

THE STATE OF NEW HAMPSHIRE

JUDICIAL COUNCIL



24TH BIENNIAL REPORT

JULY 1, 2021 - JUNE 30, 2023



THE STATE OF NEW HAMPSHIRE

JUDICIAL COUNCIL

24th Biennial Report
Pursuant to RSA 494:4

For the period
July 1, 2021 through June 30, 2023

April 2024

New Hampshire Judicial Council
One Granite Place, Suite 226
Concord, New Hampshire 03301
603-271-3592
judicialcouncil.nh.gov

STATE OF NEW HAMPSHIRE

GOVERNOR AND EXECUTIVE COUNCIL

The Honorable Christopher T. Sununu
Governor

The Honorable Joseph D. Kenney
Executive Councilor - District One

The Honorable Cinde Warmington
Executive Councilor - District Two

The Honorable Janet Stevens
Executive Councilor - District Three

The Honorable Theodore L. Gatsas
Executive Councilor - District Four

The Honorable David K. Wheeler
Executive Councilor - District Five

Mission

To oversee the delivery of effective legal representation to indigent New Hampshire residents in criminal, child protection, and guardianship court proceedings and to engage in public/private partnerships for civil legal services.

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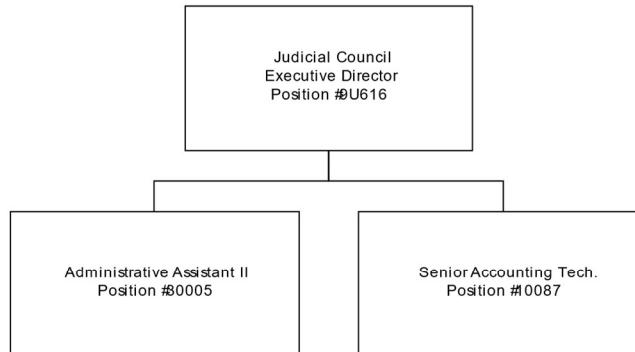
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Organizational Chart

New Hampshire Judicial Council
Department 07

FY2024 Total Authorized Positions: 3
(1 Unclassified)
(2 Classified)



Agency Staff

Jay Buckey
Executive Director (November, 2023 – present)

Richard E. Samdperil
Acting Executive Director (December, 2022 – November, 2023)

Sarah Blodgett
Executive Director (2018-2022)

Sharon P. Hebert
Administrative Assistant II

Kimberly A. Parker
Senior Accounting Technician

Membership of the Judicial Council

Pursuant to RSA 494:1, the membership of the Judicial Council is as follows:

- The four members of the judicial branch administrative council, appointed pursuant to supreme court rules.
- The attorney general or designee.
- A clerk of the superior court, selected by the chief justice of the superior court.
- A clerk of the circuit court, selected by the administrative judge of the circuit court.
- The president-elect of the New Hampshire Bar Association.
- The chairperson of the senate judiciary committee or a designee from such committee appointed by the chairperson.
- The chairperson of the house judiciary committee or a designee from such committee appointed by the chairperson.
- Eight other members appointed by the governor and council, three of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than five years, and five of whom shall be members of the public who are not lawyers.
- Five other members appointed by the chief justice of the supreme court, three of whom shall be members of the New Hampshire Bar Association of wide experience who have been admitted to practice in the state for more than five years, and two of whom shall be members of the public who are not lawyers.

Current Members

Pursuant to RSA 494:2, the term of each member who is not an *ex officio* member, shall be three years and until a successor is appointed and qualified.

Ex Officio Members

The Honorable James Bassett	Supreme Court Justice
The Honorable Mark Howard	Superior Court Chief Justice
The Honorable David King	Circuit Court Administrative Judge
Dianne Martin, Esquire	Director, Administrative Office of the Courts
James T. Boffetti, Esquire	Deputy Attorney General
Kathleen M. Mahan, Esquire	President Elect of the New Hampshire Bar Association
Senator Sharon Carson	Chair, Senate Judiciary Committee
Representative Bob Lynn	Chair, House Judiciary Committee

Clerks

Jennifer Haggar, Esquire	Superior Court Administrator
Heather S. Kulp, Esquire	Senior Circuit Court Administrator

Membership of the Judicial Council (continued)

