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Third Degree Films v. Does 1-47

United States District Court for the District of Massachusetts

October 2, 2012, Decided

CIVIL ACTION NO. 12-10761-WGY

Reporter
286 F.R.D. 188 *; 2012 U.S. Dist. LEXIS 142079 **; 104 U.S.P.Q.2D (BNA) 2015 ***; 83 Fed. R. Serv. 3d (Callaghan) 1136; Copy. L. Rep. (CCH) P30,322; 2012 WL 4498911

THIRD DEGREE FILMS, Plaintiff, v. DOES 1-47, Defendants.

Core Terms

joinder, download, film, infringement, swarm, adult, settlement, cases, sever, occurrence, subpoena, copyright infringement, defendants', discovery, film company, pieces, upload, Media, peers, individuals, permissive, sharing, Internet, courts, joined, under federal rule, motion picture, digital, user, series of transactions

Case Summary

Overview

Plaintiff could protect its copyrights and sue defendants who infringed them, but efficiency gains and cost benefits of joining defendants in one action were substantially outweighed by fairness and inefficiency concerns, potential prejudice from possibly extortionate settlement demands, evasion of filing fees, so separate trials were warranted under Fed. R. Civ. P. 20(b).

Outcome

All but one defendant severed from the case and dismissed without prejudice.

LexisNexis® Headnotes

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN1 **Joinder of Parties, Permissive Joinder**

Fed. R. Civ. P. 20(a)(2) provides that defendants may be joined in a single action if any right to relief is asserted against them arising out of the same transaction, occurrence, or series of transactions or occurrences, Rule 20(a)(2)(A), and a question of law or fact common to all defendants will arise, Rule 20(a)(2)(B). The majority of courts holding that joinder is improper in like cases have held so on the basis that the allegations do not arise out of the same transaction, occurrence, or series of transactions or occurrences.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN2 **Joinder of Parties, Permissive Joinder**

Defendants alleged to infringe a film in a single BitTorrent swarm meet the same transaction or occurrence requirement of Fed. R. Civ. P. 20(a).

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN3 **Joinder of Parties, Permissive Joinder**

A recent United States Court of Appeals for the Federal Circuit decision in a patent infringement case, which articulates a useful standard for whether joinder is proper under Fed. R. Civ. P. 20(a)(2)(B). Joinder is permissive even for independent actors who are not sued on a theory of joint liability. There is guidance for the same transaction or occurrence requirement of Rule 20(a)(2)(B) in the jurisprudence on Fed. R. Civ. P. 13(a) for compulsory counterclaims, in which courts have construed similar language to the same transaction or occurrence requirement of Rule 20(a)(2)(B) as requiring a logical relationship between the claims. The Federal

Circuit has asserted that the logical relationship test would be satisfied in the joinder context where there was substantial evidentiary overlap in the facts giving rise to the cause of action of each defendant, put another way, the defendants' alleged infringing acts, which give rise to the individual claims of infringement, must share an aggregate of operative facts. It is difficult to see how sharing and downloading activity - a series of individuals connecting either directly with each other or as part of a chain or "swarm" of connectivity designed to illegally copy and share the exact same copyrighted file - could not constitute a series of transactions or occurrences for purposes of *Rule 20(a)*.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN4 **Joinder of Parties, Permissive Joinder**

The interaction of defendants via BitTorrent file sharing-even if indirect - is significant enough to bring them within the broad scope of permissibly joined parties under *Fed. R. Civ. P. 20(a)*.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN5 **Joinder of Parties, Permissive Joinder**

Under *Fed. R. Civ. P. 20(b)*, entitled "Protective Measures," a court has broad discretion to issue orders - including an order for separate trials - to protect a party against embarrassment, delay, expense, or other prejudice. *Fed. R. Civ. P. 20(b)*.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN6 **Joinder of Parties, Permissive Joinder**

The purpose of permissive joinder of parties is to promote trial convenience and expedite the final determination of disputes.

Civil Procedure > Trials > Consolidation of Actions

Civil Procedure > Trials > Separate Trials

HN7 **Trials, Consolidation of Actions**

To the extent that case management may be more efficient at certain stages of the litigation were the defendants in a single action, the Court retains discretion under *Fed. R. Civ. P. 42(a)* to consolidate any or all of the matters for some portion of the process. *Fed. R. Civ. P. 42(a)*.

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

HN8 **Courts, Authority to Adjudicate**

Our federal court system provides litigants with some of the finest tools available to assist in resolving disputes; the courts should not, however, permit those tools to be used as a bludgeon.

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

HN9 **Courts, Authority to Adjudicate**

The mandate of *Fed. R. Civ. P. 1* is that the Federal Rules of Civil Procedure ought be administered to secure the just, speedy, and inexpensive determination of every action. *Fed. R. Civ. P. 1*. Indeed, the United States District Court for the District of Massachusetts zealously encourages all parties in actions pending before it to reach settlement if possible, as private resolution is frequently the most just and cost-effective result. Yet, it is precisely when private resolution is intimated to be unjust that the court's role shifts from encouraging such an agreement to protecting against it. The risk of extortionate settlements is too great to ignore, especially when joinder is being used to that end.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

Civil Procedure > Trials > Separate Trials

HN10 **Joinder of Parties, Permissive Joinder**

Requiring a copyright owner to sue multiple BitTorrent swarm defendants separately serves several purposes. First, it compels the owner to pay a $350.00 filing fee for each defendant, a statutory requirement under *28 U.S.C.S. § 1914(a)* that serves two salutary purposes. First, it is a revenue raising measure. Second, *§ 1914(a)* acts as a threshold barrier, albeit a modest one, against the filing of frivolous or otherwise meritless lawsuits. Requiring the owner to pay a filing fee for each defendant may help ensure Third Degree is suing the defendants for a good faith reason, that is, to protect its copyright and litigate its claim, rather than obtain the defendants' information and coerce settlement with no intent of employing the rest of the judicial process. Moreover, severing such defendants will promote fairness and efficiency in trial administration.

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Judges: WILLIAM G. YOUNG, DISTRICT JUDGE.

Opinion by: WILLIAM G. YOUNG

Opinion

[*2016]** **[*189]** MEMORANDUM & ORDER

YOUNG, D.J.

I. INTRODUCTION

In recent months, this Court has grown increasingly troubled by "copyright trolling,"[1] specifically as it has evolved in the adult film industry. The Court is not alone in its concern. Judges, scholars, and journalists alike have noted the recent trend - indeed, **[*190]** new business model[2] - whereby adult film companies file mass lawsuits against anonymous Doe defendants, identified only by their IP addresses, alleging that each IP address reproduced its pornographic film via file sharing technology in a single swarm, thus infringing the company's valid copyright and entitling the **[**2]** company to statutory damages.[3]

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[1] A copyright troll is an owner of a valid copyright who brings an infringement action "not to be made whole, but rather as a primary or supplemental revenue stream." *James DeBriyn, Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages, 19 UCLA Ent. L. Rev. 79, 86 (2012)*.

[2] See *DeBriyn, supra note 1, at 79* (explaining that "[t]o supplement profits from copyrighted works, copyright holders have devised a mass-litigation model to monetize, rather than deter, infringement, . . . utiliz[ing] the threat of outlandish damage awards to force alleged infringers into quick settlements"); Christopher M. Swartout, Comment, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement, 31 Nw. J. Int'l L. & Bus. 499, 509-10 (2011)* (describing the "purely profit-driven" "low-cost, high-volume campaigns to collect settlements from file-sharers").

[3] See, e.g., *Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 229, 240 (S.D.N.Y. 2012)* (noting the proliferation of these cases across the country, and expressing concern specifically with the multitude of "ex parte applications for expedited **[**3]** discovery of identifying information pertaining to hundreds or thousands of John Doe defendants"); *In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 296 F.R.D. 80, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *1 (E.D.N.Y. May 1, 2012)* (observing that there has been a "nationwide blizzard" of such actions and documenting abusive litigation tactics employed by the adult film company plaintiff in an apparent attempt to coerce settlement from the Doe defendants); *DeBriyn, supra note 1, at 90-91* (remarking that "the copyright troll industry has been 'multiplying like especially fertile rabbits' to scour the Internet in the hope of monetizing copyright infringement" (citation omitted)); Jason Koebler, Porn Companies File Mass Piracy Lawsuits: Are You At Risk?, U.S. News and World Report (Feb. 2, 2012), *http://www.usnews.com/news/articles/2012/02/02/porn-companies-file-mass-piracy-lawsuits-are-you-at-risk* (estimating that over 220,000 individuals have been sued since mid-2010 for illegally downloading films, many of them

While it is without question that **[**4]** a valid copyright holder is entitled to seek protection of its intellectual property in federal court, it appears that in at least some of these cases, adult film companies may be misusing the subpoena powers of the court, seeking the identities of the Doe defendants solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims.[4] And while it is true that every **[***2017]** defendant to a lawsuit must assess reputational costs in his or her determination of whether to settle or defend an action, the potential for embarrassment in being publicly named as allegedly infringing such salacious works as "Big Butt Oil Orgy 2" or "Illegal Ass 2," may be playing a markedly influential role in encouraging a myriad of Doe defendants to settle once subpoenas are issued - a bargaining chip the adult film companies appear to well understand.[5]

Against this backdrop of mass lawsuits and potentially abusive litigation tactics, courts nationwide have become skeptical of allowing **[*191]** the adult film companies unfettered access to the judicial processes of subpoenas and early discovery.[6] Furthermore, many

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pornographic, via BitTorrent, and noting that the suits are designed to coerce settlement).

[4] For example, in the Eastern District of Virginia, the court ordered the plaintiff to show cause why sanctions were not warranted under *Federal Rule of Civil Procedure 11* where, after subpoenaing the Doe defendants' identifying information from the Internet Service Providers ("ISPs"), the plaintiff contacted the defendants **[**5]** with harassing telephone calls, demanding $2,900.00 to end the litigation, and when any of the defendants filed a motion to dismiss or sever, the plaintiff voluntarily dismissed the individual from the litigation rather than allow the merits of the motion to be heard. *Raw Films, Ltd. v. Does 1-32, No. 3:11cv532–JAG, 2011 U.S. Dist. LEXIS 114996, 2011 WL 6182025, at *2 (E.D. Va. Oct. 5, 2011)*. The court averred:

> This course of conduct indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does.

*2011 U.S. Dist. LEXIS 114996, [WL] at *3*.

[5] See, e.g., *SBO Pictures, Inc. v. Does 1-3036, No. 11-4220 SC, 2011 U.S. Dist. LEXIS 137361, 2011 WL 6002620, at *3* (expressing concern that the Doe defendants - "whether guilty of copyright infringement or not - would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded[,] . . . [which] creates **[**6]** great potential for a coercive and unjust 'settlement'") (quoting *Hard Drive Prods., Inc. v. Does 1-30, No. C-11-3826 DMR, 2011 U.S. Dist. LEXIS 132449, 2011 WL 5573960, at *3 (N.D. Cal. Nov. 16, 2011)*). The Electronic Frontier Foundation, a non-profit, member-supported digital civil liberties organization, submitted an amicus curiae brief in support of an ISP provider's motion to quash or modify subpoenas in a similar mass copyright infringement case, and stated:

> While Plaintiffs may not have fully elaborated on their motives in bringing suit, the invasive, sweeping manner in which it was brought indicates that they hope to leverage the risk of public embarrassment to convince Defendants to quickly capitulate, whether or not they did anything wrong. A plaintiff's lawyer in a recent similar mass porn downloading case has not been shy about telling the press that he expects defendants there to promptly settle precisely because many people who are accused of downloading pornography are unwilling to risk being publicly identified as having done so. For example, he recently told the Texas Lawyer: "You have people that might be OK purchasing music off iTunes, but they're not OK letting their wife know that they are purchasing **[**7]** pornography. . . [.] Most people just call in to settle. We have a 45 percent settlement rate." John Council, Adult Film Company's Suit Shows Texas is Good for Copyright Cases, Texas Lawyer, Oct. 4, 2010.

Mot. Elec. Frontier Found. Leave File Amicus Curaie Br. Supp. Third Party Time Warner Cable's Mot. Quash Modify Subpoenas, Ex. 1, Mem. Amicus Curiae Elec. Frontier Found. Supp. Third Party Time Warner Cable's Mot. Quash Modify Subpoena, at 16, Third World Media LLV v. Does 1-1243, No. 3:10-cv-0090 (N.D.W.V. Nov. 23, 2010).

[6] For example, in the Northern District of California, a magistrate judge refused to grant expedited discovery to subpoena the ISP providers for the Doe defendants' identities after noting that the adult film company plaintiff conceded that to its knowledge, neither it nor any other plaintiff had ever served a single Doe defendant after early discovery had been granted. *Hard Drive Prods., Inc. v. Does 1-90, No. C 11-03825 HRL, 2012 U.S. Dist. LEXIS 45509, 2012 WL 1094653, at *3 & n.4 (N.D. Cal. Mar. 30, 2012)*. The court censured the plaintiff, stating "Plaintiff seeks to enlist the aid of the court to obtain information through the litigation discovery process so that it can pursue a non-judicial remedy that focuses on extracting 'settlement' payments from persons who may or may not be infringers. This the court is not willing to do." *2012 U.S. Dist. LEXIS 45509, [WL] at *7*. Here in the District of Massachusetts, Judge Stearns recently issued an Order to Show Cause in a similar case as to why the court "should not exercise its discretion under *Rule 21* to sever all of the Doe

courts are eradicating these mass filings on the ground that joinder of tens, hundreds, and sometimes thousands of alleged infringers is improper,[7] and some have admonished the plaintiff adult film companies for evading such substantial court filing fees as they have through the joinder mechanism.[8] Still, a number of courts have upheld the joinder of Doe defendants as proper and efficient, issued subpoenas, and **[**8]** permitted early discovery.[9]

This Court takes this occasion to address the issue of whether joinder of Doe defendants who allegedly infringed a copyrighted **[***2018]** film via file sharing technology in a single swarm is permissive under *Federal Rule of Civil Procedure 20(a)*, and, if so, whether any protective measures ought be taken by the Court pursuant to its broad discretion under *Federal Rule of Civil Procedure 20(b)*.

II. ANALYSIS

A. Procedural Posture

On April 28, 2012, Third Degree Films, Inc. ("Third Degree") sued forty-seven Doe **[*192]** defendants, identified only by their IP addresses. Compl. Copyright Infringement ("Compl."), ECF No. 1. Two days later, Third Degree filed an emergency motion for expedited discovery, seeking to subpoena the respective Internet Service Providers ("ISPs") to obtain the Doe defendants' personal identifying information. Pl.'s Emergency Ex-Parte Mot. Early Disc., ECF No. 3. This Court granted the motion and issued a modified order, instructing the ISPs to notify the subscribers of the subpoena, allow them thirty days from the date of notice to move to quash or vacate the subpoena, and then disclose **[**11]** the subpoenaed information to Third Degree. Order Granting Pl.'s Emergency Ex-Parte Mot. Early Discovery, ECF No. 7.

Subsequently, several Doe defendants moved to quash the subpoena, sever the defendants, or dismiss the action. Def. Doe No. 44's Mot. Quash ("Doe 44's Mot."), ECF No. 8; Mot. Quash & Mem. Supp. Mot. ("Doe 19's Mot."), ECF No. 9; Mot. Doe 10 Sever Dismiss Alt. Objection Inspection Mot. Quash ("Doe 10's Mot."), ECF No. 10; Def. Doe 34's Mot. Quash, Issuance Protective Order, Dismiss Compl., Incorporated Mem. Law ("Doe 34's Mot."), ECF No. 13; Doe 12's Mot. Sever & Dismiss, Alt., Mot Quash Subpoena ("Doe 12's Mot."), ECF No. 16; Consol. Mot. Quash Subpoena Pursuant *FRCP 45*, Alt., Mot. Sever Pursuant *FRCP 21* ("Doe 22's Mot."), ECF No. 18. Third Degree filed opposition briefs to the various motions. Opp'n (ECF No. 9) Doe's Mot. Quash, ECF No. 19; Opp'n (ECF No. 8) Doe's Mot. Quash, ECF No. 20; Opp'n (ECF No. 10 & 16) Mots. Sever, Dismiss, Alt. Mot. Quash Subpoena ("Pl.'s Opp'n Br."), ECF No. 21; Opp'n (ECF No. 13) Doe's Mot. Quash, Issuance Protective Order, Dismiss Compl., ECF No. 22; Opp'n (ECF No. 18) Doe's Mot. Quash Sever, ECF No. 24.

Third Degree has notified the Court **[**12]** of dismissal with prejudice of the following Doe defendants to date: Doe 8, Doe 13, Doe 14, Doe 23, Doe 26, Doe 30, Doe 36, Doe 39, Doe 43 and Doe 46. Dismissal Prejudice Specific Does, ECF Nos. 25, 26, 27, 30. On September 7, 2012, Third Degree moved for a 120-day extension to serve the now-identified defendants with a complaint and summons. Pl.'s Mot. Enlargement Time Service, ECF No. 28.

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defendants but one, while permitting [the plaintiff] to refile against each of the defendants in separate actions." *New Sensations, Inc. v. Does 1-201, No. 12-CV-11720-RGS, 2012 U.S. Dist. LEXIS 135791, 2012 WL 4370864, at *1 (D. Mass. Sept. 21, 2012)* **[**9]** (Stearns, J.).

[7] See, e.g., *Patrick Collins, Inc. v. Does 1-23, No. 11-CV-15231, 2012 U.S. Dist. LEXIS 40536, 2012 WL 1019034, at *4 (E.D. Mich. Mar. 26, 2012)* (severing the Doe defendants because the infringement of the film via BitTorrent did not constitute a "series of transactions or occurrences" as required under *Federal Rule of Civil Procedure 20(a)*); *SBO Pictures, 2011 U.S. Dist. LEXIS 137361, 2011 WL 6002620, at *3* (same).

