

CHAPTER 2

Facts Established Without Formal Proof

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Scope Note

This chapter reviews methods of establishing facts at both pre-trial and trial other than through formal proof. In particular, the chapter discusses use of evidentiary admissions, confessions, judicial admissions, judicial notice, stipulations, and interrogatories. For each of these methods, the chapter introduces the basic principles and applicable law, outlines the elements required for an adequate foundation, and sets forth a sample examination.

§ 2.1 ADMISSIONS

§ 2.1.1 Introduction

An admission is the prior act or statement of a party that the opposing party seeks to introduce as evidence against that party. A written or verbal communication or the party's conduct will typically constitute the admission. Under certain circumstances, counsel can also attempt, however, to use the silence or inaction of the party as an admission.

Both Fed. R. Evid. 801(d)(2) and N.H. R. Evid. 801(d)(2) deem these evidentiary admissions to be nonhearsay. *See* Reporter's Notes, N.H. R. Evid. 801, ("Rule 801(d)(2) excludes four categories of admissions from the definition of hearsay."). The simplest of these admissions are statements made by a party himself. The other categories of admissions include: "a statement of which the party has manifested adoption or belief in its truth," a so-called adoptive admission; "a statement by a person authorized by the party to make a statement concerning the subject," an authorized statement; and "a statement by the party's

agent or servant concerning a matter within the scope of the party’s agency or employment, made during the existence of the relationship,” the statement by an agent or servant. N.H. R. Evid. 801(d)(2).

Under both Fed. R. Evid. 409 and N.H. R. Evid. 409, evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. There are distinctions between the state and federal rule, due to N.H. Rev. Stat. Ann. § 508-B, et seq., which N.H. R. Evid. 409 does not seek to narrow in any way. *See Reporter’s Notes*, N.H. R. Evid. 409.

A party’s offer to settle a matter is generally not admissible under both Fed. R. Evid. 408 and N.H. R. Evid. 408. The state rule “is designed to exclude the offer of compromise only when it is tendered as an admission of the weakness of the offering party’s claim or defense.” *Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 131 N.H. 154, 166 (1988). The rule does not prohibit use of such evidence when counsel offers it for other purposes. *Slattery v. Norwood Realty, Inc.*, 145 N.H. 447, 450 (2000) (court held as admission, and not offer to settle, what defendant said about current dispute).

Both N.H. R. Evid. 410 and Fed. R. Evid. 410 hold that statements made by a criminal defendant in relation to a withdrawn guilty plea are inadmissible. Counsel may use as inconsistent statements, however, statements made at a plea withdrawal hearing. *State v. Barnes*, 150 N.H. 715, 718 (2004).

An employee’s admissions on a subject within the scope of his or her employment are admissible against the employer, in the absence of convincing evidence that the employee’s authority to speak was limited. *Daigle v. City of Portsmouth*, 129 N.H. 561, 585–86 (1987).

Admissions are evidence of the facts admitted, but are not conclusive. Admissions also do not need to be based on personal knowledge, be contrary to the party’s interest when made, nor must the party be unavailable.

§ 2.1.2 **Foundation Requirements**

In order to introduce an admission, it should be established that

- it was made by a party to the action, a party’s agent or servant, or a person authorized by the party;
- it is being offered by the opposing party; and

- it is not the type of statement or conduct that is inadmissible for other reasons (e.g., an offer of settlement).

§ 2.1.3 Sample Examination

The plaintiff was a passenger in Mr. White’s car when it was involved in an accident; the plaintiff testified on direct examination that the light was green when Mr. White’s car entered the intersection. Defendant’s counsel has a signed statement the plaintiff made shortly after the accident. In the plaintiff’s statement, she told a police officer the light changed just as the car she was inside entered the intersection.

There are, naturally, several ways to approach the examination, depending on a number of factors, including counsel’s style, the manner of the witness, the state of the evidence at the time, and counsel’s purpose in obtaining the admission. For example, counsel might decide to establish all the circumstances of the witness’s opportunity to observe the light and the making of the prior admission before getting to the substance of the admission itself. In other situations, counsel might want to start right off with the contradictory testimony. The following examination is one possible method, which is included as an illustration.

ATTORNEY: You testified on direct that the light was green when Mr. White’s car entered the intersection, correct?

WITNESS: Yes.

ATTORNEY: Shortly after the accident, did you speak to a police officer by the name of Sgt. Sara Rose?

WITNESS: Yes, I do, but I don’t remember her name.

ATTORNEY: You answered the officer’s questions about the accident truthfully?

WITNESS: Yes.

ATTORNEY: The accident was quite fresh in your mind at that time you spoke to the officer?

WITNESS: Yes.

ATTORNEY: You told the officer that before the car you were inside entered the intersection you were looking out the window?

WITNESS: Yes.

ATTORNEY: You told the officer that before the car you were inside entered the intersection, you saw the light change?

WITNESS: Umm . . . no, I don't remember that.

ATTORNEY: When you spoke to the officer, she wrote down what you told her?