Governor and Executive Council Appointees

Brian J. X. Murphy, Esquire	Holdover; term expired October 18, 2019
Philip H. Utter, Esquire	Term: through October 18, 2025
<i>Vacant</i> (attorney member)	
Kimberley Casey	Term: through January 1, 2026
Steven Lubrano	Term: through January 1, 2026
Dino Scala	Term: through January 1, 2026
Dr. Alan Seidman	Holdover; term expired January 1, 2020
<i>Vacant</i> (lay member)	

Chief Justice Appointees

Stephanie Bray, Esquire	Term: through December 31, 2025
John Durkin, Esquire	Term: through December 31, 2025
Richard Samdperil, Esquire	Term: through December 31, 2026
Nina Gardner (Chair)	Term: through December 31, 2025
<i>Vacant</i> (lay member)	

Standing Committees

Executive Committee

Kimberly Casey
Nina Gardner

Child Protection Subcommittee

Stephanie Bray, Esquire
Heather S. Kulp, Esquire
Dr. Alan Seidman

Indigent Defense Subcommittee

John Durkin, Esquire
Nina Gardner
Philip Utter, Esquire
Richard Samdperil, Esquire

Duties of the Judicial Council

Pursuant to RSA 494:3, it is the duty of the Judicial Council:

1. To serve as an institutional forum for the on-going and disinterested consideration of issues affecting the administration of justice.
2. To survey and study continuously the administration of justice within the state and the organization, procedure, practice, rules and methods of administration and operation of the courts of the state.
3. To devise ways of simplifying judicial procedure, expediting the transaction of judicial business, and of improving the administration of justice.
4. To recommend and provide general information to the general court, to the supreme court, to the superior court, to the circuit court, to any public official, department or agency or to the state bar association, either upon request or upon the council's own motion, such changes in the law or in the rules, organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable.
5. To serve as a catalyst for the discussion of legal and judicial issues through seminars, forums and special studies, and any other means, within the limits of available state and private funding.
6. To administer the indigent defense delivery system and ensure its quality and cost effectiveness, pursuant to RSA 604-A and RSA 604-B.
7. To provide legal and guardian-ad-litem services in child protection cases, pursuant to RSA 169-C:10, RSA 604-A, and RSA 170-C:13.
8. To provide legal services for indigent proposed wards in guardianship proceedings brought under RSA 463 and RSA 464-A.

Judicial Council Duties by Statute

- 490-A:2 Provide advice to the Chief Justices of the Supreme and Superior Courts on the efficient operation of the courts and cooperate with them on making improvements
- 14:46 Prepare fiscal note worksheets on the financial impact of proposed legislation as directed by the Office of the Legislative Budget Assistant
- 604-B:5 Oversee the operations and management of the statewide public defender
- 604-B:6 Oversee the allocation of cases between the Public Defender and private conflict counsel
- 604-A:2-b Select attorneys and administer their contracts for handling conflict criminal cases
- 604-A:2 Pay the invoices of assigned counsel in indigent criminal cases
- 169-C:10 Pay invoices of lawyers who provide representation to parents in Abuse/Neglect cases
- 604-A:2 Pay the invoices of assigned counsel in indigent criminal cases
- 604-A:6 Pay the vendors who provide services other than counsel in indigent defense matters
- 170-C:13 Pay for guardians *ad litem* who help children in abuse and neglect cases
- 464-A:6 Pay the invoices of lawyers who represent proposed wards in adult guardianship cases
- 463 Pay the invoices of lawyers who represent proposed wards in juvenile guardianships
- 525-A:2 Serve as funding source for the State's support of NH Legal Assistance
- 490-26:F Serve as the monitor and funding source for the State's support of CASA of NH
- 169-C:15:III(a) Pay the invoices of guardians *ad litem* who help children in Abuse/Neglect cases
- 170-C:13 Pay for attorneys who represent parents in Termination of Parental Rights cases

- 490-C:2 The executive director serves as an ex officio member of the Guardian *ad Litem* Board
- 651-E:2 The Executive Director serves as a member of the Inter-branch Criminal and Juvenile Justice Council
- Rule 56 Supreme Court Rule 56 makes the Judicial Council chair a member of the Judicial Performance Evaluation Advisory Committee

Receipts and Expenditures

For the 22-23 biennium the Judicial Council made the following expenditures:

