy or both, as the insured elects; provided, however, an insured shall not be entitled to duplicate payment from medical payments coverage and a health insurance policy for the same medical expense." RSA 264:16. This provision allows injured parties, not medical providers, to determine how to pay for the medical treatment, which allows the injured persons to maximize their medical payments coverage. One way to do this is to use medical payments coverage to cover the cost of co-pays or deductibles.

C. Application of Medical Payments Against Liens and Subrogation Claims

Many polices will permit medical payments coverage to be paid toward satisfying a lien or subrogation claim asserted by the plaintiff's health insurance for amounts that the insurance paid for the plaintiff's treatment. *See Langevin v. Travco Ins. Co.*, 170 N.H. 660 (2018).

Evidence of Unlicensed Motor Vehicle Operator – Notification Required

At trial, no claim can be made that the operator of a motor vehicle was not properly licensed unless the claim has been made at the Trial Management Conference or unless notice of the claim was filed in writing at least seven (7) days prior to the trial. Super. Ct. Civ. R. 37(g)(2).

Health Insurance Liens

Attorneys representing plaintiffs in personal injury claims should be sure to be on the lookout for claims for reimbursement being asserted by the plaintiffs' health insurance if the insurance has paid for any of the treatment the plaintiffs received in connection with the crash.

A. Medicare Repayment

Medicare has a lien for reimbursement from a plaintiff's settlement or award at trial for any amounts that it paid towards the plaintiff's treatment. You must notify Medicare if you represent a Medicare eligible plaintiff. Medicare will reduce its lien to pay a share of the plaintiff's "procurement costs" including attorney's fees and litigation expenses. Because Medicare is governed by federal law, attorneys are advised to strictly comply with Medicare lien repayment requirements. If the lien is not satisfied appropriately, the federal government could pursue repayment against the attorney personally.

Medicare liens are complicated, and there are a number of great CLEs available that will provide more detailed information.

B. Medicaid Repayment

Medicaid also has a lien for reimbursement of any amounts it paid for the plaintiff's treatment in connection with the injuries he or she received in the automobile crash. RSA 167:14-a, III. Beginning September 1, 2019, New Hampshire Managed Care Organizations (MCO) began processing and settling all accident and trauma subrogation cases. You must report the plaintiff's claim to the appropriate MCO. If you are not sure what MCO covers your client or have questions about resolving the lien, you may call the Department of Health and Human Services, Third Party Liability at (603)271-8063. Medicaid is not required to reduce its lien for attorney's fees and costs. RSA 167:14, III-a. However, its subrogation lien may often be less than private insurance because of the relatively low amounts paid by Medicaid to medical providers.

C. Private Health Insurers and ERISA Plans

Private health insurance plans will normally contain a contractual right to subrogation, meaning that the insurance company has a right to make a claim for reimbursement for treatment that it paid for on behalf of the plaintiff when a third-party is responsible for causing those injuries. Often the subrogation claim will be initiated when certain treatment codes are noted in the billing submitted to the insurer, and a form will be sent to the insured asking whether they are making a claim against a third-party as a result of that injury.

Most private insurance companies will reduce the lien to share in attorneys' fees and costs. Indeed, there is case law supporting that insurers are required to reduce their subrogation claims in certain situations. *Dimick v. Lewis*, 127 N.H. 141 (1985).

Unfortunately, there are certain private insurance plans which are not required to reduce their subrogation lien under any circumstances. These are so-called "self-funded" ERISA health plans, which are governed by federal law. The United States Supreme Court has held that the contractual language of these "ERISA plans" supersedes any state common law doctrines which would otherwise require the plan to compromise their subrogation lien. *US Airways v. McCutchen*, 569 U.S. 88 (2013). Advocates should take certain steps, which are beyond the scope of this guide, to verify that a health plan actually qualifies as an ERISA plan. In any event, the subrogation vendors for these ERISA plans will often agree to a limited reduction of their claimed liens in many situations to facilitate settlement.

BUSINESS CORPORATIONS AND OTHER ENTITIES

Who is Your Client?

- Normally, you represent the corporation, not the individual owner(s). Advise the owners(s) as to who you are representing in writing.
- Discuss this during the first client conference.
- Avoid owning an interest in your client's business. Such an interest will inevitably create a conflict of interest for you.
- Read N.H. R. Prof. Conduct 1.7 and the comments thereto for guidance.

The Decision to Incorporate

The decision to incorporate should not be a "knee jerk" reaction. Discuss the pros and cons of incorporation carefully with your client. Some of the advantages of incorporation are:

- Limited Liability. However, many potential creditors (such as banks and some lessors and vendors) will require personal guarantees. Insurance is often an adequate alternative to incorporation (and is a good idea even if the client(s) incorporate).
- Status. Many people believe a corporation has greater standing and credibility in the business world.
- Transferability. It is generally easier to add to, change or transfer ownership interests in a corporation. Corporations also offer considerable flexibility in forms of investment (variability in voting rights, preferences, etc.).

Articles of Incorporation

The Articles of Incorporation must set forth:

a) a corporate name that meets the requirements of RSA 293- A:4.01;
b) the number of shares the corporation is authorized to issue;
c) the street address of the corporation's initial registered office and the name of its initial registered agent; and
d) the name and address of each incorporator. RSA 293-A:2.02.

In addition, the articles must also set forth any classes of shares and series of shares within a class, and the number of shares of each class and series, that the corporation is authorized to issue. If more than one class of shares is authorized, the articles must also prescribe a distinguishing designation for each (e.g. "common" and "preferred"). RSA 293-A:6.01.

The Articles of Incorporation must further authorize:

1) one or more classes of shares that together have unlimited voting rights, and

2) one or more classes of shares (which may be the same as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution. RSA 293-A:6.01.

Corporate Name

If your client is not ready to incorporate right away but already has a name in mind, reserve the corporate name when the client first comes in. Precious time can be lost in trying to find a name that the Secretary of State will register. RSA 293-A:4.02 sets out the procedure for reserving a corporate name. A name can be reserved for 120 days.

The corporate name must contain the word "corporation," "incorporated," or "limited" or the abbreviation "corp.," "inc.," or "ltd.," or words or abbreviations of like import in another language. RSA 293-A:4.01. The name cannot contain language stating or implying that the corporation is organized for a purpose other than permitted by RSA 293-A:3.01 and its articles of incorporation. The name cannot be the same as or deceptively similar to the name of other domestic corporations or other names of entities registered in New Hampshire. RSA 293-A:4.01.

If your client is using any trade names in addition to or with its corporate name, be sure to register those names too. RSA 349:5.

Incorporators

One or more persons may act as the incorporator(s) of a corporation by delivering articles of incorporation and the certificate to the secretary of state for filing. RSA 293-A:2.01. The articles must include name and address of each person acting as incorporator. RSA 293-A:2.02(a)(4). You can complete the incorporation online at the Secretary of State's website.

Lawyers should avoid acting as incorporators for their clients. The risk of liability can be substantial, and there is usually no good reason that the client cannot sign instead.

Registered Agent

Every corporation has an obligation to maintain a registered agent who is located in New Hampshire. RSA 293-A:5.01. You will need to provide the N.H. Secretary of State with the agent's name and street address, and the corporation can change the registered agent by filing updated information with the Secretary of State. RSA 293-A:5.02.

Corporate counsel generally should act as resident agent. This ensures that he or she will be made aware (by service of process) of any lawsuits.

Optional Provisions to Consider

The New Hampshire Business Corporation Act allows tremendous flexibility in the way corporations are run. To take advantage of some aspects of this flexibility, certain optional provisions must be included in the Articles. Among others, you should consider and discuss with your client provisions mandating supermajority voting for directors and/or shareholders; provisions allowing the directors to determine the terms of a class or series of shares ("Blank Stock"); provisions limiting director and/or officer liability; and provisions allowing shareholder action by less than unanimous consent.

Bylaws

Bylaws may contain any provision for the management of corporate affairs not inconsistent with the law or the Articles of Incorporation. RSA 293-A:2.06. Bylaws are the basic road map for corporate governance. They should be broad in scope and give the corporation the full range of corporate governance procedures allowed by law.

Organizational Meeting

This meeting will often be done in the form of an action by consent. The agenda for the meeting should include:

1) Elect initial officers.
2) Authorize S corporation election, if appropriate.
3) Authorize initial bank accounts and borrowing authority.
4) Authorize initial stock issuance and identify and value consideration.
5) Stock Consideration

Make sure you have some evidence that consideration has been paid for stock before you issue it. Lack of consideration for issuance of stock has been cited as one factor in justifying piercing the corporate veil. Also make sure that stock certificates are issues and that the corporation keeps track of all stock issued and transferred in order to reduce the chances of a dispute among owners.

Shareholders' Agreement

A shareholders' agreement is arguably the most important corporate document for closely held corporations. The principal function of a shareholders' agreement is to restrict the transfer of company shares. It assures both the shareholders and the corporation that shares will be repurchased upon death, disability, termination of a shareholder's employment or the occurrence of other specified events. Provisions governing certain aspects of corporate governance are also often found in the shareholders' agreement. *See* RSA 293-A:7.32 for the provisions of the New Hampshire Business Corporations Act governing shareholder agreements.

Always be sensitive to the tax implications of a shareholders' agreement. Make sure that your client has consulted an accountant or tax lawyer to ensure that the agreement is structured properly. In any situation where a shareholder's ownership interest is or will be a major asset of his or her estate, be sure that the shareholders have consulted with an estate planning expert.

The Role of Legal Counsel for a Corporation

A. Refer the Client to an accountant

Businesses which utilize a professional accountant are usually better organized and prepared to consider financial management and business planning issues.

B. Annual Meetings

Docket annual meetings on a calendar reminder and actually hold them. Try to get your client in for a real meeting. Annual meetings are a good time for planning, to review pending matters, conclude matters that have been unresolved for a long period of time, get to know your client, and ensure that corporate formalities are being observed. It is also a good chance for a legal audit/check-up. At a minimum, if you cannot get the client in, then send out an action by consent and make sure to get it back. RSA 293- A:7.01.

C. Business Lawyer

Be a business lawyer. Your client wants you to be sensitive to the business issues and the impact of the legal advice you give. Clients are rarely interested in legal minutia. They want to know the risks and benefits of a transaction and your recommendation. Remember, in the end, the client should make the decision.

D. Avoid Becoming a Corporate Director

Being a director may create a conflict of interest. You may incur significant liability by acting as a director. This includes liability for taxes, environmental problems, and numerous other matters. Because conflicts of interest between your role as a director and counsel are likely to arise, the end result of your being a director may be that your client has to seek new counsel at some point.

E. Maintaining the Corporate Records/Entity

Make sure that your client does not ignore the existence of the corporate entity once it is formed. The corporation is a legally distinct person and should be treated as such. Use the corporate name, not individual names on contracts, stationery, bills, invoices, advertisements, etc. Always maintain separate bank accounts and records.

Be Clear on the Attorneys' Responsibility

Clarify which issues the attorney and the accountant will be responsible for, such as making a S Corporation election, obtaining an employer tax identification number, etc. Include the accountant in the annual meeting, and keep him or her apprised of all major business decisions and transactions.

Stock Issuances

Remember to issue stock upon formation of the corporation. Otherwise, your client may risk personal liability, and poor records can lead to disputes among shareholders. Before the corporation issues shares, the board must determine that the consideration is adequate. Obtain evidence that consideration was in fact paid to the corporation before you issue stock. Stock may be issued for cash, promissory notes, tangible or intangible property, labor or services actually performed, contracts for services to be performed, or other securities of the corporation. Stock can also be gifted. But there are often tax considerations to be aware of when determining the consideration that is acceptable for stock issuance and transfer, so be sure that your client consults with its accountant or tax attorney regarding that issue. Include any stock transfer restriction on the certificate itself.

Changes in Corporate Governance

A. Amending the Articles of Incorporation

See N.H. R.S.A. 293-A:10.01- A:10.09. A corporation may amend its Articles of Incorporation at any time to add or change provisions that are permitted or required. Certain amendments may be made by the Board of Directors alone, unless the Articles provide otherwise. For example, the Board may change corporate designation (i.e. "Corp." to "Limited") or geographic designation (i.e. "Concord Sporting Goods" to "North American Sporting Goods"). The Board may change authorized capital if the number of shares outstanding are increased proportionately (e.g. corporation with ten (10) authorized shares, nine (9) of which are outstanding may recapitalize with 10,000 shares, 9,000 which are outstanding). If a corporation has not yet issued shares, its Board of Directors or, if it does not have a Board, the incorporators, may adopt one or more amendments to the Articles of Incorporation. RSA 293-A:10.02. Once the corporation has issued shares, all amendments must be adopted by the board of directors and approved by shareholders. RSA 293-A:10.03.

B. Dissenters' Rights

Shareholders have a right to dissent and receive an appraisal and payment for their shares under certain circumstances, as set out in RSA 293-A:13.02.

The New Hampshire Business Corporation Act provides a strict procedure for asserting dissenters' rights. If the dissenting shareholder does not follow the statutory procedure, the shareholder loses the right to obtain payment under the statute. *See* RSA 293-A:13.20; RSA 293-A:13.21.

C. Merger and Share Exchange

A merger is a combination of two corporations, one into the other, with one surviving. A share exchange involves the acquisition of the shares of one or more classes of stock of one corporation by another through exchange of the shares being acquired for shares or other securities or obligations of the acquiring corporation. Mergers and share exchanges are governed by RSA 293-A:11.01-A:11.08.

A merger or share exchange must be generally adopted by the Board of Directors and approved by shareholders, except in a merger where the surviving corporation owns at least 90 percent of the corporation merged into it, in which case only adoption by the Board of Directors is required. RSA 293-A:11.04; RSA 293-A:11.05

Unless the Articles of Incorporation provide otherwise, shareholder approval is not required for a corporation that is acquiring the shares of another in a share exchange, if the corporation will survive the merger or is the acquiring corporation in a share exchange, or each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of change. RSA 293-A:11.04(h).

Electing S Corporation Status

A. Benefits of S Corporation Status

One of the disadvantages of corporate status is that income may be subject to tax at the corporate level and at the shareholder level (double taxation). However, by electing S Corporation status under 26 U.S.C. § 1361, tax at the corporate level can be avoided on most items of corporate income. If an S Corporation election is made, the corporation is treated as a flow through entity for federal tax purposes. Income, losses, deductions and credits of an S Corporation are passed through to its shareholders who report these items on their own income tax returns. (A corporation that has not elected to be taxed as an S Corporation is referred to as a "C Corporation").

B. Eligibility for S Corporation Status

A corporation must meet all the following requirements in order to elect to be taxed as an S Corporation:

i) The corporation must be a domestic corporation;
ii) The corporation cannot have more than one hundred (100) shareholders;
iii) The shareholders of the corporation must be individuals, estates, or certain trusts, and cannot be nonresident aliens, partnerships, or corporations;
iv) The corporation cannot have more than one (1) class of stock (see Section C below); and
v) The corporation cannot be a member of an affiliated group, an insurance company, a certain type of financial institution, or a domestic international sales corporation ("DISC").

C. Single Class of Stock

Except for differences in voting rights, an S Corporation may only have one (1) class of stock outstanding. 26 U.S.C. § 1361(b)(l)(D).

Under certain circumstances a debt instrument may be treated as a second class of stock and thereby cause the termination of the S Corporation election. A debt instrument will cause the

termination of an S Corporation election if it is treated as equity (and not debt) under general tax law principles, unless the debt instrument comes within a "straight debt safe harbor." 26 U.S.C. § 1361(c)(5). To qualify as straight debt, the debt instrument must meet the following requirements:

i) It must be a written unconditional promise to pay on demand, or on a specified date, a sum certain in money;
ii) There must be a stated interest rate and interest payments may not be contingent on profits, the borrower's discretion, or similar factors;
iii) The debt instrument may not be convertible into stock; and
iv) The creditor is an individual (other than a nonresident alien), an estate, a trust (as defined by 26 U.S.C. §1361(c)(2)), or a person who is in the regular business of lending money.

D. Making the S Corporation Election.

The S Corporation election requires action by both the corporation and the shareholders. The corporation must file a timely election with the IRS on the proper form, and all shareholders must consent in writing to the election. The corporation's election and the shareholders' consents are made by the filing of IRS Form 2553. There are strict rules relating to the time period within which the S Corporation election must be filed.

An S Corporation election for a taxable year may be filed any time during the preceding taxable year, or any time during the taxable year and on or before the 15th day of the 3d month of the taxable year. 26 U.S.C. §1362(b). Be sure to check additional limitations on the time to make an S Corporation election, which are outlined in the instruction to IRS Form 2553.

Because there are no extensions of the time to file the election, the corporation's attorney should make certain that all parties agree as to who will file the S Corporation election. Failure to file for S Corporation election is one the most common mistakes made in the incorporation process. More often than not, the failure results from miscommunication or lack of communication among the parties. Always send a letter to your client and the accountant confirming who will file the election. Keep a copy of the letter in your file.

Limited Liability Companies

A. What is a Limited Liability Company?

A limited liability company ("LLC") is a form of business entity that is intended to combine the most favorable characteristics of partnerships and corporations. Like a corporation, a limited liability company is a separate legal entity, distinct from its owners. Therefore, LLC owners (who are called members) are not ordinarily liable for any of the LLC's debts. RSA 304-C:23.

B. Requirements for New Hampshire Limited Liability Companies

Limited Liability Companies are formed by filing a Certificate of Formation with the Secretary of State. RSA 304-C:31. The Certificate of Formation must include:

i) The name of the limited liability company;
ii) The address of the registered office and registered agent;
iii) Whether the LLC will be managed by its members or managers (who may also be members); and
iv) The nature of the primary business or purpose of the LLC.

The members and/or managers may choose to include other information within the Certificate of Formation.

C. Operating Agreements

There is significant latitude when it comes to the formation and management of an LLC. LLCs are governed by Operating Agreements. RSA 304-C:40. However, there is no formal requirement for the form an operating agreement must take. They may be written, oral, and even implied. *Id.* This leeway is consistent with the policy goal of New Hampshire's LLC act—"to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." RSA 304-C:2. Even though an LLC is not required to have a written Operating Agreement, you should always counsel your client that it should enter into a written Operating Agreement so that the provisions can be tailored to the client's needs.

D. Why incorporate as a Limited Liability Company?

The most common reason that clients choose to form a limited liability company when forming an entity is that while it offers similar benefits as a corporation, including limitation of liability and the provision of a certain status, there are a lot fewer corporate formalities to maintain.

The corporate attorney should advise their client that although many formalities are not required, formalities such as keeping minutes of meetings and maintaining corporate books are still best practices. Maintaining good records can help prevent disputes.

The current version of the New Hampshire Limited Liability Company Act became effective on January 1, 2013 and may be found at RSA 304-C:1, *et seq.*

Other Business Formations

Although less commonly used, there are other types of business formations that can be used in New Hampshire that attorneys should be familiar with, including:

A. Sole Proprietorships – This form of unincorporated business is owned by one individual who retains complete control over the management of a business. This can be a good option for a business that is getting started, so long as your client has also purchased comprehensive insurance. Often, a sole proprietorship will want to register a trade name with the Secretary of State if he or she intends to operate under any name other than his or her legal name.

B. Partnerships – When two or more people operate a business for profit, they can form a partnership. There are both general and limited partnerships. In a general partnership, the partners jointly manage the company and are jointly liable for debts. In a limited partnership, certain partners are investors only and do not have any management control, but their liability to the partnership's debts is limited to their contribution to the business. It is important to have a strong partnership agreement if this business formation is used. In New Hampshire, partnerships are governed by RSA 304-A (General Partnerships) and RSA 304-B (Limited Partnerships). Partnerships can be registered with the Secretary of State to become a Limited Liability Partnership. RSA 304-A:44, *et seq.*

C. Benefit Corporations – Becoming a benefit corporation requires the company to have a purpose of creating a "general public benefit" in addition to any profit-making purposes. This is a relatively new business entity available in New Hampshire. This election requires corporations to comply with the provisions of RSA 293-C in addition to provisions of RSA 293-A.

D. Nonprofit Corporation/ Voluntary Corporations & Associations – Nonprofit entities are regulated by RSA 292 within the State of New Hampshire. An attorney assisting a nonprofit entity with formation should work closely with an accountant or be qualified to assist the client with considering whether IRS federal tax emptions will be sought and understanding what is needed to ensure that the entity formation will comply with IRS requirements.

Corporate Transparency Act (CTA):

A recent development in federal law requires most business entities to disclose beneficial owner information of the Financial Crimes Enforcement Network (FinCEN), in an attempt to lessen financial crimes such as money laundering, and to create transparency in business ownership. The Corporate Transparency Act took effect on January 1, 2024, and has since been the subject of numerous lawsuits seeking to enjoin enforcement of the Beneficial Ownership Information Report requirement. 31 U.S.C. § 5336. The Beneficial Ownership Information Report requires "reporting companies" which includes corporations, limited liability companies and other companies that file with the Secretary of State's Office. 31 U.S.C. § 5336 (a)(11). Sole proprietors, nonprofits, publicly traded companies and certain large operating companies do not need to file this report. *Id.* The

information that needs to be filed includes individuals' personal information (legal name, date of birth, residential address, ID) who own or control the company. 31 U.S.C. § 5336 (b)(2)(A).

