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# NEW HAMPSHIRE'S THREE-JUDGE EXPEDITED DOCKET

Joseph P. Nadeau\*

## I. INTRODUCTION

Today's appellate courts are being called upon to carry out their responsibilities with fewer and fewer resources. To attack their backlogs and still maintain the quality of published decisions, courts have adopted expedited dockets and other fast-track procedures.

Until December 2000, the New Hampshire Supreme Court had no expedited docket. Litigants in New Hampshire appeal to the state supreme court by certiorari, not by right.<sup>1</sup> The five justices, however, review each case individually before they meet to determine whether the case will be accepted for briefing and further review or whether the trial court decision should stand. Regular screening meetings are scheduled each month at which justices discuss the cases. Any justice disqualified leaves the room while that case is discussed. All felony convictions are accepted for full briefing, and most are scheduled for full oral argument. Except by unanimous vote of the justices screening the case with at least three justices participating, no other case is declined. A case is accepted if one judge believes it should be. No case is declined for lack of resources or lack of time to consider the issues presented.

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\* Associate Justice, New Hampshire Supreme Court.

1. See N.H. R. Sup. Ct. 7(1).

## II. THE 3JX DOCKET

In December 2000, the supreme court instituted a three-judge expedited docket, referred to as the "3JX" docket.<sup>2</sup> The three-judge panels alternate from month to month, and the judges on each panel are not disclosed until oral argument, to eliminate the temptation to judge shop. Cases for the first 3JX dockets were initially selected from pending cases, but the court now identifies, at the time of screening, cases appropriate for future expedited dockets. In 2001, 358 of the 766 cases appealed were accepted by the court for full briefing and oral argument. Ninety-seven of those cases were decided by three-justice panels following argument on the 3JX docket.

Even though the docket is expedited, the three justices read all the briefs and conduct the usual conference following the oral argument. Decisions must be unanimous, and a written decision is issued in each case.<sup>3</sup> In addition, the court has established a goal of issuing decisions in these cases within two to three weeks of argument. This goal is realistic because it is not necessary to put each order through the formal process that a full decision requires. Finally, 3JX decisions are not published and do not carry precedential value.

If the three justices cannot reach a unanimous decision on all the issues, they may order the parties to file additional briefs. Alternatively, they may decide some issues and order reargument before the full court of other issues or the entire case.

While it might be ideal for the supreme court to write a full decision in every case accepted for argument, there are many cases which lend themselves to decision by this expedited procedure. By court rule, with consent of the parties, the three-judge panel may recommend to the full court that a published opinion be issued in the case.<sup>4</sup> If the court accepts the referral, the two justices not on the panel may participate in the opinion by reading the briefs and listening to the tapes of oral argument.<sup>5</sup>

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2. N.H. R. Sup. Ct. 12-D(1)(a).

3. *Id.* 12-D(2).

4. *Id.* 12-D(4).

5. *Id.*

The rule establishes criteria for selection of cases for the 3JX docket, including but not limited to appeals:

- involving claims of error in the application of settled law;
- claiming an unsustainable exercise of discretion where the law governing that discretion is settled; [or]
- claiming insufficient evidence or a result against the weight of the evidence.<sup>6</sup>

The court rule also provides several significant features. Counsel are limited to five minutes of uninterrupted oral argument, supplemented by whatever time is necessary for counsel to answer questions from the justices, rather than the usual fifteen minutes.<sup>7</sup> This change allows the court to schedule up to twelve cases on a single day. Briefs are limited to twenty pages rather than the usual fifty pages.<sup>8</sup>

### III. CONSTITUTIONALITY OF THE 3JX DOCKET

In early 2001, a criminal defendant challenged placement of his case on the 3JX docket on the ground that it violated his right to due process under the New Hampshire Constitution, that he had a constitutional right to have his case decided by the full court.<sup>9</sup> The court held that the New Hampshire Constitution did not guarantee the right to appeal, the right to have a case heard by five justices, the right to fifteen minutes of oral argument, or the right to a full written opinion disposing of the case.<sup>10</sup> The court then analyzed the defendant's due process rights considering three factors:

- the private interest that will be affected by the docketing;
- the risk or erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and
- the Government's interest in utilizing the procedures.<sup>11</sup>

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6. N.H. R. Sup. Ct. 12-D(5) (amended by order of Jan. 15, 2002).