Expenditure by Budget Accounting Unit		FY 2022 Actual	FY 2023 Actual
1091	Assigned Counsel	\$ 1,617,217.39	\$ 3,090,418.46
	Representation in criminal and delinquency cases	\$ 661,326.11	\$ 1,649,940.46
	Representation for parents in abuse & neglect cases	\$ 955,891.28	\$ 1,440,478.00
1092	GAL Fund	\$ 661,082.61	\$ 791,129.89
	Representation for proposed wards in guardianship proceedings		
	Representation for parents in termination-of-parental-rights cases	\$ 282,146.17	\$ 297,771.00
	Non-CASA G.A.L. services for children in termination-of-parental-rights cases	\$ 51,559.44	\$ 46,419.17
	Representation for parents in appeals	\$ 69,789.37	\$ 75,970.93
1093	Contract Attorneys	\$ 1,810,799.30	\$ 1,793,836.90
	Representation in criminal and delinquency cases		
1094*	NH Public Defender	\$ 24,212,260.00	\$ 25,596,545.00
	Representation in criminal and delinquency cases		
1097	Agency Budget	\$ 338,560.58	\$ 352,573.80
1098	NH Legal Assistance	\$ 1,500,000.00	\$ 1,500,000.00
	Civil legal services for the poor		
1099	CASA Guardians ad Litem	\$ 926,550.00	\$ 926,550.00
	G.A.L. services for children in abuse & neglect cases		
	G.A.L. services for children in termination-of-parental-rights cases		
1101	Non-CASA Guardians ad Litem	\$ 167,844.40	\$ 300,037.68
	G.A.L. services for children in abuse & neglect cases		
1103	Services Other than Counsel	\$ 1,889,447.40	\$ 2,527,576.26
	Non-counsel services in criminal and delinquency cases		
1938	CARES act	\$ 381,488.20	
2443	ARPA Indigent Defense	\$ 278,602.80	\$ 734,289.00
7220 (substance abuse funds set aside for JC use)	Substance Use - Indigent Defense		\$ 63,157.88
TOTAL EXPENDITURES		\$ 35,804,565.05	\$ 41,186,694.43
<i>Revenues</i>			
1938	CARES act	\$ 381,488.20	
2443	ARPA Indigent Defense		\$ 734,289.00
7220 (substance abuse funds set aside for JC use)	Substance Use - Indigent Defense		\$ 63,157.88
TOTAL REVENUES		\$ 381,488.20	\$ 797,446.88

Summary of Expenditures:

1. Indigent Defense

The Council oversees the delivery of legal representation for New Hampshire's indigent defendants. The right to counsel is guaranteed through the 15th amendment of the NH Constitution and the Sixth and Ninth amendments of the US Constitution. The Bill of Rights in the NH Constitution provides: "Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown."

Because important legal, ethical, and administrative considerations require that the entity overseeing indigent defense representation stand separate and apart from the prosecutorial, legislative, and judicial spheres, the Council has proven to be a good home for this important government function.

The New Hampshire Public Defender

The Council provides indigent defense through three avenues. First, through the New Hampshire Public Defender (NHPD). NHPD is a private, non-profit corporation whose sole purpose is to provide legal representation to indigent criminal defendants, to civil commitment respondents, and to children in delinquency proceedings throughout the State of New Hampshire. NHPD is the main provider of indigent defense for the state, providing representation in over 37,000 cases during the period covered. NHPD also provides representation at treatment courts (i.e. drug courts) throughout the state and provides training resources which are used by contract and assigned counsel.

Because of the rules which govern conflicts of interest for attorneys (Rules of Professional Conduct), NHPD cannot ethically represent all indigent criminal defendants in the state. Specifically, Rule 1.7 of the New Hampshire Rules of Professional Conduct specifies that subject to certain exceptions:

"a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Such circumstances arise frequently in criminal defense. These ethical rules generally bar attorneys from representing co-defendants in the same case or representing a client when the lawyer represents the victim or a witness in the case (among other situations). These rules are important in preserving access to justice for all defendants but preclude a single entity from taking all indigent defense cases.

