Administrative Hearings Under the Connecticut UAPA: Basic Tools and Case Update

December 7, 2018

9:00 a.m. – 1:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute, Inc.

CT: 3.5 CLE Credits (2.5 General; 1.0 Ethics)
NY: 4.0 CLE Credits (3.0 AOP; 1.0 Ethics)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Administrative Hearings Under the Connecticut UAPA: Basic Tools and Case Update

Agenda

8:30 a.m. – 9:00 a.m.	Registration and Continental Breakfast
9:00 a.m. – 9:15 a.m.	Opening Remarks
9:15 a.m. – 10:00 a.m.	**Creating and Preserving the Record and Injunctive Relief Options Under the UAPA** Speaker: **Nyle Davey**, Office of the Attorney General
10:00 a.m. – 10:45 a.m.	**Hearings Under the UAPA and the Statutes Relating to Contested Case Hearings and Suggestions for Attorneys in Undertaking these Cases** Speaker: **Louis Todisco**, Connecticut Department of Education Division of Legal and Governmental Affairs
10:45 a.m. – 11:00 a.m.	Break
11:00 a.m. – 12:00 pm	**Ethical Considerations Representing Clients in Contested Case Hearings** Speaker: **Mary Alice Moore Leonhardt**, Moore Leonhardt & Associates LLC
12:00 p.m. – 12:30 p.m.	**Professional Licensing Proceedings at the Department of Emergency Services and Public Protection** Speaker: **Alison Rau**, Connecticut Department of Emergency Services and Public Protection
12:30 p.m. – 1:00 p.m.	Questions and Answers

Faculty Biographies

Nyle K. Davey is an Assistant Attorney General with the State of Connecticut Office of the Attorney General. Attorney Davey is currently assigned to the Torts and Civil Rights Department with a trial practice concentration on personal injury defense. Attorney Davey also serves as a consultant on complex administrative law issues that confront government attorneys.

Attorney Davey has prosecuted licensing cases in administrative actions, advised administrative tribunals, brought enforcement actions against licensees, and defended administrative decisions on appeal for a variety of state entities, including the Department of Public Health, Medical Examining Board, Board of Examiners in Podiatry, State Dental Commission, Board of Chiropractic Examiners, Board of Examiners in Nursing, Board of Examiners of Embalmers and Funeral Directors, and Psychiatric Security Review Board. He has represented a variety of state entities in administrative law matters and civil actions, including Board of Education for Services to the Blind, Commission on Human Rights and Opportunities, Dept. of Administrative Services, Dept. of Children and Families, Dept. of Developmental Services, Dept. of Education (including its Technical High School System), Dept. of Energy and Environmental Protection, Dept. of Mental Health and Addiction Services, Dept. of Emergency Services and Public Protection, Dept. of Social Services (including the Bureau of Rehabilitation Services), Dept. of Transportation, and Dept. of Veterans Affairs as well as the University of Connecticut, the constituent units of the Board of Regents for Higher Education, including the Connecticut State University System (Eastern, Central, Southern and Western State Universities), Community Colleges, and Charter Oak State College.

Attorney Davey is admitted to the bars of Connecticut, United States District Court for the District of Connecticut, and the Court of Appeals for the Second District. He is a member of the Connecticut Bar Association and its Administrative Law Section having served as Section Chairman and frequently lectures on administrative law topics. Attorney Davey is also a member of the Association’s Federal Practice and Litigation Sections. Attorney Davey has also been a member of the American Bar Association and its Administrative Law & Regulatory Practice Section, Tort Trial & Insurance Practice Section, and Division of Government & Public Sector Lawyers. Attorney Davey was a member of the organizing committee and a past chairman of the Joseph M. Healy Graduate Student Healthcare Writing Competition sponsored through the Connecticut Health Lawyers’ Association.

Prior to joining the Office of the Attorney General, Mr. Davey earned a J.D. from the University of Connecticut School of Law in 1989. He also earned a M.A. in Community Psychology from the University of New Haven in 1976 and an undergraduate degree from Nasson College in 1974. Prior to becoming a lawyer, Mr. Davey served as a municipal department head, a planning and grants program manager for a large state agency, and a policy planner and legislative liaison for the State of Connecticut Commission on Long Term Care and its fourteen member agencies.

He is a past President of the University of New Haven Alumni Association and is currently a member of the University's Henry C. Lee College of Criminal Justice and Forensic Sciences Advisory Board. He has served on various committees of the New Haven Country Club, including Finance and Membership. He has also served on the boards of directors of the Connecticut Youth Services Association, Hamden Fathers' Baseball and Softball League, and the High Lane Club.

Mary Alice Moore Leonhardt is a nurse attorney who concentrates her practice in healthcare law. She advises and advocates for physicians, nurses, dentists, psychologists and all levels of licensed healthcare providers on professional licensing as well as their professional practice business and employment relationships and

regulatory matters. She defends all licensed professionals in billing audits, fraud investigations, court appearances, depositions, and civil, criminal, and administrative trials and hearings. She works extensively with persons suffering from substance abuse and disabling mental health conditions. She also handles reimbursement and coverage matters and assists providers and patients with treatment and end of life decision-making. She received her BSN from Georgetown University and J.D. from Suffolk University Law School.

Alison Rau is a staff attorney with the Department of Emergency Services and Public Protection, based at State Police Headquarters in Middletown, CT. A 2009 graduate of the University of Connecticut School of Law, she also holds a Master's degree in Environmental Management from the Yale University School of Forestry and Environmental Studies. She handles administrative legal hearings, freedom of information act requests, memoranda of understanding, myriad law enforcement-related legal research, and is an attorney general designee as well as the legal liaison to the Deadly Weapon Offender Registry.

Louis B. Todisco received his J.D. from the University of Miami School of Law, cum laude, in 1977. While he was at the University of Miami he was the Managing Editor of the University of Miami Law Review. He also has a M.S. from the University of New Haven in Criminal Justice, and a B.A. from the University of Connecticut in Political Science. Before attending law school, he was an adult probation officer with the Connecticut Department of Adult Probation.

After graduation from Law School, Mr. Todisco engaged in the private practice of law with Cummings and Lockwood, Ronai, Berchem and Moses, and Murtha Cullina LLP (and its predecessor firm) until February 2014. His main areas of practice for most of these years were labor and employment law and health care regulatory law. In his practice, he handled matters, including contested case hearings, before state and federal agencies with jurisdiction in labor and employment law and health care regulatory law matters. He has argued cases before the Connecticut Supreme Court and the Connecticut Appellate Court.

In February 2014, Mr. Todisco became an attorney with the Connecticut Department of Education where he continues to be employed. In his current position, he represents the Department of Education in educator certification hearings, declaratory rulings, and other matters.

Mr. Todisco has presented at numerous Connecticut Bar Association programs on administrative law issues, including administrative appeals, contested case hearings, and year in review programs. He is a member of the Education Law, Administrative Law, Health Care Law, and Labor and Employment Law Sections of the Connecticut Bar Association. He is a past President of the Connecticut Health Lawyers Association and past Chairperson of the Administrative Law Section.

CONNECTICUT BAR ASSOCIATION

Administrative Law Section

FUNDAMENTALS OF ADMINISTRATIVE LAW UNDER THE CONNECTICUT UNIFORM ADMINISTRATIVE PROCEDURE ACT:

IS IT A HEARING OR IS IT A TRIAL?

Nyle K. Davey, Esq.[*]
Assistant Attorney General[**]

December 7, 2018

Abstract: In June of 1215, A.D., in Runnymede on the shores of the River Thames near London, an advisory group to English monarchs over the centuries, known as the "Witan," complained to the then King about his abusive use of his absolute unbridled powers. Under threat of revolt, the "Witan" demanded to be empowered as the final arbiter of disputes between them and the monarch or the monarch's agents as spelled out in the Magna Carta. He affixed his seal. The "Witan" became the final arbiter of facts and law. This shift in power made its way into the new American colonies' jurisprudence. Fact finding and due process rights eventually were codified in federal and state constitutions and statutes and integrated as part of the check and balance of power. Connecticut adopted its version of the Uniform Administrative Procedures Act (UAPA), § 4-166, *et seq*., as well as other provisions that granted rights as to many, but not all, governmental decisions. A specialized practice area evolved. Those practicing administrative law today provide continuous balancing of fact finding and due process rights, including judicial review. With each new generation of public and private practitioners, sensitivity must be renewed to ensure governance is accomplished by a consistent and fundamentally fair process such that that the imbalances of yesteryears do not return. Judicial review and elections continue to protect of the Rule of Law rather than the whims of a monarch.

This document presents fundamental concepts pertaining to adjudicating "contested cases" under the UAPA. Tips are offered in planning for, and participating in, agency level hearings. Some subtle distinctions are noted between agency administrative law practices and the Superior Court Practice Book Sections as to civil litigation. This document sets the stage for review by the Judiciary Branch.

It is designed to help administrative law actors, including lawyers and decision-makers to continue to support the Rule of Law and to ensure a fundamentally fair opportunity to present evidence in the context of clear and consistent legal standards.

[*] Attorney Davey is a member of the Connecticut Bar Association's Administrative Law Section and has served a Section Chairperson and other Executive Committee positions. Attorney Davey is an Assistant Attorney General with the Connecticut Office of the Attorney General.

[**] DISCLAIMER/LIMITATION: The views expressed in this paper are not attributable to the State of Connecticut, the Attorney General or his Office, the Connecticut Bar Association, or the Administrative Law Section.

ADMINISTRATIVE LAW FUNDAMENTALS
IS IT A HEARING OR A TRIAL?

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2018 PREFACE[1]

This document has its historical origin in the Connecticut Bar Association's Administrative Law Section efforts to provide a "nuts and bolts" training for practitioners engaged in administrative law under Connecticut's Uniform Administrative Procedures Act (UAPA), i.e., Chapter 53 of the General Statutes of Connecticut. It became a mini-treatise for practitioners and for laypersons and professionals who engaged in administrative decision makers as set forth in the UAPA. In addition to practitioners in the private sector, it is a resource tool for boards, commissions, agency advisors, and staffing attorneys state agency with responsibilities for doing the public's business, including but not limited to serving as investigators, adjudicators and appellants/appellees.

In the beginning, the focal point was understanding and managing state agency proceedings that were within the definition of a "contested case" under Conn. Gen. Stat. §4-166(2) and the right of review § 4-184. The primary goal was, and is, to present fundamental and practical information about practicing before an administrative agency in a proceeding governed by the UAPA. Over time, a secondary goal became to make administrative law practitioners aware of distinctions and similarities to the rules of practice employed by the Superior Court in civil litigation. While pre-dating the Continuing Legal Education requirements of today, its structure serves the CLE purposes quite well.

The document is organized around "practical" and "legal" issues encountered by practitioners, inclusive of petitioners, respondents, hearing officers, and final agency decision makers, be it a board, commission, agency staff person, agency head, or a disignee. The approach is chronological. It offers information about a preliminary assessment of proposed administrative action and follows the steps and issues through the initial stages to final appellate reviews, albeit interwoven with many descriptions of interim steps and issues as well as the need to anticipate future problems. It sounds simple. It is not.

However, a straight chronological framework simply cannot carry the day in the practice of administrative law. The chronological analysis falls short. Near the end of time with an appeal, the practitioner may encounter that thought "if I knew then, what I know now" and conclude "I should have anticipated that ____ (the practitioner can then fill in the blank only with hindsight). So during an appellate review, it is too late to address or fix the absence of factual predicates on the record created during a hearing. The chronological framework is lost

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[1] **DISCLAIMER/WARNING**: Every effort has been made to ensure that the text is accurate and current as of thirty days prior to the date of publication. However, readers are advised, directed, commanded and instructed to confirm cites, sources and current law prior to using this material in any legal or administrative proceeding, especially as may be affected by the passage of time. Reliance or any use of this document or its content is taken at the peril of the actor, not with risk or liability to any third party, including the author. *Pro se* parties should seek legal counsel as to conclusions of law and procedural descriptions contained herein. Also, as indicated herein repeatedly, a reader should review each agency's Rules of Practice and precedents, if applicable and if indexed, for additional guidance. The content herein is not a binding authority and should not be used as such by any party without further legal research and verification. **NOTE WELL**: Administrative law and its governing statutes are ever changing as are the tribunals and final decision makers.

quickly because a practitioner must consider the entire administrative law sequence (start to finish) of a particular administrative proceeding when attempting to address a single interim step or task. Having a narrow focus is fraught with danger.

An unbroken nexus must exist that connects (1) the scope and authority to regulated the subject conduct or circumstance at issue; (2) the factual particulars of the alleged offense conduct and/or subject condition; (3) the evidence at hand and competency of witnesses; (4) the proposed agency action, notice of charges, and array of adverse consequences; (5) the evidence in the "Return of Record (ROR);" (6) issues for appellate review, (7) the final yield of an appellate review; and (8) possible impacts on the target of the proposed actions; (9) impact on the agency rendering the final decision; and (10) the cost of putting on a case or defense. The practitioner need to envision a golden thread running from the reality of facts and circumstances in any administrative and the Chief Justice's finger pointing to a representation of that within the ROR. Hopefully the tension will run without a break or gap. Hopefully, the practitioner will not learn about the flaw during oral argument and then feel it again in the Court's Memorandum of Decision. The factual predicates and application of law need to linked at every stage.

The overall cost/benefit in a target of the administrative proceedings as well as to the underlying general public policy goal being pursued by the final agency decision maker must not get lost in the fog of uncertainty as the complexity of administrative law proceedings makes predicting the outcome difficult to say the least. For example, it is helpful to know the "Anatomy of A Final Decision" when performing an initial assessment. But a practitioner must start somewhere. This document can be that starting point. At least we can clearly state, that a contested proceeding starts with an agency action coming into focus and that is enough to start the analysis and start to prepare for the sequence of events to follow, including a Final Decision.

In addition, not all governmental decision makers are equal or uniform in their decision making process. There are many subtle, but important distinctions that exist between the demands and requirements of various administrative tribunals and our trial courts. Some differences are by design, some by legislative enactments, and some by common law tradition and/or agency history. Differences can be traced to variations in common law trail practices, the Superior Court's Practice Book, the Code of Evidence, and the various "Rules of Practice" adopted by the agencies.

Many private and public sector practitioners appreciate the distinctions. Many do not. For the unknowing, these distinctions represent potential points of confusion, frustrations and/or stumbling opportunities that are completely avoidable. This document is design to foster a common understanding.

"**PRACTICE TIPS**" are sprinkled on problem areas and recent changes. The chronological perspective in the Table of Contents facilitates a practitioner initiating an inquiry targeted to a current challenge or issue. This edition includes 25 new practice tips.

I. INTRODUCTION

It beyond dispute that the practice of administrative law in Connecticut in 2018 has one of its major roots in the jurisprudence that made its way across the Atlantic and into the fabric of the new colonies, including Connecticut. That is to say, the United Kingdom's early monarch form of governance was premised on all powers be vested in one person. That power is over all matters within the Kingdom. The monarch's view of facts and sense of justice were beyond reproach for centuries. The monarch's decisions were not subject to challenge at least as a matter of routine. The monarch's decisions that were characterized as benevolent were in equal authority as those that were arbitrary, capricious and onerous.

As the United Kingdom, increased in size and complexity, the monarch's power continued to be exercised by the monarch, albeit with an increasing reliance on agents to act on the monarch's behalf in the far reaches of the Kingdom. The individual monarch could not be everywhere in the Kingdom at once, so the monarch needed assistance executing the monarch's directives and demands beyond the castle walls. The monarch selected agents that advanced the monarch's orders and rules. They did so based on their own perception of the monarch's orders and their observations of facts. Many enjoyed a sense of empowerment from the monarch. The agents also had discretion, either in accordance with the monarch's or upon their own preferences. The agent's acted within the monarch's stated parameters or by their own sense of what needed to be done to protect the Kingdom. The relationship between the monarch and its agents became the seedling of administrative law and laid a foundation for a change in the distribution of power within the monarch and eventually away from the form of governance.

This document is not intended to provide a comprehensive history of the evolution of administrative law. The transition of power did not happen overnight. Even so, a transformational event occurred in June of 1215 that has a direct evolutionary connection this this document.

Over the centuries, the monarch's agents and their collective role in the monarch's governance over the Kingdom evolved into an advisory a group.[2] The members were know as the Barons of the day. Each been granted control over a landmass and people and chattel within a given area. The Baron would assemble from time to time in a group known as the "Witan." By 1215, the Witan was increasingly intolerant of then King Richard who had earned a reputation for being arbitrary, capricious and onerous in his decision making. Rulings were

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[2] See in general: Magraw, Martinez and Brownell (Eds.). "Magna Carta and Rule of Law." Chicago: ABA (2014); Helmholz, R.H. "Magna Carta and The Ius Commue." 66 U. Chi. L. Rev. 297 (1999); Mann, Julian III. ""Due Process; A Detached Judge; and Enemy Combatants." 28 J. Nat'l Ass'n Admin. L. Judiciary 1, 4 (2008); Ansbacher, Sidney F. "Stop the Beach Reunoursihment: A Case of Macguffins and Legal Fictions." 35 Nova L. Rev. 587, 590 to 597 (2011); Cimini, Christine N. "Principles of Non-Arbitrariness in the Administration of Welfare." 57 Rutgers L. Rev. 451, 463-472 (2005); Seidman, Guy I. "The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned From King Henry III." 49 St. Louis U.L.J. 393 (2005). Also see Berman, Harold J. "The Origins of Historical Jurisprudence: Coke, Selden, Hale." 103 Yale L.J. 1651 (1994); Doernberg, Donald L. "Taking Supremacy Seriously: The Contrariety of Official Immunities." 80 Fordham L. Rev. 443, 455 n.61 (2011).

increasingly based on the monarch's momentary perceptions and disregard for anyone impacted by a decision. The Witan demanded a change in the power structure, least they would revolt and strip him of all his power. The Witan produced a document known now as the *Magna Carta* and secured the King's seal upon it in the fields of Runnymede in June of 1215.

The importance of the *Magna Carta* is the King agreed to relinquish his absolute power and yield to a different power structure, i.e., the Rule of Law. The shift in power established a right of review for themselves as a group in the event that the monarch violated an established right of one of the Barons or acted beyond his authority or in a manner inconsistent with the laws, failed to provide certain due process rights, or was arbitrary or capricious.[3] In effect, the Barons reserved the power to themselves to reverse the King's final decision making, if the King strayed too far from the principles of the Rule of Law as embodied in the *Magna Carta*. The monarch's omnipotent powers were significantly curtailed and shifted over to the Witan and its members. Efforts to reverse the shift and return power to the monarch were unsuccessful. The checks and balances in the Magna Charta survived and have continued to be within the basic tenants of governance to this day and reach beyond the original limited circle of the Witan.

Fast forward to today. The balancing of administrative power continues. Again, the concepts had to cross the Atlantic to the American colonies. The Rule of Law and due process emerged in the New World jurisprudence via constitutional, statutory and policies designed to manage the balance of power between those being governed and those engaged in governing.

Admittedly, administrative standard and procedures developed standard to curb the offenses and abused of powers of yesteryear's monarch. This includes efforts to ensure that those being governed and those engaged in governing engage in fact finding with the opportunity for those governed to be heard by an independent fact finder; to ensure the allegations of violations or anticipated outcomes are known in advance of any proceeding; and the legal standards are applied in a consistent manner; and to have access to an independent judicial review of any final decision rendered that is adverse to the stake holder or object of governmental decision, if within a class of decisions as specified by the legislature for such appellate review.

Today’s fulcrum on the balance of power in Connecticut is codified in Gen. Stat. §4-183(j)(1)-(6), *supra*, where the executive branch is restrained by the Rule of Law and subjected to judicial branch review of decisions (not unlike the Barons’ right of review), when and if a decision is characterized as a violation of the law, made by unlawful procedure, clearly erroneous in light of the evidence, arbitrary, capricious, abusive or unwarranted exercise of discretion (not unlike the King’s acts), they enjoy the right of reversal of that decision. So rest assured that the right is vested and has withstood the test of time, but remains a dynamic process. Hence the practice of administrative law carries forward issues that cannot be statically resolved and the practice must keep pace with our changing society.

II. A BRIEF HISTORICAL NOTE ON THE KING AND SOVERIEGN IMMUNITY

It is safe to presume that King Richard resisted being brought into the system of justice where the King's decisions and those of his agents were subject to review. We can also presume

[3] Magraw, Martinez and Brownell (Eds.). "Magna Carta and Rule of Law." Chicago: ABA (2014)(at p. 399).

that the King retained as much power as he could as long as he could by what measure available, the impact of which continues today. "The King [and Queen, to be politically correct] can do no wrong" was, and is, the underlying proposition of the doctrine of sovereign immunity. The doctrine is by no means dead. It is black letter law that you cannot sue state government for money damages without the State's consent. This is consistent with no being able to force a judicial review of decisions unless the State has consented to that suit, either by statute for classes of claim or on a case-by-case basis.

If the State has provided a mechanism for administrative decision making and judicial review of a class of decision, that mechanism must be used to access judicial review. Known as the doctrine of administrative exhaustion, this doctrine forces the governed to give the governing every chance to avoid going to court by having the opportunity to resolve differences administratively before resorting to a judicial interventions, save a few exceptions. The legal standard is that, if the legislature has not agreed to allow a court to review a decision, then it is not reviewable.

This policy is reinforced by a presenting a higher standard of review that views statutory derogation of the doctrines in an extremely narrow perspective. In today's language, the government allows its citizens similar rights and continues to reserve to itself if and when to permit such challenges. The limitation on a right of review that protected the monarch still protects the taxpayer from footing the expense of a defense to a government action. A formidable barrier still protects the government actor where the legislature has not waived review. However, the right of review seems to be ever expanding and now is only a legislative enactment away, albeit eroding one issue at a time.

PRACTICE TIP: Today the expansion is not absolute. An element of the King's absolute powers and protection under the doctrine of sovereign immunity continues to lurk in administrative law. If the King was not forced into a judicial review process and granted a hearing (perhaps to ensure that his agents were following the correct standards or protocol), the King did not expose himself or his agents to judicial review as the proceeding was characterized as a "gratuitous" second chance by the sovereign to ensure the correct decision was made even though agency review was not one from which judicial review was authorized. Suffice it to say that the King would not likely offer to subject himself to judicial relief if not required (Why would he?). The legislature reserved to itself the power to find classes of agency decisions where a citizen would be granted a right of review. A practitioner needs to quickly determine whether a right of review exists during the initial assessment least the client may be surprise to learn that no such right exists.[4]

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[4] In addition, an injured citizen in the general population, who claims that the State's executive branch negligently administered the enforcement of a regulation, may also want justice against the public official pertaining to a failure to implement an administrative law as directed by the legislature. The initial assessment must include that the individual citizen does not have a cause of action against the public official, except in very limited circumstances. See *Leger v. Kelly, Commissioner of Motor Vehicles*, 142 Conn. 585 (1955); *Wininger v. Hong, M.D., Commissioner of Public Health*, 2010 WL 4070430 (Conn. Super.; Cosgrove, J.; Sept. 8, 2010).

So in modern terms, administrative law is a fulcrum point where each individual citizen encounters the abstract concepts known as the public good and police powers. These concepts collide in the minute details of what the individual may want to do and what is tolerated by government acting on behalf of the common good and in accordance with duly adopted statute and regulations, i.e., the Rule of Law. Administrative law is where the "rubber hits the road," meaning implementing the laws in such detail that compliance or violations must be determined by an administrative agency on a "yes" or "no" basis, fact by fact, decision by decision, case by case. Another way to say it is the "devil is in the detail" and to protect the citizens against government, government must be stopped at every detailed point possible or it will consume or overtake all available freedoms.

The primary vehicle to do this is "regulations" because they contain the most details.[5] Minute and comprehensive details, i.e., the level required to implement a law, cannot be contained within a statute, save standards that are in themselves exact, e.g., one ton. A rigid enactment creates a whole set of issues beyond the scope of this paper. Suffice it to say that the legislature usually empowers the agency to draw lines "somewhere" and that "somewhere" is usually found in regulations. *Rivera v. Liquor Control Commission*, 53 Conn. App. 165 (1999). While administrative law relies on statutory language or regulatory language for most of its benchmarks and standards, it also relies on the common law and common understanding of language when those sources of law are insufficient. *Towbin v. Board of Examiners of Psychologists*, 71 Conn. App. 153, *cert. denied* 262 Conn. 908 (2002). Compliance with the benchmarks and standards are judged in the details, not the abstract. It is for the legislative branch to provide the details for the agencies to use in implementing a decision, not the judicial branch. *Department of Public Safety v. State Board of Labor Relations*, 296 Conn. 594, 605 (2010).

When a practitioner from the public or private sector encounters a governmental action or proposed action, the obvious starting point for any analysis is the Connecticut Uniform Administrative Procedures Act (hereinafter the UAPA or the Act), also known as Chapter 54 of the General Statutes. Concurrently, the practitioner must look to the enabling statutes and related regulations to determine the scope of any authority or criteria set by the legislature in statutes and approved regulations. But these two steps are merely starting points. The 1996 Case Law Review Summary by the Connecticut Law Tribune captured one theme of importance in administrative law decisions.[6]

> Several of the state Supreme Court's administrative decisions last year read like extended versions of "Simon Says": All commissioners and others must do what they are told and play by the rules to stay in the game.

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[5] This paper does not describe the proposal, review or adoption of regulations. See Conn. Gen. Stat. § 4-167, et seq. In addition, the practitioner has to be aware that statutory standards and regulations often overlap as to detail and vary greatly. See Conn. Gen. Stat. § 4-189h concerning reduction in the number and length of regulations.

[6] Rogalski, H. *Case Law Review: Administrative Law. 23 CLT 8 at 10 (February 17, 1997).*

The challenge is knowing what they are or have decided, what they have been told and what the rules are, or to say it another way, what are the basic elements of administrative law? It is far from simple.[7]

Again, the general rule has been and continues to be that not every decision made by an agency is subject to appellate review. *Ferguson Mech. Co. v. Department of Public Works*, 282 Conn. 764, 773 (2007) *citing Summit Hydropower Partnership v. Commissioner of Environmental Protection*, 226 Conn. 792, 800 (1993). While each agency must abide by the "Simon says" rule when making decisions, each person seeking to have an agency decision reviewed must also follow a "Simon says" rule. For a recipient of an adverse government decision, "Simon says" identify a right of review and you can. If you cannot identify a right of appeal, then review is not available.

As to the current practice of administrative law in Connecticut, a very important date is July 1,1989. As the result of work by Connecticut Law Revision Commission, including input from its Advisory Committee on Amendments to the Uniform Administrative Procedure Act, the General Assembly passed Public Act 88-317. For a historical overview, see CBA-CLE Seminar on Administrative Law: The Revised Uniform Administrative Procedure Act [under] P.A. 88-317. The changes instituted by P.A. 88-317, and to a lesser degree by P.A. 88-133, still form the basic structure of administrative law in Connecticut.

A second keystone, and no less important, is the agency's authority as codified in statutes and regulations specifically related to the agency in question. Great caution must be taken as requirements vary not only from agency to agency, but from program to program and from decision to decision. There is no substitution for knowing the limits of an agency's power and when that power does not align with the decision at hand. There is no substitution for knowing the past history and past conduct of the agency and its final decision makers in relation to its decisions.

It is not unreasonable to presume that the UAPA by its name attempts to create a uniform procedure across all agencies. The UAPA does not completely accomplish that goal. The UAPA more directly focuses on judicial review and preparing an agency decision for judicial review in a consistent manner. See *McDermott v. Commissioner of Children and Youth Services*, 168 Conn. 435 (1975); *Altholtz v. Connecticut Dental Commission*, 4 Conn. App. 307 (1985). This is a direct benefit to the judiciary. As stated above, to survive judicial review, an agency decision need only meet the minimum requirements of the UAPA, but the record for review must be presented in a manner that complies with the UAPA as well. Overtime, in part due to judicial gloss and in part due to agencies gaining a better understanding about compliance with the UAPA, the agencies have evolved and are evolving into a more uniform approach and, at least from one perspective, the nature of the variations between and among the agencies, tribunals, adjudicators and hearing officers have narrowed.

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[7] In some private and public agencies, this misperception causes newer attorneys to be assigned to administrative proceedings and senior practitioners are reserved until an appellate review is required. This can be a fatal tactic since irreversible damage can be done to a case during the taking of evidence at the agency in the first instance. See herein subsection on "Making the Record."

In addition, on a historical perspective, administrative law today blends the functions of all three branches of government. The scope covers the "law governing the conduct, powers, and procedures of administrative agencies" and it is "the laws created by administrative agencies."[8] Some practitioners divide administrative law into three functions: (1) executive, i.e., implementing laws, (2) judicial, i.e., adjudicating and interpreting, and (3) legislative, i.e., rule-making.[9] Under modern law, these activities are clearly within the purview of the executive branch and undeniably have shades of gray overlapping with the other two branches of our tripartite form of governance.

A practitioner must consider that, even though the Connecticut UAPA was last significantly studied and amended in 1980's, the UAPA does not create or support a truly "uniform" "procedure" across the various state agencies. Numerous exceptions and variations still exist in Connecticut. Practice before one adjudicator can be quite different than another. It has long been observed that administrative law is not saddled with the formulistic or technical rules of the judicial branch, but the lack of formality or uniform rules exposes the practitioner to certain pitfalls and hazards as well as the benefit from not being strapped to those types of rules.

Compared to the judge and jury system in the trial court, the practitioner may find a more complex organizational structure. In the trial court, the model is a judge handles matters of law and the jury handles serves as the trier of fact; or you have a bench trial. In a contested case, the trier of fact may be an employee of the agency that is making the decision. The trier of fact may be a board or commission with multiple members, but not a jury of your client's peers. However, that board or commission may be peers of a particular profession, e.g., other licensees of a given profession. The trier of fact may be a volunteer and/or a political appointee.

The trier of fact may have a body of expertise that may be used in rendering the final agency decision, but that expertise may not be visible or even noted during the proceeding, e.g., the standard of care of a given licensed profession. The practitioner should assume that the presiding officer and/or adjudicating panel have expertise in the area of law or issues in controversy if the controversy is closely aligned with the field over which the final decision maker has authority, e.g., Dental Commission on an issue of selection of crowning material or operative procedure required. Such a licensing board may expertise and experience in a subject matter because of their own license status and may rely on that expertise in rendering a decision, even if no such evidence is received during the taking of evidence. Juries and judges are not experts. Nor are juries and judges, especially where expertise is required, permitted to go outside the evidence presented.

The presiding hearing officer may not be the final decision maker. The hearing officer may be independently empowered to render a final agency decision without formal accountability to the appointing authority. The hearing officer and/or the final decision maker may not be trained as a lawyer. The hearing officer and/or the final decision maker may seek advice of counsel unbeknownst to the practitioner. If a panel is hearing the matter or is the final

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8 Statsky, W. West's Legal Thesaurus and Dictionary. St. Paul: West Publishing Co. (1985).

9 Also, worthy of a footnote is what administrative law is not. It is not criminal, although some administratively driven decisions are just as critical to a client, e.g., civil fines and loss of a license or a permit to engage in a regulated conduct. It is not a contract action. It is not trial practice, although many trial practice skills are transferable.

decision maker, it is possible that no lawyer will be involved at all. Even so the final decision maker may rely on counsel for legal issues and a practitioner may want to encourage this (or under some circumstances want to avoid the same).

The administrative entity may be represented in the proceeding by a government attorney or agency staff. The government attorney may be a member of the agency or an Assistant Attorney General from the Office of the Attorney General.[10] One of the two opposing parties will likely not be a governmental employee, although in some occasions there are governmental attorneys all the way around. The roles and names vary from proceeding to proceeding and often shift during the course of a proceeding. The practitioner is well advised to consult with the agency's Rules of Practice to learn whether one or more of the following labels may apply: petitioner, applicant, movant, prosecutor, appellant, appellee, licensee, permittee, probationer, certificate holder, respondent, agent, witness, intervenor, hearing officer, presiding officer, final decision maker, agency head, to name just a few. Note that the use of "plaintiff" and "defendant" is not on the list, although these terms do come into play when filing an appeal from the final agency to a reviewing court.

The foundation of our common law tradition is the doctrine of *stare decisis et non quieta movere*, meaning "to abide by or adhere to decided cases and not to unsettle things which are settled." This doctrine is best served by the publication of earlier decisions. Past decisions as written become the best indicator of future decision makers and a party may read those decisions with some assurance that they are the law. Oral traditions and the whims of the final decision maker become less critical. Our common law courts eventually developed a system of publishing precedents. Unlike the courts, the agencies have only recently begun to routinely publish their decisions. The internet and electronic information management have improved the access to administrative agency decisions.

Another aspect of administrative law that may surprise a practitioner is that the agency representative may have had a long standing relationship with your client. The agency personnel may know your client's particular business or personal information in extreme detail. You may have less information than they do. The governmental representative may have been providing consultation and education to your client over the years in how to comply with existing statutes and regulations. The agency personnel may know the strengths and weaknesses of your client's business history. For repeat offenders who are brought before an administrative hearing in a contested case, your client may be facing the same the hearing officer, panel and/or final decision maker each time. In some administrative proceedings, your client and the administrative actors may be complete and total strangers, having never even met, leaving you with no real information about them either, except what your client has shared with you. No *voir dire* process is available in contested cases, although recusal is available to address conflicts. Forum selection is almost non-existent as statutes by their very nature prescribe who will render particular governmental decisions and how the decisions will be handled. See for example *Tarro v. Comm'r of Motor Vehicles*, 279 Conn. 280 (2006) (limitation

[10] See *Commission on Special Revenue v. FOIC*, 174 Conn. 308 (1978)(Where the Attorney General is not an actual party to an action, the Office of Attorney General may represent opposing state agencies to the controversy.) See general discussion: Berenson, S. *The Duty Defined: Specific Obligations That Follow From Civil Government Lawyer's General Duty to Serve the Public Interest*. 42 Brandeis L.J. 13 at 48-49 (Fall 2003).

of factors in administrative hearing on driver's license revocation compared to "reasonable and articulable suspicion" in police stops and seizures). It is not like selecting among, e.g., a jurisdiction based on the plaintiff's residence, defendant's residence or another jurisdiction where a colorable nexus can be utilized.

While you as a practitioner may see some immediate advocacy opportunities for your client in dealing with the agency personnel, your client may be focused on an ongoing regulatory relationship with the agency and agency personnel. While the agency is pursuing an action adverse to your client's interests today, your client may view the current demand as relatively unimportant in comparison to the long haul. You and your client may face a shifting role and relationship with the agency personnel as the same representatives exercise police power with enforcement authority as to alleged violations on one day and the next day be in the education and consultation role attempting to coax compliance on the same or a different issue.

Again, the practitioner must continue to be aware that there are definitely different informal customs that vary from administrative proceeding to administrative proceeding and from hearing officer to hearing officer, although again, that is not a unique characteristic to administrative law. Who is assigned to hear a matter, can make all the difference in the world, i.e., final outcome, in the same way that pulling a particular jurist can make a huge difference.

Although focused on the fundamental practice of administrative law, the balance of this paper will analyze some of the similarities and differences in the context of handling an administrative adjudication as a contested case compared to general practice issues in Superior Court. The analysis does not reach the outer limits of the analyzed universes because of limitations in time and space. Nor does the paper reach the zenith of either orbit in question. To start, an over simplified historical note is presented as a fundamental launching pad for the analysis of the more down to earth tasks that follow, i.e., what a practitioner must do and consider in advocating for his or her client when faced with a governmental action in a contested case. [11]

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[11] This paper is not an exhaustive treatise nor is it intended to be comprehensive on all possible differences.

This paper does not cover the topic of declaratory ruling as authorized by Conn. Gen. Stat. § 4-176. A declaratory ruling can be used to test the validity of a statute or regulation, and the application of the same to a particular fact pattern. These actions may be done without putting the movant at risk or placing a license in jeopardy. This paper covers the topic of adjudication of contested cases and no other aspects of rulemaking under the UAPA.

Also, beyond the scope of this analysis is the impact of overlapping federal jurisdiction. See for example *Martin v. Shell*, 198 F.R.D. 580 (D. Conn. 2000) for a discussion on primary jurisdiction of a state agency and the relationship to an independent federal action.

III. INITIAL ASSESSMENT OF AN ADMINISTRATIVE ACTION

As a practical matter, a private practitioner of administrative law starts with a client who has a demand for legal services. The practitioner must sort out the usual who, what, when and where. Once the practitioner is told or discovers that a major player in the case is the government and that the issue at hand involves (or may involve) regulated conduct or an administrative action, the practitioner must concurrently turn to the UAPA and the agency's enabling statutes and regulations.[12] Like trial practice, there is no one stop shopping in administrative law to get a full and complete understanding of the controlling law.[13]

On the governmental side of the controversy (assuming that there is a real controversy), the governmental practitioner must essentially perform the same analysis, although it is likely that the government's attorney has "been there, done that." The government attorney must determine the legal sufficiency of the proposed action, the action already taken, and/or the failure to act, as the case may be.

In addition, both the governmental entity and the practitioner must determine the scope of the enabling statute and identify any limitation on that agency's authority. A practitioner must proceed with caution when the administrative purpose is well defined, but collateral issues appear to taint an agency decision. *Fishbein v. Kozlowski*, 48 Conn. App. 552, *affirmed* 252 Conn. 38 (2000); *Dalmaso v. Dept. of Motor Vehicle*, 47 Conn. App. 839, *appeal denied* 247 Conn. 273 (1998). Nonetheless, both representatives must determine whether the UAPA applies, whether the proposed action is legal, whether the contested case definition applies, and what are the rules of the road for the orbit that the parties are about to travel together.[14] *Beecher v. State Electrical Work Examining Board*, 104 Conn. App. 655, 661 (2007), *appeal denied* 285 Conn. 920 (2008).

PRACTICE TIP: Ultimately, identification of issues and controversies is the first step in building a record for review on appeal, noting from the beginning that a reviewing court will not review an issue not presented to the agency below. *Finkenstein v. Administrator, Unemployment Compensation Act*, 192 Conn. 104, 114 (1984) *cited in Sookhoo v. Bremby*,

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[12] If a client seeks bizarre results, a practitioner must beware. By way of statutory construction, a presumption against bizarre results and against bizarre interpretations, especially if a more rational reading is possible or agency or judicial gloss suggest a not so bizarre alternative. See *Fullerton v. Dept. of Revenue Services, Gaming Policy Bd.*, 245 Conn. 601 (1998). Common sense and workability are two criteria used to ensure that regulations are not taken outside the scope of a legislative enactment. *Prioli v. State Library*, 64 Conn. App. 301, *appeal denied* 258 Conn. 917 (2001).

[13] See Leopold P. DeFusco's article entitled *Administrative Hearing Following DWI Arrests: The Issues Presented and How to Prepare, Connecticut Lawyer* (Vol. 7, No. 7 at 8; April, 1997) for an example of how complicated the handling of an administrative law problem can become in a Department of Motor Vehicles hearing.

[14] A practitioner is also cautioned that an administrative proceeding may not occupy the entire field so as to preclude other remedies at law. See *Walsh v. Stonington*, 250 Conn. 443, 736 (1999). There may be other orbits or universes in which your client may be able to travel. See also *Martin v. Shell Oil Co*., 198 F.D.R. 580 (D.Conn. 2000)(discussing coordination between federal and state actions involving state administrative hearings).

2014 WL 818618 (Conn. Super.; Prescott, J.; Jan. 29, 2014). The agency, not the reviewing court, is vested with primacy over administrative decisions making and, if the agency has not exercised that power, the court will not. *Upjohn Co. v. Planning & Zoning Commissioner*, 224 Conn. 82, 89 (1992) *cited in Sookhoo*.

PRACTICE TIP: Agency decision making is not absolute when it comes to matters of general law. In *Pikula v. Dept. of Social Services*, 321 Conn. 3 (2016), the trial court accepted the agency's characterization and treatment of a testamentary trust in the context of an appeal of the denial of a Medicaid application that turned on the availability of the corpus for general support rather than a special supplemental needs. The Supreme Court reversed. The Supreme Court held that the testator's intent, not the agency's regulations, was the controlling factor when determining whether the asset in question was "available" to support the beneficiary/applicant for Medicaid. The Supreme Court rejected proposition that the agency's expertise reached a general law issue of testator's intent. The Supreme Court turned to common law to interpret the testamentary intent rather than the agency's technical language. Beware: an agency may not occupy an entire field of law.

A. DOES THE ACT APPLY?

At first glance the UAPA is simple and straight forward. But it is still evolving by statutory changes, by judicial gloss, by agency changes and by new demands by the non-governmental parties.[15] For example see *Jim's Auto Boy v. Commissioner of Motor Vehicles*, 285 Conn. 794, 804-816 (2008), for a discussion of whether an insurer was a "customer" and therefore could file a complaint against an auto repair shop, despite the "lack of privity between the insurer and the repair shop. If the complaint was not from a customer, it appears that the UAPA would not apply.

PRACTICE TIP 2018: A plaintiff seeking to have a court review an agency decision bears the burden to put forward a prerequisite by citing to statutory authority for judicial review. *Gianetti v. Dunsby*, 2017 WL 2124330 (April 20, 2017) *reversed* 182 Conn. App. 855, 863 (2018)(subject matter jurisdiction wanting where plaintiff did not, and could not, cite to a statute authorizing the review of a municipal tax relief challenge). If the UAPA does not apply to the body that rendered the final decision, or the part of the decision being challenged, the aspirational plaintiff is without the power to invoke any judicial review and dismissal is the only option that can be taken by the trial court.

The UAPA does not control or cover all administrative law proceedings or even all aspects of a proceeding within its boundary. For example, since the UAPA does not occupy the whole procedural field, the motion practice known to the trial practice attorney is transferable to proceedings covered by the Act. The Rules of Evidence do not apply to administrative proceedings, e.g, see presentation on hearsay below. *Pizzo v. Commissioner of Motor Vehicles*,

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[15] The 2004 General Assembly Session passed Public Act 04-94: An Act Concerning Judicial Review Under the Uniform Administrative Procedure Act, effective October 1, 2004. The Act amended the definition of "contested case" as described herein. The 2005 General Assembly did not amend the UAPA or otherwise impact the enabling statutes within the scope of this paper, although it made some technical adjustments in Public Act 05-288, §§15 to 18 that made minor changes in the rule making process.

62 Conn. App. 571 (2001); *Bard v. Commissioner of Motor Vehicles*, 62 Conn. App. 45 *cert. denied* 256 Conn. 906 (2001).

If the UAPA does not control a particular issue and the agency's enabling statute and regulations are silent on a point, a practitioner may turn to the Superior Court Practice Book for guidance.[16] Unless adopted by the agency by way of incorporation, however, the court rules are not binding nor controlling over an agency. The Superior Court Practice Book controls the judiciary, not the executive branch.[17] Common law is a more direct source, but not one that is extremely enlightening in the practice of administrative law. For example, like in civil actions, there is no entitlement to the assistance of effective counsel. *Salmon v. Dept. of Public Health & Addiction Services*, 259 Conn. 288 (2002). Few arguments in an administrative proceeding based on the text of the Practice Book or Rules of Evidence will be automatic losers.