7. N.H. R. Sup. Ct. 12-D(6).

8. N.H. R. Sup. Ct. 12-D(7).

9. *State v. Landry*, 776 A.2d 1289 (N.H. 2001).

10. 776 A.2d at 1291.

11. *Id.* (quoting *In re Richard A.*, 771 A.2d 572, 576 (N.H. 2001)).

Following a discussion of these factors and an analysis of the 3JX procedures and the reasons for their adoption, the court concluded that the defendant's opportunity to argue his case on the 3JX docket comports with due process requirements and denied his motion to remove it from the docket.<sup>12</sup>

#### IV. EFFECTIVENESS OF THE 3JX DOCKET

The number of cases processed by the court has reached historical highs. The justices heard, in 2001, over 300 oral arguments and issued an unprecedented 376 written decisions. The court decided a record 1,014 cases during the year; 223 by published opinions, 153 by unpublished opinions, and the balance by various court orders. The consequence of this accomplishment has been to reduce dramatically the court's pending caseload to its lowest level in ten years. There were 514 cases pending cases at the end of the year, compared with 750 cases at the end of 2000. The three-judge expedited docket played a significant role in these statistics.

New Hampshire's decision to adopt an expedited docket has allowed the court to issue one hundred more written decisions in 2001 than in any previous year. For us, using the 3JX docket is essential if the court is to continue to reduce its backlog and to issue timely published opinions.

Following New Hampshire's adoption of the 3JX docket, the court created a survey questionnaire to measure its effectiveness. The form asked several questions designed to measure how well the innovation was received;<sup>13</sup> it was provided to attorneys at the conclusion of oral argument. We were pleasantly surprised to learn how quickly the 3JX docket became accepted by the attorneys. Their most frequent comment was that they had feared the court would assign to this docket only cases which were expected to be affirmed routinely. To their surprise, but not to our surprise, the 3JX docket maintained

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12. *Landry*, 776 A.2d at 1293.

13. *See* Tbl.1, *infra*. In addition to asking attorneys to indicate their level of agreement with statements about the efficacy of the 3JX procedure, the survey asked whether they had any recommendations for changes to the 3JX procedure and asked attorneys to indicate their levels of practice and appellate experience, the type of case appealed, and whether they prevailed in the appeal.

the very same ratio of affirmances and reversals as the court's regular docket.

The survey results are summarized below in Table 1. The court was pleased with the high marks but did note one reservation concerning the five-minute time limit on oral argument. Nevertheless, the court has decided to continue its limitation of five minutes so that more cases can be scheduled each day, particularly as the time may be supplemented if members of the court have questions. The majority of the court believes that given the issues presented in these cases, the limitations on briefing and oral argument are justified.

## V. CONCLUSION

Courts everywhere are constantly struggling to keep pace with increasing caseloads. For states without intermediate appellate courts, the task of managing cases and reducing backlog provides a daunting challenge. As judges and legislators search for a balance between funding limitations and public expectations, there are corresponding opportunities for creative solutions to the fulfillment of constitutional duties by the judicial branch of government.

As the following articles in this section of *The Journal* indicate, these solutions can take many forms and will be driven by aggressive judicial response to public needs. As more demands are placed upon appellate courts for speedy resolution of appeals, the judiciary will have to respond with new ideas and new systems. In most instances, it will be necessary to find ways to use time and to balance speedy resolution of cases with high quality decisions. As readers will see from the reports of experiences in other jurisdictions, judicial initiative and determination can produce remarkable results.

So, while justice delayed may be justice denied, justice expedited is probably justice enhanced.

TABLE 1. SUPREME COURT 3JX QUESTIONNAIRE:  
SUMMARY OF RESULTS

1= strongly disagree, 2=mildly disagree, 3=neutral  
4=mildly agree, 5=strongly agree

<i>Statement</i>	<i>Average Score</i>
1. Court staff was courteous.	4.85
2. Court staff was helpful.	4.62
3. Time allowed for oral argument was appropriate.	3.4
4. Justices did not interrupt for five minutes.	4.7
5. Justices were attentive.	4.66
6. Questions by the justices were helpful.	3.7
7. The decision was issued timely.	4.65
8. Reasons given for the decision were clear.	4.38
9. Clients were satisfied with the procedure.	4.08
10. Case was appropriate for this docket.	4.25
11. Overall the docket is a good idea.	4.22