WITNESS: I believe so . . . yes.

ATTORNEY: You read what the officer wrote?

WITNESS: Yes.

ATTORNEY: You signed what the officer wrote, correct?

WITNESS: I believe so . . . yes.

ATTORNEY: I show you Defendant's Exhibit 2 for identification and ask if this is your signature.

WITNESS: Yes, it is.

ATTORNEY: Looking at this signed statement, does it refresh your memory as to the police officer's name?

WITNESS: Well . . . yes, it says here "Sgt. Rose."

ATTORNEY: You honestly stated to Sgt. Rose what you saw, she accurately wrote it down, and you signed it because it was correct?

WITNESS: Yes, I did.

ATTORNEY: You stated to Sgt. Rose that the light was red when Mr. White entered the intersection?

WITNESS: Yes.

ATTORNEY: Thank you.

§ 2.2 CONFESSIONS

§ 2.2.1 Introduction

“A confession is a special type of evidence. Its acceptance basically amounts to conviction.” *State v. Phinney*, 117 N.H. 145, 147 (1977). Thus, it is the most devastating type of evidence that can be admitted against a defendant in a criminal case.

In recognition of this, New Hampshire mandates that the state prove beyond a reasonable doubt that a confession was given freely and voluntarily before it may be submitted to the jury for consideration. This is a greater standard for admissibility than the federal requirement of proof by a preponderance of the evidence. The primary focus of the trial court in considering whether a confession may be admitted at trial is one of voluntariness on the part of the declarant.

Judicial Commentary

In criminal cases where the state plans to introduce an audio- or video-recorded statement or confession made by the defendant, the prime threshold issues to be resolved in the pretrial setting will normally be whether the defendant was in custody and, if so, whether he or she was properly advised of his or her *Miranda* rights and waived same, and whether the statement was voluntary. Another important area that is sometimes overlooked, however, is the need to make a careful review of the details of the statement to determine whether there are portions that should be excluded on relevancy grounds. This relevancy review can be particularly important with respect to statements made by police officers during an interrogation. There are instances where, for example, in trying to extract a confession from a defendant, police officers may make speeches in which they recite their views as to the defendant's guilt or as to why a person in the defendant's position might have an incentive not to confess. In many cases such “speeches” by the police may be admissible because they are necessary to place in proper context statements made by the defendant in response thereto. However, in other instances—particularly if the officer's speech does not produce the desired incriminatory response—there may be legitimate grounds to move to redact some or all of the “speech” from being heard by the jury on the grounds that it is irrelevant and unfairly prejudicial (because of its potential to influence the jurors to simply adopt the opinion of the police as to the defendant's guilt, character,

credibility, etc., instead of making an independent decision on these matters).

The voluntariness of a confession is initially a question of fact for the trial court, whose decision will not be overturned unless it is contrary to the manifest weight of the evidence, as viewed in the light most favorable to the state. *State v. Decker*, 138 NH 432, 436 (1994). In order to be considered voluntary, a confession must be the product of an essentially free and unconstrained choice, and not extracted by threats, violence, direct or implied promises or any sort, or by the exertion of any improper influence. *State v. Chapman*, 135 N.H. 390, 394 (1992). The state must prove voluntariness beyond a reasonable doubt. *State v. Chapman*, 135 N.H. at 398. In determining the voluntariness of the confession, the trial court must consider the “totality of the surrounding circumstances.” *State v. Chapman*, 135 N.H. at 399. Whether a confession is voluntary is initially a question of fact for the trial court. *State v. Chapman*, 135 N.H. at 399. The New Hampshire Supreme Court will not overturn a trial court’s determination that a confession is voluntary unless it is contrary to the manifest weight of the evidence, as viewed in the light most favorable to the state. *State v. Spencer*, 149 N.H. 622, 627 (2003).

Courts have looked at such factors as:

- the length of the interrogation, *State v. Spencer*, 149 N.H. at 629;
- whether authorities informed the defendant of his *Miranda* rights, *State v. Portigue*, 125 N.H. 352, 364 (1984);
- the defendant’s demeanor during the interview, *State v. Aubuchont*, 147 N.H. 142 (2001);
- whether the defendant was detained for a long period of time, *State v. Rezk*, 150 N.H. 483 (2004);
- whether the defendant was under the influence of any substances, *State v. Chapman*, 135 N.H. 390, 400–01 (1992); and
- whether the defendant’s handwriting was legible and coherent on any documents that may have been executed, *State v. Rezk*, 150 N.H. 483 (2004).

The existence of a promise to the defendant as inducement to confess, is not, in and of itself, dispositive. *State v. Rezk*, 150 N.H. at 488. Rather, “all the facts must be examined and their nuances assessed to determine whether, in making the promise, the police exerted such an influence on the defendant that his [or her] will was overborne.” *State v. Reynolds*, 124 N.H. 428, 434 (1984). Specific

promises of leniency are grounds for suppression, as the inverse is an implication that should the defendant exercise his right to remain silent, he will be punished. *See State v. Rezk*, 150 N.H. at 490.