The common law doctrine of administrative exhaustion is applicable. *Lemoine v. McCann*, 40 Conn. App. 460, *cert. denied* 237 Conn. 904 (1996). Immediate redress by an independent action in a court of law may be precluded statutorilly when the UAPA applies (with limited exceptions as described below). *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675 (1990); *Doe v. Department of Public Health*, 52 Conn. App. 513 *cert. denied* 249 Conn. 908 (1999). The doctrine of *res judicata* applies both as to other administrative and judicial proceedings on the same issues. *Lafayette v. General Dynamics Corp./Elec. Boat Div.*, 255 Conn. 762 (2001); *Kelly v. City of Bridgeport*, 61 Conn. App. 9, *cert. denied* 255 Conn. 933 (2000); *State v. Burnaka*, 61 Conn. App. 45 (2000).

Due process applies, but then it is well established that the UAPA exceeds the "minimal" procedural safeguards imposed by the due process clause. *Levinson v. Conn. Bd. of Chiropractic Examiners*, 211 Conn. 508 (1989); *Wasfi v. Department of Public Health*, 60 Conn. App. 775 *cert. denied* 255 Conn. 932 (2000).

Whether the UAPA applies may impact the availability of attorney fees. If the UAPA applies, a limitation on attorney fees applies on what may be available to offset or meet the practitioner's bill, assuming in the first instance that the party challenging the agency decision prevails and under the circumstances prescribed. See *Raymond v. Freedom of Information Commission*, 67 Conn. App. 15 (2001), *on remand* 2002 Conn. Super. LEXIS 1895, 02-CBAR-1355 (June 6, 2002), *aff'd* 75 Conn. App. 142 (2002) *on remand* 03-CBAR –1990 (Aug. 5, 2003). Conn. Gen. Stat. § 4-184a establishes limitation on who may be eligible for attorney's fees and expenses by way of a $500,000 asset limitation, a $7,500 cap on all expenses, and the agency's action must be found by the court to be "without any substantial justification." *Youngquist v. Freedom of Information Commission*, 51 Conn. App. 96, *cert. denied* 247 Conn. 955 (1998); *Labenski v. Goldberg* 41 Conn.App. 866, *cert. denied* 239 Conn. 910 (1996). The trial court is vested with discretion to deny attorney fees and this statutory standard is low enough to protect almost any decision by an agency. See *Nagy v. Employees' Review Bd.*, 249 Conn. 693 (1999); *Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services*,

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[16] Please note that this issue is completely unresolved on one hand and a clear separation of powers violation on the other.

[17] If a judiciary's admission to the bar requirement is applied to the general population (i.e., restriction on the practice outside the court house), this muddies the water yet again to the extent that the court is implementing laws, not interpreting them.

244 Conn. 378 (1998); *Burinskas v. Dept. of Social Services*, 240 Conn. 141 (1997). A scintilla of justification appears to be enough. If cost benefit analysis is employed, likelihood of success is very low to recover attorney's fees and expenses at all, if the appeal is a contested case under the UAPA. A practitioner may want clarity with the client that the common perception of attorney fees being available, should they prevail, is not the standard that applies.

This aspect of administrative law is different that a Superior Court action. While a full exploration of the issue of attorneys' fees is beyond this paper, suffice it to say, the limitation in an administrative appeal may surprise the unknowing practitioner.[18] Like an action in Superior Court, a trial court decision on attorney's fees and costs is subject to appellate review with an abuse of discretion standard. *Skindzer v. Commissioner of Social Services*, 258 Conn. 642 (2001).

Whether the administrative tribunal in question is under the act requires a review of the agency itself and then the nature of the decision to be rendered.

B. IS THE AGENCY COVERED BY THE ACT?

Subsection (1) of Conn. Gen. Stat. § 4-166 provides:

> "Agency" means each state board, commission, department or officer authorized by law to make regulations or to determine contested cases, but does not include either house or any committee of the General Assembly, the courts, the Council on Probate Judicial Conduct, the Governor, Lieutenant Governor or Attorney General, or town or regional boards of education, or automobile dispute settlement panels established pursuant to section 42-181 [.]

No inclusive comprehensive list exists of covered governmental entities. If not expressly exempt from the UAPA, inclusion of an entity requires a functional analysis under the authority to "make regulations" or the definition of "contested case." See *In re Adoption of Baby Z.*, 247 Conn. 474 (1999)(adoption agency held to be a state agency under contested case definition). However, this determination is not as simple as it sounds.

PRACTICE TIP: If you think you are "in" be sure to check if you are still "out."

1. IS THE AGENCY OR THE ISSUE EXEMPT FROM THE ACT?

A note of caution is that the UAPA provides for numerous exceptions to its requirements. In addition to those noted above, exemptions to the UAPA are found in Conn. Gen. Stat. § 4-185(b) that, in pertinent part, provides:

> Notwithstanding any other provision of the general statutes to the contrary in existence on July 1, 1989, this chapter shall apply to all agencies and agency proceedings not expressly exempted in this chapter.

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[18] See General Statutes of Connecticut Index on Attorneys' Fee for an inventory of statutory provisions by topic.

The UAPA itself exempts or partially exempts a number of governmental decisions and programs. Conn. Gen. Stat. § 4-186 is entitled "Chapter 54 exemptions and conflicts." It provides:

(a) Appeals from the decisions of the administrator of the Unemployment Compensation Act, appeals from decisions of the employment security appeals referees to the board of review, and appeals from decisions of the Employment Security Board of Review to the courts, as is provided in chapter 567, and appeals from the Commissioner of Revenue Services to the courts, as provided in chapters 207 to 212a, inclusive, 214, 214a, 217, 218a, 219, 220, 221, 222, 223, 224, 225, 227, 228b, 228c, 228d, 228e and 229 and appeals from decisions of the Secretary of the Office of Policy and Management pursuant to sections 12-242hh, 12-242ii and 12-242kk, are excepted from the provisions of this chapter.

(b) (1) In the case of conflict between the provisions of this chapter and the provisions of chapter 567 and provisions of the general statutes relating to limitations of periods of time, procedures for filing appeals, or jurisdiction or venue of any court or tribunal governing unemployment compensation, employment security or manpower appeals, the provisions of the law governing unemployment compensation, employment security and manpower appeals shall prevail.

(2) In the case of conflict between the provisions of this chapter and provisions of sections 8-37gg, 8-345 and 8-346a relating administrative provisions of sections 8-37gg, 8-345 and 8-346a shall prevail.

(c) The Employment Security Division and the Board of Mediation and Arbitration of the state Labor Department, the Claims Commissioner, and the Workers' Compensation Commissioner are exempt from the provisions of section 4-176e and sections 4-177 to 4-183, inclusive.

(d) The provisions of this chapter shall not apply: (1) To procedures followed or actions taken concerning the lower Connecticut River conservation zone described in chapter 477a and the upper Connecticut River conservation zone described in chapter 477c, (2) to the administrative determinations authorized by section 32-9r concerning manufacturing facilities in distressed municipalities, (3) to the rules made pursuant to section 9-436 for use of paper ballots and (4) to guidelines established under section 22a-227 for development of a municipal solid waste management plan.

(e) The provisions of this chapter shall apply to the Board of Governors of Higher Education in the manner described in section 10a-7 and to the department of correction in the manner described in section 18-78a.

(f) The provisions of section 4-183 shall apply to the Psychiatric Security Review Board in the manner described in section 17a-597, and to appeals

from the condemnation of a herd by the commissioner of agriculture in the manner described in section 22-288a.[19]

(g) The provisions of section 4-183 shall apply to special education appeals taken pursuant to subdivision (4) of subsection (d) of section 10-76h, in the manner described therein.[20] The final decision rendered in the special education hearings pursuant to section 10-76h shall be exempt from the provisions of section 4-181a.

(h) The Higher Education Supplemental Loan Authority and the Municipal Liability Trust Fund Committee are not agencies for the purposes of this chapter.

(i) Guidelines, criteria and procedures adopted pursuant to section 10a-225 by the Connecticut Higher Education Supplemental Loan Authority and the state-wide solid waste management plan adopted under section 22a-227 shall not be construed as regulations under this chapter.

(j) The Judicial Review Council is exempt from the provisions of sections 4-175 to 4-185, inclusive.

Also, Conn. Gen. Stat. § 4-188a provides:

> The provisions of this chapter shall not apply to the constituent units of the state system of higher education, provided the board of trustees for each such constituent unit shall (1) after providing a reasonable opportunity for interested persons to present their views, promulgate written statements of policy concerning personnel policies and student discipline, which shall be made available to members of the public, and (2) in cases of dismissal of tenured, unclassified employees, dismissal of non-tenured, unclassified employees prior to the end of their appointment, and proposed disciplinary action against a student, promulgate procedures which shall provide (A) written notice to affected persons of the reasons for the proposed action; (B) a statement that the affected person is entitled to a hearing if he so requests; and (C) a written decision following the hearing.

While a client situation in any one of the exemptions may not remove the proceeding from the realm of administrative law, not being under the UAPA may affect what rules of practice apply and your client's appeal rights. *Taylor v. State Bd. Of Mediation and Arbitration*, 54 Conn. App. 550 *cert. denied* 252 Conn. 925 (1999) *certiorari denied* 530 U.S. 1266, 120 S.Ct. 2729, 147 L.Ed.2 992 (1999). Just because the UAPA does not apply does not equate to not being an administrative proceeding or having rights of appeal from the agency determination at issue. *Addona v. Administrator, Unemployment Compensation Act*, 121 Conn.

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[19] See *Zimmerman v. State Psychiatric Security*, 19 Conn. L. Rptr. 532 (June 2, 1997).

[20] See *Unified School District No. 1 v. Department of Education*, 64 Conn. App. 273, *appeal denied* 258 Conn. 910 (2001).

App. 355, 363 (2010)(noting the exemption from the UAPA and application of other statutory standards).

The practitioner should not be confused by the exception to the exception within the UAPA as to contested cases and appeals to Superior Court. While local boards of education are exempt from the UAPA, a local board of education's denial of school accommodations, including residency issues via Conn. Gen. Stat. § 10-186, can be appealed to the Superior Court under § 10-187 following a hearing by the local board and after an intermediate appeal to the State Board of Education. Under § 10-151(e), termination of a board of education employee is appealable under § 4-183(j). *Langello v. West Haven Board of Education*, 142 Conn. App. 248 (2013). Another *example*: a decision under the Unemployment Compensation Act are exempt from the UAPA, but are appealable to the Superior Court under Conn. Gen. Stat. § 31-241b. Yet another variation, some aspects of an agency's decision making may be a contested case while others are not. See *Guttman v. Department of Mental Retardation*, 2003 Conn. Super. LEXIS 3359, 03-CBAR-3006 (Nov. 7, 2003)(placement on a waiting list is not appealable; denial of services is); *Zimmerman v. State Psychiatric Security*, 19 Conn. L. Rptr. 532 (June 2, 1997)(level of placement is not appealable; continued confinement is). Administrative hearings held by the Board of Pardons and Paroles are exempt for the definition of contested case under Conn. Gen. Stat. § 4-166(4). Administrative hearings held by the Department of Corrections are no contested cases and no right of appellate review exists under the UAPA. *Francis v. Chevair*, 99 Conn. App. 789, 793, *appeal denied* 283 Conn. 901 (2007).

2. IS AGENCY ACTION BEYOND ITS AUTHORITY?

One consideration in challenging an agency action or proposal is the limitations of the agency. There are limits. The range could be "over the top" or "below the radar." An agency may only act within the limits of its prescribed authority. When the practitioner becomes aware of an issue related to the scope of authority, the foundation for a successful appeal may be laid. See *Bock & Clark Corp. v. Dept. of Consumer Protection*, 265 Conn. 400 (2003).

Where an agency has reached the outer limits of the agency's authorized duties and powers, it is not for the agency to expand its authority. *Kleen Energy Systems, LLC v. Commissioner of Energy and Environmental Protection*, 319 Conn. 367 (2015); *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672 (2007)

PRACTICE TIP 2018: In *People for the Ethical Treatment of Animals, Inc. v. Freedom of Information Commission*, 321 Conn. 805 (2016), the authority of three state agencies intersected. The plaintiff was seeking records under the Freedom of Information Act (FOIC) that were held by the University of Connecticut's Health Center (UCHC). As to the records sought, the Department of Administrative Services (DAS) had determined that release of the records would be detrimental to its safety assessment standards. Under Conn. Gen. Stat. § 1-210(b)(19), the Freedom of Information Commission (FOIC) denied the request. The trial court sustained the appeal and ordered the release of the withheld records. The defendants appealed. The Supreme Court reversed and held that both FOIC and the trial court were required to defer to the DAS decision to exert its safety risk determination by DAS exerts and professionals, "provided the reasons were bona fide and not pre-textual or irrational." *Id*. at p. 816.

Other examples abound. A narrow reading by the agency as to its own obligations can be a shield to decision making. See for example *Szewczyk v. Department of Social Services*, 275 Conn. 464 (2005)(when is "an emergency" not an emergency?), *clarified in part in Longley v. State Employees Retirement Commission*, 284 Conn. 149, 164-166 (2007); *Nagy v. Employees' Review Board*, 249 Conn. 693 (1999)(a "day" is a "day"?). A narrow reading of a term by the practitioner can avoid adverse results for a client when the agency has expanded its reading, so long as each higher court agrees. See for example *Indy Sengchanthong v. Commissioner of Motor Vehicles*, 92 Conn. App. 365, *reversed* 281 Conn. 604 (2007)(when is sleeping in a motor vehicle "operating" said vehicle?). Yet an agency can also lower its threshold for its decision and also be reversed. *Lovan C. v. Department of Children and Families*, 86 Conn. App. 290 (2004). An agency's authority cannot be so vague as fail to provide notice to those persons within its scope which behaviors are offensive. *Frank v. Dept. of Children and Families*, 134 Conn. App. 288, 315 (2012)(appeal from placement of school teacher's name on DCF Child Abuse Registry sustained, in part, because standard was unconstitutionally vague, and, in part, because the allegedly offensive conduct ceased upon clear notice from school administration). Where an agency has adopted regulations that set limits on its own authority to act, even though disputes remain about the edges of the standard, an agency decision is none the less valid and can pass judicial review until it crosses over the adopted standard. *Semerzakis v. Commissioner of Social Services*, 274 Conn. 1 (2005). See *Martowsa v. Dept. of Children and Families*, 2011 Conn. Super. 3308 (Dec. 30, 2011)(relying on agency regulations to define scope of abuse in dismissing appeal that challenged findings of abuse).

See for example *Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, *aff'd* 284 Conn. 455 (2007), where a Siting Council decision was upheld on its authority to override municipal zoning regulations; its authority to consider a municipal plan of conservation and development, but not be bound by such a plan; and its authority to disregard comments from the Department of Transportation. Even so, the Siting Council could not force or impose its decision on a private landowner to accept a communication tower as that violate its powers.

Work that is "incidental" to a licensed profession does not mean that the "incidental" conduct draws a person into the regulated profession or field or within the reach of the agency of cognizance. See *Bock & Clark Corp. v. Dept. of Consumer Protection*, 265 Conn. 400 (2003); *E.I.S., Inc. v. Connecticut Board of Registration for Professional Engineers & Land Surveyors*, 200 Conn. 145 (1986). A licensing board's past practice may be a key to the term.

When an objective standard exists, the failure to comply with that standard is fatal to the appeal or to the defense against such an appeal. *Moraski v. Board of Examiners of Embalmers and Funeral* Directors, 291 Conn. 242, 269 (2009); Department *of Transportation v. Commission on Human Rights and Opportunities*, 272 Conn. 457 (2004); *Alvord v. Commissioner of Motor Vehicle*, 84 Conn. App. 302 (2004). However, compliance with standards found in statutes and/or a regulation will suffice to defend and protect an agency decision. *Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, *aff'd* 284 Conn. 455 (2007); *Christopher R. v. Commissioner of Mental Retardation*, 277 Conn. 594 (2006). See *Wilson v. Department of Public Health*¸ 2012 WL 5860237 at *2 (Oct. 31, 2012)(discipline within scope of statutory authority will not be second guessed by a review court).

When a decision is vested in an agency by statute without standards and discretion is a necessary element of the decision making process, the agency will benefit from the loose enactment, but a court will not import standards not found in the statute in fashioning a remedy. *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521 (2005). However, it is generally accepted that the creation of a regulatory tribunal vested with considerable powers means that the tribunal is also vested with considerable discretion to achieve the envisioned public policy. *Office of Consumer Counsel v. Department of Public Utility Control*, 279 Conn. 584, 593-594 (2006); *Southern New England Telephone Co. v. Department of Public Utility Control*, 261 Conn. 1 (2002).

For an example of an agency exceeding its authority, *see Town of Groton v. Commissioner of Revenue Services*, 317 Conn. 319, 321 (2015). The Commissioner sought to impose a sales tax on a municipality related to charging private business property owners for refuse removal and transfer to a central collection site and added a small processing fee. The municipality protested the imposition of over $240,000.00 in State sales tax. Although technically not a UAPA appeal, the Supreme Court determined that the lower court incorrectly determined that the Commissioner could treat refusal removal as a proprietary function rather than a necessary governmental one and held it was not a taxable transaction with consideration paid by one party in exchange for something else. *Id.* at 338. The Supreme Court reversed. The Commissioner of Revenue Services had gone beyond his statutory duties and was rebuffed by the Court.

When an agency has adopted regulations that clarify the standards to be used in rendering decisions framed by statute, a practitioner must consider both to determine whether the agency has acted beyond its authority. *Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, *aff'd* 284 Conn. 455 (2007). Once the agency has adopted regulations that govern its conduct in implementing a statute, the agency must comply with that regulation. *Christopher R. v. Commissioner of Mental Retardation*, 277 Conn. 594 (2006). A party which falls well within a zone of regulation, meaning without question, that part cannot challenge the applicable standard as vague as it may apply to someone else under "hypothetical" facts. *Shanahan v. Department of Environmental Protection*, 305 Conn. 681, 711 (2012).

An agency's powers are defined in statute and regulations.[21] Where the relief sought in an administrative action is beyond the scope of an agency to grant and therefore, is beyond the scope of the relief that can be granted on appeal. *Mehdi v. Commission on Human Rights and Opportunities*, 144 Conn. App. 861 (2013)(affirming trial court finding that CHRO could not order a new agency to print a particular article written by the petitioner). See *Fromer v. Freedom of Information Commission*, 90 Conn. App. 101 (2005). Any public agency action taken contrary to state law is "null and void." *Council 4, AFL-CIO v. State Ethics Commission*, 52 Conn. Supp. 313, 312, *affirmed* 304 Conn. 762 (2012).

A petitioner may terminate an appeal and leave the tribunal without a basis to render a final decision at all. *Department of Public Safety v. Freedom of Information Commission*, 103 Conn. App. 571, *appeal denied* 284 Conn. 930 (2007)(agency directed to dismiss the request for

[21] See in general Buchwalter, et al. "Necessity to keep within scope of powers granted." 73 C.J.S. Public Administrative Law and Procedure § 163 (March 2015).

documents as moot because the documents were produced prior to a final decision). Where a matter before an agency is moot, no action can be taken by a reviewing court.

If the agency is exercising a newly established power that effects the substantial rights of a party, e.g., by statutory amendment to an existing standard, caution needs to be exercise to ensure that the new standard is apply only prospectively, unless the legislature has specifically made the new enactment retroactive. *Lane v. Commissioner of Environmental Protection*, 314 Conn. 1 (2014).

PRACTICE TIP: Challenges to the standard employed by the agency must also be carefully contemplated. The subject agency may have written rules and /or professional standards that do not readily meet the eye. For example in *Frank v. Dept. of Children & Families*, 134 Conn. App. 288, 312 Conn. 393 (2014), a plaintiff challenged the standard being for having his named placed on an abuse and neglect which forced the agency to put additional evidence on the record, including warnings that had been given directly to him that his specific. See also *Martorelli v. Department of Transportation*, 316 Conn. 538 (2015), where the Court interpreted a standard in light of "the legislative history, related statutes, and existing case law of Connecticut and sister state courts on the subject" and declared that those sourced provided adequate notice to the public about the standard to be employed by the agency.

The limits can be both a sword and a shield. The practitioner should learn these limits and know which ones can be challenged and which ones are best left alone, either for another day or for a set of facts that position the complainant in a stronger position.

3. A SPECIAL NOTE ON FEDERAL PREEMPTION AND DUE PROCESS

Federal preemption deserves special consideration. Where federal and state law overlap and the UAPA comes into play, a practitioner may have to deal with both as to content and procedure. For example, when a federal act reserves to the states certain elements in a field, otherwise totally occupied by a federal agency, the UAPA controls the enabling state statute on the functional aspects of the issue being control, e.g., nuclear reactors and rods. In *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 904, 73-83 (2008), the court found that the federal government had sought only to regulate “the radiological risks and environmentally related effects of the storage of spent nuclear fuel” and there was considerable other issues where state law vested “exclusive jurisdiction” in the Siting Council. *Id*. at 77-78. See also *Burton v. Connecticut Sitting Council*, 2014 WL 1395058 (Conn. Super.; Shortall, JTR; March 11, 2014)(limiting the council's jurisdiction to "nonnuclear" issues). So long as the state agency decision is within that portion of a field not occupied by federal law, the state agency is empowered to act and does not exceed its authority.

Federal preemption can also restrict a state agency’s decision making under the UAPA and related statutes. In *Jaegar v. Connecticut Siting Council*, 52 Conn. Supp. 14, 31, *affirmed* 128 Conn. App. 243, *cert. denied* 301 Conn. 927 (2011), a homeowner appealed from a final agency decision made by the Connecticut Siting Council. It authorized the placement of a “wireless telecommunication tower” within 1290 feet of the subject home. In her attempt to establish the prerequisite of aggreivement necessary for subject matter jurisdiction over her appeal (see Section VI.D below), the appellant asserted that the “radio frequency” emissions (a/k/a “RF”) were harmful to her health. Without reaching the merit of the RF issue, the lower court dismissed be the federal Telecommunications Act of 1996 succinctly and on point

"prohibits" a state from considering RF when deciding where a tower may be placed. See 47 U.S.C. § 332(c)(7)(B)(iv). Therefore, if it cannot be considered by the state actor, it cannot be a basis for being aggrieved. A practitioner needs to be aware of federal preemption.

Due process required by federal law is a second area of overlap with the UAPA that has caused some confusion. Intertwined with the definition of a "contested case" under the UAPA, the Supreme Court has recently made it clear that a federal statute or a regulation are not sufficient to create a right of appeal under the UAPA. *Town of Middlebury v. Department of Environmental Protection*, 2004 Conn. Super. LEXIS 2206 (July 24, 2004), *aff'd* 283 Conn. 156, (2007)(the General Assembly, not Congress, should determine the substantive right of appeal from state agency decisions); *Richards v. Alibozek*, 02-CBAR-1581, 2002 Conn. Super. LEXIS 2262 (June 26, 2002, 32 Conn. L. Rptr 588 (2002)(on point cited in *Town of Middlebury*, 2004 Conn. Super. LEXIS 2206 at 9). Where an agency final decision maker has complied with the UAPA, allegations of a Constitutional deprivation under a civil action under 42 U.S.C. ¶ 1983 is not likely to survive a motion to dismiss. *Allison v. Commissioner of Dept. of Ins.*,2013 WL 7020542 (Conn. Super.; Swienton, J.; Dec. 23, 2013).

In *Town of Middlebury v. Department of Environmental Protection*, 2004 Conn. Super. LEXIS 2206 (July 24, 2004), *aff'd* 283 Conn. 156, (2007) and in *Morel v. Commissioner of Public Health*, 262 Conn. 222, 239-240 (2002), *overruled in part on other grounds Commission on Human Rights & Opportunities v. Board of Education*, 270 Conn. 665, 675-676 (2004), the Connecticut Supreme Court reaffirmed the foundation of the UAPA as an important public policy tool in its own right. In *Summit Hydropower Partnership v. Commissioner of Environmental Protection*, 226 Conn. 792, 803 (n. 14) (1993), the Court observed that that the parties assumed that a federal statutory right to a hearing established a contested case. Although the *Summit* parties failed to get the court to review the question, the Court did determine that it was "far from clear" whether a federal statute could invoke a contested case appeal, but left the question to another day. *Cf. Toise v. Rowe*, 95-CBAR-0598 (Aug. 8, 1995), *aff'd* 44 Conn. App. 143 (1997), *reversed* 243 Conn. 623 (1998), *on remand* 2002 Conn. Super. LEXIS 2811 (Aug. 28, 2002), *aff'd* 82 Conn. App. 306 (2004)(State act required to establish a right, even if federal requirement part of acceptance of federal funding); *Richards v. Alibozek*, 02-CBAR-1581, 2002 Conn. Super. LEXIS 2262 (June 26, 2002, 32 Conn. L. Rptr 588 (2002)(federal funding requirement insufficient to establish a final judgment in a contested case under UAPA). See also *Taylor v. Robinson*, 196 Conn. 572 (1985), *appeal dismissed*, 475 U.S. 1002, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986)(When General Assembly used "statute," rather than broader term "law," the correct interpretation is the act only reaches "state" statutes.); *Cox Cable Advisory Council v. Dept. of Public Utility Control*, 259 Conn. 56 (2002) *cert. denied* 537 U.S. 819 (Court denied right of appeal based on federal act under theory of federal preemption.).

Also, where the UAPA and/or the state have a well-established complex system that addresses a traditional state's issue, the federal doctrine of abstention may come into play. See *Rivera v. Maloney*, 410 F.Supp. 106 (D.Conn. 1976). See *Papic v. Burke, Commissioner, Department of Banking*, 113 Conn. App. 198, 205-210 (2009)(discussion on the integration of federal and state securities laws and an appeal from an enforcement proceeding under the UAPA by the Commissioner of Banking).

C. IS THE AGENCY PROPERLY EMPOWERED TO TAKE THE ACTION?

Connecticut state agencies are empowered to act by way of statutes and regulations. A practitioner must determine whether the violation that the agency alleged occurred is in fact a violation of a valid statutory standard or a duly adopted regulation. Connecticut has a sweeping definition of the term "regulation." Subsection (b) of Conn. Gen. Stat. § 4-167 provides:

> No agency regulation is enforceable against any person or party, nor may it be invoked by the agency for any purpose, until (1) it has been made available for public inspection as provided in this section and (2) the regulation or a notice of the adoption of the regulation has been published in the Connecticut Law Journal pursuant to section 4-172 and section 4-173, if noticed on or after July 1, 2013. This provision is not applicable in favor of any person or party who has actual notice or knowledge thereof. The burden of proving the notice or knowledge is on the agency.

Subsection (16) of Conn. Gen. Stat. § 4-166 provides:

> "Regulation" means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings issued pursuant to section 4-176 or (C) intra-agency or interagency memoranda [.]

Making regulations is a specific statutory grant of authority. See for example Conn. Gen. Stat. § 10-385 empowers Connecticut Historical Commission to adopt regulations on establishment, care, use and management of archaeological sites; § 20-103a authorizes the Commissioner of Public Health, with the “advice and assistance” of the Dental Commission, to adopt regulations on various issues related to dentistry; § 20-280(g) specifies eight aspects of public accountants that the Board of Accountancy may regulate; § 20-430 empowers the Commissioner of Consumer Protection to adopt regulations on home improvement contractors; to name just a few.

Regulations have the force of statutory law and benefit from a presumption of validity if adopted in accordance with the Act. *Griffin Hospital v. Commission on Hospitals and Health Care*, 200 Conn. 489 (1986) *appeal dismissed* 479 U.S. 1023, 107 S.Ct. 781, 93 L.Ed.2d 819 (1986). The practitioner should not be caught by surprise by this presumption. The Attorney General reviews proposed regulations for legal sufficiency, pursuant to Conn. Gen. Stat. § 4-169 which provides:

> No adoption, amendment or repeal of any regulation, except a regulation issued pursuant to subsection (g) of section 4-168, shall be effective until the proposed regulation and any revision of a regulation to be resubmitted to the standing legislative regulation review committee has been submitted electronically to the Attorney General by the agency proposing such regulation and approved by the

> Attorney General or by some other person designated by the Attorney General for such purpose. The review of such regulations by the Attorney General shall be limited to a determination of the legal sufficiency of the proposed regulation. If the Attorney General or the Attorney General's designated representative fails to give notice to the agency of any legal insufficiency within thirty days of the receipt of the proposed regulation, the Attorney General shall be deemed to have approved the proposed regulation for purposes of this section. The approval of the Attorney General shall be provided to the agency electronically, included in the regulation-making record and submitted electronically by the agency to the standing legislative regulation review committee. As used in this section "legal sufficiency" means (1) the absence of conflict with any general statute or regulation, federal law or regulation or the Constitution of this state or of the United States, and (2) compliance with the notice and hearing requirements of section 4-168.

If determined to be legally sufficient, the proposed regulations are submitted to the General Assembly for review. Under § 4-170, the General Assembly's Regulation Review Committee may approve proposed regulations upon a similar finding of compliance.

An agency enjoys a presumption that its action (in a given case) was legal and proper until the contrary is shown. *Leib v. Board of Examiners for Nursing*, 177 Conn. 78 (1979); *Lovejoy v. Water Resources Commission*, 165 Conn. 224 (1973). The presumption is a rebuttable presumption, not absolute. An agency's action must conform to its statutory and regulatory limitations as well as constitutional limitations. *Liano v. City of Bridgeport*, 55 Conn. App. 75 (1999). Failure to adhere to standards of conduct or compliance found in a statute or a regulation is one way to overcome the presumption. The party challenging the agency action bears the burden to show the contrary.

A practitioner is well advised to use pre-hearing motions to attack any defect in the agency power to act. An agency can only act within the powers that it possess and taking an action within that scope is a prerequisite to further review under the UAPA. *Sastrom v. Psychiatric Security Review Board*, 105 Conn. App. 477 (2008).[22] Any defect left to stand by the challenger may be waived, except subject matter jurisdiction. Again, the common law doctrine of waiver is a constant administrative law problem for the practitioner as it is in trial practice. "Use it or lose it" is the practical guide. Again, this is similar to the trial practice pattern and raising the issue later on appeal is risky, if not prohibited.

Practices, policies, staff directives and staff "preferences" do not have the force of law and are not enforceable. It is well established that the use of a regulation that was not adopted in accordance with Chapter 54 of the General Statutes causes the decisions related thereto to be invalid and of no effect. *Salmom Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356 (1979). Illegal regulations cannot be used to support an agency

[22] A practitioner is well advised to think twice about this issue so as to avoid a "gratuitous hearing" proceeding, reaching a final decision, and then find out that no right of appeal exists as to the particular decision being made.

decision. A practitioner is well advised to request copies of any and all policies and documents used in the formulation of an action or proposed action or that provide a basis for such.[23]

PRACTICE TIP 2018: At first glance, an agency's area of cognizance may appear to be bound by a bright line. Caution is well advised in the gray areas and/or overlapping areas of governance. In *Valliere v. Commissioner of Social Services*, 2015 WL 9595140 (Nov. 25, 2015; Noble, J.; Judicial District of New Britain) *affirmed* 328 Conn. 294 (2018), an applicant for Medicaid sought to rely on a Probate Court order of support in her application and in calculating a community spousal allowance and applied income amounts. 2015 WL 9595140 at p. 1. The agency hearing officer disagreed. The applicant appealed. The trial court sustained the appeal, in part, holding that, while the agency is "the sole agency to determine eligibility", the statutory and regulatory frameworks also contemplate that the Commissioner will participate in Probate Court community spousal support and allowance proceeding, even if occurring before a Medicaid application is filed. *Id.* at pp. 7 and 11. The Supreme Court affirmed. The Supreme Court held that, given the statutory opportunity to participate in the Probate Court proceeding, a resulting order is binding on the Commissioner, even if the Commissioner did not take advantage of the opportunity to do so. *Valliere*, 328 Conn. at p. 326.

D. IS THE ACTION A CONTESTED CASE?

The Connecticut Supreme Court has continued to maintain that no absolute right of appeal exists in favor of a person wishing to have an agency action or proposed action reviewed by the judiciary. *Town of Middlebury v. Department of Environmental Protection*, 2004 Conn. Super. LEXIS 2206 (July 24, 2004), *aff'd* 283 Conn. 156, 163 (2007); *Ferguson Mech. Co. v. Department of Public Works*, 282 Conn. 764, 773 (2007); *Peters v. Dept. of Social Services*, 273 Conn. 434, 441 (2005) *citing Lewis v. Gaming Policy Board*, 224 Conn. 693 (1993). Again, it is black letter law that not every agency determination and decision made by an agency must be made after an opportunity for a hearing. *Ferguson Mech. Co. v. Department of Public Works*, 282 Conn. 764, 773 (2007) *citing Summit Hydropower Partnership v. Commissioner of Environmental Protection*, 226 Conn. 792, 800 (1993). Subsection (5) of Conn. Gen. Stat. § 4-166 provides: ,

> "Final decision" means (A) the agency determination in a contested case, (B) a declaratory ruling issued by an agency pursuant to section 4-176 or (C) an agency decision made after reconsideration. The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration [.]

Conn. Gen. Stat. § 4-166(4) provides:

> "Contested case" means a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but

[23] A quick telephone call may produce instant results or the identification of an applicable website. The Freedom of Information Act may provide a vehicle to accomplish discovery in short order. However, be prepared to pay a copy fee. Conn. Gen. Stat. 1-212.

> does not include proceedings on a petition for a declaratory ruling under section 4-176, hearings referred to in section 4-168 or hearings conducted by the Department of Correction or the Board of Pardons and Paroles [.][24]

These definitions must be read together. A practitioner must identify a right or privilege that is affected. Identification of a "state statutory" or "state regulatory" right must be accomplished for the matter to be a "contested case" and perfect a right of appeal as described herein. *Missionary Society of Connecticut v. Board of Pardons and Paroles*, 272 Conn. 647 (2005). Where a decision by an agency has no corresponding state statute or regulation bringing the decision within the ambit of a "contested case" under the UAPA, subject matter jurisdiction is wanting and the court must dismiss the attempted appeal.[25] *Ferguson Mech. Co. v. Dept. of Public Works*, 282 Conn 764, 771 (2007).

PRACTICE TIP 2018: If a practitioner cannot find a statutory or regulatory right to hearing for the class of final agency at issue, the civil action is not a contested case and subject matter jurisdiction is wanting. If the agency is not "required," but "may" hold a hearing, then the petitioner does not enjoy such a right to be heard and does not have a right to appeal to a trial court serving, i.e., no appellate review is available. Period. See *Jones v. State Department of Emergency* Services, 2018 WL 1659438 at p. 2) (March 1, 2018; Tanzer, J.; Judicial District of New Britain). The decision to expand subject matter jurisdiction is a legislative decision, not one for the judiciary. *Walenski v. Connecticut State Employees Retirement Commissioner*, 185 Conn. App. 457, 475 (2018); 2018 WL 4956953 (October 16, 2018). Dismissal is the only action that a trial court can take in the absence of such a "required" agency proceeding.

PRACTICE TIP 2018: Your client may have a contested status pertaining to one issue, but not have a contested case regarding a second issue that was heard by the agency. In *Medical Diagnostic Laboratories, LLC v. Connecticut Department of Social Services*, 2017 WL 950552 (Judge Huddleson, Presiding Judge of Administrative Appeals and Tax Session; Feb. 8, 2017), the trial court dismissed an appeal by the applicant laboratory based on regulations that the Commissioner was vested with discretion when determining enrollment or reenrollment and could do so without being required to hold an administrative hearing. In the same appeal, the court also noted that, if the Commissioner were taking an action against an enrolled laboratory, the laboratory would have a right to a hearing before the imposition of adverse action and did have a right of appeal. *Id*. at p. 2 (fn. 1). Also see: *Anderson v. Giles*, 2018 WL 2066436 (April 13, 2018; Huddleston, P.J, Administrative Appeals and Tax Session; Judicial District of New

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[24] See *Anderson v. Giles (Chairperson, Board of Pardons and Paroles)*, 2018 WL 2066436 (April 13, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain)(appeal dismissed on the plaining meaning of the statute and rejecting an attempt to re-characterize the appeal as a declaratory judgment).

[25] A declaratory ruling may provide an alternative to a contested case hearing. See *Republican Party of Connecticut v. Merrill*, 307 Conn. 470 (2012) for a discussion on declaratory rulings. See also *Aaron v. Conservation Commission*, 178 Conn. 173 (1979)(a declaratory judgment may provide an alternative where an action is not a contested case). This document is not intended to cover declaratory rulings. See § 4-176, *et seq.*; *Tilcon Connecticut, Inc. v. Commissioner of Environmental Protection*, 317 Conn. 628, (2015) for an example of a party using a declaratory judgment concurrently while a contested case is pending.

Britain)(Contested cases and declaratory judgments serve different purposes and operate differently, e.g., review of records in contested cases compare to declaratory rulings review where the taking of evidence is necessary).

PRACTICE TIP: In 1994, the legislature expanded the definition of "contested case" under the UAPA. By way of Public Act 04-94, the legislature amended the language "required by statute" with "required by state statute or regulation." Cases such as *Herman v. Division of Special Revenue*, 193 Conn. 379 (1984) are no longer valid. While a considerable body of law exists that a regulation granting a hearing is not sufficient to establish a contested case status, Public Act 04-94 overrides these cases. *Brookridge District Association v. Planning and Zoning Commission of the Town of Greenwich, et al.*, 259 Conn. 607 (2002); *Lewis v. Gaming Policy Board*, 224 Conn. 693 (1993).[26] Where no right exists in state statute or state regulation, the matter is not a contested case and the matter must be dismissed by the court. *Town of Middlebury v. Department of Environmental Protection,* 2004 Conn. Super. LEXIS 2206 (July 24, 2004), *aff'd* 283 Conn. 156, (2007); *Peters v. Dept. of Social Services*, 273 Conn. 434 (2005).[27]

A petitioner may have conditions precedent to satisfy to qualify for a hearing, e.g., filing a request for a hearing by a certain number of citizens, and if those conditions are satisified, then matter becomes a contested case. See *Town of Canterbury v. Rocque, Commissioner of Environmental Protection*, 78 Conn. App. 169 (2003)(petition with 25 signatures invokes statutory right to a hearing and causes hearing to be a contested case with associated right of judicial review).

A hearing, that is not a contested case, is a gratuitous hearing at best. A gratuitous hearing is one held by the agency in an abundance of caution and to ensure due process is given, but not because it was required by state statute or regulation. A practitioner must consider that there is no right of appeal from a gratuitous hearing and the parties cannot create such a right by agreeing to hold a hearing. *Town of East Hampton v. Dept of Public Health*, 80 Conn. App. 248 (2003) *cert. denied* 267 Conn. 915 (2004); *Dadiskow v. Connecticut Real Estate Commission*, 37 Conn. App. 777, 782 (1995). Even life and death decisions can be committed to an agency and no right of appeal exists. See *Missionary Society of Connecticut v. Board of Pardons and*

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[26] Public Act 04-94 also clarified that the right must be established in "state" statute or regulation. Public Act 04-94 eliminates any ambiguity left after *Morel*, if in fact it had not been clear to all. The State legislature has joined the judiciary in continuing to the vested power to determine important public policy questions related to opening the State court doors for judicial review. As noted above, federal statute or regulation, standing alone, are insufficient on their face to establish a right of appeal. *Town of Middlebury v. Department of Environmental Protection*, 2004 Conn. Super. LEXIS 2206 (July 24, 2004), *aff'd* 283 Conn. 156, (2007); *Richards v. Alibozek*, 02-CBAR-1581, 2002 Conn. Super. LEXIS 2262 (June 26, 2002, 32 Conn. L. Rptr 588 (2002).

[27] As a practice consideration, it is important to note that just because a matter is not a contested case does not foreclose judicial review as other enabling statutes may cause an administrative decision to be subject to appellate review by a trial court or an appellate court. All such avenues are beyond the scope of this paper. See for example Tax Appeals, Worker's Compensation and Unemployment Compensation, all exempt from the UAPA, but reviewable under their particular statutory schemes. This can be a stumbling block.

Paroles, 272 Conn. 647 (2005). An agency can even invite a "request to review" its own decision without creating a right to a hearing prior to rendering the agency's final determination, i.e., a final decision after a review is not a final agency decision in a contested case. See *Sanaa Enters., LLC v. Commissioner, Department of Public Health*, 2011 Conn. Super. LEXIS 541 (Feb. 28, 2011)(agency hearing was not mandated by state statute or state regulation and a review was insufficient to establish a right of appeal).

In addition, appeals can only be taken from a "final decision" as defined in the UAPA. Appeals from initial or preliminary decisions or even post-decision motions cannot be taken and attacked in the absence of a final decision. See *Town of Fairfield v. Connecticut Siting Council*, 37 Conn. App. 653, 665 (1995), *rev'd*, 238 Conn. 361 (1996).

If any agency proceeding is a contested case, a final decision made prior to a full hearing is appealable, e.g., rejection of an application for insufficient information or completeness. *Miller's Pond Co., LLC v. Rocque*, 71 Conn. App. 395 (2002) *affirmed* 263 Conn. 692 (2003). Note however, that an appeal will be limited to the decision made by the agency, in the first instance as to the preliminary matter only and a reviewing court will not render a decision on the merits or heart of the matter in the first instance.

However, beware, a procedure established by an agency to hear a "grievance" by way of an informal, expeditious conference may not qualify as a "hearing" in a contested case, even if authorized by statute or a duly adopted regulation. *Ferguson Mechanical Company, Inc. v. Department of Public Works*, 282 Conn. 767, 776 (2007)(allegations of bid violation are entitled to a procedure, but no right of appeal). The basic premise is that, if the legislature intended a right of review to attach to a particular agency action, it can clearly establish one and its failure to do so, can only support the conclusion that no right of review was intended. *Id.* at 777-778, citing *Peters v. Department of Social Services* 273 Conn. 434, 445 (2005).

E. WHAT RULES OF PRACTICE APPLY?

The Act's procedural requirements exceed the minimal due process owed in administrative proceeding. *Levinson v. Conn. Bd. of Chiropractic Examiners*, 211 Conn. 508 (1989). The UAPA requires that each state agency to adopt rules of practice in accordance with the Act. Subsection (a) of Conn. Gen. Stat. § 4-167provides:

> In addition to other regulation-making requirements imposed by law, each agency shall: (1) Adopt as a regulation rules of practice setting forth the nature and requirements of all formal and informal procedures available provided such rules shall be in conformance with the provisions of this chapter; and (2) make available for public inspection, upon request, copies of all regulations and all other written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions, and all forms and instructions used by the agency.

Therefore, a practitioner must go beyond the word of the UAPA to determine what the rules are. Despite the title of the Act, agency rules of practice are far from uniform. The rules of practice vary greatly. The UAPA only requires that the agency rules conform to the provisions of the Act, but the UAPA is not designed to completely occupy the field of procedural or substantive rule of practice that an agency may need to resolve a controversy. To the extent that the

proceeding are standardized the source of that is found in Conn. Gen. Stat. §§ 4-178 through 4-182. These provisions set forth requirements applicable to contested cases, including in particular decisions affecting licenses (as defined in the UAPA and as discussed below)

Conn. Gen. Stat. § 4-167 eliminates, in theory, the "secret" rules, procedures and standards that historically were known to and used by the government to its advantage. Again, § 4-167 reinforces the rule of law rather than the preferences of a decision maker on a given day in a given case, i.e., it provides consistency rather than whimsical standards. A practitioner should, as a matter of course, make a general request under subdivision (3) and utilize the opportunity to inspect such documents and learn the particulars of the procedures that are applicable.