[8] In In re BitTorrent Adult Film Copyright Infringement Cases, the magistrate judge estimated that "plaintiffs have improperly avoided more than $25,000 in filing fees by employing its swarm joinder theory. . . . Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees." *2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *13*.

[9] See, e.g., *Patrick Collins, Inc. v. Does 1-39, No. 12-CV-00096-AW, 2012 U.S. Dist. LEXIS 57187, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012)* (holding that joinder was proper, as the adult film company plaintiff had demonstrated a logical relationship between the series of individual downloads of the film via BitTorrent, and denying motion to **[**10]** quash the subpoena); *First Time Videos, LLC v. Does 1-76, 276 F.R.D. 254, 257 (N.D. Ill. 2011)* (same).

B. Facts as Alleged

Third Degree produced and owns a valid copyright to the adult film, "MILF Wars: Lisa Ann Vs. Julia Ann" (the "Film"). Compl. ¶ 8. Without Third Degree's authorization, Does 1-47 reproduced and distributed to the public at least a substantial portion of the Film using the BitTorrent file transfer protocol ("BitTorrent"). Id. ¶ 19.

As this Court previously described in Liberty Media Holdings, LLC v. Swarm Sharing Hash File AE340D0560129AFEE8D78CE07F2394C7 B5BC9C05,

> BitTorrent is a peer-to-peer file-sharing protocol used for the distribution and sharing of data over the Internet, including files containing digital versions of motion pictures. BitTorrent is different from traditional peer-to-peer networks in that it organizes all users who wish to download a particular file into a collective **[**13]** distribution network, known as a "swarm." Being part of a swarm allows users to simultaneously download and upload pieces of the media file from each other, rather than download the entire file from a single source.
>
> File sharing through the BitTorrent network begins with a single individual, often referred to as a "seed" user or "seeder," who intentionally chooses to share a particular file with a BitTorrent swarm. The original file in this case contains the entire Motion Picture. Once the file has been shared by the seed user, other members of the swarm can download the original file, which creates an exact digital copy on the computers of the downloading users. Each user requesting to download the file becomes a member of the swarm and consequently receives pieces of the original file. Eventually, the entire file is broken into pieces and distributed to various members of the swarm who may then "reassemble" the file by exchanging pieces with one another. Once a piece of the file is downloaded, it is immediately made available for **[***2019]** distribution to other users seeking to download the file, subsequently turning **[*193]** each downloader into an uploader. This sequence leads to the "rapid viral **[**14]** sharing" of the file.
>
> [The Doe defendants] collectively participated in a peer-to-peer swarm to download, copy, and distribute the Motion Picture file . . . . After searching for and obtaining a torrent file containing information sufficient to locate and download the Motion Picture, each defendant opened the torrent file using a BitTorrent client application that was specifically developed to read such files. [The Doe defendants] then traded pieces of the file containing a digital copy of the Motion Picture with each other until each user had a partial or complete copy of the Motion Picture on his or her computer. Each defendant owns or has control of a computer that contained (and possibly still contains) a torrent file identifying the Motion Picture, as well as a partial or complete copy of the Motion Picture itself.

821 F. Supp. 2d 444, 448 (D. Mass. 2011) (citations omitted).

C. Permissive Joinder of Defendants

This Court previously has confronted the issue of whether joinder of tens of Doe defendants is permissive in an infringement action alleging the use of BitTorrent file sharing technology to redistribute a copyrighted adult film. Last year, in *Liberty Media, 821 F. Supp. 2d at 451-52*, **[**15]** the Court rejected the Doe defendants' argument that joinder was improper and held that the swarm participants could be permissively joined under *Rule 20*.[10] The Court acknowledged that post-discovery, certain defendants might raise factual distinctions meriting severance of their claims, but maintained that the defendants were properly joined at the early stages of litigation until such distinctions arose. *Id. at 451 n.6*.

Since its decision was issued in Liberty Media, this Court has entertained a profusion of filings in the mass copyright infringement cases on its docket. Upon further reflection and a deeper understanding of the policy concerns at play, the Court now revisits and amends its holding in Liberty Media. The Court continues to maintain that joinder is technically proper under *Rule 20(a)*. The Court now holds, however, that in light of its serious concerns **[**16]** regarding prejudice to the defendants as a result of joinder, it ought exercise the broad discretion granted it under *Rule 20(b)* and sever the Doe defendants in this action and in similar actions

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[10] As noted by the Court in Liberty Media, the issue of permissive joinder was raised improperly by the defendants in their motion to quash, rather than in a motion to sever. *821 F. Supp. 2d at 451 n.5*. The Court noted this procedural defect, but went on to analyze and reject the merits of the defendants' joinder argument. Id.

before this Court.

1. Permissive Joinder Under *Federal Rule of Civil Procedure 20(a)*

HN1[↑] *Federal Rule of Civil Procedure 20(a)(2)* provides that defendants may be joined in a single action if "any right to relief is asserted against them . . . arising out of the same transaction, occurrence, or series of transactions or occurrences," *Fed. R. Civ. P. 20(a)(2)(A)*, and "a question of law or fact common to all defendants will arise," id. *20(a)(2)(B)*. The majority of courts holding that joinder is improper in like cases have held so on the basis that the allegations do not arise out of the same transaction, occurrence, or series of transactions or occurrences. See, e.g., *Patrick Collins, Inc. v. Does 1-23, No. JFM 8:12-cv-00087, 2012 U.S. Dist. LEXIS 47687, 2012 WL 1144918, at *6 (D. Md. Apr. 4, 2012)* (holding that joinder was improper under *Rule 20(a)(2)(B)* because "the alleged infringement was committed by unrelated defendants, through independent actions, at different times and locations"); *Liberty Media Holdings LLC v. BitTorrent Swarm, 277 F.R.D. 672, 675 (S.D. Fla. 2011)* **[**17]** (holding that joinder was improper under *Rule 20(a)(2)(B)* because the alleged infringement occurred on different days and at different times during a two-week period, and noting that even if the infringement did occur at the same time, "due to the decentralized operation of BitTorrent, this fact alone would not imply that Defendants participated in or contributed to the downloading of each other's copies of the work at issue" (internal quotation marks and citation omitted)); *Hard Drive **[*194]** Prods., Inc. v. Does 1-188, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011)* (holding that joinder was improper under *Rule 20(a)(2)(B)* because "[u]nder the BitTorrent Protocol, it is not necessary that each of the [Doe defendants] participated in or contributed to the downloading of each other's copies of the work at issue -or even participated in or contributed to the downloading by any of the [Doe defendants]"). The moving Doe defendants in the instant case similarly argue that **[***2020]** joinder is improper under *Rule 20(a)(2)(B)*. Doe 22's Mot. 3; Doe 10's Mot. 2; Doe 34's Mot. 7.

In Liberty Media, this Court concluded - albeit in a rather summary fashion - that the Doe defendants' alleged behavior satisfied the "same **[**18]** transaction or occurrence" requirement, relying on Liberty Media's assertion that "a BitTorrent swarm is a collective enterprise where each downloader is also an uploader, and where a group of uploaders collaborate to speed the completion of each download of the file." *821 F. Supp. 2d at 451* (citation omitted). After considering the case law submitted by the parties in this case, the Court continues to hold that ***HN2***[↑] Doe defendants alleged to infringe a film in a single BitTorrent swarm meet the "same transaction or occurrence" requirement of *Rule 20(a)*.

The Court is instructed by ***HN3***[↑] a recent Federal Circuit decision in a patent infringement case, which articulates a useful standard for whether joinder is proper under *Rule 20(a)(2)(B)*. In *In re EMC Corp., 677 F.3d 1351, 1356 (Fed. Cir. 2012)*, the court began by noting that joinder is permissive even for independent actors who are not sued on a theory of joint liability. The court found guidance for the "same transaction or occurrence" requirement of *Rule 20(a)(2)(B)* in the jurisprudence on *Rule 13(a)* for compulsory counterclaims, in which courts have construed similar language to the "same transaction or occurrence" requirement of *Rule 20(a)(2)(B)* **[**19]** as requiring a "logical relationship" between the claims. *Id. at 1357-58* (citing the Eighth and Eleventh Circuits, which have also extended the "logical relationship" test of *Rule 13(a)* to *Rule 20(a)*). The Federal Circuit asserted that the logical relationship test would be satisfied in the joinder context where there was "substantial evidentiary overlap in the facts giving rise to the cause of action of each defendant," *id. at 1358*; put another way, "the defendants' alleged infringing acts, which give rise to the individual claims of infringement, must share an aggregate of operative facts." Id.

In *Third Degree Films v. Does 1-36, No. 11-cv-15200, 2012 U.S. Dist. LEXIS 87891, 2012 WL 2522151 (E.D. Mich. May 29, 2012)*, a magistrate judge persuasively applied the In re EMC Corp. standard to the alleged infringement of an adult film by individuals in a single BitTorrent swarm. The court issued an opinion and order denying a motion to sever the Doe defendants, framing the issue as "whether Plaintiff has sufficiently pled that each defendant's act of infringement - downloading and uploading pieces of a digital version of the [film] - share 'an aggregate of operative facts . . . .'" *2012 U.S. Dist. LEXIS 87891, [WL] at *6* (citing *In re EMC Corp., 677 F.3d at 1351*). **[**20]** The court held that the Plaintiff had met its burden in this regard, at least at the early stages of litigation. *2012 U.S. Dist. LEXIS 87891, [WL] at *7*.

The court acknowledged the "substantial merit" of the counter-position to its holding - indeed, the position of some of the Doe defendants in this case - that because

a single swarm is comprised of thousands of peers, and because the transmissions by the Doe defendants occurred over a period of several weeks, it is possible - perhaps likely - that a particular Doe defendant did not upload to or download directly from any of the other Doe defendants named in the complaint. *2012 U.S. Dist. LEXIS 87891, [WL] at *8.*

But the Does 1-36 court was persuaded - as is this Court - by the "equally weighty contrary case law" which holds that the plausible indirect interactions between the named Doe defendants constitute "shared, overlapping facts" which suffice to establish a "series of transactions or occurrences."[11] **[*195]** *2012 U.S. Dist. LEXIS 87891, [WL] at *8-9*; see also, e.g., *Hanley v. First Investors Corp., 151 F.R.D. 76, 79 (E.D. Tex. 1993)* ("Imagine a number of 'transactions or occurrences' spread out through time and place. They are not directly continuous, or else they would constitute one transaction or occurrence rather than a **[**21]** number of them. What would make them a 'series?' The answer is some connection or logical relationship between the various transactions or occurrences."). The Does 1-36 court explained: **[***2021]**

> it is important to consider that while a peer directly uploads to only a small number of peers, those peers in turn upload pieces to other peers that later join the swarm. Thus, a defendant's "generation" of peers - peers that a defendant likely directly uploaded to - helped pass on pieces of the Work to the next "generation" of active peers. For example, it is not implausible that John Doe No. 10, who apparently participated in the swarm on July 18, 2011, shared pieces of the Work with peers that in turn, helped propagate the Work to later joining peers. Therefore, Doe No. 10 plausibly indirectly uploaded pieces of the work to, say, Doe No. 25 who participated in the swarm four days later. Indeed, it is beyond dispute that the initial seeder indirectly uploaded pieces of the Work to every peer in the swarm — no matter when they joined.

Id. (citing *Patrick Collins, Inc. v. Does 1-21, 282 F.R.D. 161, 2012 WL 11908040, at *5 (E.D. Mich. 2012)*. The court held, and this Court concurs, that the allegations **[**22]** of infringement via BitTorrent swarm plead more than simply that the Doe defendants "committed the exact same violation of the law in exactly the same way," id. (internal quotation marks and citation omitted), but rather that the Doe defendants plausibly infringed the Film through a series of transactions or occurrences. See also, e.g., *Patrick Collins, Inc. v. Does 1-39, No. 12-CV-00096-AW, 2012 U.S. Dist. LEXIS 57187, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012)* ("Although the downloads in this case occurred over a span of around three months, suggesting that the Does were not downloading the copyrighted movie at the exact same time, Plaintiff has adequately alleged that each download directly facilitated the others in such a way that the entire series of transactions would have been different but for each of Defendants' infringements."); *Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 229, 244 (S.D.N.Y. 2012)* ("[I]t is difficult to see how the sharing and downloading activity alleged in the Complaint - a series of individuals connecting either directly with each other or as part of a chain or 'swarm' of connectivity designed to illegally copy and share the exact same copyrighted file - could not constitute a 'series **[**23]** of transactions or occurrences' for purposes of *Rule 20(a)*.").

The **[**24]** Court also continues to hold that allegations of infringement through the use of BitTorrent file sharing technology meet the first prong of *Rule 20(a)(2)* requiring common questions of law or fact. As the Court explained in Liberty Media, common questions of law exist in that the allegations asserted against the Doe defendants are identical, and common questions of fact exist as to the method of infringement using *BitTorrent. 821 F. Supp. 2d at 451*; see also *Does 1-36, 2012 U.S. Dist. LEXIS 87891, 2012 WL 2522151, at *4* ("Plaintiff has alleged the same legal causes of action involving the same digital file against each of the defendants. Plaintiff has also alleged that the same investigation led to the discovery of the IP addresses allegedly

[11] It gives this Court pause that district courts are so divided over whether file sharing via the BitTorrent protocol constitutes a "series of transactions or occurrences" in satisfaction of *Rule 20(a)(2)(B)*. The inquiry is so fact-intensive, and the BitTorrent protocol so technologically complex, that no principled conclusions have emerged from the abundance of recent case law and this Court is not entirely comfortable hanging its hat on its own understanding of the process. Yet, cognizant of the oft-quoted averment of the Supreme Court that "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties," *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (U.S. 1966)*, the Court holds that ***HN4***[↑] the interaction of the Doe defendants via BitTorrent - even if indirect - is significant enough to bring them within the broad scope of permissibly joined parties under *Rule 20(a)*. Instead, the Court grounds its determination to sever the Doe defendants in this action and like actions on a basis squarely within the Court's expertise: fundamental fairness and justice to all parties.

associated with Defendants." (citations omitted)). The moving Doe defendants in this case do not contest that the common question of law or fact requirement is satisfied, and the Court will not belabor the point.

[*196] 2. Protective Measures Under *Federal Rule of Civil Procedure 20(b)*

While the Court holds that joinder is permissive under *Rule 20(a)*, analysis does not end there. ***HN5***[↑] Under *Federal Rule of Civil Procedure 20(b)* ("*Rule 20(b)*"), entitled "Protective Measures," the Court has **[**25]** broad discretion to "issue orders - including an order for separate trials - to protect a party against embarrassment, delay, expense, or other prejudice." *Fed. R. Civ. P. 20(b)*. As noted in the Introduction, the Court has serious concerns regarding the propriety of joinder of tens, hundreds, or thousands of Doe defendants in these adult film mass copyright infringement cases.

HN6[↑] The purpose of permissive joinder of parties is "to promote trial convenience and expedite the final determination of disputes." 7 Charles Alan Wright et al., 7 Federal Practice and Procedure § 1652 (3d ed. 2012). In each of its opposition briefs, Third Degree argues that joinder of the Doe defendants would promote judicial efficiency, and ought therefore be permitted. See, e.g., Pl.'s Opp'n Br. 9. Yet the joinder of forty-seven defendants, each of whom may raise different factual and legal defenses to Third Degree's claims, is contrary to those stated ends. As one court contemplated,

> Comcast subscriber John Doe 1 could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works. John Does 3 through 203 could **[**26]** be thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs' property and depriving them, and **[***2022]** their artists, of the royalties they are rightly owed. . . . Wholesale litigation of these claims is inappropriate, at least with respect to a vast majority (if not all) of Defendants. Joinder is improper.

*BMG Music v. Does 1-203, No. Civ.A 04-650, 2004 U.S. Dist. LEXIS 8457, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004)*. Even in the infancy of this action, it is clear that the Doe defendants will raise disparate defenses. For example, Doe 34 has indicated that she is a single thirty-nine year-old professional woman employed in a senior position in the financial industry, and owns a two-family home, residing in one unit and renting out the other unit. Doe 34's Mot. 3. She denied ever having downloaded or viewed the Film, but indicated that she provides wireless Internet for the tenants in the adjacent unit. Id. at 4. Doe 5 has asserted that the infringing IP address identified on the notice is not Doe 5's IP address, and argues that any such download was through a "'jacked or bootlegged connection' to the ISP network." Mot. Extension Time Obtain Legal Legal [sic] Counsel 1, ECF No. 23. Doe 10 denies that **[**27]** he/she, or anyone in the household, downloaded the Film. Doe 10's Mot. 2.

While it is true that there is factual overlap regarding the Doe defendants' alleged method of infringement via BitTorrent, it is evident that the crux of the cases, should they proceed to trial, will be the individual factual claims of each defendant. As the court aptly described in CineTel Films, Inc. v. Does 1-1,052,

> To maintain any sense of fairness, each individual defendant would have to receive a mini-trial, involving different evidence and testimony. The enormous burden of a trial like this "completely defeat[s] any supposed benefit from the joinder of all Does . . . and would substantially prejudice defendants and the administration of justice."

853 F. Supp. 2d 545, 554 (D. Md. 2012) (citing *Hard Drive Prods., 809 F. Supp. 2d at 1164*); see also *On the Cheap LLC v. Does 1-5011, 280 F.R.D. 500, 503 (N.D. Cal. 2011)* ("Because the large number of defendants with individual issues will create 'scores of mini-trials involving different evidence and testimony' and complicate the issues for all those involved, it is more efficient to proceed with separate cases where there will be separate proceedings, including **[**28]** separate motion hearings and ADR efforts." (citation omitted)). The Court simply cannot see how it "promote[s] trial convenience" to hold forty-seven mini-trials and ask one jury to make findings as to each of them.