Following its enactment, an injunction was issued by the U.S. District Court for the Eastern District of Texas in *Smith, et al. v. U.S. Department of the Treasury*, *et al.*, 6:24-cv-00336, enjoining the enforcement of the Corporate Transparency Act (CTA) reporting requirement. At that time, the filing became voluntary and not mandatory. *Id.* On February 18, 2025, however, the injunction was lifted and the Financial Crimes Enforcement Network announced that the mandatory BOIR filing requirements under the CTA are now back in effect and that the new filing deadline is March 21, 2025.

What this means for corporate clients is that for any entity formed prior to January 1, 2024, they have a deadline of filing their BOI Report no later than March 21, 2025. For entities formed in 2024, the entity has ninety (90) days to file the BOI Report after the company's creation. For entities that are formed after January 1, 2025, the BOI Report must be filed within thirty (30) days after creation. More information can be found at https://fincen.gov/boi

Attorneys working with corporate clients should inform them of the filing requirements. A person who willfully violates the BOI reporting requirements may be subject to civil penalties of up to $500 per day as well as criminal penalties of up to two years imprisonment and up to $10,000 in fines. 31 U.S.C § 5336 (h). These penalties would be applicable if beneficial owners willfully report false information or willfully fail to file. *Id.*

There will likely be further changes to the BOI Reporting requirement, the CTA, or at least a re-assessment of the filing deadline; therefore, this summary is subject to change.

E-FILING

New Hampshire's courts have implemented electronic filing (e-filing) to streamline court procedures. All Superior Court cases require e-filing, but it is still being implemented at the Probate, Family, and District Courts.

Self-represented parties can utilize online tools like TurboCourt to prepare and file forms.

Technical Support

1. For technical issues or questions about the Supreme Court's e-filing system, contact the Supreme Court's support services. Resources are available on the **Attorneys,** Self-Represented Parties, and Other Non-Attorney Filers - Supreme Court webpage and at the Supreme Court's phone number: (603) 271-2646.
2. For technical issues or questions about the trial courts' e-filing system, contact the New Hampshire Judicial Branch's support services. Resources are available on the Electronic Services webpage and at the e-Filing Center Toll-Free Number: 1-855-212-1234.

E-Filing Rules in New Hampshire Courts

1. **Supreme Court**: The Supreme Court has mandatory e-filing. As of 2020, all appellate filings by represented parties are made electronically through the Court's e-file system. The Supplemental Rules of the Supreme Court for Electronic Filing govern e-filing in the Supreme Court. Note that the Supreme Court utilizes its own e-file system separate from the trial courts. Filers must register separately to file in the Supreme Court.
2. **Superior Court**: In Superior Court, electronic filing is generally available in all civil and criminal matters. However, electronic filing is not available for criminal matters involving self-represented Defendants. The Supplemental Rules of the Superior Court for Electronic Filing govern e-filing in the Superior Court.
3. **Circuit Court**: Electronic Filing is only available for some Circuit Court case types. The Supplemental Rules of the Circuit Court for Electronic Filing govern e-filing in Circuit Court.
    - **District Division**: E-filing is permitted for cases including small claims, civil complaints (civil complaint, writ of replevin & registration of foreign judgment), and civil other (cease & desist order, hazardous & dilapidated buildings, order to vacate a building, appeal from denial suspension or revocation of a permit to carry a pistol & petition to garnish wages).
    - **Probate Division**: E-filing is permitted for guardianship of minors, guardianship of incapacitated persons, wills and estates, name changes, and involuntary admission 135-C cases.
    - **Family Division**: E-filing is available for guardianship and name changes.

Supreme Court e-Filing

How to Use the E-Filing System

1. **Registration**:

   - **Attorneys and Self-Represented Parties**: Register through the New Hampshire Supreme Court's e-filing portal. Attorney filers must email smiscio@courts.state.nh.us to provide a Bar ID number, which must be entered by the clerk's office in the Supreme Court's case management system before use of the Supreme Court's e-filing system. Attorneys should register as a "Registered Representer," not an "E-File User."

   - Filers should add SupremeCourt_DoNotReply@courts.state.nh.us to their approved email list ("whitelisting") to ensure receipt of filings and case orders.

2. **Filing Documents**:

   - **Format**: Documents must be in PDF format. Documents must be legible and properly formatted.

   - **Submission**

     1. Log into the e-filing portal and select "Create Filing" in the left-hand menu. Select Existing Case
     2. For Filing Category, select Existing Case and enter the case number in its entirety.
     3. Select the filing type ("motion," "objection," 'brief," "reply," etc.) from the drop-down list.
     4. Select the subtype that best describes the filing.
        - Note: select "Brief and Appendix filed" if you are filing a brief with a separate appendix. If you are filing a brief that includes the appendix materials within the same document as the brief itself or you are filing a brief that contains no appendix materials select "Brief Filed." To add a separate appendix to a Brief, click Add Another, select "Appendix" in the drop-down list for Name, and then click Browse (or Choose File) to select the document that you have previously prepared and saved as your appendix. If your Appendix has multiple volumes, repeat this step as many times as necessary.
     5. Click Next.
     6. On the Filing Information screen, click the box next to the name of the party on whose behalf you are submitting the filing. If the name does not appear, type it into the text box next to Other Filed on Behalf of.
     7. On the Upload Document screen, click Browse (or Choose File) to select the document that you wish to file. then click Next.

- Note: If you are requesting that a document in a public case be treated as confidential, check the Request Confidential box and then select a Confidential Reason before clicking Next. See Supplemental Rule 16.

8. On the Service Information screen, select eService as the service method for each person who appears in the Electronic Service Recipients section. Select Conventional for any Non-Electronic Service Recipients section.
9. Click Next.
10. On the Filing Summary screen, review the information displayed to make sure that you have accurately completed the various screens.
11. Click Add to Cart.
12. On the Cart screen, click Submit Filings and then wait a few moments to make sure that the Submission Confirmation screen appears.
    - Pay any required filing fees electronically via credit card.
13. After submission, the e-filing system will send two e-mail notifications to you (Filing Queued and Filing Submitted). You will also receive a service e-mail (Notice) to each person who is an electronic service recipient in the case.
14. Once the filing has been reviewed by the clerk's office and approved for docketing, you will receive from the e-filing system an additional e-mail (Filing Docketed by Clerk).

Trial Courts

How to Use the E-Filing System

3. **Registration**:
    - **Attorneys**: Register through the New Hampshire File and Serve portal.
    - Attorney filers must have a valid bar number and email address. If an attorney is part of a firm and registering, they will want to see the firm's administrator who will add their information to the firm's account. Once added to the firm's account an email will be sent to the attorney to complete registration.
    - **Self-Represented Parties**: Utilize online tools like TurboCourt to prepare and file forms. These platforms guide users through personalized questions and generate accurate forms for submission.

4. **Filing Documents**:
    - **Format**: Documents must be in PDF format. Documents must be legible and properly formatted. Each single PDF document cannot exceed 25 MB.
    - **Submission**:
        1. Log into the e-filing portal and select "File into Existing Case" in the left-hand menu.
            1. To file a new case, select "Start a New Case" and fill in the requested information.
            2. Select the Court under "Location" and enter the Case Number or a Party Name. On the results screen, click the drop down arrow under "Actions" and select "File into Case."
            3. Under "Filings," make sure "E-File and Serve" is selected under "Filing Type." Then, select the "Filing Code" ("motion," "objection," 'acceptance of service," "response," etc.) from the drop-down list that best describes the filing.
                1. If you are filing a document ex parte, select "Efile" as the "Filing Type."
            4. In "Filing Description," enter the name or a description of the document.
            5. Enter a "Client Reference Number" or "Comments To The Court" if necessary. The comments to the court will not be part of the file, and are meant to be information for the court staff. If you would like to send a courtesy copy of the pleading, enter an email address in the "Courtesy Copy" field for anyone you would like to receive one.
            6. Select the name of the party/parties on whose behalf you are submitting the filing.

7. Under “Lead Document,” click the upload button to select the document that you wish to file. Add a description and designate the document as “Public” or “Non Public Document.”
    1. Note: If you are requesting that a document in a public case be sealed, file a Motion to Seal by clicking “Add Another Filing.” The Motion to Seal should be marked as “Public.”
8. Click “Save Changes.” If you would like to file another document into this case, click “Add Another Filing” and repeat steps 3 through 7.
9. Under “Service Contacts” make sure all service contacts are selected.
10. Under “Fees” select the Payment Account, Party Responsible for Fees, and Filing Attorney.
    1. Pay any required filing fees electronically via credit card. Please note, you must have a card saved to your account and it will be charged automatically when chosen as the payment account. You cannot enter credit card info on this screen.
11. Click Save Changes.
12. Select “Summary” on the bottom of the screen and then confirm you want to file.
13. After submission, filers will receive two e-mail notifications. One is a confirmation that the filing was submitted (Filing Submitted). The second is a service e-mail (Notification of Service, Filing, or Court Documents) that is sent each person who is an electronic service recipient in the case.
14. Once the filing has been reviewed by the clerk’s office and approved for docketing, the filer will receive from the e-filing system an additional e-mail (Filing Accepted). This copy will have the Court’s date and time stamp of when it was filed in the top right corner of the first page.

5. **Service of Documents**:
    - **Electronic Service**: Registered users may sign up to receive electronic service of documents filed by other parties. Attorneys or users seeking to sign up for electronic service must sign up as a service contact on the e-filing website. The Attorney initiating a case will automatically be signed up as a service contact, however any additional Attorney’s will need to be added individually as Service Contacts. It is important to note that the filing of an Appearance **does not** automatically add you as a service contact that matter.
    - **Service to Other Parties:** E-filers must serve all pleadings to parties not registered on the e-filing system.

ETHICS

Attorney Advertising

Attorney advertising, client solicitation and communication of services are strictly regulated by Rules 7.1 through 7.5 of New Hampshire's Rules of Professional Conduct. ("N.H. R. Prof. Conduct"). The New Hampshire rules regulating advertising differ from the American Bar Association rules to which many practitioners are accustomed, including:

- N.H. R. Prof. Conduct 7.1 prohibits making false or misleading communications regarding the lawyers' services. The rule defines the meaning of "false or misleading" communications. Such communications include, without limitation: (a) a material misrepresentation of fact or law, or omission of a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading; (b) a statement that is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or (c) a statement that compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

- N.H. R. Prof. Conduct 7.2 regulates how attorneys may advertise, including specific rules about what is allowed or not allowed within such solicitations. Specifically, attorneys may not give anything of value to someone for a referral of their services, and any advertising shall include the name and office address of at least one lawyer or the law firm responsible for the advertisement's content.

- N.H. R. Prof. Conduct 7.3 regulates what is allowed in terms of direct contact with a prospective client, and it is very restrictive. This rule is aimed at preventing attorneys from contacting prospective clients who are in the vulnerable position of needing assistance and may succumb to pressure in retaining an attorney. It prohibits the initiation of contact for the purpose of procuring professional employment with most prospective clients. It also includes recorded contact as a form of regulated solicitation. The N.H. R. Prof. Conduct also carves out exceptions to permit contact with businesses, individuals who regularly require legal services "in a commercial context," non-profits and governmental organizations for the purpose of securing legal work, so long as those entities are not known to be in need of legal services in a particular matter. *See* N.H. R. Prof. Conduct 7.3(a)(3) & N.H. R. Prof. Conduct 7.3(a)(4). In doing so, New Hampshire has recognized that "entities or individuals in a commercial context, will generally hold a more favorable balance of sophistication and leverage relative to the lawyer than will individuals acting outside of a commercial context, and so will generally need less protection against the 'private importuning of the trained advocate.'" N.H. R. Prof. Conduct 7.3 cmt. 4.

Attorney Fees and Fee Arrangements

A. Amount of Fee

A lawyer shall not enter into an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses. N.H. R. Prof. Conduct 1.5 (a). This rule also sets out criteria that should be considered when determining what a reasonable fee is under the circumstances.

It is worth noting that even if you are charging a contingency fee or a flat fee, the Courts have upheld that contemporaneous time records should be kept in order to justify the expenses in the event that the client challenges the attorney's fees as unreasonable.

B. Contingency Fee Agreements

Contingency fee agreements are governed by N.H. R. Prof. Conduct 1.5(c), (d) and (e). Such agreements must be in writing and state the method by which the fee is to be determined, including: (a) the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, appeal, or litigation; (b) other expenses to be deducted from the recovery; and (c) whether such expenses are to be deducted before or after the contingent fee is calculated. At the conclusion of the matter, the lawyer shall provide the client with a written statement indicating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. N.H. R. Prof. Conduct 1.5(c).

Contingency fee arrangements are prohibited in domestic relations matters if the case involves the securing of a divorce, the establishment or modification (but not the enforcement) of a child support order, alimony, property division, or other financial order, and actions for obtaining any specific non-financial relief. Contingent fees are permissible in domestic relation matters involving enforcement of property division, or enforcing other financial orders, or obtaining a property division of assets hidden during the divorce. N.H. R. Prof. Conduct 1.5(d).

Contingency fees are also impermissible in criminal cases. N.H. R. Prof. Conduct 1.5(e).

If two lawyers not from the same firm are working together on a case on a contingency fee basis, they must be aware of the regulation of the division of fees between those two lawyers as outlined in N.H. R. Prof. Conduct 1.5(f)

C. Bartering Agreements

Compensation for legal services in exchange for goods or services is permissible provided that certain criteria are met. A practitioner should carefully review N.H. R. Prof. Conduct 1.8(a) prior to engaging in any such transaction with a client. *See also* Ethics Corner Article, *Bartering Legal Fees for Goods or Services from Client,* N.H.B.J. (Dec. 20, 2017), *available at:* https://www.nhbar.org/resources/ethics/ethics-corner-practical-ethics-articles/2016-12.

D. Other Fee Issues

For other fee issues, such payment of credit card fees, deducting the proceeds from the settlement of one case for the payment of fees in another case, and attorney liens, refer to the New Hampshire Bar Association website (www.nhbar.org) for further ethics opinions and articles.

N.H. R. Prof. Conduct 1.8(f) allows a third party to pay the attorney fees for a client if: (a) the client gives informed consent, (b) there is no interference with the lawyer's professional judgment or the attorney-client relationship, and (c) client information is protected as required by N.H. R. Prof. Conduct 1.6.

E. Sharing Fees with a Non-Lawyer

Under N.H. R. Prof. Conduct 5.4 (a), a lawyer may share a legal fee with a non-lawyer only under one of the following circumstances:

- a firm may share a fee with the estate of a deceased partner or associate over a reasonable period of time after death;
- a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may pay the estate or other representative of that lawyer, pursuant to the provisions of N.H. R. Prof. Conduct 1.17;
- an attorney may share fees with non-lawyer employees under a proper retirement plan or annual compensation plan; and,
- a lawyer may share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

F. Referral Fees

One should also note N.H. R. Prof. Conduct 1.5(f), which governs referral fees—a form of fee sharing with lawyers who are not part of the same firm. Referral fees are allowed to be paid if the resulting fee division is made in reasonable proportion to the services performed or responsibility or risks assumed by each firm or based on an agreement with the referring lawyer. In either of these instances: (i) the client must agree in writing to the division of fees, (ii) the total fee charged by all lawyers must not be increased by the division of fees, and (iii) the overall fee must be reasonable. These rules should be followed carefully if an attorney expects that a referral fee arrangement will be honored by the client and enforceable by the court.

Attorney/Client Relationship/Client Funds

A. Declining or Terminating Representation

Declining or terminating representation of a client is governed strictly by N.H. R. Prof. Conduct 1.16. Note the differences in those circumstances in which withdrawal is mandatory (N.H. R. Prof. Conduct 1.16(a)) versus discretionary (N.H. R. Prof. Conduct 1.16(b)). A lawyer must be careful about how and when he or she withdraws from an ongoing case. *See* N.H. R. Prof. Conduct 1.16 (b). A review of the Court Rules will assist a lawyer in withdrawing for non-payment of fees.

B. Client Funds/Retainers

Separate client trust accounts are required and regulated by Sup. Ct. R. 50 and N.H. R. Prof. Conduct 1.15. Be extremely careful in noting: (1) when deposited funds are able to be disbursed and (2) when fees are earned, and thus, able to be released from trust and paid to a lawyer's general account. The New Hampshire comments to NH Rule 1.15(e) and NH Rule 1.15(d) are worth reviewing very carefully. One of the most common reasons an attorney would face discipline is due to a failure to properly handle client funds.

The lawyer shall also maintain records of the handling, maintenance, and disposition of client funds from the time of receipt to the time of final distribution. Such records shall be maintained for a period of six years following final distribution.

C. Conflict of Interest

The conflict of interest rules are strict and must be scrupulously followed. Carefully review N.H. R. Prof. Conduct 1.7, 1.8, 1.9 and 1.10 (emphasizing that conflicts can arise based upon attorneys' relationships with other lawyers or law firms). Review of the New Hampshire comments to N.H. R. Prof. Conduct 1.7— and a description of the so-called "harsh reality test"—are especially worthwhile for any practitioner.

D. Communications with Parties

Lawyers are prohibited from communicating about the subject of a legal matter with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so. N.H. R. Prof. Conduct 4.2.

Rules for dealing with unrepresented persons are especially stringent, so be sure to review the applicable rule if a party you are dealing with is self-represented. *See* N.H. R. Prof. Conduct 4.3.

Frivolous Claims and Good Faith Requirement in Pleading

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. N.H. R. Prof. Conduct 3.1.

Pro Bono Publico Service

New Hampshire's Rules of Professional Conduct advise that attorneys participate in at least thirty (30) hours per year in pro bono legal services. N.H. R. Conduct 6.1. This rule anticipates an attorney's inability to provide this amount of pro bono service or to fulfill this time through representation and offers alternative methods to do so. *See* N.H. R. Conduct 6.1., 2004 ABA Model Rule Comment.

The ABA provides a service called "Free Legal Answers" for people seeking legal advice who are unable to afford an attorney. The New Hampshire Supreme Court has issued a comment clarifying how N.H. R. Conduct 6.5 applies to attorneys engaging in this service. *See* N.H. R. Conduct 6.5., New Hampshire Supreme Court Comment.

Responsibilities of a Subordinate Lawyer

The Rules of Professional Conduct apply to all attorneys in New Hampshire, including those acting in a subordinate role. N.H. R. Conduct 5.2. The rule does not find a subordinate attorney in violation if they follow "a supervisory lawyer's reasonable resolution of an arguable question of professional duty." *Id*.

Communications with Non-Client Parties

Importantly, the rules prohibit providing an unrepresented party any legal advice beyond advising that they obtain legal counsel.

Where to Find Help

When in doubt, an attorney should seek guidance before taking any action that gives the attorney pause. There are several relevant tools available in New Hampshire including:

The New Hampshire Rules of Professional Conduct and Commentary

The New Hampshire Supreme Court Attorney Discipline Office

The New Hampshire Bar's Ethics Committee is another an excellent resource. The Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the New Hampshire Bar News. New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries.

- General Info. https://www.nhbar.org/resources/professionalism-and-ethics/
- How to Obtain Answers https://www.nhbar.org/resources/ethics/obtain-answers/
    - The staff liaison to the Ethics Committee can be contacted at ethics@nhbar.org, 603-715-3259.

FAMILY LAW

Introduction

The Family Division of the Circuit Court handles the following types of cases: Adoption; Guardianship of Minors; Children in Need of Services (CHINS); Juvenile Delinquency; Abuse/Neglect of Children; Termination of Parental Rights; Domestic Violence Petitions; Divorce/Parenting; Child Support; and Name Changes (though certain Name Changes may occur in the Probate Division). A helpful guide to where different types of cases should be filed can be found at www.courts.state.nh.us/fdpp/wheretofile.htm.

Complex Family Law Docket

A Family Division Complex Case Docket has been established in the Family Division of the New Hampshire Circuit Court. The Family Division Complex Case Docket is an administrative reassignment, pursuant to RSA 490-F:2 and Supreme Court Rule 54(4)(h), of certain marital or parenting cases. The reassigned cases will be submitted to advanced dispute resolution, and then, if unsuccessful, the cases will be heard by judge specially assigned to manage this docket of cases. This was originally a pilot program, and as of January 2020, only Region C, comprised of the 7th and 10th Circuit are assigning its cases to a specific judge, Judge Jennifer Lemire, in the Brentwood location. The remaining complex family cases are being returned to their courts of origin, but the courts will reevaluate this decision once additional judicial appointments have been made.

Adoption

With certain limitations, as found in RSA 170-B:3 and 170-B:4, any adult may adopt any individual. The persons required to execute a surrender of parental rights before an adoption can occur are enumerated in RSA 170-B:5.

Counsel should be able to advise clients, whether adoptees, adopting parents, or surrendering parents, as to the consequences of adoption (including the effects on inheritance rights and privileges). In general, the consequences can be found in RSA 170-B:11 and 170-B:25.