It is also noteworthy to recognize that an agency's adopted rules of practice may not be exhaustive, but they are the rules that the agency and those before it must use. The hallmark of administrative proceedings is that it must be fundamentally fair. Therefore, a practitioner can and must resort to common law and other existing civil and evidentiary rules when the rules of practice do not cover a situation. This makes administrative law very similar to the general practice of law. It pays to know the tribunal rendering the decisions. As noted above, the UAPA goes a long way to create a "uniform" "procedure," but each agency, tribunal and hearing officer still have considerable discretion in circumscribing the crafting allegations and notices, hearing live testimony, admitting documentary evidence, forcing unwilling citizens to appear, managing briefing schedules and replies to reference a few variables.

PRACTICE TIP 2018: Where an agency's Rules of Practice are silent, a practitioner is well advised to turn to the Rules of Connecticut Practice Book for guidance. Separation of powers prohibits the Judicial Branch from imposing the Practice Book on Executive Branch actors. However, if the Practice Book provisions are incorporated by reference in their own duly adopted regulation, then the agency must comply with the same. While the Rules of Practice may not be applicable in an administrative proceeding, a good practice is to follow them or to demand that the agency articulate the rule that it intends to apply. When in doubt, do all things necessary to keep a hearing fundamentally fair for all participants. In this regard, treating administrative hearing as if it were a Superior Court civil proceeding until the tribunal or hearing officer directs otherwise is a safe strategy.

PRACTICE TIP 2018: This document does not yet address the Superior Court Rules of Evidence and use in administrative proceedings. Except as otherwise stated herein as to hearsay (see Section IV.F.1 below), a practitioner can advance their administrative practice with understanding and knowing those rules. As detailed herein, administrative proceedings are not bound by Superior Court Rules, except to the extent that the Rules are a codification of traditional common law standards. Again, administrative proceedings are more relaxed than Superior Court civil actions, but there may be a limited rational to push to the outer limits. Also again, the safe strategy is to follow the Rules of Evidence until directed otherwise.

For example, many agency Rules of Practice do not cover sealing hearing documents or excluding the public from the hearing. Practice Book does. See Sections 7-4B (Motion to File Record Under Seal), 7-4C (Lodging A Record11-20 (Closure of Courtroom in Civil Cases); 11-20A(Sealing Files or Limiting Disclosure of Documents in Civil Cases); 11-20B (Documents Containing Personal Identifying Information); 25-55 (Medical Evidence); 25-59 (Closure of

Courtroom in Family Matters); and 25-59A (Sealing Files or Limiting Files or Limiting Disclosure of Documents in Family Matters); 25-60(b)(Evaluations, Studies, Family Services Mediation Report and Family Services Conflict Resolution Reports), to name a few. Where sealing may be appropriate, the Practice Book provides general guidance. The time to consider the issue is at the pre-hearing stage, including whether there may be alternatives to complete exclusions. Better practice strategies may be to secure a pre-hearing ruling to seal the record in its entirety, to pre-redact documents, and/or to preclude the public from attending all or certain parts of a hearing. Certainly, in a hearing with sensitive issues, knowing the lay of the land will likely alter your course in preparation, in preparing witnesses, and in managing strategies. Early decisions will impact how and what you can include when building the record during the agency hearing.[28]

Another example is spoliation of evidence. As a general matter, the Rules of Practice do not cover the issue. The Practice Book does not expressly set a standard. For civil actions, judicial gloss is found in *Beers v Bayliner Marine Corporation*, 236 Conn. 769, 775 (1996) as compared to a stricter standard that applies to a criminal proceeding as stated in *State v. Asherman*, 193 Conn. 695, 724 (1984), *cert. denied* 470 U.S. 1050, 105 S.Ct. 1749, 84 L.Ed.2d 8114 (1985). Suffice it to say that an administrative appeal is a civil action and, therefore, we assume the *Beers* standard applies, although no appellate review has occurred on point. *Moore v. Commissioner of Motor Vehicles*, 172 Conn. App. 380, 392 (2017). In a civil action, spoliation has been recognized in Connecticut as an intentional tort. The basic elements are (1) the spoliation was intentional; (2) relevant evidence was destroyed related to the inference being sought; (3) the party seeking an adverse inference acted with due diligence related to not allowing the spoliation occur. See *Rizzuto v Davidson Ladders, Inc.*, 280 Conn. 225, 237-238 (2006). At least in a civil action, a party cannot pull at their own bootstraps on a spoliation cause of action as the court would search for some corroborating or concrete evidence of the underlying claims. *Id.* at p. 239. Even if a plaintiff can prevail, the court is not obligated to grant relief. A court "may" draw an adverse inference. The operative word is "may." An adverse inference is not mandated. In an administrative appeal, a practitioner might be able to push for a clean inference, if evidence of intentional conduct can be shown. This is still an evolving area of overlap between civil actions and contested cases in an administrative appeal.

F. STARE DECISIS: INDEX OF AGENCY DECISIONS

The UAPA provides that each agency shall make all written decisions available for inspection to the extent allowed under the Freedom of Information Act.[29] Conn. Gen. Stat. §§ 1-200, *et seq.*; 4-180(a). The UAPA further provides:

> No written order or final decision may be relied on as precedent by an agency until it has been made available for public inspection and copying. On and after October 1, 1989, no written order or final decision, regardless of when rendered, may be relied on as precedent by an agency unless it also has been indexed by name and subject.

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[28] Sealing the record below may also strengthen arguments on appeal. See *Lemanski v. Commissioner of Motor Vehicles*, 2018 WL 1791160 (Huddleston, P.J., Presiding Judge Administrative Appeals and Tax Session; March 19, 2018).

[29] Effective after October 1, 1989.

Subsection (b) of Conn. Gen. Stat. § 4-180a.

A practitioner is well advised to inquire of an agency whether it has an index of written decisions. A positive response sets the stage for some valuable research. If the agency has such an index, counsel is well advised to inspect, either in person, on line or through a staff member. The agency's past conduct in similar situations is invaluable information to have, including knowing decisions that the agency has decided not to decide or ruled beyond their jurisdiction as embodied in their earlier decisions and orders. A negative response may level the playing field because precedents are not available for either side.

If counsel has not dealt with the subject matter in a prior administrative proceeding before the particular tribunal in question, the value of this research cannot be overstated. This research may reveal the strengths and weaknesses in the pending case and how an agency tends to address various issues. This research may also reveal the procedural quirks of a particular agency or particular hearing officers.

PRACTICE TIP: Beware that a reviewing court and the agency facing a final decision are not absolutely or blindly bound by the doctrine of *stare decisis*. The doctrine is subject to abandonment when the final decision maker or the reviewing court desires to make a correct decision rather than following an erroneous prior decision. *Commissioner of Public Health v. Freedom of Information Commission*, 311 Conn. 262 (2014) *abrogating Director of Health Affairs Policy Planning v. Freedom of Information Commission*, 292 Conn. 164 (2009).

PRACTICE TIP 2018: Where a standard phrase has been used in prior decisions by a hearing officer and then the officer uses the same phrase, but uses a different meaning or usage, it is infinitely more difficult to assert that the standard is time tested. *Martorelli v. Department of Transportation*, 316 Conn. 538, 545-546 (2015). Such a change or shift can be the foundation for a claim of for failing to utilize the doctrine of *stare decisis* or, at a minimum, conduct that appears to unreasonable, arbitrary, illegal or in abuse of agency discretion. See *Valliere v. Commissioner of Social Services*, 328 Conn. 294, (2018). See below Section VI.B.4 on Deference.

G. ADMINISTRATIVE EXHAUSTION AND EXEMPTIONS

The doctrine of exhaustion of remedies is a jurisdictional scheme of administrative appeals to the Superior Court when it sits in an appellate function. *Stepney, LLC v. Town of Fairfield*, 263 Conn. 558 (2003). In administrative law, the doctrine serves a dual purpose in that it does not allow a party to circumvent the administrative process. *Pet v. Department of Health Services*, 207 Conn. 346, 351-352 (1988); *Financial Consulting, LLC v. Leonardi, Insurance Commissioner*, 2012 WL 2549323 (June 4, 2012). In addition, the doctrine preserves and reserves judicial resources for use only when a case and controversy exists following a final agency decision where one of the parties below is actually aggrieved the final agency decision from which the appeal was taken, meaning no further administrative proceeding will resolve the matter differently. *Housing Authority v. Papandreas*, 222 Conn. 414 (1992); *Polymer Resources, Ltd. v. Keeney*, 227 Conn. 545 (1983); *Lucas v. Riordan*, 62 Conn. App. 566 (2001). Two exceptions exist to escape the doctrine.

Unless an exemption applies, the Court simply lacks subject matter jurisdiction when an administrative remedies have not been exhausted. If an administrative remedy has been made

available, it must be exhausted before resorting to the Court. *Coyle v. Commissioner of Revenue Services*, 142 Conn. App. 198, 206 (2013).

Under Conn. Gen. Stat. § 4-183(b), the legislature has carved out a narrow exception to the doctrine of administrative exhaustion at the agency level. Subsection (b) establishes that:

> A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy.

Subdivision (1) extends this option only to persons involved in a contested case before a state entity since that is a prerequisite under the UAPA. As noted elsewhere, that is a fairly bright line.

For an example of attempt to invoke a subdivision (2) exception, see *Department of Insurance v. Freedom of Information Commission*, 2017 WL 3251227 (June 26, 2017; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain). The exception to the general rule requires that administrative remedy would be wholly inadequate or administrative proceedings would be wholly futile, then the proceeding can be avoided.[30] *Commission on Human Rights & Opportunities v. Human Rights Referee*, 66 Conn. App. 196 (2001); *Johnson v. Department of Public Health*, 48 Conn. App. 102 (1998). This is a rare and exceptional circumstance. *Breiner v. State Dental Commission*, 57 Conn. App. 700 (2000). See *Johnson v. Statewide Grievance Committee*, 248 Conn. 87 (1999).

The inadequacy and the futility must be on an objective person standard basis, not the subjective desire of a particular client. There is danger for the practitioner who advises a client to "opt out" of an administrative proceeding based on a claim of inadequacy or futility at the agency level. A reviewing court may well be hostile to a self-serving perception, especially if the agency is representing that it was "ready, willing and able" to adjudicate the matter while pending below and on remand.

In addition, exhaustion of an administrative remedy has been confused with an independent cause of action for injunctive relief where the matters are closely related, yet distinct. For example, under the Connecticut Environmental Protection Act, a party may be permitted to intervene in an administrative proceeding or may elect to file an action directly in Superior Court for an injunction to immediately halt a situation that is damaging the environment even though one or more other parties may have a pending administrative

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[30] Where an agency lacks authority to grant the relief sought, the claim may be exempt. *Local 1739, International Assoc. of Firefighters v. Town of Ridgefield*, Judicial District of Danbury at Danbury (CV-01-0343225-S, Moraghan, J.T.R.), 01-CBAR-0870 (October 11, 2001); 7 Conn. Ops. 1211 (October 29, 2001)(Labor Relations Board could not order the cease and desist order sought, therefore futile to bring such an administrative action). But see *Waterbury Firefighters Assoc., Local 1339 v. Waterbury Financial Planning & Assistance Board*, (CV-01-166380-S, Hertzberg, J.), 01-CBAR-0773 (Sept. 26, 2001), 7 Conn. Ops. 1211 (September 26, 2001)(merely substitution of decision maker by operation of law does not make remedy inadequate at law).

proceeding on that vary issue. *City of Waterbury v. Town of Washington*, 260 Conn. 506 (2002) overruling *Fish Unlimited v. Northeast Utilities Service Co.*, 254 Conn. 1 (2000)(Fish I) and *Fish Unlimited v. Northeast Utilities Service Co.*, 254 Conn. 21 (2000)(Fish II). See also *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480 (2003).

PRACTICE TIP 2018: The exhaustion doctrine "is rooted in both prudential and constitutional considerations." *Metropolitan District v. Commission on Human Rights and Opportunities*, 180 Conn. App. 478, 487, *cert. denied* 328 Conn. 937 (2018). Prematurely commencing a civil action on grounds of futility and in pursuit of injunctive relief offends the agency primacy over its area of cognizance and violates the separation of powers doctrine. *Id*. The apparent lust of an easy or immediate redress cannot overcome the doctrines intended to force the exhaustion of administrative remedies.[31]

H. AGREEMENTS, STIPULATIONS, CONSENT AND DEFAULTS

The Act, like trial practice, structurally permits the parties to shape and direct what issues of fact and, to some degree, issues of law must be addressed by the tribunal. Subsection (c) of Conn. Gen. Stat. § 4-177 provides:

> Unless precluded by law, a contested case may be resolved by stipulation, agreed settlement, or consent order or by the default of a party.

A practitioner should consider this issue early in the assessment process and at each every turn thereafter.[32] The UAPA does not provide that all contested case matters need go to hearing nor do they. Do not assume that the government attorney or representative has no interest in talking about the possibility of settlement. Like the general practice of law, the practitioner's skills in advocating for a client's interest through negotiations may be a better choice than taking chances in a final agency decision as described elsewhere in this paper.

A point of confusion exists on who is a party to any such agreement. If the matter is completely resolved, including a provision for withdrawal of the petition, the statement of charges or the request for a hearing, then there is no decision for the presiding officer to hear or approve (unless prohibited by an agency rule). The parties are only signatories to such agreement. The matter is no longer a contested case and no controversy remains. However, the practitioner must check the rules of practice for the issue at hand since an agency rule can prevent such a withdrawal, especially where the agency has become the prosecuting party, e.g., in the Commission on Human Rights and Opportunities.

If the parties stipulate only as to certain facts and not others, a part of the controversy remains to be heard and the hearing officer must render a findings of fact, including the

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[31] For example of unravelling federal and state overlapping jurisdictions and the UAPA, see *Great Plains Lending, LLC, v. State of Connecticut Dept. of Banking*, 2015 WL 9310700 (Nov. 23, 2015; Schuman, J.; Judicial District of New Britain) same case after remand 2017 WL 6601990 (Dec. 1, 2017; Shortall, J.T.R.; Judicial District of New Britain).

[32] The time to stipulate to facts is in the proceeding before the agency. Stipulations of fact not presented to the agency below will be of no effect on appeal to the trial court. *Neri v. Powers*, 3 Conn. App. 531, *cert. denied* 196 Conn. 808 (1985).

stipulations and render a final agency decision or a proposed decision as the case may be. The presiding officer's signature is not necessary.

Advice to default may also be sage advice, e.g., when an administrative action is directly related to a pending criminal matter and criminal investigators may desire to see how the testimony goes. Note however that a statute of limitations may be running concurrently and waiting for one proceeding to finish may create other problems for other time limitations, e.g., a labor dispute may not be resolved by the time a related human rights case needs to be initiated.

I. COLLATERAL ESTOPPEL AND ISSUE PRECLUSION

The doctrine of collateral estoppel is noteworthy. The common law doctrine of collateral estoppel can come into play as the agency and the person or entity challenging the agency decision may have been this route before (perhaps with another attorney and perhaps *pro se*). *Corcoran v. Department of Social Services*, 271 Conn. 679 (2004). If the parties and the issues are not the same, reconsideration of the facts may be allowed over an objection of collateral estoppel. *Hill v. Conn. State Employees' Retirement Commission*, 83 Conn. App. 599, *cert. denied* 271 Conn. 909 (2004).

The same result may occur as to issue preclusion. If the parties have already addressed a particular legal issue, that may also come into play. *See for example Evans v. Tiger Claw, Inc.*, 141 Conn. App. 110 (2013)(under the doctrine of res judicata, administrative wage hearing that resulted in a finding of lost wages in an amount certain barred re-litigating same controversy in civil action against employer in an apparent attempt to secure a higher amount).

PRACTICE TIP: Collateral estoppel and issue preclusion does <u>not</u> apply where alternative legal authority empowers an agency decision, even though the subject matter or object of interest is one in the same. *See for example Costa v. Betsy Sams*, 2008 WL 4044332 (Aug. 31, 2008) and Sa*ms v. Department of Environmental Protection*, 308 Conn. 359 (2013). Mr. and Mrs. Sams owned land directly on the Connecticut River where the river transitions into Long Island Sound. Their land was eroding away. To protect their property, they built a "stone filled gabion basket seawall." The seawall was "approximately 261 feet in length and of variable height from 7 to 10 feet above substrate" Defendant-appellee's Brief. 2010 WL 8972457 (March 31, 2010). They only built one seawall, but to defend their actions twice. They were successful in round one, but lost in the second.

In *Costa*, the Town of Old Saybrook sought injunctive relief and order for removal from the trial court under its zoning regulations and authority under the Coastal Management Act (Conn. Gen. Stat. § 22a-90, *et seq*.). The Sams defense was in part that the town did not have enforcement powers because their wall was not a "structure" as defined in the applicable regulations and no municipal approvals were needed. The Sams argued the wall was really to only arrest landward erosion and not waterward erosion. The trial court agreed. No appeal followed. The wall remained standing. Thereafter, DEP sought the same relief by way of an order for removal by way of its own authority. The Sams requested an administrative hearing. After a hearing, the hearing officer found, unlike the *Costa* Superior Court, that the agency had presented substantial evidence that the wall was partially above the high tide line (i.e., "landward") and partially below the high tide line (i.e., "waterward"). The hearing officer found erosion was occurring both landward and waterward. The hearing officer concluded that the wall was well within jurisdiction limits of the Coastal Management Act; to wit, the permit

requirement did apply and the removal order was on solid ground. In affirming, the Supreme Court held that DEP was not bound to the findings or conclusions of law made by the *Costa* trial court. 308 Conn. at 396-402.

In *Lane v. Commissioner of Environmental Protection*, 2012 Conn. App. 649, n.15 (2012), squarely puts the burden on the party seeking to benefit from equitable estoppel to show that the agency personnel enticed by calculated behavior to induce that party to do something and thereafter the party in fact changed their position upon that inducement. See also *Kimberly-Clark Corp. v. Dubno*, 204 Conn. 137 (1987). Absent such an inducement factor, any agency inaction is not a basis for a court to impose equitable estoppel. Caution is well advised where an agency may have been aware of a violation, but took no enforcement action. The lack of enforcement does not on its face satisfy the inducement perquisite.

IV. SOME FUNDAMENTALS ABOUT HANDLING CONTESTED CASES

This section presents the down to earth review of the significant issues that a practitioner must address when involved in a contested case that is going to hearing. The hallmark of an administrative proceeding is that it should be "fundamentally fair." What is "fundamentally fair" is not defined, but is well understood as to its essential elements.[33]

A. NOTICE

As to contested cases, subsection (a) of Conn. Gen. Stat. § 4-177 establishes that "all parties shall be afforded an opportunity for hearing after reasonable notice." Subsection (b) further provides:

> The notice shall be in writing and shall include: (1) A statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and regulations involved; and (4) a short and plain statement of the matters asserted. If the agency or party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

Subdivisions (1), (2) and (3) are straight forward. Subdivision (4) has a low threshold in that the agency obligation is to reveal only a "short and plain statement" of the alleged misconduct or violation to be heard. *Jutkowitz v. Department of Health Service*s, 220 Conn. 86 (1991). The details or factual basis of notice can be revealed during the course of the proceeding. A reversible error is one that causes the respondent to be materially prejudiced. *Grimes v. Conservation Commission*, 243 Conn. 266 (1997). As a practical matter, with limited pre-hearing discovery permitted, the sounder practice may be a request to revise when the statement is too short and too plain rather hoping that a material prejudice will occur down the line.

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[33] See *McGee v. Hartford Federation of Paraprofessionals*, 02-CBAR-1178, 2002 Conn. Super. LEXIS 1768 (May 20, 2002).

A practitioner must determine whether the facts within a given case raise an issue within the ambit of the statutory and regulatory authority of the agency. An agency may not expand its jurisdiction or powers to reach an issue outside of it or to reach a particular result not provided therein, save when agency discretion is a part thereof. Where the statute or regulation authorizes and requires discretion vested in the agency, the agency must still avoid being completely arbitrary.

The basic premise is that the notice must provide a sufficient basis to grant the respondent a fundamentally fair opportunity to defend and the possible consequence of the action against the recipient. *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108 (2011). See also *Cornelius v. Conn. Department of Banking*, 05-CBAR-1039, 2005 Conn. Super. LEXIS 1636 (June 9, 2005), *aff'd* 94 Conn. App. 547, *appeal denied* 278 Conn. 913 (2006).

PRACTICE TIP: An agency may not be required to spell out all the consequences of a proposed adverse action, especially if the consequence occurs by operation of law. For example, in *Rowland v. Commissioner of Motor Vehicles*, 2012 WL 3064657 (June 26, 2012), a driver was arrested for Driving While Intoxicated (DUI) in 2009. Thereafter, the Department of Motor Vehicles (DMV) proposed to revoke his personal license for a ninety days and his Commercial Driver's License (a/k/a CDL) for a one year period. His public service endorsement to transport passengers (a/k/a the "S" endorsement) was also impacted by those suspensions. In 2011, after the 2009 suspensions had been served and licenses reinstated, the driver reapplied for the "S" endorsement. DMV denied the application because, the "S" endorsement had a regulatory prohibition for a five year period following a DUI suspension. The trial court held the 2009 notice was sufficient and the agency was not required to present every possible consequence of the loss of a license. *Id.* at *2. The trial court held that the 2009 notice that was given was not defective and the agency complied with § 4-177(b), hence the court dismissed the driver's appeal from the 2011 imposition of the five year prohibition.

1. APPLICATION TO REVISE THE NOTICE

If a practitioner determines that the notice does not provide notice of sufficient detail to prepare a defense, an application for a more definite statement is the remedy specially envisioned in the last sentence of § 4-177. Failure to utilize the remedy constitutes waiver. *Greater Bridgeport Transit District v. State Bd. of Labor Relations*, 43 Conn. Supp. 340, *affirmed* 232 Conn. 57 (1993). The statutory language states the agency "shall" provide it. It sounds mandatory.

Given the limited prehearing discovery right (discussed below), filing an application as a matter of course makes sense. The statute does not directly state where the application should be directed. It makes sense to serve it upon the agency and see how they respond. A negative response could then be made to the tribunal by packaging the application and the response. This strategy gives the practitioner two chances to get the more definite statement.

Unlike the order of pleading in the Superior Court's Practice Book Section 10-6, most of the agency rules of practice do not have an order or sequence of pleading. Logic would suggest however that once you have filed an answer to a statement of charges or the notice that you have waived the option for a more definitive statement.

Practitioner should review the Notice carefully to determine what next step is required either by a direct statement (e.g., file an answer by a date certain) or you may request a hearing by sending it to a particular address.

2. ADJUDICATION VERSUS RULEMAKING

The practitioner may have to educate the client about the distinction between adjudication of a contested case versus general rule making authority of an agency. Again, under the definition of a contested case, the controversy to be decided is limited to "the legal rights, duties or privileges of a party." Thus the scope of the remedy in contested case is limited to a party or the decision being made by the agency about that party. A decision in a contested case is binding only on the parties named in the notice or persons who have acquired that status. A contested case usually involves an offensive conduct that occurred in the past and for which there may be a penalty, forfeiture or other burden imposed on that party.

Other provisions of the UAPA govern rulemaking and are not a primary focus of this material. However, a practitioner may have a client that may not understand that adjudication and rulemaking are separate functions. While in receipt of a notice of a contested case being brought against the individual for something related to that individual, rulemaking has a greater applicability and an opportunity for participation by other people, i.e., not just the party named in the notice of the contested case. Rulemaking is usually only prospective and results in a regulation, i.e., a standard of general applicability and without regard to one particular party. Penalties, forfeitures or other burdens are not imposed upon any particular party and cannot be in full force and effect until adopted in accordance with the UAPA, including approval by the General Assembly.

B. REQUEST FOR A HEARING

It is common for the opportunity for a hearing to not be automatically granted, but rather that the party who received a notice of a proposed governmental action must verbally or in writing request a hearing. Again, rules of practice are key. A practitioner may need to see the hard copy of the notice of proposed action for specific requirements to perfect the hearing right. In rare instances, the obligation to hold a hearing rest solely with the agency. This is the exception, not the rule.

The time frame to make a request for a hearing at the agency level may be short. When in doubt as to whether to pursue the matter, a request should be filed and withdrawn later. If the client and/or practitioner miss the deadline, again check the applicable rules of practice. An agency head may have authority to extend the deadline for cause or enlarge the time for compliance. Even if no specific rule is on point, the practitioner should make his or her case for a "fundamentally fair" proceeding, including allowing more time to respond.

Some proposed agency actions take the form of a show cause proceeding, where the agency merely announces that it intends to take a proposed action and the person potential affected by the proposed decision must show why the action should not be taken. If no request for a hearing is made, the agency decision becomes final. A final order will likely issue shortly after the deadline has passed. Such an order may deem all allegations to be true and stand as the finding of facts for the final decision. The record of such a hearing is minimal. It is difficult to mount an appeal to the Superior Court without at least some evidence to become the basis for a

reversible error. A practitioner is ill advised to let the allegations become uncontested findings of fact, unless of course they are correct.

Some proposed actions take the form of a statement of charges or bill of particulars. A notice in this form will offer a short plain statement, but will usually bring forth factual particulars and specify statutory and/or regulatory provisions that have been allegedly transgressed. These notices look much like a criminal count and may have supporting affidavits attached. Some in this format also have clear remedy or consequence provisions, e.g., civil fine of $15,000. Most provide notice of the right to a hearing and how to request one.

As to requesting a hearing, compliance with time frames is another tricky issue. Where a particular agency action is established by statute and the statutory constraint relates to the overall purpose of the statute and the right is one that did not exist at common, strict compliance with the statutory standard may appear at first glance to be absolutely required to invoke subject matter jurisdiction. Then again, it may not be. Where a strict interpretation inhibits an agency mandate, a court may be willing to allow late filings, if the jurisdiction bar is not absolute in the statutes wording. See *William* v. *Commission on Human Rights and Opportunities*, 54 Conn. App. 251 (1999), *rev'd on point* 257 Conn. 258 (2001), *on remand* 67 Conn. App. 316 (2001).

The simple solution is obvious. Requesting a hearing and later withdrawing is the prudent practice. Pushing a statute of limitation is not.

C. LIMITED PREHEARING DISCOVERY

It is generally accepted that prehearing discovery does not exist under the Act. *Pet v. Dept. of Health Services*, 207 Conn. 346 (1988). Subsection (a) of Conn. Gen. Stat. §4- 177c provides:

> In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

The UAPA does not specify when the opportunity the inspection or copy must occur, i.e., prior to the hearing. See *McGee v. Hartford Federation of Paraprofessionals*, 02-CBAR-1178, 2002 Conn. Super. LEXIS 1768 (May 20, 2002). However, a practitioner should turn to the rules of practice of the applicable agency because, again, it is the controlling authority on the subject. Even if the UAPA does not provide for pre-hearing inspection, an agency hearing officer may allow it and may even order it. Denial of the opportunity to inspect and copy implicates due process and a practitioner should be making demands to inspect and documenting any decision denying access.

Like in trial practice in a trial court, a practitioner should request an immediate inspection of governmental files containing information about the client. In addition to the authority found in §4- 177c, the Freedom of Information Act provides a basis for reviewing some public information documents. Conn. Gen. Stat. § 1-7, *et seq*. The agency must respond

to the FOIA request without regard to the pending administrative proceeding. A second basis, and perhaps a more inclusive request as to your client personally, is the Personal Data Act. The Personal Data Act is more specific to the individual in question and the request is tailored to see information about just your client. Conn. Gen. Stat. § 4-190, *et seq.* However, both of these acts and the Uniform Administrative Procedures Act (UAPA) do not obligate the agency to compromise confidentiality as may be provided by federal and state laws. See Conn. Gen. Stat. §§ 1-210, 1-213(b)(1), and 4-194(a).

Regardless, the inspection of the agency's information may assist you in understanding the history of the relationship of your client and the agency. It may provide insight into the agency's perception of your client. Perhaps more importantly, you may see information in black and white print (or color photos) and in detail without emotional or perceptional overlays of the stakeholder, i.e., your client. Even though some or much of the information obtained may not relate to the issue that created the need for legal services, it may eliminate some surprises for the practitioner during the hearing, e.g., past administrative sanctions that have been imposed that the client did not mention.

As a practice issue, before demanding an inspection, Freedom of Information Act requests, and/or Personal Data Act productions, a practitioner may consider the value of such inquiries when it is not uncommon for the opposing party to respond with a "like kind" demand as soon as you have woken up the "sleeping dog" and the dog may be more demanding than you anticipated. As a general rule of thumb, it is better to know what is or may be coming than not.

1. COMPLIANCE MEETING FOR A LICENSEE

Under the UAPA, a "license" is a very broad legal concept that includes "any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but does not include a license required solely for revenue purpose" Conn. Gen. Stat. § 4-166(8). Conn. Gen. Stat. § 4-182(c) requires the agency give the license holder an opportunity to show compliance with the applicable law. This event is called a "compliance meeting". See Subsection G below regarding the special note about administrative actions against "licensees." A license holder may not be compelled to attend a compliance meeting.

As a matter of preliminary discovery, a compliance meeting can be very informative about the allegations against the licensee. A practitioner is well advised to view the meeting as a double edge sword. There are risks and benefits. A case by case assessment is necessary.

In its essence, it is an opportunity for the licensee to demonstrate to the agency that the licensee has in fact "complied" with the "standard" within the authority being enforced or proposed for enforcement, i.e., the standard that the agency has, at least on a preliminary basis, alleged is deficient or has been violated. During the compliance meeting, the license holder will likely need to reveal information about themselves or the situation that the agency has "noticed" as problematic. But it is not necessarily all one sided.

On the other hand, the licensee may have an opportunity on a pre-hearing basis to learn about the position of the agency, the evidence or complaints that the agency already has in hand, and what the agency considers the strength of its case against the licensee. Of course this information may be limited to learning that the agency rejects the licensee's claim of compliance. The practitioner may also benefit from a compliance meeting as to assessing the

strength of the evidence against the client in comparison to the client's perception and reports already in the practitioner's hand. If the license holder is a new client, the practitioner may get a glimpse of the license holder's style and relationship with agency personnel. By no means should agreeing to a compliance meeting be done blindly or in the cold with no preparation.

A compliance meeting can be an opportunity to set-up an application to revise and/or perfect interrogatories or requests for production, to the extent that they may be used in a given proceeding. A compliance meeting may also assist the practitioner in learning who the players will be in a given administrative proceeding, e.g., will the investigator become the prosecutor or who will be offering testimony for the agency.

The practitioner must balance on a case by case basis whether the compliance meeting may serve your client and you as a pre-hearing discovery mechanism like a deposition; or not. Such a meeting can provide at least a glimpse of the government's evidence. You may learn about the weaknesses and strengths of any defenses while revealing the same to the government agency involved.

2. DEPOSITIONS, INTERROGATORIES AND REQUESTS FOR PRODUCTION

No provision of the UAPA provides for the use of depositions, interrogatories and requests for production. In so much as agreements and stipulations are allowed, they may be used by a practitioner to limit and narrow issues of fact or law. Rejection of a proposal leaves the issue open and also may help set a course for a hearing.

The lack of depositions, interrogatories and requests for production is a distinct contrast to trial court civil procedures, both federal and state. Note, again, that agency rules of practice may directly or indirectly serve the same purpose. For example, there is no limitation on the application for revisions to the statement of charges or complaint to be pursued by the agency. Repeated clarification could bring out considerable information.

As noted above, careful use of the limited pre-hearing discovery that is available under the Freedom of Information Act and the Personal Data Act may mitigate the need for pre-hearing discovery through depositions, interrogatories and requests for production.

3. THE EXPERT WITNESS

Again, subdivision (2) of subsection (a) of Conn. Gen. Stat. §4- 177c establishes that each party must be afforded the opportunity to put on witnesses and to present evidence on all issues involved. A party cannot be denied an opportunity to present expert witnesses as the words of the statute is "witnesses" and "all issues." There is no requirement in the Act itself that the expert be revealed in advance or that a report be filed. A practitioner should again turn to the agency's rules of practice for guidance.

Offering expert testimony can be of particular importance if the hearing officer or panel does have sufficient expertise in hand to render a contradicting source of expertise, meaning if the hearing officer or a majority of the panel members lack the expertise in question and only one expert is presented as a witness, the adjudicator may not be able to ignore that testimony. See *Downy v. Retirement Bd. City of Waterbury*, 66 Conn. 105 (2001). *Downy* further suggests that a practitioner is well advised to poll or otherwise establish on the record the qualifications

of the hearing officer or panel members to build a foundation of factual predicates for an eventual appeal.

D. MAKING THE RECORD

The record of the hearing at the agency level is prescribed in statute. Subsection (d) of Conn. Gen. Stat. § 4-177 provides:

> The record in a contested case shall include: (1) Written notices related to the case; (2) all petitions, pleadings, motions and intermediate rulings; (3) evidence received or considered; (4) questions and offers of proof, objections and rulings thereon; (5) the official transcript, if any, of proceedings relating to the case, or, if not transcribed, any recording or stenographic record of the proceedings; (6) proposed final decisions and exceptions thereto; and (7) the final decision.

A term of art in administrative law is the "Return of Record" or "ROR." Return of Record is what the agency compiles and delivers to the court under Conn. Gen. Stat. §4-183(g).[34]

PRACTICE TIP: Effective January 1, 2014, the Superior Court modified Conn. Prac. Bk. Sec. 14-7A as applicable to contested cases and ROR. The revision set-up a new method of presenting the record of the agency proceeding to the Superior Court. See Sec. VI.B.2 for the procedural elements of presenting the record of the agency proceeding to trial court.

As discussed below, if the hearing will result only in a proposed final decision (rather than the final decision maker actually hearing the evidence first hand), the evidence that goes forward will be limited to what was offered by the parties, taken by way of administrative notice and offered by witnesses. Although oral arguments and exceptions may be considered later, the evidence phase of the hearing process is limited to the hearing. Also, with limited exceptions as discussed below as to agency procedural irregularities, the record is essential because on appellate review to the Superior Court the review is restricted to the record. Conn. Gen. Stat. § 4-183(i).

Unlike a trial court, agency practice varies as to having a transcriptionist or court reporter present at administrative proceedings. Subsection (e) of Conn. Gen. Stat. § 4-177 allows an agency to record a hearing by electronic means and hold off preparing a transcript until one is requested or if needed for an appeal. Therefore, do not be surprised if a certified short hand recorder is not present. Remember administrative proceedings were, and are still in many ways, viewed as less expensive than formal trials. Not requiring a transcriptionist is a cost savings to the agency.[35] Many times the presiding officer uses only a tape recorder and a

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[34] Conn. Gen. Stat. §4-183(g) allows the parties to stipulate to a reduction in the ROR and for the imposition of a tax costs if a party "unreasonably" refuses to limit the record. This provision is rarely invoked. In addition, this provision empowers the court to authorize "corrections and additions" to the ROR. This is accomplished by filing a Supplemental ROR (SROR). SROR are the exception, not the rule, but do occur.

[35] The practitioner is well advised to make an advanced informal inquiry of the hearing officer on the method of recording that is planned and give some consideration requesting that a transcriptionist be retained by the agency or securing permission to employ one at your

transcript is produced later only if absolutely needed. A practitioner should not lose sight of the fact that the use of a tape recorder can cause significant problems and challenges in presenting a complete and full description of the proceeding below. See *Johnston v. Salinas*, 56 Conn. App. 772 (2000). See also Conn. Gen. Stat. §1-7 (defining public records).

While this topic may seem out of sequence to the reader, a practitioner is well advised to give consideration to making the record well before hearing the presiding officer inquire, "Are you ready to proceed."[36] The question is really, "Are you ready to proceed with making the record?" The reality is actually, "Are you ready to proceed with making that record that you will need on appeal should this tribunal rendered an adverse decision to your client's interest?" See Section *infra* VI.B.2 on the Scope of Review on Appeal to the Trial Court and Record Review Limitations. The time to think this issue is now, i.e., before the hearing, not later and certainly not during the applicable appeal period or once you begin to challenge the final agency decision.

The burden of proof is on the party causing the hearing to be held. *American Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296 (2005). In a contested case, the burden of proof must be viewed in the context of making the record because only evidence in the record can be considered and on appellate review only the record will be reviewed as to the substantial evidence standard. Therefore, making the record is a consideration that must be paramount in the practitioner's strategies. The record is the foundation of findings of facts and the application of law to the case on appeal. Conn. Gen. Stat. § 4-183(j), in part, provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Therefore, early in a proceeding it is appropriate to be focused on the administrative record in the context of when the hearing is on appeal to the trial court. The importance of the record as prepared by the agency at the conclusion of an agency proceeding for submission to the trial court cannot be overstated. The epicenter of administrative law is the making of the record during the taking of evidence. A practitioner must focus on this task from the beginning and continue to do so through and including filing for reconsideration. Failure to have evidence put into the record can reverberate throughout the remainder of the life of a given case.

PRACTICE TIP 2018: It is a poor plan to hold your cards close to the vest or save your evidence for another day. See *Lemanski v. Commissioner of Motor Vehicles*, 2018 WL

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client's expense, if the stake is high enough for your client to consider this cost effective. Subsection (e) also provides that the party requesting the transcript shall bear the costs. The UAPA is silent on the issue of videotaping or digital recording of a hearing.

[36] See for example *Quarry Knoll II Corporation, et al., v. Planning & Zoning of Town of Greenwich*, 256 Conn. 674 (2001)(return of record from proceeding below did not contain information on the impact of agency's decision on intervenors who did not participate in the making of that record, hence review limited by the record). Rarely is it a good idea to sit out the agency level proceeding when the record is made, if even a remote interest exists. See *Office of Consumer Counsel v. Department of Public Utility Control*, 279 Conn. 584, 594 (2006).

1785678 (April 6, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain). Judge Huddleston denied the plaintiff's motion to add additional information where the record of agency hearing showed the plaintiff had knowledge about the evidence during the hearing, but it was not included in the record. In the same appeal, Judge Huddleston later denied a motion to suppress evidence, in part, because the record below showed the plaintiff did not object to certain evidence being offered at the agency hearing. See 2018 WL 1785681 (March 19, 2018).

Remands for the purpose of presenting additional to the agency requires an order of remand and remands are governed by § 4-183(h). Generally, the plaintiff is hard pressed to prevail and such an order is not easily obtained. See *Wakefield v. Commissioner of Motor Vehicle*, 90 Conn. App. 441, *appeal denied* 275 Conn. 931 (2005). While you cannot control what the final decision maker puts into a memorandum of decision or order, you can control what you put into the record or what issues will be raised on the record. A review Court will need to find "some" record that about a matter that you raised or attempted raise at the agency level before the Court will review it on appeal. *Solomon v. Conn. Medical Examining Board*, 85 Conn. App. 854 (2004), *cert. den.* 273 Conn. 906 (2005). Your job is to make sure that your client's interests make it into that the record.

1. PREPONDERANCE OF EVIDENCE

Although the UAPA is silent on the applicable standard that a trier of fact must employ in a contested case, in *Jones v. Conn. Med. Examining Board*, 2009 Conn. Super. LEXIS 2534 (Oct. 5, 2009), 129 Conn. App. 575, *cert. granted* 302 Conn. 921 (2011), *affirmed* 309 Conn. 727 (2013), the Connecticut Supreme Court removed any confusion on the applicable standard under the UAPA.[37] The applicable standard is preponderance of evidence, not clear and convincing. Use of the preponderance of evidence standard satisfies the Constitutional due process requirement. 309 Conn. at 733. *Sternstein v. Connecticut Medical Examining Board*, 2013 WL 5663257 (Conn. Super.; Cohn, J.; Sept. 18, 2013)(applying *Jones* standard).

The preponderance of evidence standard is showing a fact is more likely than not to be so based on the evidence on the record that is probative and reliable evidence. *Sanservino v. Commissioner of Motor Vehicles*, 79 Conn. App. 856 (2003); *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333 (2000). *Kirei v. Hadley*, 47 Conn. App. 451 (1998), *aff'd on remand* 60 Conn. App. 526 (2000). The criminal standard of beyond a reasonable doubt does not apply. *Adams v. Commissioner of Motor Vehicles*, 182 Conn. App. 165, (2018); *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn.App. 391, *cert. denied* 245 Conn. 917 (1998); *Thompson v. Connecticut Department of Motor Vehicles*, 2018 WL 650354 at p. 4 (Jan. 8. 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain).

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[37] The reference to the lack of a standard and the silence of the legislature may be seen by some as an open invitation to the legislature to articulate a difference standard either within the context of the UAPA or within the particular statutory authority in question. In *Jones*, the controversy was between a licensed physician and the Connecticut Medical Examining Board in the context of a disciplinary action being prosecuted by the Connecticut Department of Public Health under authority of Conn. Gen. Stat. §§ 19a-17 and 20-13c. The Court released the decision on August 13, 2013. The 2014 General Assembly did not take any action to modify the holding in general or within the particular statutes at issue.

No heightened standard, including clear and convincing, applies to UAPA contested cases. *Jones*, 302 Conn. at 743; *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 821 (2011); *Dickman v. Office of State Ethics, Citizens Advisory Board*, 140 Conn. Appeal (2013).

2. SUBSTANTIAL EVIDENCE RULE AT HEARING

The practitioner must put substantial evidence on the record. Substantial evidence is present if the record contains competent factual predicates from which the fact in issue can be reasonably inferred. *Schallenkamp v. DelPonte*, 229 Conn. 31 (1994); *Ames Dept. Store v. CHRO*, 45 Conn. Supp. 276, *aff'd* 48 Conn. App. 561, *cert. denied* 245 Conn. 924 (1998). See also: *Banroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391 (1998). Although more than one finding of fact may be possible, the presiding officer's findings must stand, if it is reasonable. *Murchison v. Civil Service Commission Waterbury*, 234 Conn. 35 (1995). The mere existence of conflicting evidence does not prevent a determination that particular findings are not supported by substantial evidence. *Tarullo v. Inlands Wetlands and Watercourses Commission of the Town of Wolcott*, 263 Conn. 572 (2003); *Samperi v. Inland Wetlands Agency*, 226 Conn. 579 (1993).

A reviewing court must give considerable weight to findings of fact. *Longley v. State Employees Retirement Commission*, 284 Conn. 149 (2007); *Conn. Light and Power Co. v. Texas-Ohio Power, Inc*., 243 Conn. 635 (1998). In the absence of substantial evidence on the record, the findings will not be able to stand, if the evidence does not meet the substantial evidence standard. *Dolgner v. Alander*, 237 Conn. 272 (1996). Courts are bound by the findings of subordinate facts. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333 (2000); *Crescimanni v. Department of Liquor Control*, 41 Conn. App. 83 (1996). Again, the reviewing court accords an agency a high level of deference on findings of fact. *Rivera v. Liquor Control Commission*, 53 Conn. App. 165 (1999). When the agency record contains admissions against the interest of a party, a reviewing court will be hard pressed to overturn or ignore that fact. *Toise v. Rowe*, 95-CBAR-0598 (Aug. 8, 1995), *aff'd* 44 Conn. App. 143 (1997), *reversed* 243 Conn. 623 (1998), *on remand* 2002 Conn. Super. LEXIS 2811 (Aug. 28, 2002), *aff'd* 82 Conn. App. 306 (2004).