The Court further agrees with the reasoning in Pacific Century Int'l, Ltd. v. Does 1-101 that joinder of the Doe defendants would transform what "appears to be a relatively **[*197]** straightforward case" into "a cumbersome procedural albatross." *No. C-11-02533 (DMR), 2011 U.S. Dist. LEXIS 124518, 2011 WL 5117424, at *3 (N.D. Cal. Oct. 27, 2011)*. The court explained:

> To provide two illustrative examples, each Defendant would have the right to be present at

> every other Defendant's depositions — a thoroughly unmanageable and expensive ordeal. Similarly, pro se Defendants, who most likely would not e-file, would be required to serve every other Defendant with a copy of their pleadings and other submissions throughout the pendency of the action at substantial cost.

Id.

HN7[↑] To the extent that case management may be more efficient at certain stages of the litigation were the defendants in a single action, the Court retains discretion under *Federal Rule of Civil Procedure 42(a)* to consolidate any or all of the matters for some **[**29]** portion of the process. *Fed. R. Civ. P. 42(a)*. Thus, the Court may consolidate the cases for purposes of discovery or early motion practice. See id. Moreover, if it appears that the method of infringement via BitTorrent protocol is largely uncontested, perhaps that matter might be stipulated. Alternatively, the Court could join the defendants and try that limited issue before a jury and then, applying the principles of issue preclusion, use the jury's finding in the separate trials of each defendant. Thus, joinder is not the only procedural mechanism by which the Court efficiently can administer these cases; indeed, it may create significant inefficiencies. In light of the Court's reservations regarding the prejudicial effect of joinder at the action's inception, the Court declines to permit joinder of the Doe defendants, and will instead consolidate the independent actions to the extent necessary.

Moreover, this Court is concerned that the joinder mechanism is being manipulated to facilitate a low-cost, low-risk revenue model for the adult film companies. See Christopher M. Swartout, Comment, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement, 31 Nw. J. Int'l L. & Bus. 499, 509-10 (2011)* **[**30]** (describing the "purely profit-driven" "low-cost, high-volume campaigns to collect settlements **[***2023]** from file-sharers"). Third Degree and like companies file a single cookie-cutter complaint alleging copyright infringement against tens, hundreds or thousands of individuals based on their IP addresses, paying only a single $350.00 filing fee, and likely employing a contingency fee structure. See *James DeBriyn, Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages, 19 UCLA Ent. L. Rev. 79, 91 (2012)* (noting that in these cases, the contingency fee structure is reversed so that the law firm keeps 70 percent, and explaining that this structure allows copyright holders to "monetize peer-to-peer (P2P) activity and realize revenues from an unexpected source - Internet piracy" (citation omitted)).

The company then moves for early discovery, subpoenas the Doe defendants' identifying information from the ISPs, and sends the defendants settlement demand letters. *Id. at 95-96*. The company relies on the combined threat of substantial statutory damages and the embarrassment of being publicly named as illegally downloading a pornographic film (not **[**31]** to mention the pressure applied by the knowledge that co-defendants are settling), to assume that at least some of the defendants will settle for perhaps $2,000.00 or $3,000.00 - which result comes at minimal cost to the company. See *id. at 98-99*.

Other courts have noted the same pattern and expressed similar misgiving. In SBO Pictures, Inc. v. Does 1-3036, the court explained:

> Indeed, the Court is concerned that Plaintiff's motive for seeking joinder of over three thousand Doe Defendants in one action may be . . . to coerce . . . settlements. As Plaintiff's counsel surely knows, trial of a suit with thousands of individual defendants would present unmanageable difficulties. The vast majority of these mass copyright infringement suits are resolved through settlement once the plaintiff secures the information identifying the Does. . . . However, "while the courts favor settlements, filing one mass action in order to identify hundreds of doe defendants through pre-service discovery **[*198]** and facilitate mass settlement, is not what the joinder rules were established for."

*No. 11-4420 SC, 2011 U.S. Dist. LEXIS 137361, 2011 WL 6002620, at *3-4 (N.D. Cal. Nov. 30, 2011)* (citing *Patrick Collins, Inc. v. Does 1-3757, No. C 10-05886 LB, 2011 U.S. Dist. LEXIS 128029, 2011 WL 5368874, at *2 (N.D. Cal. Nov. 4, 2011)* **[**32]** (other citations omitted) (internal quotation marks omitted)).

In In re BitTorrent Adult Film Copyright Infringement Cases, the court averred that ***HN8***[↑] "[o]ur federal court system provides litigants with some of the finest tools available to assist in resolving disputes; the courts should not, however, permit those tools to be used as a bludgeon." *Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 296 F.R.D. 80, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *10 (E.D.N.Y. May 1,*

2012) This Court is in complete agreement.

This Court is ever mindful of **HN9**[↑] the mandate of Federal Rule of Civil Procedure 1, that the Federal Rules of Civil Procedure ought be "administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Indeed, this Court zealously encourages all parties in actions pending before it to reach settlement if possible, as private resolution is frequently the most just and cost-effective result. See Philip W. Tone, The Role of the Judge in the Settlement Process, Fed. Judicial Ctr., Seminars for Newly Appointed United States District Judges 57, 60 (West 1975).

Yet, it is precisely when private resolution is intimated to be unjust that this Court's role shifts **[**33]** from encouraging such an agreement to protecting against it. See In re Relafen Antitrust Litigation, 231 F.R.D. 52, 57-58 (D. Mass. 2005). As the court asserted in Third Degree Films, Inc. v. Does 1-108, No. DKC 11-3007, 2012 U.S. Dist. LEXIS 59233, 2012 WL 1514807 (D. Md. Apr. 27, 2012), "the risk of extortionate settlements is too great to ignore, especially when joinder is being used to that end." 2012 U.S. Dist. LEXIS 59233, [WL] at *4. To be clear, the Court has not observed any specific bad faith behavior in this case by Third Degree to date,[12] as has occurred in other cases. Cf. Raw Films, Ltd. v. Does 1-32, No. 3:11cv532–JAG, 2011 U.S. Dist. LEXIS 114996, 2011 WL 6182025, at *2 (E.D. Va. Oct. 5, 2011) (noting that the plaintiff contacted the defendants with harassing telephone calls, demanding **[***2024]** $2,900.00 to end the litigation, and when any of the defendants filed a motion to dismiss or sever, the plaintiff voluntarily dismissed the individual from the litigation). Rather, the Court takes issue with the general structure of this case[13] and like cases, and has determined that the most appropriate method to protect against any potential coercion is to sever the Doe defendants and require them to be sued individually.

HN10[↑] Requiring Third Degree to sue the defendants separately serves several purposes. First, it compels Third Degree to pay a $350.00 filing fee for each defendant, a statutory requirement under 28 U.S.C. § 1914(a) that serves "two salutary purposes. First, it is a revenue raising measure. . . . Second, § 1914(a) acts as a threshold barrier, albeit a modest one, against the filing of frivolous or otherwise meritless lawsuits." In re Diet Drugs, 325 F. Supp. 2d 540, 541 (E.D. Pa. 2004). A magistrate judge recently reprimanded a plaintiff adult film company for evading more than $25,000.00 in filing fees by suing thousands of defendant Does in **[*199]** four actions, and noted the incentive for the plaintiff to bring these suits en masse where a single filing fee might result in a flurry of settlement agreements. In re BitTorrent Adult Film Copyright Infringement Cases, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *12-13. Requiring Third Degree to pay a filing fee for each defendant may help ensure Third Degree is suing the Doe defendants for a good faith reason, that is, to protect **[**36]** its copyright and litigate its claim, rather than obtain the defendants' information and coerce settlement with no intent of employing the rest of the judicial process. Moreover, as discussed above, severing the defendants will promote fairness and efficiency in trial administration.

The Court acknowledges without reservation Third Degree's right to assert copyright protection of the Film and to sue individuals who infringe on its intellectual property. But after a careful weighing of the balance of potential injustices in this case and like cases, the Court determines that any efficiency gains and cost benefits to Third Degree from joining the Doe defendants in a single action are substantially outweighed by the fairness concerns and inefficiencies at trial, the potential prejudice from what seems to be a developing pattern of extortionate settlement demands, and the evasion of

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[12] The Doe defendants argue that Third Degree is engaged **[**34]** in improper and abusive litigation tactics, see, e.g., Doe 12's Mot. 2, but raise no specific examples in this regard. The Court takes judicial notice of a purported class action pending against Third Degree and four other adult film companies alleging, inter alia, that its actions in similar mass copyright infringement suits cause it to be liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, intentional infliction of emotional distress, and fraud. See Compl. with Class Allegations Jury Demand as to All Counts 6, Barker v. Patrick Collins, Inc., No. 3-12-cv-372-S (W.D. Ky. July 5, 2012).

[13] Although the instant case names only forty-seven Doe defendants, as opposed to hundreds or thousands of defendants sued in some of the cited cases, Third Degree currently has identical cases pending for infringement of one of three adult films ("MILF Wars: Lisa Ann Vs. Julia Ann," "Illegal Ass 2," or "Big Butt Oil Orgy 2") against a total of 238 individuals in the District of Massachusetts, 164 individuals in the District of Maryland, and 615 individuals in the Southern District of New York, for a total of 1,017 Doe defendants in 13 actions in just three districts. **[**35]** While Third Degree admittedly is no longer suing as many individuals in a single action, there are still an alarming number of defendants pending.

thousands of dollars of filing fees.

III. CONCLUSION

For the foregoing reasons, Does 2-47 are severed from the case and dismissed without prejudice, subject to Third Degree filing individual complaints against them within thirty days of this order.[14]

SO ORDERED.

/s/ William G. Young

WILLIAM G. YOUNG

DISTRICT JUDGE

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[14] This order excepts the following Does, who already have been **[**37]** dismissed with prejudice: Doe 8, Doe 13, Doe 14, Doe 23, Doe 26, Doe 30, Doe 36, Doe 39, Doe 43, and Doe 46.

Neutral
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Trefethen v. Liberty Mut. Group, Inc.

United States District Court for the District of New Hampshire

November 7, 2013, Decided; November 7, 2013, Filed

Case No. 11-cv-225-SM

Reporter
2013 U.S. Dist. LEXIS 160137 *; 2013 DNH 148; 2013 WL 5963120

Margaret Trefethen, Plaintiff v. Liberty Mutual Group, Inc., Defendant

Notice: NOT FOR PUBLICATION

Prior History: *Trefethen v. Liberty Mut. Group, Inc., 2011 U.S. Dist. LEXIS 118319 (D.N.H., 2011)*

Core Terms

sanctions, improper purpose, imposition of sanctions, substantially similar, legal argument, termination, invalidate, asserting, frivolous, cases, weak

Counsel: **[*1]** For Margaret Trefethen, Plaintiff, Counter Defendant: John E. Lyons, Jr., Lyons Law Offices PA, Portsmouth, NH.

For Liberty Mutual Group Inc., Defendant, Counter Claimant: Douglas J. Hoffman, LEAD ATTORNEY, PRO HAC VICE, Jackson Lewis LLP (MA), Boston, MA; Martha Van Oot, Debra Weiss Ford, K. Joshua Scott, Jackson Lewis LLP (NH), Portsmouth, NH.

Judges: Steven J. McAuliffe, United States District Judge.

Opinion by: Steven J. McAuliffe

Opinion

ORDER

As it did in the substantially similar case of *Bryant v. Liberty Mutual Group, Inc., 2013 DNH 142 (D.N.H. Oct. 24, 2013)*, Liberty Mutual has filed a motion for sanctions under *Rule 11 of the Federal Rules of Civil Procedure*. [1] That motion is denied.

The imposition of sanctions under *Rule 11* is reserved for cases in which a party or an attorney has made arguments for an "improper purpose," advanced "frivolous" claims, or asserted factual allegations without "evidentiary support" or the "likely" prospect of such support. See, e.g., *Citibank Global Mkts., Inc. v. Rodriguez Santana, 573 F.3d 17, 32 (1st Cir. 2009)*. See also *CQ Int'l Co. v. Rochem Int'l, Inc., USA, 659 F.3d 53, 60 (1st Cir. 2011)*. This is not such a case.

Like the plaintiff in Bryant, Trefethen recognized that her wrongful termination claims against Liberty Mutual would be barred if the Severance Agreement and General Release she signed was valid and enforceable against her. Indeed, Liberty Mutual moved for summary judgment on that very ground, asserting that Trefethen's employment-related claims were precluded by the Severance Agreement. Accordingly, Trefethen's initial efforts were focused on invalidating that agreement.

Trefethen's efforts to overcome the contractual bar ultimately proved unavailing. But, as was the case in Bryant, Trefethen's arguments were not so weak, **[*3]** or frivolous, or lacking in factual or legal support as to warrant the imposition of sanctions under *Rule 11*. See generally *Young v. City of Providence, 404 F.3d 33, 39-40 (1st Cir. 2005)* ("[C]ourts ought not invoke *Rule 11* for slight cause; the wheels of justice would grind to a

[1] Three former employees of Liberty Mutual brought independent, but substantially similar, suits against their former employer, asserting that they were the victims of wrongful termination and, in some cases, unlawful workplace discrimination. Each of those plaintiffs was represented by the same counsel and each raised similar legal arguments in an effort to invalidate the Severance Agreement and General Release they had signed upon their separation from Liberty Mutual. See Bryant v. Liberty Mut. Group, Inc., 11-cv-217-SM, Trefethen v. Liberty Mut. Group, Inc., 11-cv-225-SM **[*2]** , and Stevens v. Liberty Mut. Group, Inc., 11-cv-218-PB.

halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims."). Nor is there evidence that those arguments were advanced for an improper purpose or that counsel conducted a culpably inadequate investigation prior to filing suit. And, of course, Liberty Mutual is not entitled to an award of sanctions under *Rule 11* simply because some of Bryant's claims proved unsuccessful. See, e.g.,*Protective Life Ins. Co. v. Dignity Viatical Settlement Partners. L.P., 171 F.3d 52, 58 (1st Cir. 1999)*.

Conclusion

For the foregoing reasons, as well as those discussed in greater depth in Bryant, the court concludes that Trefethen's legal arguments supportive of her view that the Severance Agreement was unenforceable on grounds of fraudulent inducement were consistent with existing law, there was adequate factual support for at least some of the arguments she pressed, **[*4]** and there was no evidence that those arguments were advanced for an improper purpose.

Defendant's Motion for Rule 11 Sanctions (document no. 65) is denied.

SO ORDERED.

/s/ Steven J. McAuliffe

Steven J. McAuliffe

United States District Judge

November 7, 2013

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Kenna v. United States Dep't of Justice

United States District Court for the District of New Hampshire

November 9, 1989, Decided

C.A. Nos. R.I. 86-0202T, N.H. No. C86-125D

Reporter
128 F.R.D. 172 *; 1989 U.S. Dist. LEXIS 13998 **

Bruce E. KENNA, Plaintiff, v. The UNITED STATES DEPARTMENT OF JUSTICE; Edwin Meese, III, as Attorney General; D. Lowell Jensen, as Deputy Attorney General, William P. Tyson, as Director Executive Office for United States Attorneys; Lawrence S. McWhorter, as Deputy Director, Executive Office for United States Attorneys; Susan A. Nellor, as Director, Office of Legal Services, Executive Office for United States Attorneys; and Richard V. Wiebusch, both personally and as United States Attorney for the District of New Hampshire, Defendants

Core Terms

leak, sanctions, defendants', documents, summary judgment, parties, Memorandum, attorneys, expenses, interrogatories, deposition, newspapers, signer

Case Summary

Procedural Posture

Plaintiff employee, a former Assistant United States Attorney, brought a wrongful termination action against defendant employer, the United States Department of Justice, and defendant officers, department officials, seeking reinstatement and damages. Defendants sought sanctions under *Fed. R. Civ. P. 11*, *26(g)* and *28 U.S.C.S. § 1927* alleging that the employee and his prior attorney made fraudulent claims that required needless discovery.

Overview

Due to a disagreement with his supervisor, the employee was terminated from his position. Although he was given a summary of the reasons for his discharge, the employer did not provide the employee with a copy of the letter. Shortly afterward, excerpts from the letter appeared in newspapers. The employee alleged that defendants had leaked the letter to the media and obtained an official copy. In reality, the employee had convinced a secretary to copy the letter and had given it to his attorney. When defendants learned of the false claim, they sought sanctions. Because *Fed. R. Civ. P. 11*, which imposed an affirmative obligation to conduct a reasonable inquiry regarding the basis of a claim before it was asserted, provided a remedy for all defendants' claims, the court analyzed their motion under that rule. The court sanctioned the employee and his attorney for their baseless filing pursuant to *Rule 11*. The court held that the employee and his attorney were jointly and severally liable for the costs incurred by defendants because of the baseless claim, plus reasonable attorney's fees.

Outcome

In the employee's wrongful termination action, the court granted defendants' motion for sanctions based on the fraudulent claims made by the employee and his counsel.