Evidence of a confession is most commonly established by calling as a prosecution witness the law enforcement officer or other person to whom the defendant allegedly made the confession, and asking that person what the defendant said, and/or introducing through that witness a written confession or recorded statement. Accordingly, the questioning of a witness to whom a defendant confessed must establish that applicable constitutional guidelines were followed. This most commonly occurs at a pretrial hearing outside the presence of the jury. The court typically schedules such a hearing after a motion to suppress is filed by the defendant. If the judge denies the motion, the path is paved for the prosecution to offer the confession at trial. N.H. Sup. Ct. R. 94. Compliance with constitutional safeguards pertaining to confessions will also be a predicate for the admission of the testimony at trial, and for its consideration by the jury.

Failing to record an interrogation would not result in automatic suppression of a defendant's statement, although courts have recognized that videotaping a custodial interrogation may lessen inherent speculation, avoid unwanted claims of coercion, and generally assist all parties in assessing what transpired during the interrogation, such that, to the extent possible, custodial interrogations should be videotaped. *State v. Farrell*, 145 N.H. 733, 739 (2001) (pertaining to juvenile interrogations). The court has also recognized that listening to a defendant be inculcated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence, thus making inequitable the admission of selective recordings of a post-*Miranda* interrogation and persuading the New Hampshire Supreme Court to hold that in order to admit into evidence the taped recording of an interrogation, which occurred after *Miranda* rights were given, the recording must be complete. *State v. Barnett*, 147 N.H. 334, 337–38 (2001).

It is important to note that an uncorroborated confession is not, standing alone, sufficient for a jury to convict the defendant. Justification of this rule lies in the prevention of conviction of the innocent by false confession, however motivated. There need be only sufficient corroboration to indicate that the confession or admission is trustworthy. This standard does not require proof of the crime by evidence independent of the confession or admission. It does require substantial independent evidence indicating that the admission of the defendant is true. *State v. Hanley*, 116 N.H. 235 (1976).

Although out-of-court statements offered in evidence to prove the truth of the matter asserted are hearsay, N.H. R. Evid. 801(c), and are generally not admissible at trial, N.H. R. Evid. 802, confessions by a defendant in a case are not considered hearsay, N.H. R. Evid. 801(d)(2). Rules 801(d)(2)(A) and (B) are exceptions

to this rule, in that they exclude from the definition of hearsay any statement that is offered against a party and is “the party’s own statement, in either an individual or a representative capacity,” or “a statement of which the party has manifested adoption or belief in its truth.” The latter exception includes the adoptive or tacit admission doctrine. *State v. Cook*, 135 N.H. 655, 663 (1992). This is premised on the theory that when a statement that is incriminatory or accusatory about the defendant “is made within [the defendant’s] presence and hearing” and “is not denied by [the defendant],” this is an adoptive admission, for the presumption is that an innocent person would deny it. *State v. Jansen*, 120 N.H. 616, 618 (1980). Understanding the strength that such evidence has with a jury, courts are cautioned that they must determine that the defendant had sufficient “opportunity and motive to deny the truth of the accusations.” *State v. Jansen*, 120 N.H. at 618.

Additionally, it is important to note that under the New Hampshire Rules of Evidence and their federal counterpart, a statement including an admission of guilt that is made pursuant to plea discussions is generally not admissible at a later proceeding. N.H. R. Evid. 410(4). Clearly, courts do not wish to have a quieting effect on offers to plead guilty and any related conversations.

Statements of a declarant criminal defendant fall outside of the hearsay rule when offered by the prosecution in the case, as they are statements of a party opponent. *See* N.H. R. Evid. 801(d)(2). Contrastingly, a defendant may not introduce his or her own statements without the statements falling in a delineated exception to the hearsay rule or by subjecting himself or herself to cross-examination. *See* N.H. R. Evid. 801, 802, 803.

Confessions of other persons, most commonly codefendants, can also fall under the definition of a party opponent’s statement under N.H. R. Evid. 801(d)(2)(E), if the opposing party wishes to introduce them. The court will allow such statements if and when they were made during the course and in furtherance of the conspiracy. N.H. R. Evid. 801 (d)(2)(E). Additionally, the existence of the conspiracy must be sufficiently proved by independent evidence. *State v. Gilbert*, 121 N.H. 305, 311 (1981).

If the defendant wishes to introduce statements of a codefendant who is subject to Fifth Amendment protections, the defendant can either request immunity from the court (which may, in some cases, order it from the state if it is deemed to be necessary) or he or she can seek to introduce the statements under Rules 804(a)(1) and 804(b)(3), by asking the court to find the declarant unavailable. In order to succeed in introducing such statements of a codefendant to exculpate the accused, the proponent of the statement will have to point to corroborating circumstances clearly indicating the trustworthiness of the statement. Should such powerful evidence come in when a declarant witness is deemed

“unavailable,” the proponent of the evidence will certainly face challenges based on the confrontation clause.