PRACTICE TIP: In *Do v. Commissioner of Motor Vehicles*, 2015 WL 777101 (Judicial District of New Britain, Feb. 4, 2015), *reversed* 164 Conn. App. 616 (2016), the Appellate Court wrote,

> It is a rare case in which a decision by an administrative hearing officer to admit an exhibit will be reversed for an abuse of discretion. Principles of fundamental fairness dictate that this is such a case.

164 Conn. at 616. Contrary to trial court conclusions, a divided Appellate Court found the lack of substantial evidence on the record because of inconsistencies in an arresting law enforcement officer's report and changes that negated the burden of the agency to put competent evidence on the record. The teaching moment is the "rareness" comment. The dissent would not have reversed, in part, because there was other substantial evidence on the record that supported the trial court decision which left little doubt about identity of the driver, the vehicle or the guilt of the offending DUI driver. The teaching moment is that substantial evidence in the face of inconsistencies may not be enough to carry the day on appeal.

Stipulations may ensure that the subordinate and ultimate facts on the record are as desired by the parties rather than as found by the presiding officer. Again, this is similar to trial practice.

A practitioner may face a thorny issue when a trial court remands a pending appeal to the agency to take additional evidence because the Return of Record (ROR) is found to be deficient such that the reviewing court does not otherwise reach the merits of the appeal. Some confusion may be encountered because case law has shifted over time. The Supreme Court exercised its powers to correct the Court's misapplication of the law of remand in *Commissioner on Human Rights and Opportunities v. Board of Education of the Town of Cheshire*, 270 Conn. 665, 675 (2004) by overruling *Morel v. Commissioner of Public Health*, 262 Conn. 222 (2002) and by abrogating *Lisee v. Commission on Human Rights & Opportunities*, 258 Conn. 529 (2001). The *Lisee* Court overruled several decisions containing dictum to the contrary. *Lisee*, at 542 (n.16) *overriding specifically Jones v. Crystal*, 242 Conn. 599 (1997); *Connecticut Resources Recovery Authority v. Commissioner of Environmental Protection*, 233 Conn. 486 (1995); *Johnston v. Salinas*, 56 Conn. App. 772, 774 (n.4), (2000); *Dacey v. Commission on Human Rights & Opportunities*, 41 Conn. App. 1, 5 (1996). Under *Lisee*, the rule was essentially an incomplete record was one not ripe for review. *Lisee* at 538. Now, under *Board of Education of the Town of Cheshire*, 270 Conn. at 675-676, the Supreme Court has attempted to eliminate any confusion. See Section VI.G below on "A REMAND MAY BE APPEALABLE."

Even so, a remand that is adverse to the party that caused the appeal in the first instance should consider the remand as an opportunity to supplement the record, get a second bite of the apple and, perhaps, avoid an adverse decision following the remand, i.e., when the agency hold the further proceedings in accordance with the reviewing court's directives. A case-by-case analysis is required to determine whether a practitioner should advise a client about whether substantial evidence has been put forward in the earlier proceeding and any added value that more evidence might provide in a future appeal from a second adverse final agency decision. See Section VI.B.6 below on "Substantial Evidence Rule on Appeal." Also, see Section IV.G on "A Remand May Be Appealable."

PRACTICE TIP 2018: The practitioner is well advised to steer clear of such a circumstance that may lead to a remand for failure to have substantial evidence in the ROR. There is no guidance offered as to how much of an administrative record is enough of a record for a court to find ripeness and address the merits on the record presented. In effectiveness of counsel can be a basis for a remand. *Clark v. Commissioner of Motor Vehicles*, 183 Conn. App. 426, 442 (2018) quoting *Salmon v. Dept. of Public Health & Addiction Services*, 259 Conn. 288, 324 (2002). This issue is better avoided by being over inclusive in making the Return of Record during the hearing.

PRACTICE TIP: If you are concerned that you may be on thin ice, your feet are probably already wet and cold, you just cannot feel them (yet). This hazard can be avoided by planning the evidence and testimony to be offered during a hearing, tracking what evidence and testimony has been put on the record, and removing any speculation or conjecture about what has been put on the record. Be direct. Tell the hearing officer: “I need to put this (whatever it is) on the record as I will need it on appeal.” If you are refused the opportunity to put a matter on the record, that alone can become an issue on appeal. If you concede, waiver is an issue.

E. PRESIDING OFFICER

The UAPA places the presiding officer at the center of the hearing process. A fundamental function of a presiding officer is to serve as an impartial and unbiased tribunal to review at the requests of the person or entity opposing a governmental action or proposed action whether that action is correct, given a fair reading of the facts at hand and as applied to the applicable legal standards. *Transportation General, Inc. v. Insurance Department of State of Connecticut*, 236 Conn. 75 (1996). The standard to disqualify a hearing officer is a high standard to overcome, if it is not raised at the agency level at the beginning of a hearing. A factual showing that the bias was material to the outcome will be required to negate an agency decision on appeal. *Beecher v. State Electrical Work Examining Board*, 104 Conn. App. 655, 666(n.5)(2007), *appeal denied* 285 Conn. 920 (2008); *Rado v. Board of Education*, 216 Conn. 541 (1990).

A presumption exists that the administrative officer, be it an individual or panel, hearing a matter and acting in an adjudicative role, is not biased and to overcome the presumption the petitioner must show actual bias, unless the "circumstances indicate a probability of such bias too high to be constitutionally tolerable." *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108, 122 (2011).

A practitioner should not hesitate to explore an officer's involvement with other agency personnel on any issue directly or indirectly related the content of the notice of the hearing or the statement of charges. Checking is good advocacy. The issue is whether there any "bias" has been created. See *Hultman v. State Department of Social Services*, 47 Conn. Supp. 228 (2000). Simple questions and simple answers can resolve doubt and preserve the issue for appeal if necessary. Once again, waiver is an issue. However, see *Recycling, Inc., v. Commissioner of Energy and Environmental Protection*, 179 Conn. App. 127 (2018) and a related matter, *Recycling, Inc., v. Zoning Board of Appeal of City of* Milford, 2018 WL 1137532 at p. 3-4, including fn. 5, (Jan. 26, 2018) in the next subdivision of this document.

Subsection (13) of Conn. Gen. Stat. § 4-166 defines a presiding officer as "the member of the agency or the hearing officer designated by the head of the agency to preside at the hearing." Subsection (6) of Conn. Gen. Stat. § 4-166 defines a hearing officer as the individual appointed by an agency to conduct the proceeding. Agency employees may be the presiding officer. The presiding officer may or may not be the final decision maker as discussed below. In some cases, the hearing officer will be very active and in others will not. Like trial practice, knowing who the presiding officer is, how he or she conducts hearings, and similar information about what to expect in a hearing, can be very helpful. Also, understanding what the officer is empowered to do is critical. These issues will be discussed in this section.

1. HEARING PANEL

A factor for a practitioner to consider is whether the presiding hearing officer will actually be sitting with other members of a multi-member panel to hear the case. Unlike the trial practice environment where a judge hears, sometimes with the assistance of a jury, many administrative rules of practice require a multi-member panel to hear and/or decide matters. Practitioners should be aware that requirements vary. See for example Board of Chiropractic Examiners under Conn. Gen. Stat. § 20-25; various trades examining boards with the

Department of Consumer Protection under Conn. Gen. Stat. § 20-331; reviewing committees of statewide bar grievance committee under Conn. Gen. Stat. § 51-90g(a); to cite just a few.

Establishing that the hearing being held is before a properly constituted panel is a critical element to avoid unnecessary remands and costs as a reviewing court is more likely than not to merely remand a case burdened with such a defect rather than substitute the judgment of the court for that of a properly constituted panel. See *DuBaldo v. Dept. of Consumer Protection*, 209 Conn. 719 (1989); *Block v. Statewide Grievance Committee*, 47 Conn. Sup. 5 (2001). However, not every defect of a panel will result in delay. See *Picard v. Dept. Of Public Health*, 00-CBAR-0679 (Dec. 7, 2000), 7 Conn. Ops. 24 (Jan. 24, 2001)(holdover board members were *defacto* officers and their actions are valid). The practitioner representing a person challenging the composition of a board is well advised to consider whether the error caused prejudice or harm. The appearance of impropriety may be enough, but the presence of material prejudice would more likely cause a reviewing court to vacate the agency order and cause a new proceeding to be held, i.e., have the adverse agency decision vacated and enforcement delayed until a duly constituted panel hears the matter.[38]

The final decision maker enjoys a legal presumption that the adjudication will be objective and free of bias. *Fish Unlimited v. Northeast Utilities Services Co*., 254 Conn. 1 (2000) *overruled, in part, City of Waterbury v. Town of Washington*, 260 Conn. 506 (2002); *Breiner v. State Dental Commission*, 57 Conn. App. 700 (2000). See also *Scinto v. Conn. Fire Protection Sprinkler Systems Work Examining Board*, 2001 Conn. Super. LEXIS 1196 (May 1, 2001). The decision maker also enjoys a presumption that he or she or they will comply with the law which includes exercising only those powers granted to them and only rendering decisions within those boundaries. To do otherwise is to tread on reversible ground. *Hall v. Gilbert and Bennett Mfg., Co., Inc*., 241 Conn. 282 (1997). An agency does not have authority to expand its jurisdiction. *Stickney v. Sunlight Const., Inc*., 248 Conn. 754 (1999). An agency must strictly stick to its enabling statutory authority. *In re Michaela Lee R*., 253 Conn. 570 (2000).

A party must act upon a suspicion of bias at the earliest possible point in the proceeding after discovery of the appearance of impropriety. A motion to disqualify is a prerequisite to ensure that the matter is addressed by the tribunal. See *Jaeger v. Connecticut Siting Council*, 52 Conn. Supp. 14 (2010), affirmed 128 Conn. App. 24, *cert. denied* 301 Conn. 927 (2011).

Another difference to appreciate under the UAPA is that not all persons participating in a final agency decision may personally observe the giving of live testimony. A person who is not present at a hearing may participate in the final decision making by reading the record. *Solomon v. Conn. Medical Examing Board*, 85 Conn. App. 854 (2004), *cert. den.* 273 Conn. 906 (2005); *Towbin v. Bd. of Examiners of Psychologist*, 71 Conn. App. 153 *cert. denied* 262 Conn. 908 (2002). Conn. Gen. Stat. §4-179 establishes a procedure to be followed in this circumstance that includes providing a written proposed final decision and an opportunity for oral argument. Unlike a Superior Court proceeding, where the testimony of a witness can be taken in written form under limited circumstances, in an administrative appeal, the trier of fact may not have eye balled the witness at all.

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[38] If a practitioner is pursuing a hearing de novo, compared to merely a new decision based on a reading of the record of the defective hearing, the practitioner should attempt to have the order of remand expressly state that an entirely new hearing must be held.

2. PRESUMPTION AGAINST BIAS

The final decision maker benefits from a presumption of performing adjudicatory functions without bias and in a manner that is fundamentally fair to petitioners and respondents alike. *Villages, LLC v. Enfield Planning and Zoning Commission*, 149 Conn. 448, 457 (2014); *Gonzalez v. State Elections Enforcement Commission*, 145 Conn. App. 458, 469 , *cert. denied* 310 Conn. 954 (2013). The party with the burden to disqualify an adjudicator must have evidence of actual bias and not merely the potential of a bias. *Recycling, Inc., v. Commissioner of Energy and Environmental Protection*, 179 Conn. App. 127 (2018) *Moraski v. Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242 (2009).

PRACTICE TIP 2018: Practitioner caution should be exercised when alleging agency adjudicator bias. It is a high standard. In *Recycling, Inc., v. Commissioner of Energy and Environmental Protection*, 179 Conn. App. 127 (2018), the Appellate Court held that agency personnel, including the adjudicator benefit from a presumption againt bias in performing their functions. The presence of substantial evidence creates a formidable problem for the challenger in establish actual bias, especially if challenger's opposition is undermined by a record that contains a logical and rational basis for the adverse decision under attack. As to Commissioner's decision to revoke State licenses and permits, also see *Recycling, Inc., v. Zoning Board of Appeals of City of Milford*, 2018 WL 1137532 at p. 3-4, including fn. 5, (Jan. 26, 2018). The City informed the Commissioner about information adverse to the applicant and the Commissioner issued a public statement regarding the revocation. The Commissioner then recused himself and designated a deputy commissioner to render the final agency decision. The agency's final decision by the deputy commissioner was affirmed. 179 Conn. App. at p. 157-160 (footnotes 26-29). The See below Sections VI.B.4 on Deference and VI.B.5 below on Substantial Evidence Rule on Appeal.

Upon review, a reviewing court will look for the absence of clear and convincing evidence that supports a mistake in law or fact was made before the court will undo, reverse or modify the agency's final determinations. *Jones v. Connecticut Medical Examining Board*, 129 Conn. App. 575, 587 (2011). It is well established to overcome the presumption, the final decision must be burdened by errors of fact and law that are "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Tomlin v. Personnel Appeal Board*, 177 Conn. 344, 348 (1979).

PRACTICE TIP: Different standards are used in the Superior Court than in the context of an agency decision maker. In Superior Court, the judges have an obligation to police themselves. The practitioner can participate in that process. In the administrative law adjudicator context, an agency final decision maker does not. *Villages, LLC v. Enfield Planning and Zoning Commission*, 149 Conn. 448, 457 (2014).

Code of Judicial Conduct Rule 1.1 provides that "A judge will avoid … the appearance of impropriety. The test of impropriety is whether the conduct would create in reasonable minds a perception that the judge would violate this Code or engage in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." A variety of other rules, create a duty for each jurist to self-rule and *sua sponte* recuse or decline to handle that might be questioned for impartiality. Actual conflicts or bias is not required.

While the mere appearance of bias may be sufficient to disqualify a jurist in Superior Court and an agency final decision maker may be well advised to follow the same standard, it is not insufficient to force the disqualification of a final agency decision maker. *Recycling, Inc., v. Commissioner of Energy and Environmental Protection*, 179 Conn. App. 127, 158 (2018); *Moraski v. Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 262 (2009)(more than appearance of bias required to disqualify agency decision maker); *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108, 122 (2011)(more than appearance of bias necessary to disqualify arbitrator). The challenger will have to show that he or she has been prejudiced and substantial rights denied. *Lucarelli v. Freedom of Information Commission*, 135 Conn. App. 807 (2012). A judge's "mere appearance" standard is not applicable to an agency final decision maker, even if the higher standard makes perfect sense to ensure the integrity of administrative law. *Clisham v. Board of Police Commissioners*, 223 Conn. 453, 361 (1992).

To overcome the presumption, a party must raise the issue in advance of the hearing or the adjudication, or at such time as it becomes evident. *Gonzalez v. State Elections Enforcement Commission*, 145 Conn. App. 458, 469 , *cert. denied* 310 Conn. 954 (2013). Yes, you may have to address the issue with the very person who may later be rendering the final decision, a decision that could be in favor of your client. It can be a close call. Some diplomacy may be required, even if the result is merely to eliminate one member of a panel. The practitioner's goal may be to show that due process was violated by the bias of the decision maker, if that person cannot be recused. Making a "sour grapes" objection (i.e., after the adverse decision has been rendered), i.e., after the final decision has been completed is on its face late and may be too late.

A practitioner deciding how hard to fight over a questionable disqualification should be aware of the doctrine of necessity. Where the only tribunal that is empowered to render a decision is burdened by a disqualification, the disqualification may be excusable and negated. *Dacey v. Connecticut Bar Association*, 170 Conn. 520, 524 (1976). If the tribunal is a multi-member panel, the decision to disqualify should not be automatic. If the practitioner knows the voting pattern of the potentially disqualified member, one might conclude that keeping that person may outweigh the remaining members who will be forced to decide without that disqualified member's participation. Waiver of the bias, if raised, could become a matter of choice.

3. EX PARTE COMMUNICATION

Communication with the hearing officer is restricted. Subsection (a) of Conn. Gen. Stat. § 4-181 provides:

> Unless required for the disposition of ex parte matters authorized by law, no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative, without notice and opportunity for all parties to participate.

Subsection (c) further provides:

> Unless required for the disposition of ex parte matters authorized by law, no party or intervenor in a contested case, no other agency, and no person who has a direct or indirect interest in the outcome of the case, shall communicate, directly or indirectly, in connection with any issue in that case, with a hearing officer or any member of the agency, or with any employee or agent of the agency assigned to assist the hearing officer or members of the agency in such case, without notice and opportunity for all parties to participate in the communication.

Strict adherence is required. A reversible error is one where prejudice to the excluded party occurred and reversed or otherwise altered the agency's final decision. The burden of proof that the ex parte communication did not result in prejudice is upon the agency. *Martone v. Lensink*, 215 Conn. 49 (1990); *Henderson v. Department of Motor Vehicles*, 202 Conn. 453 (1987).

A practitioner should be aware that the UAPA contemplates that a final decision maker or hearing officer may have occasion to speak with other members of the agency in question. Subsection (b) of Conn. Gen. Stat. § 4-181 provides:

> Notwithstanding the provisions of subsection (a) of this section, a member of a multimember agency may communicate with other members of the agency regarding a matter pending before the agency, and members of the agency or a hearing officer may receive the aid and advice of members, employees, or agents of the agency if those members, employees, or agents have not received communications prohibited by subsection (a) of this section.

The remedy, if there is one, is to request an opportunity to create a record and then have an opportunity to reply on the record.

Some confusion arises when a governmental employee is investigating a matter at an early stage of the administrative proceeding that has not yet been instituted or is at a preliminary stage. While the investigator may eventually be a part of the prosecution team, that employee is not a hearing officer and the rules of ex parte communication are not in effect. In fact not communicating with the investigator may create other evidentiary problems in that an investigator who only hears the other side of a story will not have as balanced a perspective as one who has input from the object of an investigation when determining probability. Obviously the object of an investigation may decline to share any or all of the information available. There is peril in either strategy, but communication with persons other than a hearing officer or panel member is not within the scope of the ex parte rule. See *Na-Mor v. Conn. Dept. of Public Health*, 02-CBAR-0045, 2002 Conn. Super. LEXIS 319 (Jan. 29, 2002). A practitioner should not miss this opportunity to advocate the client's story. Once the notice of a hearing has been issued, communication with the person designated as the hearing officer or on the panel should be avoided except as permitted on procedural matters.

Like in the Superior Court environment, the opportunity to provide rebuttal communication is the essential element to be protected. *Wasfi v. Department of Public Health*, 60 Conn. App. 775, *cert. denied* 255 Conn. 932 (2000). Communication that is disclosed can be

preserved by providing an opportunity, albeit in the second instance, to level the playing field and equaling access to the decision maker. Motions to reopen evidence or other creative, but fair, opportunities to fix ex parte error should seriously be considered, if ex parte communication or the appearance of ex parte communication occurs.

The remedy for ex parte communication is not the dismissal of the matter, but rather that the adjudicators be disqualified from participation in the proceeding. *Henderson v. Dept. of Motor Vehicles*, 202 Conn. 453, 462 (1987); *Menillo v. Commission on Human Rights & Opportunities*, 47 Conn. App. 325, 330 (1997). Ex parte communication is at best a procedural violation and not a basis for the agency to abandon the statutory obligation to protect the public by enforcing a regulatory standard on the object of the adjudication.

4. FORMALITY

"Hearings before administrative agencies … are informal and are not governed by the strict and technical rules of evidence." *Santiago v. Commissioner of Motor Vehicles*, 134 Conn. App. 668, 673 (2012) *quoting Pizzo v. Commissioner of Motor Vehicles*, 62 Conn. App. 571, 579 (2001). Informality and formality are not addressed by the UAPA. While the practitioner will not need to be as formal as during a trial or oral argument in open court, the practitioner is ill advised to presume that the more relaxed or casual manner in most administrative proceedings is anything more than that. Too casual may translate into disaster.

Do not expect to see the hearing officer or panel in judicial robe. Do not refer to the hearing officer as "Your Honor," although at least one agency is now referring to its administrative hearing officers in this manner.[39] A polite "Mr. X" or "Ms. X" is sufficient; "Madame Hearing Officer" is not offensive nor is "Mr. Chairman" in a panel. If the person is an appointed member of a commission or an agency head or deputy, "Commissioner" is always acceptable.

In many ways, administrative hearings are as informal as probate hearings. Most administrative adjudication rooms do not have witness boxes. Practitioners usually do not stand to address the trier of fact or witnesses, unless a podium is necessary for recording purposes. How the hearing room is set-up may give the practitioner a good clue as to formality. In some proceedings, all participants are at a round table, suggesting an informal approach. Some rooms will have a "T" shape table which may mean opposing parties are close to each other, but physically separated., i.e., somewhat more formal. Beware of separate tables for each party with a hot seat for the witness at the end of the presiding officer's table, a suggestion that the proceeding may be more formal than not. The presence of a transcriptionist is another clue that the proceeding will be more formal than not.

Beware some administrative hearings, particularly where the issues are well defined and well-7travelled by the agency. See *Santiago v. Commissioner of Motor Vehicles*, 134 Conn. App. 668, 673 (2012) and also see above subsection entitled "Stare decisis: Index of Agency Decisions." Practitioners are well advised to review the decisions made by the agency in the past.

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[39] A notable exception may be the Human Rights Referees who use the "Honorable" language in the context of their roles as administrative law judges.

5. PRESIDING OFFICER'S GENERAL AUTHORITY

Conn. Gen. Stat. § 4-177b grants the hearing officer such general powers as is necessary to conduct a hearing. This statute, in part, provides:

> In a contested case, the presiding officer may administer oaths, take testimony under oath relative to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing held in the case.

The details of these powers are found in various sections of the UAPA. In addition, agency rules of practice must be consulted on each issue raised because the rules vary by agency. The presiding officer's ultimate responsibility is to ensure that the parties have a fundamentally fair opportunity to present evidence, including cross examination of witnesses called by any other party. *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, *cert. denied* 245 Conn. 917 (1998).

6. SUBPOENA POWER

Conn. Gen. Stat. § 4-177b also governs the power of the hearing officer to issue and enforce subpoenas. This statute provides:

> If any person disobeys the subpoena or, having appeared, refuses to answer any question put to him or to produce any records, physical evidence, papers and documents requested by the presiding officer, the agency may apply to the superior court for the judicial district of Hartford or for the judicial district in which the person resides, or to any judge of that court if it is not in session, setting forth the disobedience to the subpoena or refusal to answer or produce, and the court or judge shall cite the person to appear before the court or judge to show cause why the records, physical evidence, papers and documents should not be produced or why a question put to him should not be answered. Nothing in this section shall be construed to limit the authority of the agency or any party as otherwise allowed by law.

Note that the hearing officers power is discretionary and a hearing officer may not agree to issue a subpoena or enforce it, if the party has the means to do so. Again the practitioner is well advised to review the statutory and regulatory provisions on this point that are particular to each agency proceeding at issue.

The last sentence is of particular note and indicates that a party who is represented by counsel is not burdened by this provision and retains the power to issue and enforce subpoenas as a Commissioner of the Superior Court. See Conn. Gen. Stat. § 51-85 which expressly provides any Commissioner of the Superior Court may issue and enforce a subpoena related to an administrative hearing. As noted above, careful use of the limited pre-hearing discovery that is available under the Freedom of Information Act and the Personal Data Act may mitigate the need to issue a subpoena for documents. Also some agency Rules of Practice and/or pre-hearing orders require the disclosure of witnesses and documents.

7. PARTIES, INTERVENORS AND OTHERS

Subsection (11) of Conn. Gen. Stat. § 4-166 establishes:

> "Person" means any individual, partnership, corporation, limited liability company, association, governmental subdivision, agency or public or private organization of any character, but does not include the agency conducting the proceeding.

The status of a given person or entity in a proceeding is obviously important and on a case by case basis may determine available rights. Subsection (10) of Conn. Gen. Stat. § 4-166 provides:

> "Party" means each person (A) whose legal rights, duties or privileges are required by statute to be determined by an agency proceeding and who is named or admitted as a party, (B) who is required by law to be a party in an agency proceeding or (C) who is granted status as a party under subsection (a) of section 4-177a;

To be a party the litigant must have a personal and legal interest that is at issue in the proceeding in question. *Day v. Middletown*, 245 Conn. 437 (1998). This claim must be at least colorable. *Med-Trans of Conn., Inc. v. Dept. of Public Health and Addiction Services*, 242 Conn. 152 (1997). A general interest is not sufficient. *New England Cable Television Ass'n., Inc. v. DUPC*, 247 Conn. 95 (1998).

Subsection (a) of Conn. Gen. Stat. § 4-177a provides:

> The presiding officer shall grant a person status as a party in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing; and (2) the petition states facts that demonstrate that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency's decision in the contested case.

A practitioner must prepare the petition with an eye to an appeal because the petition may be the only opportunity to create an administrative record of the proposed or claimed facts as to the petitioner's status. *State Library v. FOIC*, 240 Conn. 824 (1997) *on remand* 50 Conn. App. 491 (1998). A practitioner is ill advised to <u>not</u> put in as much information into the administrative record as possible when filing a petition under this subsection, especially as to aggrievement.

If the legal rights, duties or privileges are not specifically affected, a person or entity may become an intervenor. Subsection (7) of Conn. Gen. Stat. § 4-166 provides:

> "Intervenor" means a person, other than a party, granted status as an intervenor by an agency in accordance with the provisions of subsection (d) of section 4-176 or subsection (b) of section 4-177a;

Subsection (b) of Conn. Gen. Stat. § 4-177a provides:

> The presiding officer may grant any person status as an intervenor in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing; and (2) the petition states facts that demonstrate that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings.

Under subsection (d) of Conn. Gen. Stat. § 4-177a, the presiding officer is essentially empowered to craft the role and degree of participation of any intervenor in a particular hearing. Subsection (b) of Conn. Gen. Stat. § 4-177c that provides:

> Persons not named as parties or intervenors may, in the discretion of the presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation.

A practitioner representing the original petitioner or respondent in an agency hearing is well advised to give careful consideration to opposing and objecting an application by any seeking to become an intervenor. Simply stated, a favorable decision for one person is usually adverse to others. Once a person or entity secures that status of an intervenor, that status establishes a right of appeal that cannot be ignored by the original party. See *Yellow Cab Co. of New London v. Dept. of Transportation*, 2009 Conn. Super. LEXIS 2095 (Aug. 7, 2009), 127 Conn. App. 170, *cert. denied* 301 Conn. 908 (2011). Not opposing an intervenor's application will almost a guarantee that one of the two parties (or more) will be burdened by an adverse final decision and thereby one will be empowered to file an appeal in the full exercise of that person's right of review. The time to resist is at the agency level before the presiding officer grants party status to the intervenor. Taking the long view of the intervenor is important.

PRACTICE TIP: The Supreme Court has offered a "better practice" suggestion in one case in at least one statutory scheme where a state agency, a regional commission, and a local municipality had overlapping jurisdiction. While not necessary for the final disposition of the issues before the hearing officer, the Court observed that the real party of interest (i.e., the property owner) could avoid being at risk for two legal proceedings rather than one. Sa*ms v. Department of Environmental Protection*, 2009 WL 1057064 *affirmed* 308 Conn. 359, 372 (n.15)(2013); see also *Costa v. Betsy Sams*, 2008 WL 4044332 (Aug. 31, 2008). The controversy in *Sams* was the lack of permits for the construction of a seawall and removal of the wall. The Court appears to favor binding both agencies into one proceeding. However, the error in rejecting the petition to intervene was not dispositive in that the state agency was empowered to fully adjudicate the matter.

8. REVIEW OF PRELIMINARY, PROCEDURAL AND EVIDENTIARY RULINGS

Conn. Gen. Stat. § 4-178a limits the autonomy of a hearing officer or a multi-member board by providing:

> If a hearing in a contested case or in a declaratory ruling proceeding is held before a hearing officer or before less than a majority of the members of the agency who are authorized by law to render a final decision, a party, if permitted by regulation and before rendition of the final decision, may request a review by a majority of the members of the agency, of any preliminary, procedural or evidentiary ruling made at the hearing. The majority of the members may make an appropriate order, including the reconvening of the hearing.

No set statutory standard is put forward how the § 4-178a mechanism works. Again, a review of the agency rules of procedure is critical in deciding whether an interlocutory review has been authorized by an agency regulation. The practitioner must be willing to challenge the hearing officer's preliminary, procedural or evidentiary ruling during the hearing or, at least before a final decision is released. Failure to request this remedy could result in a waiver.

PRACTICE TIP: A practitioner is well advised to use the first opportunity to raise an issue. Such conduct may preserve the issue for review on appeal, even if the issue is not later addressed by the final agency decision maker, e.g., a full board or commission. Get the issue on the record. See Section "Making the Record" above. *Albini v. Connecticut Medical Examining Board*, 2011 WL 1566994 (April 5, 2011). See *City of Bridgeport v. Connecticut State Board of Labor Relations*, 2017 WL 114259 at p. 6 (Feb. 21, 2017; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain.)(the trial court applied a collateral estoppel theory and permitted the appeal to go forward upon evidence that the matter at bar was not identical to the earlier proceeding).

9. REVIEW OF A PROPOSED FINAL DECISION

Not all presiding officers are equal. A practitioner should determine who will be the final decision maker. It may not be the presiding officer, i.e., not the hearing officer. When a statute specifically directs that an agency head shall decide an issue, delegation is prohibited, unless the statute also contains that provision.[40] *State v. Tedesco*, 175 Conn. 279 (1978); *Dan M. Creed, Inc. v. Tynan*, 151 Conn. 677 (1964). When the statute directs that the agency head shall render a decision, delegation is still not valid unless authorized by law. *Rich-Taubman Associates v. Commissioner of Revenue Services*, 236 Conn. 613 (1996). However, the UAPA clearly contemplates that the agency head cannot take the evidence on all contested cases and that changes in personnel or membership of multiple member agencies will occur. Subsection (c) of Conn. Gen. Stat. § 4-179 provides:

> Except when authorized by law to render a final decision for an agency, a hearing officer shall, after hearing a matter, make a proposed final decision.

The assumption is that the hearing officer is not the final decision maker unless the agency final decision maker is expressly authorized to make such a delegation and has formally done so. Delegation of ministerial functions is the rule, but not for contested cases.

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[40] One exception is that Conn. Gen. Stat. § 4-8 that expressly allows a deputy to exercise the powers of the agency head under limited circumstances and only so long as those conditions continue, including absence and disqualification.

The parties and the agency may agree under subsection (d) to allow the hearing officer to render the final agency decision. In determining whether to agree to such a delegation, a factor to consider is that subsection (b) provides:

> A proposed final decision made under this section shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its findings.

Subsection (a) of Conn. Gen. Stat. § 4-179 provides:

> When, in an agency proceeding, a majority of the members of the agency who are to render the final decision have not heard the matter or read the record, the decision, if adverse to a party, shall not be rendered until a proposed final decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the members of the agency who are to render the final decision.

An agreement to allow a hearing officer to be the final arbiter creates advantages and disadvantages not dissimilar to those in trial practice negotiations. If your client can make a good showing as a live witness, you may want the hearing officer to hear as much testimony as possible. If on the other hand, you have a stronger case on paper and the witnesses will detract (i.e., your witnesses are ruff around the edges), then the value of limiting live testimony must be considered in which case a proposed final decision may be a better choice, if available.

The UAPA does not require that an empowered decision maker personally attend the taking of the evidence. Reading the record is legally sufficient to participate in the final decision or to make the same. *Solomon v. Conn. Medical Examing Board*, 85 Conn. App. 854 (2004), *cert. den.* 273 Conn. 906 (2005); *Lewis v. Statewide Grievance*, 235 Conn. 693 (1996). Not attending a part of a hearing or even the entire proceeding does not preclude a decision maker from rendering a decision so long as that individual has read the record of the hearing. *Pet v. Department of Health Services*, 228 Conn. 651 (1994).

Unlike trial practice, the practitioner should not lose sight of the fact that the record of a hearing can be more important than the theatrics of the moment. What makes a good impression on the hearing officer or a panel present at the hearing may not be persuasive when reduced to a transcript. The practitioner should take care to ensure that any visual explanations are reduced to a detailed transcript by careful questioning and almost overstating what happened.

Given the need to exhaust an administrative remedy to avoid the dismissal, when a proposed decision has been made and is pending, a practitioner may consider filing exceptions or making oral arguments against the proposal, but the failure to do so will not necessarily violate the exhaustion requirement. See *Albini v. Connecticut Medical Examining Bd.*, 2011 WL 1566994 (Conn. Super., Cohn, J.; April 5, 2011) *affirmed in part and reversed in part,* 144 Conn. App. 337 (2013).

F. THE HEARING OF EVIDENCE

The UAPA sets the stage for what evidence may be received by the hearing officer during a contested hearing. Conn. Gen. Stat. § 4-178 provides:

> In contested cases: (1) Any oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence; (2) agencies shall give effect to the rules of privilege recognized by law; (3) when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form; (4) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available, and upon request, parties and the agency conducting the proceeding shall be given an opportunity to compare the copy with the original; (5) a party and such agency may conduct cross-examinations required for a full and true disclosure of the facts; (6) notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge; (7) parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed; and (8) the agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence.

The general practitioner must know that administrative law proceedings do not strictly follow the rules of evidence used by the courts as this is a well-established practice in administrative law.[41] *Appeal of Hopson*, 65 Conn. 140, (1984); Appeal *of City of Norwalk*, 88 Conn. 471, 479 (1914); *Do v. Commissioner of Motor Vehicles*, 164 Conn. App. 616, 624 (2016); *Gagliardi v. Commissioner of Children & Families*, 155 Conn. App. 610, 619, cert. denied 316 Conn. 917 (2015); *Kostrzewski v. Commissioner of Motor Vehicle*, 52 Conn. App. 326 *cert. denied* 249 Conn. 910 (1999). Evidence that is incompetent in court may be competent in the administrative hearing. *Griffin v. Muzio*, 10 Conn. App. 90, *cert. denied*, 203, 805 (1987). "The erroneous admission of evidence will not invalidate an administrative order unless substantial prejudice is affirmatively shown … The burden is on the plaintiff to prove that the evidentiary ruling of an administrative hearing officer is arbitrary, illegal[,] or an abuse of discretion." *Id.* 10 Conn. App. at 94, *cited in Gagliardi v. State Dept. of Children and Families*, 2013 WL 6916621 (Conn. Super.; Prescott, J.; Dec. 2, 2013.

1. OBJECT, THEN OBJECT, AND THEN OBJECT

Practitioners at trial in the Superior Court or before the agency should object to any question in a like manner, except as noted below. Failure to raise an issue during the agency hearing, i.e., making a timely objection to a question and/or the answer given, is considered a

[41] Effective January 1, 2000, the Connecticut Code of Evidence applies "to all proceedings in the superior court in which facts in dispute are found." Conn. Gen. Stat. § 1-1(b). The Code does not apply to administrative proceedings. Logic suggests using it should be considered by the practitioner, especially where the hearing officer is a member of the bar.

waiver and cannot be the basis in a later appellate appeal as a basis of voiding an agency decision. *Adams v. Commissioner of Motor Vehicles*, 182 Conn. App. 165, 176 (2018); *Solomon v. Connecticut Medical Examining Board*, 85 Conn. App. 854, 859 (2004), cert. denied 273 Conn. 906 (2005); *Tompkins v. Commissioner of Motor Vehicles*, 60 Conn. App. 830 (2000).

There are four issues to keep in mind. One, you may get a favorable ruling, especially if you tie the objection to the second item. Two, your goal is to show that the taking of evidence was fundamentally unfair or in violation of due process and the only way to do that is to have a clear and detailed record of proceeding below. Third, the administrative record is what will be reviewed on appeal to the Superior Court with one exception. Fourth, if you fail to raise an issue during the agency proceeding, you will be precluded from raising later.

If and when an appeal to Superior Court is filed, Conn. Gen. Stat. § 4-183(i), in part,

provides:

> If alleged irregularities in procedure before the agency are not shown in the record or if facts necessary to establish aggrievement are not shown in the record, proof limited thereto may be taken in the court.

Again, the practitioner should view this as consistent with ensuring a fundamentally fair proceeding. But note that the limitation in Superior Court is "to establish aggrievement." This exception by its own language does not include the merits of the claim being adjudicated before the agency.

Where an irregularity appears at the agency level, preservation of the issue should first be addressed by raising an objection. Again, once an objection is raised, the presiding officer has two choices. The presiding officer could deny the objection and thereby you have preserved the issue for appeal, including if the decision is only a proposed decision in which case you can point out the adverse ruling to the final decision maker in oral argument. The presiding officer may sustain the objection resulting in the elimination of the potential harm and in effect granting the relief sought, i.e., a more fundamentally fair proceeding. It is less than prudent to sit on your hands at the agency and plan to show the irregularities later on appeal.

Like trial practice, the failure to raise an issue at the agency level will preclude the reviewing court from taking up the issue. *Dragan v. Connecticut Medical Examining* Board, 223 Conn. 104, 114 (1992); Albini *v. Conn. Medical Examing Bd.*, 144 Conn. App. 337, 345 (2013); *Towbin v. Bd. of Examiners of Psychologist*, 71 Conn. App. 153 *cert. denied* 262 Conn. 908 (2002). However, where the focal point of a proceeding is on a question of law, objecting to evidence offered, will not necessarily preclude continuing to seek review of a question of law. See *Office of Consumer Counsel v. Public Utilities Regulatory Commission*, 2015 WL 139497 (March 3, 2015). Such a failure may be excused.

PRACTICE TIP 2018: For another example of Object, Object, Object, see *Carl P. v. Department of Children & Families*, 2018 WL 2208079 (April 23, 2018; Cohn, J.T.R., Superior Court for Judicial District of New Britain). See also Subsection 2 immediately below: Hearsay Is Admissible. However, that does not mean that you should not object. Objecting to hearsay is

an appropriate method to challenge the prerequisite that the evidence offered must still be trustworthy. *Family Garage, Inc. v. Commissioner of Motor Vehicles*, 130 Conn. App. 353, 360 (2011). Hearsay evidence may also be the foundation for a deprivation of the right to cross-examination as the person who is testifying cannot be cross-examined about the truth of the matter, given that the hearsay by definition is not a matter that the witness can testify about in a judicial setting under the Rules of Evidence.

2. HEARSAY IS ADMISSIBLE

Subdivision (1) of § 4-178 is of particular importance. It is well established that hearsay evidence is admissible in administrative hearings, subject to limitation. Under *Carlson v.* Kozlowski, 172 Conn. 263, 267 (1977), the party introducing the hearsay must ensure that the opposing party is aware of the potential use or planned use of hearsay evidence, if it is the only evidence on point, in sufficient time that the party not offering the evidence can either take or cause the hearing officer to take action to make the original declarant available to give testimony. The *Carlson* Court cited *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) in support of the proposition the UAPA must also have limitations on the admission of hearsay. 172 Conn. at 267-268. The presiding officer must determine whether the hearsay testimony is (a) relevant, (b) probative and (c) trustworthy. *Gagliardi v. Commissioner of Children & Families*, 155 Conn. App. 610, 623-624, *cert. denied*, 316 Conn. 917 (2015), *Kloth-Zanard v. Dept. of Social Services*, 53 Conn. Supp. 363, 370, affirmed 157 Conn. App. 366, *cert. denied* 319 Conn. 923 (2015)*; O'Sullivan v. DelPonte*, 27 Conn. App. 377, 381 (1992); *Cassella v. Civil Service Commission of City of New Britain*, 4 Conn. App. 359 (1985), *affirmed* 202 Conn. 28 (1987); *Hutman v. Dept. of Social Services*, 47 Conn. Supp. 228 (2000). A practitioner is well advised to focus on a particular defect rather than hanging on the trial practice standard that hearsay is not admissible at all, but the statute provides otherwise. A practitioner should not have that "lost in space" look when his or her objection to hearsay evidence is overruled. It is equally correct to state that subdivision (1) of § 4-178 does not render all hearsay automatically admissible. Gonzalez v. State Elections Enforcement Commission, 145 Conn. 458, 484-485, *cert. denied*¸ 310 Conn. 954 (2013).

When hearsay evidence is the only evidence probative of the controversy at issue and it is sufficiently trustworthy, it may be admitted even if prejudicial when the prejudiced party knew the hearsay would be offered and failed to subpoena, or have the presiding officer subpoena the declarants. *Carlson v. Kozlowski*, 172 Conn. 263 (1977); *Cassella v. Civil Service Commission*, 4 Conn. App. 359 (1985); *Altholtz v. Dental Commission*, 4 Conn. App. 307 (1985). See also *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 LEd. 2d 842 (1971). A letter to the opposing counsel on point and submitted at the hearing for inclusion in the administrative record is one way to handle the issue and to ensure that the notice is preserved and included in the administrative record.

PRACTICE TIP 2018: Where hearsay is combined with other credible direct testimony, the impact of the admissibility may not be readily apparent during the agency proceeding, but could tip the trier of fact as presented in the final decision. See *Llanos v. Bzdyra*, 2017 WL 55162259 (Oct. 17, 2017; Huddleston, P.J., Presiding Judge, Administrative Appeals and Tax Session; Judicial District of New Britain).

Admissible hearsay can include the findings and actions of another tribunal in another action. *Kostrzewski v. Commissioner of Motor Vehicles*, 52 Conn. App. 326 *cert. denied* 249 Conn. 910 (1999).

3. WITNESSES

As noted above, the presiding officer has considerable discretion regarding witness management during a hearing. The UAPA and reviewing courts defer to the presiding officer's findings as to the credibility of witnesses. *Levy v. Commission on Human Rights and Opportunities,* 236 Conn. 96 (1996). A presiding officer need not believe every witness nor every statement. *Ames Department Store, Inc. v. Commission on Human Rights and Opportunities ex rel. Lewis*, 45 Conn. Supp. 276 *affirmed* 48 Conn. App. 561 *cert. denied* 245 Conn. 924 (1998). Generally, a practitioner should do whatever necessary to complete cross-examination on the same day as direct. In some administrative hearings, especially those that depend on volunteer members, there may be a considerable time delay between hearing dates. If a witness, who testified on direct becomes unavailable prior to cross-examination, e.g., death or leaving the state, the presiding officer will be forced to decide among several options, guided by a standard of fundamental fairness and prejudice (assuming someone objects to the lack of cross examination). The officer may have to strike the direct testimony if the party was deprived of the full opportunity to cross-examine the witness. *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 237 Conn. 209 (1996).

PRACTICE TIP: Witnesses are a necessary element of authentication of writings. In *Gagliardi v. Commissioner of Children & Families*, 155 Conn. App. 610, *Cert. denied,* 316 Conn. 917 (2015), the trial court entertained a challenge to the authentication of text messages that served as the basis for a final agency decision to substantiate allegations of child abuse by a teacher. The Court noted that the bar is "not that high" and the administrative hearings may receive evidence that would otherwise be excluded in a judicial proceeding. *Id.* at 620. The reviewing courts found a "chain of custody" and the lack of any evidence of "fabrication" supported the finding of reliability. The threshold for admissibility is merely a "prima facie" level. *Id.* at 621.

