

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: #2017-016. Supreme Court Rules 38 and 40. Code of Judicial Conduct – Application to Court Staff Generally.
Date: November 15, 2019

In an order dated October 29, 2019, the Supreme Court adopted this Committee's recommendation to amend the definition of "judge" set forth in Supreme Court Rule 40 ("Procedural Rules of Committee on Judicial Conduct"), effective January 1, 2020, as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ 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.

Attorney Albee has raised the question of whether the change to the definition of judge requires changes to Supreme Court Rule 38 ("Code of Judicial Conduct"). Among the issues the Committee may wish to consider include:

- Whether the definition of "judge" should be added to the Terminology section of Rule 38, as set forth in Appendix A.
- Whether A, B and D in the "Application" section of Rule 38 should be amended, as set forth in Appendix B.

The Committee may also wish to review all of Rule 38 to determine whether additional changes may be necessary.

APPENDIX A

Amend the "Terminology" Section of Supreme Court Rule 38 as follows

(proposed additions are in **[bold and in brackets]**):

TERMINOLOGY

"Appropriate authority" means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported.

"Compensation" denotes remuneration for personal services.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure.

"Court personnel" does not include the lawyers in a proceeding before a judge.

"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality.

"Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married, but including parties who have entered into a civil union.

"Economic interest" means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian.

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

"Impending matter" is a matter that is imminent or expected to occur in the near future.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality.

"Independence" means a judge's freedom from influence or controls other than those established by law.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character.

["Judge" means the following members of the State of New Hampshire Judicial Branch: (1) a full-time or part-time judge of any court or division; (2) a full-time or part-time marital master; (3) a referee or other master; and (4) when performing an adjudicatory function, 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.]

"Judicial candidate" means any person, who has been nominated for judicial office.

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"**Law**" encompasses court rules as well as statutes, constitutional provisions, and decisional law.

"**Member of the candidate's family**" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

"**Member of the judge's family**" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

"**Member of a judge's family residing in the judge's household**" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

"**Nonpublic information**" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports.

"**Part time judge**" is a judge who serves on a continuing or periodic basis but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full time judge.

"**Pending matter**" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

"**Political organization**" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.

"**Require.**" The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

"**Third degree of relationship**" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

APPENDIX B

Amend the "Application" Section of Supreme Court Rule 38 as follows

(proposed deletions are in ~~striketrough~~ format; additions are in **[bold and in brackets]**):

APPLICATION

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial **[adjudicatory]** functions, including an officer such as a magistrate, ~~court commissioner~~, marital master, special master or referee, is treated as a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

B. All retired judges who have elected to take senior active status or who wish to serve as judicial referees or temporary justices of the supreme court shall comply with the provisions of this Code governing part time judges, except that they shall also comply with the provisions of Rule 3.9 if they wish to serve as a private mediator or arbitrator for compensation. A retired judge who does not take senior active status and who does not desire to serve as a judicial referee or a temporary justice of the supreme court is not subject to Rule 3.9 of this Code.

C. Part time Judge. A part time judge:

(1) is not required to comply

(a) except while serving as a judge, with Rule 2.10(A);

(b) at any time, with Rules 3.1(B), 3.4, 3.7(A)(6), 3.8, 3.9, 3.10, 3.11(B), 3.11(C), 3.13(A), 3.14 and 3.15;

(c) at any time, with Rule 3.2 but only to the extent that it prohibits appearances before administrative bodies in adjudicatory proceedings; otherwise, a part time judge shall comply with Rule 3.2.

(2) shall not practice law in the court on which the judge serves, in any other court of the same level (e.g., a part time district court judge shall not practice law in any other district court), any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

(3) may serve as counsel to the town wherein the judge's court is located or a town within the judicial district of the judge's court, provided that:

(a) the judge may give no advice to the police of such town and may give no advice to any other officer or employee of the town that could reasonably be expected to influence the exercise of discretion by the police in the performance of their duties;

(b) the judge may give no advice to any officer or employee of the town on a matter that could reasonably be expected to be the subject of any action or suit before the judge's court; and

(c) the judge shall recuse him or herself from sitting as judge on any case in which the judge's advice to the town is directly called into question or in which a ruling could directly affect the interests of the town.

(4) Notwithstanding anything above to the contrary, a part time marital master shall be governed by all of the canons of the Code of Judicial Conduct as provided in Superior Court Administrative Rule 12-7.

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.

E. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3), and 4E, and shall comply with these sections as soon as reasonably possible and shall do so in any event within the period of one year.

Comment

[1] When a person who has been a part time judge is no longer a part time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to Rule 1.12(a) of the N.H. Rules of Professional Conduct.

[2] If serving as a fiduciary when selected as a judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

[3] In recent years many jurisdictions have created what are often called "problem solving" courts, in which judges are authorized to act in nontraditional

ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual role as independent decision makers on issues of fact and law. When local practices and/or protocols specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on "problem solving" courts shall comply with this Code except to the extent local practices and/or protocols provide and permit otherwise.