
From: Robert Mittelholzer [mailto:rmittelholzer@nhjcc.com]
Sent: Monday, April 02, 2018 3:15 PM
To: Justice Robert J Lynn
Subject: RE: The Reach of New Hampshire's Code of Judicial Conduct

Justice Lynn:

Following our discussion and most recent email exchange of March 27th and March 28th regarding the merits of exempting or retaining “court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate and/or deputy registers, and/or any other persons performing the duties of a clerk or register” as part of the definition of “judge” under Rule 40 (2) and as positions falling under New Hampshire’s Code of Judicial Conduct, I did some further digging as to how it came to pass that New Hampshire may have seen fit to augment the Model Code in this way. It seemed to me that it could not have been by accident that New Hampshire would have added “court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate and/or deputy registers, and/or any other persons performing the duties of a clerk or register” to the definition of “judge”. Here’s what I found out.

- No one that I spoke with seems to remember exactly when, but these Code provisions were adopted long before there was an Administrative Office of the Courts (AOC).
- Historically in New Hampshire and as recently as the late 1980’s, Clerks (particularly in Superior Court) virtually ran their own courts.
- Clerks served as Constitutional officers, presided over hearings, made important decisions involving cases and issued rulings of the Court. They wrote all of the checks related to the running of the court and were responsible for creating and administering their own budgets.
- Some Clerks at the Superior Court level would actually put on a black robe before presiding over hearings.
- Such activity may be far less frequent these days but still occurs from time to time and is specifically authorized by Superior Court Administrative Rule 1.6, *Authority of Clerks* which provides as follows:

NEW HAMPSHIRE SUPERIOR COURT ADMINISTRATIVE RULES

CLERKS AND DEPUTIES

Rule 1-6. Authority of Clerks.

In addition to the inherent authority of the clerk of superior court, and all deputy clerks appointed pursuant to RSA 499:13, to perform such duties and acts as may be necessary to effectuate and provide for the orderly and efficient operation of the court and clerk’s offices, and to exercise such other powers and responsibilities conferred upon them by statute, court

rule or administrative rule, the clerk of superior court for each county and deputy clerks of court who are attorneys licensed to practice in the State of New Hampshire shall have the following authority:

I. To perform administrative acts including but not limited to:

(a) Scheduling of all hearings and issuing notices to appear and transport orders.

(b) Issuing orders of notice or orders setting or amending return days.

(c) Issuing orders relative to service of process.

(d) Effectuating all court orders including the issuance of commitment orders, arrest orders, or summons to appear for contempt proceedings.

(e) Disbursing funds held by the court upon appropriate order by a justice.

(f) Selecting counsel when appointment of counsel is ordered by the court and appointing and selecting counsel to serve as guardian ad litem in domestic and equity matters.

(g) Performing such duties relative to jurors as may be performed by a clerk under RSA 500-A.

The additional authority of deputy clerks who are not attorneys licensed to practice law in the State of New Hampshire shall be limited to Sections I(a), (b), (d), (e) and (g).

II. To be available for appointment by a presiding justice of the superior court as a master pursuant to RSA 519:9 to hear uncontested divorces, applications for temporary orders or ex parte restraining orders in marital cases, petitions for ex parte attachments, and to conduct pretrial conferences in all non-criminal matters, and to make recommendations to the court relative thereto, when a justice or marital master is not present or is otherwise unavailable. Said appointment shall be made by a presiding justice of the superior court and shall not extend for more than 90 days, provided that said appointment can be renewed for additional 90-day periods.

III. After personal review, with the consent of a presiding justice of the superior court:

(a) to act on non-criminal motions (including petitions to attach with notice) to which no objection has been filed or to which opposing counsel has indicated there is no objection, provided that the authority is limited to non-dispositive motions in cases where all parties are represented by counsel;

(b) to approve stipulations where all parties have indicated in writing that they agree with the relief requested and are represented by counsel; and,

(c) to approve preliminary pretrial stipulations in cases where all parties are represented by counsel.