PRACTICE TIP 2018: Like in civil trial practice, a decision to call or not call a witness must be viewed not as a single point in time decision, but the possible life of the controversy during appellate reviews. Deciding what witness to call and what evidence to put on the record is similar in administrative hearings to civil trial proceedings. Predicting what evidence might carry the day with the trier of fact or sink your ship at the hearing stage or on appeal is a peril decision. See *Commissioner of Emergency Services and Public Protection v. Freedom of Information Commission*, 330 Conn. 372, (2018) as an example of decisions to limit witness testimony at the agency level which turned out to be sufficient have a trial court reverse the order, but insufficient to sustain appeal for further review in the Supreme Court. The Supreme found the evidence lacking and insufficient to satisfy the burden of proof required to establish that documents being sought were exempt from the Freedom of Information Act. *Id.* at 377 and at fn. 3. The Supreme Court reinstated the agency decision because the party with the burden had failed to meet that burden, hence no exemption applied. *Id.* at 396. The Supreme Court sustained the appeal and ordered the documents released.

4. AGENCY EXPERTISE

The hearing officer or panel may also yield considerable power based on his or her own expertise. Conn. Gen. Stat. § 4-178, as described above, expressly authorizes that the "agency's experience, technical competence, and specialized knowledge may be used in the evaluation of evidence." This should not be taken lightly. This expertise may not be highly visible during the hearing and while evidence is being taken, but none the less can play a critical role in the final analysis. See *Briggs v. State Employees Retirement Commission*, 13 Conn. App. 477 (1988) *reversed* 210 Conn. 214, *on remand* 18 Conn. App. 817 (1989).

The practitioner should be aware that notice of such reliance is required. *Pet. v. Dept. of Health Services*, 228 Conn. 651 (1994). Further, where an agency is comprised of experts, the agency may completely disregard the testimony of an expert witness. *Fleischman v. Conn. Bd. of Examiners in Podiatry*, 22 Conn. App. 193 (1990). Note however, if an agency decision is based on the panel members' own expertise, at least a majority of those participating in the decision must possess expertise in the field at issue. See *Levison v. Board of Chiropractic Examiners*, 211 Conn. 508 (1989).

In addition, a hearing officer may reject "unrebutted expert testimony", if other evidence is offered by the opposing party. *Simard v. Commissioner of Motor Vehicles*, 62 Conn. App. 690 (2001); *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, *cert. denied* 245 Conn. 91 (1998). "Experts" are not trump cards in administrative proceedings, especially where other substantial evidence is put before the hearing officer upon which a contradictory finding may be founded. *Towbin v. Bd. of Examiners of Psychologist*, 71 Conn. App. 153, *cert. denied* 262 Conn. 908 (2002); *Dore v. Commissioner of Motor Vehicles*, 62 Conn. App. 604 (2001).

G. A SPECIAL NOTE ABOUT ACTIONS AGAINST A LICENSE

The UAPA contains several specific provisions that relate to actions and proposed actions against licenses and license holders. Subsection (8) of Conn. Gen. Stat. § 4-166 provides:

> "License" includes the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but does not include a license required solely for revenue purposes;

Subsection (9) further provides that:

> "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license[.]

By operation of subsection (a) of Conn. Gen. Stat. § 4-182, all action involving licensing are contested cases. The UAPA provides for the coordination of applications for renewal and proposed adverse actions. Subsection (b) of § 4-182 provides:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency, and, in case the

> application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Careful attention to expiration dates is advised. Obviously when an enforcement action is pending against a license that is expiring, a practitioner is well advised to cause the licensee to complete the renewal application in a timely fashion, thus removing all confusion about the status of the license in the event that the licensee prevails.

As to clients who are merely applicants (i.e., licensee and premittee want-a-bees) check with the particular enabling legislation. There may be a provision granting the applicant an opportunity for a hearing and thus become contested cases under the UAPA. Most do not.

1. A LICENSE IS STILL A PRIVILEGE

A practitioner may well have to advise a licensee that he or she is not free to do what they want to do when they are engaged in a regulated profession. It is well established that "no one has an inalienable right" to engage in a particular profession or vocation that requires skills, knowledge and abilities." *Amsel v. Brooks*, 141 Conn. 288, *appeal dismissed* 348 U.S. 880, 75 S.Ct. 125, 99 L.Ed. 693 (1954). See also *Elf v. Dept. Public Health*, 66 Conn. App. 410 (2001). Assuming that the statute or regulation allegedly violated are related to the valid exercise of police powers to protect the health, safety and welfare of citizens in a reasonable manner, the applicable standard is the rational relationship standard. *Elf v. Dept. Public Health*, 66 Conn. App. 410 (2001); *Kagan v. Alander*, 44 Conn. Sup. 223 (1994), *affirmed* 42 Conn. App. 92, *cert. denied* 239 Conn. 913 (1996). A practitioner may have to advise the client that to claim that the regulation in question is constitutionally flawed, a heavy burden must be carried and the flaw must be proved beyond a reasonable doubt. *State v. Floyd*, 217 Conn. 73 (1991); *Elf v. Dept. Public Health*, 66 Conn. App. 410 (2001).

License holders even have an "extra-territoriality" problem. Interstate compacts and an ever extending federal recognition of issues that transcend state lines can surprise some licensees. An out-of-state conviction can have an impact here in Connecticut. See *Spear v. Commissioner of Motor Vehicles*, 91 Conn. App. 9 (2005).

Some agencies have a waiting period before a disciplined licensee may reapply. If conditions for restatement are made at the time a disciplinary action is taken, satisfaction of the conditions is an obvious condition precedent to regaining that license. Even so, holding a license that permits a person to engage in a regulated business or activity, merely holding a license does not guarantee to access to government funding or otherwise entitle the holder to additional rights. See *Raydenbow v. O'Meara,* 2002 U.S.Dist. LEXIS 26727 (D.Conn. Jan. 22, 2002, *aff'd* 50 Fed. Appx. 21, 2002 U.S.App. LEXIS 22810 (2nd Cir. 2002).

2. COMPLIANCE MEETINGS

Subsection (c) of § 4-182, in part, provides:

> No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the

> intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

This appears to be a repeat of the notice requirement, but also includes an opportunity to show compliance prior to the issuance of agency proceeding. An agency is obligated to provide the licensee with the opportunity prior to the agency bringing the action.

Practitioners may face a strategic dilemma (a catch-22) when not "all" the evidence shows that the licensee has complied with the requirements to hold or continue to hold a license. Practitioners should proceed with caution when declining to participate in a compliance meeting. See *Johnson v. Department of Public Health*, 48 Conn. App. 102 (1998)(procedural errors as to compliance meeting followed by opportunity at hearing to showing compliance and no prejudicial error found). See also *Dadiskos v. Connecticut Real Estate Commission*, 37 Conn. App. 777 (1995)(failure to hold compliance meeting is not an appealable issue).

Again as noted above, the limitations on prehearing discovery is an issue that should be considered in the context of decisions related to compliance meetings and deciding to participate or waive the right to have a compliance meeting.

3. SUMMARY SUSPENSION

Subsection (c) of § 4-182, in part, requires that prior written notice be given to a licensee regarding the facts or conduct upon which a proposed licensing action is based. Subsection (c) also provides a standard for a summary suspension of the license and authority to issue a cease and desist order.

> If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Additional, relief may be available for the agency including application for a stay for operating without a license if in fact the licensee persists in engaging in the regulated conduct. An agency may also seek injunctive relief from the Superior Court.

If a licensee has been subject to a summary suspension followed by a full hearing, that full hearing is the opportunity to contest the summary suspension and the reasons that it should not have been issued. Failure to address the summary suspension at hearing may render issues related to it moot and not subject to review on appeal. See *Moraski v. Connecticut Board of Examiners*, 291 Conn. 242, 256-257 (2009).

H. A SPECIAL NOTE ABOUT CIVIL PENALTIES AND SANCTIONS

Many agencies have authority to levy civil penalties. Penalties that are set forth in statute and are administered within legislative parameters, e.g., one hundred dollars per day of illegal activities, are reasonable. *Wasfi v. Department of Public Health*, 60 Conn. App. 775, *cert. denied* 255 Conn. 932 (2000). When an agency does impose a penalty within the parameters of its prescribed authority, the applicable standard of review has been held to be an

abuse of discretion. *Stern v. Medical Examining Board*, 208 Conn. 492 (1988) *cited in Miele v. Department of Consumer Protection*, 05-CBAR-1879, 2005 Conn. Super. LEXIS 2512 (Sept. 19, 2005). See *Papic v. Burke, Commissioner, Department of Banking*, 2007 Conn. Super. LEXIS 820 at 52 (March 22, 2007), *affirmed* 113 Conn. App. 198 (2009)(Hearing Officer four violations and proposed a civil penalty of $20,000; the Commissioner raised the civil penalty to the maximum, i.e., four violations at $10,000 each for a total of $40,000).

With a preponderance of evidence rule in play, a trier of fact need only determine whether it is more likely than not that a violation occurred. The higher standard of beyond a reasonable doubt is not applicable. A practitioner is well advised to read the charges when assessing the potential impact of ongoing violations or continuing violations. But a civil penalty or sanction within the bounds of the statutory framework will likely be tested on an abuse of discretion standard and will likely stand (assuming substantial evidence rule is satisfied). *Wasfi v. Department of Public Health*, 60 Conn. App. 775, 790, *cert. denied* 255 Conn. 932 (2000); *Stern v. Medical Examining Board*, 208 Conn. 492, 498 (1988); *Paley v. Connecticut Medical Examining Board*, 142 Conn. 522, 529 (1995). See also *Carbone v. Connecticut Medical Examining Board*, 2007 Conn. Super. LEXIS 1847 (July 13, 2007).

Some violations may have overlapping implications for criminal proceedings. A double jeopardy defense is simply stated not available when a civil sanction is brought against the same person for the same offense that has already been the subject of a criminal proceeding, or vice-a-versa, where the civil sanction serves a legitimate and remedial purpose, the amount is reasonable as set forth in a controlling authority (i.e., specific amount per day) and the sanction is rationally related to the stated purpose. *United States v. Halper*, 480 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); *Gelinas v. West Hartford*, 225 Conn. 575 (1993) *on remand* 65 Conn. App. 265, *appeal denied* 258 Conn. 926 (2001). See also *State v. Crawford*, 257 Conn. 769, 779 (2001); *State v. Hickan*, 235 Conn. 614 (1995), *cert. denied* 517 U.S. (1996). Coordination of two such actions goes beyond the scope of this paper, except to state that the practitioner should heed the warning that, unlike most trial practice proceedings, many agency proceedings also have implications for criminal prosecutions.

V. ANATOMY OF A FINAL DEICISON

Subsection (c) of Conn. Gen. Stat. § 4-180 provides:

> A final decision in a contested case shall be in writing or orally stated on the record and, if adverse to a party, shall include the agency's findings of fact and conclusions of law necessary to its decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its decision. Findings of fact shall be based exclusively on the evidence in the record and on matters noticed. The agency shall state in the final decision the name of each party and the most recent mailing address, provided to the agency, of the party or his authorized representative. The final decision shall be delivered promptly to each party or his authorized representative, personally or by United States mail, certified or registered, postage prepaid, return receipt requested. The final decision shall be effective

> when personally delivered or mailed or on a later date specified by the agency.

Most final agency decisions are reduced to writing. As noted above, indexed decisions are available and a practitioner who has not seen one should avail him or herself of that opportunity to inspect one. Particular attention should be paid to the findings of fact and conclusions of law. Those elements of must align with the ultimate decision or order as well as the original notice reviewed when the client first learned of the governmental action in question.

A. FINDINGS OF FACT

Findings of fact must be based on evidence of record or information recognized by administrative notice. During the hearing, the practitioner must make sure that the record has ample factual predicates from which the presiding officer may reasonably infer the agency's ultimate finding of fact. *Dufraine v. Commission on Human Rights and Opportunities*, 236 Conn. 250 (1996). The importance of the findings of fact at the agency level cannot be overstated. As stated above, Conn. Gen. Stat. § 4-183(j), in part, provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Again, the trial court performs an appellate function and the time and place to establish facts is at the agency level. In the agency's final decision the findings of fact must emanate from a preponderance of the evidence, i.e., more likely than not, and be supported by substantial evidence on the record. *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716 (2010).

It is not uncommon for the findings of fact to be bolstered by issues of credibility, e.g., the memorandum of decision may state on point that witness A gave contradicting testimony to that offered by witness B; and witness A was found to be more credible. Even so, a reviewing Court must find that witness A gave "substantial" evidence or the finding of fact may not stand. Critical is what evidence is "on the record" and not merely what the practitioner believes was stated on the record.

B. CONCLUSIONS OF LAW

A final agency decision must include conclusions of law, meaning the agency must apply the applicable statutory or regulatory standard to the findings of fact made as described above. This is essentially the same as done by the court judge or by a jury as instructed by a trial court judge. Again remember that the presiding officer may not be an attorney.

Unlike factual determinations when it comes to legal questions, a reviewing court does not grant a great deal of deference to an agency as to questions of law, especially on matters of first impressions. *SLI Intern Corp. v. Crystal*, 236 Conn. 156 (1996). A reviewing court must decide whether the agency acted unreasonably, arbitrarily, illegally or in abuse of its discretion, when applying the facts to the alleged violation of a statutory or regulatory provision. *Longley v. State Employees Retirement Commission*, 284 Conn. 149 (2007); *Starr v. Commissioner of Environmental Protection*, 236 Conn. 722 (1996). A reviewing court does not give special deference to an agency interpretation of a pure question of law. *Fullerton v. Dept. of Revenue*

Services, Gaming Policy Board, 245 Conn. 601 (1998). If the agency correctly applied the law to the facts of record, the decision must stand. *City of Hartford v. Freedom of Information Commission*. 41 Conn. App. 67 (1996); *Meri-Weather, Inc. v. Freedom of Information Commission*, 47 Conn. Supp. 113 *affirmed* 63 Conn. App. 695 (2001).

Some but not all memorandum of decisions include a discussion about what facts were applied to a particular legal standard and why the final decision came out as it did. The practitioner should consult the agency rules of practice in this regard. See *Bain v. Inland Wetlands Commission of Town of Oxford*, 78 Conn. App. 808 (2003); *Keiser v. Conservation Commissioner of Town of Redding*, 41 Conn. App. 39 (1996). Again, greater deference, but not absolute deference, may be accorded to an agency final decision when the agency is charged with the enforcement of a law or regulation. *Carpenter v. Freedom of Information Commission*, 59 Conn. App. 20, *cert. denied* 254 Conn. 933 (2000).

C. FINAL DECISIONS AND ORDERS

The Act does not address what a final decision or order must contain in detail. Again, the practitioner may find that the decision is in the form of a cookie cutter format or may find that it is crafted on a case by case basis depending on the nature of the content necessary to fulfill a particular statutory or regulatory purpose.

As noted above, the order should be in sufficient detail as to ensure that the practitioner and the client have no ambiguity in mastering compliance. A practitioner should instruct a client on compliance.

D. ORAL FINAL DECISIONS

The UAPA does not require that a final decision be reduced to writing. An oral final decision, that otherwise satisfies the requirements of a final decision, is as valid as a written one. *Commission on Human Rights v. Windsor Hall Rest Home*, 232 Conn. 181, 188 (1995); *Emerick v. Freedom of Information Commission*, 156 Conn. App. 232 (2015). The forty-five day appeal period runs from the date of such an oral decision. *Id.* See also *Deblasi v. Board of Firearms Permit Examiners*, 2013 WL 2278961 at p. 2 (April 30, 2013).

When the presiding officer announces a final decision orally on the record during a hearing, a practitioner is well advised to ask that the transcript be produced and that the effective date of the order be set at some point after its production. Note that proposed final decision may not be orally given and must be reduced to a written document, even if merely by preparation of the transcript of the hearing.

E. FORCING TIMELY DECISIONS

Under subsection (a) of Conn. Gen. Stat. § 4-180, the UAPA imposes a time limit on rendering a final decision. Subsection (a) provides:

> Each agency shall proceed with reasonable dispatch to conclude any matter pending before it and, in all contested cases, shall render a final decision within ninety days following the close of evidence or the due date for the filing of briefs, whichever is later, in such proceedings.

"Reasonable dispatch" is not defined. Again, a practitioner should consult the statutes of cognizance and agency rules of practice to verify that a more specific timeframe is mandated. Practitioners are cautioned that continuances can become a double edge sword. If over used, continuances can mount up to an implied waiver, i.e., a self-imposed unreasonable dispatch.

Regardless, the remedy for unreasonable failure to render a final decision in a timely manner is found under subsection (b) § 4-180.

> If any agency fails to comply with the provisions of subsection (a) of this section in any contested case, any party thereto may apply to the superior court for the judicial district of Hartford for an order requiring the agency to render a final decision forthwith. The court, after hearing, shall issue an appropriate order.

A motion to compel is the proper vehicle to pursue this remedy. *DeMilo and Co., Inc. v. Dept. of Transportation*, 43 Conn. Supp. 457, *affirmed* 233 Conn. 296, 659 (1993). Failure to exhaust this remedy results in waiver. Id., *Fraenza v. Keeney*, 43 Conn. Supp. 386, *affirmed* 232 Conn. 401 (1994); *Jutkowitz v. Department of Health Services*, 220 Conn. 86 (1991) *appeal denied* 243 Conn. 910 (1997).

Informal consultation with the decision maker is a consideration prior to resorting to the Superior Court both because such a communication may prompt a decision and it sets the table for the remedy. To strengthen any post-hearing resort to Superior Court, notice of potential prejudice should be offered to the agency to ensure that the hearing is in fact closed and the decision is in fact still pending. A brief statement of the procedural facts could be helpful at the agency level and later to the Court. Documenting your position as to "reasonable dispatch" may also be helpful in securing an order to force a timely decision. It is highly recommended that this is done in writing and with notice to all parties so as to provide them with the opportunity to respond, i.e., avoiding an appearance of any *ex parte* communication.

PRACTICE TIP 2018: An agency is well advised to render decisions within any timeframe prescribed. In *Handel v. Commissioner of Social Services*, 183 Conn. App. 392, 401 (2018), the Appellate Court sustained an appeal from an agency decision that was not rendered by an agency within a proscribed timeframe. Bright lines can support harsh results.

VI. AFTER THE FINAL AGENCY DECISION IS RELEASED

Immediately after a final agency decision is released by the final agency decision maker (including oral decisions as noted above), the practitioner's job is not done. Appealing to the trial court from a final agency decision is a pure statutory cause of action. It cannot be overstated that identification of the statutory right of review must be identified from the start. If a right of review is identified, it must be pled to avoid dismissal for lack of subject matter jurisdiction.

If a right of review is identified, the practitioner must be aware that the statute of limitation for an appeal begins to run its short course. Where the agency has "scrupulously" followed procedure, provided ample due process, allowed the record to be full of evidence, and rendered the final decision well within its enabling statute standards, the practitioner needs to

carefully consider whether an appealable issue is available. *Joyell v. Commissioner of Education*, 45 Conn. App. 476 (1997).

A practitioner who successfully fends off an adverse decision at the agency level through an agency hearing with an independent public entity must beware that the respondent agency may have a right of appeal and may challenge that the victory below by appealing to the trial court. See *Commissioner of Public Safety v. Board of Firearms Permit Examiners*, 129 Conn. App. 414, cert. denied 302 Conn. 918 (2011)(Commissioner of Public Safety appealed to Superior Court after Board of Firearms Permit Examiner reversed Commissioner's decision denying permit to applicant). See also *Blinkoff v. Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 719 (2011)(prosecuting agency authorized to appeal adverse agency final decision).

A practitioner who successfully secures an agency decision after a hearing during which another person or entity has been granted party status as an "intervenor" must beware that the "intervenor" may view your client's victory as an adverse decision and may challenge the decision via an appeal which would, if sustained, would reverse the final agency decision, i.e., undo the practitioner's favorable decision. See *Yellow Cab Co. of New London v. Dept. of Transportation*, 2009 Conn. Super. LEXIS 2095 (Aug. 7, 2009), 127 Conn. App. 170, *cert. den.* 301 Conn. 908 (2011).

A. RECONSIDERATION BY THE AGENCY OF ITS DECISION

Quick action is required to get another chance for a favorable decision at the agency level and to delay the enforcement of an adverse decision. Conn. Gen. Stat. § 4-181a addresses the issue of reconsideration from a final decision by the agency in a contested case. This should be viewed as an extraordinary remedy and of limited applicability, but if the shoe fits, you should use it.

Two points of caution are offered as to the amendment brought by Public Act 06-32. First, Public Act 06-32 amended § 4-183(a) by adding subdivision (3) that, among other things imposed a ninety day time limitation for the agency to take a different action that in the original final decision. If the agency fails to render a new or different final decision, the original final decision becomes by operation of subdivision (4) and the clock is set forward to that date to start the appeal process. To say it another way, subdivision (4) creates a new final agency decision from which an appeal can be started under Conn. Gen. Stat. § 4-183. Reconsideration under PA 06-32 is particularly important in complex appeals with multiple parties and/or multiple orders.

Caution is noted that under Conn. Gen. Stat. § 4-183(a) that filing a petition for reconsideration is not a prerequisite for filing an appeal to Superior Court.[42] Subdivision (1) of subsection (a) in Conn. Gen. Stat. § 4-181a provides:

> Unless otherwise provided by law, a party in a contested case may, **within fifteen days** after the personal delivery or mailing of the final

[42] Note however that the existence of a final decision is a prerequisite to trigger a reconsideration. *Southern New England Telephone Co. v. Department of Public Utility Control*, 64 Conn. App. 134 (2001), *appeal dismissed* 260 Conn. 180 (2002).

> decision, file with the agency a petition for reconsideration of the decision on the ground that: (A) An error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown. Within twenty-five days of the filing of the petition, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition.

If by the 15th day, a petition for reconsideration has not been filed, the practical impact is that the 45th days period appeal period continues to run abated. See *Mastrianna v. Department of Social Services*, 2018 WL 3014179 (May 18, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain).
Subdivision (2) further provides:

> Within forty days of the personal delivery or mailing of the final decision, the agency, regardless of whether a petition for reconsideration has been filed, may decide to reconsider the final decision.

Subdivision (3) then sets a time frame of 90 days for rendering a decision by providing:

> If the agency decides to reconsider a final decision, pursuant to subdivision (1) or (2) of this subsection, the agency shall proceed in a reasonable time to conduct such additional proceedings as may be necessary to render a decision modifying, affirming or reversing the final decision, provided such decision made after reconsideration shall be rendered not later than ninety days following the date on which the agency decides to reconsider the final decision. If the agency fails to render such decision made after reconsideration within such ninety-day period, the original final decision shall remain the final decision in the contested case for purposes of any appeal under the provisions of section 4-183.

Subdivision (4) attempts to clarify the scope of review on appeal following a reconsideration and/or modification of a decision during reconsideration. It provides:

> Except as otherwise provided in subdivision (3) of this subsection, an agency decision made after reconsideration pursuant to this subsection shall become the final decision in the contested case in lieu of the original final decision for purposes of any appeal under the provisions of section 4-183, including, but not limited to, an appeal of (A) any issue decided by the agency in its original final decision that was not the subject of any petition for reconsideration or the agency's decision made after reconsideration, (B) any issue as to which reconsideration was requested but not granted, and (C) any issue that was reconsidered but not modified by the agency from the determination of such issue in the original final decision.

In *Citizens Against Overhead Power Line Construction, et al.*, 2011 WL 1565843 (March 24, 2011), 139 Conn. App. 565, *cert. granted* 308 Conn. 906 (2013), *affirmed* 311 Conn. 259 (2014), the Supreme Court let stand the Appellate Court holding that the trial court lacked subject matter jurisdiction over an appeal where an agency had not yet reached a final decision on a petition for reconsideration. The trial court determined that, until the full ninety (90) day reconsideration period had run its course and lapsed without the agency acting, subject matter jurisdiction was lacking. 139 Conn. App. at 575-576. Once reconsideration is sought, unless the agency issues a decision under subdivision (2) [denial of petition] or subdivision (3) [issuance of a new final decision], the majority read the appeal period is limited to the ninety-first day and ending forty-five (45) days thereafter. Justice Bishop dissented. The dissent rejected the notion that a reviewing court cannot receive an appeal until the ninety-first day after the agency's original decision date when a petition for reconsideration is filed. When a practitioner discovers that a reconsideration under §§ 4-181a and 4-183(c)(4), as amended by Public Act No. 2006-32, are at issue, the parties may be locked into an automatic delay by operation of the statute or until the agency renders a decision on the reconsideration, whichever comes first. The 45 day appeal period appears to be suspended and will also restart under the same conditions.

PRACTITIONER TIP: Any matter that is within the intersection of §§ 4-181a and 4-183(c)(4) will have to keep a steady eye on the clock and agency conduct or risk the possible flip side consequence of not filing within the 45 day window.

Subsection (b) of § 4-181a restarts the contested case process by providing:

> On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion. The procedure set forth in this chapter for contested cases shall be applicable to any proceeding in which such reversal or modification of any final decision is to be considered. The party or parties who were the subject of the original final decision, or their successors, if known, and intervenors in the original contested case, shall be notified of the proceeding and shall be given the opportunity to participate in the proceeding. Any decision to reverse or modify a final decision shall make provision for the rights or privileges of any person who has been shown to have relied on such final decision.

The absence of any changed condition can doom an attempted appeal. *Gayle v. Commissioner of Department of Motor Vehicles*, 2018 WL 1769149 at p. 2 (March 14, 2018; Tanzer, J.; Judicial District of New Britain)(failure to plead changed conditions can contribute to a dismissal).

However, subsection (c) of § 5-181a provides an escape hatch if the error raised on reconsideration is clerical in nature.

> The agency may, without further proceedings, modify a final decision to correct any clerical error. A person may appeal that modification under the provisions of section 4-183 or, if an appeal is pending when the modification is made, may amend the appeal.

Bottom line is that reconsideration is a limited remedy and is not readily available. Not every hearing in a contested case will qualify for reconsideration. However, if the practitioner finds that the case qualifies, the risk is controlled for the client in requesting reconsideration. More importantly requesting reconsideration does not toll the statute of limitation for filing an appeal. *CHRO v. Windsor Hall Rest Home*, 232 Conn. 181 (1995). Nor is a reconsideration a final decision from which an appeal may be taken. *Greco v. Commissioner of Motor Vehicles*, 61 Conn. App. 137 (2000). See also: *Markley v. State Elections Enforcement Commission*, 2018 WL 4038182 at p. 3 (August 2, 2018; Shortell, J.; Judicial District of New Britain)(where no evidence is put forward that reconsideration was granted, a court is bound to the 45 day limitation).

Again, subsection (a)(4) is particularly important in handling complex appeals. A practitioner is well advised to file a timely appeal for reconsideration and file a timely appeal in the Superior Court when in doubt. Practitioners are also well advised to keep their eye on final decisions with multiple parties as reconsiderations by one party may result in adverse decisions after a final decision appears to be in hand to yet another party. At least in theory, this cycle of reconsideration could stretch out the finality sought by one party at the expense of another. Litigation can be anticipated in this area.

PRACTICE TIP 2018: In *National Health Care Associates v. Connecticut Department of Social Services*, 2017 WL 1194290 at p. 6 (Feb. 17, 2017; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain), the trial court dismissed an appeal as untimely "[i]n the absence of allegations in the complaint that a request for reconsideration was filed, and in the absence of evidence that the [reconsideration] letter was mailed to or received by the defendant, and in light of the defendant's affirmative and unrebutted evidence that it did not receive a request for reconsideration[.]" In so much as filing a motion for reconsideration can extend the statute of limitation that might otherwise lapse, the burden to show compliance fall on the party seeking the benefit. Using a return receipt and preserving tracking information is well advised.

B. SCOPE OF REVIEW ON APPEAL

It is well established that appeals in contested cases from final agency decisions are statutory creatures and compliance is strictly construed. *Commissioner of Emergency Services and Public Protection v. Freedom of Information Commission,* 330 Conn. 372, 379 (2018); *Peters v. Dept. of Social Services*, 273 Conn. 434 (2005) A petitioner is well advised to determine in the initial phase of taking on an administrative proceeding whether the issue at hand presents an appealable issue. See *Hefti v. Commission on Human Rights & Opportunities*, 61 Conn. App. 270 (2000) *cert. denied* 255 Conn. 948 (2001); *Testa v. City of Waterbury*, 55 Conn. App. 264 (1999).

The standard of review has been articulated as preventing the agency from acting in a completely unreasonable, arbitrary, illegal or in abuse of discretion. *Matthew M. v. Department of Children and Families*, 143 Conn. App. 813, 824 (2013) *citing Dickman v. Office of Sate Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 766-767 (2013); *Commission on Human Rights and Opportunities v. City of Hartford*, 138 Conn. 141, 156 (2012); *Sgritta v. Commissioner of Public Health*, 133 Conn. App. 710, 715 *cert. denied* 305 Conn 906 (2012).

Again, the scope of review is limited to the decision made by the agency and other issues as may exist between the parties cannot be addressed through the appeal. *Nizzardo v. State Traffic Commission*, 259 Conn. 131 (2002); *Mystic Marinelife Aquarium*, Inc. v. Gill, 175 Conn. 483 (1978). It is black letter law that a reviewing court cannot merely substitute its judgment for that of the agency decision maker. *Commissioner of Public Safety v. Board of Firearms Permit Examiners*, 129 Conn. App. 414 (2011). In addition, a "well reasoned" trial court decision in an administrative appeal may simply be adopted by an appellate court. See *Council 4, AFL-CIO v. State Ethics Commission*, 52 Conn. Supp. 313, *affirmed* 304 Conn. 672, 673-674 (2012).

Fact finding is vested in the agency below, not the trial court upon review. Conn. Gen. Stat. § 4-183(j) provides that:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

The appellate function is further restricted. This subsection establishes that:

> The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

PRACTICE TIP: Section 4-183(j) is the heart of the early assessment. The statute provides a readymade check list of errors that could become reversible error, meaning if a practitioner can guide a court to conclude that the final decision maker's final agency decision is burdened by one of the six, then a favorable court ruling is likely. By the flip side of the coin, if you do not fit into one of the six subdivisions, then the court is almost left with no option except to affirm the agency decision.

PRACTICE TIP 2018: For an example of a subsection (3) "made upon unlawful procedure" standard, see *Godaire v. Department of Social Services*, 174 Conn. App. 385, 401 (2017). In *Godaire*, the Appellate Court held that the redetermination procedure of the agency was not lawful. The applicant below did not submit additional information to support his qualifications, in part, because the agency communicated that he qualified for the benefits sought. Thereafter, the agency retroactively disqualified him. The Appellate Court did not let the agency decision stand.

1. TRIAL COURT'S APPELLATE FUNCTION

Conn. Gen. Stat. § 4-183(j) limits the scope of review of the trial court which really sits in an appellate capacity.[43] As such the trial court is not sitting as a plenary trial court and, under subsection (j), must restrict its review to determining if "administrative findings, inferences, conclusions, or decisions are ... [i]n violation of constitutional provisions[.]" This enabling statute does not include the power to declare the statute applied by the agency to be unconstitutional.[44] *Ryhall v. Akim Co.*, 263 Conn. 238, 337 (2003). See also *Beizer v. Dept. Of Labor*, 56 Conn. App. 347 (2000), cert. denied 252 Conn. 937 (2001); *McGarry v. State Board of Education*, 01-CBAR-0441 (April 2, 2001), 7 Conn. Ops. 509 (May 7, 2001); *Rudy's Limousine Service, Inc. v. State Dept. Of Transportation*, 01-CBAR-0788 (Oct. 2, 2001). The implication of this limitation may not be readily apparent to the trial court practitioner and may escape consideration when assessing a challenge to the Superior Court from a final agency decision.

If the basis of a contemplated appeal is that the statute that was applied is wholly unconstitutional, the trial court may lack subject matter jurisdiction. *Beizer*, supra. The better reading of § 4-183(3) requires the reader to insert the phrase "as applied in this case" to any constitutional challenge. This jurisdictional limitation is consistent with empowering the agency with primacy over the application of the law to a given case and preserving rule making as a separate and distinct function. An agency decision that is a matter of first impression for that agency is not entitled to special deference. See *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 165-165 (2007) *clarifying MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128 (2001); *Charette v. Waterbury*, 80 Conn. App. 232 (2003). However, if a practitioner can create a "novel" question of law, and have the agency below render an adverse decision on it, the appellate review may become more expansive. See *Parkhurst v. Wilson-Coker* 82 Conn. App. 877, 884-885 (2004).

Thus the trial court's appellate jurisdiction reaches any error made by the agency, but does not extend to invalidating an act of the legislature (either by passing a statute or approving a regulation, or both) based on the facts of the single case on appeal to the court, i.e., rule-making is driven not by a case-to-case model, but rather through the deliberative process with more extensive notice to affected parties as required by the legislative process or by rule making provisions of the UAPA (either by the adoption of regulations or through declaratory rulings). While it may be too late when considering an appeal from a final agency decision, the limitation on the trial court's jurisdiction is consistent with the overall statutory scheme under the UAPA and the doctrine of exhaustion of administrative remedies in so much as a challenge to the constitutionality of a statute may be addressed through a declaratory ruling. The point to

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[43] See *Mordecai v. Town of Hamden*, Judicial District of New Haven at New Haven, 03-CBAR-2096 (Aug. 14, 2003), 7 Conn. Ops. 1123 (Oct. 8, 2001)(Granted motion to strike all non-administrative claims and monetary damages in administrative appeal. Booth, J.).

[44] A plaintiff on appeal from an adverse decision in a contested case may consider a declaratory judgment action as a better alternative for advancing a constitutional challenge. See *Fullerton v. Administrator, Unemployment Compensation Act*, 280 Conn. 745, 759-760 (2006); *Stafford Higgins Industries, Inc. v. Norwalk*, 245 Conn. 551, 572 (1998). Also see *Martorelli v. Connecticut Dept. of Trans.*, 2013 Conn. WL 6925938 at p. 16 (Conn. Super.;Prescott, J.; Dec. 3, 2013). This area of the law is still evolving.

consider is that taking an administrative appeal for the purpose of declaring a statute unconstitutional may be futile. Once an error of law is discovered, a remand to the agency to rendered a decision in accordance therewith may be the limit of the available remedy. See *Lagueux v. Leonardi*, 2012 WL 6582533 (Nov. 22, 2012).

The appellate function of the trial court ultimately is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of [its] discretion. *Vorlow Holding, LLC v. Commissioner of Energy & Environmental* Protection, 161 Conn. App. 837, 843 (2015); Matthew *M. v. Department of Children and Families*, 143 Conn. App. 813, 824 (2013)*; Dickman v. Office of Sate Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 766-767 (2013). A practitioner is well advised not to take an appeal, if the client merely does not like the outcome, even though the final agency decision maker had substantial evidence for or against the final decision. *F.M. Commissioner of Children and Families*, 143 Conn. App. 454, 481 (2013).

For examples of a trial court drilling down into a Return of Record (ROR), see *City of Meriden v. Freedom of Information Commission*, January 29, 2018; Cohn, J.T.R; Judicial District of New Britain) and *Susan L. v. Department of Children and Families*, 2018 WL 3206768 (June 4, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain).

2. RECORD REVIEW LIMITATION

Conn. Gen. Stat. § 4-183(i) establishes that "[t]he appeal shall be conducted by court without a jury and shall be confined to the record." This confinement means the practitioner and agency representatives need to focus on building the record with an eye to possible appellate review by a trial court in the future. As noted below in IV.D "Making the Record," the time to anticipate a review by the trial court is before the agency record is being made byt the agency level.

PRACTICE TIP: Effective January 1, 2014, Conn. Prac. Bk. Sec. 14-7A changes the method for presenting the Return of Record (ROR) in contested cases to the Superior Court. In summary, the first step is that the agency representative prepares a list of papers that are the records as set forth in Conn. Gen. Stat. § 4-183(g). The list is set to be prepared and certified thirty days after the agency representative files an appearance, or where a motion to dismiss has been filed, within 45 days after the decision is released. Under Conn. Gen. Stat. § 4-183(g), either party may agree to limit the list. The parties are given the opportunity to inspect the records. Conn. Gen. Stat. § 4-183g. The parties still are empowered to agree to limit the record.

Conn. Prac. Bk. Sec. 14-7A(d) provides:

> No less than thirty days after the filing of the certified list of papers in the record under subsection (b), the court and the parties will set up a conference to establish which of the contents of the record are to be transmitted […], including dates for the filing of the designated contents of the record, for the filing of appropriate pleading and briefs, and for conducting appropriate conferences and hearings. […] At the conference, the court shall also determine which, if any, of the designated contents of the record shall be transmitted to the parties and/or the

> court in paper format because such papers are either difficult to reproduce electronically or difficult to review in electronic format.

The importance of the conference cannot be overstated. Conferences can be held telephonically.

For documents that were on the subsection (b) certified list, but not included under subsection (d) filing, a party may as a matter of right amend the record to include the document and the court may grant additional time to the opposing party to respond. For documents that were not on the subsection (b) certified list and not filed under subsection (d), no party is permitted to include those materials in their brief or appendices, unless the court grants permission to do so.

Failure to follow the rules about the ROR may result in sanctions as the court determines appropriate after a hearing. Conn. Prac. Bk. Sec. (i) makes it clear that the court may impose sanctions by its own motion or by motion of one of the parties.

3. EXCEPTION TO THE RECORD REVIEW LIMITATION

Conn. Gen. Stat. § 4-183(i) carves out two exceptions to the "review of record" limitation in administrative appeals. It establishes:

> If alleged irregularities in procedure before the agency are not shown in the record or if facts necessary to establish aggrievement are not shown in the record, proof limited thereto may be taken in the court.

Procedural irregularities and aggrievement are the two exceptions. The cautionary point here is the trial court has discretion to take evidence and the appellant does not have a right to present evidence on these issues. It is also possible that the agency will move to remand to address the issue in the first instance.

4. DEFERENCE

As a preface to deference, a practitioner should remember that regulations adopted in accordance with the UAPA are afforded a presumption of validity. *Velez v. Commissioner of* Labor, 306 Conn. 475, 485 (2013). If you overcome that presumption, you must consider that a reviewing court will still need to address the issue of deference which may been seen as yet another uphill battle in identifying ambiguous toe hoe for an appeal.

The Supreme Court has established a three prong test for deference when reviewing an agency decision. The agency must have a formal interpretation or articulated standard and it must be "both time-tested and reasonable." *Freedom of Information Officer, Dept. of Mental Health and Addiction Services v. FOIC,* 318 Conn. 769, 781 (2015) *citing Commissioner of Public Safety v. Freedom of Information* Commissioner, 312 Conn. 513, 526 (2014) *citing Chairperson, Connecticut Medical Examining Board,* 310 Conn. 276, 281-282 (2013). See also *Velez v. Commissioner of* Labor, 306 Conn. 475, 484-485 (2013); Longley *v. State Retirement Commission*, 284 Conn. 149, 166 (2007). See also *Liberman v. Aronow*, 319 Conn. App. 748 (2015). If the legal question has not been time tested, then the reviewing Court uses plenary powers. *Lane v. Commissioner of Environmental Protection*, 314 Conn. 1, 16 (2014). Prior judicial review is not a mandatory component of that analysis as the agency's conduct can serve as a basis for all three. Judicial review does not hinder establishing deference, but once an

appellate review has been rendered the matter perhaps should be analyzed as the “law” rather than “deference.” Whether time-tested or not, a court should grant deference only if the agency's interpretation of a statute is "reasonable" under the application of "established rules of statutory construction." *Commissioner of Emergency Services and Public Protection v. Freedom of Information Commission*, 330 Conn. 372, 379 (2018).

It is black letter law that questions of law are entitled to de novo review by the trial court. *Planning and Zoning Commission Town of Monroe v. Freedom of Information Commission*, 316 Conn. 1 (2015); *Commissioner of Public Safety v. Freedom of Information Commission*, 316 Conn. 1 (2015); *Semerzakis v. Commissioner of Social Services*, 274 Conn. 1 (2005). It is also black letter law that a reviewing court will afford great deference on questions of law to an agency charged with the enforcement of that matter and that have been time tested. *DiamlerChryser Servs., N.Am., LLC v. Commissioner of Revenue Services*, 274 Conn. 196, 202 (2005) *citing Southern New England Telephone Company v. Department of Public Utility Control*, 261 Conn. 1 (2002). However, the limitation of deference is restricted or contracted when the appeal requires that the court expound on the law, articulate a new interpretation of the law or otherwise alter or amend the agency interpretation that no longer is in accord with the court's interpretation of the law (and/or statutory amendments). *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672 (2007); *Cendant Corp. v. Commissioner of Labor*, 276 Conn. 16 (2005). If the matter being challenged on the appeal is a matter of first impression, meaning not previously subjected to judicial review, a reviewing court will likely apply a plenary review with limited deference, if any. *Department of Public Safety v. FOIC*, 298 Conn. 703, 717 (20100).

Where an issue in question is an evolving area of the law, a reviewing court is even less likely to grant deference to an agency’s interpretation. *Jim’s Auto Body v. Commissioner of Motor Vehicles,* 285 Conn. 794, 804 (2008). See *Seymour v. Elections Enforcement Commission*, 255 Conn. 78 (2000) *certiorari denied* 533 U.S. 951, 121 S.Ct. 150 L.Ed.2d 752 (2001)(Balancing the competing interests of political free speech, public disclosures to avoid fraud, and enforcement actions to ensure fair elections). Compare to appeals from decisions by the Department of Motor Vehicles to revoke drivers’ licenses where the legal standards are narrow and well defined in statute. See for example *Simard v. Commissioner of Motor Vehicles*, 62 Conn. App. 690 (2001); *Dore v. Commissioner of Motor Vehicles*, 62 Conn. App. 604 (2001); *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, *cert. denied* 245 Conn. 917 (1998). In these cases, the area of the law is well defined and predictability of the outcome at the agency level and on appeal is high. In *Christopher R. v. Commissioner of Mental Retardation*, 277 Conn. 594, 603 (n.9)(2006), two trial court decisions over a twenty-three year period did not qualify as "judicial scrutiny" or "time tested." *Longley v. State Retirement Commission*, 284 Conn. 149, 164 (2007).

A reviewing court must let stand any agency decision on appeal that was the product of a correct application of the law. *Lovie Dechio v. Raymark Industries, Inc.*, 299 Conn. 376 (2010); *Cadlerock Prop. J.V., L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661 (2000) *cert denied* 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001); *Griffin Hospital v. Commission on Hospitals & Health Care*, 200 Conn. 489, *appeal dismissed* 479 U.S. 1023 (1986). Questions of law get a broader standard of review than factual determinations. *Office of Consumer Counsel v. Department of Public Utilities Control*, 252 Conn. 115 (2000). However, that deference does not include an improper application of the law

or if an interpretation of a statute is the focal point of the appeal. *Director, Retirement & Benefits Services Division v. Freedom of Information Commission*, 256 Conn. 764 (2001). When the reviewing court determines that the evidence or the law is subject to possible error, then the agency loses the deference, if it was otherwise applicable, and a broader standard of review must be employed, to wit: the reviewing court approaches the review *de novo*. *Connecticut Motor Cars v. Commissioner of Motor Vehicles*, 300 Conn. 617 (2011); *State Medical Society v. Board of Examiners in Podiatry*, 208 Conn. 709 (1988).

