

Abusive Litigation Practices

Gallagher v. Funeral Source One Supply & Equipment Co., Inc., 2015 WL 773737 (D.N.H. Feb. 24, 2015) (14-CV-115-PB) (abusive litigation practices can qualify as unfair or deceptive acts or practices within the meaning of RSA 358-A, the Consumer Protection Act; noting that, under Consumer Protection Act, courts can be guided by the interpretation and construction given to Section 5(a)(1) of the Federal Trade Commission Act; FTC has brought enforcement actions based on abusive litigation practices)

As Massachusetts Consumer Protection Act (Mass. Gen. Laws c. 93A) is similar to N.H.'s RSA 358-A, New Hampshire Supreme Court has at times looked to Massachusetts courts for guidance when faced with interpretative questions regarding RSA 358-A.

The Massachusetts CPA can support claims based on abusive litigation practices. See Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760 (1986).

Robertson's Case, 137 N.H. 113 (1993)

PCC sought sanctions against Attorney Robertson due to alleged violations of Rules 4.4 and 8.4.

Rule 4.4: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person."

Referee was appointed. Referee found that Robertson accused lawyers representing city of Portsmouth with serious crimes, violations of multiple court orders, and usurping the power and defying the authority of the superior court. Referee concluded that Robertson had "exceeded the parameters of zealous advocacy."

Robertson went to a defense attorney's office and told him that the city should settle the original suit for a figure that was twice the amount of the jury verdict. In that same meeting, Robertson told the defense attorney that he was going to pursue charges of professional misconduct. Robertson didn't deny that he repeatedly alleged the commission of felonies and crimes by the defense attorneys. Robertson argued that simply because he used an "aggressive tone" does not show that his remarks were inappropriate.

Result: Robertson was publicly censured and assessed costs incurred by PCC (or its predecessor).

Daigle v. City of Portsmouth, 137 N.H. 572, 574 (1993)

Lists exceptions to rule that each party to lawsuit bears responsibility for his/her own attorney's fees:

1. Where litigation is instituted or unnecessarily prolonged through party's oppressive, vexatious, arbitrary, capricious, or bad faith conduct
2. Where parties are forced to litigate against an opponent whose position is patently unreasonable – Focus is on litigant's unjustifiable belligerence or obstinacy where an action is commenced, prolonged, required, or defended without any reasonable basis in

the facts provable by evidence.

In domestic relations cases, RSA 458:51 authorizes the court to award the prevailing party its reasonable attorney's fees upon a finding of contempt.

<http://www.gencourt.state.nh.us/rsa/html/XLIII/458/458-51.htm>

Plaintiff's motion for sanctions was denied. Defense then filed a motion for attorney's fees incurred in defending the allegations of discovery misconduct. The superior court approved over \$133,000 in attorney's fees.

Sanctions hearing encompassed more than the initial allegations that four documents, and information relating to those documents, were knowingly withheld. At start of sanctions hearing, the plaintiff's attorney filed a motion to increase sanctions to \$3.3 million, claiming that the city and its attorneys engaged in many unlawful deeds. The misdeeds alleged to have been committed by defense counsel included perjury, criminal activity, and conspiracy to withhold information. No evidence was introduced to support these additional serious allegations of wrongdoing. Attorney Robertson offered to settle the case for twice the jury verdict. This offer was made under threat of criminal charges, bad publicity, and disbarment proceedings.

There is a duty not to abuse the discovery process.

When advocacy is used to undermine opposing counsel's professional reputation, or simply for the sake of burdening the opponent with unnecessary expenditures of time and effort, the system has been poorly served.

As of result of the allegations that were presumably made in the press, the City Attorney for the City of Portsmouth was asked by a city councilman how his disbarment proceedings were going.

When presented with evidence that is consistent with two possible interpretations of how opposing counsel have conducted themselves, professional courtesy favors adopting that which is consistent with ethical and professional conduct, at least until the contrary is demonstrated beyond mere suspicion.

Result: Award of attorney's fees was affirmed in part & reversed in part