The principal constitutional safeguard that must be addressed in questioning a witness to a confession is the voluntariness of the confession. This, in turn will require a showing that the defendant was warned of his or her *Miranda* rights prior to the confession, if the questioning took place while he or she was under arrest or otherwise in a situation that amounted to “custodial interrogation.” It will also require a showing that after having been advised of those rights, the defendant knowingly, intelligently, and voluntarily waived them.

§ 2.2.2 Foundation Requirements

To establish the admissibility of a confession, the following must be shown:

- that the defendant made statements to a witness;
- that in those statements, the defendant acknowledged that he or she was guilty of the crime charged and/or that the defendant committed all the acts necessary to establish his or her guilt of that crime; and
- that the statement was voluntary—i.e., in the case of questioning by law enforcement officers while the defendant was in custody, he or she was advised of the *Miranda* rights and knowingly, intelligently, and voluntarily waived those rights.

§ 2.2.3 Sample Examination

In this sample examination, a prosecutor is questioning a police officer to whom the defendant confessed after being arrested:

PROSECUTOR: Upon arriving at the scene of the crime, what did you see?

WITNESS: I saw the defendant, Mark Jones, hunched over the victim and then run away.

PROSECUTOR: Do you see him in the court room?

WITNESS: Yes. He is over at the defendant’s table.

PROSECUTOR: Let the record reflect that the witness has identified the defendant.

- JUDGE: It will so reflect
- PROSECUTOR: What did you do at that point?
- WITNESS: I chased him, and then I tackled him from behind and placed him under arrest.
- PROSECUTOR: What did you do then?
- WITNESS: I conducted a pat search for weapons and then took him back to the police station.
- PROSECUTOR: What did you do there?
- WITNESS: I interviewed him.
- PROSECUTOR: Where and when did you do that?
- WITNESS: In Detective Martin's office at the station on the day of the crime, August 14, 2004. at approximately 3:30 p.m.
- PROSECUTOR: Who else was present?
- WITNESS: Detectives Mark Martin and Bob Greene.
- PROSECUTOR: What is the first thing you said to the defendant when the interview began?
- WITNESS: I advised him of his *Miranda* rights.
- PROSECUTOR: What specifically did you say to him in advising him of his *Miranda* rights?
- WITNESS: I told him that he had the right to remain silent, that anything he said could and would be used against him, that he had a right to have an attorney present at this time and that if he could not afford an attorney, the state would appoint one for him.
- PROSECUTOR: What did you do next?
- WITNESS: I asked him if he understood all the rights that I had explained to him.
- PROSECUTOR: How did he respond?

- WITNESS: He said he understood them and was willing to answer our questions without having an attorney present.
- PROSECUTOR: What did you do next?
- WITNESS: I gave him our standard *Miranda* form to sign.
- PROSECUTOR: Describe for the jury what this form is please.
- WITNESS: It is a form that that arrested suspects are asked to read through and initial each individual right, indicating that they understand that right, and then sign at the bottom if they waive those rights and are willing to speak to the police.
- PROSECUTOR: Showing you what's been marked as state's Exhibit 3 for identification, would you tell the jury what that document is?
- WITNESS: That is the form that was shown to the defendant, and that he initialed and signed.
- PROSECUTOR: When did you show this to him?
- WITNESS: Right after we advised him orally of his *Miranda* rights.
- PROSECUTOR: Did you read the form to him or have him read it?
- WITNESS: We asked him to read each right out loud, state if he understood that right, and then asked him to initial each right after describing it, and finally asked if he waived those rights and was willing to talk to us. He said he was willing to waive his rights, and proceed with the interview. He then signed the form in our presence.
- PROSECUTOR: The state requests the identification be struck on state's Exhibit 3 and admitted as a full exhibit.
- JUDGE: The identification is struck and it will become a full exhibit.
- PROSECUTOR: Your Honor, may I publish Exhibit 3 to the jury?
- JUDGE: Yes.
- PROSECUTOR: [Gives the exhibit to the jury to examine.]. After the defendant signed the form, what happened?

- WITNESS: We asked him questions concerning the crime.
- PROSECUTOR: What questions specifically did you ask him?
- WITNESS: We asked him if he killed William Smith.
- PROSECUTOR: What did he say?
- WITNESS: He said that he shot and killed William Smith because Smith had fooled around with Jones' girlfriend earlier that evening.
- PROSECUTOR: Did you ask Mr. Jones to make out a written statement?
- WITNESS: Yes.
- PROSECUTOR: Did he do so?
- WITNESS: Yes.
- PROSECUTOR: When?
- WITNESS: Within a half-hour of the time he told us that he killed William Smith.
- PROSECUTOR: Showing you state's Exhibit 12 for identification, is this the statement he wrote out?
- WITNESS: Yes.
- PROSECUTOR: Whose writing is it?
- WITNESS: I witnessed him write the statement in our presence.
- PROSECUTOR: Did you see him sign it as well?
- WITNESS: Yes, I saw him sign his name at the bottom of page 4 and initial each of the four pages.
- PROSECUTOR: The state asks that the identification on state's Exhibit 12 be struck, and that it be admitted as a full exhibit.
- JUDGE: Identification is struck on state's Exhibit 12, and it shall be a full exhibit.
- PROSECUTOR: May I publish this exhibit to the jury your Honor?