As a practical matter, in assessing how to proceed in an agency proceeding or whether to appeal a decision from a final agency decision, a critical factor to consider is the level of detail in statute, regulation and agency precedents that versus general policy parameters. The greater the detail, the harder it may be to find wiggle room to secure a *de novo* review of the agency use of a particular legal standard or diminish the deference that may be accorded by the reviewing court. The greater the agency discretion to determine the legal standard to apply (i.e., watch out for "case-by-case" standards), there may be more room to find the agency was unreasonably, arbitrarily, illegally or in abuse of discretion. *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672 (2007). An agency's past conduct is a significant factor considered and can be a "persuasive support" where it has been formally adopted and used over an extended period of time, but its past practice is not accorded deference. *Jim's Auto Body v. Commissioner of Motor Vehicles*, 285 Conn. 794, 813 (n.27) (2008) citing *Longley v. State Retirement Commission*, 284 Conn. 149, 164 (2007). Again, under *Longley*, the standards are formally articulated, time tested, and reasonable. Failure to meet any one of the three standards can defeat a court use of any deference in favor of the agency use of a standard in a given case. *Id.* at 165-166.

PRACTICE TIP: Where an agency has not finalized a set of standards and adopted regulations related thereto, all bets are off for deference. *Tilcon Connecticut, Inc. v. Commissioner of Environmental Protection*, 317 Conn. 628, 650-651 (2015).

Caution is suggested when a practitioner attempts to use a technical violation of a law or regulation to thwart a major public policy or negate an agency enforcement action against an individual for the benefit of the public. *Charbonneau v. Commissioner of Motor Vehicles*, 124 Conn. App. 556 (2010)(affirming Commissioner's suspension of drunk driver's license, despite the arresting officer's failure to be re-certification on use of breath test devise). See also *Peruta v. Freedom of Information Commission*, 2013 WL 6439604 (Conn. Super.; Prescott, J.; Nov. 7, 2013)(upholding an application of a statutory provision that, if not applied, would frustrate the statutory scheme). Caution is also warranted when the legislature has modified other provisions of a statute, but let stand other provisions. *State v. Salamon*, 287, 509, 525 (2008) *over ruled on other grounds State v. Sanseverino*, 291 Conn. 574 (2009). A reviewing court may look to legislative history to determine the circumstances of an enactment, the overarching policy goal and other principles not expressly stated in the language adopted by the legislature to determine if deference is warranted. *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*, 310 Conn. 276, 281-83 (2013) cited in *Flores v. Freedom of Information*, 2014 WL 1876915 (Conn. Super.; Cohn, J.; April 7, 2014).

The limits of deference were encountered in *Commissioner of Corrections v. Freedom of Information Commission, et al., United States of America, et al. v. Freedom of Information Commission*, 307 Conn. 53 (2012) when FOIC ruled in favor of disclosure of information that

was in the possession of the Commissioner of Corrections and within the ambit of the Federal Bureau of Investigations' National Crime Information Center's computerized database. FOIC ruled in favor of a petitioner whose personal information was being sought related to his arrest by federal Immigrations and Customs Enforcement agents. The Corrections Commissioner appealed. The United States intervened. The United States asserted that its interpretation of the federal law, including its own regulations, was entitled to deference and the FOIC interpretation of the federal law was not. The Connecticut Supreme Court agreed with the United States. The Court ordered the information in question not be disclosed, in part, because FOIC did not have expertise or experience in the federal law at issue so as to warrant deference, but the United States did. Deference lead the Court to order the information sought not be released.

5. SUBSTANTIAL EVIDENCE RULE ON APPEAL

Among the well-established restrictions under § 4-183(j), the trial court cannot substitute its judgment as to the credibility of witnesses and findings of fact so long as there is a rational basis for the findings. American *Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296 (2005); *Sweetman v. State Elections Enforcement Commission*, 249 Conn. 296 (1999); *Moore v. Commissioner of Motor Vehicles*, 172 Conn. App. 360, 387 (2018); *Spitz v. Board of Examiners of Psychologists*, 127 Conn. App. 108 (2011); *Funderburk v. Commissioner of Motor Vehicles*, 68 Conn. App. 655 (2002); *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, *cert. denied* 245 Conn. 917 (1998). The reviewing court determines whether the administrative record contains evidence supporting the final agency decision, not whether the plaintiff contentions are supported by some evidence. *Wing v. Zoning Board of Appeals*, 61 Conn. App. 639, *cert denied* 256 Conn. 908 (2001). The trial court applies the "substantial evidence rule" and where there is insufficient evidence to support a found fact, the trial court may determine that the agency action was unreasonable and arbitrary. Such a decision cannot stand. *Office of the Consumer Counsel v. Dept. of Public Utility Control*, 246 Conn. 18 (1998); *Alvord v. Commissioner of Motor Vehicle*, 84 Conn. App. 302 (2004); *Quality Sand v. Planning Commission of Torrington*, 55 Conn. App. 533 (1999).

On appeal to the trial court, the applicable standard is the same as the judicial review of jury verdicts. *Eikovic v. Commission on Human Rights and Opportunities*, 57 Conn. App. 767, *cert. denied* 253 Conn. 925 (2000); *Rivera v. Liquor Control Commission*, 53 Conn. App. 165 (1999). This is a highly deferential rule. *Jim's Auto Body v. Commissioner of Motor Vehicles*, 285 Conn. 794, 817 (2008). *New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 247 Conn. 95 (1998). On appeal, the court applies a standard that is "something less than weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Egan v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 572 (2012) *quoting Blinkoff v. Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 720, *cert. denied* 302 Conn. 922 (2011). Again, a trial court sits in an appellate function, not as a plenary trial court. *Beizer v. Department of Labor*, 56 Conn. App. 347, *appeal denied* 252 Conn. 937 (2000).

When the reviewing court determines that the record contains an admission by a party against the interest of that party, the reviewing court almost automatically affirm the agency decision. *Toise v. Rowe*, 95-CBAR-0598 (Aug. 8, 1995), *aff'd* 44 Conn. App. 143 (1997), *reversed* 243 Conn. 623 (1998), *on remand* 2002 Conn. Super. LEXIS 2811 (Aug. 28, 2002),

aff'd 82 Conn. App. 306, 311-312 (2004). Counsel is caution that a client's desire for a particular outcome will not overcome the admission of facts at the agency level nor the correct application of law by the agency. *Toise,* 82 Conn. App. at 315.

Where a reviewing court determines that the final decision maker had conflicting evidence on the record, the reviewing court must also let the decision stand. *Pet v. Dept. of Health Services*, 228 Conn. 651, 668 (1994); *Funderburk v. Commissioner of Motor Vehicles*, 68 Conn. App. 655 (2002); *Fiolek v. Commissioner of Motor Vehicle*, 45 Conn. Supp. 489, *on appeal* 51 Conn. App. 486, *cert. denied* 248 Conn. 906 (1999). See also *Toise v. Rowe*, 95-CBAR-0598 (Aug. 8, 1995), *aff'd* 44 Conn. App. 143 (1997), *reversed* 243 Conn. 623 (1998), *on* remand 2002 Conn. Super. LEXIS 2811 (Aug. 28, 2002), *aff'd* 82 Conn. App. 306 (2004). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence[.]" *Pet*, 228 Conn. at 668 *quoted in Croll v. Commissioner of Department of Social Services*, 2018 WL 1475740 at p. 10 (February 23, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain). See also *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 588 (1993).

Indy Sengchanthong v. Commissioner of Motor Vehicles, 92 Conn. App. 365, *reversed* 281 Conn. 604 (2007), provides an example of how the facts found and application of law are sometimes inseparable. In this case, the trail court sustained the driver's appeal and the Appellate Court affirmed because the court determined that the driver was incapacitated when found by law enforcement and, as a result, the agency lack substantial evidence upon which to conclude that he was operating the vehicle and the license suspension lacked substantial evidence. The Supreme Court used a different standard as to the term "operating," i.e., the "key in the ignition," a standard that was established in *State v. Haight* 279 Conn. 546, 556-556 (2006)(criminal conviction upheld based on the key is in the ignition standard; other facts are not material). *Id.* at 611. Using the "key in the ignition" standard, the Supreme Court found substantial evidence on the record to support the agency action and reversed the lower courts with direction to dismiss the appeal.

Hogberg v. Dept. of Social Services, 123 Conn. App. 545, (2010) provides another example of the application of the substantial evidence rule. This appeal involved an agency denial of Medicaid because the applicant failed to meet the standard of "severe and unusual" circumstances such that additional funds would be provided to meet his needs. The evidence of record showed only that he was a typical seventy-one year old man, not one with "severe and unusual circumstances." The record did not support a conclusion that the agency was unreasonable, arbitrary, illegally or in abuse of its discretion. See *Dolgner v. Alander*, 237 Conn. 272, 280 (1996).

If substantial evidence is found on the record by the trial court and the trial court dismisses the appeal, further appellate review makes it even hard to reverse as an abuse of discretion standard will be employed by the Appellate Court and/of the Supreme Court, if your case ascends to the higher docket. *American Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296 (2005).

PRACTICE TIP: While a party may have the burden to create a record to convince a hearing officer to make a particular finding of fact, on the appeal that same party may need to

claim to the contrary that substantial evidence is wanting. See *Palomba-Bourke v. Commissioner of Social Services*, 312 Conn. 196 (2014)(Medicaid applicant needed to show trust instrument was valid and then encounter the Court's high deference to the agency determination of findings of fact based on the applicant's evidence on the record.) In effect, a good record below makes it harder to show that the final decision was unreasonable, arbitrary, illegal or in abuse of discretion. This dilemma must be evaluated in considering whether to challenge a final agency decision. See also *Aronow v. Freedom of Information Commission*, 2018 WL 650381 (January 5, 2018; Young, J.; Judicial District of New Britain).

6. REVIEW OF FINAL DECISION AND ORDER

An appeal to the trial court must be based on more than just dissatisfaction with the outcome of that decision. There are several issues to consider.

A procedural irregularity must cause a material prejudice affecting substantial rights of an appellant.[45] *Solomon v. Conn. Medical Examining Board*, 85 Conn. App. 854 (2004), *cert. den.* 273 Conn. 906 (2005); *Merchant v. State Ethics Commission*, 53 Conn. App. 808 (1999). The absence of substantial evidence must leave the findings of fact without the necessary factual predicates. *Dolgner v. Alander*, 237 Conn. 272 (1996). The application of the wrong legal standard is a rare event, but none the less should be considered. *In accord with Meri-Weather, Inc. v. Freedom of Information Commission*, 47 Conn. Sup. 113, *affirmed* 63 Conn. App. 695 (2001)(trial court review of standards applied by hearing officer as stated in memorandum of decision found on point to earlier judicial gloss). Again, if the agency exceeded its authority or misinterpreted a standard of law may provide a reversible error. See *Director, Retirement and Benefits Services Division, Office of Comptroller v. Freedom of Information Commission, et al*., 256 Conn. 764 (2001)(public interest found missing as to private life information of public employees who sought to protect such information that was otherwise public in nature). Again see Conn. Gen. Stat. § 4-183(j).

A practitioner will find that the substantial evidence test is similar to the standard applied to the judicial review of a jury verdict. *Rogers v. Board of Education of City of New Haven*, 252 Conn. 753 (2000); *Ezikovich v. Commission on Human Rights & Opportunities*, 57 Conn. App. 767, *cert. denied* 253 Conn. 925 (2000). See also *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Proctection*, 253 Conn. 661 (2000), *ceriorari denied* 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001). Again, the practitioner must consider that the reviewing court will give considerable weight to agency findings. *Bell Atlantic Mobile, Inc. v. Department of Public Utilities Control*, 253 Conn. 453 (2000).

The final decision and order should be reviewed for possible defects. If evidence from outside the record appears, red flags should go up just like when a jury has given consideration to evidence not offered at trial. See for example: *Wasfi v. Department of Public Health*, 60 Conn. App. 775 (2000) *cert. denied* 255 Conn. 932 (2001) (reliance on agency expertise without

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[45] See *Mario D'Addario Buick, Inc. v. Connecticut Department of Motor Vehicles*, Judicial District of New Britain, 01-CBAR-0883 (Oct. 12, 2001), 7 Conn. Ops. 1243 (November 5, 2001)(Appeal dismissed where hearing officer's errors of law [failure to use 3 of 10 criteria and statutorily defined "relevant market area"] had no significant impact on final agency decision related to dealership application.).

notice is problematic). At the opposite end of the continuum of details, an agency memorandum of decision that is devoid of any factual details or conclusions of law should be suspect also. *Grace Community Church v. Planning and Zoning Commission of Town of Bethel*, 42 Conn. Supp. 256 (1992) *affirmed* 30 Conn. App. 765, *cert. denied* 226 Conn. 903, *certiorari denied* 510 U.S. 944, 114 S.Ct. 383, 126 L.Ed.2d 332 (1993). However, if the record contains sufficient evidence to support a final decision a reviewing court will not likely reverse an agency decision based on this defect alone. *Keiser v. Conservation Commission of Town of Redding*, 41 Conn. App. 39 (1996); *Fromer v. Boyer-Napert Partnership*, 42 Conn. Supp. 57, *affirmed* 26 Conn. App. 185 (1990).

A "shot gun" approach to filing an appeal where each and every factual finding and rationale are challenged is not recommended. The reviewing court will grant a *de facto de novo* review. This approach will likely weaken rather than strengthen an appeal. See *United Technologies Corporation/Pratt & Whitney Aircraft Div. v. Commission on Human Rights & Opportunities*, 72 Conn. App. 212, *cert denied* 262 Conn. 920 (2002). See *Roy C.W. v. Department of Children and Families*, 2017 WL 1655848 (April 5, 2017; Cohn, J.T.R; Judicial District of New Britain).

If the agency final decision is not burdened by a reversible defect, appealing to the Superior Court may not be advisable. The ultimate duty of a reviewing court is to determine whether the adjudicator, in issuing a final decision and in light of all the evidence, need only find that the final decision was not unreasonable, arbitrary, illegal or in abuse of discretion. Act within the scope of the statutory authority will be upheld. *Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, *aff'd* 284 Conn. 455 (2007). Advising a client of the strengths of a “bullet proof” final agency decision may be as hard for a trial court practitioner who has done all things possible to ensure a favorable outcome at the earliest point, but fails to win (for whatever reason) a favorable decision. The burden to show that the final decision was unreasonable, arbitrary, illegal or in abuse of discretion fall squarely on the party taking up that challenge. *Spitz v. Board of Examiners of Psychologist*, 127 Conn. App. 108, 116 (2011); *Roy v. Commissioner of Motor Vehicles*, 67 Conn. App. 394 (2001). The practitioner may not have very long to consider these points during the heat of battle at the agency level, but will be well advised to comb the appellate record looking for such an angle on review. See *Winsor v. Commissioner of Motor Vehicles*, 101 Conn. App. 674 (2007).

C. STATUTE OF LIMITATIONS FOR PERFECTING YOUR APPEAL

The statute of limitation for perfecting an appeal is short by comparison to most other causes of action in Connecticut. Forty-five (45) days by receipt or postmark after the final decision is rendered. See Conn. Gen. Stat. § 4-183(c).

PRACTICE TIP 2018: For written final decisions, the 45 day period starts when the agency mails the decision by Return Receipt Mail (as evidenced by the return of the "green card" or by tracking information available in a digital format. The burden is on the agency to document when the 45 day period started. See *Zaneski-Nettleton v. Department of Social Services*, 2017 WL 2452079 at p. 3 (May 5, 2017; Stevens, J.; Judicial District of Milford at Milford) same case 2018 WL 1054555 (Jan. 29, 2018; Huddleston, P.J., Administrative Appeals and Tax Session; Judicial District of New Britain)(in the first instance, the trial court denied the dismiss for lack of proof of start date of statute of limitation as required by the UAPA and

credible testimony from the addressee that she would have received a letter if mailed properly; but then, upon the plaintiff's return to the trial court, the trial court found sufficient evidence to determine the appeal was barred by failure to comply with the statute of limitations).

It is also well established that failure to comply with the statute of limitations deprives the court of subject matter jurisdiction and such an administrative appeal must be dismissed. *Godaire v.Freedom of Information Commission*, 141 Conn. App. 716, 719 (2013) citing *Glastonbury Volunteer Ambulance, Inc. v. Freedom of Information Commission*, 227 Conn. 848, 854-856 (1993); *Pine v. Department of Public Health*, 100 Conn. App. 175, 182-183 (2007); *Melton v. Department of Children and Families*, 2012 WL 5476936 at p. 1, (Oct. 12, 1012). There are no exceptions in the statute. See *Connelly v. Commissioner of Correction*, 149 Conn. App. 808 (2014)(incarcerated prisoner not excused from requirement).

The trigger for the running of the appeal period is the mailing date of the decision, not the receipt of it. *Connelly v. Commissioner of Corrections*, 149 Conn. App. 808 (2014). Or by the delivery of an oral decision. *Emerick v. Freedom of Information Commission*, 152 Conn. App. 232 (2014).

Two things must happen.[46] To comply, the plaintiff must file the matter with the Clerk of the Court and either deliver the appeal or have it deposited in the mail by the forty-fifth day upon the agency rendering the final decision.[47] Conn. Gen. Stat. § 4-183(c). *Taylor v. State Bd. Of Mediation and Arbitration*, 54 Conn. App. 550, cert. denied 252 Conn. 925 (1999) *certiorari denied* 530 U.S. 1266, 120 S.Ct. 2729, 147 L.Ed.2 992 (1999). See also *Nizzardo v. State Traffic Commission*, 55 Conn. App. 679 (1999), *cert. granted* 252 Conn. 943 (2000). The forty-five day statute of limitation runs from the date that the final agency decision was mailed or delivery to the party which could mean an oral decision.

In administrative appeals, a statute of limitation for filing is not merely procedural, but rather goes to jurisdiction and the failure to comply deprives the court of jurisdiction to hear the appeal at all. *Hefti v. Commission on Human Rights & Opportunities*, 61 Conn. App. 270 *cert. denied* 255 Conn. 948 (2001). This includes failure to pay the filing fee. *Id*. Simply failing to serve the agency within the forty-five (45) statute of limitation precludes judicial review under the UAPA. *Godaire v. Freedom of Information Commission, et al.*, 141 Conn. App. 716, 719 (2013). Service by fax does not comply. *Seibold v. Commissioner of Dept. of Motor Vehicles*, 2014 WL 565905 (Superior Court; Prescott, J.; Jan. 9, 2014)(rejecting telefax expressly as well as carrier pigeon or any other means of delivery not specified in statute).

Service under § 4-183(c) is effective upon the agency or the Attorney General if the appeal is deposited in the mail. Beware that the plain language of Public Act 99-39 does not

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[46] See *McAllister v. State Dept. of Insurance*, 01-CBAR-0306, 2001 Conn. Super. LEXIS 1142 (April 26, 2001).

[47] If service is not accomplished on a party, the person taking the appeal can file an explanation for not complying and the court may excuse the error. However the trial court cannot excuse or waive the filing upon an agency. *Berka v. City of Middletown*, 2016 WL 4253211 (July 15, 2016), *affirmed on alternate grounds* 181 Conn. App. 159, cert. denied 328 Conn. 936 (2018). See also *Cruess v. Connecticut State Employees Association*, 2013 WL 692609 at p. 5(Conn. Super.; Schuman, J.; Dec. 12, 2013).

alter the statute of limitation for filing the appeal with the court. See *Bittle v. Commissioner of Social Services*, 48 Conn. App. 711, *affirmed* 245 Conn. 922 (1998), *reversed* 249 Conn. 503 (1999). But see *Glastonbury Volunteer Ambulance, Inc. v. Freedom of Information Commission*, 227 Conn. 848 (1993). Also, use of a mail service other than United States Postal Service may result in a fatal defect. See *Williams v. State of Connecticut Dept. Of Mental Retardation*, 01-CBAR-0873 (Oct. 11, 2001), 7 Conn. Ops. 1212 (Oct. 29, 2001)(private national delivery service fails to meet statutory standard).

PRACTICE TIP 2018: Subsection (d) of § 4-183, obligates the person taking the appeal to file a return of service by a State Marshal or an affidavit showing the date of service on the agency and each party. In *Berka v. City of Middletown*, 2016 WL 4253211 (July 15, 2016), *affirmed on alternate grounds* 181 Conn. App. 159, *cert. denied* 328 Conn. 936 (2018), the City of Middletown's local health department issued several orders against a property owner for code violations on his property. Pursuant to Conn. Gen. Stat. § 19a-229, the owner appealed to the State Commissioner of Public Health who convened a contested case hearing and affirmed the local orders. The owner appealed from the Commissioner's final decision. *Id*. at p. 161. The owner (now plaintiff) cited and served only the City as a party below. No controversy existed that the plaintiff never served the Commissioner in accordance with § 4-183(d). *Id*. at p. 162. The trial court dismissed the appeal for lack of subject matter jurisdiction because the plaintiff failed to name the Commissioner. The Appellate Court affirmed, but not because the plaintiff failed to cite the Commissioner, but rather the failure to serve the Commissioner within the 45 day limit was a fatal flaw that deprived the trial court from having subject matter jurisdiction. See also: *Markley v. State Elections Enforcement Commission*, 2018 WL 4038182 (August 2, 2018; Shortell, J.; Judicial District of New Britain).

Conn. Gen. Stat. § 4-183(m) provides for waiver of court fees in an administrative appeal and "the application for the waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered." Once the application is granted, the tolling provision does not apply and the service and filing of the appeal must be timely, or the want of subject matter jurisdiction shall bar the court from hearing the appeal. *Connelly v. Connecticut Department of Correction, et al.*, 2012 WL 6924527 (Dec. 28, 2012); *Holley v. Davey*¸ 2012 Conn. Super. LEXIS 943 at 2 (April 4, 2012)(with the 45 day appeal period running from July 20, 2011 to Sept. 3, 2011 and extended to Sept. 6th due to Labor Day, the plaintiff filed a waiver application on August 31st which the court granted on Sept. 1, meaning the service and filing on Sept. 8, 2011, was untimely by two days). A bright line brings a harsh result. See *Lawson v. Commissioner of Motor Vehicles*, 134 Conn. App. 614, 619 (2012).

D. AGGRIEVEMENT AS A PREREQUISITE TO AN APPEAL

Aggreivement is a question of standing and a prerequisite to invoking the powers of the court to review an agency decision. *Civie v. Connecticut Siting Council*, 157 Conn. App. 818, 824 (2015); *Brouillard v. Connecticut Sitting Council*, 52 Conn. Supp. 196, 133 Conn. App. 851, 856, *cert. denied* 304 Conn. 923 (2012). In the absence of aggreviement, the reviewing court lacks subject matter jurisdiction and the dismissal of the appeal is the only action that can be taken. *Albuquerque v. State Employees Retirement Commission*, 124 Conn. App. 866, 873 *cert. denied* 299 Conn. 924 (2011).

It is well established that there are two types of aggrievement, statutory and classical. See *Terese B. v. Commissioner of Children and Families*, 68 Conn. App. 223, 228 (2002). To maintain an appeal, a party need satisfy at least one of the two. *Soracco v. Williams Scotsman, Inc.*, 292 Conn. 86, 92 (2009); *Jaegar v. Connecticut Siting Council*, 52 Conn. Supp. 14, 31, *affirmed* 128 Conn. App. 243, *cert. denied* 301 Conn. 927 (2011)(homeowner not able to establish either statutory nor classical aggrievement related to telecommunication tower).

The person claiming to be aggrieved has the burden to show it. *Missionary Society of Conn. v. Board of Pardons & Paroles*, 272 Conn. 647, 650 (2005) *cinting Bongiorno Supermarket, Inc. v. Zoning Bd. of Appeals*, 266 Conn. 531 (2003); *Med-Trans of Connecticut, Inc. v. Dept. of Public Health & Addiction Services*, 242 Conn. 152 (1997). See *Klevens v. Deep Rivers Planning & Zoning Commission*¸ 07-CBAR-2323 (Sept. 7, 2007), 2007 Conn. Super. LEXIS 2419 (Sept. 14, 2007). Mere speculation about damage or harm will not suffice to show aggrievement. *Goldfisher v. Connecticut Siting Council*, 95 Conn. App. 193, 199 (2006). Mere disappointment or a disadvantage attributed to competition does not automatically satisfy aggrievement as a legally protected interest. *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 127 (1993).

PRACTICE TIP 2018: In administrative appeals and civil trial practice alike, the burden to plead and prove that the subject matter jurisdiction is on the party seeking to invoke the powers of the court. *Lawrence v. Department of Energy and Environmental Protection*, 178 Conn. 615 (2017).

As to statutory aggrievement, the party seeking review relies on a statutory enactment establishing a class of person or entities that can seek judicial review. *Albuquerque v. State Employees Retirement Commission*, 124 Conn. App. 86, 873 cert. denied 299 Conn. 924 (2011). Such a person must establish that their interests are within the zone of interest protected by the statutory enactment. *New England Cable TV Association v. Dept. of Public Utilities Control*, 247 Conn. 95, 105-106 (1998); *Freese v. Department of Social Services*, 176 Conn. App. 64, 76 (2017). An agency regulation is insufficient to meet the statutory requirement. *Id.*at p. 80.

Classical aggrievement is not dependent upon legislative enactment. Judicial gloss has established that the appealing party "must allege a legally protected interest" that is "concrete and actual, not merely a hypothetical" *ABC, LLC v. State Ethics Commission*, 264 Conn. 812 (2003) *quoting New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospital & Health Care*, 226 Conn. 105, 127 (1993). Judicial gloss also requires, at a minimum, the person taking the appeal must plead the adversity or injury related to an adverse decision from which that party is challenging in the appeal to the trial court. *Water Pollution Control Authority v. Keeney*, 234 Conn. 488, 493-494 (1995).

In addition to the statutory and classic aggrievement, subsection (a) of Conn. Gen. Stat. § 4-183 also has an aggrievement requirement. An appeal to a trial court without a controversy will be dismissed for lack of subject matter jurisdiction as administrative appeals cannot be used as an avenue for merely advisory opinions. *Wallingford v. Dept. of Public Health*, 262 Conn. 758, 767 (2003).

The time to think about aggreivement is at the agency hearing level to ensure that the factual predicates to establish aggreivement are on the record. Failure to do so may be fatal to a

subsequent administrative appeal. *Goldfisher v. Connecticut Siting Council*, 95 Conn. App. 193, 199 (2006). However, Conn. Gen. Stat. § 4-183(i), if additional evidence is required to show aggrievement, a reviewing trial court may take additional evidence. The factual predicates must be personal to the person attempting to bring the appeal and that person's interest must be the one adversely affected by the agency decision from which the appeal is being taken. *Weihing v. Dodsworty*, 100 Conn. App. 29 (2007).

If procedural irregularities are part of the aggreivement on appeal, prejudice must be proven by the person raising it. *Beecher v. State Electrical Work Examining Board*, 104 Conn. App. 655 (2007), *appeal denied* 285 Conn. 920 (2008); *Tele Tech of Connecticut Corp. v. Department of Public Utility Control*, 270 Conn. 778 (2004). Also, under Conn. Gen. Stat. § 4-183(i), a court may take additional evidence to show those irregularities, if such evidence is not already within the Return of Record.

PRACTICE TIP: In *Isabella D. v. Department of Children and Families*, 320 Conn 215 (2016), the agency hearing officer reversed an agency decision to place an alleged perpetrator's name from the agency's abuse and neglect registry. The final agency decision was not adverse to the alleged perpetrator. The victim of the alleged abuse filed an appeal. The trial court dismissed for lack of aggrievement and, therefore, lack of standing. The Supreme Court affirmed, in part, because the alleged victim was not a party below and had other administrative proceedings design to protect her from abuse. Placement of the alleged perpetrator's name on the abuse and neglect registry was not one of them.

PRACTICE TIP: In *Burton v. Freedom of Information Commission*, 161 Conn. App. 654 (2015) *cert. denied*, 321 Conn. 901 (2016), the agency (FOIC) declined to impose a civil penalty on the Commissioner of Energy and Environmental Protection for failing to respond in a timely manner to a petition for records. The petitioner filed an appeal seeking to reverse the FOIC agency decision. The trial court dismissed for lack of aggrievement and standing. The petitioner appealed. The Appellate Court affirmed. The Court found both classic and statutory aggrievement lacking. Further, the Appellate Court declined to follow federal precedent in determining aggrievement where no State statutory right to challenge the Commission's decision.

E. STAYING THE FINAL ACTION PENDING APPEAL

Even with an adverse decision in hand, a practitioner still has the opportunity to hold off an adverse impact. Subsection (f) of Conn. Gen. Stat. § 4-183 provides:

> The filing of an appeal shall not, of itself, stay enforcement of an agency decision. An application for a stay may be made to the agency, to the court or to both. Filing of an application with the agency shall not preclude action by the court. A stay, if granted, shall be on appropriate terms.

By the terms of the statute, an application for a stay can be filed with the agency that issued the final decision, the court, or both. A practitioner will find this is another example of overlap and blending together of common law civil procedure and administrative law under the UAPA. See also *Caruso v. City of Bridgeport*, 284 Conn. 793 (2007).

Perhaps first most, merely filing an appeal does not stay enforcement of a final agency decision. *Bittle v. Commissioner of Social Services*, 48 Conn. App. 711, *affirmed* 245 Conn. 922 (1998), *reversed* 249 Conn. 503 (1999); *Bauer v. Waste Management of Conn., Inc.*, 239 Conn. 515 (1996).

The practitioner must (1) assess the options of filing an application for stay in the agency, the court, or both and (2) what terms might be appropriate. A particular point of concern may be that the agency has already rendered an adverse decision. Where the legislature has established an area of cognizance for the agency, e.g., consumer protection, and the agency of cognizance has already reached a final decision after an opportunity to be heard, crafting an application must address the factual basis of adverse action against the individual as well as the benefits or harm avoidance that is the target of the adverse ruling.

PRACTICE TIP 2018: As to an application to the court, see Section VII below as to the standing orders of the Administrative Appeals and Tax Session. The Standing Order of the Honorable Judge Huddleston, Presiding Judge, informs counsel that Administrative Appeals and Tax Session will employ the standards articulated in *Griffin v. Commission on Hospitals & Health Care*, 196 Conn. 451, 458-59 (1985) when evaluating a motion for stay. The Court expects counsel to confer and determine the status of opposition and to communicate the same to the Court, if an expedited decision is being sought.

PRACTICE TIP 2018: Applications to the Administrative Appeals and Tax Session for stays in appeals by a person for a motion to stay of his/her motor vehicle operator's license suspension by the Commissioner of Motor Vehicles pursuant to Section 14-227b, a separate Standing Order has been issued by Judge Huddleston. In addition to the *Griffin* standard, the Standing Order sets out five specific points be addressed, including the applicants driving history and the notification to the Attorney General. Again see the Standing Order for details. Further, in the driver's license context, an application for a stay can only be filed the court has assigned a docket number. Also counsel should know that, unlike other appeals or motions, the Standing Order requires that the plaintiff (i.e., the person seeking to continue to drive) must personally appear at the oral argument when the court considers the application. Again, as noted above, a stay directly thwarts the safe drivers goal and may exposes other drivers and property owners to the very harms that a suspension prevents. A practitioner must be prepared to anticipate that appropriate terms and will likely need to crafted accordingly.

As to an application to an agency for a stay of an adverse decision, the UAPA does not contain a standard. The applicable standard is found in common law traditions and the agency's Rules of Practice, if applicable to this issue. See again *Griffin v. Commission on Hospitals & Health Care*, 196 Conn. 451, 458-59 (1985). Common law uses a balancing of equities standard. *Waterbury Teachers' Association v. Freedom of Information Commission*, 230 Conn. 441 (1994); *Griffin Hospital v. Commission on Hospital and Health Care*, 196 Conn. 451 (1985) *same case* 200 Conn. 489 (1986).

The denial of an application to stay the enforcement of pending the outcome of an administrative appeal is not a final judgment from which an appeal may be taken. *Waterbury Teachers Assn. v. Freedom of Information Commission*, 230 Conn. 441, 451 (1994).

F. CAPABLE OF REPETITION, YET EVADING REVIEW

Just when you thought, this paper might come down to earth, comes an exception to the doctrine of finality. Generally when the reviewing court can no longer grant any practical relief in an administrative appeal, the subject matter jurisdiction over the appeal evaporates. *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 904, 84 (2008) *Windels v. Environmental Protection Commission*, 284 Conn. 268, 279 (2007); *Jewett v. Jewett*, 265 Conn. 669 (2003); *In re Romance M.*, 229 Conn. 345, 357 (1994). Where an appeal has for any reason become moot (e.g., expiration of the order on appeal or death of the licensee), the requirement for a real case and controversy to continue jurisdiction may give way to the exception based on the doctrine of "capable of repetition, yet evading review. *Department of Public Safety v. Freedom of Information Commission*, 103 Conn. App. 571, *appeal denied* 284 Conn. 930 (2007); *Town of Wallingford v. Dept. of Public Health*, 262 Conn. 758 (2003); *Loisel v. Rowe*, 233 Conn. 370, 388 (1995); *Karp v. New Britain*, 57 Conn. App. 312 (2000).

If you appeal does not fit within the "capable of repetition, but evading review" exception, and practical relief is no longer a viable remedy as to the merits, the case and controversy evaporates and dismissal is mandated based on the matter being moot. *In re Claudia F.*, 93 Conn. App. 343 (2006); *In re Candace*, 259 Conn. 523 (2002).

G. A REMAND MAY BE APPEALABLE

Conn. Gen. Stat. § 4-1183(h) provides for the trial court to issue an order of remand.

> If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

Once a matter is set for a hearing date before the trial court, one would presume that an application for a remand back to the agency would be barred.

PRACTICE TIP 2018: A remand "does not vitiate the department's original decision, but instead permits [it] to consider new evidence and to modify its decision as necessary. Thus, a remand under § 4-183(h) does not offer the parties an opportunity to re-litigate the case *ab initio*, but rather represents a continuation of the original agency proceeding." *Clark v. Commissioner of Motor Vehicles*, 183 Conn. App. 426, 442 (2018) quoting *Salmon v. Dept. of Public Health & Addiction Services*, 259 Conn. 288, 315 (2002). The general rule is that a remand is not a final judgment. The general rule is not absolute.

One case has been cited as the "landmark case in the refinement of final judgment jurisprudence." *Shay v. Rossi*, 253 Conn. 134, 165-166 (2000). See also *Wells Fargo Bank of*

Minnesota, N.A. v. Jones, 85 Conn. App. 120, 124 (2004). That case is *State v. Curcio*, 191 Conn. 27, 30 (1983). The *Curcio* standard has a two part test. First, if the remand "terminates a separate and distinct proceeding," it is deemed a final judgment for the purpose of appellate review. The second possibility is if the remand so concludes a right of a party such that further proceedings cannot affect them, then it is again deemed a reviewable final judgment. *Curcio*, 191 Conn. at 31. Although *Curcio* involved a criminal matter, the statutory analysis is applicable to the UAPA cases in so much as administrative appeals are creatures of statutes, including Conn. Gen. Stat. §§ 4-184 (right of review), 51-197b (administrative appeals and exceptions) and 52-263 (final judgments).

The *Curcio* standard lives on. See *Tilcon Connecticut, Inc. v. Commissioner of Environmental Protection*, 317 Conn. 628, 647 (2015); *Abreu v. Leone*, 291 Conn. 332, 338 (2009); *Hogan v. Dept. of Children & Families*, 290 Conn. 545, 558 (2009).

PRACTICE TIP 2018: A remand by the trial court back to an agency can be used by the trial court to render a split decision. In *Montville Police Department v. Freedom of Information Commission*, 2018 WL 1056308 (February 1, 2018; Huddleston, J., Administrative Appeals Session and Tax Session; Judicial District of New Britain), the trial court dismissed as to three parts of an appeal, but remanded the matter back to the agency to render a decision as to a fourth part of the original appeal.

See Section IV.D.2 below on remands to take additional evidence or otherwise supplement the record below in light of the substantial evidence rule.

H. PRE-TRIAL CONFERENCE

The UAPA is silent on the use of pre-trial conferences in administrative appeals. Given that an administrative appeal is a civil action, that procedure is available to the trial court. See Conn. Prac. Bk. Sections 14-11 to 14-14. While presiding over the Administrative Appeals and Tax Session, the Honorable George Levine introduced the concept to parallel its use in general civil matters pending in the Superior Court. The practice has continued.

The conference offers the parties an opportunity to avoid the inherent delay in process that is preparing an appeal to be heard by the trial court. Finality can be advanced by settlement. Like many civil actions, settlement, if accomplished early in the life an appeal, can avoid the expense associated with pursuing an appellate review. Not all appeals are afforded pre-trail conferences, e.g., contested cases regarding Department of Motor Vehicle license suspensions are not (2011).[48] Appeals that are not settled are issued scheduling orders and proceed toward Court review as has long been the practice.

Again, the “return of record” in an administrative appeal is limited to the record of the agency level proceeding and nothing more. Preparing for pre-trial settlement conferences actually starts with the building of the “return of record” (yes, at the beginning, the practitioner must look to the end) as the evidence of record should be the strength of a party’s push for a settlement. Note that a party should not sit back and take a lax strategy at the agency level as to

[48] See Judicial Website at ”jud.ct.gov/external/super/Standorders/MV_AdminAppeal_0110” for “Standing Order on Temporary Postponements (Stays) of Motor Vehicle license suspensions of Motor Vehicle license suspensions appeals.”

compiling the “return of record” and hope and pray for a better deal in settlement at a pre-trial settlement conference in the Superior Court.

I. MOOTNESS: THE END OR NOT?

The existence of a controversy is an essential element of maintaining an administrative appeal from the very initial assessment through and including the rendering of a final judgment by the final appellate review. *Commissioner of Correction v. Freedom of Information Commission*, 129 Conn. App. 425, 428 (2011), *cert. denied* (2012)(statutory amendment precluded remedy sought). See *Department of Public Safety v. Freedom of Information Commission*, 103 Conn. App. 571, *cert. denied* 284 Conn. 930 (2007)(mootness, regardless of when it occurs, creates a want of subject matter jurisdiction at the agency level and during pendency of appellate review). See also *Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission*, 240 Conn. 1 (1997).

VII. ADMINISTRATIVE APPEALS AND TAX SESSION

For the most current assessment, consult the Judicial Department website at:

https://jud.ct.gov/external/super/Standorders/civil/tax/ . Please review this web page.

The Honorable Patrick L. Carroll, III, Chief Court Administrator, appointed the Honorable Shelia A. Huddleston, Judge of the Superior Court, to serve as the Presiding Judge of Administrative Appeals and Tax Session of the Superior Court. Judge Carroll empowered Judge Huddleston to order the transfer of all appeals from state agencies in contested cases to the Administrative and Tax Session from where ever they are filed to the Judicial District of New Britain where the Session is seated. Judge Huddleston has so ordered, except in accordance with the limitation that appeals for unemployment compensation appeals from the Security Review Board will be heard in the District Court where filed. The general rule is followed, except on rare instances when an administrative appeal retained or sent back to the judicial district where it was filed. Exceptions to the rule still exist.

Judge Huddleston does not hear all appeals. Practitioners can anticipate that other judges and judge trial referees may handle appeals and convene Pre-Trial Conferences. Most appeals are head in the Judicial District of New Britain. On occasion, appeals may be heard in other districts, but that is the exception, not the rule.

As to the Administrative Appeals and Tax Session, Judge Huddleston also waived the requirement that parties file a "Request for Action" form with a motion. Unless the Court orders otherwise, all responses to motions must be filed within thirty days. Reply briefs are limited to ten pages and may be filed as a matter of right within fourteen days. Oral arguments are governed by Practice Book section 11-18(a).

PRACTICE TIP 2018: Judge Huddleston further ordered that the failure to file a brief in opposition, "any right to a hearing will be considered to be waived and the court may act on the motion immediately." Planning to no action prior to oral argument is ill-advised. The court has put practitioners on notice that the court does not favor in learning about your client's position in opposition in the first instance at oral arguement.

VIII. CONCLUSION

Administrative Law continues to be a vibrant and dynamic area of practice. While the members of the Witan protesting the King's abuse of power in 1215 could not have envisioned the practice of law under the UAPA in America, let alone in the State of Connecticut, the survival of the basic tenants of the *Magna Carta*, including the balance of power between the government and those governed, continue to garner constant attention and refinements, albeit now with more clearly standards as defined legislative, judicial gloss and executive branch subdivisions of governance procedures that have strengthen the Rule of Law. The power of fact finding and the application of a Rule of Law cannot be understated. Access to an impartial arbiter with a fundamentally fair opportunity to be heard is essential to balancing power between those governing and those being governed.

It is an ever changing pursuit of a lofty public policy that, by its nature, requires each generation of citizens to engage and determine their own tolerance for the Rule of Law and the interaction of those governing and those being governed. The principle of fundamental fairness continues to warrant the attention as the benefits and costs of such administrative decision are shared among us as are the costs of civil procedures used to resolve differences among us.

Both governmental and private sector practitioners are well advised to preserve and protect the procedural differences in the two settings. Historically, administrative law was driven by a degree of cost effectiveness and expeditiousness, albeit with assurances that each administrative proceeding, no matter how unique and different than the next, resulted in a "fundamentally fair" proceeding with a result that was lawful. Judicial proceedings were perceived as resting on higher costs and expenses as were then associated with technical pleadings and plagued by an equal need for consistencies and fairness. Save some arbitrations and mediation activities, the judiciary has not adopted the informalities of administrative law. In the context of practicing in the UAPA world of "contested cases," perhaps it is inevitable that the executive branch and its adjudicatory function will drift toward the next closest functional component of government, i.e., civil trial adjudications within the judicial branch.

Insomuch as many agencies have begun to act more like trial courts, the traditional distinctions between administrative law practice and trial practices have begun to blur and fade. Should administrative law loose its slightly more informal and cost effective characteristics, perhaps a future generation may push the pendulum back in that direction.

At least for the foreseeable future, many important differences still exist. The practitioner who engages in both areas of practice will continue to find considerable similarities on one hand and, on the other hand, will still encounter significant differences that can require different skills and strategies. Whether administrative law will continue to be a unique practice area apart from trial practice or whether the evolution of the less formal and relaxed standards enjoyed by administrative law practice will eventually yield to demands of common law as implemented through our judiciary remains an open question. Only time will tell.

Administrative law practitioners and civil trial practice lawyers alike are well advised to stay current in both area of practice. Triers of fact and adjudicators are also well advised to appreciate the subtle distinctions when managing administrative hearings.