Contract Counsel

Under the statutory order of appointment, all criminal appointments are initially assigned to NHPD. (See RSA 604-A:2, II). The Council contracts with private attorneys to provide representation in conflict cases where ethical rules forbid NHPD representation. This system was established in 1985 to serve as a backstop to the NHPD, to provide predictability of costs and to reduce the State's reliance on the more expensive assigned counsel system. Contract attorneys agree to take a certain number of cases per year (with each case given a fixed unit value) on a flat fee basis. In recent years, the contract attorney system has declined substantially.

Assigned Counsel

All cases not handled by NHPD or contract counsel are assigned to private lawyers who bill on an hourly basis. Assigned counsel are attorneys in private practice who are appointed to represent the accused when there is a conflict for NHPD and contract attorneys or when there is insufficient contract counsel availability to cover all cases.

Services Other Than Counsel

The Council also administers the funds for court-approved non-counsel services. When an accused person is indigent and cannot afford expert services necessary to their defense in a criminal case, statutory and constitutional law require that the State provide them with funds sufficient to retain expert services. RSA 604-A:6 states:

“In any criminal case in which counsel has been appointed to represent a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in his case, counsel may apply therefor to the court, and, upon finding that such services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the necessary services on behalf of the defendant.”

This statute protects the well-established constitutional rights of an accused person to due process, equal protection, effective assistance of counsel and the right to present all proofs favorable. RSA 604-A:6 requires the Council to pay for these services when a trial judge has ruled that the defendant is indigent and that the services are necessary to an adequate defense. Most commonly these services include language interpretation, private investigators, blood analysis, transcripts, depositions of witnesses, toxicology experts, witness fees, psychological examinations, forensic experts, and accident reconstruction experts.

In certain instances, failure to consult with an expert can result in counsel being found ineffective and the appointment of a new attorney. The New Hampshire Supreme Court found counsel ineffective in a negligent homicide case for failing to consult with an

accident reconstruction expert. *State v. Whitaker*, 158 N.H. 762, 772-75 (2009). These types of expenditures have grown rapidly in the past several years as cases have grown more complex and new types of expenditures (such as document review software) have arisen.

2. Civil Legal Representation

Although indigent defense in criminal cases constitutes the bulk of the Judicial Council's budget, the Judicial Council also funds civil representation in many areas.

Child Protection Cases

When the Division for Children, Youth and Families brings a petition of abuse and neglect against a parent, a confidential Circuit Court – Family Division case is opened. If the accused parent is indigent, the court is required to appoint an attorney pursuant to RSA 169-C:10, II (a). These cases are time-consuming and deadline driven. If the child is not reunified with his or her parents at the end of the case, a termination of parental rights case is brought forward. The Judicial Council funds attorneys at both the abuse and neglect stage and at the termination of parental rights proceedings. A parent also has opportunities to appeal a court's decision to Superior Court and the Supreme Court.

The Council has taken on an ever-increasing role in child protection cases and is now responsible for paying for parent representation, Court Appointed Special Advocates (CASA) and private Guardians ad Litem (GALs). A GAL is court appointed to represent the interests of a minor in a legal proceeding.

CASA provides GAL services through its volunteers. The statutory basis for this arrangement lies in RSA 169-C:10 where the appointment of a GAL in an abuse and neglect case is required. Beginning in 1996 with a small, three-month trial, the Council began providing funding to support a small portion of the administrative, recruitment and training activities of CASA. Since that time, the funding has increased to match CASA's increasingly larger share of the statewide caseload. Legislation enacted in 2012 requires courts to appoint a CASA GAL in the first instance. At its inception, the rationale for providing funding to CASA was that for its investment in supervision, recruitment, and support for a legal position, the State was able to provide services of a well-trained and supervised volunteer to serve as GAL. The Judicial Council has continued to provide funding for CASA as an important provider of these services.

The Council can also pay the fees for attorneys to represent children in abuse and neglect cases. These attorneys can be appointed by the court to represent the child's interests. These attorneys serve in a different legal role, as they do not represent a child's "best interest" as a GAL does, but instead represents the child's "expressed interest," i.e. what the child says he or she wants to happen.

Private GALs

If CASA is unavailable, the court appoints a private GAL. The Council pays for this service. The Council's Executive Director sits on the GAL Board.

Additional Services in Probate and Family Matters

The Council also pays for court-ordered services provided by GALs and attorneys in cases related to guardianships of incapacitated adults and minors, and representation in Supreme Court appeals from any of these case types.

