

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: #2017-016 (Sup. Ct. R. 40 – JCC) and the Feb. 1 Report to the Court
Date: February 4, 2019

As you may recall, the Committee voted to recommend that the Court adopt proposed amendment to the definition of “judge” set forth in Supreme Court Rule 40 (Procedural Rules of the Committee on Judicial Conduct). However, when I began drafting the minutes from the report, it became clear to me that I was not sure what the Committee intended to recommend. I discussed this issue with Justice Donovan, and he asked me not to include the Committee’s recommendation in the report to the Court, and to add this item to the agenda for the March meeting. This memo summarizes why I was confused about what the Committee had voted to recommend, and raises questions for the Committee to consider at the March meeting.

At the December meeting, the Committee considered whether to recommend that the Court adopt the proposal to amend the definition of judge. The proposal included in the public hearing notice was as follows (new material is in **[bold and brackets]**; deleted material is in ~~striketrough~~ format):

Judge – this term includes **[the following members of the State of New Hampshire Judicial Branch]**: (1) a full-time or part time judge of any court or division ~~of the State of New Hampshire Judicial Branch~~; (2) a full-time or part-time marital master; (3) a referee or other master; **[and] (4)[, when performing an adjudicatory function,]** a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register, and anyone performing the duties of a clerk or register **[on an interim basis]**. Not everyone who is a “judge” as defined herein is bound by every canon of the Code of Judicial Conduct – the Code of Judicial Conduct applies to a judge to the extent provided in Supreme Court Rule 38.

At the meeting, Committee members generally agreed that the existing definition is inadequate, but that the proposal put out for public hearing was also inadequate. Concerns were expressed about the language “when performing an adjudicatory function.” Charlie Stewart proposed striking this language and the language, “a court stenographer, monitor or reporter.” The Committee voted to make these changes. Unfortunately, my notes are unclear about whether the Committee intended to make Mr. Stewart’s change to the language put out for public hearing or to the language of the existing rule. When I spoke with Mr. Stewart about this, his recollection was that the vote was to make the change to the existing rule. If this is, in fact, what the Committee recommended, I apologize for

not understanding that, and not including the proposal in the February 1, 2019 report to the Court. If the Committee is unsure about what it intended to recommend, it may wish to consider the history of the proposed rule change before it decides whether to amend the existing rule or the proposal that was put out for public hearing.

I. History of Proposed Rule Change

As you may recall, the JCC raised a concern about the definition of judge in an October 16, 2017 letter to the Committee (attached). The letter asked the Committee to consider what the prevailing opinion is regarding the application and reach of Supreme Court Rule 40(2), defining the term “judge” and the application section of Supreme Court Rule 38 as to Court staff beyond clerks, deputy clerks and court stenographers, monitors and reporters. The October 16 letter noted that General Counsel for the Administrative Office of the Courts, attorney Mary Ann Dempsey, had raised a concern about the language, “and anyone performing the duties of a clerk or register” included in Supreme Court Rule 40(2). Attorney Dempsey noted that while this language has never been interpreted to apply to court staff beyond the clerk and deputy clerk but instead “only relates to individuals who may be acting the capacity of a clerk on an interim basis,” it could be interpreted more broadly. Therefore, the JCC and General Counsel Dempsey asked the Committee to consider whether the language should be amended “to clarify the meaning of the phrase, ‘duties of a clerk’ so that there will be no ambiguity and possible misunderstanding of the intent of the rules in the future.”

When the Committee first considered this issue, it was generally agreed that the definition of judge was too broad, and the Committee proposed amending the definition to read, “Judge – this term includes: a full or part-time judicial officer appointed by the Governor and Council.” The Committee asked me to forward this proposal to the JCC and request comment.

In an April 16, 2018 letter to the Committee, the JCC expressed concern about the Committee’s proposal. The JCC unanimously believes that the definition should not be amended to exclude court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate or deputy registers or any other persons performing the duties of a clerk or register.

At the June 8, 2018 meeting, the Committee considered a proposal, which I drafted at the request of Justice Lynn and Justice Donovan. The proposal was designed to address the concerns raised in the JCC’s April 16, 2018 letter. The Committee ultimately voted to request comment on that proposal (this is the language set forth on page 1 of this memo).

The Committee received one comment regarding the proposal from part-time Circuit Court Family and District Division referee and former Superior Court Clerk

Dana Zucker. In his December 6, 2018 letter attorney Zucker stated, among other things, that he believes that the rule should not limit the applicability of the Code of Judicial Conduct to circumstances in which those identified are “performing an adjudicatory function.”

At the December meeting following the public hearing, there was a great deal of discussion, again, about the fact that the definition of judge is too broad, given the reason the Code of Judicial Conduct exists. Judge Delker suggested that it might never be appropriate for the JCC to decide the fate of non-judicial staff. The Committee generally agreed that neither the existing rule nor the proposed amendment put out for public hearing was satisfactory. Ultimately, Charlie Stewart proposed deleting the language, “a court stenographer, monitor or reporter.” As I have indicated, it was not clear to me whether the Committee intended to recommend that this change be made to the existing rule or to the proposed amended rule that was put out for public hearing. If the Committee’s intention was that the change be made to the existing rule, I have a concern the Committee may wish to consider. And, since the Committee is considering this rule amendment again, it may wish to consider a second concern I raise here.

II. My Concerns

My primary concern is that if the Committee voted to make a change to the existing rule, then the amendment recommended by the Committee does not address the concern raised in the JCC’s October 16, 2017 regarding the language, “and anyone performing the duties of a clerk or register.” The language, “on an interim basis” that was included in the proposal that was put out for public hearing was designed to address this concern.

My second concern is that deletion of the language of “a court stenographer, monitor or reporter,” conflicts with the JCC recommendation set forth in its April 16, 2018 letter to the Committee. The Advisory Committee on Rules is certainly entitled to have an opinion that differs from the JCC’s and to make a recommendation based upon its own opinion. However, I am not confident, given the discussion at the meeting, that the Committee was aware that it was recommending an amendment that was in conflict with the position taken by the JCC.