LexisNexis® Headnotes

Civil Procedure > Attorneys > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN1[↓] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 11, *26(g)* and *28 U.S.C.S. § 1927* all provide for monetary assessments against those who engage in various forms of frivolous or vexatious

litigation practices. Under *Fed. R. Civ. P. 26(g)*, such assessments may be made to compensate the opposing party and/or punish the transgressor. Moreover, they may be levied against attorneys and parties alike. However, the rule applies only to abuses of discovery. *28 U.S.C.S. § 1927*, on the other hand, has a broader reach. It extends to any conduct that unreasonably "multiplies the proceedings." However, it permits sanctions solely against attorneys or those conducting the litigation and only to the extent of the excess expenses incurred by an adversary. *Fed. R. Civ. P. 11*, on the other hand, Incorporates the features of both. Like *28 U.S.C.S. § 1927*, it applies to all phases of litigation. Moreover, like *Rule 26(g)*, it provides for compensatory and/or punitive sanctions against attorneys and parties alike.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN2 **Sanctions, Baseless Filings**

Fed. R. Civ. P. 11 requires that every document filed on behalf of a party be signed by that party's attorney or, if the party is unrepresented, by the party himself. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a paper is signed in violation of this rule, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the paper, including a reasonable attorney's fee.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN3 **Sanctions, Baseless Filings**

Fed. R. Civ. P. 11 imposes an affirmative obligation to conduct a reasonable inquiry regarding the basis for a contemplated claim before it was asserted. That duty is a continuing one that requires that the validity of the claim be reassessed as the litigation progresses. The relevant question for measuring responsibility is whether a competent attorney or party, after appropriate investigation, would have reasonably believed that the claim was well grounded in fact and law.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > Sanctions > General Overview

HN4 **Sanctions, Baseless Filings**

When a party signs a document, liability may be predicated on breach of the certification that the rule deems the "signer" to have made. In providing sanctions against "the person who signed" the document, the rule makes no distinction between the signature of an attorney and that of a party. Furthermore, a party's signature is not the only basis for imposing liability on that party. Even a party who is represented by counsel and who does not sign the offending document may be penalized.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN5 **Sanctions, Baseless Filings**

A court has considerable discretion to determine how liability should be allocated between a party and the party's attorney. In exercising that discretion, the court should assess the relative responsibility of each for the violation and the harm caused. Consequently, a party should bear sole responsibility when that party deceives counsel into erroneously believing that there is a basis for the claim asserted. Similarly, a party who colludes with counsel in presenting a claim that the party knows lacks merit should be held jointly accountable for the consequences. Shared responsibility should also attach to a party who permits the assertion of a claim that such party reasonably should have known to be groundless. In measuring the quantum of knowledge imputed to a party, an objective test should be utilized.

Counsel: **[**1]** Carroll F. Jones, Esquire, Robert J. Lynn, Esquire, Ronald L. Snow, Esquire, Concord, New Hampshire, and Raymond J. Kelly, Esquire, Manchester, New Hampshire for Plaintiff.

Sharon L. Reich, Esq. Patrick Sorek, Esq. J. Ledbetter, Esq. Civil Division, Dept. of Justice, Washington, District of Columbia for Defendants.

Judges: Ernest C. Torres, United States District Judge. *

Opinion by: TORRES

Opinion

[*173] MEMORANDUM AND ORDER

Ernest C. Torres, United States District Judge.

This case graphically illustrates the truth of Lord Marmion's lament "Oh! what a tangled web we weave when first we practise to deceive!" [1] It is an action by a former Assistant United States Attorney (AUSA) who seeks reinstatement and damages for what he contends was the wrongful termination of his employment and is presently before the Court on the defendants' motion for sanctions pursuant to *Rules 11* and *26(g) of the Federal Rules of Civil Procedure* and *28 U.S.C. § 1927*. The motion is based on allegations that the plaintiff and his former counsel made fraudulent claims that required needless discovery and greatly increased the expenses incurred by the defendants in connection with this litigation.

[2]** FACTS

The facts underlying this case are set forth in a separate memorandum and order addressing the defendants' motion for summary judgment. *727 F. Supp. 64*. For present purposes, it is sufficient to note that, from 1981 to 1985, Bruce Kenna was an AUSA in the Office of the United States Attorney for the District of New Hampshire. During the last few months of his tenure, Kenna had a number of serious disagreements with Richard Wiebusch, the United States Attorney in charge of that office. As a result, on September 18, 1985, Wiebusch wrote to the Executive Office for the United States Attorney (EOUSA) of the Department of Justice (DOJ) seeking permission to discharge Kenna and detailing the reasons for his request. A summary of those reasons was furnished to Kenna, but EOUSA refused to provide him with a copy of the letter. It finally did so when excerpts mysteriously appeared in two local newspapers on October 31 and November 1, 1985. Eventually, permission to discharge Kenna was granted and his employment was terminated in December of 1985. This suit was commenced in March of 1986.

The motion for sanctions revolves around the publication of Wiebusch's September 18 letter. The original complaint **[**3]** implied that the defendants leaked the letter and suggested that certain due process claims asserted by Kenna were based, at least in part, upon such publication. The defendants vigorously denied any role in the publication and embarked on a course of **[*174]** discovery to determine the source of the leak. The facts uncovered during that process and as presented during two days of evidentiary hearings before this Court are as follows.

In September of 1985, when Kenna learned that his job was in jeopardy, he engaged attorney Carroll Jones. The strategy they developed to prevent Kenna's termination included exerting pressure on Wiebusch and the DOJ by publicizing the details of the dispute. Initially those efforts were hampered by the fact that Kenna did not have a copy of the September 18 letter. That problem was partially solved in mid-October when two secretaries in Wiebusch's office surreptitiously photocopied his copy and delivered it to Kenna. Kenna, in turn, promptly gave the copy to Jones but cautioned him not to disclose how it was obtained. That left Kenna and Jones with a further problem, namely, how they could publicly respond to statements contained in a letter that they were not **[**4]** supposed to have. Jones solved that problem by leaking the letter to two local newspapers which published excerpts on October 31 and November 1 together with Jones's "responses." Feigning ignorance as to how the media had obtained the letter, Jones then persuaded EOUSA to furnish him with an official copy on the ground that it had become public information.

Kenna acknowledges reading the newspaper articles but denies knowing, until more than two years later, that Jones was responsible for releasing the letter. In fact, Kenna claims that, within a few days after publication, he twice asked Jones how the media had obtained the letter and was told that they had most likely received it from Wiebusch. Jones recalls only one such inquiry but admits telling Kenna that Wiebusch was the likely source of the leak. Jones claims that, in making that statement, he was being facetious and thought Kenna understood that.

* Of the District of Rhode Island.

[1] Sir Walter Scott, "Marmion," Canto VI, Stanza 17 (1808).

The original complaint does not specifically allege that Wiebusch leaked the September 18 letter. However, as previously noted, it implies that the government was responsible for the letter's publication and that some of Kenna's claims were predicated on that contention. [2] Similar **[**5]** innuendoes were contained in a subsequent "conformed complaint."

According to Kenna and Jones, both complaints, like all other documents filed on Kenna's behalf, were drafted by Kenna but signed by Jones. The purpose of this arrangement was to minimize Kenna's legal expenses. Jones claims that he did not read these documents closely before signing and filing them because Kenna was an experienced trial attorney. He further contends that this explains why he signed the complaints even though they conveyed what he knew to be a false impression about the publication of the September letter.

Kenna's professions of ignorance about what Jones had done and Jones's professions of ignorance about what Kenna was alleging in his pleadings appear much less plausible when considered in the context of intervening and subsequent events. In May of 1986, the defendants apparently began **[**6]** to "smell a rat." They filed a motion to dismiss or for summary judgment based, in part, on the absence of any definitive allegation that they had caused publication of the September 18 letter. In their supporting memorandum, they expressed the belief that Jones was responsible for the leak. Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, May 15, 1986, at 19-20. Jones forwarded those documents to Kenna along with a cover note stating, "I think we got them on the 'leaks.'" Kenna, claiming that he attached no significance to that comment, countered with opposing memoranda and a supporting affidavit. In them, he stated that "contrary to the defendants' assertions, the plaintiff *has* alleged dissemination of defamatory **[*175]** material by the government" [emphasis added] and that he "believe[d] that the government -- through one of its representatives -- caused publication of that letter." Memorandum in Support of Plaintiff's Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, June 11, 1986, at 15; Kenna affidavit, July 14, 1986, para. 10. Jones not only signed that memorandum but also argued the motion before **[**7]** Judge Selya to whom this case was then assigned. Furthermore, Kenna was present when the motion was heard and drove from Concord to Providence and back with Jones for the argument. Both men claim that they did not discuss the question of publication because their attention was focused on other issues raised by the defendants' motion.

In any event, Judge Selya dismissed four of the seven counts contained in the complaint but let the remaining counts stand. In so doing, he indicated that the record was not then sufficiently developed to permit summary judgment and directed the plaintiff to file a conformed complaint containing only the three remaining counts. That complaint was filed on January 26, 1987 and repeated the allegations implying that the defendants had leaked the September 18 letter.

Judge Selya's decision opened the floodgates to discovery which included numerous interrogatories and requests for admissions propounded by Kenna to the defendants. Among them were a request that Wiebusch admit that he released the September 18 letter to the press and a series of interrogatories asking for detailed information regarding who might have had access to the letter or its contents. **[**8]** [3] Jones signed and served both sets of documents. The defendants responded by deposing three of the AUSAs in the office and a secretary. Jones attended each of those depositions, during which the defendants' counsel asked questions calculated to determine the source of the leak. Jones not only failed to disclose his role but affirmatively added to the deception by, himself, asking questions suggesting that Wiebusch was responsible. [4]

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[2] The original complaint states, "On October 31, 1985, local newspapers in New Hampshire began publishing excerpts from defendant Wiebusch's letter of September 18, 1985." Complaint para. 69. This paragraph was incorporated by reference in the due process, ***first amendment*** and conspiracy counts of the complaint.

[3] Plaintiff's First Request for Admissions from Defendant Wiebusch, September 1987, at 39. Plaintiff's Second Set of Interrogatories to Defendant Richard Wiebusch, November 18, 1987.

[4] For example, Jones asked the following questions of Judith Barrett, the secretary who had furnished Kenna with a copy of the September 18 letter:

Jones: You were working in the office at the time Mr. Wiebusch came on board as U.S. Attorney.

Barrett: Yes, I was.

Q. And it's true, isn't it, that he was often visited by members of the media, both print and television, and that sort of thing in the office.A. I can remember of couple of occasions, yes.Q. And he would meet with members of the press in his office.A.

[9]** On November 9, 1987 Kenna was deposed and specifically denied any knowledge regarding the leak. The following day, the defendants took the deposition of the secretary who purloined the letter and learned that a copy had been furnished to Kenna. That prompted the defendants to seek to redepose Kenna and submit to him a second set of interrogatories focusing on any information he or Jones might have regarding the leak. When Kenna resisted these efforts, the defendants noticed Jones's deposition and issued a subpoena to him. Jones moved to quash that subpoena, citing the attorney/client privilege. That motion was heard on December 1, 1987. The magistrate hearing it deferred decision but, in the meantime, directed Kenna to answer the second set of interrogatories. Those answers were furnished on December 7. In them, Kenna acknowledged that Jones had leaked the letter but claimed that he did not learn that until December 4, when he was so informed by Jones's attorney.

[*176] Having caught Jones with his hand in the cookie jar and believing that the crumbs on Kenna's fingers came from the same source, the defendants brought this motion for sanctions. Specifically, they seek the sum of $ 17,127.00 **[**10]** for attorneys fees and expenses attributable to the false claim and prosecution of this motion. In support of their request, they have submitted detailed time records and evidence of payment for the costs they have incurred.

DISCUSSION

HN1[⬆] *Rules 11* and *26(g) of the Federal Rules of Civil Procedure* and *28 U.S.C. § 1927* all provide for monetary assessments against those who engage in various forms of frivolous or vexatious litigation practices. Under *Rule 26(g)*, such assessments may be made to compensate the opposing party and/or punish the transgressor. Moreover, they may be levied against attorneys and parties alike. However, the rule applies only to abuses of discovery. *Section 1927*, on the other hand, has a broader reach. It extends to any conduct that unreasonably "multiplies the proceedings." However, it permits sanctions solely against attorneys (or those conducting the litigation) and only to the extent of the excess expenses incurred by an adversary. *Rule 11*, on the other hand, incorporates the features of both. Like *§ 1927*, it applies to all phases of litigation. Moreover, like *Rule 26(g)*, it provides for compensatory and/or punitive sanctions against attorneys and parties **[**11]** alike. Therefore, while the conduct at issue in this case is potentially within the scope of all three provisions, the Court will focus its analysis on *Rule 11*.

HN2[⬆] *Rule 11* requires that every document filed on behalf of a party be signed by that party's attorney or, if the party is unrepresented, by the party himself. It states that:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a . . . . paper is signed in violation of this rule, the court . . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . . paper, **[**12]** including a reasonable attorney's fee.

Fed. R. Civ. P. 11.

The purpose of the rule is to discourage baseless claims and defenses and other abusive tactics that needlessly increase the cost and duration of litigation. That purpose is effectuated by emphasizing the obligations assumed by participants in the process and by mandating sanctions when those obligations are violated. *Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988)*; *Fed. R. Civ. P. 11* advisory committee notes.

Prior to 1983, the standard for determining whether a violation had occurred was a subjective one that hinged on whether the attorney or party had acted out of a good faith belief that the action taken was supportable. The 1983 amendments to *Rule 11* made two significant changes. First, they ***HN3***[⬆] imposed an affirmative obligation to conduct a reasonable inquiry regarding the basis for a contemplated claim before it was asserted. That duty is a continuing one that requires that the validity of the claim be reassessed as the litigation progresses. Second, the amendments substituted a

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Yes, he would.Q. And he'd close the door; wouldn't he?A. Yes, he would.Q. So you didn't know what they were giving him?A. No, I did not.Q. Or what he was giving them.

A. No.

Deposition of Judith Barrett, November 10, 1987 at 40.

more stringent objective test for measuring responsibility. Thus the relevant question is no longer whether the **[**13]** signer subjectively believed that a claim was legitimate. Rather, it is whether a competent attorney (or party), after appropriate investigation, would have reasonably believed that the claim was well grounded in fact and law. *See* Kale v. Combined [*177] Insurance Co. of America, 861 F.2d 746, 758 (1st Cir. 1988); Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-662 (7th Cir. 1987); Fed. R. Civ. P. 11 advisory committee notes.

Liability of Attorney Jones

In the instant case, Jones signed all of the relevant documents in his capacity as Kenna's attorney. By virtue of Rule 11, he thereby represented that he had read the documents, that he had conducted a reasonable inquiry into the basis for his client's claims, that, after doing so, he believed those claims to be well grounded in both fact and law and that the claims were not interposed for any improper purpose. At least one of those representations was false. Jones, himself, concedes that he did not carefully read the documents because Kenna, the draftsman, was an experienced trial attorney. That, in itself, is a sufficient basis for imposing sanctions on Jones under Rule 11.

However, Jones's transgressions appear to extend **[**14]** much further. It is difficult to believe that Jones failed to read not only the original complaint but also the defendants' motion for summary judgment, Kenna's response to that motion and the conformed complaint, all of which clearly reveal Kenna's claim that the defendants were responsible for publication of the September 18 letter. Indeed, the note he sent to Kenna (i.e. "I think we got them on the 'leaks.'") when he forwarded the motion for summary judgment clearly indicates his awareness of that claim. Furthermore, it is inconceivable that Jones could have argued that motion without being aware of Kenna's claim since the motion was predicated in part on the contention that the claim was false. Even if Jones was impervious to the contents of the documents he was filing and the arguments of his adversary, any ignorance that the subject was an issue in the case should have been dispelled by the depositions of other AUSAs and secretaries in the office which focused, in part, on the source of the "leak." Instead of setting the record straight, Jones either sat mute or, in one case, asked questions obviously calculated to continue the deception. Thus, it appears that he not only failed **[**15]** to make reasonable inquiry to reassess Kenna's claim but perpetuated it with knowledge that it was false. In short, the Court finds that Jones's violations of Rule 11 go well beyond a failure to carefully read the documents he signed. In any event, he is clearly subject to sanctions under the rule.

Liability of Kenna

As previously stated, liability for sanctions under Rule 11 extends to parties as well as attorneys. ***HN4***[↑] When a party signs a document, liability may be predicated on breach of the certification that the rule deems the "signer" to have made. In providing sanctions against "the person who signed" the document, the rule makes no distinction between the signature of an attorney and that of a party. Furthermore, a party's signature is not the only basis for imposing liability on that party. Even a party who is represented by counsel and who does not sign the offending document may be penalized. Rule 11 provides that if a document is signed in violation of its strictures, sanctions may be imposed against "the person who signed it, *a represented party, or both.*" Fed. R. Civ. P. 11 [emphasis added].

HN5[↑] A court has considerable discretion to determine how liability should **[**16]** be allocated between a party and the party's attorney. In exercising that discretion, the court should assess the relative responsibility of each for the violation and the harm caused. *See* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988); Chevron, U.S.A. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985); Westmoreland v. CBS, Inc., 248 U.S. App. D.C. 255, 770 F.2d 1168, 1178-79 (D.C. Cir. 1985). Consequently, a party should bear sole responsibility when that party deceives counsel into erroneously believing that there is a basis for the claim asserted. Similarly, a party who colludes with counsel in presenting a claim that the party knows lacks merit should be held jointly accountable for the consequences. Shared responsibility should also attach to a party who permits the assertion of a claim that **[*178]** such party reasonably should have known to be groundless.

In measuring the quantum of knowledge imputed to a party, an objective test should be utilized. Of course, in some respects, the standard for determining whether a party reasonably should have known if the claim were meritorious ought to be less stringent than that applied to counsel. Thus, it would be patently unjust to expect **[**17]** a lay party to exercise the same level of judgment as a trained attorney regarding the *legal* basis

for a claim. In such cases, the standard employed should be that of a reasonable person of similar background. On the other hand, when the issue is whether a claim is well grounded in *fact,* a lay party may have superior knowledge and, therefore, should be held to the same standard as counsel or perhaps a more stringent one.

In this case, it makes no difference whether the focus is on what Kenna actually knew about the basis for his claim or what he reasonably should have known. In either event, the result is the same. It is difficult to believe that Kenna did not learn the source of the leak until December 4, 1987. From the outset, his strategy included publicizing the details of the dispute, and he was well aware of Jones's frequent contact with the media in furtherance of that strategy. Furthermore, he delivered a copy of the September 18 letter to Jones knowing that Jones could not use it unless it could be made public information without disclosure of the source from which it was obtained. Indeed, a few days later the letter did, in fact, appear in the newspaper.

