#2016-010
#2016-013
#2016-011

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VIA ELECTRONIC MAIL

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

RE: Comments on Proposed Rule Amendments Described In April 17, 2017 Notice

Dear Advisory Committee on Rules:

I write to provide you with my thoughts on some of the proposals described in the April 17, 2017 Public Hearing Notice. Thank you for the opportunity to submit these comments.

Proposed Amendment to Superior Court (Civ.) Rule 10 (Appendix E)

I recommend that the proposed new subsection (b) to Rule 10 should end at the word "compulsory," so as to read as follows: "A pleading may state as a counterclaim against an opposing party any claim that is not compulsory." That language would track the analogous language of Fed. R. Civ. P. 13(b).

I am concerned by the proposed inclusion of the additional language ". . . so long as a right of action existed thereon at the time of the filing of the complaint." This language, if adopted, would make it difficult for defendants to lodge a counterclaim under the N.H. Consumer Protection Act, RSA 358-A:10, for abusive litigation practices. I, along with my co-counsel and fellow NHBA member Laura L. Carroll, represented the defendants in the case which recognized such a claim (which, in that case, was presented as a counterclaim). *See Gallagher v. Funeral Source One Supply & Equip. Co., Inc.*, Case No. 14-cv-115-PB, 2015 WL 773737, 2015 DNH 033 (D.N.H. Feb. 24, 2015). In that case, the conduct upon which the counterclaim was largely grounded occurred, as the Court noted, "after [plaintiff] had filed his complaint." *Id.* at p. 2.

If the proposed rule in its current form becomes adopted, a defendant (in a position similar to that in which our clients found themselves) would be forced to separately file a suit, since the defendant would be foreclosed from filing a permissive counterclaim on the basis that the right of action under the CPA did not "exist[] thereon at the time of the filing of the complaint." Forcing a defendant with an otherwise viable CPA to file a separate action would be wasteful

and could deprive defendants of the prophylactic protections afforded by the *Gallagher* decision. The power of the *Gallagher* decision, a decision Laura and I are proud to have played a part in securing, has been noted by other members of the bar,[1] and should not be practically undermined in the Superior Court by an adoption of a procedural rule.

To the extent that there are concerns that a CPA counterclaim for abusive litigation practices would become the proverbial tail wagging the dog, those concerns are addressed by proposed new subsection (h), which provides as follows: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims or third-party claims." New subsection (h) tracks the first sentence of Fed. R. Civ. P. 42(b), which has been effectively utilized by federal district courts for many years.

Proposed Amendment to Superior Court (Civ.) Rule 12(g) (Appendix F)

I generally support the proposed amendments to Rule 12(g), but would recommend that the proposed new Rule 12(g)(2) use the words ". . . the moving or any opposing party represents himself or herself", instead of "the moving or any opposing party is appearing pro se." I believe the trend in recent years within the NHBA and the Courts has been to refer to such parties as "self-represented" or some similar formative, rather than "*pro se*." For example, the NHBA's Committee on Cooperation with the Courts presently has a Subcommittee on Procedural & Civility Rules for Self-Represented Litigants.[2]

Proposed Amendment to Superior Court (Civ.) Rule 17 (Appendix G)

The proposed additions to subsection (a) and (b) of Rule 17 would, in my opinion, unnecessarily set a tone of preferential treatment to parties represented by counsel. Under the current rule, all parties – whether represented or not – must file an appearance.

Under the new proposal, every party who is self-represented must still file an appearance. However, the separate appearance requirement is effectively waived for those *represented* parties whose "counsel include[] the foregoing information in a complaint, answer or motion to dismiss." I question why a clerk's office should be forced to treat a counsel-represented party's complaint (which contains the information required by Rule 17(a)) as sufficient and therefore not requiring a separate appearance, yet treat a self-represented party's complaint (which contains the very same information) as deficient.

I think this unsupportable, disparate treatment is further exacerbated by the proposed inclusion in subsection (b) of this statement: "The failure of a self-represented party to file an Appearance in

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1 *See* Bauer, P. & Hawkins, C., "Consumer Protection Applied To Abusive Litigation Tactics," *N.H. Bar News* (Apr. 15, 2015), *available at* https://www.nhbar.org/publications/display-news-issue.asp?id=7852 (last accessed Apr. 21, 2017).

2 I presently sit on that Subcommittee. However, my comments and positions set forth in this letter are solely my own, and in no way should be attributed to the Subcommittee.

conformity with this rule shall result in a conditional default or other order as justice requires." A party's failure to include the required information – whether the party is counsel-represented or self-represented – should be subject to the same penalty (i.e., conditional default), or otherwise no penalty at all.

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Please contact me if you have any questions about the points I have raised, or if your committee would like to have me appear telephonically at the hearing on June 16, 2017.

Sincerely,

Zachary R. Gates

cc: Laura L. Carroll