JUDGE: You may.

PROSECUTOR: [Publishes the exhibit to the jury for their review.]

§ 2.3 JUDICIAL ADMISSIONS

§ 2.3.1 Introduction

A judicial admission is but one category of admissions out of the wide variety of statements or conduct by a party or his or her attorney that may be binding. A judicial admission, as opposed to an evidentiary admission, occurs in connection with a judicial proceeding and generally binds the party making it. The opposing party is then relieved of the responsibility for submitting further evidence on the issue.

For example, a party may be bound by certain allegations in his or her pleadings, statements of counsel, or a response (or failure to respond) to a request for admissions under N.H. Super. Ct. R. 54 or Fed. R. Civ. P. 36(a). *Peaslee v. Koenig*, 122 N.H. 828, 831–32 (1982) (defendant failed to answer request for admission stating all trees were cut on plaintiffs' land, barring defendant from disputing otherwise, despite evidence to contrary).

A party's counsel may admit matters of fact. *Alton v. Gilmanton*, 2 N.H. 520, 520 (1823). A party's counsel may also bind his or her client when acting within the scope of his or her authority. *Norberg v. Fitzgerald*, 122 N.H. 1080, 1082 (1982). Admissions made by counsel are binding unless amounting to a "compromise of the claim or a confession of judgment." *Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 670 (2006) (quoting *Moore v. Allied Chem. Corp.*, 480 F. Supp. 377, 383–84 (E.D. Va. 1979)).

Inconsistent positions in subsequent pleadings may also be admissible. "[I]f the writ showed an inconsistency with the plaintiff's position as taken at the trial, it was properly admitted; otherwise, it was incompetent." *Bellavance v. Nashua Aviation & Supply Co.*, 99 N.H. 10, 11 (1954). *But see Masterson v. Berlin St. Ry.*, 83 N.H. 190, 193 (1927) (where original claim asserted A and B were negligent, amended claim asserting only A was negligent is not inconsistent). Generally, counsel may use a party's pleading in one case as an admission in another case provided it is material and relevant to the issues in the subsequent action. *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 833 (2005).

A product manufacturer may not inquire into a customer's previous lawsuit against the customer's property owner as the claims against the property owner

were under different theories. *Laramie v. Sears, Roebuck & Co.*, 142 N.H. 653, 659–60 (1998). A party in a collateral proceeding may not assert lack of jurisdiction over him or her due to his lack of ownership when in the earlier proceeding he or she never denied ownership, failed to object to evidence of ownership, and admitted in various pleadings in the record that he or she in fact was the owner. *Bonser v. Courtney*, 124 N.H. 796, 812 (1984).

A party to a civil action against a convicted criminal may invoke the doctrine of collateral estoppel to preclude the former defendant from relitigating issues decided on the merits in the criminal trial. *See Hopps v. Utica Mut. Ins. Co.*, 127 N.H. 508, 511 (1985); *see also Stewart v. Bader*, 154 N.H. 75, 83 (2006) (defendant’s decision not to testify at his criminal trial did not deprive him of the full and fair opportunity to litigate issues in that trial, which would bar application of collateral estoppel). *But cf. In re Three Video Poker Machs.*, 129 N.H. 416, 421–22 (1987) (dismissal of criminal case does not bar civil forfeiture proceeding); *Allstate Ins. Co. v. Aubert*, 129 N.H. 393, 398 (1987) (despite wife’s criminal conviction, trial court erred in holding that husband was precluded from relitigating the issue of wife’s intent under the doctrine of collateral estoppel).

§ 2.3.2 **Foundation Requirements**

In order to introduce a judicial admission into evidence, it must be demonstrated that there has been conduct or a statement of a party or counsel, when acting within the scope of his or her authority, that has been made

- in the course of a judicial proceeding; and
- in compliance with the pertinent statute or rule, if any is applicable.

§ 2.3.3 **Sample Examination**

The submission of a judicial admission by the opposing party may be brought directly to the court’s attention or introduced into evidence through testimony. If introduced into evidence through testimony, counsel should first bring the issue to the court’s attention before attempting to introduce the judicial admission for the first time in front of the jury. For purposes of this sample examination, it is assumed that the party who made the admission is testifying.

ATTORNEY: Let’s consider the function of the safety shield. Prior to removing the safety shield, you were aware the purpose of the safety shield was to prevent contact with the serrated edge of the machine?

WITNESS: Yes, I was.

ATTORNEY: You had received three weeks of on-the-job training concerning the working of the machine, correct?

WITNESS: Yes.