It is also **[**18]** hard to accept that Kenna would have drafted the complaint and presented it to Jones without discussing the contents with him. This is particularly true in light of the fact that the allegations regarding the leak were important to some of his claims. If Kenna truly believed that the defendants were the source of those leaks, it would be reasonable to expect that he would have talked to Jones about how they could gather proof of those charges. Another indication of Kenna's knowledge is the carefully hedged wording of the complaint which strongly implies but falls just short of literally alleging that the defendants leaked the letter.

Even more troubling is Kenna's receipt of the defendant's motion for summary judgment accusing Jones of responsibility for the leak and Jones's accompanying note stating "I think we got them on the leaks." That measure can only be construed as an expression of satisfaction that the deception was having its intended effect. If Wiebusch had been responsible for the leak, the defendants could hardly be expected to have taken the position they did. Added to that is the fact that Kenna and Jones rode together to Providence for argument on that motion which **[**19]** was based, in part, on the sufficiency of Kenna's allegations regarding the leaks. It strains credulity to believe that, despite all of that, they never discussed the subject.

The coup de grace was the fierce resistance by both Kenna and Jones to the defendants' efforts to question them regarding the leaks after learning that a copy of the September 18 letter had been illicitly furnished to Kenna.

Even if one believed that Kenna did not *actually* learn of the deception for more than two years, the inescapable conclusion is that he reasonably *should* have known. Thus, accepting at face value Kenna's assertion that he sincerely interpreted Jones's response to his November 1985 inquiry to be a denial of responsibility for the leaks, the events previously recounted should have alerted any reasonable person that something was amiss and prompted further inquiry. Since Kenna did not at least do that, he cannot evade responsibility under *Rule 11*.

Sanctions

Having determined that sanctions should be borne jointly by both Jones and Kenna, the only remaining issue is the nature and amount of those sanctions. *Rule 11* specifically contemplates that sanctions include "an order to pay **[**20]** to the other . . . . parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a **[*179]** reasonable attorney's fee." *Fed. R. Civ. P. 11*. Here, the defendants' representations fix that figure at $ 17,127.00. Therefore, the defendants' motion for sanctions is granted, and it is hereby ordered that Jones and Kenna jointly and severally pay that sum to the defendants within thirty days. In addition, the clerk is directed to forward a copy of this Memorandum and Order to the New Hampshire Supreme Court Committee on Professional Conduct for whatever action it may deem appropriate.

IT IS SO ORDERED.

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Harkeem v. Adams

Supreme Court of New Hampshire

August 29, 1977

No. 7677

Reporter
117 N.H. 687 *; 377 A.2d 617 **; 1977 N.H. LEXIS 410 ***

James Harkeem v. Benjamin C. Adams, Commissioner, New Hampshire Department of Employment Security, Abington Shoe Company, Miller Shoe -- Dover c/o Melville Shoe Corp.

Prior History: **[***1]** Appeal from Hillsborough County.

Disposition: *Exceptions overruled.*

Core Terms

benefits, counsel fees, superior court, bad faith, retirement, tribunal, grounds, unemployment, claimant's

Case Summary

Procedural Posture
Defendant New Hampshire Department of Employment Security (department) appealed from the decision of the Hillsborough County Superior Court (New Hampshire), which held that the department acted in bad faith when it denied plaintiff claimant unemployment benefits. The superior court awarded the claimant unemployment benefits and ordered the department to pay the claimant's legal fees.

Overview
The department rejected the claimant's application for unemployment benefits on the basis that his prior voluntary retirement had cancelled his accumulated wage credits. The claimant contested the ruling, and judgment was granted in his favor. The department denied the claimant's second application for benefits on grounds that the claimant had failed to sufficiently expose himself to employment. The superior court determined that the department acted in bad faith when it raised a new issue. The superior court ordered the department to pay all costs and counsel fees incurred by the claimant. On appeal, the department contended that the award of counsel fees did not lie within the court's powers in a case of bad faith conduct and that the finding of bad conduct was not properly made on the facts. The supreme court affirmed the decision, concluding that the grant of counsel fees was proper and within the superior court's discretion. The supreme court held that the department acted in bad faith when it introduced new issues during the appeal and that the claimant was unnecessarily forced to seek judicial assistance to secure his right to unemployment benefits.

Outcome
The supreme court affirmed the award of counsel fees to the claimant in his action against the department after he was denied unemployment compensation.

LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN1 **Remedies, Costs & Attorney Fees**

Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit. An additional important consideration is that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits. However, when overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN2 **Basis of Recovery, Bad Faith Awards**

Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, an award of counsel fees on the basis of bad faith is appropriate.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Legislation > Initiative & Referendum

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review of Benefit Determinations

HN3 **Separation of Powers, Legislative Controls**

N.H. Rev. Stat. Ann. § 282:5 C(6) requires that a written decision be prepared in all cases, setting forth all the material findings necessary to support the tribunal's conclusions and determining all things necessary to dispose of the case. The statute specifies that the decision of an appeal tribunal shall be deemed to be the decision of the commissioner of the New Hampshire Department of Employment Security for all subsequent actions in connection therewith. It is provided that the decision "shall become final" upon the expiration of the 10th day following its mailing to the plaintiff. N. H. Rev. Stat. Ann. § 282:5 C(5). Although the decision may be reopened upon request of an interested party or upon the commissioner's own initiative, the legislature has expressly limited the further hearing to the introduction of evidence or argument relative to and concerning the factors which constitute the basis of grounds for the reopening. N.H. Rev. Stat. Ann. § 282:5 E (2).

Civil Procedure > Appeals > Appellate Briefs

HN4 **Appeals, Appellate Briefs**

The appeal procedure, as expressly set forth in N. H. Rev. Stat. Ann. § 282:5 G(3), requires only that a claimant's petition set forth specifically the grounds upon which it is claimed the appeal tribunal's decision is in error. Thus the superior court's de novo review takes place within the parameters set by the claimant's petition. The introduction of new issues by the New Hampshire Department of Employment Security at that stage is wholly inappropriate.

Counsel: *Wadleigh, Starr, Peters, Dunn & Kohls* and *James C. Wheat* (*Mr. Wheat* orally), for the plaintiff.

Edward F. Smith, Michael M. Black, Andre J. Barbeau, Paul V. Kenneally, Robert L. Hermann, Jr., Lonnie E. Siel (*Mr. Black* orally), for the New Hampshire Department of Employment Security.

Judges: Douglas, J. Bois, J., did not sit; the others concurred.

Opinion by: DOUGLAS

Opinion

[*688] **[**617]** In *Griffin v. New Hampshire Department of Employment Security, 117 N.H. 108, 370 A.2d 278 (1977)*, we declined to answer the question whether the superior court, in the exercise of its general equitable powers, can order a party who has instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct, to pay his opponent's counsel fees. That question is now presented to us, and we answer it in the affirmative.

[618]** The plaintiff, James Harkeem, does not appear before this court for the first time. Part of the facts of this case have been previously recounted in *Harkeem v. Department of Employment Security, 115 N.H. 658, 348 A.2d 711 (1975)*, **[***2]** and need be summarized only briefly here. On March 23, 1973, Mr. Harkeem voluntarily retired from his employment with the Encore Shoe Company of Manchester, New Hampshire, having spent the preceding thirty-five years of his life working in the shoe industry of this state. He applied for unemployment compensation benefits, which were **[*689]** denied on the grounds that he had voluntarily retired. No appeal was taken, and the determination became final. In August 1973, the plaintiff returned from retirement to work at the Melville Shoe Corporation in

Dover, New Hampshire. This employment terminated on September 14, 1973, and Mr. Harkeem filed for unemployment compensation benefits on September 19, 1973. His claim was rejected by the department's certifying officer and appeal tribunal, on the basis that under RSA 282:4 K and the defendant's implementing Regulation 32, his prior voluntary retirement had cancelled Mr. Harkeem's accumulated wage credits. The validity of this interpretation was contested by the plaintiff in proceedings in the superior court and in this court, which on November 28, 1975, rendered a decision in the plaintiff's favor. *Harkeem v. Dep't of Empl. Sec.* **[***3]** *, 115 N.H. 658, 348 A.2d 711 (1975)*.

During the pendency of the litigation of the plaintiff's September 1973 claim, Mr. Harkeem found new employment at the Abington Shoe Company in Newmarket, New Hampshire. This employment was terminated in May, 1974, after a three-month trial period, and Mr. Harkeem again filed for unemployment compensation benefits. This claim, which is the subject of the instant action, was denied by a certifying officer of the defendant, and by its appeal tribunal in June 1974. The sole basis for the denial was the same as that which supported the rejection of Mr. Harkeem's previous claim: that his voluntary retirement in March, 1973, cancelled the wage credits he had earned in his previous thirty-five years of employment, leaving him with insufficient credits to qualify for benefits.

Action on this second claim was held in abeyance at the trial court level by agreement of the parties pending this court's decision on the question of law presented by the plaintiff's first claim, which was also controlling in the second. When the decision in the plaintiff's favor was rendered, a request was made by his counsel to the defendant that benefits be paid for the second **[***4]** claim period. The defendant refused, and a hearing was held in superior court on May 27, 1976. At that hearing, the defendant no longer pursued the wage credit question, as that issue had been conclusively settled against it. Instead the department sought to raise the entirely new ground that the plaintiff had failed to sufficiently expose himself to employment, as required by RSA 282:3 C. The Trial Court (*Bois*, J.) found that "the State of New Hampshire had no evidence whatsoever to indicate that there were any grounds **[*690]** to disqualify the claimant but those based on the commissioner's interpretation of Regulation 32 A (2) prohibiting the payment of benefits on the basis of annual earnings prior to retirement"; that "the defendants were arbitrary, capricious, frivolous and unreasonable in their conduct toward the plaintiff after November 28, 1975"; and that "[t]he defendants with premeditation ignored and violated any and all principles of fair play and equitable conduct by a sovereign with unlimited resources in relation to one of its citizens." Accordingly, the court awarded the plaintiff the benefits which he sought in the amount of $ 1,104. Furthermore, "based **[***5]** on its equity powers as well as on its duty to see justice done," the court assessed interest and costs incurred by the plaintiff subsequent to November 28, 1975, as well as counsel fees in the amount of one-third of the recovery. The defendant contends that the award of counsel fees does not lie within the court's powers in a case of bad faith conduct, and that in any event the finding of bad faith was not properly made on the facts of the instant case.

[619]** Exceptions to the general rule that parties pay their own counsel fees have been judicially fashioned in the past. *See Guay v. Association, 87 N.H. 216, 177 A. 409 (1935)*. These exceptions are flexible, not absolute, and have been extended on occasion. *See, e.g., Concord Nat'l Bank v. Haverhill, 101 N.H. 416, 145 A.2d 61 (1958)*; *Lavoie v. Bourque, 103 N.H. 372, 172 A.2d 565 (1961)*; *cf.* Doleac, *Court Awarded Attorneys' Fees Under New Hampshire Common Law*, 17 N.H.B.J. 134 (1976).

HN1[↑] Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit. An **[***6]** additional important consideration is that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits. *Tau Chapter v. Durham, 112 N.H. 233, 237, 293 A.2d 592, 594 (1974)*; *Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)*. However, when overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights. *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975)*; *Mills v. Electric Auto-Lite, 396 U.S. 375, 391-92 (1970)*; *see* RSA 491: App. R. 56 (Supp. 1975). Bad faith conduct held to justify the award of counsel fees has **[*691]** been found where one party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," *Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 n.4 (1968)*; 5 J. Moore, Federal Practice para. 54.77 [27], at 1709 (2d ed. 1974), where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, *Stolberg v. Members of Bd. of Trustees for State Col. of Conn., 474 F.2d 485,* **[***7]** *490 (2d Cir.*

1973), and where it should have been unnecessary for the successful party to have brought the action. Bradley v. School Board of City of Richmond, 345 F.2d 310, 321 (4th Cir. 1965), vacated on other grounds, 382 U.S. 103 (1965).

HN2[↑] Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 661 (1974). Comment, 8 Conn. L. Rev. 551, 554-55 (1976). This principle, which merely shifts the cost of what should have been an unnecessary judicial proceeding to the responsible party, has long been recognized in New Hampshire in a related line of cases wherein attorneys' fees have been awarded on the basis of the courts' power to enforce their own decrees. *See, e.g.*, Manchester v. Hodge, 75 N.H. 502, 504, 77 A. 76, 77 (1910); Fowler v. Owen, 68 N.H. 270, 39 A. 329 (1895). When an individual is of limited means, as is so often the case in unemployment compensation actions, the shifting of **[***8]** counsel fees to an opposing party who has acted in bad faith to prolong the litigation does not run counter to the policy of the general rule discussed above. Rather an award in such an instance will further the intent of the rule, because protection will thereby be provided against the danger that lack of funds will prevent needed access to the courts. Rolax v. Atlantic Coastline R. Co., 186 F.2d 473, 481 (4th Cir. 1951); Doe v. Poelker, 515 F.2d 541, 548 (8th Cir. 1975).

An unemployment compensation claimant is usually an individual without financial resources to cover litigation costs. Plaintiff's right to benefits was clearly established by RSA ch. 282, and by our decision in Harkeem v. Department of Employment Security, 115 N.H. 658, 348 A.2d 711 (1975). That victory was hard won by him, for the diligence of the defendant compelled him to pursue his claim through every available legal channel before he obtained vindication. However, instead of ceding to him the fruits of his victory, the department, contrary to both statute and established **[*692]** case law on both the supreme and superior **[**620]** court levels, sought to subject him to further litigation **[***9]** by raising new arguments before the superior court.

HN3[↑] RSA 282:5 C (6), which deals with decisions of the department's appeals tribunal, requires that a written decision be prepared in all cases, setting forth "all the material findings necessary to support the [tribunal's] conclusions" and determining "all things necessary to dispose of the case." The statute specifies that "[t]he decision of an appeal tribunal shall be deemed to be the decision of the commissioner of the department of employment security for *all subsequent actions in connection therewith*." (Emphasis added.) It is provided that the decision "shall become final" upon the expiration of the tenth day following its mailing to the plaintiff. RSA 282:5 C (5). Although the decision may be reopened upon request of an interested party or upon the commissioner's own initiative, the legislature has expressly limited the further hearing to the introduction of evidence or argument "relative to and concerning the factors which constitute the basis of grounds for the reopening." RSA 282:5 E (2).

Had the question of the scope of the superior court's review never before been raised the defendant could argue that it could **[***10]** not be found to be in bad faith herein, for it would be entitled to rely on its argument that the term "de novo" in RSA 282:5 G(3) authorized it to raise new grounds before the superior court. However, prior case law from this court has conclusively settled the question. In Chaisson v. Adams, 114 N.H. 219, 317 A.2d 791 (1974), the defendant herein moved to dismiss a claimant's appeal to the superior court under RSA 282:5, arguing that the petition had failed to state a cause of action. We noted then that HN4[↑] the appeal procedure, as expressly set forth in RSA 282:5 G(3), requires only that a claimant's petition set forth specifically the grounds upon which it is claimed the appeal tribunal's decision is in error. Thus the superior court's de novo review takes place within the parameters set by the claimant's petition. The introduction of new issues by the department at this stage is wholly inappropriate.

Accordingly, the department, knowing that it was limited to its own stated reasons for denying Mr. Harkeem's claim, had no valid reason to deny the plaintiff benefits after this court's ruling of November 28, 1975. Its obdurate pursuit of further fruitless **[*693]** litigation **[***11]** showed a callous disregard for the rights of the plaintiff, and resulted in a needless drain upon the resources of the judicial system of this state. The award of attorney's fees against the defendant department in the instant case was proper.

Exceptions overruled.

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Positive
As of: March 7, 2018 8:45 PM Z

Langadinos v. Bd. of Trs. of the Univ. of Mass.

United States District Court for the District of Massachusetts

August 29, 2013, Decided; August 29, 2013, Filed

Civil Action No. 12-11159-GAO

Reporter
2013 U.S. Dist. LEXIS 140758 *

GREGORY LANGADINOS, Plaintiff, v. BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS, et al., Defendants.

Subsequent History: Adopted by, Injunction granted at, Motion to strike denied by *Langadinos v. Bd. of Trs. of the Univ. of Mass., 2013 U.S. Dist. LEXIS 142155 (D. Mass., Sept. 30, 2013)*

Prior History: *Langadinos v. Bd. of Trs. of the Univ. of Mass., 2013 U.S. Dist. LEXIS 140757 (D. Mass., Aug. 28, 2013)*

Core Terms

law school, Defendants', lawsuits, injunction, recommendations, frivolous, enjoined, courts, repeated, orders, pro se, documents, harassing, pleadings, vexatious, parties

Counsel: **[*1]** Gregory Langadinos, Plaintiff, Pro se, Arlington, MA.

For Southern New England School of Law, also known as University of Massachusetts School of Law, Robert V. Ward, Jr., Defendants: Kenneth V. Kurnos, Law Offices of Kenneth V. Kurnos P.C., Boston, MA.

For Kenneth Kurnos, Law Office of Kenneth V. Kurnos, Defendants: Kenneth V. Kurnos, Law Offices of Kenneth V. Kurnos P.C., Boston, MA; Michael J. Stone, Peabody & Arnold LLP, Boston, MA.

For Board of Trustees of the Uninversity of Massachusetts, in their official capacity and in their individual capacity, Defendant: Jean M. Kelley, LEAD ATTORNEY, Office of the Attorney General, Trial Division, Boston, MA.

For Margaret D. Xifaras, in her official capacity as Trustee of SNESL/UMASS and in her official capacity as Trustee of UMASS; and in her individual capacity, Defendant: Jean M. Kelley, LEAD ATTORNEY, Office of the Attorney General, Trial Division, Boston, MA; Kenneth V. Kurnos, Law Offices of Kenneth V. Kurnos P.C., Boston, MA.

Judges: JENNIFER C. BOAL, United States Magistrate Judge.