The signature of the clerk or the attorney deputy clerk taking such action shall appear on the appropriate document involved along with the statement "Acting pursuant to Superior Court Administrative Rule 1-6." In the event that a motion to reconsider or an objection is filed concerning the action taken, the matter shall be scheduled for a hearing before a justice.

IV. To perform the following acts and issue such orders as provided for in the superior court rules, in addition to those rules where the clerk's authority is already specifically delineated:

- (a) To enter default and continue for judgment pursuant to Rule 14.*
- (b) Upon withdrawal of counsel to set a date for the filing of a new appearance pursuant to Rule 20.*
- (c) To discontinue cases pursuant to Rule 52.*
- (d) To allow the withdrawal of court documents pursuant to Rule 56.*
- (e) To enter final judgment pursuant to Rule 74.*
- (f) In conjunction with the presiding justice, to enter scheduling orders pursuant to Rule 96-A.*
- (g) To enter orders regarding service by publication pursuant to Rule 128 and Rule 180.*
- (h) To enter default pursuant to Rule 131 and Rule 139.*
- (i) To dismiss marital cases which have been pending for two years pursuant to Rule 210.*
- (j) To waive the waiting period in marital cases pursuant to Rule 207.*
- (k) To non-suit or dismiss non-jury cases which have been pending for three years pursuant to Rule 168.*
- (l) To waive the records research fee in Rule 169 when a request for record information is made by a member of the media consistent with the public's right to access court records under the New Hampshire Constitution.*

The signature of the clerk or the attorney deputy clerk taking any action enumerated in paragraph IV shall appear on the appropriate document involved along with the statement "Acting pursuant to Superior Court Administrative Rule 1-6." In the event that a motion to reconsider or an objection is filed concerning the action taken, the matter shall be scheduled for a hearing before a justice.

- It was the Clerk of the New Hampshire Supreme Court that went to the Judicial Conduct Committee regarding the Justice Thayer, Justice Brock, Judge Pappagianis incident in part because he believed that he was duty bound by the Code of Judicial Conduct to do so and in part because without the JCC, that Clerk would have had nowhere else to go.

- As far as stenographers went, prior to the court system going the route of pure technology, the court stenographers were the sole keepers of the record. The case record was in fact whatever the stenographer said it was. (By way of parenthetical observation, I personally remember US District Court Judge Shane Devine frequently reminding lawyers, juries and spectators that it was the stenographer who was truly the most important person in the courtroom for that very reason.)

- Beyond this, confidentiality, honesty and the other requirements and aspirational goals articulated by the Code of Judicial Conduct were thought to be important standards for stenographers, monitors and court reporters to adhere to. The JCC has previously asserted its jurisdiction over court monitors and reporters in the past and, more recently, bail commissioners.

- It was historically believed that public confidence in the administration of justice was enhanced by having an independent body such as the JCC available to receive "complaints" about stenographers, court reporters, monitors, clerks, and deputy clerks. Without an independent body such as the JCC, any such complaints would be handled administratively by default via the Judicial Branch (e.g. AOC, Clerk's office, or Supreme Court) with no provision for citizen feedback. This was probably even more true in the days of registers of probate which were Constitutionally elected positions making the register of probate virtually responsible to no one but the voter.

- The Preamble to the Code of Judicial Conduct tells us that the Code serves to: 1- enumerate a number of important precepts that all judicial officers must respect and honor in order to preserve the public trust and to maintain and enhance confidence in our legal system; 2- provide guidance and assistance in maintaining the highest standards of judicial and personal conduct; and, 3- help provide a basis for regulating the conduct of judicial officers through two distinct disciplinary bodies. Supreme Court Rule 40 (2) states plainly that not everyone who falls under the admittedly broad definition of "judge" as defined in Rule 40 (2) is bound by each and every canon of the Code of Judicial Conduct.

I will share your question with the Judicial Conduct Committee at its upcoming meeting on Friday, April 13, 2018 and will ask the Committee to share its collective viewpoint with you and the Supreme Court's Advisory Committee on Rules in advance of your Committee's upcoming meeting in May. Will you please remind me again when in May your Committee will be meeting?

This is indeed a most interesting issue.

RTM