ATTORNEY: At this point, Your Honor, to further assist the jury, I request permission to read Mr. Green's Admissions of Fact Number 9 and Number 12, which are admissible in accordance with the court's allowance of our motion in limine. May I proceed?

JUDGE: Yes, you may.

ATTORNEY: Thank you, Your Honor. The request, Number 9, to Mr. Green, which was submitted to him on behalf of Mr. Brown, reads as follows:

"As an experienced lathe operator, you knew at the time you removed the safety shield that it was designed to prevent contact by the operator with the serrated edge."

Mr. Green's response: "Admitted."

Further, Request Number 12 reads as follows:

"If the safety shield had been in place at the time of the accident, it would have prevented your hand from coming into contact with the serrated edge."

Mr. Green's response: "Admitted."

Practice Note

At this time, or even before the admissions are read by counsel, the trial judge will usually give a brief explanation to the jury about the meaning of requests for admissions and their effect in reaching a verdict. You should ask the court ahead of time to read the instruction close in time to your reading of the admission.

§ 2.4 JUDICIAL NOTICE

§ 2.4.1 Introduction

Under certain circumstances, the court may take judicial notice of an indisputably true matter that eliminates the necessity of a party introducing the matter into evidence and proving its truth. A court may take judicial notice in both civil and criminal cases as to matters of fact or law.

Once the court decides it will judicially notice a particular fact, the parties to the civil action may not offer contrary evidence at trial. In criminal cases, “the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” N.H. R. Evid. 201(g).

N.H. R. Evid. 201(a), which generally follows Fed. R. Evid. 201(b), sets forth the requirements for judicial notice of so-called adjudicative facts. Rule 201(a) describes two categories of adjudicative facts, both of which must be “not subject to reasonable dispute.” The first category is facts within the common knowledge of the community. The second category is facts readily discernable from authoritative sources “whose accuracy cannot reasonably be questioned.” N.H. R. Evid. 201(a)(2).

Facts typically within the common knowledge of the community include:

- the laws of nature, *e.g.*, *Crowley v. New Hampshire Fire Insurance Co.*, 100 N.H. 477, 479 (1957) (behavior of heavy, inanimate object tightly packed and securely fastened when truck is allegedly traveling very slowly in low gear on a wide turn on a practically level road);
- scientific fact, *e.g.*, *Leavitt v. Bacon*, 89 N.H. 383, 387 (1938) (Newton’s laws of motion; “for every action there is a compensating reaction”);
- facts relating to human life, *e.g.*, *Dunbar Fuel Co. v. Cassidy*, 100 N.H. 397, 403 (1957) (impairment of use of arm affects ability to engage in unskilled, manual labor); and
- public ways, *e.g.* *State v. Barkus*, 152 N.H. 701, 709–10 (2005) (Interstate 93 is “way” within meaning of drunk driving statute); *State v. Day*, 101 N.H. 289, 290–91 (1958) (Main Street in Dover is “way”); *State v. Deane*, 101 N.H. 127, 131 (1957) (Route 3 in Nashua is “way”); *but see State v. Gagnon*, 155 N.H. 418, 419

(2007) (overruling trial court's taking of judicial notice that "paved area around the fire station" was "way"); *see also* N.H. Super. Ct. R. 89 (waiving formal proof of way unless demanded).

Some jurisdictions have been quite creative in finding facts within the common knowledge of the community. *See e.g. Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 426 (1964) ("[W]e consider that the joys of life in New England include the ready availability of fresh fish chowder. We should be prepared to cope with the hazards of fish bones, the occasional presence of which in chowders is, it seems to us, to be anticipated"); *Katz v. Gow*, 321 Mass. 666, 667 (1947) ("It is common knowledge that a golf ball does not always fly straight toward the intended mark, especially when hit by an unskilled person.").

Facts readily discernable from authoritative sources include:

- government, *e.g. Levitt v. Maynard*, 105 N.H. 447, 448 (1964) (population of congressional districts); and
- geography, *e.g. Winnipiseogee Lake Co. v. Young*, 40 N.H. 420, 430 (1860) (location of Lake Winnepesaukee).

Superior Court Rule 63A allows life expectancy tables to be admissible. *See also Thibeault v. Brown*, 92 N.H. 235, 238 (1942) (expectancy of life based upon standard tables).

As a rule, courts will not take judicial notice of the records of another cause of action, even if tried in the same court and involving the same parties, to supply facts that the parties have not formally introduced into evidence. *State v. Cox*, 133 N.H. 261, 266 (1990); *cf. Town of Brookline v. Goldstein*, 388 Mass. 443, 447 (1983) (a court can take judicial notice of its own records).

Cases decided before the adoption of the Rules of Evidence, however, permitted a court to take judicial notice of its own records. *LePage v. St. Johnsbury Trucking Co.*, 97 N.H. 46, 52–53 (1951) (Supreme Court may take judicial notice of trial court's docket as to whether posttrial motion had been filed and acted upon by trial court); *Petition of Morin*, 95 N.H. 518, 523 (1949) (in habeas corpus proceeding by parents regarding custody of minor child, trial court may take judicial notice of pendency of criminal charges against parents); *Wellington v. Wellington*, 88 N.H. 482, 482 (1937) ("It is frivolous to suggest that the court may not take judicial notice of its own records for any purpose for which those records may become material.")