Guardianship of Minors

Guardianships of minors and their estates are governed by RSA 463. Generally, the Family Division has jurisdiction over guardianship of minors. However, if the case involves guardianship of both the person of a minor and the estate of the minor, jurisdiction is with the Probate Division. Filing requirements and other matters pertaining to the action are governed by Fam. Div. R. 5.1 through 5.8. The Petition form can be found on the Court website. Unlike the termination of parental rights, where the parental ties are permanently severed, guardianship may be ended or modified. The burdens of proof are different depending on how the guardianship was established and can be found in RSA 463.

Guardianship of a Minor may be established if the child's parent has a substance misuse disorder. If a guardianship is granted for this reason, even if the parent consents to the guardianship, the burden of proof is different than if it were a consented to petition without a substance misuse disorder under RSA 463:10(V).

Case summaries for Guardianship cases are unavailable as the file is 'locked' at the court. If a practitioner wishes to seek information about a particular case, they must first file an appearance and then speak to the clerk at the applicable court directly to obtain the information. The Call Center is unable to answer any questions about these cases.

All Guardianship proceedings are confidential. Only the parties (including the child, if over age 14) are permitted in the courtroom during the hearing unless the parties agree otherwise.

Children in Need of Services (CHINS)

Purpose

The purpose is to assist children under the age of 18, who suffer from a diagnosis of severe emotional, cognitive, or other mental health issues, and who engage in aggressive, fire setting, or sexualized behavior that pose a danger to the child or others. CHINS (RSA 169-D) apply to children who are otherwise unable or ineligible to receive services under RSA 169-B, and RSA 169-C, which provide protection to abused, neglected and delinquent children.

Adjudicatory Hearing

CHINS proceedings begin with an adjudicatory hearing, in which the court determines whether the child is in need of services. Because the adjudicatory phase is adversarial in nature, the juvenile alleged to be a child in need of services is entitled to appointed defense counsel, is afforded full due process rights, has the right to present evidence and witnesses, and to cross-examine adverse witnesses. The purpose of the defense attorney in this stage of the proceeding is to advocate for the juvenile's position, and to protect the child's constitutional rights. The adjudicatory hearing shall be held within 21 days of the initial appearance. RSA 169-D:13, II.

The mandatory time limits on juvenile adjudicatory hearings under RSA 169-D constitute a legislative pronouncement of a child's right to the expeditious resolution of his/her alleged "need for services" rooted in his/her right to due process, and are analogous to an adult offender's right to a speedy trial. *In re Russell C.*, 120 N.H. 260, 266 (1980).

The court forfeits its jurisdiction if it does not comply with the above time limits, unless the non-compliance is the result of a delay caused or requested by the juvenile, in which case the juvenile will be deemed to have waived the time limits. *Id.*

Dispositional Hearing

If the court finds that the child is, in fact, in need of services, the court determines the most appropriate and least restrictive disposition for the child considering all of the facts, the investigation report made by the appropriate agency, and the recommendations of the parties and counsel. RSA 169-D:17.

The juvenile's statutory right to counsel is not predicated upon the assumption that the juvenile is competent to stand trial. Rather, if a juvenile is incompetent, the court has the inherent authority to appoint a guardian ad litem (GAL) to act as a substitute decision-maker for the juvenile and as a substitute client for the attorney.

Juvenile Delinquency

Jurisdiction

Juvenile proceedings may be filed in the Family Division in the judicial district in which the minor is found or resides or where the offense is alleged to have occurred. RSA 169-B:5.

Petition

Any person may file a petition alleging the delinquency of a minor. RSA 169-B:6. The purpose is to give the juvenile and his/her parents adequate notice of the substance of the proceedings. *In re Russell C.*, 120 N.H. at 266. The petition must be signed under oath and must state with particularity the date, time, manner, and place of the conduct alleged, and shall state the statutory provision alleged to have been violated. The petition shall also be entitled "In the interest of _____, a minor." RSA 169-B:6. The court will serve a copy of the petition to the Department of Health and Human Services, which also becomes a party. RSA 169-B:6-a.

Purpose of proceeding

The purpose of the proceeding is *not* to punish the child for breach of a law or regulation, but to give him/her a better chance to become a better and worthy citizen. *In re Kevin E.*, 143 N.H. 417, 418 (1999). As a result, the juvenile proceedings are designed to be more curative, non-penal, and more protective of minors than the adult criminal justice system. *Id.* In the juvenile system, the juvenile is not tried for a crime, not convicted of a crime, and not deemed to be a criminal. *Id.*

Further, no public record is made of his/her alleged offense. *Id.* The determination is not that of criminal guilt, but of delinquency. *Id.*

All case records relative to delinquency are confidential. RSA 169-B:35.

Appointment of Counsel

The court appoints counsel at the time of arraignment of an indigent minor, unless the right to counsel has been validly waived. RSA 169-B:12. The court may also require the minor to consult with counsel if the court believes the minor has a cognitive, emotional, learning, or sensory disability. *Id.*

Adjudicatory Hearing

The hearing shall be held within 21 days of arraignment for minors detained pending such hearing, and within 30 days of arraignment for minors not detained. RSA 169-B:14.

Like with CHINS, the mandatory time limits on juvenile adjudicatory hearings under RSA 169-B constitute a legislative pronouncement of a child's right to the expeditious resolution of his/her alleged "delinquency" rooted in his/her right to due process, and are analogous to an adult offender's right to a speedy trial. *In re Russell C.*, 120 N.H. at 266.

The court forfeits its jurisdiction if it doesn't comply with the above time limits, unless the non-compliance is the result of a delay caused or requested by the juvenile, in which case the juvenile will be deemed to have waived the time limits. *Id.*

Abuse/Neglect of Children

General

The purpose of RSA 169-C is to provide protection to children whose life, health or welfare is endangered and to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases.

Because the right of parents to raise and care for their children is a fundamental liberty interest protected by the New Hampshire Constitution and United States Constitution, all biological and adoptive parents are presumed to be fit unless and until they are found to be unfit, in either an abuse/neglect proceeding or a termination of parental rights proceeding.

Proceedings

Unlike CHINS or juvenile delinquency cases, in which the juvenile's liberty interest triggers the need for due process safeguards, a juvenile alleged to be abused or neglected under RSA 169-C is neither subject to a deprivation of his liberty in such a manner, nor to a proceeding akin to a criminal trial.

Burden of Proof

The petitioner must prove the allegations by a preponderance of evidence. RSA 169-C:13.

Effect of Consent Order

Like the criminal defendant who enters a guilty plea, the parent in an abuse and neglect proceeding who enters into a consent order is waiving important constitutional rights, which include the right to a hearing in which the Petitioner must prove by a preponderance of the evidence that the child has been abused or neglected, RSA 169-C:13, and the right to cross-examine those who testify against the parent. RSA 169-C:18.

Termination of Parental Rights

Grounds for termination of parental rights are governed by RSA 170-C:5.

Jurisdiction

The Family Division handles terminations of parental rights pursuant to RSA 170-C.

Once a petition has been filed, notice must be given by personal service to the parent whose parental rights may be terminated. RSA 170-C:7. If it appears impractical to personally serve the parent, the court may permit service by certified mail to the parent's last known address or publication once a week for two successive weeks in a newspaper of general circulation in the area where that person was last domiciled. *Id.* Courts have begun to require exhaustive internet and social media searches as a means of locating missing parties prior to granting any default orders even after service by publication.

The filing of a termination petition triggers the appointment of a guardian ad litem ("GAL") to represent the interests of the child. RSA 170-C:8. When a termination proceeding is filed alleging the mental incompetency of the parent, the court also appoints a GAL for the parent. *Id.* The GAL interviews all parties, reviews pertinent records, and makes recommendations which are taken into consideration by the court but are not binding.

The Right to Counsel

The court shall notify the parents of their right to counsel, and if they request and are financially unable to pay, the court shall provide counsel. RSA 170-C:10. If the termination is based on a child abuse or neglect allegation, the court must appoint an attorney to represent the child, and to represent indigent parents. RSA 169-C:10. Compensation shall be borne by the town in which the child resided at the time the petition was filed. *In re Heather D.,* 121 N.H. 547, 551 (1981).

Social Study

Upon filing of a petition, the court shall direct that a social study be made by DHHS or another authorized agency and that a written report be submitted to the court prior to the dispositional hearing. RSA 170-C:9. The study shall include the circumstances of the petition, the social history, the present condition of the child and parents, proposed plans for the child and other facts as may

be pertinent to the parent-child relationship. The purpose of the study is to aid the court in making its disposition of the petition. If the petition is filed by one parent with respect to the other parent, the court may waive or limit the extent of the social study.

Mental Health Evaluation

At any time prior to the final decree, the court may order that the child or the parents, or both, undergo a mental health evaluation at a mental health center, by one or more psychiatrists or clinical psychologists, who shall provide a written assessment. RSA 170-C:9-a.

Burden of Proof

Because of the significance of the parent's interest at stake, the Petitioner must prove a statutory ground for termination beyond a reasonable doubt. *In re Adam R.*, 159 N.H. 788, 792 (2010). Once that is established, the court then considers whether termination is in the child's best interest. *Id.* The calculation of a child's best interest is not, however, an evidentiary fact and need not be established "beyond a reasonable doubt." *Id.*

Hearing process

The final hearing is confidential and not open to the public or the press, and the Court must issue a decision not later than sixty days after the date of the final hearing.

An order terminating the parent-child relationship divests the parent and the child of all legal rights, privileges, duties, and obligations. RSA 170-C:12. A GAL appointed pursuant to RSA 170-C may give his or her consent to the adoption of the child in lieu of the parents whose parent-child relationship has been terminated. *Id.* The rights of inheritance of both the parent and the child are not divested until the adoption of the child. *Id.*

Appeals

Termination decisions can be appealed pursuant to RSA 170-C:15. The pendency of the appeal does not suspend the order of the court regarding the child. *Id.* The decision may only be appealed to the NH Supreme Court for errors of law. Appeals must be taken within thirty days of the entry of the court decree. All proceedings in pursuance of the decision appealed from shall be stayed pending determination of the appeal by the NH Supreme Court. A decision of the trial court judge, so far as it is affirmed or unaltered on appeal, is considered to have been in force from the time it was made by the judge.

The GAL may also initiate an appeal on behalf of the minor if the GAL determines that issues exist which are adverse to and substantially affect the minor's interest. If other parties appeal, it is suggested that the GAL examine the Notice of Appeal and notify the NH Supreme Court whether issues exists which will require that a brief be filed by the GAL. *See* System-wide Guardian Ad Litem Application, Certification, & Practice Rules.

Domestic Violence Petitions/Orders of Protection

Jurisdiction

Domestic violence petitions and orders are governed by RSA 173-B. The petition shall be filed in the court in the county where the plaintiff or defendant resides. It should be noted that a person filing false allegations of abuse can be subject to criminal penalties.

Notice of the petition shall be given to the defendant either personally or through sheriff's department. There is no filing fee. If the filing is outside of court hours, the petition is filed with the on-call clerk listed with the police department. Upon issuance of an emergency protective order, the clerk of the court makes immediate arrangements for service of the order by a police officer. The clerk further gives a copy of the order to the local police department charged with the enforcement of the order. This emergency protective order is in effect only until the next business day. At which time, a petitioner would need to file a Petition for a Domestic Violence Order of Protection with the courthouse in the county where the Petitioner of Defendant is residing.

After filing a domestic violence petition, the clerk schedules a hearing, which must be held within thirty days of filing or within ten days of service of process upon the defendant, whichever occurs later.

Civil Protective Orders v. Criminal Process

Civil protection orders grant more extensive relief and make practical arrangements for eviction, child custody, visitation, and child and spousal support, and can order restraint on actions against property, family, and other household members. They cannot, however, always offer immediate relief. Civil orders have a lower standard of proof and require proof only by a preponderance of the evidence.

Criminal process, on the other hand, may provide more immediate, but less complete, protection. A law enforcement officer may make an arrest without a warrant if he/she has probable cause to believe that the person to be arrested has within the past 12 hours committed abuse as defined in RSA 173-B:1, I against a person eligible for protection from domestic violence as outlined in RSA 173-B:1. RSA 594:10. The warrantless arrest may be made whether or not the abuse was committed in the presence of the officer. RSA 173-B:10, II.

Burden of Proof

The court grants relief necessary to cease the abuse only upon plaintiff's showing of abuse by a preponderance of the evidence. To prove the abuse, the plaintiff must have more than a generalized fear for personal safety to support a finding that a credible threat to his/her safety exists. *Walker v. Walker*, 158 N.H. 602, 608 (2009). Relief that may be granted is listed in RSA 173-B:5, I.

Once a restraining order is issued, it is unlawful for the defendant to possess any firearm or ammunition. *Id.*

Temporary reconciliation by the parties does not revoke the order, and an order restraining the defendant from entering the plaintiff's premises does not lose its validity merely because the parties resume living together. The parties can modify a restraining order *only* with the court's approval. RSA 173-B:5, VIII.

A DVP order is for a fixed period of time not to exceed one year but may be extended upon motion of the plaintiff showing good cause, with notice to the defendant. The Defendant has the right to have a hearing on the extension within thirty days of the extension. RSA 173-B:5, VI.

Temporary Relief

Temporary relief and emergency (temporary) protective orders differ from permanent relief. A petition for temporary relief requires an *immediate and present danger of abuse*. *Ex Parte* restraining orders may be filed 24/7, without actual notice to the defendant, who then may file a written request for hearing, and such hearing has to be held not more than five business days after the clerk receives the request. RSA 173-B:4.

Temporary relief that may be granted as listed in RSA 173-B:4, I. Although the court may make orders related to custody or impose conditions on visitation rights in order to assure the safety of the plaintiff and children, the court generally does not make orders for financial support or monetary compensation.

It should be noted that if there are custody orders that were previously judicially determined in any of the RSA 173-B:5 enumerated proceedings, the *ex parte* orders cannot supersede those prior court orders. *Fichtner v. Pittsley*, 146 N.H. 512, 515 (2001). The court in which the *ex parte* was filed, however, may transfer the petition to such court and enable it to modify it.

Violation of Orders

Violations of domestic violence protective orders provide for both civil and criminal penalties. Regardless of any contempt action, a defendant who willfully violates a temporary or permanent protective order will be arrested, detained and referred for prosecution. The arrest may be made without a warrant upon probable cause, whether or not the violations were committed in the presence of the officer. RSA 173-B:9. If the defendant knowingly violates the order, he/she will be guilty of a class A misdemeanor.

Additionally, the defendant may have to appear for a hearing on civil or criminal contempt, and the plaintiff may seek relief from both, mandatory arrest/prosecution provisions and the contempt provisions of the statute. A hearing on criminal contempt charges does not invoke double jeopardy or preclude hearing on other criminal charges underlying the contempt, or vice versa.

Separate Suits for Battering

Case law gives battered spouses the right to join a tort action with a divorce proceeding. As a consequence, it allows for a separate cause of action for compensatory and punitive damages, in addition to a divorce fault ground which may be a factor in awarding alimony.

The New Hampshire Supreme Court has further held that for collateral estoppel and *res judicata* purposes, a divorce action does not preclude a *subsequent* tort action under circumstances where the spouse based the tort action upon the same act alleged and actually litigated in the divorce. *Aubert v. Aubert*, 129 N.H. 422, 425–26 (1987). Moreover, if the defendant spouse was previously criminally convicted for the act which is subject to tort action, the defendant is collaterally estopped from re-litigating the issues of liability and causation if the issues are based upon the same wrong that was fully addressed in the criminal conviction. *Id.*

Divorce/Parenting/Child Support

Jurisdiction

The jurisdictional requirements for bringing an action for divorce in New Hampshire are set forth in RSA 458:5 and should be carefully reviewed.

Limited Representation

Counsel may wish to familiarize themselves with Family Division Rule 1.19, Limited Representation by Attorneys, as limited representation may be an attractive option to potential clients. Many parties are self-represented in divorce, parenting, and child support actions but may benefit from a limited representation in certain more complicated matters pending before the court.

Grounds

Fault grounds for divorce are enumerated in RSA 458:7. Fault grounds cannot be considered for property settlement purposes in a no-fault divorce. You should have a discussion with your client about the additional costs involved in litigating the fault ground as well as the potential increased hostility between the parties that may continue long after the divorce is concluded, especially where there are children if he or she is considering pursuing an at-fault divorce. Remember to also plead irreconcilable differences as an alternative grounds for divorce in the event that the court does not find a fault ground, otherwise the divorce may be granted on your opponent's Cross-Petition for Divorce.

Service of Process

The Family Division will allow the non-filing party the opportunity to pick up his or her service copy of the Petition for Divorce at the court before it is sent to the petitioner's attorney to have service made by the appropriate sheriff's department. The opposing party's counsel may also pick up the documents to be served at the court on behalf of his or her client, but the attorney should be prepared to file an Appearance at that time in case there is any question about the formal representation of the client. If the copies of the Petition for Divorce are not picked up, the Orders of Notice are sent back to petitioner's counsel, who then makes arrangements for service by the sheriff's department.

Review the Orders of Notice as soon as you receive them to ensure that you will forward them to the appropriate sheriff's department for service. If you are filing a Petition for Divorce against an out-of-state resident, you may wish to inform the Court of that fact when filing your Petition for Divorce so that the court will allot additional time for service. Otherwise, you may need to file a motion for additional time to complete service. As soon as you receive the Orders of Notice, contact any out-of-state sheriff's department and ascertain their address and fees so that you may forward your Orders of Notice as soon as possible. Service on any non-party accused of adultery is governed by RSA 458:11. A non-party accused of adultery has a right to appear and be heard.

Cross-Petition for Divorce

If the respondent chooses to file a response, with or without a cross-petition, it shall be filed within the timeframes set forth in the clerk's notice. It is a good idea to file a cross-petition where there is some likelihood that the petitioner may choose not to go forward, as in that event, if a cross-petition has been filed, the respondent may maintain the action without initiating a new action for Divorce.

Child Impact Seminar

In any divorce in which minor children are involved (and in Parenting Petition cases), both parties are required to attend a child impact seminar. Typically, the seminar's facilitators mail a Certificate of Completion to the Court. Obtain a copy of the Certificate from your client as a backup. Counsel should have his or her client register for the seminar as soon as possible, as it is expected that both parties will either have registered or completed the seminar prior to their First Appearance. Financial assistance is available to parties that are unable to afford the cost of the seminar.

In cases where the client has already taken the course, either in New Hampshire or another jurisdiction, the party may file with the court to waive this requirement.

Case Manager Conference

A Case Manager Conference may be scheduled where one party is represented by counsel and the other is not. The Case Manager will bring the parties into a Conference Room and informally discuss the divorce process. The Case Manager may urge the parties to discuss the divorce action and ascertain whether a Stipulation on all or some issues may be achieved. If the Case Manager Conference is not successful, a Temporary Hearing is normally held. Counsel may be somewhat uncomfortable in the Case Manager Conference, especially in vigorously contested cases, as it is designed for the parties to communicate directly and has a mediation-like approach.

Mediation

In divorce actions and legal separation actions in which there are minor children, and in parenting petition cases, parties shall be ordered to participate in mediation unless the Court finds that mediation would not be appropriate due to factor(s) listed in RSA 461-A:7. For more information about mediation, please see Family Division Rule 2.13.

Temporary Hearing

A temporary hearing should be requested as soon as possible when there is, or is likely to be, any dispute between the parties over parenting responsibilities, child support, alimony, the use of property, or the payment of any bills. Remember that, in general, there are no binding obligations if there is no order. The temporary hearing is a very important hearing, as it often creates an informal precedent that may very well carry over into the final decree. Most temporary hearings are conducted by means of offers of proof. Counsel should interview his or her client thoroughly to be able to explain to the court each party's respective family role, employment history, and the circumstances leading to the divorce. Counsel should be very careful in his or her representations to the court, and all representations should be based upon the client interview and testimony that the client would give if called to testify. Counsel should bring a proposed temporary order, the client's financial affidavit, and, if minor children are involved, a child support guidelines worksheet, Uniform Support Order ("USO"), and proposed temporary parenting plan. A USO may also be brought if alimony is being requested.

Financial Affidavits

For every hearing involving support, each party must submit a current financial affidavit. If an uncontested divorce hearing is scheduled, new financial affidavits must be filed if the current affidavits on file are more than thirty (30) days old. It is good practice to bring a current financial affidavit to every Court appearance.

Clients often struggle to complete the affidavit. It is a good practice to tell them that they should use the past 30 days as a reference for any expenses on page 3. Always check their auto registration amount to make sure it is not the annual amount. If any amounts seem too high, they probably are. Good practitioners will ensure that clients have proper documentation to support

each figure entered on a financial affidavit.

If your client's expenses on page 3 exceed their income on page 1, be prepared for the expenses to be challenged. This can harm your client's credibility with the court.

Discovery

Discovery is governed by Family Division Rule 1.25. The Family Division has a Mandatory Initial Self Disclosure rule, Rule 1.25-A. This rule should be reviewed closely, as the Court may impose serious sanctions if the rule is not complied with.

Guardian Ad Litems

If the Court appoints a guardian ad litem ("GAL"), the Court will issue an Order specifying the subject matters of the GAL's investigation and the payment for the GAL's services. The GAL will likely send each client an identical fee agreement, Guardian Ad Litem Stipulations, and a questionnaire, which will need to be completed before the GAL will begin his or her investigation.