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Some Practical Suggestions for Practicing Before Administrative Agencies[1]

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1. While there are some Tips to practicing before administrative agencies, and there probably are some Pitfalls, despite the title to this program, THERE ARE NO TRICKS.[2]

    a. What allows a practitioner to be successful in practicing before administrative agencies are the same qualities which promote success in other areas of practice: planning, preparation, reasonableness, and effective advocacy (which results from planning, preparation, and reasonableness).

2. Assume that you are dealing with an expert.

    a. Administrative agencies deal with specific areas of law, e.g. environmental law, labor law, tax law, banking law, and many others.
    b. The persons who staff administrative agencies, whether they are lawyers or not, develop expertise in the areas in which they work. They probably know more about the area than you do.
    c. Accept this; and, of course, always prepare.

3. Realize that the agency has an agenda (mission) of its own.

    a. Whether it is protecting nursing home residents, ensuring that employees are paid in accordance with wage and hour laws, keeping the air clean, enforcing banking laws, or something else, agencies have their own agenda, probably dictated by law.
    b. Agencies operate within statutory and regulatory constraints.
    c. You need to show the agency a way to let your client do what your client wants to do without violating the agency's legal obligations.

4. Seek advice before there is a problem.

    a. Agency personnel are experts, and they have seen a lot.
    b. If your client is having a problem, the agency may have dealt with it before.
    c. Many agency officials want to help.
    d. Do not be reluctant to make a call to ask a question, gain some advice, before there is a problem.
    e. Even where your relationship has been adversarial in other matters, you may be able

[1] The observations of agencies and agency practice in this outline were developed during my 35 plus years in private practice before beginning work as a lawyer with the Connecticut Department of Education.

[2] This outline was originally used for a program entitled "What Every Administrative Law and Land Use Attorney Should Know: Tips, Tricks, and Pitfalls."

to get advice to avoid a problem.

f. You will be best able to do this if you have treated the agency personnel in a professional and respectful manner.

5. Work hard to earn the professional respect of agency personnel.

   a. You start this by showing some respect for the agency and its responsibilities. Remember, the agency has its own agenda, probably set out in the law.
   b. Be well prepared for meetings, conferences, etc. People who staff the agencies are busy, and you are wasting their time, as well as your own, when you are not prepared.
   c. Argue your client's position vigorously, but respectfully.
   d. Put your client's case in the best light possible, but do not mislead the agency.
   e. You want the agency to feel it can rely on what you say.

6. If your client is in the wrong, be ready to show corrective action.

   a. All agencies have some law enforcement responsibilities, and sometimes your client has made some mistakes.
   b. Be ready to show the agency why whatever your client did, or did not do, will not be repeated.
   c. Having your client engage in training, develop new policies and procedures, etc. to show that there will not be problems in the future.
   d. If your client has made mistakes, try to get the focus to be on the future.
   e. You may be able to do this without admitting a violation of law.

7. Make the effort to resolve the case at the earliest time.

   a. You may get called in to a matter during the investigatory process.
   b. Spending the time to provide information, addressing legal issues, getting an expert involved during the investigation, while possibly expensive, can be cheaper than defending charges after the investigation.

8. Let the Agency Get to Know Your Client.

   a. Ok, you have to use some judgment here, but in many cases this can be a good idea.
   b. If the agency is seeking to do something to your client that is not good, it is helpful to show the agency that your client is a real person.
   c. You want the agency to know that your client is trying to do the right thing, or competent to do what he/she wants to do, or sorry for what he did, or willing to take corrective action, etc.

9. If you going to have a contested case hearing before an agency hearing officer,

prepare for the hearing as you would a trial in the Superior Court.

a. Yes, the rules of evidence are relaxed, but the rest of the process is similar to a Court trial.
b. You have to examine witnesses, and your witnesses are subject to cross examination. This requires preparation.
c. Also, while "any oral or documentary evidence may be received," the agency can exclude "irrelevant, immaterial, or unduly repetitious evidence." CGS 4-178 (1)
d. Read the UAPA contested case provisions.
e. The agency will have procedural rules which may contain provisions in addition to those in the UAPA. You should always read the agency's rules of practice.
f. If you are defending against a statement of charges, read all the agency regulations which cover the subject matter, not just those cited in the statement of charges. The agency lawyer or assistant attorney general will know what the other regulations say, and you will want to know also.
g. Consider the need for affirmative defenses.
h. The agency lawyer will be knowledgeable as to the agency procedure and the substantive law. Take this into consideration.

10. Remember that the grounds for appeal of an agency decision are fairly narrow. You usually win or lose based on the agency decision.

"CONTESTED CASE" HEARINGS UNDER THE UNIFORM ADMINISTRATIVE PROCEDURE ACT

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These materials provide a general discussion of the law relative to the subject areas presented. The subject matter and speaker comments are presented for educational purposes only. They are not intended to provide legal advice in any particular situation. Any ideas or opinions expressed in this outline or during the presentation are solely those of the author and not those of the Connecticut Department of Education or the State of Connecticut generally.

I. Contested Case Hearings under the Uniform Administrative Procedure Act (UAPA) [1]

When representing a client in a "contested case" hearing under the UAPA it is necessary to consult both the UAPA provisions addressing contested cases and the rules of practice of the agency involved. The UAPA defines what type of proceeding is a contested case and sets forth various requirements for contested case hearings. This outline is based largely on the applicable provisions of the UAPA.

Agency Hearings. Except as otherwise required by the general statutes, a hearing in an agency proceeding may be held before (1) one or more hearing officers, provided no individual who has personally carried out the function of an investigator in a contested case may serve as a hearing officer in that case, or (2) one or more of the members of the agency. C.G.S. Section 4-176e.

A. **What is a Contested Case?** The term "contested case" is defined in the UAPA in Section 4-166(4) as follows:

> "Contested case" means a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but does not include proceedings on a petition for a declaratory ruling under section 4-176, hearings referred to in section 4-168 or hearings conducted by the Department of Correction or the Board of Pardons and Paroles . . . .

1. It is essential that the opportunity for a hearing be "required" by a state statute or regulation. If it is not so required, the proceeding is not a contested case.

2. A "final decision" in a contested case may be appealed to the Superior Court under section 4-183 of the UAPA.

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[1] The author of this outline is currently an attorney with the Connecticut Department of Education, a Connecticut state agency. However, I spent over 35 years in private practice before becoming employed by the State of Connecticut. This outline was initially prepared while I was in private practice, although it has been updated for this presentation. In private practice I appeared before numerous state and federal agencies, including handling many matters with the Department of Public Health and the Department of Social Services.

B. **Contested cases. Notice. Record.** Section 4-177 sets forth the notice requirements for a contested case and what constitutes the record in a contested case. "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Conn. Gen. Stat. § 4-177(a).

1. **Notice.** Section 4-177(b) provides:

The notice shall be in writing and shall include:

a. A statement of the time, place, and nature of the hearing;

b. A statement of the legal authority and jurisdiction under which the hearing is to be held;

c. A reference to the particular sections of the statutes and regulations involved; and

d. A short and plain statement of the matters asserted. If the agency or party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

e. Practice Suggestion: Section 4-177(b)(4) provides that a party may request in appropriate circumstances a more definite and detailed statement of the matters asserted. Given the limited discovery in administrative proceedings, this can be a very valuable tool.

f. For a discussion of the relationship between sections 4-177(b) and 4-182(c) (discussed below), *see Jones v. Connecticut Medical Examining Board,* 129 Conn. App. 575 (2011) *aff'd* 309 Conn 727 (2013). *See also Financial Consulting LLC v. Commissioner of Insurance,* 315 Conn. 196 (2014).

2. **The Record.** Section 4-177(d) provides that the record in a contested case shall include: (1) Written notices related to the case; (2) all petitions, pleadings, motions and intermediate rulings; (3) evidence received or considered; (4) questions and offers of proof, objections and rulings thereon; (5) the official transcript, if any, of proceedings relating to the case, or, if not transcribed, any recording or stenographic record of the proceedings; (6) proposed final decisions and exceptions thereto; and (7) the final decision.

a. An appeal of a "final decision" is confined to the agency record in the case. Except with respect to facts necessary to establish aggrievement or procedural irregularities which are not shown in the record, testimony is not taken in court. Conn. Gen. Stat. § 4-183(i).

b. Any issue which you may want to argue on appeal, and any evidence in support of your position, must be included in the record as defined above.

c. A case worth reading on protecting the record for an appeal is *Towbin v. Board of Examiners of Psychologists*, 71 Conn. App. 153 (2002). In this case the Appellate Court declined to review a plaintiff's claim that the delay between the time of the improper conduct and the administrative proceeding violated his constitutional right to due process and to fundamental fairness. The plaintiff had asserted his timeliness claim in special defenses to the Board's charges. However, the plaintiff apparently did not present evidence on the issue of timeliness, delay or prejudice. He did not raise his special defenses in his brief or oral argument in response to the Board's proposed decision. The Board's decision contained no factual findings relevant to the plaintiff s claim. Therefore, the Appellate Court concluded that the record was inadequate for its review. Note that the Superior Court had addressed this claim.

C. **Contested cases. Party, Intervenor status.** In a contested case the presiding officer may grant a person party or intervenor status. Conn. Gen. Stat. § 4-177a. In either case the person seeking status must submit a written petition to the agency and mail copies to all parties at least five days before the date of the hearing.

1. The five-day requirement may be waived at any time before or after commencement of the hearing by the presiding officer on a showing of good cause. Id. § (c).

2. **Party Status.** To obtain party status the petition must state "facts that demonstrate that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency's decision in the contested case." Id. § (a) (2). *See* C.G.S. § 4-166(10) (definition of party).

3. **Intervenor Status.** To obtain intervenor status the petition must state "facts that demonstrate that the petitioner's participation is

in the interests of justice and will not impair the orderly conduct of the proceedings." Id. § (b) (2). *See* C.G.S. § 4-166(7) (definition of intervenor).

4. In the case of an intervenor, "the presiding officer may limit the intervenor's participation to designated issues in which the intervenor has a particular interest as demonstrated by the petition and shall define the intervenor's rights to inspect and copy records, physical evidence, papers and documents, to introduce evidence, and to argue and cross-examine on those issues. . . ." Id. § (d).

5. The particular agency may have a regulation which implements the process for obtaining party or intervenor status. This regulation should also be reviewed.

   a. *See, e.g.* Reg. Conn. State Agencies (RCSA) § 10-4-15, (State Board of Education Regulation – Parties and Intervenor).

6. **Practice Suggestion**: Although the time frame is short, if you already represent a party before the agency you may want to challenge another person's petition for party or intervenor status and in the case of an intervenor, the extent of participation permitted by the agency.

D. Contested cases. Presiding officer. Subpoenas and production of documents. In a contested case under the UAPA, the presiding officer may administer oaths, take testimony under oath relative to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing held in the case. Conn. Gen. Stat. § 4-177b.

1. If any person disobeys a subpoena or refuses to answer any question put to him or to produce any records, physical evidence, papers or documents requested by the presiding officer, the agency may apply to the superior court or to any judge if the court is not in session, setting forth the disobedience to the subpoena or refusal to answer or produce. The court or judge shall cite the person to appear before the court or judge to show cause why the records, physical evidence, papers or documents should not be produced or why a question should not be answered. Id.

2. Attorneys can also issue subpoenas to compel the attendance of witnesses and subpoenas *duces tecum* in administrative proceedings. An attorney may make application to the

Superior Court for an order compelling compliance if a person subpoenaed refuses to appear or to answer a question. Conn. Gen. Stat. § 51-85.

3. While an attorney for a party may issue a subpoena for a witness or documents, in some instances it may be better for the presiding officer to do so.

E. Contested cases. Documents. Evidence. Arguments. Statements. (a) Each party and the agency conducting a contested case shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by law and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved. Conn. Gen. Stat. § 4- 177c (a).

1. Persons not named as parties or intervenors may, in the discretion of the presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation. Id. § (b).

2. Section 4-177c should be taken seriously by a respondent if the agency makes a request pursuant to this section. In Carbone v. Connecticut Medical Examining Board, 2007 Conn. Super. LEXIS 1847, 2007 WL 2245025 (July 13, 2007), the respondent sought to play a portion of an audiotape for the purpose of impeaching a DPH witness. The DPH attorney objected on the ground that the audiotape was not disclosed prior to the hearing as required by the DPH discovery request pursuant to section 4-177c. The Board sustained this objection. The respondent, on appeal, claimed that his due process rights were violated because the Board restricted his cross- examination of this witness.

   The court determined that it was unnecessary to rule on this issue, because the respondent was not materially prejudiced by the ruling. However, the fact that the DPH objected on this basis, and the Board sustained the objection, is worth noting. Also worth noting is the Board's statement that the respondent had the opportunity to cure any procedural defect by, *inter alia*, disclosing the transcript to the DPH at some point during the five months between hearing dates, so as to obviate the Board's ruling on discovery grounds, but failed to do so.

3. Documents can also be obtained prior or during a contested case proceeding through a request pursuant to the Freedom of Information Act. Conn. Gen. Stat. § 1-200 et seq.

F. **Contested cases. Evidence.** Section 4-178 sets forth the UAPA's rules with respect to evidence.

1. The general rule: "Any oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . . ." Conn. Gen. Stat. § 4-178(1).

a. Administrative agencies are not strictly bound by the rules of evidence and may consider evidence that would be incompetent in a judicial proceeding so long as the evidence is reliable and probative. *See Casella v. Civil Service Commission,* 4 Conn. App. 359, 362 (1985), *aff'd* 202 Conn. 28 *quoting Lawrence v. Kozlowski,* 171 Conn. 705, 710 (1976), *cert. denied* 431 U.S. 969 (1997). This means that hearsay and other evidence which may not be admissible in court will usually be allowed.

b. In *Jutkowitz v. Department of Health Services,* 220 Conn. 86, 108-109 (1991) (internal quotation marks and page references removed) the Supreme Court stated:

"We note first that administrative tribunals are not strictly bound by the rules of evidence and that they may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative. *Lawrence v. Kozlowski,* 171 Conn. 705, 710, 372 A.2d 110, cert. denied, 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *Balch Pontiac–Buick, Inc. v. Commissioner of Motor Vehicles,* 165 Conn. 559, 570, 345 A.2d 520 (1973). There is moreover no specific prohibition against hearsay evidence in the Uniform Administrative Procedure Act, which provides that '[a]ny oral or documentary evidence may be received, but [that] the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. General Statutes § 4–178(1)." *Tomlin v. Personnel Appeal Board,* 177 Conn. 344, 348, 416 A.2d 1205 (1979)."

c. Practice suggestion: The important issue in an

administrative proceeding is not whether the evidence is hearsay, but whether the evidence is reliable and probative and the weight to be given to the testimony or other evidence.

d. Your objection should focus on the reliability of the evidence, not only that it is hearsay. Object on this basis and protect the record for appeal.

e. In *Do v. Commissioner of Motor Vehicles*, 164 Conn App. 616, *cert. granted* 322 Conn. 901 (2016) the Appellate Court held that the Superior Court had improperly held that a DMV hearing officer did not abuse his discretion in admitting an unreliable A-44 form used by police to report an arrest related to operating under the influence. The Appellate Court noted that fundamental fairness requires the admission of only reliable evidence.

1. Remember, an agency decision must still be supported by "substantial evidence." Conn. Gen. Stat. 4-183(j)(5).

2. Privilege. The UAPA requires that "agencies shall give effect to the rules of privilege recognized by law. . . ." C.G.S. § 4-178 (2).

3. Written testimony. The UAPA provides that when a hearing will be expedited and the interest of the parties will not be substantially prejudiced, any part of the evidence may be received in written form. Id. § (3).

a. Some agencies require testimony to be submitted in advance of the hearing. The witness must then be produced at the hearing to adopt the written testimony under oath and to be subject to cross examination.

1. The failure to produce the author of a statement to adopt the statement under oath or to be cross-examined can result in the testimony being stricken.

b. The right to cross-examine witnesses for a full and true disclosure for the facts is protected by the UAPA. Id. § (5). *See also* 4-177c (a)(2).

4. Documents. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. However, upon request, parties and the agency shall be given an opportunity to compare the copy with the original. C.G.S. § 4-178 (4). In Villa v. Department of Motor Vehicles, 1990 Conn. Super. LEXIS 29, 1990 WL 283984 (1990), the Superior Court held that allowing a State Trooper's report into evidence without, at the very least, having the original available for plaintiff s counsel to examine and from which to cross-examine was error and did substantially prejudice the rights of the plaintiff.

5. Prior to being introduced into evidence most writings must be authenticated. For an interesting case on the authentication of text messages in a Department of Children and Families case in which DCF substantiated claims of child sex abuse see *Gagliardi v. Commissioner of Children and Families,* 155 Conn. App. 610 (2015).

6. Official Notice. "[N]otice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge . . . ." C.G.S. § 4-178 (6). The UAPA provides that "parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed . . . ." Id. § (7).

a. While agencies are entitled to take notice of facts: "Agency members are prohibited from relying on non-record material facts about a dispute before them, such as facts learned from first-hand investigation of case-specific details, without giving the parties before them the opportunity to rebut such evidence." Wasfi v. Department of Public Health, 60 Conn. App. 775, 782 (2000), *cert denied* 255 Conn. 932 (2001). However, as noted below, an agency's "experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence." Conn. Gen. Stat. C.C.S. § 4-178(8) (discussed below).

b. The *Wasfi* case is a very helpful case to read when considering C.G.S. § 4-178 (6), (7), and (8).

c. Practice suggestion: It may be useful to file in advance of the hearing a written request to be notified of any material of which the agency intends to take notice.

This may allow for the opportunity to properly review material which is to be noticed and to contest the material if appropriate.

d. Evaluation of evidence. The agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence. Conn. Gen. Stat. § 4-178(8).

e. In a licensing case: "As long as the board hearing and deciding a licensing matter is composed of at least a majority of experts in the field involved in the case, the board may rely on its own expertise in evaluating charges against persons licensed by the board and the requisite standard of care by which to judge such cases." *Levinson v. Bd. of Chiropractic Examiners,* 211 Conn. 508, 525 (1989). Thus, in such a situation, expert testimony is not required.

f. Whether § 4-178(7) or 4-178(8) may govern in a particular situation may not always be clear. "[T]he difference between an administrative tribunal 's use of non-record information included in its expert knowledge, as a substitute for evidence or notice, and its application of its background in evaluating and drawing conclusions from the evidence that is in the record, is primarily a difference of degree rather than of kind." *Wasfi v. Department of Public Health,* 60 Conn. App. at 683, *quoting Levinson v. Board of Chiropractic Examiners,* 532 (1989) (internal quotation marks omitted).

G. Review of Preliminary, Procedural or Evidentiary Rulings. Section 4-178a provides that if a hearing in either a contested case or a declaratory ruling proceeding is held before a hearing officer or before less than a majority of the members of the agency authorized by law to render a final decision, "a party, if permitted by regulation and before rendition of the final decision, may request a review by a majority of the members of the agency, of any preliminary, procedural or evidentiary ruling made at the hearing. The majority of the members may make an appropriate order, including the reconvening of the hearing." Conn. Gen. Stat. § 4-178a (emphasis added).

H. Proposed Final Decision. The UAPA provides for a proposed final decision in two circumstances.

1. If the majority of the members of the agency who are to render the final decision have not heard the matter or read the record,

the decision, if adverse to a party, cannot be rendered until a proposed final decision is served on the parties, and each party adversely affected has the opportunity to file exceptions and present briefs and oral argument to the members of the agency who are to render the final decision. Conn. Gen. Stat. § 4-179(a).

2. Except when authorized by law to render a final decision for an agency, a hearing officer shall, after hearing a matter, make a proposed final decision. Id. § (c).

3. A proposed final decision must be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its findings. Id. § (b)

4. This is obviously a very important provision where the proposal for decision is adverse to a party.

5. Through exceptions and a brief and oral argument, a party may be able to persuade the agency that the proposed decision is wrong.

6. This is also the opportunity to make sure that any issues are clearly raised before the agency for the purpose of an appeal to the Superior Court. However, keep in mind that the hearing will have been closed at this time, and if an issue required evidence, it will be too late to submit evidence.

I. **Contested cases. Communications by or to Hearing Officers and Members of an Agency.** Section 4-181 sets forth detailed rules relating to individual persons deciding the cases and essentially prohibits *ex parte* communications except as set forth below.

1. Unless required for the disposition of ex parte matters authorized by law, in a contested case, no hearing officer or agency member who is to render a final decision or to make a proposed final decision shall communicate directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party, or party appointed representative without notice and opportunity for all parties to participate. Conn.

Gen. Stat. § 4-181(a).

2. However, a member of a multimember agency may communicate with other members of the agency regarding a matter pending before the agency and members of the agency or hearing officer may receive the aid and advice of members, employees, or agents of the agency if those members, employees, or agents have not received prohibited communications. Id. § (b).

3. Unless required for the disposition of ex parte matters authorized by law, no party or intervenor in a contested case, no other agency, and no person with a direct or indirect interest in the outcome of the case, shall communicate, directly or indirectly, in connection with any issue in the case, with a hearing officer, any member of the agency, or with any employee or agent of the agency assigned to assist the hearing officer or members of the agency in the case, without notice and opportunity for all parties to participate in the communication. Id. § (c).

4. The above apply from "the date the matter pending before the agency becomes a contested case to and including the effective date of the final decision." Id. § (d). Except as may otherwise be provided by regulation, "each contested case shall be deemed to have commenced on the date designated by the agency for that case, but in no event later than the date of the hearing." Id.

5. Once a violation of § 4-181 has been proved by the party seeking relief, "the burden shifts to the agency to prove that no prejudice has resulted from the prohibited ex parte communication." *Henderson v. Department of Motor Vehicles*, 202 Conn, 453, 460 (1987). However, a party who becomes aware of an ex parte communication may waive a claim based on the ex parte communication by failing to raise it in a timely manner. Also, at least in a licensing case such as the *Henderson* case, the proper motion is one to disqualify the adjudicator, not to dismiss the proceeding. Id. at 460-61. *See also Villages, LLC v. Enfield Planning and Zoning Commission*, 149

Conn. App. 448 (2014); *Bristol v. Connecticut Medical Examining Board,* 2014 WL 279687 (Sup. Ct. Jan, 2, 2014); *Ryan v. Department of Public Health,* 2004 Conn. Super. LEXIS 1589 (2004).

a. Practice Suggestion: If you become aware of an ex parte communication, act promptly or risk being deemed to have waived the violation of § 4-181.

b. Another Practice Suggestion. Alert your client to the rules about *ex parte* communications when a contested case begins. Your client may have worked with the decision-maker on matters in the past and not realize that *ex parte* communications are improper during the course of a contested case.

c. Trust me on this: It is no fun being in a case with multiple parties and having your client accused of an *ex parte* communication.

J. Matters Involving Licenses. In any matter involving a license, section 4- 182 of the UAPA should be considered. In connection with the potential revocation of a license, subsection (c) is pertinent. This section states:

> No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action and the specific provisions of the general statutes or regulations adopted by the agency that authorize such intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. . . .

Conn. Gen. Stat. § 4-182(c).

1. Section 4-182 (c) was addressed extensively in the case of *Tele Tech of Connecticut Corporation v. Department of Public Utility Control,* 270 Conn. 778 (2004). In *Tele Tech*, the Court determined that the "opportunity to show compliance" provision of this statute represents a "second chance" doctrine which allows a licensee the opportunity to put its house in lawful order before more formal agency proceedings are undertaken. 270 Conn. at 802. To this extent, of course, it is a useful provision for licensees.

2. It is also useful for the agency. We do not want to go forward with cases that should not be brought. Give us a reason why we should not go forward. This is your chance to show the agency why the case should not be brought.

3. **Always take full advantage of this opportunity to resolve the matter without formal proceedings.**

4. This requires preparation. Have a plan.

5. For example, in a licensing case, if the agency is claiming a failure to meet a standard of care, and you dispute this, this is a good time to present an opinion from your own expert (if you have one). It is better to have the agency personnel decide not to bring a case based on your evidence before proceedings begin than to win after the hearing.

6. Occasionally you may want to submit a witness statement if there are witnesses that support your position on factual issues and you think this may help dissuade the agency from going forward. Of course, it the matter is not resolved after the 4-182(c) conference, you will have given the agency a statement it may be able to use at a hearing.

7. Sometimes you may want to ask for the opportunity to present a position paper arguing why the agency is wrong. Remember that if you do this and are not successful, you will have given the agency a thorough preview of your case. Also, investigate the facts thoroughly, because you will have to deal with this document at the hearing if you go to a hearing.

8. Even if you cannot persuade the agency to drop the case at the 4-182(c) conference, there may be the chance to settle the matter on some basis. "Unless precluded by law, a contested case may be resolved by stipulation, agreed settlement, or consent order or by the default of a party." C.G.S. § 4-177(c).

9. Often it is helpful to let your client do much of the talking. Let the agency get to know your client.

K. **The Final Decision.** The UAPA Procedural Rules also set forth the provisions relating to the final decision. C.G.S.§ 4-180 requires that an agency render its final decision within 90 days following the close of evidence or the due date for the filing of briefs, whichever is later. If the agency fails to comply with this rule, a party can go to court for an order requiring the agency to render its decision forthwith. This section also states that a final decision must be in writing or orally stated on the record. It also states what must be included in a final

decision.

L. C.G.S. § 4-180a deals with indexing written orders and final decisions.

M. **Reconsideration and Modification**. C.G.S. § 4-181a addresses reconsideration and modification of decisions. Unless otherwise precluded by law, a party in a contested case may, within 15 days after personal delivery or mailing of the final decision, file a petition for reconsideration on the ground that: (A) an error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case, and which for good reason was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown. The agency has 25 days to decide whether to reconsider the petition. Failure to do so within 25 days of the filing constitutes a denial of the petition, and you still have 5 days to appeal. C.G.S. § 4-181a (a) (1).

N. Even if a petition for reconsideration has not been filed, within 40 days of the personal delivery or mailing of the final decision, the agency may decide to reconsider the final decision. C.G.S. § 4-181a (a) (2).

O. If an agency decides to reconsider a final decision, it shall proceed in a reasonable time to conduct additional proceedings to render a decision modifying, affirming, or reversing the final decision, provided that the decision after reconsideration shall be rendered not later than 90 days following the date on which the agency decided to reconsider. If the agency fails to render the decision within 90 days, the original final decision remains the final decision for purposes of any appeal under section 4-183. C.G.S. § 4-181a (a) (3).

P. "Except as otherwise provided in subdivision (3) of this subsection, an agency decision made after reconsideration pursuant to this subsection shall become the final decision in the contested case in lieu of the original final decision for purposes of any appeal under the provisions of section 4-183, including, but not limited to, an appeal of (A) any issue decided by the agency in its original final decision that was not the subject of any petition for reconsideration or the agency's decision made after reconsideration, (B) any issue as to which reconsideration was requested but not granted, and (C) any issue that was reconsidered but not modified by the agency from the determination of such issue in the original final decision." C.G.S. § 4-181a (a) (4).

Q. "On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion. The procedure set forth in this chapter for contested cases shall be applicable to any proceeding in which such

reversal or modification of any final decision is to be considered. The party or parties who were the subject of the original final decision, or their successors, if known, and intervenors in the original contested case, shall be notified of the proceeding and shall be given the opportunity to participate in the proceeding. Any decision to reverse or modify a final decision shall make provision for the rights or privileges of any person who has been shown to have relied on such final decision." C.G.S. § 4-181a (b).

R. "The agency may, without further proceedings, modify a final decision to correct any clerical error. A person may appeal that modification under the provisions of section 4-183 or, if an appeal is pending when the modification is made, may amend the appeal." C.G.S. § 4-181a (c).

S. **Agency rules of Practice should always be consulted for important procedural provisions.**

II. Some Practical Suggestions for Conducting an Administrative Hearing.

A. Before the Hearing

1. Consider filing an application for a more definite and detailed statement. CGS Section 4-177(b). This may help identify what the agency is claiming.

2. Sections 4-178(6) and (7) provide that an agency may take notice of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge as well as agency files, etc. Parties must be given timely notice and have the opportunity to contest the materials noticed. Id. § (7). Consider filing a written request to be notified in a timely manner of any of the agency's intent to take any such notice.

3. If you anticipate that the Department will offer expert testimony, consider asking the presiding officer to require that it be prefiled. This will give you the opportunity to have it reviewed by an expert and to prepare cross-examination questions. Remember that this works both ways – you will also be required to do so.

4. Section 4-177c(a)(l) provides that the agency or a party shall be afforded the opportunity "to inspect and copy relevant and material records, papers and documents not in possession of

the party or such agency, except as otherwise provided . . . ."

a. The file may contain notes of agency investigators, statements of potential witnesses and other materials which may be used effectively during cross-examination or otherwise.

b. The UAPA also requires the respondent to permit inspection and copying, as least as to nonprivileged matters.

5. Prepare for the hearing as if you were going to try the case in the Superior Court.

a. This includes preparing your witnesses both for direct and anticipated cross-examination.

b. Weighing the accuracy and the credibility of witnesses is the province of the agency. *See, e.g. Fagan v. City of Stamford,* 179 Conn. App. 440 (2018)

6. Read all the regulations covering the subject matter, not just those cited in the Statement of Charges.

7. In the notice of hearing, the agency may seek "revocation of the license or other disciplinary action as the Department deems appropriate and consistent with the law . . . ." Try to learn whether you will be permitted to introduce evidence which support a lesser penalty even if violations are found. Consider including in an answer a statement in the nature of an affirmative defense stating that if violations are found, a penalty other than revocation is appropriate.

B. **At the Hearing**

1. Consider asking the hearing officer to sequester witnesses. Listening to prior testimony allows witnesses to conform their testimony to the earlier witness and allows them to see what they may face on cross-examination. Sequestration is an established technique to ensure honest testimony and a hearing officer should grant this request. Remember, however, sequestration will then apply to your witnesses also.

2. Object to unreliable evidence. Hearsay is allowed, but evidence still must be reliable. If you do not object, you may waive this argument.

3. Unless you are sure that there will be post-hearing briefs, consider filing a trial memorandum at the beginning of the hearing with your position on pertinent issues. This may educate the hearing officer as to your position as well as to preserve legal claims for appeal. Do not assume that you will be permitted to file a post- hearing brief or other written argument at the close of evidence.

4. If there will be no post hearing brief, try to write out your final argument in advance. Include important cases which support your position. This will allow for a "brief like" argument in the transcript. The hearing officer will almost certainly obtain a copy of the transcript and you will benefit from this reasoned argument.

5. Treat the hearing officer as you would a judge in Superior Court.

C. In General

The lawyer for the agency will either be an agency in house attorney or an assistant attorney general who works regularly with the agency. In either case, your opposition will be knowledgeable both as to the substantive law and administrative procedure, experienced and good at what he or she is doing. Never underestimate the agency's counsel.

Sec. 4-181. Contested cases. Communications by or to hearing officers and members of an agency. (a) Unless required for the disposition of ex parte matters authorized by law, no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative, without notice and opportunity for all parties to participate.

(b) Notwithstanding the provisions of subsection (a) of this section, a member of a multimember agency may communicate with other members of the agency regarding a matter pending before the agency, and members of the agency or a hearing officer may receive the aid and advice of members, employees, or agents of the agency if those members, employees, or agents have not received communications prohibited by subsection (a) of this section.

(c) Unless required for the disposition of ex parte matters authorized by law, no party or intervenor in a contested case, no other agency, and no person who has a direct or indirect interest in the outcome of the case, shall communicate, directly or indirectly, in connection with any issue in that case, with a hearing officer or any member of the agency, or with any employee or agent of the agency assigned to assist the hearing officer or members of the agency in such case, without notice and opportunity for all parties to participate in the communication.

(d) The provisions of this section apply from the date the matter pending before the agency becomes a contested case to and including the effective date of the final decision. Except as may be otherwise provided by regulation, each contested case shall be deemed to have commenced on the date designated by the agency for that case, but in no event later than the date of hearing.

(1971, P.A. 854, S. 16; P.A. 88-317, S. 19, 107; P.A. 89-174, S. 3, 7.)

History: P.A. 88-317 designated former section as Subsec. (a) and amended Subsec. (a) to apply restriction on communications to a "hearing officer or member of any agency" instead of to "members or employees of an agency", to insert "final", to substitute "proposed final decision" for "findings of fact and conclusions of law in a contested case", and to make technical changes, deleted provision authorizing agency members to communicate with each other and to have the aid and advice of personal assistants and substituted new Subsec. (b) re communications among members of multimember agency and receipt of aid and advice by members of an agency or a hearing officer and added new Subsec. (c) re communications involving parties, intervenors, other agencies and persons having an interest in the outcome and new

Subsec. (d) re period when section applicable, effective July 1, 1989, and applicable to all agency proceedings commencing on or after that date; P.A. 89-174 deleted provision in Subsec. (b) which had required agency to disclose in case record identity of employees or agents communicating with an agency member or a hearing officer.

Cited. 168 C. 435; 171 C. 691; 172 C. 263; 173 C. 462; 183 C. 128; 186 C. 153; 191 C. 173. Once violation of statute proved by party seeking relief, burden shifts to agency to prove no prejudice resulted from prohibited ex parte communication; waiver of claim to disqualification discussed. 202 C. 453. Where record shows prima facie violation of section, burden shifted to agency to prove no resulting prejudice. 207 C. 296. Cited. 212 C. 471; 215 C. 49; 226 C. 105; 239 C. 32.

Cited. 1 CA 1. To be entitled to relief, plaintiff must show prejudice to his rights resulting from an ex parte communication in violation of statute. 4 CA 143. Cited. 9 CA 622; 27 CA 495; judgment reversed, see 225 C. 499; 36 CA 587; 37 CA 777; 43 CA 512; 44 CA 622. Investigator's report cannot be construed as ex parte communication where other party has notice of report and opportunity to participate in presentation of allegations to the fact finder. 47 CA 325. Plaintiff was deprived of due process of law when commissioner engaged in ex parte communications with plaintiff's former attorney and issued unilateral order awarding attorney's fees without providing plaintiff with notice or opportunity to present evidence. Id., 391.

Subsec. (b):

Cited. 37 CA 653; judgment reversed, see 238 C. 361. It was not improper for zoning commission to consider memorandum after close of public hearing because it was sent from one commission member to another concerning commission's deliberations and contained a summary of the member's opinion. 112 CA 484.

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Connecticut Judicial Branch
Law Libraries

2016 Edition

Vexatious Litigation in Connecticut

A Guide to Resources in the Law Library

Table of Contents

Prepared by Connecticut Judicial Branch, Superior Court Operations, Judge Support Services, Law Library Services Unit

lawlibrarians@jud.ct.gov

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- "We begin our discussion by setting forth the elements of the common-law tort of vexatious litigation. Our Supreme Court has stated: 'In a malicious prosecution or vexatious litigation action, it is necessary to prove want of probable cause, malice and a termination of [the] suit in the plaintiffs' favor.... [Establishing] a cause of action for vexatious suit requires proof that a civil action has been prosecuted not only without probable cause but also with malice.... It must also appear that the litigation claimed to be vexatious terminated in some way favorable to the defendant therein.' (Citations omitted; emphasis added; internal quotation marks omitted.) *QSP, Inc. v. Aetna Casualty & Surety Co.*, 256 Conn. 343, 361, 773 A.2d 906 (2001); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole*, 189 Conn. 518, 538, 457 A.2d 656 (1983); *Vandersluis v. Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); D. Wright, J. Fitzgerald & W. Ankerman, Connecticut Law of Torts (3d Ed. 1991) § 162, p. 432.

  We now identify the elements of statutory vexatious litigation. Section 52-568 provides: 'Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.' This court has stated that '[t]he elements of a common-law or statutory cause of action for vexatious litigation are identical.' *Norse Systems, Inc. v. Tingley Systems, Inc.*, 49 Conn. App. 582, 596, 715 A.2d 807 (1998); see also *Frisbie v. Morris*, 75 Conn. 637, 639, 55 A. 9 (1903); *Hebrew Home & Hospital, Inc. v. Brewer*, 92 Conn. App. 762, 766-67, 886 A.2d 1248 (2005); *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 467, 874 A.2d 266 (2005), aff'd, 281 Conn. 84, 912 A.2d 1019 (2007); *Shurman v. Duncan*, 14 Conn. Supp. 293, 294 (1946)." Bernhard-Thomas Bldg. Systems, LLC v. Dunican, 100 Conn. App. 63, 68-69, 918 A.2d 889, 893-894 (2007).

- "The torts of malicious prosecution and vexatious litigation are similar because in both types of action 'the claimed impropriety arises out of previous litigation.' *Blake v. Levy*, 191 Conn. 257, 262, 464 A.2d 52. The principles governing both torts are based on the 'competing policies of deterrence of groundless litigation and protection of good faith access to the courts.' *Blake v. Levy*, supra, 263, 464 A.2d 52." Colli v. Kamins, Superior Court, Judicial District of Hartford-New Britain at Hartford, No. 277215 (November 8, 1983) (39 Conn. Supp. 75, 76) (468 A.2d 295, 297).

Section 1: Vexatious Suits in Connecticut

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to the tort of vexatious lawsuits in Connecticut.

SEE ALSO:

- Frivolous Lawsuits in Connecticut
- Malicious Prosecution in Connecticut (Section 2)
- Abuse of Process in Connecticut (Section 3)

DEFINITIONS:

- "A vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor." Vandersluis v. Weil, 176 Conn. 353, 356, 407 A.2d 982, 985 (1978).

- "In suits for vexatious litigation, it is recognized to be sound policy to require the plaintiff to allege that prior litigation terminated in his favor. This requirement serves to discourage unfounded litigation without impairing the presentation of honest but uncertain causes of action to the courts." Zeller v. Consolini, 235 Conn. 417, 424, 666 A.2d 64, 67 (1995).

- "[I]t is well settled that equity may enjoin vexatious litigation . . . This power of equity exists independently of its power to prevent a multiplicity of actions. It is based on the fact that it is inequitable for a litigant to harass an opponent not for the attainment of justice, but out of malice . . . To be vexatious, litigation must be prosecuted not only without probable cause but also with malice." (Citations omitted.) Bridgeport Hydraulic Co. v. Pearson, 139 Conn. 186, 194, 91 A.2d 778, 781 (1952).

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.

- Conn. Gen. Stat. (2015).
  - Chapter 925. Statutory Rights of Actions and Defenses
    - § 52-568. Damages for groundless or vexatious suit or defense.
    - § 52-568a. Damages for groundless or vexatious suit against the owner or operator of a "pick or cut your own agricultural operation."

LEGISLATIVE:

Office of Legislative Research reports summarize and analyze the law in effect on the date of each report's publication. Current law may be different from what is discussed in the reports.

- Christopher Reinhart, *Vexatious Litigation and Sanctions Against Attorney*. Office of Legislative Research Report, 2008-R-0101. (January 30, 2008).

FORMS:

- 3A Joel M. Kaye and Wayne D. Effron, Connecticut Practice Series: Civil Practice Forms (4th ed. 2004).
  Form 804.11. Vexatious Suit

- 16A Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  Chapter 15. Malicious Prosecution/Vexatious Litigation
  § 15:9. Sample trial court documents—Sample complaint
  § 15:10. —Sample answer containing affirmative defense

JURY INSTRUCTIONS:

- Connecticut Judicial Branch Civil Jury Instructions (2008).
  Part 3: Torts
  3.13. Intentional Torts
  3.13-5. Vexatious Suit - Claim under General Statutes § 52-568
  3.13-6. Vexatious Suit - Claim at Common Law (modified April 5, 2012)

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

- Charlotte Hungerford Hospital v. Creed, 144 Conn. App. 100, 115, 72 A.3d 1175, 1184 (2013). "The Supreme Court adopted the traditional standard of probable cause applicable to both litigants and their attorneys: '[C]ivil probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it.... Although the reasonable attorney is substituted for the reasonable person in actions against attorneys, there is no reason to craft a different standard that essentially would immunize attorneys from vexatious litigation claims by requiring a claimant to prove that 100 out of 100 attorneys would have agreed that the underlying claim was without merit.' (Citations omitted; internal quotation marks omitted.)."

- Byrne v. Burke, 112 Conn. App. 262, 275-276, 962 A.2d 825, 834-835 (2009). "'[I]f it appears in the action for ... a vexatious suit, that the prosecution properly ended in a judgment of conviction, or that in the civil suit judgment was properly rendered against the defendant therein, such outstanding judgment is, as a general rule,

conclusive evidence of the existence of probable cause for instituting the prosecution, or the suit.' *Frisbie v. Morris*, 75 Conn. 637, 639–40, 55 A. 9 (1903). '[I]f the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail.' (Internal quotation marks omitted.) *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. at 99, 912 A.2d 1019. 'This is true although it is reversed upon appeal and finally terminated in favor of the person against whom the proceedings were brought.... Likewise, a termination of civil proceedings ... by a competent tribunal adverse to the person initiating them is not evidence that they were brought without probable cause.' 3 Restatement (Second), Torts § 675, comment (b) (1977)."

- Shaw v. Yarbrough, Superior Court, Judicial District of Hartford at Hartford, No. FA 06-4022806 (September 13, 2006) (42 Conn. L. Rptr. 25) (2006 Conn. Super. Lexis 270842) (2006 WL 2733828). "In this paternity action, plaintiff seeks double or treble damages from defendant, pursuant to C.G.S. Sec. 52- 568, for the defendant's having raised in his Answer to her complaint the contention that he is not certain if he is the father of the plaintiff's son. Plaintiff asserts that this response in the pleadings and the subsequent necessity of proceeding with genetic testing to establish paternity (which has now been accomplished, with affirmative results), was a vexatious ploy on defendant's part.... In this case, in the court's view, there was absolutely no evidence presented that raised any question that the child's father was the defendant, however, because of the rights afforded under C.G.S. Sec. 46b-160, the 'without probable cause' requirement of C.G.S. 52-568 cannot be met in this instance and the plaintiff's motion is denied."

WEST KEY NUMBERS:

- *Action*
  9. Unnecessary or vexatious actions.
- *Malicious Prosecution*
  25. Civil actions and proceedings.
  (1). In general.
- *Injunction*
  1168. Abusive, vexatious, or harassing litigation.
  1169. —In general.
  1170. —Particular cases.

ENCYCLOPEDIAS:

- Robin Miller, Annotation, *Validity, Construction, and Application of State Vexatious Litigant Statutes*, 45 ALR6th 493 (2009).

- 42 Am. Jur. 2d *Injunctions* (2010).
  III. Kinds of Rights Protected and Matters Controllable

Particular Rights and Injuries
§ 80. Access to court; frivolous lawsuits
Grounds and Occasions for Relief
§ 181. Vexatious, frivolous, or oppressive litigation

- 52 Am. Jur. 2d *Malicious Prosecution* (2011).
  I. In General
  § 3. Distinctions
  II. Elements of the Cause of Action
  Lack of Probable Cause
  § 52. Generally

- *Cause of Action for the Malicious Prosecution of Civil Actions*, 32 COA2d 131 (2006).

