

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2017-016. Application of Code of Judicial Conduct to Court Staff
Generally
Date: May 29, 2018

As you may recall, Executive Director of the Judicial Conduct Committee, Robert Mittelholzer, raised a concern in an October 16, 2017 letter to the Committee relating to the definition of “judge” found in Supreme Court Rule 40 (“Procedural Rules of the Committee on Judicial Conduct”). Supreme Court Rule 40(2) reads:

Judge – this term includes: (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; (4) a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register, and any person performing the duties of a clerk or register. 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.

The application section of Supreme Court Rule 38 (“Code of Judicial Conduct”) provides:

D. Clerks, Deputy Clerks, Registers of Probate, Deputy Registers of Probate, any persons performing the duties of a Clerk or Register, and Court Stenographers, Monitors and Reporters shall comply with Rules 2.1, 2.2, 2.3, 2.5, 2.8, 2.10, 2.12, 2.15 and 2.16.

Attorney Mittelholzer noted in the October 16 letter 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 in 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.”

At the March meeting, it was noted that judges are appointed for life, and that the Judicial Conduct Committee exists to provide a way to discipline judges who act inappropriately. It was also noted that the others listed in the rule are employees managed by the Court, so that if they do something wrong, the Court is able to take appropriate disciplinary action. Following some discussion, the Committee proposed to amend the rule as follows:

Judge – this term includes **[a full or part-time judicial officer appointed by the Governor and Counsel.]** ~~:(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; (4) a court stenographer, monitor or reporter, a clerk of court or deputy clerk, including a register of probate or deputy register, and any person performing the duties of a clerk or register. 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.~~

As you know, Attorney Mittelholzer submitted an April 16, 2018 letter to the Committee in response to the Committee’s request that the JCC comment on this proposed amendment. According to the April 16 letter, 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 and/or any other persons performing the duties of a clerk or register.

Justice Lynn has reviewed the April 16, 2018 letter and understands the concerns expressed by the JCC. Nevertheless, he would narrow the definition to make it clear that those members of court staff are included in the definition of judge only when they perform adjudicatory functions. He therefore proposes that the rule be amended as follows:

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 applied to a judge to the extent provided in Supreme Court Rule 38.