GALs can only make recommendations to the court regarding residential responsibility of the child *if* both parties agree.

Contact with Opposing Counsel/Pro Se

Divorce litigation often involves significant emotions and intensity. Whenever reasonably possible, an attempt should first be made to resolve problems between the parties informally through opposing counsel. Counsel will encounter many self-represented opponents in divorce litigation. Counsel should always be careful to make it clear that you only represent the client and not both parties when dealing with a self-represented party. Counsel also should be prepared to accept a certain degree of leniency that the Court will afford *pro s*e litigants in meeting deadlines and in filing pleadings. Counsel should reserve his or her objections to serious non-compliance of *pro se* litigants.

Motions

Counsel should keep in mind that "no exhibits shall be attached" to motions filed with the Family Division, unless those exhibits are "necessary to support an affidavit." Further, an affidavit must be filed if the counsel includes facts in the motion that are not already part of the record.

Ex parte motions must be accompanied by an affidavit verifying the notice provided (or the attempt to provide notice) to the other party. Additionally, both counsel and the client must be physically present at Court in order for an *ex parte* motion to be heard/ruled upon.

Final Hearings

Counsel should be familiar with the statutes governing property settlement (RSA 458:16- a) and alimony (RSA 458:19). Counsel should err on the side of asking the judge or marital master for specific findings of fact and/or rulings of law. Additionally, although the rules of evidence are not directly applicable in divorce hearings in the Family Division, counsel should still make appropriate objections in order to preserve issues for appeal.

Name Change

Jurisdiction

A petition to change name can be filed in the Family Division if the petition relates to an open or closed case within the jurisdiction of the Family Court, even if not originally filed or heard there. Fam. Div. R. 9.3. All other name change actions must be filed in the Probate Division. Fam. Div. R. 9.1. A separate petition is required, unless the petitioner seeks to restore his/her former name prior to the issuance of a final divorce decree, or seeks to change a child's name as part of an adoption.

Notice

The petitioner shall provide notice to all parties involved in the case. In closed cases, the petitioner shall do so via certified mail, return receipt requested. In open cases, first-class mail is sufficient.

If the request pertains to a minor child, notice is not required if the non-petitioning party/guardian consents to the change under oath or if the parent's rights have been terminated.

Hearing

The court, in its discretion, can decide the matter without a hearing if no objections have been filed and if criminal record check results report no finding.

The hearing must be held if the request pertains to a child fourteen years or older. The child must attend the hearing.

If the court grants the petition, a certificate of change of name will be issued to the petitioner for filing with appropriate agencies.

LANDLORD AND TENANT

Evictions

A. Eviction Procedures

RSA 540 governs the eviction process; the eviction procedure was recently amended, and the latest version went into effect on January 1, 2025. Additionally, the Rules of the Circuit Court of New Hampshire – District Division, establish rules for Landlord/Tenant actions: https://www.courts.nh.gov/rules-circuit-court-state-new-hampshire-district-division/landlord-and-tenant-actions .

If each required step is not **strictly** followed, the District Division may dismiss the eviction action on procedural grounds. *See So. Willow Props. v. Burlington Coat Factory of N.H.*, 159 N.H. 494, 498–99 (2009). A landlord cannot use self-help to evict a tenant from a residential property.

At the outset, RSA 540 distinguishes "restricted property" from "nonrestricted property." First, "nonrestricted property" is all real property rented for nonresidential purposes OR real property rented for residential purposes with any of the following characteristics: (i) single-family house if the owner of the single-family house does not own more than three single-family houses at one time; (ii) rental units in an owner-occupied building containing a total of four dwelling units or less; or (iii) single-family houses acquired by banks or other mortgagees through foreclosure. "Restricted property," by contrast, is all real property rented for residential purposes that are not included above. It is important to understand the distinction because the eviction process differs between restricted property and nonrestricted property.

RSA 540:1-a also establishes numerous occupancies that do not fall under the definition of "tenancy" (e.g. hotels, short-term rentals, student dorms). Accordingly, these occupancies are not subject to RSA 540. RSA 540:1-a, IV.

B. Landlord's Agent

RSA 540:1-b requires a landlord renting a restricted property to appoint an agent to receive service of legal process. Owners of a restricted property must file a statement with the town or city clerk of the municipality where the property is located within 30 days of assuming ownership identifying a person authorized to accept service of process for any legal proceeding brought against the owner and related to the property. RSA 540:1-b. This section shall not apply to manufactured housing parks as defined in RSA 205-A:1, II. RSA 540:1-b, I.

C. Eviction Notice and Demand for Rent

Demand for rent and eviction notice forms are available on the New Hampshire Court website. While use of those forms is not required, a valid demand for rent or eviction notice must include the same information as is requested and provided on those forms. RSA 540:3 & 5. A tenancy may be terminated by giving the tenant a notice in writing to quit the premises, which is now

referred to as an eviction notice. RSA 540:2. As noted, the statute describes two different types of property: **restricted** and **non-restricted property**. It is essential that the attorney understand the distinctions drawn in RSA 540:1-a and understand which type of property is the subject of the action so that he or she may draft a proper eviction notice.

The lessor or owner of restricted property may terminate any tenancy by giving the occupant and/or tenant an eviction notice for any of the following reasons:

i. Neglect or refusal to pay rent due and in arrears, upon demand;
ii. Substantial damage to the property;
iii. Failure of the tenant to comply with a material term of the lease;
iv. Behavior by tenant, or member of tenant's family, which adversely affects the health or safety of the other tenants or the landlord;
v. Failure of the tenant to accept suitable temporary relocation due to lead-based paint hazard abatement;
vi. Other good cause;
vii. Willful failure by the tenant to prepare the unit for remediation of an infestation of insects or rodents after reasonable written notice; or
viii. A remaining cotenant or occupant is the accused perpetrator of domestic violence, sexual assault or stalking, resulting in termination of a lease pursuant to RSA 540:11-b. *See* RSA 540:2, II.

"Other good cause," includes the tenant's failure to agree to a rental change in the lease, provided that the landlord gave the tenant 30 days written notice of the amount and effective day of the rental increase. *See* RSA 540:2, IV. "Other good cause," also includes any legitimate business or economic reason, and "need not be based on the action or inaction of the tenant." *See* RSA 540:2, V.

If the ground for eviction is "other good cause," and the good cause is based on the action/inaction of the tenant, the landlord shall first provide the tenant with written notice stating that in the future such action or inaction would constitute grounds for eviction. This notice must be served pursuant to RSA 540:5 or by certified mail. *See* RSA 540:2, III. If the tenant fails to comply after receiving this written notice, the landlord then may serve an eviction notice on the tenant.

At the same time, a landlord or owner of restricted property shall not terminate a tenancy based solely on the tenant (or a household member of the tenant) being the victim of domestic violence, stalking, or sexual assault, unless a specific exception applies. *See* RSA 540:2, VII.

- Demand for Rent

  In the event that an eviction is being initiated for non-payment of rent, the tenant must be served with a demand for rent. It is important to note that the demand for rent **cannot** be for a greater sum than the whole rent in arrears when the demand is made or the demand will be ineffective. *Buatti v. Prentice*, 162 N.H. 228, 230 (2011). An eviction notice must also be served.

  Although the full amount of past due rent should be included on the demand for rent, in a Landlord Tenant Action, the District Division can only award a maximum amount of damages of $1,500.00. RSA 540:13, III. However, nothing will prohibit the landlord from seeking any remaining amount of rent or other damages due from the tenant in an action in another court (often through a small claim action). *Id.*

- Eviction Notice (Formerly Notice to Quit)

  Actions for removal of a tenant by a writ of possession require an expired eviction notice to be presented at the time the action is filed. This document will be required whether the cause of eviction is nonpayment of rent or some other basis. In 2006 the legislature made changes to replace the term "notice to quit" with "eviction notice." The statute contends that if a residential tenancy was in effect on July 1, 2006 a notice to quit can be considered an eviction notice. *See* RSA 540:3, V. Case law suggests using "notice to quit" language is still acceptable even if the tenancy was not in effect at that date. *See Darbouze v. Champney*, 160 N.H. 695, 698 (2010). It is advisable to use the contemporary term "eviction notice" in lieu of "notice to quit" to avoid possible pitfalls.

  The eviction notice must strictly comply with three requirements: (1) the landlord must provide notice in accordance with the statute (RSA 540:3); (2) the landlord must state with specificity the reason for the eviction; and, (3) when evicting for nonpayment of rent, the landlord must provide that eviction may be avoided by payment of arrearages and liquidated damages in the amount of $15. *See Darbouze*, 160 N.H. at 698. If the notice to quit is held to be invalid for failing to comply with these requirements, the process must be started again from the beginning.

  For all residential tenancies, 30 days' notice is sufficient/required in nearly all cases before initiating a landlord tenant action in the pertinent district court. *See* RSA 540:3, II. There are limited, and expressed, circumstances where seven days is sufficient. *See id.*

- Service of Eviction Notice and Demand for Rent

  If the eviction is for nonpayment of rent, RSA 540:5 provides that a demand for rent must be served prior to or simultaneous with the service of an eviction notice. The documents must contain an Affidavit of Service. RSA 540:5 also provides that the notice and demand may be served personally or left at the residential tenant's last and usual place of abode. When serving the notice and demand on commercial tenants, a

recent legislative change now permits service of process at the rental property provided that a copy of the demand for rent or eviction notice shall be sent by certified mail to the commercial tenant at his or her last known legal address, or, if a non-resident that has registered with the Secretary of State, to the registered agent. RSA 540:5, I. Proof of service of the demand for rent and eviction notice must be provided to the court by delivering a true and attested copy of the notice accompanied by an affidavit of service, but the affidavit need not be sworn under oath. RSA 540:5.

D. Landlord and Tenant Writs

Landlord and Tenant Writs are served in the same manner as other civil writs. RSA 540:13, II provides that a Landlord and Tenant Writ must contain a notice regarding the eviction procedure. The writs now being issued by the District Division contain this notice. Although older writs that do not contain proper information may be used, a sheet of paper containing the appropriate information **must** be attached to the writ. **Failure to provide this notice makes a Landlord and Tenant Writ defective and gives rise to a defense for the tenant.**

E. Tenant Defenses

Tenants may raise defenses to an eviction based on violation of fitness or retaliation of the landlord. *See* RSA 540:13. These defenses are quite technical. *See* RSA 540:13-a & 540:13-d. These statutes must be read carefully to be sure that each requirement is met. A landlord should be cautioned that in the event a tenant successfully raises a defense of retaliation or violation of fitness, **he or she may be entitled to multiple damages**, *Sherryland, Inc. v. Snuffer*, 150 N.H. 262, 266 (2003), **and attorney's fees**. *Tulley v. Sheldon*, 159N.H. 269, 272–73 (2009). Still, a tenant may raise defenses, claims, or counterclaims that offset/reduce the rent he/she owes if the landlord is making a claim for unpaid rent. *See* RSA 540:13, III.

F. Judgement & Storage of Tenant Property

If the tenant makes default, or if the landlord sustained his/her complaint at trial, judgment shall be rendered in the landlord's favor and a writ of possession shall issue. *See* RSA 540:14, I. A writ of possession shall authorize the sheriff to remove the tenant from the premises. *Id.*

Landlords are required to maintain and exercise reasonable care in the storage of the personal property of a tenant who has vacated the premises for a period of 7 days after the premises is vacated. RSA 540-A:3, VII.

G. Appeal

Any party appealing a decision of the District Division in a Landlord and Tenant action must provide notice of their intent to appeal to the Supreme Court within seven (7) days of the decision. RSA 540:20.

Appeals

The District Division retains jurisdiction of the case until the appeal is perfected by the filing of a notice of appeal in the Supreme Court. RSA 540:20. If the appellant fails to enter the appeal (or provide copies to the court), the appellee can request the District Division judgment to be affirmed and may seek additional damages and costs incurred during that period. RSA 540:22.

In the event that a tenant does appeal a judgment, the landlord is entitled pursuant to RSA 540:25 to rents due from the date of the notice of appeal until such time as the appeal is decided. The Court may direct that such rents be paid into Court.

Tenant Actions

A. Specific Acts Prohibited and Right to Quiet Enjoyment

Tenants are provided with rights of action against a landlord in RSA chapter 540-A. RSA 540-A:3 states specific acts that landlords are prohibited from taking. For instance, landlords are not permitted to interrupt or terminate any utility service except in the case of temporary interruption for repairs or in temporary emergencies. The statute also prohibits a landlord from denying a tenant access to the leased premises or the tenant's property except through proper judicial procedure. Additionally, no landlord is allowed to enter the leased premises without the tenant's consent (though a tenant should not prevent reasonable entry, such as to complete repairs), except to make emergency repairs. RSA 540-A:2 provides for a right to quiet enjoyment of a tenancy. A tenant is entitled to compensation of actual damages or $1,000 for each violation of RSA 540-A:2 & 3 and up to three times that amount for knowing or willful violations. RSA 540-A:4, IX & RSA 358-A:10. Once a court finds that a landlord has willfully violated RSA 540-A:3, the court **must** award full statutory damages. *Carter v. Lachance*, 146 N.H. 11, 14 (2001).

B. Security Deposits

The definition of "landlord" is different for the provisions of RSA 540-A that deal with security deposits than in other subdivisions. "A person who rents or leases a single-family residence and owns no other rental property or who rents or leases rental units in an owner-occupied building of 5 units or less shall not be considered a 'landlord' for the purposes of this subdivision, except for any individual unit in such building which is occupied by a person or persons 60 years of age or older." RSA 540-A, I. Therefore, if you are planning to assist a client that is disputing whether a security deposit should have been returned, you should try to ascertain whether the provisions of RSA 540-A will apply or whether the action would be based in a breach of contract. When RSA 540-A does not apply, you should pay careful attention to the terms of any written lease.

If the provisions of RSA 540-A apply, security deposits may not exceed one month's rent or $100, whichever is greater. RSA 540-A:6. Note that regardless of what you call it (i.e., deposit for pets, cleaning, keys, last month's rent, etc.), it is still treated as a security deposit under the law. It has been common practice for landlords to require an additional "pet deposit" in recent years, but that requirement violates the statute if the amount exceeds the amount of one month of rent.

Landlords must hold security deposits in trust and may not co-mingle security deposits with their own funds. In the event that a landlord retains a security deposit, he or she must, within thirty (30) days from the termination of the tenancy, either return the entire security deposit plus accrued interest (if held for more than one year) or provide the tenant with a list of damages which the security was used for, as well as copies of receipts for purchasing materials for repairs, labor estimates, bills, or invoices indicating actual or estimated costs of repair. RSA 540-A:7.

If there is unpaid rent that the landlord wishes to apply the security deposit against, the landlord must provide the tenant with a **written** itemized list of any claim for unpaid rent or other charges to which the security deposit was applied. Penalties for violations of the security deposit provisions of RSA 540-A:6 and RSA 540-A:7 are severe and may include the awarding of multiple damages, RSA 540-A:8, and attorney's fees. RSA 358-A:2.

The definitions in RSA 540-A:1 must be read carefully, as this section only applies to residential rental property, and, even then, contains some exclusions.

LITIGATION

This section primarily focuses on civil litigation in New Hampshire Superior Courts, but also touches on differences in the procedures in the proceedings in the United States District Court for the District of New Hampshire. Although not specifically cited below, the rules applicable in the District Division of the Circuit Court are often very similar. The rules applicable in the District Division can be found on the Court's website.

Complaint

New Hampshire is a notice pleading jurisdiction. As such, courts take a liberal approach to the technical requirements of pleadings. In the Superior Court, all civil actions are in the form of a Complaint. The Complaint contains a statement of facts on which the claim is based, a request for relief, and a demand for judgment. The Complaint may set out a common set of facts, and then separate sections for each count or cause of action.

The Complaint must state legal claims which will withstand motion practice from the defendant(s). In particular, defendant's motions may include but are not limited to a motion to dismiss for lack of personal jurisdiction and/or failure to state a claim.

All Superior Court civil cases and most Circuit Court filings are now submitted online through the Court's e-file system. This includes the Complaint or other initiating document. The filing fee is paid online using a credit card.

Federal Court actions are also submitted electronically.

A. *Ad Damnum* Clauses

The requirement of *ad damnum* clauses – the clause in a prayer for relief stating the amount of damages claimed – has been abolished in state civil actions. *See* RSA 508:4-c. The "declaration or other affirmative pleadings" shall not contain *an ad damnum* but must "state that the damages claimed are within any minimum or maximum jurisdictional limits of the court to which the pleading is addressed." *Ad damnum* clauses are still permitted in Federal Court complaints.

Service of Process

A. Federal Court Actions

Federal Rules of Civil Procedure 4 and 5 set forth in detail the service requirements for Federal Court actions. If you know who will represent the defendants in a federal court action, you should contact them to see if they will waive service. Additional time to answer a complaint is given to a party that waives service. *See also* L.R. 4.1.

B. State Court Actions

1. *On Natural Persons*

a. Resident

Service may be made on any natural person by giving a copy of the process to him or her at any place within the state ("in-hand service") or by leaving a copy of the process at his or her abode ("abode service"). *See* RSA 510:2.

b. Non-Resident

If a natural person has no abode in New Hampshire and cannot be found within the state for the purposes of completing in-hand service, but nevertheless transacts business, commits a tort, or owns, uses, or possesses property in the state, he or she may be subject to the jurisdiction of the courts of the state for claims arising from that business, tort or ownership, use, or possession of property.

Service of process upon a nonresident may be made by serving an attested copy of the process upon the Secretary of State, along with a check in the amount of $10, and by sending an attested copy of the process to the person's last known residence by certified mail, return receipt requested. When the service of process is forwarded to the Court for filing, it must be accompanied by an affidavit executed by plaintiff's counsel stating compliance with these requirements. The return receipt must also be attached to the affidavit. *See* RSA 510:4.

2. *On Corporations*

a. Domestic Corporations

Service of process upon a New Hampshire corporation will typically be made upon the registered agent. If a corporation has no registered agent, or if the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. *See* RSA 293-A:5.04.

b. Foreign Corporations

To conduct business in New Hampshire, a foreign corporation must procure a certificate of authority from the Secretary of State, and it must appoint and maintain a registered agent. *See* RSA 293-A:15.01, 15.07. If there is no registered agent, if the registered agent cannot with reasonable diligence be served, if the corporation has withdrawn from transacting business in New Hampshire, or if the corporation has had its certificate of authority revoked,

service may be made by registered or certified mail, return receipt requested, to the secretary of the foreign corporation at its principal office. *See* RSA 293-A:15.10(b).

3. *On Partnerships*

a. Domestic General Partnerships

Any partnership organized or existing within the state and having more than four general partners may be served by in-hand or abode service on any officer, or if there are no officers, on any two members. A New Hampshire partnership with four or fewer general partners cannot be sued in the firm name, and all general partners must be served by in-hand or abode service. *See* RSA 510:13; *Rosenblum v. Judson Engineering Corp.*, 99 N.H. 267, 269–70 (1954).

b. Foreign General Partnerships

Any general partnership, regardless of the number of its general partners, organized outside New Hampshire but doing business in New Hampshire, must register under with the Secretary of State and must maintain a registered agent in the state. *See* RSA 305-A:1. Once a foreign general partnership has been registered, service may be made on the partnership in its own name by leaving an attested copy in the registered office of the registered agent during regular business hours. *See* RSA 305-A:6. Otherwise, the foreign partnership can be served by certified mail, return receipt requested, addressed to the secretary of the foreign partnership at its principal office. *Id.*

c. Domestic Limited Partnerships

Any limited partnership organized or existing within the state is required to maintain an agent for service of process. Any domestic limited partnership having more than four general partners may be served by in-hand or abode service on any officer, or if there are no officers, on any two members. A limited partnership with fewer than four members may be served by in-hand or abode service to the registered agent or by in-hand or abode service, to all members of the limited partnership. RSA 510:13.

d. Foreign Limited Partnerships

Every limited partnership organized under the laws of another jurisdiction and doing business in the state must register with the Secretary of State. *See* RSA 304-B:49. Upon registering, every foreign limited partnership is required to appoint an agent for service of process. *See id.*

4. *On Limited Liability Companies*

a. Domestic Limited Liability Companies

Service on a domestic limited liability company may be made on the company's registered agent. *See* RSA 304-C:36 (providing for alternative service if service cannot be made on the registered agent); RSA 304-C:37 (same).

b. Foreign Limited Liability Companies

Any limited liability company organized under laws of another jurisdiction and doing business in New Hampshire must register with the Secretary of State and must maintain a registered agent in the state. *See* RSA 304-C:181. Service upon any registered foreign limited liability company can be made upon the registered agent. *See id.* If no registered agent exists, or if one cannot be found with the exercise of reasonable diligence, service can be completed in compliance with RSA 304-C:182 and RSA 510:4.

5. *On the State (State as a Defendant)*

When the state, as a body politic and not acting through one of its boards, agencies, or commissioners, is the intended defendant, in-hand service should be made on the Secretary of State in the State House in Concord. When specific relief is sought from the state as a body politic, service should also be made on the state officer who exercises the state's primary authority in that field.

