


STATE OF NEW HAMPSHIRE  
Superior Court  
Rockingham, ss.  
Case No. 215-2022-CV-00167

  
Honorable David W. Ruoff  
September 12, 2024

*Steven Rand, et al*  
Plaintiffs,

v.

*The State of New Hampshire,*  
Defendant.

**Motion Granted.  
However if any  
witness wishes to  
have counsel  
present, they may do  
so.** Clerk's Notice of Decision  
Document Sent to Parties  
on 09/12/2024

**PLAINTIFFS' EXPEDITED MOTION FOR PROTECTIVE ORDER**

Now come the Plaintiffs, by and through counsel, and (i) object to Grantham School District's ("Grantham") move for a protective order that permits them to speak with witnesses who testified in the *ConVal* case as long as counsel in the Rand case refrain from inquiring about privileged communications or otherwise confidential information and expressly advise the *ConVal* witnesses to refrain from volunteering privileged or otherwise confidential information. In support of their motion, Plaintiffs state as follows.

1. This case is set to go to trial September 30, 2024. As part of their case, Plaintiffs intend to call several district officials who also testified in the *ConVal* matter. These witnesses are current or former employees of the districts that were Plaintiffs in *ConVal*. To streamline the trial, Plaintiffs and the State agreed that these witnesses will not repeat their testimony regarding base adequacy. Instead, the Parties will limit their testimony to issues relating to differentiated aid, which was not addressed in *ConVal*. Plaintiffs intend to call these witnesses, including Ms. Witte, in their personal capacity rather than as expert witnesses or district representatives, and to question

them about factual knowledge that is relevant to this case. None of these witnesses will testify pursuant to Rule 702, N.H. Rules of Evidence. Regrettably, counsel for the *ConVal* Plaintiffs, Michael J. Tierney, has objected to Plaintiffs communicating with these witnesses, arguing that they are represented parties that Plaintiffs are prohibited from contacting. *See* Rule 4.2, N. H. Prof'l Rules of Conduct. He may also have interfered with Rand counsel's efforts to effect service of trial subpoenas.

2. Mr. Tierney is wrong, for the reasons discussed below. By invoking the rules of professional conduct, however, he has forced Plaintiffs' counsel to make an untenable choice: abandon their obligation to develop critical evidence in this case or risk professional misconduct complaints by Mr. Tierney. Plaintiffs therefore informed Mr. Tierney that they intended to serve subpoenas on four witnesses (Lisa Witte, Kenneth Dassau, Donna Magoon, Teresa Walker). Plaintiffs served Mr. Dassau personally on Wednesday August 7, 2023.<sup>1</sup> Plaintiffs also informed Mr. Tierney they intend to move this Court for a protective order to allow Plaintiffs to communicate with those witnesses in preparation for trial. As a courtesy, Plaintiffs provided Mr. Tierney with a draft of Plaintiffs' motion yesterday and, to avoid the need for Court intervention, once again asked him to consent to the relief sought. Rather than responding, Mr. Tierney filed a motion to quash Ms. Witte's testimony. Bizarrely, although Ms. Witte testified in her role as the superintendent of the Monadnock School District ("Monadnock") in the *ConVal* matter and then retired from Monadnock, Mr. Tierney filed his motion on behalf of Grantham. Notably, Ms. Witte has not moved to quash Plaintiffs' subpoena.

---

<sup>1</sup> Plaintiffs attempted to serve Ms. Witte personally on the same day but were unable to do so and left a copy of the subpoena at her residence, with the intention to make another attempt at service today. Plaintiffs efforts to serve witnesses Magoon and Taylor have been unsuccessful, so far.

3. Plaintiffs respectfully ask this Court to rule that Plaintiffs may communicate with witnesses that previously testified at the *ConVal* trial.

**THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER**

4. New Hampshire's Rules of Professional Conduct ("**Rules**") permit Plaintiffs to communicate with witnesses who testified in *ConVal* about their potential testimony in the *Rand* matter. Rule 4.2 only prohibits communications with a "person that the lawyer knows to be represented by another lawyer *in the matter*" about "*the subject of the representation.*" Rule 4.2 (emphasis added). The Rule does not prohibit communications with a represented party about matters outside the prior representation. *See* Rule 4.2, 2004 ABA Model Rule Comment, 4.2(4). Nor does it preclude communications with former employees of a represented organization. *Id.* 4.2(7).<sup>2</sup> ("Consent of the organization's lawyer is not required for communication with a former constituent."). None of the *ConVal* Plaintiff districts are parties in this case. Indeed, as Mr. Tierney has repeatedly argued and this Court has ruled, the *ConVal* matter is separate and distinct from this case. Thus, Plaintiffs' request to consolidate the two matters was denied and Mr. Tierney successfully argued against Plaintiffs filing an amicus pleading in *ConVal*. Plaintiffs have repeatedly reassured Mr. Tierney that they will not communicate with the witnesses about attorney-client communications, or other confidential information. Rather, Plaintiffs intend to communicate with them regarding differentiated aid in the *Rand* case, which Rule 4.2 permits.

---

<sup>2</sup> The Statement of Purpose to the Rules explains that "Each Rule is published together with the applicable ABA Comment, as adopted by the American Bar Association in conjunction with its Model Rules of Professional Conduct. Preceding the ABA Comment may be found an Ethics Committee Comment, which may describe distinctions between the Rule as adopted in New Hampshire and the respective ABA Model Rule." New Hampshire Rules of Professional Conduct, Statement of Purpose, available at: <https://www.courts.nh.gov/new-hampshire-rules-professional-conduct>. As to Rule 4.2, the distinctions described by the Committee between the New Hampshire Rule and the ABA Model Rule do not concern paragraphs 4.2(4) or 4.2(7) of the ABA Model Rule.

Moreover, three of the four witnesses in question, are no longer employed by the *ConVal* Plaintiff districts for which they testified. Witness Donna Magoon remains employed as the Superintendent of the Newport School District. Under Rule 4.2 Plaintiffs are free to communicate with those witnesses without Mr. Tierney's consent.

5. Plaintiffs have made every effort to work with Mr. Tierney and resolve this dispute without Court intervention. With less than two months left before trial begins, however, Plaintiffs can no longer delay developing this aspect of their case. Plaintiffs respectfully request that this Court rule that Plaintiffs are permitted to speak with witnesses who previously testified in *ConVal* regarding all matters necessary to prepare their testimony in this case, provided that they do not discuss attorney-client communications, or other confidential information.

Wherefore, for the foregoing reasons, Plaintiffs request the Court issue the requested protective order and grant such other relief as is just and proper. Plaintiffs waive hearing and request the Court expedite consideration of this matter. Plaintiffs have separately objected to Mr. Tierney's Motion to Quash.

Dated: August 12, 2024

Respectfully submitted,

/s/ Andru Volinsky

Andru Volinsky, NH Bar No. 2634  
160 Law, PLLC  
P.O. Box 1181, Concord, NH 03302  
(603) 491-0376  
[andruvolinsky@gmail.com](mailto:andruvolinsky@gmail.com)

John E. Tobin, Jr., NH Bar No. 2556  
60 Stone Street  
Concord, NH 03301  
(603) 568-0735  
[jtobinjr@comcast.net](mailto:jtobinjr@comcast.net)

Natalie Laflamme, NH Bar No. 266204

Laflamme Law, PLLC  
100 N. Main St, Suite 512  
Concord, NH 03301  
(603) 937-5434  
natalie@laflammelaw.com

Wendy Lecker\*  
Education Law Center  
60 Park Place, Suite 300  
Newark, NJ 07102  
(203) 536-7567  
wlecker@edlawcenter.org

Joshua D. Weedman\*  
White & Case LLP  
1221 Avenue of the Americas  
New York, NY 10020  
(212) 819-8200

*\* admitted pro hac vice*

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion has been served via the court's electronic filing system to all parties of record on this 12<sup>th</sup> day of August 2024. Counsel for Grantham, Mr. Tierney, is also served via the electronic filing system as he receives all pleadings in this matter.

*/s/ Andru Volinsky*  
Andru Volinsky