Opinion by: JENNIFER C. BOAL

Opinion

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO ENJOIN PLAINTIFF FROM FILING FURTHER LAWSUITS IN THIS JURISDICTION WITHOUT PRIOR COURT APPROVAL

[Docket **[*2]** Nos. 26, 36]

Boal, M.J.

Pro se plaintiff Gregory Langadinos ("Langadinos" or "Plaintiff"), [1] a frequent litigant in this and other courts, filed this action against defendants University of Massachusetts Board of Trustees ("UMass"), Margaret D. Xifaras ("Xifaras"), in her individual and official capacity, Southern New England School of Law (the "Law School"), Robert V. Ward, Jr. ("Ward"), the Law Office of Kenneth V. Kurnos (the "Law Office"), and Kenneth Victor Kurnos ("Kurnos"). Langadinos alleges federal civil rights violations, state law torts, and breach of contract. This is Langadinos' fifth suit against the Law School and its former dean, Ward, the third against Kurnos and the Law Firm, and the second against

[1] Langadinos is somewhat different from the typical pro se litigant because he graduated from law school, although **[*3]** it appears that he has not been admitted to practice law in any jurisdiction. See *Langadinos v. Hosokawa Micron Int'l, Inc., No. 08-11237-DPW, 2011 U.S. Dist. LEXIS 35841, at *1 n1(D. Mass. Mar. 31, 2011)*.

Xifaras. Defendants Law School, Ward, Kurnos, the Law Firm, and Xifaras have moved for an order permanently enjoining Langadinos from filing any future lawsuits in the U.S. District Court for the District of Massachusetts without prior court approval. [2] Docket No. 26. For the reasons discussed below, this Court recommends that the District Court grant the motion.

I. FACTUAL AND PROCEDURAL HISTORY

A. Prior Related Proceedings

From 1997 to 1998, Langadinos was a student at the Law School. *Langadinos v. Southern New England School of Law, Civ. A. No. 08-2064, 2012 Mass. Super. LEXIS 250* , Memorandum and Order on Defendants' Renewed Motion to Dismiss for Fraud Upon the Court and for Repeated Non-Compliance with this Court's Orders (Mass. Super. May 3, 2012), p. 1. [3] Due to poor performance, Langadinos transferred to Touro Law Center ("Touro") in New York. Id. He was dismissed for academic reasons. Id. He then filed suit against Touro. Langadinos v. Trustees of Touro College, No. 99-cv-4211 (TCP) (E.D.N.Y.). The suit was removed to federal court where it was ultimately dismissed with prejudice. Superior Court Dismissal Order at 2. The federal court found Langadinos to be "a vexatious litigant." See Docket No. 19 at 3. The federal court also **[*4]** enjoined Langadinos from filing further pleadings, motions, or appeals against the defendants without first obtaining the written permission of a judge or clerk of that court. See *Langadinos v. Trustees of Touro College, 71 Fed. Appx. 95 (2nd Cir. 2003)*.

Langadinos then applied for readmission to the Law School. Superior Court Dismissal Order at 2. When his application was denied, he sued the Law School, alleging discrimination on the basis of handicap and national origin. Langadinos v. Southern New England School of Law, Inc., No. 00-cv-11817-RWZ (D. Mass.). In connection with this lawsuit, Langadinos and the Law School entered into a Confidential Settlement Agreement (the "Settlement Agreement"). Ex. 1 to Amended Complaint. Thereafter, Langadinos attended Appalachian School of Law, against which he immediately brought a claim for discrimination. Superior Court Dismissal Order at 2.

On May 6, 2008, Langadinos commenced an action against the Law School, Ward, Xifaras and others in Suffolk Superior Court. Langadinos v. Southern **[*5]** New England School of Law Inc., No. 08-2064 (Mass. Super.) (the "Superior Court Action"). [4] In that case, Langadinos alleged that he learned during a deposition in the case he had brought against Appalachian School of Law that Ward, while Dean of the Law School, had disparaged him in violation of the parties' prior Settlement Agreement and defamed him. Kurnos represented the defendants in that suit. On September 9, 2009, the Superior Court dismissed all counts of the complaint except for the claims of breach of contract and defamation. Superior Court Dismissal Order at 2.

On July 1, 2011, Langadinos filed two baseless lawsuits in the Middlesex Superior Court against the Law School, Ward and Kurnos. Id. at 3. In the first suit, Langadinos sought an ex parte Order of Protection against Ward and Kurnos pursuant to *M.G.L. c. 258E*, alleging that they had been criminally harassing and stalking him. Id. at 4. Attached to his complaint were three emails from Kurnos requesting that Langadinos provide him with his home address. Id. Langadinos did not explain, however, that those emails were **[*6]** sent in response to his own failure to provide a valid street address to which service of process could be made in compliance with *Rule 11 of the Massachusetts Rules of Civil Procedure*. Id. at 5. Langadinos also attached to his complaint two affidavits signed by classmates, Paul Pezza and Fabian Powell, which contained inflammatory statements concerning Ward. Id. Both would later admit under oath that the affidavits were false and signed under duress. Id. They also stated that Langadinos had tried to convince them to accuse Ward of being a racist, which they refused to do even when under duress. Id.

In addition, Pezza testified that the second affidavit filed under his name contained additional statements that Pezza had never seen before. Id. These statements were inflammatory and racially charged. Id. Pezza swore that he did not sign the second affidavit. Id. A handwriting expert later testified that the signature on the second affidavit was forged. Id. After an ex parte hearing, Langadinos' motion for an Order of Protection was denied, and the first Middlesex suit was dismissed sua sponte as being frivolous in the extreme. Id.

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[2] The District Court referred this case to the undersigned for full pretrial proceedings, including dispositive motions on May 7, 2013. Docket No. 29.

[3] This decision is attached as Exhibit 3 to Defendants' Exhibit Appendix. Docket No. 28. The Court refers to the decision as the Superior Court Dismissal Order.

[4] A copy of the Complaint in that action is attached as Exhibit 2 to the Exhibit Appendix. Docket No. 28.

In the second suit filed in Middlesex County, Langadinos **[*7]** sought preliminary injunctive relief enjoining Ward and Kurnos from mentioning the terms or even the existence of the Settlement Agreement, from making certain arguments in the Superior Court Action, and from making any disparaging comment about him. Id. at 5-6. He also sought hundreds of thousands of dollars in damages for alleged psychological harm attributable to statements made about him by Kurnos in connection with the Superior Court Action. Id. at 6. Langadinos attached to his complaint the above mentioned perjurious affidavits. Id. He also filed a series of pages which contained irrelevant and highly sensitive personal information about Kurnos, including Kurnos' social security number and the name of his wife. Id. After a hearing, Superior Court Judge Connolly denied Langadinos' motion for a preliminary injunction and dismissed the case in its entirety, specifically finding that:

> This plaintiff [Langadinos] has been harassing [the Law School] with frivolous lawsuits since at least 2000 which this Court estimates has cost the law school hundreds of thousands of dollars in legal fees. He is putting highly personal information of some of the defendants in the complaints and/or attachments. **[*8]** This is his fourth lawsuit against [the Law School] and some of its faculty. There was a companion case filed by Mr. Langadinos here in Middlesex Superior Court on the same day as this case was filed, namely July 1, 2011 and it gives a better and clear picture just what Mr. Langadinos is all about and what he is trying to achieve in these lawsuits.

Id.

In addition, at the hearing, Judge Connolly ordered Langadinos to provide a valid residential street address, not just his P.O. Box, which was all he had previously given to the defendants in that action. Id. Under oath, Langadinos stated that he lived at 168 Great Road, Unit 452, Bedford, Massachusetts 01730. Id. at 6-7. Judge Connolly repeated the address to be certain that there was no error, and Langadinos confirmed it. Id. at 7. After the hearing, Kurnos mailed a notice of deposition to that address. Id. The notice was returned as "NOT DELIVERABLE." Id. The defendants subsequently discovered that the "residential" address Langadinos had provided to Judge Connolly was, in fact, the address of the Bedford Post Office, with "Unit 452" corresponding to Langadinos' P.O. Box number. Id.

On May 3, 2012, the Superior Court dismissed the remaining **[*9]** claims in the Superior Court Action on the grounds that Langadinos had committed a fraud upon the Court and repeatedly failed to comply with court orders. Superior Court Dismissal Order. The Superior Court found, among other things, that Langadinos had served scurrilous, racially charged discovery, filed altered documents with the court, filed perjurious and forged affidavits, and committed other misconduct. Id. at 2-13.

In addition, the Superior Court enjoined Langadinos from "filing any action at law or equity in any Massachusetts state court of original jurisdiction against any party" without first filing a verified complaint and going through a prescreening hearing before a regional administrative justice to determine whether or not Langadinos' claims were frivolous. *Langadinos v. Southern New England School of Law, Inc., No. 2008-2064, 2012 Mass. Super. LEXIS 250, 2012 WL 4854704, at * 3 (Mass. Super. Sept. 20, 2012)*. In its order, the Superior Court specifically found that:

> I have already determined that in this case plaintiff "altered documents before filing them in order to hinder Defendants' ability to respond to discovery requests and to get their lawyer sanctioned; filed two baseless lawsuits in another **[*10]** county of the Superior Court in order to harass and intimidate Defendants' lawyer and to interfere with Defendants' ability to mount a defense in this case; committed perjury in open court; filed two materially false affidavits and one forged affidavit knowing that the affiants had disclaimed them; filed at least two of his own materially false affidavits in different attempts to obtain favorable rulings; knowingly made false statements of material fact before [the] court; purposefully misrepresented [the] court's prior rulings in an attempt to conceal his fraud; systematically abused the judicial process in order to make it difficult or impossible for Defendants to respond to his motions; and repeatedly unabashedly placed slanderous, defamatory and racially charged language in his pleadings, in complete disregard of [the] court's orders." I also found that the plaintiff "harassed and intimidated *two friends*, both lawyers and officers of this court, into signing false affidavits [footnote omitted] so that they could assist him in perpetrating the fraud, and so that he could claim attorney/client privilege in order to cover it up."

*2012 Mass. Super. LEXIS 250, [WL] at *1* (citations

omitted; emphasis in original).

Further, **[*11]** the Superior Court ordered Langadinos to pay in excess of $208,000 in attorneys' fees incurred by defendants as a result of Langadinos' fraudulent conduct. See *Langadinos v. Southern New England School of Law, Inc., No. 2008-2064, 2012 Mass. Super. LEXIS 250, 2012 WL 4840678, at *3 (Mass. Super. Sept. 20, 2012)*.

B. This Action

Langadinos filed this action on June 28, 2012, the same day of the hearing on the Defendants' request that Langadinos be prohibited from filing any future actions in the Commonwealth's state courts without prior court approval. Docket No. 1. The original complaint alleges that various defendants violated RICO, federal and state wiretapping acts, and committed fraud on the court. Id. The original complaint named as defendants W.R. Berkley Corporation, William R. Berkley, Acadia Insurance Company, Ward, the Law School, Kurnos and the Law Firm. Docket No. 1 at ¶¶ 6-12.

On October 23, 2012, Langadinos filed a motion to extend the time to serve the Complaint for six months until April 28, 2013. Docket No. 2. The District Court allowed the motion in part and extended the time to serve the Complaint until January 21, 2013. Docket No. 4. On January 22, 2013, Langadinos filed an Amended Complaint. Docket **[*12]** No. 6. The Amended Complaint is completely different from the original complaint. [5] The Amended Complaint dropped defendants W.R. Berkley Corporation, William R. Berkley and Acadia Insurance Company and adds defendants UMass and Xifaras. Id. In addition, all of the claims in the original complaint have been replaced by claims for unlawful retaliation, violations of the Americans with Disabilities Act, different civil rights violations, breach of contract claims, fraud in the inducement, intentional/negligent infliction of emotional distress and defamation. Id.

Also on January 22, 2013, Langadinos filed proof of service of the Complaint. The proofs of service state that a copy of the Amended Complaint was served on January 18, 2013. Docket Nos. 7-12. However, the Amended Complaint was not filed until January 22, 2013. Docket No. 6.

All Defendants moved to dismiss the Amended Complaint. Docket Nos. 14, 16, 24. Langadinos filed an opposition to Defendants' motion to dismiss on May 21, 2013. Docket Nos. 34, 35. Langadinos also filed a motion **[*13]** for a preliminary injunction, seeking an order "protecting the plaintiff from the defendants [sic] continuous interference with plaintiff's ability to obtain his day in court, and redress the grievances committed by the defendants." Docket No. 32.

On August 29, 2013, this Court recommended that the District Court grant the Defendants' motions to dismiss. Docket No. 41.

C. Other Actions

Langadinos has filed a number of other actions against others over the years. Those cases include the following:

1. Langadinos v. Langadinos, Middlesex Superior Court, Civil Action No. MICV1996-03806; Filed: 06/27/1996; Disposition: Settled.

2. Langadinos v. Rainville et al., Bristol Superior Court, Civil Action No. BRCV1998-00864; Filed: 12/31/1998; Disposition: Dismissed as to Rainville, M.D. for failing to post bond in Med. Mal. Action. Dismissal as to others via summary judgment. See *Langadinos v. Rainville, 54 Mass. App. Ct. 1102, 763 N.E.2d 583 (2002)*.

3. Joseph O'Connell v. Gregory Langadinos, Supreme Judicial Court Docket No. SJ2001-0081 (*M.G.L. c. 211, §3* Petition and supporting Memorandum); Filed: 2/16/2001; Disposition: Relief Denied 2/26/2001 Sosman, J. See *Goldberg v. Langadinos, 76 Mass. App. Ct. 1134, 926 N.E.2d 1201 (2010)*; **[*14]** *Goldberg v. Langadinos, 67 Mass. App. Ct. 1118, 857 N.E.2d 509 (2006)*.

4. Langadinos v. Charland, et al., Essex Superior Court, Civil Action No. ESCV2003-01664; Filed: 11/20/2003; Disposition: Settled. See Ex. 16 to Defendants' motion.

5. Langadinos v. Massachusetts Board of Bar Examiners, Supreme Judicial Court Docket No. SJ2004-0207 (complaint to be admitted to the bar after failing bar examination); Filed: 5/10/2004; Waiver of Fees requested and allowed; Disposition: Relief Denied. See Ex. 17 to Defendants' motion.

6. Langadinos v. Hosokawa Micron International, Inc., Essex Superior Court, Civil Action No. ESCV2007-01894; Filed: 07/07/2008; Disposition: Summary judgment granted to defendant. See *Langadinos v.*

[5] However, the Amended Complaint is strikingly similar to the complaint in the Superior Court Action and is largely based upon the same set of facts.

Hosokawa Micron Intern., Inc., No. 08-11237-DPW, 2011 U.S. Dist. LEXIS 35841, 2011 WL 1213079 (D. Mass. Mar. 31, 2011).

7. Langadinos v. Patel et al., Middlesex Superior Court, MICV2010-04502; Filed: 11/30/2010; Waiver of Fees; Disposition: Settled. See Ex. 19 to Defendants' motion.

8. Langadinos v. American Airlines, Federal District Court for the District of Massachusetts, Docket No. 98-11127-NG; Filed: 09/10/98; Disposition: Dismissed for repeated failure to comply with Court's discovery orders. See *Langadinos v. Am. Airlines, Inc., 48 Fed. Appx. 4 (1st Cir. 2002)*.

9. **[*15]** Langdinos v. Pezza Law, P.C. et al., Middlesex Superior Court, Civil Action No. MICV2012-00911; Filed: 03/08/2012; Disposition: Pending. See Ex. 21 to Defendants' motion.

10. Langadinos v. Sears Holdings Management Corp. et al., Norfolk Superior Court, Civil Action No. NOCV2012-00703; Filed: 04/17/2012; Affidavit of Indigency filed and apparently rejected so filing fee paid; Disposition: Settled. See Ex. 22 to Defendants' motion.

II. ANALYSIS

The Defendants request an injunction prohibiting Langadinos from filing any future lawsuits in the U.S. District Court for the District of Massachusetts without first obtaining court approval. Docket No. 26 at 3-4. This Court finds that the requested injunction is appropriate under the circumstances.

"Federal courts plainly possess discretionary powers to regulate the conduct of abusive litigants." *Cok v. Fam. Ct. of R.I., 985 F.2d 32, 34 (1st Cir. 1993)*. This power encompasses the Court's ability to enjoin litigants who abuse the court system by filing groundless and vexatious litigation. *Gordon v. United States Dep't of Justice, 558 F.2d 618, 618 (1st Cir. 1977)* (per curiam). Where a litigant has demonstrated a "propensity to file repeated suits **[*16]** involving the same or similar claims" of a "frivolous or vexatious nature," a bar on further filings is appropriate. *Castro v. United States, 775 F.2d 399, 409 (1st Cir. 1985)* (per curiam), overruled on other grounds by *Stevens v. Dep't of the Treasury, 500 U.S. 1, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991)*.

An injunction on the ability to file lawsuits should be tailored to the specific circumstances presented, particularly when issued against a pro se plaintiff. *Cok, 985 F.2d at 34-35*. A comprehensive filing ban should occur only where clearly indicated by the record in a particular case. *Id. at 36* (warning that injunction restricting all court access should be issued "only when abuse is so continuous and widespread as to suggest no reasonable alternative.").

This Court is mindful of the severity of issuing a broad injunction against a pro se plaintiff and that such restrictions against pro se plaintiffs should be approached with caution. See *id. at 35*. The Court also recognizes that litigiousness alone will not support an injunction. See *Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980)*. However, Langadinos' filing practices against the Defendants have been abusive and persistent. Langadinos has now sued the Law **[*17]** School and Ward five times, Kurnos and/or his Law Firm three times, and Xifaras twice. Except for the 2000 original action against the Law School and the Boston Globe allegations in the instant case, all the lawsuits involve the same set of facts. This action is almost identical to the Superior Court Action and was filed after the Superior Court dismissed the Superior Court Action for fraud on the court and repeated abuses of the litigation process. It was also filed on the same day that the Superior Court Action heard the motion to enjoin Langadinos from filing any future lawsuits in the Massachusetts state courts. Although the Superior Court did not issue the injunction until September 20, 2012, this Court may permissibly infer that the filing of this action was an attempt to end run a then anticipated injunction prohibiting Langadinos from filing any more lawsuits in the state courts. The Defendants have spent much money and resources defending against Langadinos' frivolous lawsuits.