6. *Time of Service*

Upon receipt of the Complaint, the court will issue a completed Summons for service. The Summons will state the deadline by which the plaintiff must complete service. The plaintiff must file proof of service with the Court within 21 days of the deadline. *See* Super. Ct. Civ. R. 4; Dist. Div. R. 3.4. Failure to serve the defendant within the court-ordered deadline will result in dismissal of the action. If you need additional time to complete service, you should file a motion with the court requesting an extension.
In federal court, service must be completed on the defendant within 90 days of the complaint being filed, unless the plaintiff obtains an extension of time form the court. Fed. R. Civ. P. 4(m).

Responsive Pleadings to Summons and Petitions

A. Timeline for filing responsive pleadings

In state court civil actions, an appearance and answer (or other responsive pleading) must be filed no later than 30 days after the defendant has been served. Super. Ct. R 9(a). In Federal Court, an answer (or other responsive pleading) is due 21 days after service. Fed. R. Civ. P. 12. However, if a defendant timely returns a waiver of service will not be

required to file the answer or responsive pleading for sixty (60) days after the request for waiver was sent. Fed. R. Civ. P. 4(d)(3).

B. Answer

1. Requirement of Specificity

The Answer must state in short and plain terms the party's defenses to each claim asserted, and it shall admit or deny each paragraph of the complaint. Super. Ct. R. 9(a). If a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party should so state. *Id.* This has the effect of a denial. If the responding party only wants to deny part of an allegation, the party should specify which part of the allegation is admitted and which part is denied. *Id.*

2. Necessity of Including Statement of Affirmative Defenses.

An Answer must also contain a statement of affirmative defenses. Both the state and federal rules list examples of affirmative defenses, but other affirmative defenses exist. If you are unsure whether a defense is considered affirmative, or whether a particular affirmative defense applies, the best practice is to plead it, as failure to plead an affirmative defense constitutes waiver of that defense. Super. Ct. R. 9(d); Fed. R. Civ. P. 8(c).

3. Demand for Jury in State Court

In order to preserve your right to a jury trial in state court, the defendant **must** request a jury trial on the first page of the Answer. Failure to do this constitutes a waiver of the defendant's right to a jury trial. Super. Ct. R. 9(c). A party may not rely upon another's selection of a jury trial. Review the section below for information about demanding a jury in federal court actions.

4. Demand for Jury in Federal Court

In federal court actions, any party may demand a trial by jury of any issue triable of right by a jury by serving upon any other party a demand in writing at any time after the commencement of the action and not later than fourteen (14) days after the service of the last pleading directed to such issue. The failure of a party to serve a demand for jury trial in accordance with Fed. R. Civ. P. 38(b) and to file it as required by Fed. R. Civ. P. 5(d) constitutes a waiver of the right to a trial by jury. The New Hampshire Local Rules require that the demand for jury be made on the front page, immediately following the title of the filing. LR 38.1. The demand for trial by jury, once made, may not be withdrawn without the consent of all parties. Review the section above for information about demanding a jury trial in state court actions.

C. Appearance

In addition to filing an answer, in state court actions, the defendant must also file an appearance within thirty days from the date of service. Super. Ct. R. 9(a); *see also* Super. Ct. R. 17.

Under prior law, the filing of an Appearance in Superior Court submitted the filer to the Court's personal jurisdiction. Rule 9(e), however, changes that traditional rule to: an Appearance or Answer do not waive a personal jurisdiction challenge. However, a motion to dismiss must still be filed within 30 days of service.

D. Crossclaims and Counterclaims

Both Federal Rule of Civil Procedure 13 and Superior Court Rule 10 contain strict requirements regarding crossclaims and counterclaims. Fed. R. Civ. P. 13; Super Ct. R. 10. Often these claims must be asserted in the initial response to the complaint or at least at the same time. In many cases, as set forth in the applicable court rules, counterclaims and crossclaims must be filed within a certain number of days or may be permanently barred.

Additionally, an Answer is typically required to be filed in response to crossclaims or counterclaims, or default can occur. Review the rules carefully!

Civil Motions

A. A. Concurrence Requirement

1. State Court

Any party filing a motion shall certify to the court that he/she/it has made a good faith attempt to obtain concurrence of the relief sought, except in the case of dispositive motions, motions for contempt or sanctions, or other comparable motions. Super. Ct. R. 11(c).

2. Federal Court

Any party filing a motion other than a dispositive motion shall certify to the court that a good faith attempt has been made to obtain concurrence in the relief sought, and if concurrence has been obtained, reference to the same must be presented in the body of the motion, and the motion shall also contain the words "assented-to" in its title. LR 7.1(c).

B. Facts Verified by Affidavit

The Superior Courts will not hear any motion grounded upon facts unless the facts are verified by affidavit, are apparent from the record or other documents filed in the case, or are agreed to and stated in writing signed by the parties or their attorneys. Super. Ct. R. 11(b). For more routine motions requiring verification, the affidavit/certification can be incorporated within the motion itself.

C. Requests for Oral Argument

In Superior Court civil actions, no oral argument or evidentiary hearing will be scheduled unless a party requests oral argument or an evidentiary hearing on any motion. Such a request for oral argument must be made through a brief statement, written offer of proof, or memorandum stating the reasons why oral argument or an evidentiary hearing is necessary.

If this is not done, the court may rule on the motion based on the pleadings and record alone. Super. Ct. R. 13(b). The Court may still decide to rule on the motion without a hearing even if one had been requested.

D. Timing of Objections

1. State Court

In the state courts, the general rules allow a ten (10) day period in which to file a reply or objection to a motion. Super. Ct. R. 13(a). However, in the case of motion for summary judgment, thirty (30) days are allowed for filing an objection. *See id.*; RSA 491:8-a. These deadlines run from the date of receipt in the clerk's office of the filed motion. The ten (10) day period includes weekends and legal holidays, unless the last day of the period so computed is a Saturday, Sunday, or a legal holiday, in which case the period is extended until the end of the next day that is not a Saturday, Sunday, or a legal holiday. Super. Ct. R. 2; *see also* RSA ch. 288. Parties may request, by motion, extensions of the time in which to file an objection.

2. Federal Court

In federal court, the general rule allows the filing of an objection within fourteen (14) days of the date the motion is served. Objections to motions for summary judgment are due within thirty (30) days from the date the motion is served. LR 7.1(b); *see* Fed. R. Civ. P. 6 (addressing calculation of deadlines and seeking extensions of a deadline).

E. Replies and Surreplies

1. State Court

The moving party may file a reply within ten (10) days of the filing of the objection. A party who intends to file a reply must advise the clerk within three (3) days of the filing of the objection. This is typically done through a simple "Notice of Intent to File Reply" filing. Surreplies are not permitted except by leave of the court. Super. Ct. R. 13A.

2. Federal Court

With regard to non-dispositive motions, no replies are permitted except by leave of the court. A motion for leave to file a reply must be filed within seven (7) days of the objection and must attach the proposed reply.

For dispositive motions, a reply is permitted as of right within seven (7) days. Whenever a reply is permitted, a surreply is also permitted; however, the rules caution that surreplies are not encouraged and should be filed only in exceptional circumstances. LR 7.1(e).

Default

A. If a party fails to file an appearance and answer the court may issue a default. This is typically done by the clerk's office *sua sponte*.

A party may also move for a default if an opposing party fails to appear and answer or comply with some general rule of court. Where a defendant has made no appearance whatsoever, the moving party should also file a military affidavit. *Chenausky v. Chenausky*, 128 N.H. 116, 118 (1986). Where a default has been entered, the defaulted party may move to strike the default. The defaulted party must file a motion and affidavit of defense, setting forth the defense and the facts upon which the defense is based. *See* Super. Ct. R. 42(a). The court will strike the default upon agreement by the parties or as justice may require. *See id*.

In practice, it is common for attorneys to assent to motions to strike default, as a matter of courtesy to fellow practitioners.

B. Once default has issued, the plaintiff must then prove damages by submitting evidence and/or seeking a hearing, and then seeking entry of a final judgment. If a default is reduced to judgment, courts will not vacate the judgment except in cases of fraud or injustice. *See Nihan v. Knight*, 56 N.H. 167, 169 (1875).

C. A default judgment is a final judgment on the merits and is conclusive as to the rights of the parties. A default judgment including conditional defaults for failure to answer interrogatories can constitute an absolute bar to subsequent litigation on the same cause of action, under the principles of res judicata. *Innie v. W & R, Inc.*, 116 N.H. 315, 316 (1976).

Initial Disclosures

1. State Court – Superior Court – Automatic Disclosures

Without waiting for discovery requests, the plaintiff must make initial discovery disclosures within thirty (30) days after the defendant files the answer. The defendant must make its initial disclosures within sixty (60) days of the date it filed the answer. Super. Ct. R. 22; Dist. Div. R. 3.22. The Superior Court Rules state what is required to be included in the automatic disclosures.

2. Federal Court

In federal court, both parties are required to make their initial disclosures within fourteen (14) days after the parties' Rule 26(f) conference or as otherwise ordered by the court; however, in practice parties often agree upon other times for disclosures depending on the scope of the required discovery. Fed. R. Civ. P. 26(a). Fed. R. Civ. P. 26(a)(1)(A) states the information that is required to be provided as part of the initial disclosures.

In practice, counsel typically confer and agree about the deadlines and procedures stated in the Rule 26 discovery plan. Counsel then submit the plan to the Court as a stipulated discovery plan. When counsel proceed in this manner, the formal Rule 26(f) discovery conference is often not held.

Requests for Admission

A. Requests for admission can be used in cases when you wish to narrow the disputed facts and believe that the opposing party will agree that certain facts are not in dispute. Requests for admission were previously filed with the clerk of court. However, they are now served directly on the adverse party. Facts set forth in requests for admission are deemed admitted unless a written sworn denial or a written objection to a request for admission are served on the requesting party within thirty (30) days of the filing of the requests for admission. Super. Ct. R. 28(a); Dist. Div. R. 3.28.

B. A party who denies a requested admission without good reason or in bad faith, which is subsequently proven, may be ordered by the court to pay the reasonable expenses, including counsel fees, incurred by the other party in proving the fact in question. Super. Ct. R. 28(c); Dist. Div. R. 3.28.

Interrogatories

1. State Court

In state court, parties are limited to twenty-five (25) interrogatories throughout the entire case. You cannot escape the limit by using sub-parts to your interrogatory, since all sub-parts are considered as separate interrogatories. *See* Super. Ct. R. 23; Dist. Div. R. 3.23. Answers must be returned within thirty (30) days. Super. Ct. R. 23(i); Dist. Div. R. 3.23(i). Also, if the answering party objects to responding, the parties have the obligation to attempt to work out their differences before a motion to compel is filed. *See* Super. Ct. R. 23(k). If you are compelled over your objection to answer an interrogatory, you have to do it within ten (10) days of the court's order. *Id.*

In more complex cases, counsel should consider filing for additional discovery beyond the limit of twenty-five (25) interrogatories.

2. Federal Court

The federal court also limits parties to twenty-five (25) interrogatories. *See* Fed. R. Civ. P. 33(a). Answers must be returned within thirty (30) days. Fed. R. Civ. P. 33(b). In federal court, if the responding party objects to responding and you need to file a motion to compel, you must include each interrogatory or request and the answer, responses and objection in the motion. L.R. 37.1. When the court rules that further answers to the discovery requests are required, you have fourteen (14) days to respond. L.R. 37.1(b).

In more complex cases, counsel should consider filing for additional discovery beyond the limit of twenty-five (25) interrogatories.

Requests for Production

1. State Court

Any party can make a request "to inspect, copy, test, or sample any designated documents or electronically stored information including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form, or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of" discovery. *See* Super. Ct. R. 24; Dist. Div. R. 3.24. Answers must be returned within thirty (30) days, unless otherwise agreed or ordered by the court. Super. Ct. R. 24(b)(2); Dist. Div. R. 3.24(b)(2). Requests to view property can also be made through this rule, but most commonly parties use it to request copies of documents. You should also become familiar with the rules for electronically stored information.

2. Federal Court

Federal court also permits parties to request "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form," "designated tangible things," and the ability to inspect property controlled or possessed by the responding party. *See* Fed. R. Civ. P. 34(a). Responses normally must be returned within thirty (30) days. *Id*. You should also become familiar with the rules for electronically stored information.

Depositions

A. Depositions Immediately After Filing Suit

No deposition shall be taken within thirty (30) days after service of a complaint or bill in equity except by agreement or by leave of court for good cause shown. Super. Ct. R. 26(b).

B. Notice of Deposition

1. State Court

No notice to the adverse party of the taking of deposition shall be deemed reasonable unless served at least three (3) days before the day on which the deposition is to be taken, exclusive of the day of service and day of caption. Twenty (20) days' notice shall be deemed reasonable in all cases, unless otherwise ordered by the Court. Super. Ct. R. 26(b).

Many depositions are scheduled by informal agreement of the parties and counsel. Others are conducted pursuant to a formal subpoena and notice of deposition. *See* RSA 516:4; RSA 517:4. If there is concern that a party or witness may not appear pursuant to an agreement, or a deadline is imminent, it is good practice to formally notice the deposition and subpoena the witness even if there is an agreement.

2. Federal Court

In federal court, a formal notice of deposition is required. Fed. R. Civ. P. 30(b). That notice must include the time and place of the deposition and the deponent's name and address, if known. It is best practice to send the notice to other parties who will attend the deposition (i.e., stenographer).

C. Stipulations

1. In New Hampshire, there are standard stipulations which are generally agreed upon at depositions not taken immediately prior to trial (or for use at trial). These stipulations normally read:

   (a) It is agreed that the deposition shall be taken in the first instance in stenotype, and when transcribed may be used for all purposes for which depositions are competent under New Hampshire practice.

   (b) Notice, filing, caption and all other formalities are waived. All objections, except as to form, are reserved and may be taken in court at time of trial.

   (c) It is further agreed that if the deposition is not signed within thirty (30) days after submission to counsel, the signature of the deponent is waived.

D. Objections

Since objections to form are almost always waived if not asserted, it may be wise to object to substantive leading questions asked at deposition by an attorney to his or her own client. Another common objection includes objecting to questions that are compound or otherwise unclear so that the deponent may not understand the questions.

E. Video Depositions

A party may record a deposition by videotape, so long as that intent is included in the notice (or the parties agree). Super. Ct. R. 26(l). The Court, within its discretion, may allow the use of videotaped depositions that have been taken by agreement at trial. If the parties cannot reach an agreement, the Court may still, in its discretion, order the taking/use of such depositions. If there are objections to questions asked at the videotaped deposition, a transcript of the proceedings should be provided at the Trial Management Conference so that the court can act on the objection before the trial. Otherwise, the objection is waived.

Pretrial Statements/Civil

In superior court, parties must prepare and file a pretrial statement 14 days before the trial management conference. *See* Super. Ct. R. 35(b). In federal court, final pretrial statements are governed by L.R. 16.2.

Evidence

Below are the ten most common errors made by lawyers during evidentiary arguments according to an article by the Honorable Kathleen A. McGuire entitled "Ten Common Errors in Evidentiary Arguments" reprinted in part from *Bar News* (May 21, 1997 issue) (with permission).

1. Cross-examination beyond the scope of direct:

Rule of Evidence 611(b) states that "(a) witness may be cross-examined on any matter relevant to any issue in the case . . . ." Thus, New Hampshire has wide open cross-examination. This is unlike the analogous federal rule which limits cross- examination to issues raised on direct. Superior Court Rule 36(d) however, does limit redirect to the scope of cross-examination.

2. Unfair Prejudice

Presumably all evidence which is relevant is prejudicial to the opposing party. Mere prejudice is not a basis for exclusion. The appropriate test is whether it is unfairly prejudicial. N.H. R. Ev. 403 (noting that evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice."); *State v. Cochran*, 132 N.H. 670, 672 (1990) (internal citations omitted) ("[T]he prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.").

3. Admission v. Declaration Against Interest

These two evidentiary rules are often confused.

An admission under Rule of Evidence 801(d)(2) is a party's own statement offered against the party. So long as the statement is relevant (N.H. R. Ev. 401) and not unduly prejudicial (N.H. R. Ev. 403), it is admissible.

A declaration against interest is a statement made by witnesses other than a party to the case. Such a statement may be admitted as an exception to the hearsay rule under certain circumstances. *See* N.H. R. Ev. 804(b)(3).

4. Admissibility v. Weight

Admissibility is for the judge; weight is for the jury. Generally, as long as evidence is relevant (N.H. R. Ev. 401) and not unduly prejudicial (N.H. R. Ev. 403), it is admissible.

5. Impeachment by prior statements

Prior statements of a witness need not be shown to the witness before impeaching the witness with them. Rule of Evidence 613(a) states: "When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney."

Lawyers often confuse this rule, however, with Rule of Evidence 613(b), which requires that a witness be given an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the prior statement may be admitted.

6. Foundation: Photographs/Diagrams

In order to introduce a photograph or diagram, it is not necessary to call the photographer or the person who drew the diagram. Any person familiar with the scene or object depicted may verify the photograph or diagram by testifying basically that the witness is familiar with the scene or object and that the photo/diagram is a fair and accurate representation of the scene or object.

Keep in mind that, for purposes of introducing evidence, both the State and Federal Courts use some form of electronic (cloud-based) exhibit and evidence management application at hearings and trial.

Attorneys and SRLs can leverage CaseLines exhibit management software to organize, annotate, and present all types of evidence in both civil and criminal cases. Efficient exhibit communication driven by CaseLines is expected to support speedier hearings and reduce workload. CaseLines Digital Evidence Center ("CaseLines"), is also a new Thomson Reuters product, is a cloud-based court exhibit and evidence management application. The CaseLines Digital Evidence Management project has rolled out in two phases. Phase 1 focused only on evidentiary hearings and bench trials. Phase 2 incorporated the jury component. Phase 1 is completed, and Phase 2 began October 2024. Judges, litigators, and court staff are continuing to optimize the technology that eliminates burdensome paper copies and facilitates multimedia evidence presentations.

7. Hearsay: Statements of another witness who will testify at trial

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. N.H. R. Ev. 801(c). Simply because the declarant will testify at another point in the proceeding does not convert a hearsay statement into a non-hearsay statement. *State v. Coppola*, 130 N.H. 148, 153 (1987).

8. Hearsay: Witness's own out-of-court statements

A witness's own prior statements are hearsay to the same extent that any other person's statements would be unless they fit within Rule of Evidence 801(d)(1) in which case they are not hearsay.

9. Hearsay: When statements are not hearsay and admissible just because they are made

Attorneys often argue that particular statements are not hearsay because they are not coming in for the truth of the matter asserted but only for the fact that they were said. Often these arguments are transparent and are offered as a way around the hearsay rule. Allowing such testimony merely because it was said would be improper. *Compare State v. Favreau*, 134

N.H. 336, 240–42 (1991), *with State v. Belkner*, 117 N.H. 462, 469 (1977). Some words have legal significance merely because they were said or written. In these cases, the words themselves are in issue.

10. Hearsay: State of mind of person hearing statements

In some cases, the state of mind of the person receiving the statements is relevant and evidence about the statements is admissible for a non-hearsay purpose.

Life Expectancy Tables

The life expectancy tables published by the United States Center for Disease Control and Prevention, National Center for Health Statistics and available at http://www.cdc.gov/nchs are admissible as evidence to prove life expectancy. *See* Super. Ct. Civ. R. 37(e).

Medical Records

A. Counsel should not contact a physician without having obtained a medical release authorizing them to speak with the physician and/or to view the patient's medical records. Counsel should be aware that many health care providers require current releases (signed within the past ninety (90) days). The release must be HIPPA compliant. Sample forms can be found online.

Some health care providers require releases with original signatures and therefore refuse to accept copies of releases. Many providers will also provide their own releases.

B. Attorneys should exercise caution when permitting opposing counsel to review medical records or to obtain medical records through a release. Any such authorization or release must be narrowly tailored and must instruct the health care provider as to the limited purpose of the release. It is recommended that the release specify that the requesting party does not represent the patient. It is also recommended that the opposing counsel be required to forward a complete copy of all medical records obtained to the counsel representing the party whose records were obtained.

A. Mental health records are privileged and protected. *See* RSA 330-A:32; N.H. R. Ev. 503(b); *Desclos v. S. N.H.Med. Ctr.*, 153 N.H. 607, 616–18 (2006). However, they may be relevant and, therefore, necessary to provide in cases where severe emotional distress is claimed. Clients should be aware that if they are claiming they underwent treatment for severe emotional distress related to their cause of action, they will end up waiving privilege and may be required to disclose unrelated treatment.

Objections to Evidence at Trial

Unless an objection was made or an exception was reserved at trial, alleged errors of evidence by the trial court will not be considered on appeal. Good practice dictates that all grounds for an objection be stated with specificity, not just in a general objection. N.H. R. Ev. 103; *State v. Johnson*, 103 N.H. 578, 587 (1988).

Experts

A. Written Disclosure: Super. Ct. R. 27(a) mandates that "within 30 days of a request by the opposing party, or in accordance with any order of the court issued pursuant to Rule 5 a party shall make a disclosure of expert witnesses (as defined in Rule of Evidence 702), whom he or she expects to testify at trial." In practice, expert disclosure dates are almost always set by the Rule 5 Case Structuring Order.

