

#2017-016

STATE OF NEW HAMPSHIRE
JUDICIAL CONDUCT COMMITTEE

Mary E. Collins, Chair
Attorney Jaye L. Rancourt, Vice Chair
Judge James H. Leary
Ernest Goodno
Alan K. Blake
Judge Steven M. Houran
Judge Lucinda V. Sadler
Stephen R. L'Heureux
Thomas R. Eaton
Edwin S. Underhill, IV
Tracy A. Uhrin



Robert T. Mittelholzer, Esq.
Executive Secretary
132 Chapel Street
Portsmouth, New Hampshire 03801

Phone: (603) 427-9295
Fax: (603) 427-9297
Email: rmittelholzer@nhjcc.com

April 16, 2018

Chief Justice Robert J. Lynn
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Supreme Court Advisory Committee on Rules'
Consideration as to Whether the Code of Judicial Conduct
(New Hampshire Supreme Court Rule 38) and the Procedural
Rules of the Judicial Conduct Committee (New Hampshire Supreme
Court Rule 40) Should be Amended to Exempt Court Stenographers,
Monitors or Reporters, Clerks of Court or Deputy Clerks, Including
Registers of Probate and/or Deputy Registers from Compliance with
the Code of Judicial Conduct

Chief Justice Lynn:

In follow up to our telephone conversation of March 26, 2018, I shared with members of the Judicial Conduct Committee the Supreme Court's Advisory Committee on Rules request seeking the JCC's opinion as to whether the Code of Judicial Conduct (New Hampshire Supreme Court Rule 38) and the procedural rules of the Judicial Conduct Committee (New Hampshire Supreme Court Rule 40) should be amended to exempt 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, commissioners, bail commissioners, etc. from compliance with the Code of Judicial Conduct. I shared with my Committee's members that the Supreme Court's Advisory Committee on Rules is presently wondering whether it is redundant and, therefore, perhaps unnecessary to require Code compliance (and hence provide for JCC jurisdiction) regarding non-judges serving strictly at the pleasure of the Supreme Court where (unlike in the case of judges) the Supreme Court is able to take direct and immediate administrative action subject to any applicable collective

bargaining agreement. I mentioned that some members of the Supreme Court's Advisory Committee on Rules may be concerned that the Supreme Court may be painting with too broad a brush by holding 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, commissioners, bail commissioners, etc. to unnecessarily high standards.

I shared with the members of my Committee that following our conversation of March 26th, I discovered that it appears that New Hampshire may be the only state in which the Code of Judicial Conduct applies to court stenographers, monitors or reporters, clerks of court or deputy clerks, including a registers of probate or deputy registers, and/or any other persons performing the duties of a clerk or register, commissioners, bail commissioners, etc. with all of the other jurisdictions appearing to follow the Model Code more closely in this regard than New Hampshire. The Model Code provides that the Code of Judicial Conduct applies to judges and that "[a] judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative judiciary" (although most states omit "member of the administrative judiciary"). While other states may go on to list specific judicial offices - no other state apparently includes stenographers, clerks or other positions that do not perform judicial functions.

I further shared with Committee members that I reached out to a number of members of the bar as "institutional historians" who may have been part of the discussions early on to specifically include court stenographers, monitors or reporters, clerks of court or deputy clerks, including a registers of probate or deputy registers, and/or any other persons performing the duties of a clerk or register as "judges" within the meaning of the Code as well as the procedural rules of the JCC to inquire as to the reasoning behind their inclusion and discovered the following additional information.

- Although I could find no one who seems to remember exactly when, these Code provisions were adopted long before there existed 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 courthouses. They served as Constitutional officers, presided over hearings, made important decisions involving cases and issued rulings of the Court. They wrote the checks related to the running of the court and were responsible for creating and administering their own budgets.

- As late as the 1980's, there were Superior Court Clerks that would routinely wear a black robe while 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 issues in part because that individual

believed that he was duty bound by the Code of Judicial Conduct to do so and in part because the Code provided him the freedom to do so.

- As far as stenographers are concerned, 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, jurors and courtroom 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 asserted its jurisdiction over court monitors in the past and more recently bail commissioners.

- Finally, it had always been 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 as personnel matters via the Judicial Branch (e.g. AOC, Clerk’s office, or Supreme Court) with no provision for citizen feedback.

- This was 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.

Following discussion at its meeting of Friday, April 13, 2018, our Committee members unanimously found that most if not all of the foregoing historical arguments for inclusion of court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate or deputy registers, and/or any other persons performing the duties of a clerk or register appear to make as much sense today as in previous years.

Our members believe that until and unless the Supreme Court also chooses to repeal Superior Court Administrative Rule 1.6, Clerks of Court and their deputies are clearly “judicial officers” providing both quasi-judicial and judicial functions. Even if the Supreme Court were to repeal Superior Court Administrative Rule 1.6, our Committee members feel that one must still consider the dilemma of where a Clerk goes when there is a suspected problem at the top of the judicial food chain. Our members would also ask the Advisory Committee on Rules to consider that while it may be true that the court has essentially done away with court reporters and stenographers for day to day activities in favor of today’s sound recording – they have not done so altogether. Stenographers are still brought in from time to time when the record is vitally important *albeit* at the parties’ own expense. (The JCC even uses stenographers to transcribe its own hearings.) Stenographers may not be used as frequently in the court system as they

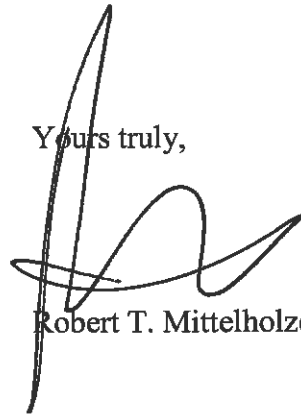
once were but when they are brought in our Committee members believe that they should be governed by the Code of Judicial Conduct. The same may also be said as to monitors and court reporters.

Finally, our Committee members noted that the Preamble to the Code of Judicial Conduct states 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.

Besides expressing its opinion such that most if not all of the foregoing historical arguments to include court stenographers, monitors or reporters, clerks of court or deputy clerks, including registers of probate or deputy registers, and/or any other persons performing the duties of a clerk or register appear to make as much sense today as in previous years, the members of our Committee were unanimously of the view expressed by the old saw, "If it ain't broke – don't fix it."

I hope that the preceding summary is responsive to your Committee's request and ultimately useful to you.

Yours truly,

A handwritten signature in black ink, appearing to read 'R. T. Mittelholzer', written over the typed name below.

Robert T. Mittelholzer

cc: Mary E. Collins, Chair
Jaye L. Rancourt, Vice Chair