New Hampshire Legal Assistance

Since 1997, the Legislature has provided vital funding for New Hampshire Legal Assistance (NHLA) in support of its efforts to provide legal aid to low-income New Hampshire residents. The State funding for NHLA has been a cornerstone of civil justice for vulnerable elders, veterans, the disabled, and victims of domestic violence.

NHLA assists individuals and families with civil legal problems such as preserving affordable housing, preventing homelessness, maintenance of subsistence income, access to affordable health care, enforcing consumer rights, youth education rights, long-term care for vulnerable seniors and safety from domestic abuse. While the Council has no statutory or contractual supervisory oversight over NHLA, this organization submits regular reports on its state appropriations.

Major accomplishments FY 2022 and 2023

The work of the Judicial Council impacts thousands of New Hampshire residents who depend upon it to provide competent legal representation. In fiscal years 2022 and 2023, the Judicial Council funded (either entirely or in part):

1. The New Hampshire Public Defender, which provided services in **37,735 cases**.
2. CASA, which represented **1,659 new children** in abuse and neglect cases.
3. New Hampshire Legal Assistance, which assisted **8,000 people** in civil matters throughout the state.
4. The Judicial Council also paid the bills in **16,347 cases**, ranging from guardians *ad litem* for minors to attorneys representing indigent defendants.

The most important accomplishment of the Judicial Council was ensuring the ongoing operation of the state's indigent defense system during the Covid pandemic Crisis and its role in the recovery from that crisis. During the Covid pandemic, the Council worked to ensure that attorneys were present to represent citizens in all courts for family and criminal matters. Under previous Directors Sarah Blodgett and Richard Samdperil this included:

1. Working to obtain federal funding to obtain additional funds to retain and train attorneys.
2. Encouraging private attorneys to take cases under extremely difficult circumstances during the pandemic through the Criminal Defense Task Force.
3. Setting up a Criminal Defense Academy through UNH, utilizing Federal Grant funds.
4. Creating legislation mandating the adoption of child representation standards.
5. Updating the fee schedule for assigned council through advocacy at the rules committee.

Future Challenges

1. Ensuring access to counsel for all indigent defendants.

Under New Hampshire law, all cases in which counsel are assigned must first go to the New Hampshire Public Defender, and then to contract and assigned counsel. Unfortunately, the number of attorneys willing to accept cases through the courts has not kept pace with demand. The New Hampshire Public Defender has had chronic issues with staff retention, and fewer attorneys have been willing to take contracts with the state for indigent representation. The Judicial Council must then rely on assigned counsel to take these cases. The current reimbursement rate for these cases (\$90 per hour) is not sufficient to attract the necessary number of attorneys to do this constitutionally required work.

2. Improving and expanding access to representation for children.

The Judicial Council is required by statute to adopt and implement child representation standards. Due to delays from the pandemic and changes in leadership, the adoption of these standards has been delayed. The adoption of these standards will help ensure quality representation for New Hampshire children with assigned counsel. The standards will also create a new need for the Judicial Council to arrange and provide trainings for attorneys who represent children.

3. Modernizing the payment system for vendors and attorneys who are paid through the Judicial Council.

Ensuring accurate, transparent, and prompt payment for vendors and attorneys is important for ensuring that providers will continue to work with the Judicial Council. The Judicial Council is working to modernize and streamline the process for these payments.

4. The Need for an Alternative Public Defender Program

As the number of attorneys willing to take contract and assigned cases has dropped, the need for an alternative public defender has increased. An alternative public defender, based in the center of the state, would be able to provide the type of short notice, on demand representation that is required for the number and types of cases that are now seen. Even if small in size, (i.e. 5-6 attorneys) this type of a program could go a long way in meeting the needs of the courts for indigent representation.

5. Expanding demands for specialized evaluations.

Evaluations of defendants have become more widespread. These evaluations can range from substance abuse evaluations, psychological evaluations, psychosexual evaluations, and other specialized evaluations. Courts use these evaluations in determining proper sentences, assessing dangerousness, and determining suitability for various treatment courts. These evaluations are important, but expensive. The Judicial Council is pursuing avenues to manage costs for these evaluations as well as other related non-counsel expenditures.