This disclosure must conform with RSA 516:29-b, unless waived by agreement of the parties; however, in practice the requirements set forth in the applicable court rules almost always result in a disclosure that complies with the statute. The statute requires that the disclosure be accompanied by a written report from the expert. The statute enumerates certain detailed requirements for the expert report. Note that the report requirement only applies to witnesses "retained or specially employed to provide expert testimony," or "whose duties as an employee of the party regularly involve giving expert testimony." Retained experts must sign their reports.

B. Federal Rule of Civil Procedure 26(a)(2) contains the federal requirements for expert witness disclosures; they are similar to the state rules.

C. Parties are under a duty to supplement their responses to each of the above items, as well as answers to interrogatories and other discovery as laid out in Super. Ct. R. 21(g).

D. Payment of a contingency fee to any witness, including an expert, is prohibited.

Contribution

A. A right of contribution exists between or among two (2) or more tortfeasors who are jointly and severally liable upon the same claim, whether or not judgment has been recovered against all or any of them. RSA 507:7-f, I.

B. Contribution is not available to a person who enters into a settlement with a claimant unless the settlement extinguishes the liability of the person from whom contribution is sought, and then only to the extent that the amount paid in settlement was reasonable. RSA 507:7-f, II.

C. Generally, the right of contribution may only be enforced by bringing a separate action for that purpose. *See* RSA 507:7-f, I. If judgment has been rendered, the action for contribution must be commenced within one (1) year after the judgment becomes final. RSA 507:7-g, III. There are additional methods of enforcing the right of contribution which are set forth in RSA 507:7-g.

Dismissal

State Actions

1. Three (3) Year "New Activity" Rule

   In all non-jury cases, except marital cases, the Superior Court may dismiss an action or declare a non-suit when it appears that there has been no activity on the docket for a period of three (3) years. *See* Super. Ct. R. 41.

2. Voluntary Dismissal

   A plaintiff may elect to voluntarily dismiss an action by requesting a non-suit. Plaintiff's counsel should ensure that the non-suit is "without prejudice" so that the action may be reinstituted at another time. However, if it will prejudice the defendant, or if the motion for non-suit is solely for the purpose of delay, the court may in its discretion deny a motion for voluntary non-suit without prejudice or grant the motion "with prejudice." *Total Service, Inc. v. Promotional Printers, Inc.*, 129 N.H. 266, 267–68 (1987).

B. Federal Actions

In Federal Court, a plaintiff may voluntarily dismiss its action by stipulation or by filing a "notice of dismissal" prior to entry of the defendant's answer. Fed. R. Civ. P. 41(a). Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is "without prejudice." If the opposing party has filed an answer, the plaintiff must seek leave of the court unless all parties assent to dismissal. If the case settles before trial (i.e., all parties assent to the dismissal), plaintiff's counsel ordinarily files the stipulation for dismissal.

Jury Instructions

A. Civil

Matthew Bender publishes New Hampshire Civil Jury Instructions, which are form jury instructions for civil cases. You can access these through LexisNexis as well. It is highly recommended that these jury instructions be utilized, if possible. *See* New Hampshire Civil Jury Instructions, New Hampshire Handbook Series (Matthew Bender & Co. 2020).

Certain standard instructions, such as "what is evidence," will normally be included by courts without the parties needing to ask for the instruction.

B. Criminal

The New Hampshire Bar Association has published "New Hampshire Criminal Jury Instructions," a group of standard jury instructions for criminal cases. Contact the Bar Association to obtain a copy.

Judgment Notwithstanding the Verdict/Motion for Directed Verdict

A motion is normally made in court orally at the end of the case of the moving party's opponent. You can also submit it in writing. It is advisable that a defendant move for a directed verdict at the close of evidence; otherwise, a subsequent motion for judgment notwithstanding a verdict may be prohibited by the Court. *See, e.g.,* Fed. R. Civ. P. 50; Super. Ct. R. 43.

Relief Based on Accident, Mistake or Misfortune

"A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." *See* RSA 526:1.

In other areas of law, a person may be relieved from a failure to file an appearance, pleading, appeal or other document within proper time limits if his/her failure was "the result of accident, mistake, misfortune and not due to neglect." *See, e.g.,* RSA 72:37-a, RSA 491:22, III, RSA 511:13, RSA 599:1-b; *see also Craftsbury Co., Inc. v. Assurance Co. of Am.,* 149 N.H. 717, 719 (2003).

Interest on Judgments

A. Civil Actions

1. State Courts

In civil actions in the New Hampshire state courts, prejudgment interest is allowed from the date of the summons at a rate computed pursuant to RSA 336:1. Post-judgment interest accrues under the same statute. *Id*. The rate is determined by the state treasurer, who transmits it to the director of the administrative offices of the courts on or before the first day of December each year. The rate remains in effect from January 1 through December 31. *Id*.

Statutory interest is calculated from the date of the summons through the date of judgement. RSA 524:1-b. If the interest rate varied during the pendency of the litigation, the interest rate that applied during each year will be applied to the applicable time period to calculate the total interest due. *Linteau v. Gauthier*, 142 N.H. 460, 461 (1997).

2. Federal Courts

If the issue is a federal one, interest is determined by the federal interest rate, which tracks the federal reserve. In federal diversity cases, the prevailing party uses their own state interest rate. 28 U.S.C. § 1961 governs civil and bankruptcy adversary judgment interest.

B. Mediation and Arbitration

Many cases are resolved by either mediation or arbitration. The parties should decide in advance of private mediation or arbitration how the interest component will be addressed. Often parties will apply the interest that would be available in a court judgment.

Typically, counsel agree on three private mediators, the names of whom are included in the Case Structuring Order (state court) or in the Rule 26 Discovery Plan (federal court). However, volunteer mediators are also available in the state court clerks' offices.

C. Workers' Compensation

There are unique rules that apply to the award of attorneys' fees and statutory interest in the Workers' Compensation context. For a discussion of those rules, *see* the Workers' Compensation section, below.

D. Contractual Interest

The statutes above do not apply if the parties had agreed in writing that another interest rate would apply. RSA 336:1. In order for the contractual interest rate to apply, the parties must have agreed in writing, and the agreement needs to have been signed by the defendant. *In re Bradford Realty, Inc.*, 55 B.R. 218, 220 (Bankr. D.N.H. 1985); *D.W. Clark Rd. Equip. v. Murray Walter, Inc.*, 124 N.H. 281, 285 (1983).

Federal Tort Claims

In Federal Tort Claim cases, attorney fee limits are established by statute: 20 percent if settled before suit and 25 percent if settled after suit is initiated, during trial or through a verdict. 28 U.S.C. § 2678. Violation of these limits is a **criminal offense**, with a maximum penalty of one year in prison and a $2,000 fine.

Settlement

A. In General

New Hampshire law encourages the settlement of disputes, the parties are generally free to settle a case on any terms they like at any stage of the proceedings. *See Halstead v. Murray*, 130 N.H. 560, 564–65 (1988); *In re Estate of Kelly*, 130 N.H. 773, 781 (1988).

B. Attorney Authority

For the purposes of negotiating and executing a settlement agreement, the parties' attorneys are presumed to have authority to bind their clients and each party and his/her attorney is entitled to rely upon the appearance of such authority in negotiating and agreeing upon settlement terms. *J.E.D. Associates, Inc. v. Town of Danville*, 122 N.H. 234, 236 (1982). However, that authority ends at the death of the client. *In re Estate of Kelly*, 130 N.H. 773, 782 (1988); *see* N.H. R. Prof. Conduct 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."); N.H. R. Prof. Conduct 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."); *Koch v. Randall*, 136 N.H. 500, 504 (1992).

B. Settlement for Minor

A settlement on behalf of a minor which net amount exceeds $10,000 must be approved by the Court in which the action is pending or to which the Writ may be made returnable. RSA 464-A:42; Super. Ct. R. 40(b); Dist. Ct. R. 3.40.

C. Settlement by the Parties Agreement

The parties should memorialize their settlement in a written agreement signed by all parties and their attorneys. Such an agreement will be enforceable as a contract even without approval of the court. *See, e.g., Goodrich v. Webster*, 74 N.H. 474, 475 (1908).

D. Settlement by the Court's Order Terminating the Case

Regardless of the parties' agreement, a case cannot be terminated without an order of the court and an entry on the docket. In many cases, the parties will submit their settlement agreement to the court in the form of Stipulations and will ask the court to approve the terms. In this way, the Stipulations become part of an enforceable court order.

In other cases, the parties may not want the terms of their settlement agreement made to the public and will simply stipulate to the wording of final docket markings while entering into a formal settlement agreement that will not be submitted to the court.

Third Party Practice

A. *Against A Person Who May Be Liable to the Plaintiff (Joinder)*

At any stage of the proceedings, any party move to add a third party, either as a plaintiff or defendant, in order to determine their rights or obligations in the underlying claim. Super. Ct. R. 14. The motion must identify the party and show how his or her rights or obligations are involved in the proceeding. An attested copy of the motion must be served on the third party, and the third party may object. The court has discretion to permit the joinder, and usually will do so if the procedure may be expected to avoid multiple claims. *See King v. Nedovich*, 118 N.H. 161 (1978).

In federal court, the third-party plaintiff must obtain leave of the court if it files its complaint more than 14 days after serving its answer. Fed. R. Civ. P. 14.

B. *Against A Person Who May Be Liable to the Defendant (Interpleader)*

1. In General

Superior Court Rule 10 provides that a party against whom a claim for affirmative relief is asserted may, in turn, bring an action against any other person who will be liable to him or should the opponent prove any part of his claim. *See Sears v. Philip*, 112 N.H. 282, 284–85 (1972). In order to be consolidated with the underlying action, third-party proceedings must be commenced within thirty (30) days after the defendant files its answer unless the deadline is extended "for good cause shown to prevent injustice." Counterclaims and crossclaims must be filed within thirty (30) days of the Defendant's answer date. *See* Super. Ct. R. 10.

In federal court, Rules 19 and 20 govern. The claim against the third party will automatically be consolidated with the original case or cases, but any party may move to sever claims for trial. Crossclaims and counterclaims in federal court must be pled with the Answer. *See* Fed. R. Civ. P. 13.

2. Contribution Among Joint Tortfeasors

If the plaintiff in a tort action consents, a defendant may commence an action of law against another person who is "jointly and severally liable upon the same indivisible claim, or otherwise liable for the same injury, death or harm" and move for the two actions to be consolidated for discovery and trial. *See* RSA 507:7-f. When the plaintiff receives a verdict in his favor, the court will enter judgment separately against each defendant for his proportionate share of the damages. RSA 507:7-e (III); *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793, 803–04 (2006); *Jaswell Drill Corp. v. General Motors Corp.*, 129 N.H. 341, 343 (1987) ("The Act . . . adopts the rule of contribution among tortfeasors and allows appointment of damages.").

MECHANIC'S LIENS

Statutory Lien

Anyone who performs labor or furnishes materials to real estate in an amount over $15.00 (i.e., construction projects, improvements, etc.) automatically has a lien (commonly called a "mechanic's lien") on the real estate and improvements which secure the right to payment. RSA 447:2–4; *see also* RSA 453:1, *et seq*. Such liens can also attach to vessels. RSA 447:1. This lien can be lost if the specific procedural requirements of RSA 447:1, *et seq.* for "perfecting" or "securing" the lien are not satisfied. *See Marston v. Stickney*, 55 N.H. 383, 385 (1875).

Statutory Requirements

Contractors and subcontractors are entitled to the same lien. RSA 447:5. However, to be entitled to the full amount of the lien against the owner, a subcontractor must provide written notice to the owner and the construction mortgagee of the subcontractor's intent to claim a mechanic's lien **prior to** providing the labor or materials. *See* RSA 447:5, 6, & 12(b). The notice requirements are set forth in RSA 447:5 and RSA 447:12-b, II. If the required notice is not given until after the labor or material is provided, the lien is valid only to the extent of the amount due to the party with whom the subcontractor contracts. RSA 447:6; *Westinghouse Elec. Supply Co. v. Electromech, Inc.*, 119 N.H. 833, 835 (1979); *Russell v. Woodbury*, 135 N.H. 432, 435 (1992). The person giving notice must furnish the owner/controller of the relevant property with an accounting. RSA 447:8. Mechanic's liens are subject to reduction for set off, recoupment and counterclaims. *Westinghouse*, 119 N.H. at 837.

Perfection of Lien

Mechanic's liens are perfected by obtaining and perfecting an *ex parte* attachment. Sample forms can be found here for the Superior Court and here for the Circuit Court. Mechanic's liens are limited to the specific real property, vessel, etc. to which the labor and/or materials were furnished. RSA 447:1, *et seq.* Plaintiff's Petition/Motion for *Ex Parte* Attachment and Writ of Attachment must adequately describe the property at issue to avoid wrongfully attaching other real estate belonging to the defendant. *Alex Builders & Sons v. Danley*, 161 N.H. 19, 26-27 (2010). The Superior Court provides a checklist for perfecting a mechanic's lien, which is available here.

The petition must affirmatively set forth plaintiff's compliance with RSA 447 (specifically the 120-day perfection deadline). *See* RSA 447:9. After the *ex parte* attachment is granted, a Writ of Attachment is completed, attached to a certified copy of the Court's Order granting the attachment, and recorded in the Registry of Deeds in the county where the property is located. The Writ of Attachment and Summons and Complaint must then be served upon the defendant. The Court typically gives the plaintiff 20 to 30 days to accomplish service.

Once perfected, the lien is entitled to priority over certain mortgages, attachments and liens. *See* RSA 447:11, 12-a; *Lewis v. Shawmut Bank*, 139 N.H. 50, 52 (1994). A mechanic's lien made pursuant to RSA 447:1, *et seq.* does not have precedence over tax liens. RSA 447:9.

The Writ of Attachment must strictly conform to the statutory requirements and case law that has developed. *See Gothic Metal Lathing v. FDIC*, 135 N.H. 262, 263 (1992). The Writ of Attachment must satisfy the three-prong test established by *Gothic Metal Lathing*. The Writ must state the purpose for which the attachment is brought, describe the property to be attached with reasonable accuracy and specificity, and direct the officer to attach that specific property. *Id.* In determining whether the above requirements are met, the Court considers both the Petition/Motion for Attachment and the Writ of Attachment as an integrated whole. *Alex Builders & Sons, Inc.*, 161 N.H. at 24–25. Although the Writ of Attachment must clearly identify the real estate to be attached, over inclusion of property to be attached does not void a mechanic's lien on the property validly subject to it so long as the statutory requirements are met. *Id.* at 27.

Time Limitations

Except in the case of public works projects, mechanic's liens must be perfected within one hundred twenty (120) days from the last date the labor is performed or the materials furnished. RSA 447:9. The lien must be perfected within this period or it is lost. RSA 447:9-10. Case law suggests that the one hundred twenty (120) day time limit begins to run when the job is substantially completed. *See Bader Co. v. Concord Electric Co.,* 109 N.H. 487, 489 (1969); *Tolles-Bickford Lumber Co. v. Tilton School,* 98 N.H. 55, 58 (1953). For instance, in *Tolles-Bickford*, the Supreme Court opined that the subsequent provision of some molding that had been previously omitted by a materialman did not serve to extend the materialman's lien deadline because the Court treated it as a substitution. *Id.*

Public Works Projects

Publicly owned property is not subject to liens. Thus, if a construction job is done for a state, county, or municipal public works project, the liens given by RSA 447:5–14 attach to money due to be paid by the state or political subdivision. Any such lien must be filed within ninety (90) days after the completion and acceptance of the project by the contracting party. RSA 447:15. If the public project contract is for an amount of $75,000 on behalf of the state or $125,000 on behalf of a political subdivision, the general contractor is required to provide a payment bond to protect materialmen and subcontractors. RSA. 447:16.

To recover against the bond, the subcontractor or supplier must file a statement of claim within ninety (90) days after the completion and acceptance of the project by the contracting party. *Fastrack Crushing Servs., Inc. v. Abatement Int'l/Advatex Assocs.*, 149 N.H. 661, 664–67 (2003). The notice must be filed with the Secretary of State if the State is the contracting party. The notice must be filed with the Department of Transportation or Department of Administrative Services if the state is a party to the contract by or through either Department. If a political subdivision of the state is a contracting party, the notice must be filed in the Superior Court for the county in which the contract was principally performed. Additionally, a copy of the notice must be sent to the principal and surety (bond company). RSA 447:17. Plaintiff's counsel should obtain a copy of the payment bond because it may expand (but not restrict) the right to recover upon the bond. *In re Leon Keyser, Inc.*, 97 N.H. 404, 407–09 (1952). To enforce the claim against the bond, the claimant must file a Petition in the Superior Court within one (1) year after filing the notice of claim. RSA 447:18.

PROBATE

Assets: Probate and Non-Probate

(1) A probate asset is property owned by the decedent (titled in the decedent's name alone), including real estate, tangible personal property ("TPP") (*e.g.,* household furniture, jewelry (whether kept in the home or in a safe deposit box), tools, and automobiles[4]) and intangible property (e.g., investment accounts, bank deposits, securities, and contract rights) that does not have a beneficiary designation.

(2) A non-probate asset is property which passes automatically to persons or beneficiaries without the supervision of the Probate Court (Circuit Court Probate Division). Examples of non-probate assets are jointly-held property passing to a surviving joint tenant; life insurance proceeds payable to a designated beneficiary and not to the decedent's estate; property passing by way of an inter-vivos or irrevocable trust to the beneficiaries named in the trust; and retirement plans and Individual Retirement Accounts (IRAs) that are payable to the designated beneficiaries and not to the decedent's estate. Many brokerages and banks allow for beneficiary designations, variously called Payable-on-Death (POD), Transfer-on-Death (TOD), or In-Trust-For (ITF) (sometimes called a "Totten" Trust). Note that the ITF designation is not really a trust.

(3) For federal estate tax purposes, all assets owned by the decedent upon death are included in the total gross estate minus exemptions and deductions, such as estate administration expenses, property passing to a surviving spouse and qualified charitable expenses. This includes both probate and non-probate assets, including some jointly-held assets and certain transfers made within three years of the decedent's death. Both of which should be included in the calculation to determine the decedent's potential estate tax liability.

Disclaimers

A disclaimer is a written statement declining to accept (or devolving) an inheritance, property passing automatically by operation of law, or other gift. In 1996, New Hampshire adopted the Uniform Disclaimer of Property Interests Act, RSA 563-B, codifying the right of an individual[5] to disclaim an interest in property. Given the increase in the use of disclaimers since the passage of the Uniform Act, the Probate Court published a bulletin to address court procedure, Prob. Div. Procedure Bulletin 16. RSA 563-B:4 describes the "form" of the disclaimer, and RSA 563-B:12 describes when the right to disclaim will be barred.

[4] In New Hampshire, if a motor vehicle used for family purposes is registered in the name of a decedent, it is deemed to be jointly owned with a surviving spouse. Therefore, if there is a surviving spouse, the motor vehicle of a decedent is a non-probate asset, which transfers to the surviving spouse outside of the probate process. RSA 261:17. The surviving spouse need only sign the title and present a certified copy of the death certificate to transfer title. RSA 261:17.

[5] Any fiduciary, including an executor, administrator, trustee, guardian, or conservator, may disclaim a property interest.

For a disclaimer to be effective, the potential recipient must make no use or control over the disclaimed property prior to the disclaimer. Further, the potential recipient must not accept the property or any interest or benefit of the property to be disclaimed within a reasonable time after learning of the interest. RSA 563-B:11 requires that a copy of the disclaimer be filed with the Probate Court of the county in which the probate proceeding is pending. There are also delivery requirements set forth under RSA 563-B:11 that are important to review. If the disclaimer involves real property, a copy of the disclaimer must be recorded in the appropriate Registry of Deeds.

If the statutory requirements set forth under RSA 563-B are met, the use of disclaimers has the effect of reducing or avoiding estate, gift, and generation-skipping transfer taxes. For example, upon transfer of the property to those who take as a result of the disclaimer, there will be no gift tax owed by the disclaimant. To achieve the transfer without federal gift tax consequences, a disclaimer will normally have to be a "qualified" disclaimer pursuant to the Internal Revenue Code Section 2518, as amended. A qualified disclaimer must be written and executed within nine (9) months[6] of the decedent's death and is irrevocable once made. If the disclaimer does not meet the requirements of a qualified disclaimer, the disclaimed property may be deemed to pass from the disclaiming party and not the decedent, and therefore, have gift tax consequences. *See* I.R.C. § 2518 and 7 C. DeGrandepre, N.H. Practice: Wills, Trusts & Gifts at 20 (4th ed. 2003). It should be determined as soon as possible whether it is beneficial for a beneficiary to disclaim his or her interest in property passing as a result of a decedent's death with the nine (9) month deadline, execution, delivery, court filing and recording requirements in mind.