- 1A C.J.S. *Actions* (2005).
  II. Cause or Right of Action
  § 73. Unnecessary, vexatious, or frivolous actions

TEXTS & TREATISES:

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- Douglass B. Wright et al., Connecticut Law of Torts (3rd ed. 1991, with 2015 supplement).
  Chapter XVIII. Vexatious Litigation
  § 160. Introduction
  § 162. Vexatious suit

- 3A Joel M. Kaye and Wayne D. Effron, Connecticut Practice Series: Civil Practice Forms (4th ed. 2004, with 2015 supplement).
  Authors' Commentary for Form 804.11

- 12 Robert M. Langer et al., Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2015-2016 edition).
  Chapter 4. CUTPA and Related Business Torts
  § 4.15. Malicious prosecution, vexatious litigation, and abuse of process

- 16A Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  Chapter 15. Malicious Prosecution/Vexatious Litigation
  § 15:1. Elements of action
  § 15:2. Authority
  § 15:3. Remedies—Compensatory damages
  § 15:4. —Punitive or exemplary damages
  § 15:5. Limitations of actions: Statute of limitations
  § 15:6. Defenses—Limitations
  § 15:7. —Existence of probably cause
  § 15:8. Checklist

- Frederic S. Ury and Neal L. Moskow, Connecticut Torts: The Law and Practice (2nd ed. 2015).
  Chapter 12. Bringing Intentional Tort Claims

You can click on the links provided to see which law libraries own the title you are interested in, or visit our catalog directly to search for more treatises.

§ 12.03. Bringing a claim for misuse of the legal system
[1] Distinguishing among malicious prosecution, vexatious suits, and abuse of process
[2] Historical perspective of cause of action relating to misuse of the legal system
[3] Proving the required elements of malicious prosecution and vexatious suits
[4] Establishing the lack of probable cause in the underlying action
[8] Establishing that the underlying action terminated in the malicious prosecution/vexatious litigation plaintiff's favor
[9] Recovering damages in a malicious prosecution/vexatious litigation suit
[10] Defending a malicious prosecution or vexatious litigation suit
[17] Checklist for malicious prosecution/vexatious litigation claims

- Daniel J. Krisch and Michael Taylor, Encyclopedia of Connecticut Causes of Action (2015).
  Part 1. Common Law Causes of Action
  1V-2. Vexatious Litigation (Common-Law)
  Part 2. Statutory Causes of Action (Traditional)
  2V-1. Vexatious Litigation (Conn. Gen. Stat. § 52-568)

- 1 Fowler V. Harper et al. Harper, James and Gray on Torts (3rd ed. 2006, with 2015 supplement).
  Chapter 4. Malicious Prosecution and Abuse of Process
  § 4.8. Malicious civil litigation

- Dan B. Dobbs, The Law of Torts (2nd ed. 2011).
  Chapter 46. Process rights: Misusing and denying judicial Process
  § 592. Wrongful civil litigation and tactics
  § 593. Special-injury or special-grievance requirement
  § 596. Damages

- Restatement of the Law Second, Torts
  Chapter 30. Wrongful Use of Civil Proceedings
  § 674. General principle
  § 675. Existence of probable cause
  § 676. Propriety of purpose
  § 677. Civil proceedings causing an arrest or a deprivation of property
  § 678. Proceedings alleging insanity or insolvency
  § 679. Repetition of civil proceedings
  § 680. Proceedings before an administrative board
  § 681. Damages
  § 681A. Burden of proof

§ 681B. Functions of court and jury

- Richard L. Newman & Jeffrey S. Wildstein, Tort Remedies in Connecticut (1996, with 2014 supplement).
  Chapter 12. Intentional torts
  § 12-3. Malicious prosecution and vexatious suit
  (a). Introduction
  (b). History
  (c). Elements
  (d). Damages
  (e). Conn. Gen. Stat. § 52-226a
  (f). Defenses

LAW REVIEWS:

- Sarah Gruber, *A Lawyer's Guide to Vexatious Litigation in Connecticut*, 88 Connecticut Bar Journal 184 (2015).

- Kenneth Rosenthal, *Vexatious Litigation in Connecticut: Malicious Prosecution of Civil Actions, Probable Cause, and Lawyer Liability*, 84 Connecticut Bar Journal 255 (2010).

Figure 1: Vexatious Suit

Vexatious Suit

1. On (*date*) the defendant in this action commenced a civil suit against the plaintiff in this action claiming (*state claim*) which was returnable to the superior court for the judicial district of (*name*) on (*return date*).
2. On (date), judgment in that action was rendered in favor of the plaintiff in this action to recover of the defendant in this action $ costs of suit.
3. That action was commenced and prosecuted by the defendant in this action without probable cause, and with a malicious intent unjustly to vex and trouble him.
4. The plaintiff in this action necessarily expended in the defense of that action a much larger sum than the costs in that suit; to wit: $.

The plaintiff claims, by force of statute in such case provided, to recover treble damages.

(P.B. 1963, Form 205; see Gen. Stat., § 52-568)

Table 1: Determining Existence of Probable Cause in Vexatious Litigation Action against an Attorney

Determining existence of probable cause in vexatious litigation action against an attorney in Connecticut
"We agree with the supreme courts of California and Michigan that an attorney's subjective belief in the tenability of a claim and the extent of an attorney's investigation and research have no place in determining the existence of probable cause in a vexatious litigation action against an attorney and that the presence or absence of probable cause should be judged by an objective standard. That said, we nevertheless agree with — and, therefore, adopt — the Indiana Court of Appeals' articulation of an objective standard of probable '[T]he objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.' (Emphasis added.) *Wong v. Tabor*, supra, 422 N.E.2d [1279,]1288 [(Ind. App. 1981)]. We are mindful that '[r]easonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which all reasonable lawyers agree totally lack merit — that is, those which lack probable cause — are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause.' (Emphasis in original; internal quotation marks omitted.) *Roberts v. Sentry Life Ins.*, 76 Cal. App. 4th 375, 382, 90 Cal. Rptr. 2d 408 (1999), review denied, 2000 Cal. LEXIS 1059 (February 16, 2000). 'This lenient standard for bringing a civil action reflects the important public policy of avoiding the chilling of novel or debatable legal claims and allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win. . . .' (Internal quotation marks omitted.) *Padres L.P. v. Henderson*, 114 Cal. App. 4th 495, 517, 8 Cal. Rptr. 3d 584 (2003), review denied, 2004 Cal. LEXIS 3174 (April 14, 2004)." Falls Church Group v. Tyler, Cooper and Alcorn, 89 Conn. App. 459, 473-474, 874 A.2d 266, 275 (2005), affirmed Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 281 Conn. 84, 912 A.2d 1019 (2007).

Section 2: Malicious Prosecution in Connecticut

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to the tort of malicious prosecution in Connecticut.

SEE ALSO:

- Frivolous Lawsuits in Connecticut
- Vexatious Litigation in Connecticut (Section 1)
- Abuse of Process in Connecticut (Section 3)

DEFINITIONS:

- "'An action for malicious prosecution against a private person requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice.' *McHale v. W.B.S. Corp.*, 187 Conn. 444, 447, 446 A.2d 815 (1982) . . . the requirement that the plaintiff establish that the defendant initiated or procured the institution of criminal proceedings against him, is the only element that distinguishes the tort of malicious prosecution from the tort of vexatious litigation . . . Although the required showing for both torts essentially is the same, there is a slight difference in that a plaintiff in a malicious prosecution action must show initiation of the proceedings by the defendant." Bhatia v. Debek, 287 Conn. 397, 404-405, 948 A.2d 1009, 1017 (2008).

FORMS:

- 3A Joel M. Kaye and Wayne D. Effron, Connecticut Practice Series: Civil Practice Forms (4th ed. 2004).
  Form 804.10. Malicious Prosecution

- 16A Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  Chapter 15. Malicious Prosecution/Vexatious Litigation
  § 15:9. Sample trial court documents—Sample complaint
  § 15:10. —Sample answer containing affirmative defense

- 17 Am Jur Pleading and Practice Forms *Malicious Prosecution* (2012 rev.).
  § 3. Checklist—Drafting complaint, petition, or declaration in action for malicious prosecution of prior civil action
  § 4. Complaint, petition, or declaration— For malicious prosecution of prior civil action—General form

CASES:

- Giannamore v. Shevchuk, 108 Conn. App. 303, 318-319, 947 A.2d 1012, 1021 (2008). "Our Supreme Court has stated: 'In a malicious prosecution action, the defendant

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update

is said to have acted with malice if he [or she] acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based....' (Citation omitted; internal quotation marks omitted.) *Mulligan v. Rioux*, supra, 229 Conn. at 732, 643 A.2d 1226; see also 3 Restatement (Second), Torts, Malicious Prosecution § 668, p. 438 (1977). Furthermore, we note that '[m]alice may be inferred from lack of probable cause.' *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. at 94, 912 A.2d 1019. If the evidence supports a finding of a lack of probable cause, then the fact finder reasonably may conclude that the defendant acted with malice. See *Mulligan v. Rioux*, supra, at 746, 643 A.2d 1226."

- DeLaurentis v. New Haven, 220 Conn. 225, 250, 597 A.2d 807, 820 (1991). "Courts have taken three approaches to the 'termination' requirement. The first, and most rigid, requires that the action have gone to judgment resulting in a verdict of acquittal, in the criminal context, or no liability, in the civil context . . . The third approach, while nominally adhering to the 'favorable termination' requirement, in the sense that any outcome other than a finding of guilt or liability is favorable to the accused party, permits a malicious prosecution or vexatious suit action whenever the underlying proceeding was abandoned or withdrawn without consideration, that is, withdrawn without either a plea bargain or a settlement favoring the party originating the action."

- Colli v. Kamins, Superior Court, Judicial District of Hartford-New Britain at Hartford, No. 277215 (November 8, 1983) (39 Conn. Supp. 75, 77) (468 A.2d 295, 297). "An abandonment of a criminal proceeding, so far as the plaintiff's right to prevail is concerned, is the equivalent of its successful termination. *Shaw v. Moon*, 117 Or. 558, 562, 245 P. 318 (1926). The rule governing the kindred tort of malicious prosecution is that it is sufficient if the defendant in the underlying prosecution was 'discharged without a trial under circumstances amounting to an abandonment of the prosecution without request from or by arrangement with him.' *See v. Gosselin,* 133 Conn. 158, 160, 48 A.2d 560 (1946)."

WEST KEY NUMBERS:

- *Malicious Prosecution*
  9-14. Nature and commencement of prosecution—Civil actions.
  25. Civil actions and proceedings.
  26-33. Malice.
  34-37. Termination of prosecution.
  38-77. Actions.

ENCYCLOPEDIAS:

- 52 Am. Jur. 2d *Malicious Prosecution* (2011).

I. In General
II. Elements of the Cause of Action
III. Parties
IV. Defenses
V. Damages
VI. Practice and Procedure

- *Cause of Action for the Malicious Prosecution of Civil Actions*, 32 COA2d 131 (2006).

- 54 C.J.S. *Malicious Prosecution* (2010).
  I. In General
  II. Elements of the Cause of Action for Malicious Prosecution
  III. Defenses to Cause of Action for Malicious Prosecution
  IV. Persons Entitled to Sue and Persons Liable
  V. Actions

- Jimmie E. Tinsley, J.D., *Malicious Prosecution* 7 POF2d 181 (1975).
  § 5. Proceedings on which action may be based—Civil action

TEXTS & TREATISES:

You can click on the links provided to see which law libraries own the title you are interested in, or visit our catalog directly to search for more treatises.

- 1 Daniel C. Pope, Connecticut Actions and Remedies, Tort Law (1996).
  Chapter 7. Malicious Prosecution
  A. Introduction
  § 7:01. Overview
  B. Essential elements
  § 7:02. Essential elements
  § 7:03. Initiation of prior criminal proceeding
  § 7:04. Initiation of prior civil proceeding
  § 7:05. Lack of probable cause
  § 7:06. Malice
  § 7:07. Favorable termination
  C. Remedies and damages
  § 7:08. In general
  D. Defenses
  § 7:09. In general
  E. Pleading and practice
  § 7:10. In general
  F. Research aids
  § 7:11. Bibliography

- Douglass B. Wright et al., Connecticut Law of Torts (3rd ed. 1991, with 2015 supplement).
  Chapter XVIII. Vexatious Litigation
  § 160. Introduction
  § 161. Malicious prosecution

- 3A Joel M. Kaye and Wayne D. Effron, Connecticut Practice Series: Civil Practice Forms (4th ed. 2004).).
  Authors' Commentary for Form 804.10

You can click on the links provided to see which law libraries own the title you are interested in, or visit our catalog directly to search for more treatises.

- 12 Robert M. Langer et al., Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2015-2016 edition).
  - Chapter 4. CUTPA and Related Business Torts
    - § 4.15. Malicious prosecution, vexatious litigation, and abuse of process

- 16A Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  - Chapter 15. Malicious Prosecution/Vexatious Litigation
    - § 15:1. Elements of action
    - § 15:2. Authority
    - § 15:3. Remedies—Compensatory damages
    - § 15:4. —Punitive or exemplary damages
    - § 15:5. Limitations of actions: Statute of limitations
    - § 15:6. Defenses—Limitations
    - § 15:7. —Existence of probably cause
    - § 15:8. Checklist

- Frederic S. Ury and Neal L. Moskow, Connecticut Torts: The Law and Practice (2nd ed. 2015).
  - Chapter 12. Bringing Intentional Tort Claims
    - § 12.03. Bringing a claim for misuse of the legal system
      - [1] Distinguishing among malicious prosecution, vexatious suits, and abuse of process
      - [2] Historical perspective of cause of action relating to misuse of the legal system
      - [3] Proving the required elements of malicious prosecution and vexatious suits
      - [4] Establishing the lack of probable cause in the underlying action
      - [5] Effect of a criminal conviction on a malicious prosecution action
      - [8] Establishing that the underlying action terminated in the malicious prosecution/vexatious litigation plaintiff's favor
      - [9] Recovering damages in a malicious prosecution/vexatious litigation suit
      - [10] Defending a malicious prosecution or vexatious litigation suit
      - [17] Checklist for malicious prosecution/vexatious litigation claims

- Daniel J. Krisch and Michael Taylor, Encyclopedia of Connecticut Causes of Action (2015).
  - Part 1. Common Law Causes of Action
    - 1M-1. Malicious Prosecution

- 1 Fowler V. Harper et al. Harper, James and Gray on Torts (3rd ed. 2006, with 2015 supplement).

You can click on the links provided to see which law libraries own the title you are interested in, or visit our catalog directly to search for more treatises.

Chapter 4. Malicious Prosecution and Abuse of Process
§ 4.1. General principles involved; What constitutes malicious prosecution
§ 4.2. The interests involved
§ 4.3. Initiation of criminal proceedings
§ 4.4. Favorable termination of proceedings
§ 4.5. Probable cause
§ 4.6. Malice
§ 4.7. Damages
§ 4.10. Other malicious and wrongful exposure to government action
§ 4.11. Policy factor in false arrest, malicious prosecution, defamation: Their relationship to each other
§ 4.12. Policy factor in false arrest, malicious prosecution, defamation: The absolute defense in all three

- Dan B. Dobbs, The Law of Torts (2nd ed. 2011).
  Chapter 46. Process rights: Misusing and denying judicial Process
  § 586. Elements of malicious prosecution
  § 587. Malicious prosecution—Instigating or continuing the prosecution or proceeding
  § 588. —Want of probable cause
  § 589. Improper purpose or "malice"
  § 590. Termination of the prosecution
  § 591. Special defenses
  § 593. Special-injury or special-grievance requirement
  § 596. Damages

- Restatement of the Law Second, Torts
  Chapter 29. Wrongful Prosecution of Criminal Proceedings (Malicious Prosecution)
  §§ 653-657. General principles
  §§ 658-661. Termination of proceedings
  §§ 662-667. Probable cause
  §§ 668-669A. Purpose
  §§ 670-671. Damages
  §§ 672-673. Burden of proof and function of court and jury

- Richard L. Newman & Jeffrey S. Wildstein, Tort Remedies in Connecticut (1996, with 2014 supplement).
  Chapter 12. Intentional Torts
  § 12-3. Malicious prosecution and vexatious suit
  (a). Introduction
  (b). History
  (c). Elements
  (d). Damages
  (e). Conn. Gen. Stat. § 52-226a
  (f). Defenses

Section 3: Abuse of Process in Connecticut

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating the tort of abuse of process in Connecticut.

SEE ALSO:

- Frivolous Lawsuits in Connecticut
- Vexatious Litigation in Connecticut (Section 1)
- Malicious Prosecution in Connecticut (Section 2)

DEFINITIONS:

- "Abuse of process is the misuse of process regularly issued to accomplish an unlawful ulterior purpose. The gravamen of the complaint is the use of process for a purpose not justified by law. The distinction between malicious prosecution or vexatious suit and abuse of process as tort actions is that in the former the wrongful act is the commencement of an action without legal justification, and in the latter it is in the subsequent proceedings, not in the issue of process but in its abuse. The distinction in the elements essential for recovery in each tort is that in the action for abuse of process the plaintiff is not bound to allege or prove the termination of the original proceeding nor, in most jurisdictions, the want of probable cause, while both of those must be proven in an action for malicious prosecution or vexatious suit." Schaefer v. O. K. Tool Co., Inc., 110 Conn. 528, 532-533, 148 A. 330, 332-333 (1930).

COURT RULES:

Amendments to the Practice Book (Court Rules) are published in the Connecticut Law Journal and posted online.

- Conn. Practice Book (2016).
  - Chapter 4. Pleadings
    - § 4-2. Signing of pleadings
  - Chapter 10. Pleadings
    - § 10-5. Untrue allegations or denials
  - Chapter 24. Small Claims
    - § 24-33. Costs in small claims
  - Chapter 85. Sanctions
    - § 85-2. Other actions subject to sanctions
      - (5). Presentation of a frivolous appeal or frivolous issue on appeal
    - § 85-3. Procedure on sanctions

FORMS:

- 1PI Am Jur Pleading and Practice Forms *Abuse of Process* (2014).
  - Checklist—Drafting a complaint, petition, or declaration in an action for abuse of process
- 16 Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  - Chapter 7. Abuse of Process
    - § 7:9. Sample trial court documents—Sample complaint
    - § 7:10. —Sample answer containing affirmative defense

JURY INSTRUCTIONS:

- Connecticut Judicial Branch Civil Jury Instructions (2008).
  Part 3: Torts
  3.13. Intentional Torts
  3.13-8. Abuse of Process

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

- Rogan v. Rungee, 165 Conn. App. 209, 217, 2016 WL 1637725 (2016). "'Damages suffered through an abuse of legal process not malicious must be compensatory, that is compensation for the natural consequences resulting, which would include injury to the feelings because of the humiliation, disgrace or indignity suffered, together with injury to the person and physical suffering....' *McGann v. Allen*, 105 Conn. 177, 184, 134 A. 810 (1926). Thus, for the court to properly award emotional distress damages for abuse of process, the abuse of process must have caused the defendant's emotional distress. Whether such causation exists is a question of fact. See *Burton v. Stamford*, 115 Conn.App. 47, 87, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009)."

- Larobina v. McDonald, 274 Conn. 394, 406-407, 876 A.2d 522, 530 (2005). "...although the definition of process may be broad enough to cover a wide range of judicial procedures, to prevail on an abuse of process claim, the plaintiff must establish that the defendant used a judicial process for an improper purpose."

- Varga v. Pareles, 137 Conn. 663, 667, 81 A.2d 112, 115 (1951). "One who uses a legal process against another in an improper manner or to accomplish a purpose for which it was not designed is liable to the other for the injury caused thereby. See Restatement, 3 Torts 682. In the former instance, the action lies, for example, against anyone who uses oppression or unreasonable force in the service of process, or causes it to be used, irrespective of his motive in so doing."

WEST KEY NUMBERS:

- *Process*
  172-213. Abuse of process.

ENCYCLOPEDIAS:

- 1 Am. Jur. 2d *Abuse of Process* (2016).
  I. Nature and Elements of Action
  II. Actionable Abuses of Particular Processes
  III. Persons Liable
  IV. Actions

- 52 Am. Jur. 2d *Malicious Prosecution* (2011).
  I. In General
  § 3. Distinctions

- *Cause of Action for Abuse of Process*, 33 COA2d 465 (2007).

- 72 C.J.S. *Process* (2005).
  - X. Abuse, or Malicious Use, of Process
    - §§ 152-155. In general
    - §§ 156-161. Elements
    - §§ 162-164. Actions

TEXTS & TREATISES:

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- 1 Daniel C. Pope, Connecticut Actions and Remedies, Tort Law (1996).
  - Chapter 8. Abuse of Process
    - A. Introduction
      - § 8:01. Overview
    - B. Essential elements
      - § 8:02. Elements
      - § 8:03. Justifiable initiation or issuance
      - § 8:04. Perversion of lawful process
    - C. Remedies and damages
      - § 8:05. In general
    - D. Defenses
      - § 8:06. In general
    - E. Pleading and practice
      - § 8:07. In general
    - F. Research aids
      - § 8:08. Bibliography

- Douglass B. Wright et al., Connecticut Law of Torts (3rd ed. 1991, with 2015 supplement).
  - Chapter XVIII. Vexatious Litigation
    - § 160. Introduction
    - § 163. Abuse of process

- 12 Robert M. Langer et al., Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2015-2016 edition).
  - Chapter 4. CUTPA and Related Business Torts
    - § 4.15. Malicious prosecution, vexatious litigation, and abuse of process

- 16A Thomas B. Merritt, Connecticut Practice Series: Connecticut Elements of an Action (2015-2016 edition).
  - Chapter 7. Abuse of Process
    - § 7:1. Elements of action
    - § 7:2. Authority
    - § 7:3. Remedies—Compensatory damages
    - § 7:4. —Punitive or exemplary damages
    - § 7:5. Limitations of actions: Statute of limitations
    - § 7:6. Defenses—Limitations
    - § 7:7. —Lack of issuance of process
    - § 7:8. Checklist

- Frederic S. Ury and Neal L. Moskow, Connecticut Torts: The Law and Practice (2nd ed. 2015).
  - Chapter 12. Bringing Intentional Tort Claims
    - § 12.03. Bringing a claim for misuse of the legal system

You can click on the links provided to see which law libraries own the title you are interested in, or visit our catalog directly to search for more treatises.

[1] Distinguishing among malicious prosecution, vexatious suits, and abuse of process
[11] Distinguishing abuse of process from vexatious suit and malicious prosecution
[12] Proving the required elements of an abuse of process claim
[13] Holding attorneys liable for abuse of process
[14] Recovering damages in abuse of process cases
[15] Pleading an abuse of process count
[16] Defending an abuse of process suit
[18] Checklist for abuse of process claims

- Daniel J. Krisch and Michael Taylor, Encyclopedia of Connecticut Causes of Action (2015).
  Part 1. Common Law Causes of Action
  1A-1. Abuse of Process

- 1 Fowler V. Harper et al. Harper, James and Gray on Torts (3rd ed. 2006, with 2015 supplement).
  Chapter 4. Malicious Prosecution and Abuse of Process
  § 4.9. Abuse of process

- Dan B. Dobbs, The Law of Torts (2nd ed. 2011).
  Chapter 46. Process rights: Misusing and denying judicial Process
  § 594. Abuse of process
  § 596. Damages

- Restatement of the Law Second, Torts
  Chapter 31. Abuse of Process
  § 682. General principle

- Richard L. Newman & Jeffrey S. Wildstein, Tort Remedies in Connecticut (1996, with 2014 supplement).
  Chapter 12. Intentional torts
  § 12-4. Abuse of process
  (a). Elements
  (b). Damages
  (c). Pleading
  (d). Defenses

Department of Emergency Services and Public Protection Administrative Law Hearings Program

Alison A. Rau, Staff Attorney

December 7, 2018

Disclaimer

- The views expressed in this presentation are not attributable to the State of Connecticut, the Department of Emergency Services and Public Protection, the Connecticut State Police, the Connecticut Bar Association, or the Administrative Law Section.

What is Section 4-183?

- Fundamentals of Administrative Law Under the CT Uniform Administrative Act Connecticut General Statutes § 4-183.
- Exhaustion of Administrative Remedies
- What does this mean in practice?

DESPP- Building the Licensure Hearings Program

- Hearings at DESPP had previously been an ad hoc process- only 1-2 x per year, using UAPA if needed but mostly resulting in settlements through compliance conferences
- Advice from the AGO changed this and sparked a more formal system to ensure due process
- Currently we give gratuitous hearings to almost anyone who wishes them

Hearings Program as required by due process concerns

- Building from scratch
- UAPA
- Regulations governing hearings
- Attorney General involvement
- Nascent Legal Affairs Unit

Preparation for hearings at DESPP

- Request the state and federal criminal history records of the individuals
- Request specific incident reports from municipal police departments
- Obtain hearing officer designations from the Commissioner's office (specified by our agency statutes and regulations- commissioner must sign off on hearing officer designations)
- Review and approve notice letters
- Determine if any individuals are currently incarcerated (it happens)
- Solicit outside witnesses if applicable- municipal PD officers are often willing to help if necessary.
- Prepare hearing "script," prepare witnesses for testimony and cross-x
- Meet with individuals in compliance conference to obtain withdrawals if possible
- Prosecute hearings, enter into settlement negotiations if applicable

First

- Standardization of hearings rights and notice letters
- Proper Notice
- Cite enabling statutes and regulations- e.g. for security guards, CGS 29-161q and/or 29-161v, RCSA 29-2-2. Most but not all licenses include right to hearing
- Referral to BOPP and impact of withdrawal

Caveats in the notice letter

- Please be informed that all Connecticut residents are due the opportunity to erase their criminal history records three years from the date of a misdemeanor conviction and five years from a felony conviction by applying to the Board of Pardons and Paroles (BOPP) http://www.ct.gov/bopp/cwp/view.asp?a=4331&q=510432
- If you apply for a pardon with the BOPP and are successful, any criminal convictions that are pardoned are erased. If you choose to withdraw, you can go through the BOPP application process, obtain a pardon, and then reapply to the Special Licensing & Firearms Unit once your record is clear. You do not lose your ability to appeal a denial or revocation if an application for a pardon is unsuccessful.

Second

- Hearing scheduling
- Hearing officer Designation by Commissioner

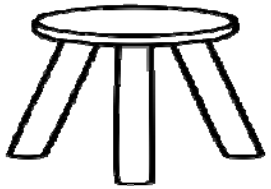
Third

- Information collection for exhibits and conferences
- Police reports
- Criminal history record information- federal and state
- Google!

Fourth

- Compliance conferences- a good way to weed out cases that need to go to hearing
- Can result in tears
- BOPP process daunting
- Tall tales
- Occasional identity theft claims- very rarely proven, but can happen

Fifth



- Gradually shifting expectations for statutes with conviction barriers to licensure
- Interaction of licensing statutes with 46a-81 and 46a- 80
- Guidance from DESPP higher-ups has informed our ability to consider licensure applications using the three-prong analysis

Examples for licensure despite felony convictions

- Nonviolent drug felony convictions
- Certificates of rehabilitation
- No further offenses
- In the interests of justice
- Good opportunities for individuals to make a case for themselves
- Possible pro bono opportunity?

46a-81

- Sec. 46a-81. (Formerly Sec. 4-61r). Statutes controlling law enforcement agencies excepted. (a) Except as provided in section 36a-489, the provisions of sections 46a-79 to 46a-81, inclusive, shall prevail over any other provisions of law which purport to govern the denial of licenses, permits, certificates, registrations, or other means to engage in an occupation, trade, vocation, business or profession, on the grounds of a lack of good moral character, or which purport to govern the suspension or revocation of a license, permit, certificate or registration on the grounds of conviction of a crime.

- (b) Sections 46a-79 to 46a-81, inclusive, shall not be applicable to any law enforcement agency, provided nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth in said sections.

46a-80

(c) A person may be denied employment by the state or any of its agencies, or a person may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, profession or business by reason of the prior conviction of a crime if, after considering

(1) the nature of the crime and its relationship to the job for which the person has applied;

(2) information pertaining to the degree of rehabilitation of the convicted person; and

(3) the time elapsed since the conviction or release, the state or any of its agencies determines that the applicant is not suitable for the position of employment sought or the specific occupation, trade, vocation, profession or business for which the license, permit, certificate or registration is sought.

In making a determination under this subsection, the state or any of its agencies shall give consideration to a provisional pardon issued pursuant to section 54-130e, or a certificate of rehabilitation issued pursuant to section 54-108f or 54-130e, and such provisional pardon or certificate of rehabilitation shall establish a presumption that such applicant has been rehabilitated. If an application is denied based on a conviction for which the applicant has received a provisional pardon or certificate of rehabilitation, the state or any of its agencies, as the case may be, shall provide a written statement to the applicant of its reasons for such denial.

How are DESPP UAPA hearings different?

- No official rules of evidence, but set opening/closing statements, introduction of evidence and witnesses, examination, cross-examination, closing statements
- Hearsay is permissible
- Agency-specific criteria in statute and regulation for denials/revocations/suspensions
- “More probative than prejudicial” standard
- Subpoenas unnecessary
- Informality reigns, but decorum observed
- Hearing officer designated by Commissioner, may receive advice from AAG
- Some flexibility for settlement agreements
- Usually pro se applicants

Hearing Officer guidance

- Grand old Document- Plain Talk About Contested Cases, A Manual on Administrative Law. April 16, 1986, by Henri Alexandre, AGO, a seminar on the UAPA presented at the Codes and Standards Committee of the Department of Public Safety, August 1992

Department of Emergency Services and Public Protection

– The six division Department of Emergency Services and Public Protection (DESPP) came about as a result of legislation that created DESPP on July 1, 2011. The origin of DESPP began in 1903 when the Connecticut law makers created the nation's first state police department consisting of five men who drew a salary of three dollars a day to enforce state liquor and vice laws. In 2011, in an effort by the state to decrease the number of agencies and reduce costs, another transformation occurred. The Department of Public Safety became the Department of Emergency Services and Public Protection (DESPP).

- DESPP is comprised of the following six divisions: The Commission on Fire Prevention and Control, Connecticut State Police, Emergency Management and Homeland Security, Police Officers Standards and Training Council, Scientific Services, and the Division of Statewide Emergency Telecommunications

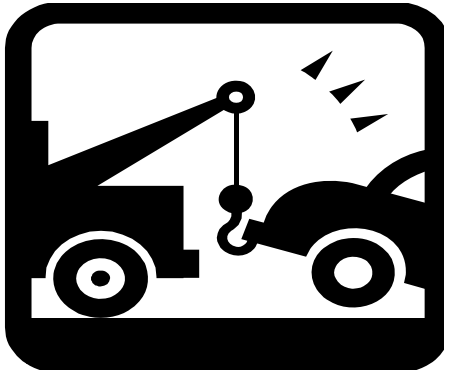
- https://portal.ct.gov/DESPP/Division-of-Emergency-Service-and-Public-Protection/About-Us

Connecticut State Police Licensure

- The Special Licensing and Firearms Unit (SLFU) is responsible for the issuance of the following:
- State Pistol Permits
- Eligibility certificates for pistols and revolvers
- Eligibility certificates for the purchase of long guns
- Ammunition certificates
- Oversight and regulation of firearm sale transactions
- Licensing of Professional Bail Bondsman
- Licensing of Private Security Companies
- Licensing of Private Investigators
- Licensing of Bail Enforcement Agents
- Licensing of Precious Metals and Pawn Brokers
- Security Guard Cards
- https://portal.ct.gov/DESPP/Division-of-State-Police/Special-Licensing-and-Firearms/Special-Licensing-and-Fire

Other licensure intersects

- Firefighter certifications
- COLLECT Operators
- Wreckers
- Fireworks/explosives licenses



Pistol Permits- a different animal

- A person has ninety days following the refusal of an issuance of a permit, or revocation or limitation of same to file an appeal with the BFPE. The BFPE is located at the State Office Building, 20 Trinity St., 5th Floor, Hartford CT 06106, and can be contacted at 860-256-2977. The board requires the submission of a written statement of fact to initiate an appeal. The appeal is considered filed when the statement is received. You must provide your name, address and telephone contact number in the statement.

- Upon receipt of the statement, the board will evaluate the basis of your appeal. If the matter falls within the jurisdiction of the board, the matter will be assigned a hearing date. Hearings are conducted in an informal manner, but rules of evidence are followed and all witnesses are sworn in. A transcript of the hearing is maintained. The decisions of the board shall be rendered by a majority vote and the appellant notified in writing within 20 days of such decision. The decision of the board may be appealed in accordance with the provisions of C.G.S. sec. 4-183.
- https://portal.ct.gov/DESPP/Division-of-State-Police/Special-Licensing-and-Firearms/State-Pistol-Permit#revocations

Bail Enforcement Agent grounds for suspension or revocation

- The licensee has practiced fraud, deceit or misrepresentation;
- The licensee has made a material misstatement in the application for issuance or renewal of his license;
- The licensee has demonstrated incompetence or untrustworthiness in the conduct of his business;
- The licensee has been convicted of a felony or other crime affecting his honesty, integrity or moral fitness.
- In accordance with the provision of section 4-182(c) of the Connecticut General Statute, if the Department of Emergency Services and Public Protection finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a bail enforcement agent license may be ordered pending proceedings for revocation or other action.
- https://portal.ct.gov/DESPP/Division-of-State-Police/Special-Licensing-and-Firearms/Bail-Enforcement-Agents#revocation

Bail Enforcement Agents

- Case Study – the incompetent Trio
- Expired license of the ringleader Mr. B
- Rookie duo
- Failure to verify location of quarry
- Terrorization of family who had just purchased residence and destruction of property resulted in revocation notices
- Settlements for the rookies- paying restitution and suspended status, condition to re-take the BEA course before restoring license to active status, and surrender of license and restitution

Mr. B

- The department revoked Mr. B's Bail Enforcement Agent license under CGS section 29-152i(7)
- Mr. B's actions stemming from an event on August 14, 2017 whereupon he and other BEA agents damaged property and terrorized citizens indicate his unsuitability. In addition, Mr. B was on suspended status during this incident due to a domestic violence pending case from spring 2017.

Mr. B hearing

- By the time of hearing, the domestic violence charge had been dismissed and the records of which could not be introduced
- However, there is nothing preventing introducing a witness to an interaction to provide evidence as to the suitability of the individual in question
- Testimony from the trooper who had arrested him for domestic violence

Resolution for Mr. B

- In a decision from the hearing officer, revocation was upheld due to the combination of errors.
- “The two aforementioned incidents presented at the hearing would not alone necessarily justify the revocation of your License. When considered in the aggregate, however, they raise serious questions concerning your conduct and judgement as a Bail Enforcement Agent. The Department has reasonably determined and shown that you are an unsuitable holder of a Bail Enforcement License pursuant to C.G.S. §§ 29-152i.”

Firefighter Certification case

Name:	**JOE FRAGOSO**	**Registration #:**	1303098
Last Verification Date:	06/21/2017		

Physical Description

• **Age:**	41 (DOB: 09/25/1977)	• **Height:**	5'05''
• **Sex:**	M	• **Weight:**	167lbs
• **Race:**	Hispanic	• **Eyes:**	Brown
• **Hair:**	Brown		
• **Scars/Tattoos:**			

Address

661 ABBINGTON DR
K6
EAST WINDSOR, NJ 08520, Mercer County

View Map

Other Known Addresses

Offenses

• **Description:**	53a-71(r) - Second Degree Sexual Assault involving sexual intercourse with someone under age 18 if the actor is age 20 or older and stands in a posistion of power, authority, or supervision over the person by virtue of the actor's professional, legal, occupational, o View this statute
• **Date Convicted:**	03/20/2014
• **Conviction State:**	Connecticut
• **Release Date:**	12/16/2015

Department of Emergency Services & Public Protection
Division of State Police
SEX OFFENDER REGISTRY

CONNECTICUT 1903 STATE POLICE

http://www.icrimewatch.net/offenderdetails.php?OfndrID=2051882&AgencyID=54567

Coventry fire official sent to prison for relationship with teen

By Mike Savino *Journal Inquirer*
Mar 21, 2014

Judge Jorge A. Simon said to the man, Joe Fragoso, 36, now of Middletown: “For some reason, your prurient interest took over your sense of responsibility.”

Fragoso, a former lieutenant of the Coventry Volunteer Fire Association, pleaded guilty Jan. 9 to second-degree sexual assault stemming from a relationship he had with a 16-year-old junior firefighter. https://www.journalinquirer.com/page_one/coventry-fire-official-sent-to-prison-for-relationship-with-teen/article_44f7b1bc-b10f-11e3-ba95-0019bb2963f4.html

Warrant information

- “According to the warrant for Fragoso's arrest, he exchanged photos and videos with the girl. In each case, they showed naked body parts or sexual acts. Fragoso, who is married and has children, also acknowledged sexual contact with the teen and other women, the warrant said. The teenager told police that she and Fragoso engaged in sexual acts in the quartermaster's room at the main firehouse, and at the South Street fire station. They had intercourse once, she said.”

Dempsey, Christine. “Former Coventry Fire Lieutenant Gets Two Years In Prison For Sexually Assaulting 16-Year-Old Girl,” The Hartford Courant, March 20, 2014. Available at: http://www.courant.com/community/coventry/hc-xpm-2014-03-20-hc-coventry-fire-prison-0321-20140320-story.html

Prosecutor's remarks

- "To counter character references that described Fragoso as "a man of integrity" and also the notion that the crime was an "isolated transgression in an otherwise stellar life," prosecutor Elizabeth Leaming told the judge that Fragoso has been accused of sexually assaulting two other girls, one in the early 1990s and another who recanted her accusation. There was no arrest in either case.

- He also has a "spotty" record with other fire departments in the state, she said, some of which reprimanded him or expelled him.

- "He basically marched to the beat of his own drum," Leaming said, citing records that show Fragoso got in trouble for regularly disobeying the commands of his leaders."

Dempsey, Christine. "Former Coventry Fire Lieutenant Gets Two Years In Prison For Sexually Assaulting 16-Year-Old Girl," The Hartford Courant, March 20, 2014. Available at: http://www.courant.com/community/coventry/hc-xpm-2014-03-20-hc-coventry-fire-prison-0321-20140320-story.html

Mr. Fragoso

- Served time
- Board of Pardons and Paroles granted Certificate of Employability with limitation that he could not work in an authoritative position with minors or those in a vulnerable position.
- DESPP revoked Firefighter I, Firefighter II, and Fire Service Instructor I certifications on grounds of professional unfitness and felony conviction as outlined in R.C.S.A. 7-323l-100(a)(3) and (4)
- First hearing held July 2016

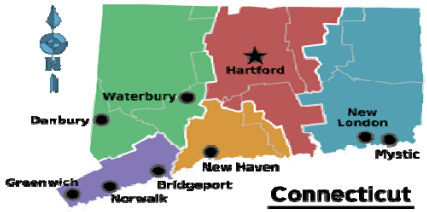
Chronology of case

- Revocation upheld in September 2016 decision
- Request for reconsideration filed October 2016
- Certificate of Employability revised to remove section requiring no unsupervised contact with minors
- Request for reconsideration denied January 2017
- Appeal to Superior Court filed February 2017
- Court-remanded *de novo* hearing held November 2017
- Revocation upheld again January 2018
- Court case dismissed for failure to prosecute November 2018

46a-80(c)

- (c) A person may be denied employment by the state or any of its agencies, or a person may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, profession or business by reason of the prior conviction of a crime if, after considering
- (1) the nature of the crime and its relationship to the job for which the person has applied;
- (2) information pertaining to the degree of rehabilitation of the convicted person; and
- (3) the time elapsed since the conviction or release, the state or any of its agencies determines that the applicant is not suitable for the position of employment sought or the specific occupation, trade, vocation, profession or business for which the license, permit, certificate or registration is sought.

46a-81



- Sec. 46a-81. (Formerly Sec. 4-61r). Statutes controlling law enforcement agencies excepted.

  (a) Except as provided in section 36a-489, the provisions of sections 46a-79 to 46a-81, inclusive, shall prevail over any other provisions of law which purport to govern the denial of licenses, permits, certificates, registrations, or other means to engage in an occupation, trade, vocation, business or profession, on the grounds of a lack of good moral character, or which purport to govern the suspension or revocation of a license, permit, certificate or registration on the grounds of conviction of a crime.

(b) **Sections 46a-79 to 46a-81, inclusive, shall not be applicable to any law enforcement agency,** provided nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth in said sections.

Good, Bad, Interesting

- Good: Court kicked it back to DESPP, did not usurp our ruling. Informed future response for dealing with similar licenses
- Bad: Had to rehold hearing to provide for three prong analysis

Interesting: Mr. Fragoso seemed unaware of the possibility of us introducing additional information based on his testimony and exhibits, and didn't seem to consider that the hearing officer could identify inconsistencies in his exhibits

http://www.cc.com/video-clips/t3frq9/important-things-with-demetri-martin-good--bad-or-interesting-

Initial Hearing

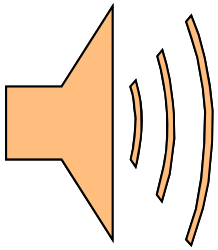
- Mr. Fragoso introduced sexual offender psychological records and testified that he felt he was not a threat to public safety and not professionally unfit to hold licensure
- He was not able to show that his felony conviction had been expunged or cleared from his records
- Fire Academy Director testified as to the decision-making process for decertification and a LMSW testified as to sexual offender treatment and risks to the public
- Based on meeting the two prongs of the regulations, the hearing officer upheld the revocation

Request for reconsideration

- Mr. Fragoso asked for reconsideration based on his assessment that he was not a threat to public safety
- Hearing officer denied reconsideration, and the case was appealed to Superior Court, where Mr. Fragoso invoked CGS 46a-80(c)
- Agency filed a Motion for Remand in order to allow for
- additional fact-finding, specifically to allow DESPP to consider Plaintiff's Certificate of Rehabilitation, particularly through the lens of CGS 46a-80, which was granted

On whose authority?

- Joe Fragoso: Because what I'm stating is that a firefighter is no different than a municipal employee. A firefighter does not have a position of authority. A firefighter is not in a position of trust because they don't have a law enforcement requirement. They cannot enforce the law.
- Transcript, p. 22, November 2, 2017



Second Hearing

- 3 prong analysis gone into in much greater detail
- Fragoso had protested that firefighters don't hold positions of authority- relationship of crime to licensure- 32:27-36:46
- Degree of rehab and time- 41:17-43:55
- Lack of candor- 1:48:48 by Sgt. Hicks- of other younger victim conflicting with polygraph etc- 1:52
- 1:59-54 other discrepancies- around 2:05:40

Hearing Officer's decision

- DESPP properly revoked Plaintiff's licenses pursuant to R.S.C.A 7-323l-100(a)(3) and (a)(4) because Mr. Fragoso was:
- "professionally unfit to perform the duties for which the certificate was granted" and was "convicted in a court of law of a felony."
- Specifically, the Hearing Officer found "[t]he abuse of authority over a minor who was a volunteer junior member shows a great lapse in judgment that the Agency has used to evidence your current unfitness for the Certifications," and also noted deceptive statements and inconsistencies within the testimony and evidence presented.

Ultimate Resolution

SUPERIOR COURT
JUDICIAL DISTRICT OF NEW BRITAIN
AT NEW BRITAIN
11/13/2018

The plaintiff has not moved to amend his appeal. A judgment of nonsuit shall enter for failure to prosecute the appeal with reasonable diligence.

Questions?

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