NCCRC
National Coalition for a Civil Right to Counsel

Attn: Eileen Fox, Clerk of Supreme Court
New Hampshire Supreme Court Building
1 Charles Doe Drive
Concord NH 03301

October 15, 2014

Dear Ms. Fox:

The National Coalition for a Civil Right to Counsel (NCCRC) submits these comments in response to the proposed change to Rule 3.11 of the Rules of the Circuit Court of the State of New Hampshire- Family Division. We urge the Court to reject the change, as it will work a grievous harm to the ability of parents to protect their fundamental rights.

The mission of the NCCRC, formed in 2003, is to support recognition and implementation of a right to counsel in civil cases, and we serve as the nation's leading voice in this effort. To accomplish this, we have compiled extensive information about how the right to counsel contributes to fairer decisionmaking, reduces costs for communities, and provides an essential element of a just and stable society. Our new website (http://www.civilrighttocounsel.org) details the status of the right to counsel in each of the fifty states, as well as current expansion efforts underway across the country, many of which have received our assistance. We have 260+ participants in 36 different states, all of whom are committed to ensuring meaningful access to the courts for all and to exploring how the right to counsel in civil cases can best be advanced in their particular jurisdiction.

We are aware the American Bar Association (ABA) has or will be filing a letter opposing the proposed rule. We agree fully with the ABA's longstanding and wise policies on how appointment of counsel is essential throughout the life of an abuse/neglect proceeding. In particular, the ABA "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases" warns, "Unless and until parental rights are terminated, the parent has parental obligations and rights while a child is in foster care. Advocacy may be necessary to ensure the parent is allowed to remain involved with key aspects of the child's life." Our experience supports this principle: NCCRC participants have seen how attorneys perform numerous post-dispositional services for parents, such as helping to ensure that parents understand and meet all expectations and obligations established earlier in the case by the government and the court so as to avoid a future termination of parental rights case. Although the Rules Committee meeting notes indicate the rule change was motivated by a desire to "set out clearly the parameters of representation," we believe that both courts and attorneys understand the parameters of an appointment that lasts from the beginning of child welfare proceedings against the parent to the ending of such proceedings.

We also urge rejection of the fiscal justification for the rule change that was raised at the December 2013 public hearing. For one, existing jurisprudence from this Court and the U.S. Supreme Court suggests that money alone should not be a sufficient motivation to

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truncate the fundamental rights of parents. In *In re Noah W.*, 813 A.2d 365, 369, 371 (N.H. 2002), this Court recognized that "[t]he loss of one's children can be viewed as a sanction more severe than imprisonment … [F]amily and the rights of parents over it are fundamental and inherent within the Federal and our own State Constitution." In *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981), the U.S. Supreme Court added that "a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." A desire to save money should not constitute a "powerful countervailing interest." Additionally, we do not believe that the rule change will necessarily save money, since a) providing uninterrupted counsel for parents may expedite the return of the child to the parents, reducing foster care costs and avoiding the expense (both of counsel and court time) of future termination of parental rights hearings; and b) it seems likely that many attorneys will file post-dispositional motions to continue representation, which will force courts to hold numerous hearings that will cost the judiciary additional funds. Moreover, the case-by-case approach to appointing counsel that the rule change would adopt has proved particularly troublesome in practice. See John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763 (Spring 2013).

As a secondary matter, we are concerned by the concept of a court restricting a right to counsel established by a state legislature, and we note that this concern was raised during the Rules Committee meeting. N.H. Rev. Stat. Ann. 169-C:10(II)(a) states, "In any case of neglect or abuse brought pursuant to this chapter, the court shall appoint an attorney to represent an indigent parent alleged to have neglected or abused his or her child." There is no indication the legislature wanted to limit or truncate this representation in any fashion; in fact, the Legislature's use of the word "case" suggests that they intended representation to continue until the child welfare case is completely closed.

It is not unusual for a court to use its rulemaking authority to expand or enhance the right to counsel established by a legislature. For instance, while a Michigan statute provides that a Michigan court must appoint "an attorney or guardian ad litem" for minors seeking a judicial waiver of the parental consent, M.C.L.A. § 722.904(2)(e), a Michigan court rule provides for the right to appointment of both an attorney *and* a guardian ad litem upon request by the minor, Mi. R. Spec. P. MCR 3.615(F) and (G). And while a Tennessee statute provides a right to counsel in juvenile proceedings, Tn. R. Juv. P. Rule 36(b) specifies that any right to counsel at "all stages of the proceedings" in juvenile court includes the appellate stage. Conversely, our research has not revealed any instance anywhere of a court rule that narrows the scope of a statutorily-created right to counsel.

Given that there were no attendees at the December 2013 public hearing other than the rule change proponent, we believe that not many people were aware of the proposed change until now. We therefore appreciate this opportunity to share our knowledge and experience on this issue with the Court, and hope that the Court will not limit the critically important right to counsel for parents seeking to protect their fundamental rights.

Sincerely,

John Pollock
Coordinator, National Coalition for a Civil Right to Counsel