Federal Estate Tax Return (Form 706)

To determine whether to prepare and file a U.S. Federal Estate (and Generation-Skipping Transfer) Tax Return, Form 706, for a decedent, it is important to check the federal annual exclusion amount in effect at the time of the decedent's death to determine whether there is any federal estate tax liability for the estate, as the applicable federal exclusion amounts vary depending on the date of death of the decedent.[7] A federal estate tax return must be filed if the decedent's gross estate plus adjusted taxable lifetime gifts exceeds the exemption amount. Following the passage of the American Taxpayer Relief Act of 2012 (Pub.L. 112-240, H.R. 8, 126 Stat. 2313, enacted January 2, 2013), Congress made permanent the $5,000,000 exemption, indexed for inflation from 2011, for gift, estate, and generation-skipping transfer taxes.

[6] Under RSA 563-B:2, the nine-month time limit on disclaimers applies when the interest being disclaimed is a present interest under a testamentary document or the laws of intestacy, as well as under a trust that becomes irrevocable upon the decedent's death and in a joint tenancy.

[7] The Tax Cuts and Jobs Act (TCJA), passed in 2017, set the unified federal estate and gift tax exemption at $11.18 million for 2018, $11.4 million for 2019, and with annual inflation adjustments for 2020-2025. For 2020, the estate and gift tax exemption is $11.58 million per individual and $23.16 million for a married couple. The annual gift exclusion amount is $15,000.

The American Taxpayer Relief Act of 2012 also made permanent the portability of the gift and estate tax exemption. Under this law, if a spouse dies without fully utilizing his or her estate tax exemption, the estate of the second spouse to die may use whatever portion of the exemption was not used by the first spouse. In order to preserve the predeceased spouse's unused estate tax exemption (DSUE) for use by the surviving spouse, a timely U.S. Federal Estate Tax Return, Form 706 must be filed. Therefore, the U.S. Federal Estate Tax Return may need to be filed for a decedent, even if there is no federal estate tax due.

It is important to plan ahead for the preparation and filing of a Form 706, which is due within nine (9) months after the date of the decedent's death. The IRS will allow an extension to file and/or to pay the federal estate tax due; however, the estimated federal estate tax must be paid with the filing of the extension request, Form 4768, to avoid late fees and penalties. A Form 712 will need to be completed by all insurance companies for life insurance policies of which the decedent was the owner and/or insured, and for policies that designate the estate as the beneficiary. The values of all of the decedent's assets and all interest and dividends earned must be determined as of the decedent's date of death. Household and personal property and real estate may need to be appraised. A closely held business interest, limited liability corporation, partnership interest, or family business may also need to be formally appraised, and appropriate discounts may need to be factored in. It is important to review the decedent's assets upon death and to order the appraisals early in the estate administration process. The right to make certain elections may be lost if the Form 706 is filed late without an approved extension; although, extensions are not difficult to obtain. If the estate is a taxable estate, assets should be revalued six (6) months after death (known as the alternate valuation date) and compared to the date of death values to determine if the alternate valuation date values are lower (resulting in a lower federal estate tax).

Filing Requirements and Other Important Dates

When administering an estate, create a checklist for the probate administration, court filing due dates and the federal and state tax deadlines to avoid missing an important deadline or filing. Implement a tickler or reminder system on your calendar. The Circuit Court Administrative Office and Electronic Filing Center have prepared a reference guide for "Administering an Estate," which is a helpful resource to guide individuals serving as a fiduciary of an estate.

Late filings can be expensive, may be grounds for a malpractice suit, and result in the loss of client confidence.

Any new estate cases filed after June 14, 2017 must be initiated electronically at all probate division locations. The following provides an initial overview of forms to be filed to open a probate administration matter. The forms, both paper forms and e-Filing forms (generally e-Filing forms have the "Pe" suffix designation), are conveniently available on the Probate Court's website at https://www.courts.nh.gov/our-courts/circuit-court/forms/will-and-estate-e-filing-forms.

The Probate Division Rules, Administrative Orders and Procedure Bulletins are also available on the Court's website.

For administration, with or without a Will, you will need to prepare one or more of the probate forms listed below. If the decedent left a Will (testate), the original Will (and codicils, if any) must be filed with these opening papers by mailing the Will to the Estates Electronic Filing Center or delivering it to a Circuit Court Probate Division court. In all cases (whether testate or intestate), you must mail a certified copy of the death certificate, which usually is provided by the funeral director. The most commonly used forms are:

(1) **Petition for Estate Administration** (form NHJB-2145-Pe), (RSA 550:1 and 553);

(2) **Legatees and Devisees** – **Estate with Will** (form NHJB-2150-Pe**)** or **Heirs-at-Law – Estate without a Will** (form NHJB-2151-Pe).

(3) Pursuant to Probate Division Rule 21, copies of all documents and correspondence filed with or submitted to the Court must be sent to all beneficially interested persons, as defined by RSA 550:12, and filings accompanied by a **Certification of Copies to Parties** (form NHJB-2148-P; NHJB-2148-DFPe).

(4) **Bond** with **Sureties** is usually required by the Court in an amount set by the Judge. The Surety Bond can be obtained and filed within thirty (30) days of the Petition approval and setting of the bond. The Surety Company will prepare the proper form to be filed with the Court. You should become familiar with a Surety Bond agent and may obtain forms or applications ahead of time, or you may submit an online bond application. Under RSA 553:13 (II), if the estate has a gross value of $25,000 or less only a Personal Surety Bond should be required.

(5) **Waiver of Administration** is available in the following circumstances:

- **(a)** A decedent dies testate and an individual is named in the Will as the sole beneficiary and is appointed to serve as administrator;
- **(b)** A decedent dies testate and all individuals named in the Will as beneficiaries of the decedent's estate are appointed to serve as co-administrators or any appropriate person is appointed, with the assent of all beneficiaries;
- **(c)** A decedent dies testate, a trust is named in the Will as the sole beneficiary and any appropriate person, including one or more trustees of the trust is appointed to serve as the administrator, with the consent of all trustees;
- **(d)** A decedent dies intestate and an individual is the sole heir and is appointed to serve as the administrator;
- **(e)** A decedent dies intestate and all heirs of the estate are appointed to serve as the co-administrators, or any appropriate person is appointed to serve with the assent of all heirs; and
- **(f)** In the discretion of the court, the court determines it is appropriate under the circumstances. RSA 553:32.

In order to comply with these requirement disclaimers, ademption of legacies, or declination to serve as executor may be used. RSA 553:32, I.

The Waiver of Administration process provides a simpler process to settle an estate, involving less court supervision, in which the court does not require an inventory, a fiduciary bond and an accounting.

File form NHJP-2144-Pe, **Waiver of Full Administration Statement to Close Estate**, between 6 and 12 months after the appointment of the executor or administrator. Under this procedure, the normal documents to open an estate are filed, such as the **Petition for Estate Administration**, and an interested party has six months from the appointment of the administrator to file for **Full Administration**. If no interested party files, the administration proceeds as a Waiver of Full Administration.

(6) If the conditions for a Waiver of Administration are not present, the estate will follow the **Full (or regular) Administration** process, under which an inventory of estate assets, a fiduciary bond, and an accounting are required.

(7) **Summary Administration** is available for most estates, and it is one way to close an estate (the other avenue for closing an estate is to file a final accounting). RSA 553:33. After six months, if the requirements are met, file a **Motion for Summary Administration** (form NHJB-2149-P; NHJB-2149-Pe) with the Assents for Summary Administration for all Beneficially Interested Persons (form NHJB-2122-P; NHJB-2122-Pe) By filing a **Motion for Summary Administration**, the executor/administrator affirms there are outstanding debts or claims against the estate. If allowed, the executor/administrator may finalize the administration without further court supervision and no final accounting is required.

(8) Filing Fees are required for all petitions. Check Probate Court Rule 169, the Probate Court website, which provides a fee schedule, or call the clerk for current fees (855-212-1234).

(9) If appropriate, file:

(a) **Appointment of Resident Agent**, if the fiduciary is not a resident of New Hampshire (form NHJB-2120-P; NHJB-2120-Pe) (RSA 553:25)

(b) **Declination** (form NHJB-2123-P; NHJB-2123-Pe) if the executor named under the Will declines to serve.

(c) **Statement of Counsel as to Propriety of a Foreign Will/Codicil to be Admitted into Probate** (form NHJB-2146-P; NHJB-2146-Pe), if the Will was executed in another state or foreign country.

(d) **Certification of Trust** (form NHJB-2634-P; NHJB-2634-Pe), which reports the name and address of all trustees when a trust is referenced in a Will.

Once the appropriate forms and documents (original Will and certified copy of death certificate) are filed and the Court has reviewed and accepted them, the Court will issue a **Certificate of Appointment (Letter of Appointment)** documenting the appointment of the executor/administrator. If the value of the estate is $10,000 or more and publication is required, the Court will also send a **Notice of Appointment** to area newspapers, which serves as formal notice that an estate has been opened and an executor/administrator appointed.

(10) Important Dates

DATE	FILING REQUIRED	RSA REFERENCE
Within 30 days after death	File Will with the Probate Division in the county in which the decedent was domiciled at the time of death.	552:2
Within 30 days after appointment	File Bond with the Probate Court	553:13
Within 60 days of appointment	Provide notice to Surviving Spouse, Legatees, and Heirs at Law (send to all interested parties)	552:15
File with the Petition for Estate Administration	Legatees and Devisees and Heirs at Law forms	551:12; RSA 561:1
Within 90 days of appointment (120 days with the 30 day grace period)	Inventory of Fiduciary (NHJB-2125-Pe)	554:1; 554:26-a
Within 6 months of grant of administration	Last date for creditors to "exhibit" demand to administrator	556:3
6 months after appointment	Earliest date to close Estate (expiration of six -month exhibition period for creditor claims), if all claims are paid, via Motion for Summary Administration with Assents	556:1-5
6 months after appointment	Deadline for surviving spouse to waive homestead rights, if any, and provisions for him/her in the Will, such that the surviving spouse elects instead to receive his/her statutory share, RSA 560:10, of the estate, via Waiver by Surviving Spouse (NHJB-2498-Pe)	560:14
6 months after date of death	Alternative valuation date for Federal Estate Tax Return (Form 706).	I.R.C. §2032
Within 6 months of Will's allowance	Contest a will (e.g., Motion to Re-Examine Will)	RSA 552:7

9 months after death	Due date to file Federal Estate Tax Form 706 and to pay tax if gross estate exceeds exemption amount	Form 706
9 months after death	Disclaimers must be executed, filed with Court and or recorded with Registry of Deeds	563-B, I.R.C §2518
12 months (plus 90 days) after	First Account Due	554:26; 554:26-a
Within 30 days after account filed	Beneficially interested person file objection to an account or waive right to object and the right to any further notice concerning a hearing on the account	Prob. Div. R. 108-A
12 months after appointment	Due date for payment of pecuniary legacies, with interest to accrue thereafter (See RSA 336:1, II for rate of interest)	564:C:2-201(3)
Within one (1) year of grant of administration	Last date for creditor to file suit against Executor/Administrator on claim against decedent	556:5
Two (2) years after death	Last date for creditor to bring action against real estate of decedent if no administration opened	556:29

Obtain a Tax Identification Number (TIN – also called Employer Identification Number – EIN)

You will need a federal tax identification number for the estate before you can open an account in the name of the Executor of the Estate and to close out bank accounts, sell securities, and transfer or retitle estate assets, for income tax purposes. A federal tax identification number can be obtained immediately online after completing the IRS application: Apply for an Employer Identification Number (EIN) Online. The Executor or Administrator must sign an SS-4 form prior to a third-party applying for the tax identification number for authorization. The original SS-4 form should be retained by the authorized third-party. Alternately, Form SS-4 can be filed manually, by mail or fax.

First and Final Accounts

(1) All assets, including those not inventoried, shall be accounted for, and the Administrator charged therewith in the account of administration. RSA 554:6. The account should include, among other transactions, the following disbursements: funeral and burial expenses; debts (including expenses of last illness); administrative expenses; attorney and fiduciary fees; and interim distributions made with prior court approval.

(2) Every Administrator must file an account annually, unless excused by the Judge of Probate, but accounts may not be excused for more than three (3) years. RSA 554:26.

(3) The accounting period begins with the date of appointment and continues through the last day of the month prior to the one-year anniversary of the date of appointment (e.g., date of appointment is May 15, 2019, the first account period will run through April 30, 2020). Subsequent accountings will run from the period day after the end of the first accounting period through the following year (e.g., May 1, 2020 through April 30, 2021).

(4) Executor/Administrator's Accounting, Form NHJB-2117-P; NHJB-2117-Pe, must be used for accounts.

Income Tax Considerations

When administering an estate, consider whether a final tax return, Form 1040, needs to be filed for the decedent. The decedent's final Form 1040 will include the decedent's income earned and deductible expenses paid by the decedent from January 1st through the decedent's date of death, and the Form 1040 will be due to be filed with the IRS by April 15th in the year following the decedent's death.

Estates which earn taxable income greater than $600, must file Form 1041 on the 15th of the fourth month after the close of the first tax year of the estate or April 15th, when a calendar year end is elected by the estate. Estates may use a fiscal year end in the first two years the Estate is open.

If there is a Revocable Trust, an IRS Form 8855 can be filed to make a 645 election to treat a qualified revocable trust (QRT) as part of the estate's 1041 federal income tax return. This will allow a combined 1041 tax return for the estate and trust during the estate's election period. Once the election is made, it cannot be revoked. The due date for the 645 election is the 15th of the 4th month after the close of the first tax year of the estate, or the estate's 1041 extension due date, even if there is not sufficient income to file the Form 1041 at that time.

Sale of Real Estate

When property is devised to a beneficiary under a Will, generally that beneficiary may take title to the property, subject to the rights of the estate. *Lane v. Thompson*, 43 N.H. 320, 325 (1861); *Lucy v. Lucy*, 55 N.H. 9, 10 (1874). That is, the estate retains the residual right to sell the real estate of a decedent to the extent necessary to satisfy creditor claims where the decedent's personal property is insufficient to pay the debts of the estate. Of note, the administrator is not able to possess or manage (including collection of rents) real property until they get a decree of insolvency from the Probate Court. *See Ayers v. Laighton*, 73 N.H. 487 (1906). *See also* RSA 554:19-b.

If it is not necessary to sell real estate to pay debts of the estate, title passes to those designated to receive the property by Will or under the law of intestacy. Under such circumstances, the administrator will file a **Notice to Towns and Cities Pursuant to RSA 554:18-a** (NHJB-2142-P; NHJB-2142-Pe).

RSA 559:18 permits the sale of real estate by the administrator or executor "with the written consent of the widow or widower and the heirs at law or devisees" unless the Will provides otherwise. Beware of merely obtaining the beneficiaries' signatures on the consent form. The consent should be "informed" and provide information including the proposed selling price, the terms of the sale and any terms bearing on the beneficiaries' interests. Consent to the sale does not relieve the fiduciary of his/her duty to obtain a fair price.

Suits By and Against Administrators

(1) The statutory provisions governing suits or claims against an estate are set forth in RSA 556. An action against an administrator for a cause of action against the deceased must be initiated within one (1) year of the fiduciary's date of appointment, RSA 556:5, but not sooner than six (6) months after such appointment nor unless a demand is made to the administrator. RSA 556:1; *but see* RSA 556:28 (noting that if suit is not brought within the allotted time, an extension may be granted by the court under certain circumstances).

(2) RSA 556 sets forth deadlines for creditors to notice a claim ("exhibit demand") with the personal representative of the Estate within six (6) months of the original grant of administration. RSA 556:2-3; *but see Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487–88 (1988); *Stewart v. Farrel*, 131 N.H. 458, 461 (1989).

(3) Do not rely on publication to notify creditors if you have actual knowledge of a claim. The U.S. Supreme Court, in *Tulsa Prof. Collection Servs., Inc.*, held that due process requires the personal representative to make a reasonable effort to notify all creditors of whom he has knowledge of the debtor's death. 485 U.S. at 491. Thus, the executor should send any known or potential creditor written notice of the administration of the estate and appointment of the executor within the six (6) month creditor period or upon knowledge of the potential claim or creditor of the estate, by certified mail, return receipt.

Wills

(1) Execution of Will

(a) The testator must be eighteen years old or older or be married. RSA 551:1. Additionally, the testator must be of "sane mind." *Id.* The Will must be signed by the testator or by some person at the express direction and in the presence of the testator. RSA 551:2, III. The Will must be signed by two or more credible witnesses who shall, at the testator's request and in the testator's presence, attest to the testator's signature. RSA 551:2, IV.

(b) Establish a set routine for the execution of Wills. Only a single original Will should be executed. The testator has the right to revoke a Will by destroying the original; therefore, the potential for confusion in the case of multiple originals is great. The lawyer should advise the client to keep the original Will in a safe place; if the client chooses to leave the original with the lawyer, a note indicating the location of the original Will should be attached to the copy given to the client.

(c) Always incorporate a self-proving affidavit into the Will. The affidavit eliminates the necessity of producing a witness to the execution of the Will in order to prove a Will. RSA 551:2-a, 552:5-b and 551-A. If a self-proving affidavit was not signed, RSA 552:6 allows for proof of a Will in common form without the testimony of a subscribing witness with the assent of the surviving spouse, legatees, devisees, heirs at law and, for an unnamed charitable interest, the director of charitable trusts.

(2) Proof of Will During Life of Testator – RSA 552:18 provides a process for proving a Will during the lifetime of an individual. In order to be eligible to initiate the proceeding to prove a Will, the individual must be either a New Hampshire resident or own real estate in New Hampshire. Notice must be provided to the "interested" parties of the proceedings listed in the statute. The Will must then be proved "in solemn form." After going through this process, upon the death of the testator, the Will can be admitted to probate and conclusively deemed proved.

(3) Filing the Will - Anyone who has physical custody of a Will must deliver it to the Probate Court in the county in which the testator was domiciled, or to the person nominated in the Will as executor, within thirty (30) days after the custodian has learned of the death of the testator. RSA 552:2. Even if a decedent seemingly leaves no assets subject to probate, the original Will should be placed in the custody of the Probate Registry. RSA 552. Absent sufficient cause for noncompliance in filing the Will with the Court, the penalty for failure is $20 per month, to be recovered by any person having an interest in the Will. RSA 552:4.

Ancillary Administration in New Hampshire

If a non-resident (non-domiciliary) dies with property in New Hampshire that does not pass by title or operation of law, an administrator (or personal representative) may need to be appointed in this State to manage the New Hampshire assets. The process by which a probate or administration is opened in New Hampshire for a non-resident decedent is known as ancillary administration. An ancillary administration, both its opening and procedure, follows a trajectory similar to the administration of a domiciliary's estate. The "types" of estate administration referenced above (e.g., Full Administration; Waiver of Administration; and Summary Administration) apply to ancillary estates.

Generally, ancillary administration is required if the decedent (i) was not a New Hampshire resident at death and (ii) died owning real estate or other property (*e.g.,* a safe deposit box) in New Hampshire. For pre-mortem estate planning purposes, counsel should consider advising non-residents with property in the State to own the New Hampshire property in a trust, in a joint tenancy (which includes a right of survivorship in New Hampshire), or with a designated survivorship right (such as transferable-on-death designations on securities or IRAs).

Probate Litigation

1) Will Contest

A will contest is initiated by the filing a Motion to Re-Examine Will with the Probate Court. In the Motion, the contestant must identify the grounds for seeking re-examination. There are two primary categories (or tracks) for re-examination: (a) lack of due execution (*e.g.,* only one witness signs in the testator's presence); or (b) RSA 552:7 grounds for invalidation. Per RSA 552:7, a Will may be invalidated if the testator lacked testamentary capacity or if the instrument was the result of fraud, duress, or undue influence. As a precondition for filing a claim, the contestant must surrender to the executor any legacy received. If a will contest is successful, the Probate Court will disallow the Will, resulting in the revival of a prior will that was revoked expressly or by implication by the execution of the contested will. *See* RSA 551:13, I (prescribing the circumstances under which a will or clause of a will may be revoked).

2) Trust Contest

Many of the same legal elements, evidentiary standards, burdens of proof, and strategic considerations that apply in will contests also apply in the context of challenges to a trust instrument. The trust contest is commenced with the filing of a petition seeking to "set aside" the instrument, often on the basis of incapacity, RSA 564-B:4-402, and/or undue influence, RSA 564-B:4-406(a).

3) Companion and Other Claims

Will and trust contests are often accompanied by other causes of action and/or companion cases. Companion claims may seek the imposition of a constructive trust on transfers and benefits received by the primary legatee on the grounds of unjust enrichment. Another common cause of action is a demand for an account of acts by an attorney-in-fact under a power of attorney, RSA 564-E:114(h).

Other equity proceedings include trustee removal actions, RSA 564-B:7-706, which frequently involve claims for breaches of fiduciary duties, such as the duties of care (RSA 564-B:8-804), loyalty (RSA 564-B:8-802), and impartiality (RSA 564-B:8-803).

REAL ESTATE

Title Standards

The New Hampshire Bar Association Real Property Law Section has adopted title standards which, in and of themselves, are an excellent guide to traps for the unwary. The standards are updated every few years. A link to the current version of the title standards may be found at: https://nhba.s3.amazonaws.com/wp-content/uploads/2024/11/14120047/2024-Title-Standards-final.pdf

Registries

The Registries of Deeds have made their indexes available online, though some registries require you to have a subscription or to pay another fee to view the documents. Be aware that index listings referring to towns or property information are for reference only and may be incomplete. Viewing the complete document is the only way to know what is contained in any recorded document. A link to each Registry's website can be found at: http://www.nhdeeds.com/

Recording Requirements

Each of the registry websites include the detailed recording requirements (paper size, ink color, type fonts, use of copies and faxes, requirements for recording plans, etc), which are no longer optional, meaning that failure to obey will leave you unable to record your documents.

