OUTLINE FOR TABLE 5 PRESENTATION

ABUSIVE LITIGATION – PLEADINGS

I. Examples of Abusive Pleadings

A. Scandalous or ad Hominem Attacks on Opposing Counsel

These are pleadings where a party makes a direct or personal attack against the opposing party or attorney. Examples can include allegations that the other side is lying, suborning perjury or intentionally misleading the Court.

An example can be found in Nault v. American Honda Motor Corp., 148 F.R.D. 25 (D.N.H. 1993) where plaintiff's counsel accused defense counsel of intentionally lying or suborning perjury in discovery responses. 148 F.R.D. at 29. Plaintiff's counsel then filed motions for default judgment and to revoke pro hac vice status. Id. at 28-29

B. Serial or Repetitive Motions / Pleadings

This situation can arise where one side files motions to reconsider nearly every order issued by the Court, or files a motion whenever there is the slightest dispute between the parties. The most common example occurs in cases where there are pro se litigants or there are contested parenting cases.

One example of such a situation occurred in Northwest Bypass Group v. U.S. Army Corp. of Engineers, 552 F.Supp. 2d. 137 (D.N.H. 2008) where plaintiff's counsel filed serial motions to reconsider nearly every interlocutory order issued by the Court. Id. at 139. As a result, the defendants filed motions for sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Id. at 138-9. Ultimately, the Court deferred ruling on this motion and scheduled them for a further hearing.

C. Confusing or Prolix Documents

The pleading or complaint makes no logical sense to the reader, usually because it contains repetitive or irrelevant allegations.

An example of such a situation occurred in Snierson v. Scruton, 145 N.H. 75 (2000), where the plaintiff filed a complaint containing 44 pages in over 200 separate paragraphs. The Supreme Court stated the pleading was onerous and defense counsel could have filed a motion for a more specific statement. Id. at 75-76. However, the Supreme Court reversed the trial court's dismissal of the entire action, holding that some of the causes of action alleged sufficient facts to survive a motion to dismiss.

D. Joining multiple parties solely to cut costs and extort defendants

Where a plaintiff joins multiple defendants solely for the purpose of cutting litigation costs for itself and/or to extort the defendants into a settlement, expect the court to sever the defendants into separate cases. See e.g., Third Degree Films v. Does 1-47, 286 F.R.D. 188 (D. Mass. 2012).

II. Responses to Abusive Pleadings

A. Rules Based Responses

1. Motion for Sanctions to Fed. R. Civ. P. 11(c)

This rule allows a court to sanction a party who has filed a pleading that is intended to harass, unnecessarily delay or increase the cost of litigation, or was otherwise filed for an improper purpose. See, Trefethen v. Liberty Mut. Group, Inc., 2013 U.S. Dist. LEXIS 160137, 2 (D.N.H. 2013).

Rule 11 sanctions are also appropriate for baseless claims and defenses. See Kenna v. United States Dep't of Justice, 128 F.R.D. 172, 176 (D.N.H. 1989), see also, Trefethen, at 2 (explaining that Rule 11 sanctions are reserved for "allegations without evidentiary support or the likely prospect of such support").

To avoid Rule 11 sanctions, the attorney (or party) has an obligation to investigate the claim or defense and determine whether the claim is well grounded in fact and law. Kenna, 128 F.R.D. at 176-177. The duty is a continuing duty, and as the litigation progresses, the validity of the claim or defense must be re-assessed. Id. at 176.

However, Rule 11 sanctions are not appropriate merely because an attorney (or party) made "an unfounded objection, weak argument, or dubious factual claim." Trefethen, at 3 (citing Young v. City of Providence, 404 F.3d 33, 39-40 (1st Cir. 2005)).

Even if a pleading runs afoul of Rule 11, a motion for sanctions may not be filed until 21 days after the pleading has been served. Nawrocki v. Wilson, 2010 U.S. Dist. LEXIS 102530 20-21 (D.N.H. 2010).

2. Motion for Attorney's Fees pursuant to N.H. Super. Ct. Civ. R. 11(d)

This Rule allows one side to obtain attorney's fees if the Court finds the motion was frivolous, or a party's unreasonable conduct required the filing of a motion to obtain relief.

3. Objection and Motion to Strike for Failure to Comply with N.H. Super. Ct. Civ. R. 11(b); N.H. Fam. Div. R. 1.26(B); N.H. Dist. Div. R. 1.8 (B).

These rules require that all motions based upon facts be supported by an affidavit or verification unless the facts are apparent in the record. This option could be available if the opponent repeatedly attempts to inject irrelevant or unsupported factual allegations into a pleading.

4. Objection and Motion to Strike for Failure to Comply with N.H. Super. Ct. Civ. R. 29(e); N.H. Fam. Div. R. 1.25(E)(6)

These rules require that counsel or parties confer in good faith, and certify to same, before the filing of a discovery motion (Superior Court Rule) or any hearing on a discovery based motion (Family Division Rule).

5. Objection and Motion to Strike for Failure to Comply with N.H. Super. Ct. Civ. R. 11(c); N.H. Fam. Div. R. 1.26(C)

   This Rule requires parties to confer in good faith to attempt to obtain concurrence on a motion before it is filed unless it can be reasonably assumed that the other side will not concur (e.g. a dispositive motion or a motion for contempt).

B. Non Rules Based Responses

1. Standing Objection to Certain Motions. If the opposing side insists upon filing repeated motions challenging the same issue, ask the court to allow you to make a standing objection to that issue. This saves you the effort of having to file a new objection every time the pleading is filed.

2. Motion for More Specific Statement. As stated in Snierson, if the pleading cannot be understood, require the other party to file a more concise or articulate pleading.

3. Limitation on Pretrial Pleadings. Ask the Court to impose a limit on pretrial pleadings to a set number, unless there is an emergency. In the case of an emergency motion, have the Court inform the other side that if the Court finds there was no emergency warranting the filing of the motion, attorney's fees may be awarded.

4. Pre-certification of Pleadings: In severe cases, require the party who has filed the motion to certify that the motion has been reviewed by N.H. counsel and has certified that the motion is proper and complies with the applicable court rules.

5. Common law: Unnecessarily prolonging litigation by pursuing "fruitless litigation showed a callous disregard for the rights of the plaintiff, and resulted in a needless drain upon the resources of the judicial system ..." Harkeem v. Adams, 117 N.H. 687, 692-693 (1977). The New Hampshire Supreme Court took exception to the Department of Employment Security's strategy of repeatedly raising new arguments for the first time, after repeatedly losing prior arguments, rather than conceding its loss to the plaintiff. Id. at 691-692. The Court affirmed the trial court's award of fees and costs pursuant to its common law power to do so for abusive and oppressive litigation conduct. *See generally* Id.

6. Federal courts are empowered to enjoin a person from filing further complaints "where a litigant has demonstrated a 'propensity to file repeated suits involving the same or similar claims' of a frivolous or vexatious nature ...'" Langadinos v. Bd. of Trs. Of the Univ. of Mass., 2013 U.S. Dist. LEXIS 140758, 15-15 (D. Mass. 2013). Though, the power to "restrict all court access should be issued, 'only when abuse is so continuous and

widespread as to suggest no reasonable alternative.'" Id. (quoting Cok v. Fam. Ct. of R.I., 985 F.2d 32, 34 (1st Cir. 1993)).

Ethical / Bar Admission Considerations:

Bar applicant's abusive practices barred him from being admitted to practice. See, In re Bar Applicant ADM-2004-176, 152 N.H. 523, 534-535 (2005). By way of example:

> "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?'"

Id. at 534.