In addition, the Court notes that Langadinos is a frequent litigant in this and other courts. Except for a few technical successes, Langadinos appears to have lost every one of his lawsuits in both the **[*18]** trial courts and on appeal. At least some of his lawsuits in this district appear to have been frivolous. See, e.g., *Hosokawa Micron Int'l, Inc., 2011 U.S. Dist. LEXIS 35841, 2011 WL 1213079 at *1* (finding of vexatious and frivolous motion practice by Judge Woodlock; court also noted that Langadinos' own expert concluded his product liability claim had no merit). Yet another one was dismissed because of Langadinos' repeated failures to comply with court orders and burdening the court with needless delays. See *Am. Airlines, 48 Fed. Appx. at 4*. Other judges have characterized Langadinos as a vexatious and harassing litigant. See Exs. 3, 7A, 23. Therefore, to prevent Langadinos from continuing to

abuse the judicial process, from wasting judicial resources, and from wasting the resources of parties who must respond to his frivolous lawsuits, the Court recommends [6] that he be enjoined from making any new filings in this district without prior permission, except to effect an appeal of the various orders issued in this case. Langadinos may, consistent with *Fed. R. Civ. P. 72(b)*, file an objection to this Court's reports and recommendations in this case. The Court notes that the recommended injunction will not deprive **[*19]** Langadinos of his right to file potentially meritorious pleadings, but will simply require that Langadinos demonstrate to the Court, prior to acceptance of his pleadings, that they are not frivolous or filed for an improper purpose.

III. RECOMMENDATION

For the foregoing reasons, this Court recommends that the District Judge assigned to this case grant the Defendants' motion for a permanent injunction and issue the following injunction:

> Plaintiff is enjoined from filing any further pleadings in this action and from filing any additional or new claims, cases, complaints, or other documents in the U.S. District Court for the District of Massachusetts, except to effect an appeal of the Court's orders in this case, without first obtaining written approval of a judge of this Court by filing **[*20]** a written petition seeking leave of Court to do so. The petition must be accompanied by a copy of this Court's Memorandum and Order, together with the papers sought to be filed, and a certification under oath that there is a good faith basis for their filing. The Clerk of Court shall accept the documents, mark them as received, and forward them for action on the petition to a judge of this Court authorized to act on matters on the Miscellaneous Business Docket of the Court. Any documents which are submitted for filing by the Plaintiff in violation of this Order shall not be filed or docketed by the Clerk's Office, but shall be returned by the Clerk's Office to the Plaintiff.

IV. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of *Fed. R. Civ. P. 72(b)*, any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See *Fed. R. Civ. P. 72*. **[*21]** The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with *Fed. R. Civ. P. 72(b)* will preclude further appellate review of the District Court's order based on this Report and Recommendation. See *Phinney v. Wentworth Douglas Hospital,199 F.3d 1 (1st Cir. 1999)*; *Sunview Condo. Ass'n v. Flexel Int'l, 116 F.3d 962 (1st Cir. 1997)*; *Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993)*.

/s/ Jennifer C. Boal

JENNIFER C. BOAL

United States Magistrate Judge

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[6] In *Cok*, the First Circuit vacated an injunction against a pro se plaintiff because she was not warned or otherwise given notice that filing restrictions were contemplated. *Cok, 985 F.2d at 35*. Here, Langadinos has filed an opposition to Defendants' motion for injunctive relief. He will also have the opportunity to object to this recommendation. See *Cok, 985 F.2d at 35* (citing *Pavilonis, 626 F.2d at 1077*).

Neutral
As of: March 7, 2018 8:47 PM Z

In re Bar Applicant ADM-2004-176

Supreme Court of New Hampshire

June 22, 2005, Argued ; August 18, 2005, Opinion Issued

No. ADM-2004-176

Reporter
152 N.H. 523 *; 880 A.2d 439 **; 2005 N.H. LEXIS 135 ***

In the Matter of Bar Applicant ADM-2004-176

Subsequent History: **[***1]** Released for Publication August 18, 2005.

US Supreme Court certiorari denied by *Hirsch v. Supreme Court of Nh, 126 S. Ct. 1655, 164 L. Ed. 2d 400, 2006 U.S. LEXIS 2746 (U.S., Apr. 3, 2006)*

Prior History: Committee on Character and Fitness.

Core Terms

applicant's, contempt, motions, motion to recuse, fitness to practice law, committee's, attorneys, opposing counsel, misconduct, negative report, practice of law, discovery, contends, filings, records, abused, child support, legal system, documents

Case Summary

Procedural Posture
After its standing committee on character and fitness filed two reports recommending that the applicant be denied admission to the New Hampshire Bar, the court issued an order to show cause why the application should not be denied.

Overview
The applicant had years of history of getting into legal disputes with others in which he took everything too hard and tended to perceive evil intent in the oversights and small mistakes of others. In two instances, in fighting drug use in a large city and in family court litigation involving a child support matter in a nearby state, the applicant became so convinced of the corruption of others that he launched campaigns in which he impugned the integrity of nearly everyone with whom he had come in contact. In the family law matter, he was eventually found in contempt, and that holding was affirmed by that state's highest court. The standing committee and the court did not doubt that the applicant was a person of high morality, but they agreed that he had not carried the burden, which was solely his under N.H. Sup. Ct. R. 42, of showing his fitness to practice law. The character and temperament flaws that he had demonstrated over decades of unnecessary disputes with others made him unsuitable as a repository of clients' trust.

Outcome
The court denied the application.

LexisNexis® Headnotes

Legal Ethics > Practice Qualifications

HN1 **Legal Ethics, Practice Qualifications**

See N.H. Sup. Ct. R. 42(5)(a).

Evidence > Admissibility > Character Evidence

Legal Ethics > Practice Qualifications

Evidence > Burdens of Proof > General Overview

HN2 **Admissibility, Character Evidence**

In New Hampshire, the burden of establishing fitness to practice law rests upon the applicant. The applicant must prove good moral character and fitness by clear and convincing evidence. Any doubt concerning character and fitness should be resolved in favor of protecting the public by denying admission to the applicant.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Legal Ethics > Practice Qualifications

HN3 **Jury Trials, Province of Court & Jury**

As a general rule, the Supreme Court of New Hampshire accords deference to a fact finder's determination of witness credibility and resolution of disputed questions of fact. Nevertheless, a recommendation of that court's standing committee on character and fitness is advisory only and neither binds the court nor limits its authority to take action.

Legal Ethics > Practice Qualifications

HN4 **Legal Ethics, Practice Qualifications**

The New Hampshire Supreme Court's standing committee on character and fitness has been making determinations of character and fitness without the assistance of formal standards since its inception. The fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis. The court relies on case law and the standards governing practicing attorneys. What cannot be permitted in attorneys cannot be tolerated in those applying for admission as attorneys.

Business & Corporate Compliance > ... > Judgments > Enforcement & Execution > Foreign Judgments

Civil Procedure > Sanctions > Contempt > General Overview

HN5 **Business & Corporate Compliance, Foreign Judgments**

The Supreme Court of New Hampshire will not, in the matter of review of a contempt finding, substitute its judgment for that of the Vermont Supreme Court.

Legal Ethics > Practice Qualifications

Legal Ethics > Professional Conduct > Tribunals

HN6 **Legal Ethics, Practice Qualifications**

Abuse of legal process and violation of a court order are two factors considered relevant to bar admission. The conduct of someone else generally is not relevant to the exploration of an applicant's fitness because it sheds no light on the ultimate question: whether the applicant is fit to practice law. Repeated, unsupported, ad hominem attacks on the ethics, integrity, and motivations of others involved in the process do, however, reflect adversely on the applicant's fitness to practice law.

Legal Ethics > Practice Qualifications

HN7 **Legal Ethics, Practice Qualifications**

The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination.

Legal Ethics > Practice Qualifications

HN8 **Legal Ethics, Practice Qualifications**

Turbulent, intemperate or irresponsible behavior is a proper basis for the denial of admission to the bar. These characteristics are not acceptable in one who would be a counselor and advocate in the legal system. When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike manner. Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence.

Legal Ethics > Practice Qualifications

HN9 **Legal Ethics, Practice Qualifications**

The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.

Legal Ethics > Practice Qualifications

HN10 **Legal Ethics, Practice Qualifications**

The right to practice law is not an inherent right of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted only to those who demonstrate special fitness in intellectual attainment and character. All may aspire to it on an absolutely equal basis, but not all will attain it.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Legal Ethics > Practice Qualifications

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11 **Equal Protection, Nature & Scope of Protection**

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > General Overview

Legal Ethics > Practice Qualifications

HN12 **Procedural Due Process, Scope of Protection**

An applicant for admission to the New Hampshire Bar is required to establish his character and fitness to the satisfaction of the standing committee on character and fitness and the Supreme Court of New Hampshire. N.H. Sup. Ct. R. 42(5)(a). An applicant is on notice that the content of his submissions will be an issue before that court. It is by those submissions that an applicant is afforded the opportunity to establish his good character and fitness.

Counsel: Applicant ADM-2004-176, by memorandum and orally, Po se.

Janet F. DeVito, of Concord by memorandum and orally, for the Committee on Character and Fitness.

Judges: BRODERICK, C.J., and NADEAU, DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Opinion

[*523] **[**441]** Per CurlAm. The applicant seeks admission to the New Hampshire Bar. The standing committee on character and fitness of the New Hampshire Supreme Court (committee) filed two adverse reports recommending that the applicant be denied admission. We issued an order instructing the applicant to show cause why his application should not be denied. *See* Sup. Ct. R. 42(5)(k). Thereafter, both parties were allowed to file briefs or memoranda, and oral argument was held. We now deny the application.

Supreme Court Rule 42(5)(a) states:***HN1*** "All persons who desire to be admitted to practice law shall be required to establish their moral character and fitness to the satisfaction of the Standing Committee on **[*524]** Character and Fitness of the Supreme Court of New **[***2]** Hampshire in advance of such admission. " Sup. Ct. R. 42(5)(a). ***HN2*** The burden of establishing fitness to practice law rests upon the applicant. Application of Appell, 116 N.H. 400, 401, 359 A.2d 634 (1976). The applicant must prove good moral character and fitness by clear and convincing evidence. Application of T.J.S., 141 N.H. 697, 699, 692 A.2d 498 (1997); In re Mustafa, 631 A.2d 45, 47 (D.C. 1993). Any doubt concerning character and fitness should be resolved in favor of protecting the public by denying admission to the applicant. T.J.S., 141 N.H. at 702-03.

HN3 As a general rule, we accord deference to a fact finder's determination of witness credibility and resolution of disputed questions of fact. Nevertheless, the committee's recommendation is advisory only and neither binds this court nor limits our authority to take action. Id. at 699.

The applicant is married and has two children from his current marriage. He also has two children from a former marriage. The applicant has a master's degree in education and a law degree. He has owned and

operated his own business for the past twenty years.

[*3]** The applicant submitted his petition and questionnaire for admission to the bar of New Hampshire on May 1, 2003. He submitted letters of recommendation from many sources, including law school professors, friends, physicians and even a former wife, to the committee over the course of the proceedings. The committee interviewed the applicant on July 1, 2003. After the interview and a follow-up investigation, the committee issued a negative report.

The report highlighted several areas of concern, including: (1) a past due financial obligation; (2) twelve civil matters to which the applicant has been a party, including three divorces; (3) two monetary judgments entered against him; (4) a judgment for past due child support; (5) eighteen motor vehicle violations, of which fourteen had been incurred since 1991; and (6) that he had been fired from one of his jobs. The committee also discussed an order finding the applicant in contempt of the Windham Family Court in Vermont.

The areas of greatest concern to the committee were the applicant's unsubstantiated reports of his effort to fight drug **[**442]** addiction in Montreal and his "apparent disdain for authority . . . that is reflected in the course **[***4]** of his on-going litigation in Windham Family Court. "

The applicant requested a hearing before the committee to explain the issues contained in the report, *see* Sup. Ct. R. 42(5)(j), at which he was represented by counsel. Following the hearing, the committee voted to submit a second negative report. It found that the applicant had not met his burden of demonstrating the character and fitness required for admission to the bar. The grounds for the committee's finding included: (1) **[*525]** the applicant's "willful, deliberate and contumacious" conduct before the Windham Family Court in Vermont; (2) the applicant's abuse of the judicial process, including the filing of eighteen motions in a ten-month period; and (3) the applicant's lack of "sufficient positive characteristics of character and fitness to practice law. "

The applicant contends that both negative reports of the committee "contain numerous errors, misapprehensions and misquotations. The conclusions of those reports are generally unsupported by substantial evidence. "

The applicant further objects to the committee's use of proposed character and fitness standards that have not yet been adopted. The applicant suggests use of **[***5]** the Code of Recommended Standards for Bar Examiners promulgated by the American Bar Association (ABA Standards). American Bar Association Section of Legal Education and Admissions to the Bar and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 1997-98* (1997). ***HN4***[↑] The committee has been making determinations of character and fitness without the assistance of formal standards since its inception. Although we have referred to the ABA Standards for guidance in the past, *see* T.J.S., 141 N.H. at 701, "the fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis. " *Appeal of Lane, 249 Neb. 499, 544 N.W.2d 367, 375 (Neb. 1996)* (quotation and brackets omitted). We shall rely upon case law and the standards governing practicing attorneys. *See id.* ("What cannot be permitted in attorneys cannot be tolerated in those applying for admission as attorneys. ").

The applicant argues that he has demonstrated a commitment to good works. This commitment includes claims that he, among other activities, worked as an inner city school **[***6]** teacher, helped organize taxi drivers in Philadelphia to resist the Teamsters' Union, secretly transported banned books out of communist Czechoslovakia, forced the cleanup of an "asbestos-contaminated area" in Brattleboro, exposed a "longstanding pattern of abuses and gender discrimination" at the Office of Child Support and the Windham Family Court in Vermont, and worked extensively to combat drug addiction in Montreal.

The applicant began his frequent trips to Montreal while in law school. On these trips, according to his testimony, he counseled young drug addicts, passed out anti-drug literature and provided information to law enforcement authorities. The applicant received at least three speeding tickets during trips to and from Montreal while driving under conditions of extreme fatigue and one ticket for a traffic violation in Montreal while trying to locate people he suspected of being drug dealers. He presented **[*526]** numerous e-mails he has written to police officers in Montreal, containing detailed information about people he suspected of being drug dealers, including license plate and phone numbers associated with persons he suspected of being drug dealers. He sent multiple reports **[***7]** to **[**443]** the Solicitor General of Canada on his view of the drug trafficking situation in general in Montreal, and one report containing allegations that members of the Montreal police force were engaged in trafficking. He also submitted two responsive e-mails from law

enforcement officials, one indicating when a particular officer would return from vacation and one providing a contact name for future correspondence.

The applicant's attorney represented to the committee that he had spoken over the phone with two law enforcement officers in Montreal. One officer confirmed to the attorney that the applicant had sent him e-mails. The other officer simply stated that it was his office's policy not to disclose whether someone was working as an informant. Apart from the applicant's testimony, there is no other evidence in the record of any response to the applicant from authorities in Montreal.

We begin by addressing the issue of the contempt before the Windham Family Court in Vermont. The applicant claims the contempt was reversed, and therefore does not reflect poorly upon his character and fitness. In November 2001, the applicant filed a motion to modify the amount of child support he was **[***8]** paying. The Vermont Office of Child Support filed a petition for enforcement of the child support order soon thereafter. The litigation progressed slowly, in part due to the number of motions filed and several canceled hearings. The applicant filed a motion to recuse the first magistrate presiding, which was granted in March 2002. He filed a third-party complaint against the State of Vermont in October 2002, asserting that a discrepancy between a pre-printed form and Vermont Rule of Family Procedure 4(g)(2)(D) about the required time to file an affidavit of income and assets had caused him economic harm. The applicant filed a motion to recuse the new magistrate on February 28, 2003; it was denied. He also filed a complaint with the judicial conduct committee in March 2003, which was dismissed.

On May 20, 2003, the applicant was ordered to provide his former wife, the plaintiff, with certain financial and business records. The presiding magistrate asked opposing counsel to draft the order. According to the applicant, the attorney and the magistrate faxed the order back and forth to make revisions. The final order lacked protective language which the applicant considered vital; the **[***9]** applicant wanted customer information contained in the records sealed so the plaintiff could not contact his customers and harass them, as he claimed she had done in the past. The magistrate had agreed to put such language in the order, but it was **[*527]** missing from the final order for production of the documents. The applicant was ordered to produce the documents by June 20, 2003.

On June 19, the applicant faxed two motions to the court. One was another motion to recuse the magistrate; the other was a motion for a continuance. The applicant was informed that the court did not accept faxed motions, a fact which he disputes, but he filed his motions by hand on June 24, 2003.

On June 23, 2003, the plaintiff filed a motion for contempt. On July 3, 2003, the applicant filed a "continuation" of his motion for recusal of the magistrate, in which he requested that all of the discovery orders issued by her be quashed. The applicant turned over the requested information on July 22, 2003, at the hearing on the motion for contempt. The contempt hearing did not conclude on July 22 and at its resumption on August 22, 2003, the magistrate found the applicant guilty of contempt of court. The applicant **[***10]** was ordered to pay the plaintiff's attorney's fees in the **[**444]** amount of $ 1,066.50. The applicant filed two more motions to recuse the magistrate, one of which was dismissed because he filed it *pro se* although he was represented by counsel.