Electronic Recording

Each of the New Hampshire Registries of Deeds now permit E-Recording, which may be done through one of the electronic recording providers, including Simplifile, Corporation Service Company, Indecomm Holding Inc., or ePN. While these are the providers commonly listed on the Registry of Deeds' websites, there may be other service providers that can assist you with electronically recording documents. You also should check to see if the registry has any limitations on what they will accept. For example, Coos county will not accept e-recording of death certificates or powers of attorney.

Mortgages

Priority: Mortgages take priority only to the maximum dollar amount stated in the mortgage; a mortgage which fails to state a dollar amount takes no priority over subsequently recorded liens. RSA 479:3. Mortgages which fail to include the statutory language set forth in RSA 477:29 will likely lose the protections set forth in the statutes. Failure to include statutory power of sale language will likely disqualify the mortgage from the expedited foreclosure provisions of RSA 479:25, 26 and 27. The alternatives are at best cumbersome, expensive, and of uncertain effect. For instance, if you do not have a statutory power of sale in the mortgage, you may need to petition the court to permit you to foreclose.

Mortgage Discharges: Discharges must be executed by the record holder of the mortgage (not necessarily the holder of the loan) to be effective. Discharges may be either witnessed or acknowledged, and will be considered sufficient when substantially in the form as provided by RSA 479:7. Mortgages may also be discharged by affidavit if the mortgagee does not discharge the mortgage and record such discharge within 60 days of satisfaction of the mortgage. RSA 479:7-a. However, the provisions of the statute are not easily satisfied.

Foreclosures: Foreclosures under a power of sale clause must strictly follow the requirements of RSA 479:25 and 26. If the person selling the property under the power of sale neglects to timely provide the statutory notice to a junior lienholder, the foreclosure will not be defective if the lienholder releases its lien or, better yet, records an affidavit indicating that it had actual knowledge of the foreclosure.

"Due on sale" Clauses: Before transferring a property subject to a mortgage, check to see if the mortgage is "due on sale." If it is, obtain the lender's consent before transferring the property.

Acknowledgments

Real estate documents executed outside the United States will generally require acknowledgment at an embassy or consulate of the United States. *See* RSA 477:4.

Title Insurance

A) Title insurance insures only the property as described (Schedule A) subject to the stated exceptions (Schedule B-1), and with priority over other stated exceptions (Schedule B-2).

B) Policy jackets contain important information as to the extent of insurance and the requirements for claims.

C) It is better to file a claim too early than too late.

D) Issuers should draft the description and schedules to reflect that which is to be insured based on the current state of the property and its title, rather than to automatically accept descriptions and exceptions handed down from prior drafters. Insureds should review the description and schedules to make sure they are receiving the insurance they are paying for. Vague descriptions (e.g., east by Smith, west by the creek . . .) or descriptions containing exceptions ("except for property conveyed to Jones . . .") may indicate that a new survey should completed. Generic exceptions (e.g., "subject to all matters of record;" "subject to all matters as shown on Plan #___;" "subject to items referred to in deeds at Book __ Page _____") may gut the coverage.

E) Title insurance continues to provide coverage even after the insured has conveyed out or released its interest in the property. For example, title warranty claims may be made against prior owners of a property, and title insurance may provide the former owner coverage to defend against such a claim.

F) While mortgage holders will require title insurance to protect their interests, you should advise a buyer as to the benefits of obtaining his or her own "owners policy" that will provide the owner with additional protection.

Condominiums

A) Condominiums derive their legal standing solely from RSA 356-B, which is one of New Hampshire's longest and most complex statutes. In turn, individual condominiums, their units and owners' associations draw their attributes solely from their condominium declaration, bylaws, site and floor plans as recorded, which documents are void to the extent that they fail to comply with the letter of the statute.

B) A condo unit lacking a recorded certification of completion pursuant to RSA 356-B:20 may lack marketable title.

C) A condo unit must be described by its identifying number, name of condominium, town or city and county of location, and book and first page number where the declaration is recorded. Any further data is unnecessary, per RSA 356-B:9.

D) Condominium endorsements raise a significant risk for the issuing agent if the documents do not fully comply or if a unit as it exists differs from the unit described on the plans.

E) Condominium association liens are governed by RSA 356-B:46, which, provides that perfected condo liens take priority over all liens except property taxes, prior recorded liens and encumbrances, and first mortgages to institutional lenders.

F) Local ordinances vary as to whether a condominium constitutes a sub-division requiring planning board approval, although RSA 672:14, I, includes condominiums in the definition of "subdivision."

G) Condominium developments of 11 or more units must also register with the Attorney General pursuant to RSA 356-B.

Purchase and Sale Agreements

While New Hampshire is a "caveat emptor" jurisdiction, sellers must make some disclosures. *See* RSA 477:4-a for requirements for radon gas, arsenic, lead paint, PFAS and flood disclosures; 477:4-b for subsurface disposal system disclosures; 477:4-c for requirements for water supply and sewage disposal disclosures; 477:4-d for insulation, water supply, flood zone, and private sewage disposal disclosures in residential purchases, 477:4-g for disclosures related to the production of methamphetamines, and 477:4-h for disclosures related to public utility tariffs. RSA 477:4-f and 356-B:58 contain disclosure requirements in condominium sales. Waterfront property is subject to additional disclosure requirements. *See* RSA 485-A:39.

RSA 477:4-e states that there is no requirement to disclose that the property was a site of a homicide, other felony, or suicide unless the buyer requests such a disclosure.

Federal law requires sellers to notify potential buyers that homes and condominiums built before 1978 may have lead-based paint. As part of those disclosures, the EPA publishes a pamphlet entitled "Protect Your Family from Lead in Your Home – Real Estate Disclosure" that sellers must provide. A lead disclosure statement, such as the one produced by the EPA should also be provided.

Transfer Tax

Real property transfer tax is assessed on most transfers of ownership of real property, RSA 78-B:1, and it is to be paid in equal parts by both the seller (or grantor, assignor, or transferor) and purchaser (or grantee, assignee, or transferee) at time of recordation of the transfer, RSA 78-B:4. The exceptions to being required to pay transfer tax are contained in RSA 78-B:2.

A Declaration of Consideration form must be filed by both the seller (or grantor, assignor, or transferor) and purchaser (or grantee, assignee, or transferee) with the Department of Revenue Administration within 30 days of transfer or recording, whichever is later. *See* RSA 78-B:10.

The current tax rate is "$.75 per $100, or fractional part thereof, of the price or consideration for such sale, grant, or transfer . . . computed to the nearest whole dollar." However, for transfers under $4,000, a minimum payment of $40 is due ($20 from each party). RSA 78-B:1(b).

Transfer tax is assessed based on fair market value of the property being transferred, not necessarily the stated value at closing, so that the taxable value of a property sold subject to a mortgage and unpaid real property taxes will likely include the sum of both.

Transferring an interest in an entity owning real estate may trigger transfer tax liability, even if no deed is recorded (e.g. transfer of a membership in an LLC that operates as a holding company). *See* RSA 78-B and related administrative rules. The DRA provides separate real estate transfer tax declarations for sales of interests in holding companies, which are available on the DRA's website.

Inventory of Property Transfer

A seller must also file an original Form PA-34, Inventory of Property Transfer (a/k/a/ Real Estate Transfer Questionnaire) with the Department of Revenue Administration within 30 days of recording the deed. The form is available on the DRA's website. A copy of the Form PA-34 must also be sent to the tax assessor's office in the municipality where the property is located.

Current Use

Properties subject to current use taxation are subject to a change tax when the use of the property changes or the property otherwise becomes ineligible. RSA 79-A:7. The assessing municipality should be consulted as to whether a change tax lien has been satisfied if the lien has not been released of record. *See* RSA 79-A and administrative rules.

Trusts

Only the trustees of a trust can buy, sell, or mortgage property that the trustees hold for a trust. The trust instrument must be examined to determine whether a trustee is authorized to convey or encumber real property. Third parties are entitled to rely on a trustee certificate substantially in the form set forth in RSA 564-B:10-1013(k). Second parties (such as buyers or lenders) should not rely entirely on a certificate and should inquire into the terms of the trust.

Other Entities

An entity's organizing documents (with all amendments) and, if applicable, authorizing resolutions, must be examined to determine the entity's power to buy, sell, or mortgage property. Similarly, certificates from Secretaries of State should not be relied on for accurate spelling or punctuation of entity names. The organizational documents should be examined, and a resolution of the managers, officers, directors, or other controlling interests of the entity approving the purchase, sale, or mortgaging of a property should be obtained.

Charities, non- profit entities, religious organizations, et cetera (a/k/a voluntary corporations) do not necessarily have authority to materially change their "trust" (i.e. mission), so purchases of property from or giving secured loans to such an organization should be examined to verify compliance with New Hampshire charitable trust law, failing which the transaction may be undone later by the State. *See, e.g.* http://www.doj.nh.gov/charitable-trusts/; RSA 7:19-a.

Tenancies

Jointly owned property is owned as tenants in common unless the deed specifically creates a joint tenancy.

Joint tenancy can exist only where expressly created (e.g. "Mr. and Mrs. A as joint tenants with rights of survivorship") and only if the "four unities" are present: possession, time, title, and interest. *See* RSA 477:18. If any of the four are broken, the parties revert to tenancy in common. Only natural persons can be joint tenants (each joint tenant must be able to acquire the property upon the death of the other joint tenant).

Homestead Rights

Pursuant to RSA 480:1, every person is entitled to $120,000 worth of his or her interest in a dwelling as a homestead, provided that person also is an owner of the real estate. The homestead right is exempt from attachment on levy or execution, except in the case of the exceptions set forth in RSA 480:4. A spouse has homestead rights in the domiciliary property, but in no other property. Purchase money mortgages are exempt from homestead rights. RSA 480:5-a. Deeds from individuals not including the spouse as a grantor should either recite that the property is not homestead property or include the spouse's release of homestead rights.

Ethics Considerations in Real Estate Matters

A) Attorneys conducting real estate closings are governed by the trust accounting rules. If you do not have cleared funds in your trust account, you cannot issue any checks on a closing. *See* Supreme Court Rules 50 and 50-A.

B) A lawyer cannot "represent a transaction," but is bound by the Rules of Professional Conduct in recognizing conflicts of interest between clients and non-clients. An attorney considering representing both a buyer and seller must carefully consider the potential conflicts of interest and obtain informed consent from the parties. *See* Ethics Committee Advisory Opinion #2014-15/10.

C) Settlement agents should not charge closing costs (e.g. for obtaining a mortgage discharge, for overnight mail, for document preparation) in excess of out of pocket expenditures against any party to a closing without the prior written consent of the party being charged.

D) New Hampshire has a unique Rule of Professional Conduct Rule (N.H. R. Prof. Conduct 1.11A) that regulates conflicts of interest of lawyers representing clients before a governmental body (e.g. before a town land use board) when the lawyer or a member of the lawyer's firm sits on a town board.

Transfer of Buildings

Buildings may be conveyed separately from land. Manufactured housing (known as "mobile homes" or "trailers") are subject to special rules for conveyance under RSA 477:44. Owners of mobile home parks should also be aware of the regulations that are set forth on RSA 205-A.

Transfer Through Probate

Real property can be, and often is, transferred through probate process. A full title search must include search of the Registry of Probate in the county where the probate is located. *See* New Hampshire Bar Association Title Examination Standards, § 1-3.

Sale of Timber

Standing trees may be conveyed separate from the land and will be considered real, rather than personal, property until harvested. RSA 477:35. Commercial cutting of timber must be preceded by filing a notice of intent to cut with the applicable municipality and payment of the timber yield tax. RSA 79:10.

IRS Reporting

A Form 1099-S report must be filed to document and report most real property sales. It will normally be completed by the closing agent. *See* http://www.irs.gov/instructions/i1099s/ar02.html.

I.R.C. § 1445 requires that a buyer of real property in the United States must withhold tax on the sale of the property if the seller is a foreign person. If the seller is not a foreign person, then a "Certificate of Non-Foreign Status" should be completed as part of the closing documentation.

SMALL CLAIMS

The small claims process is governed by RSA 503:1, *et seq.*

General

A small claim is any right of action not involving the title to real estate in which the debt or damages, exclusive of interest and costs, do not exceed $10,000. RSA 503:1, I. If the damages exceed that amount, the plaintiff must waive the right to recover the amount over $10,000 in order to continue in small claims Dist. Ct. R. 4.1(a)(4)(b). In any case where the debts or damages exceed $1,500 the defendant may request a jury trial, which will result in the case being transferred to the superior court. RSA 503:1, II-III; *see* Dist. Ct. R. 4.3(a)(3)(b). In small claims cases where the amount of damages claimed is over $5,000, mediation is mandatory and shall be scheduled in advance of, or on, the hearing date. Dist. Ct. R. 4.12(b). Upon the request of any party and the agreement of the remaining parties, small claims where the amount of damages claimed is under $5,000 may also be referred to mediation. Dist. Ct. R. 4.12(a). Mediation, however, is non-binding, and does not impair the right to demand a trial.

In practice, typically the first hearing or "Pre-Trial Hearing" held in each case will include mediation. Even when the amount of damages claimed is less than $5,000, courts "strongly encourage" utilizing the mediator provided, which does not require any additional cost to be paid by the parties. Attendance at this pre-trial hearing is mandatory and failure to attend will result in the entry of judgment in favor of the non-absent party. Dist. Ct. R. 4.4(b).

If mediation is not successful, the court will schedule the case for a hearing on the merits at a later date (Though the rules allow the hearing to go forward that same day).

Service and Attachments

After the plaintiff files its small claim, the Circuit Court serves it on the defendant(s) by first class mail. RSA 503:6, I; Dist. Div. R. 4.2(a).

Pre-judgment attachments are not available in small claims actions. If a plaintiff obtains a judgment, the judgment can be recorded as a lien against any New Hampshire property owned by the Defendant by following the requirements set forth in RSA 524:13.

Pleadings and Evidence

The pleading requirements in small claims are minimal. "[A] small claim complaint need only provide a description setting forth with specificity the reason(s) the plaintiff believes that the defendant owes money to the plaintiff and [t]he amount that the plaintiff claims that the defendant owes." *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 446 (2020) (quotations and citations omitted). At small claims hearings, the rules of evidence shall not apply, and the judge may admit any evidence he or she deems material and proper. RSA 503:7.

Similarly, Dist. Ct. R. 4.6 states that hearings will be informal. All parties shall be required to take an oath or affirmation but may be permitted to testify informally. The court may hear the

case by offers of proof from each of the parties as to what their evidence would prove if the court were to hear all witnesses and documents submitted. However, either party has the right to object to this procedure.

The findings of fact by the justice hearing the claim are final, but questions of law may be transferred to the Supreme Court in the same manner as from the superior court. RSA 503:9.

Discovery

Formal discovery is not permitted unless it is requested and ordered at the pre-trial hearing. Dist. Ct. R. 4.5.

Electronic Filing

Electronic filing of small claims is mandatory at all District Court locations. The court website contains helpful information about the requirements for filing into a small claims case.

Filing a new case requires completion of at least a: (1) small claims complaint; (2) confidential information sheet (for individuals); and (3) appearance. Responding to a small claim can be done by filing a: (1) response to small claims; (2) confidential information sheet (for individuals); and (3) appearance.

Although you can file documents of your own creation in small claims actions, so long as they comply with court rules, most filings can completed on forms provided by the court.

WORKER'S COMPENSATION

Standard for Workers' Compensation Benefits

To seek protection under the Workers' Compensation Law, an injury must occur in the course and scope of employment and arise out of the employment. The worker must be an employee as defined in RSA 281-A:2. There are four general types of benefits: medical treatment, weekly disability benefits (indemnity benefits), vocational assistance, and permanent impairment compensation.

Controversies

Disputes about the compensability of a claim, the eligibility of the worker for weekly benefits, or payment of medical bills (or any other matter under RSA 281-A) are resolved through administrative hearings at the Department of Labor. A hearing request may be made in writing to the Director and should specify the pertinent legal issues. When filing hearing requests before the Department, be sure to indicate the issues to be addressed in the hearing. For example, disputes over indemnity benefits should indicate they are being brought under RSA 281-A:48, whereas disputes over medical benefits will be brought under RSA 281-A:23. If there are multiple statutory provisions at issue, be sure to include each section or they may not be addressed at hearing.

Appeal from Decision of Hearings Officer

An appeal of a decision of a hearings officer must be filed with the Workers' Compensation Appeal Board within thirty (30) days of the decision. RSA 281-A:43 I(b). There is also a mechanism to seek reconsideration under N.H. Admin. R., Lab 204.09 within 10 days of the decision. Best practice is that appeals should be filed inside of 30 days regardless of seeking reconsideration.

Appeal from Appeals Board

As a prerequisite to appealing a decision form the Workers' Compensation Appeals Board to the New Hampshire Supreme Court, a motion for rehearing must be filed within thirty (30) days of the Appeals Board decision. RSA 541:3.

Attorneys' Fees and Interest

RSA 281-A:44 allows attorney's fees and interest to be awarded to a claimant when he or she prevails in an appeal to the Appeals Board or the Supreme Court. The statute allows reasonable attorney's fees, as approved by the Department of Labor or the court, but does not mandate approval of costs and expenses. For any disputes resulting in a payment of retroactive benefits after a hearing, the Department typically approves 20%of that amount for fees to claimants' attorneys. 20% is also standard for payment of fees in a lump sum settlement. Claimants' attorneys may also be entitled to payment of their fees if they win in an action seeking payment for medical bills pursuant to RSA 281-A:44. The Supreme Court has developed factors to be considered when deciding whether attorneys' fees charged are reasonable. *See, e.g., Appeal of Metevier*, 146 N.H. 62 (2001). RSA 281-A:44 also allows for an award of interest at the rate set forth in RSA 336:1, II, on that portion of the

payment of any award which has been contested from the date that the payment was in dispute. The statute states that the interest shall be computed from the date of the injury. *See* RSA 281-A:44.

Average Weekly Wage

The weekly amount of an employee's indemnity benefits will be calculated based on their Average Weekly Wage. The formula is detailed in 281-A:15. The Average Weekly Wage will also determine the value of a permanent impairment award under 281-A:32.

Independent Medical Examination

An injured employee must, from time to time (up to twice per calendar year unless the commissioner finds more are necessary) and within a fifty (50) mile radius of their residence, submit to a medical examination requested by the insurer or employer. Failure to do so may result in suspension or forfeiture of medical benefits and compensation. RSA 281-A:38 & 39. An employee can be required to appear at an examination more than 50 miles from their residence upon an order from the Department. An employee must be notified at least 10 days prior to any scheduled examination and the notice must include the language included in 281-A:38-II. Employees are also permitted to bring a witness to an examination. An employee's refusal to attend an examination may result in the termination of benefits.

Medical Records Submissions

All medical records and reports must be submitted to the Labor Department and the opposing party within fifteen (15) days of receipt of same. RSA 281-A:23, V(d). Any report not previously filed with the Labor Department must be provided to opposing counsel at least five (5) *business* days prior to any contested hearing in order to be received into evidence at the hearing. All other evidence must simply be "disclosed" to all sides at least two (2) business days prior to any hearing. N.H. Admin. R., Lab. 204.07(b).

Research

The New Hampshire Bar Association has published excellent Continuing Legal Education materials regarding Workers' Compensation in New Hampshire. Perhaps the most comprehensive research material is the New Hampshire Workers' Compensation Manual, available from LexisNexis.

Lump Sum Settlements

In certain situations, workers' compensation claimants may negotiate a settlement of their claim with the carrier. A settlement is effectively the waiver of possible future workers' compensation benefits in exchange for a lump sum from the carrier. All settlements must be on standard Department of Labor forms and must be reviewed by the Department at a hearing. For claimants, best practices require all lump sum settlements to include Social Security offset language. The standard Lump Sum Settlement document can be found at https://www.dol.nh.gov/workers-compensation/workers-compensation-forms.

Liens Against Third-Party Settlements

As a general rule, the workers' compensation carrier may assert a lien against all third-party settlements. All third-party settlements must be approved by the Labor Commissioner (or if a court action has been brought, by the court). If the settlement includes a lump sum settlement of the workers' compensation claim, only the Labor Commissioner may approve it. RSA 281-A:13, III. Also note that the workers' compensation carrier is not entitled to interest on the amount of any lien from a third-party action. *Lakin v. Daniel Marr & Son, Co.*, 126 N.H. 730, 733 (1985).

Workers' Compensation Lien & Vocational Rehabilitation Expenses

The insurer does not have a statutory lien against a third-party settlement for monies spent on vocational rehabilitation. *Chambers v. Geiger*, 133 N.H. 149, 152 (1990). The statute provides for a lien only on "compensation, medical, hospital, or remedial care" paid by the insurer or employer. RSA 281-A:13 I (b).