Under N.H. R. Evid. 201(d) and the corresponding federal rule, the court shall take judicial notice when requested by a party and supplied with the necessary

information. The court may also take judicial notice within its discretion even without the request of either party. N.H. R. Evid. 201(c).

§ 2.4.2 **Foundation Requirements**

In order for the court to take judicial notice,

- it must be established that the fact is generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; or
- it must be established that the law is a decisional, constitutional, and public statutory law, rule of court, regulation of governmental agency, or ordinance of a municipality and other governmental subdivisions of the United States or of any state, territory, or other jurisdiction of the United States; and
- the necessary source must be provided to the court where required.

§ 2.4.3 **Sample Examination**

By its nature, counsel addresses to the judge by request or motion the matter that he or she seeks to have judicially noticed, and not to the jury. An attorney should bring the matter to the court's attention for a preliminary ruling as to whether the court will take judicial notice or he or she will need proof at trial. However, counsel may make the request to take judicial notice at trial, if necessary.

(a) ***Request That Judicial Notice Be Taken of the Date and Day of the Week***

ATTORNEY: The defendant respectfully requests that the court take judicial notice of the fact that the writ in this case was filed on Monday, January 4, 2010.

JUDGE: The court will take judicial notice of the fact, which is evidenced by the case docket that the writ was filed on January 4, 2010, that such date fell on a Monday, and the jury will be so instructed.

(b) *Request That Judicial Notice Be Taken of State Regulatory Provision*

ATTORNEY: The plaintiff requests that the court take judicial notice of the water quality standards applicable to this case. I am providing the court and counsel a copy of the relevant section of the New Hampshire Code of Administrative Rules. I respectfully request that the court take judicial notice of these regulations pursuant to N.H. R. Evid. 201(b).

(c) *Request That Judicial Notice Be Taken of the Law of Another State Based on the Testimony of a Qualified Witness*

Practice Note

First, qualify the witness, presumably a lawyer admitted in another state, as an expert witness. After each of the following questions, wait for the witness's response before proceeding.

ATTORNEY: Are you familiar with the provisions of [state] law regarding the number of witnesses who must attest to a validly signed will?

Please give the source and the citations of those provisions.

Please read the pertinent section describing the number of witnesses required.

Do you have with you a copy of the pertinent provisions?

May I have it, please?

With the court's permission, I would like to submit a copy of the statute in question, contained in [cite] and request that the court take judicial notice that the law of [state] requires [number] witnesses at the signing of a valid will.

Practice Note

This dialog is included for illustrative purposes only. Ordinarily, a trial judge would simply take judicial notice of the statute of another state after you point out the statute and a copy presented to him or her.

§ 2.5 **STIPULATIONS**

§ 2.5.1 **Introduction**

A stipulation is an agreement between the parties to a proceeding, or their attorneys, concerning certain facts or evidence. Parties may reach stipulations both before and during trial and may utilize them in civil and criminal cases. Stipulations need not be in writing, if made in open court. *Perley v. Bailey*, 89 N.H. 359 (1938). *But see* N.H. Super. Ct. R. 202 (requiring all stipulations in domestic relations cases to be typewritten and signed).

A stipulation to certain facts obviates the need for proof of those facts and establishes them as uncontroverted. Parties may stipulate, for example, to what the testimony of a witness would be without live testimony. Stipulated testimony is not conclusive; however, the fact finder is free to evaluate the credibility of the testimony and determine its probative value. The court will not give effect to stipulations that intrude upon the court's function, for example, on a question of law, as parties cannot bind a court to a rule of law. *In re Estate of Infant Fontaine*, 128 N.H. 695, 697 (1986).

Once there has been an agreed-upon stipulation, a party may not readily withdraw from it and judicial action may be required to vacate or alter it. “[J]udges should be able to reasonably rely on the stipulations and agreements of counsel made in court regarding matters before them.” *Hudon v. City of Manchester*, 141 N.H. 420, 423 (1996). “It is common knowledge that the scrupulousness with which arrangements of this sort are kept in this state is of inestimable value in the administration of justice.” *Hudon v. City of Manchester*, 141 N.H. at 423 (quoting *Johnson v. Nat’l Biscuit Co.*, 96 N.H. 44, 49 (1949)).

Courts shall construe stipulations as a contract. *Czumak v. N.H. Div. of Developmental Servs.*, 155 N.H. 368, 373 (2007). Absent fraud, duress, mutual mistake, or ambiguity, the court shall interpret stipulations as a matter of law, according to “the intention of the parties as expressed in the language used,” and “not according to an unexpressed intention which may have been in the mind of either of the parties.” *D. Latchis, Inc. v. Borofsky Bros., Inc.*, 115 N.H. 401, 404 (1975).