The applicant appealed the finding of contempt, as well as the denials of his repeated motions to recuse, to the Vermont Supreme Court. The Vermont Supreme Court reversed the contempt finding, as the contempt had been purged when the applicant produced the requested documents. The Vermont Supreme Court, however, upheld the imposition of compensatory fines imposed upon the applicant.

> Defendant asserts that he reasonably, mistakenly, or in "good faith" believed that his motions to recuse magistrate Gartner and quash the discovery order relieved him of the obligation to comply with the order. The trial court rejected the claim, finding that defendant's violation was wilful, deliberate, and contumacious, and we discern nothing in defendant's arguments or the record to suggest that the court's finding was clearly erroneous or an abuse of discretion. . . . Nor does defendant's claim that he believed the order to be invalid because it was drafted **[***11]** by opposing counsel, or involved some form of alleged ex parte communication with the court, represent a persuasive defense. . . . Defendant also contends that he was excused from compliance with the discovery order because it omitted an express provision reflecting the magistrate's decision to seal the business records produced. The court here correctly observed that defendant's concerns could have been addressed through a **[*528]** motion to amend the order, and did not excuse his

noncompliance.

The Vermont Supreme Court also addressed the applicant's numerous motions for recusal of the magistrate:

> Viewed in light of these standards [of abuse of discretion], defendant's arguments are entirely unpersuasive. Defendant contends that the administrative judge erred in ruling that the tape of an unrelated proceeding involving magistrate Gartner was irrelevant, but defendant offers no persuasive rationale that the proceeding was relevant to the magistrate's impartiality in *this* proceeding. Defendant also contends that the administrative judge erred in declining to address in any detail defendant's claim that the magistrate committed numerous procedural errors. The administrative **[***12]** judge correctly ruled, however, that legal errors do not demonstrate prejudice . . . and - contrary to his claim - defendant has not proved a "pattern" of error demonstrating bias.
>
> . . . Defendant additionally cites several questions and comments by the magistrate at a number of hearings, suggesting that they "were not only pointless but bizarre and possibly for psychological effect," as well as "gratuitous," an improper "signal" to opposing counsel, and proof that the magistrate was "less than honest. " The cited questions and comments, however, do not remotely support defendant's claims. Finally, defendant contends the magistrate demonstrated bias by failing to sanction opposing counsel for drafting the discovery order without a provision sealing the records to be disclosed, and by engaging in ex parte communications with opposing counsel. The administrative judge correctly noted that the alleged omission may have been a legal or procedural error but did not demonstrate bias, and the alleged ex-parte communication has not been demonstrated.

The applicant contends that the contempt order "was not ignored, it was challenged. There is a difference. " ***HN5***[↑] We will not, however, **[***13]** **[**445]** substitute our judgment for that of the Vermont Supreme Court. The Vermont Supreme Court upheld the fines imposed by the lower court to the extent that they arose from the defendant's failure to obey the court order: "Under V.R.F.P. 16(c)(3), the court may award a sum of money sufficient to compensate the aggrieved party for any loss, including attorneys' fees, 'caused by the contempt. '" While the applicant's contempt was purged by **[*529]** July 22, 2003, he was, nonetheless, in contempt of court from June 20, 2003, until he produced the requested documents.

Next we turn to the applicant's response to the committee's finding that he has abused the judicial process, as evidenced by the number of motions he has filed, including several motions to recuse.

The applicant's response to this finding is influenced by his belief that he is fighting systematic abuses prevalent at the Windham Family Court: "Lastly it is difficult to see how a determined effort to reform a Court can be termed abuse of the legal system. As has been extensively documented Windham Family Court cannot be deemed a normal part of the legal system. It is an aberration. " He states: "The Committee was unwilling to entertain **[***14]** the possibility that there might be 'deeply ingrained institutional misconduct' or that a person might have a reasonable belief, based on the evidence of many years, that this was true."

It is apparent from his filings, both before this court and the Windham Family Court, that the applicant perceives the Windham Family Court to be a corrupt institution, and that he believes that his attempts to correct its misconduct will have consequences: "It has been known for many years that the neighborhood around Montreal bus station and Windham Family Court were deleterious to the well-being of their respective communities. It ought to be clear that any direct attempt at correcting these situations will entail the risk of severe retaliation. "

In responding to the committee's finding that eighteen motions were filed in a period of less than ten months, the applicant states that three of the eighteen motions were made by opposing counsel, and that "six of the motions were made by [the applicant's] lawyer . . . . This was more or less his first case after having been admitted. It was plain to anyone with an ounce of political sense that this entire contempt issue was for the purpose of denying **[***15]** [the applicant] the right to practice law. "

The applicant is particularly troubled by the actions of the court manager at the Windham Family Court. In September 2003, the court manager transmitted a copy of the applicant's file at the Windham Family Court to the committee in response to its request. In her letter, the court manager stated, "I would urge you to read [the applicant's] filings carefully, as I believe they greatly reflect upon his fitness and character. " She also informed the committee that the applicant had been recently found in contempt of court; a copy of the

contempt order was included in the file transmitted. In August 2004, the court manager sent the committee updated filings in the litigation, including a copy of the recent Vermont Supreme Court opinion. The court manager included a letter summarizing the events. This package was also sent to the Vermont Board of Bar Examiners.

[*530] The court manager's summary of the litigation did not sway our decision. Whether her actions were improper is not a question we need to decide. We did not include in our analysis the applicant's reactions to the court manager's actions. We need only say that, after reviewing the **[***16]** entire court file, we are not convinced that the applicant's reactions to the *other* perceived **[**446]** instances of prejudice and misconduct were warranted by the situation. His reaction to the contempt finding, his motions to recuse the magistrate and the overall tenor of his pleadings are indicative of his character and fitness to practice law. They suggest an intemperate disposition, and an unusual quickness to find fault with others.

Next we address the committee's general finding that the applicant lacked "sufficient positive characteristics of character and fitness to practice law. " Specifically, the committee found that:

> 3. [The applicant] has shown an inability to exercise the reason and good judgment a lawyer should have and has shown a disregard for the rights and welfare of others in that:
>
> a. [The applicant] has a pattern of blaming others for the negative events in his life. Those he blames include courts, judges and allegedly corrupt police.
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> b. [The applicant] often creates unnecessary problems for those he deals with in guise of solving society's problems.
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> c. [The applicant] has harmed his own children, and others in his family while attempting **[***17]** to fix what he feels to be a corrupt and biased legal system.
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> d. [The applicant's] conduct in litigation could be found to violate Rules 3.1 and 3.2 of the Rules of Professional Conduct if he were an attorney.
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> e. [The applicant] had difficulty focusing on the specific issues the committee asked him to address and often rambled about irrelevant subjects.

The applicant responds that he does not view the events at the Windham Family Court as negative because he appreciates the opportunity to stand up for what is right. He also challenges the committee's finding that he is hurting his children in his efforts for reform. In the midst of his legal struggles with his former wife over his motion to modify child support, the contempt against him and his many motions to recuse, the applicant filed a motion to enforce an order for parent-child contact. He claimed that the Vermont statute requires a hearing to be held within thirty days after such a motion is filed, but that no such hearing has taken place.

[*531] The applicant laments this fact: "Where's the justice, where's the decency, where's the law, who protects the children?" But when questioned by members of the committee, the **[***18]** applicant revealed that he has ignored his own request to enforce the visitation order. The applicant has focused his energy upon the contempt issue, the motions for recusal and the alleged misconduct at the Windham Family Court. As the following excerpts from the hearing transcript indicate, the applicant has shown more fervor in pursuing the claimed misconduct at the Windham Family Court than he has in pursuing his right to see his children, though he claims to be representing their interests:

> Mr. [Willard] Martin: And in this order appointing the guardian, the judge did not set down a date by which the guardian was to complete his or her work?
>
> Applicant: No, I believe that is not - that's the case. And this is my criticism, that the best interests of the children have been lost.
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> Mr. [Willard] Martin: But here, sir, you have been spending your time reporting the master, or the magistrate, to the Judicial Conduct Committee, you've been filing these motions to recuse, and you're not asking when the guardian's report is due, when you're gonna have a hearing on visitation. **[**447]** It seems to me that it's all topsy-turvy. And I believe you when you say that your children are **[***19]** very important to you, I don't doubt that, but it seems to me that - you know that saying about representing yourself . . . .
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> Applicant: I know. I know. I shouldn't be representing myself here. I can't afford an attorney for Vermont matters. . . .
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> . . . .
>
> Mr. [Willard] Martin: I only bring up these questions, because it's a question of how you view your role as a lawyer, and whether you have the fitness to

> recognize what the important issue is in moving on, and placing the interests of the client, which would in a derivative way include your own children **[*532]** at this point in time, over the good of the general public.

Despite the clear evidence that the applicant never followed through with his motion to enforce an order for parent-child contact, he blames the presiding judge: "Now it is *seventeen times the legal limit* [since a hearing should have been held] and Judge Hayes still has failed to schedule a hearing. Yes, [the applicant] does hold Judge Hayes accountable and does assign blame. "

We are troubled by the applicant's perception that relatively minor events occur for specific, and sometimes nefarious, reasons. For example, when his former wife's attorney did **[***20]** not put the required protective language into the order requiring him to produce certain financial and business records, the applicant did not "believe that the omission of the vital protective order was accidental. " The applicant also believes that the Vermont Supreme Court order was written with his New Hampshire bar admission application in mind:

> The original contempt finding was condemned by the Supreme Court partially because it, "focused on punishment and not upon compliance. " The Vermont Supreme Court was well aware that the case had Bar Admission implications. Indeed the circumstances indicate that the New Hampshire Committee was the intended audience. [The applicant] suggests that the Vermont Supreme Court's disapproval of finding that [*sic*], "focus on punishment and not upon compliance," refers not only to the clear excessiveness of the award, but also indicated disapproval of the use of a finding of contempt for Bar Admission purposes as well as the extravagant language used to achieve that result.

He also suggests that the standards proposed by the committee, but not yet adopted, were written specifically for his case:

> This is precisely **[***21]** the wrong time to use an unapproved standard, written by the very committee using it for the first time and (apparently) drafted during the pendancy [*sic*] of the present case. [The applicant] . . . has no way of knowing if the standards were drafted with this very case in mind. The Committee's Commentary *seems* to suggest this but again, there is no way for [the applicant] to know if this is the case.

The applicant suggests that he was initially ordered to pay damages for items not related to his contempt because, while he knew of only a few cases of ethical violations,

> **[*533]** the malefactors at Windham Family Court knew about hundreds of cases and knew that [the applicant] would press for a full State investigation. If [the applicant] can be discredited there is less chance for scrutiny into areas that Judge Hayes and Attorney Annis wished to keep buried. This is why the overturned **[**448]** contempt opinion was written with such vituperative language and full of easily avoided errors of fact that *were not corrected when they were pointed out with great clarity in the Motion to Reconsider.*

Judges and magistrates are people, who despite their best efforts, **[***22]** fall prey to the same mistakes, oversights and misunderstandings that beset the rest of humanity. The existence of our appellate system is an explicit recognition that errors will occur. The applicant has shown a worrisome tendency to treat mistakes, if any, made by magistrates, judges, court personnel and the committee as signs of prejudice against him.

We are also troubled by the reasoning displayed in the applicant's arguments and the conclusions drawn therefrom, before this court, the committee and the Windham Family Court. For example, in a paragraph set off on its own in his memorandum of law, he asks, "Is it more comfortable to believe that [the applicant] has disdain for authority, than to consider that the lawlessness at Windham Family Court is probably the indirect cause-in-fact of domestic violence?"

In his response to his former wife's motion for contempt, the applicant deduces "unethical and disingenuous" conduct from a mistake made by opposing counsel:

> 3. The discovery process has been marked by conduct on the part of Attorney Corum that appears to be unethical and disingenuous. For example, an earlier Discovery request asked for "all corporate records" **[***23]** of [the applicant's business]. Mr. Corum knew, or ought to have known, that [the applicant's business] is not and has never been a corporation.

The applicant somehow detects "unethical and disingenuous" conduct from his former wife's attorney's

minor error. This is *not* an example of such conduct. Rather, it is an example of how the applicant tends to take small incidents and blow them out of proportion. Similar small occurrences were behind his motions for recusal; for example, the absence of the protective language from the document production order led to a motion to recuse the presiding magistrate.

The applicant also views the wrongs allegedly done to him on an exaggerated scale. For example, he draws the following parallel to the **[*534]** alleged *ex parte* communication, of which the Vermont Supreme Court found no evidence, between the magistrate and his former wife's attorney:

> [The applicant] states his great-grandfather decided to leave St. Petersburg and come to America because the Czar, under the influence of the mesmerizing Rasputin, had decreed that Jews could sell watches, repair watches but not both. This has given [the applicant] blood-memory of **[***24]** the nature of violations of Substantive Due Process. Over 120 years after the Czar's edict, [the applicant's daughter] will have a similar blood-memory of the nature of an ex parte communication.

He also displays a general hostility to the committee throughout his pleadings: "Again, this is an argument so absurd that only a lawyer could make it. "

> Unfortunately the author [of the committee reports] was so dazzled and blinded by the status of these individuals as Judge and Court Employee that he abandoned all skepticism about their veracity, even after he saw that Attorney Annis had written her curious letter claiming that Judge Hayes had been upheld and reading the Vermont Supreme Court opinion which held that Judge Hayes had abused discretion in three separate areas.
> In the same document he also writes:
>
> [The applicant] is loath to be discourteous, but if the author of the [first and **[**449]** second negative reports] can be this wildly inaccurate on this point, and opposing counsel can make a blunder that is equally embarrassing when she was present at the very meeting at which the Chairman did not even realize that there were bi-lateral communication [*sic*], **[***25]** why should the Court give credence to the other conclusory assertions that are offered without a shred of evidence?

Contrary to the applicant's assertion, our review of the evidence indicates that the committee's findings are supported by evidence. The applicant violated a court order, resulting in a finding of contempt. The applicant abused the judicial process in an attempt to reform perceived misconduct. And the applicant has not demonstrated sufficient positive characteristics to support his fitness to practice law.

HN6[↑] Abuse of legal process and violation of a court order are two factors considered relevant by the ABA Standards. We find the reasoning of the Massachusetts Supreme Judicial Court in a similar case helpful:

> **[*535]** The conduct of someone else generally is not relevant to the exploration of the applicant's fitness because it sheds no light on the ultimate question: whether the applicant is fit to practice law. Repeated, unsupported, ad hominem attacks on the ethics, integrity, and motivations of others involved in the process do, however, reflect adversely on the applicant's fitness to practice law.

In re Admission to Bar of Com., 444 Mass. 393, 828 N.E.2d 484, 498 (Mass. 2005). **[***26]** Even assuming for the purposes of argument that the alleged events at the Windham Family Court took place, they do not rise to the level of prejudice and misconduct that the applicant perceives. Rather, they reflect a tendency to exaggerate on the part of the applicant. ***HN7***[↑] "The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination. " *Lane, 544 N.W.2d at 375*. Again we find the language of the Supreme Judicial Court of Massachusetts helpful.

> Moreover his penchant for hyperbolic and dramatic language about what he perceives to be misconduct by others shows a seeming lack of understanding of the seriousness of the accusations he makes. Given all of this, coupled with the petitioner's mischaracterizations of other matters, we cannot say that the petitioner has met his burden of proving that he is fit to practice law.

In re Admission, 828 N.E.2d at 501.

In addition, ***HN8***[↑] "turbulent, intemperate or irresponsible behavior is a proper basis for the denial of admission to the bar. " *Application of Feingold, 296 A.2d 492, 500 (Me. 1972)*. These characteristics **[***27]** are not acceptable in one who would be a counselor and advocate in the legal system. *Lane, 544 N.W.2d at 374*.

> When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike

> manner. Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence.

ne, 544 N.W.2d at 375. ***HN9***[↑] "The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers. " *ABA Standards*, *supra*

[*536] We do not challenge the applicant's assertion that he is a moral person. He is committed to helping others, and expresses a deep concern for equality and **[**450]** justice. We do not question these traits. It is his lack of fitness that hinders his ability to practice law. ***HN10***[↑] The right to practice law is not an inherent right of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege **[***28]** granted only to those who demonstrate special fitness in intellectual attainment and character. All may aspire to it on an absolutely equal basis, but not all will attain it. *T.J.S., 141 N.H. at 702*. Based upon our review of the evidence, we hold that the applicant has not satisfied his burden of proving by clear and convincing evidence his fitness to practice law.

Finally, we turn to the applicant's claims that he has been denied procedural due process. The applicant argues his due process rights have been violated because: (1) he was not provided with the right to confront witnesses against him; and (2) new "charges" against him were added in the second negative report.

> ***HN11***[↑] A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or *Equal Protection Clause of the Fourteenth Amendment*. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

hware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) **[***29]** (citations omitted).

As to his first argument, the applicant was the only witness presenting evidence. Our finding that the applicant has not met his burden of proving his character and fitness to practice law is based primarily upon his own words: his filings before the Windham Family Court, his filings with the committee, his testimony before the committee and his filings with this court.

As to his second argument, that new charges against him were raised in the second negative report, the applicant seems to have confused this inquiry into his character and fitness to practice law with a criminal trial. *See In re Converse, 258 Neb. 159, 602 N.W.2d 500, 506-07 (Neb. 1999)*. It is not a trial, and the applicant has not been charged with any crime.

This proceeding is intended to determine the applicant's character and fitness to practice law in New Hampshire. ***HN12***[↑] The applicant was aware that he would be required to establish his character and fitness to the satisfaction of the committee and this court. *See Sup. Ct. R. 42(5)(a)*. The applicant **[*537]** was "on notice that the content of his submissions would be an issue before this court . . . ." *In re Admission, 828 N.E.2d at 501*. **[***30]** Indeed it was by these submissions that he was afforded the opportunity to establish his good character and fitness. He failed to do so.

Application denied.

BRODERICK, C.J., and NADEAU, DALIANIS, DUGGAN and GALWAY, JJ., concurred.

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