§ 2.5.2 **Foundation Requirements**

Where a stipulation is to be introduced at trial, the following should be shown:

- there is agreement by the parties or their counsel to the matter in question;

- the matter stipulated to is an appropriate subject of a stipulation; and
- the stipulation is in writing, where required.

§ 2.5.3 Sample Examination

Assume that the parties have entered into a written stipulation as follows; it has been brought to the court’s attention, outside the jury’s presence; it has been agreed upon; and it will be introduced at trial.

Text of stipulation:

The parties in the above-captioned case hereby stipulate and agree to the truth of the following facts:

1. At the time of the accident, Mr. Gold was the lawfully licensed operator of the Volkswagen car involved in the accident.
2. The Volkswagen vehicle was owned by Ms. Black, to whom it was registered.
3. The attached document, marked as Exhibit A, is an authentic copy of the registration certificate for the Volkswagen vehicle and may be offered into evidence as an exhibit.

During trial, the stipulation and the registration certificate are offered into evidence:

ATTORNEY: Your Honor, as counsel discussed earlier, there are certain stipulations concerning the accident vehicle that we have agreed to file with the court.

JUDGE: Very well, you may read the factual stipulation to the jury.
[Court instructs the jury as to the meaning of a stipulation and its effect in reaching their final decision.]

You may proceed, counselor.

ATTORNEY: Thank you, Your Honor. The parties have agreed [provide stipulated facts]. Your Honor, we would further seek to offer into evidence, along with the stipulation, a copy of the

registration certificate for the Volkswagen vehicle that the parties have agreed is authentic and may be offered.

JUDGE: All right. The stipulation and the registration certificate may be marked as Exhibits 1 and 2, respectively.

§ 2.6 **INTERROGATORIES**

§ 2.6.1 **Introduction**

Rule 33 of the Federal Rules of Civil Procedure and New Hampshire Superior Court Rule 36 cover interrogatories to parties. Answers to interrogatories may be used at trial to the same extent as depositions are permitted. A party's answers to interrogatories may be read by the other party as evidence at the trial. The interrogated party may require that all the answers on any one subject matter be read if only a part of them is read. N.H. Super. Ct. R. 36.

Ordinarily, answers to interrogatories do not limit the answering party's proof at trial. *Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. 705, 707 (1976). The purpose of interrogatories, however, is to narrow the issues "and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial." *Kearsarge Computer, Inc. v. Acme Staple Co., Inc.*, 116 N.H. at 707. Therefore, "a party must fully disclose all requested information which he [or she] has at the time of the demand." *Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. at 707. Although Superior Court Rule 33 does not explicitly require supplementation of responses, "[u]nder some circumstances, a party has a continuing duty to supplement its answer to an interrogatory, especially when failure to disclose newly discovered information would substantially prejudice the other party." *Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. at 707–08.

Interrogatory answers are usually introduced to impeach or contradict the testimony of the party or as an admission to prove an element of the case-in-chief. If possible, interrogatory answers are best read where the evidence would normally go in the orderly presentation of one's case.

§ 2.6.2 **Foundation Requirements**

The following are the foundation requirements for admitting interrogatories:

- they must have been answered by the party under oath,

- they must be offered by the opposing party, and
- the party against whom the interrogatories are offered must be able to require that all interrogatories on one subject be read.

§ 2.6.3 Sample Examination

In this hypothetical situation, the plaintiff’s attorney needs to establish the names and addresses of the officers and directors of the defendant corporation, Redd Products, Inc.

ATTORNEY: Your Honor, I would like to read to the jury the answers to plaintiff’s interrogatories No. 1, No. 2, and No. 3 by the defendant’s president, Mr. Gray, in this action.

JUDGE: You may proceed.

ATTORNEY: Before reading the interrogatories and the answers, may I ask the court to explain to the jury what interrogatories are?

JUDGE: Yes. I will do so at this time.

[Court instructs the jury on interrogatories.]

ATTORNEY:
(reading)

Interrogatory No. 1:

Please state your name, home address, business address, occupation, and title in the defendant corporation.

Answer:

James Gray
10 Tower Road
Bedford, New Hampshire
Redd Products, Inc.
99 Middle Street
Manchester, New Hampshire
President of Redd Products, Inc.

Interrogatory No. 2:

Please state the names and home addresses of the officers of Redd Products, Inc.

Answer:

President and vice president,
James Gray
10 Tower Road
Bedford, New Hampshire
Treasurer, Nora Gray
10 Tower Road
Bedford, New Hampshire
Clerk, Attorney Grace Lemon
55 Pleasant Street
Concord, New Hampshire.

Interrogatory No. 3:

Please state the names and addresses of all directors of
Redd Products, Inc.

Answer:

James Gray
10 Tower Road
Bedford, New Hampshire
Nora Gray
10 Tower Road
Bedford, New Hampshire.

Having completed reading the interrogatories and answers, the plaintiff's attorney continues with the examination of Mr. Gray.