

#2017-016

Dana W. Zucker
60 Linda Lane
Gilford, NH 03249
603 528 4976, 603 387 3942

Carolyn Koegler, Esq.
N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

December 6, 2018

Dear Committee,

I am corresponding concerning proposed amendments to Supreme Court Rule 40(2). I currently serve as a part-time Referee in the Circuit Court Family and District Divisions. I am also a former Clerk of Superior Court who was involved in drafting Superior Court Administrative Rule 1-6 and performed adjudicatory functions pursuant to that Rule, and also as a former member of the Committee on Judicial Conduct who was involved in changes over the years to Supreme Court Rule 40.

I would like to say first that I have always considered the applicability of certain provisions of the Code of Judicial Conduct to clerks and various other personnel to be appropriate given the great impact our respective courts, and our actions, have on the public. The Code is both aspirational and provides a vehicle for our citizens to bring purported misconduct to the attention of an independent body for consideration.

That having been said, I have several additional comments as to the proposed changes. The first is that in defining clerks and other personnel as judges when performing adjudicatory functions, I think the Committee also needs to address Supreme Court Rule 38 as to the application of the Code which is specifically referred to in Rule 40(2). The current Application provision requires that clerks comply with only selective rules of Canon 2. As an example, rules in Canon 2 concerning the prohibition of ex parte communications, ensuring the right to be heard, and disqualification to avoid a conflict, are not currently applicable. I think most would agree that anyone performing adjudicatory functions ought to comply with these provisions of the Code as well. I believe the same would be true of Canon 1 as to promoting confidence in the judiciary and avoiding impropriety.

My initial thought is that when exercising adjudicatory functions, a clerk is akin to a part-time judge and should be subject to the same provisions of the Code. This leads to my second comment. The proposed Rule limits the applicability of the Code to only when performing an adjudicatory function. Judges and part-time judges are subject to the Code not just while in court or the courthouse hearing cases, but in their personal lives as well. As an example, promoting confidence in the judiciary extends well beyond a particular case or adjudicatory function and does not end when a case is concluded and

the clerk goes back to performing the routine functions of a clerk. However when a clerk does return to primary responsibilities, other Code provisions such as the prohibition as to ex parte communications would not be applicable.

I also note that court stenographers, monitors and reporters perform no adjudicatory functions and might be eliminated from the proposed language and that the Committee might consider replacing paragraph (3) of the proposed Rule with a full-time or part-time referee or other master to make it consistent with paragraph (2).

Assuming the Committee were to find the above to be worthy of consideration, I would suggest the following language to paragraph (4) of proposed Rule 40(2) and the Application section of Rule 38 to address these issues:

I would replace paragraph (4) of Rule 40(2) with: A clerk of court, deputy clerk of court, or other non-judicial personnel who are attorneys and perform adjudicatory functions.

I would replace paragraph (D) of the Application section of Rule 38 with: a clerk of court, deputy clerk of court or other non-judicial personnel who are attorneys and perform adjudicatory functions similar to those contained in paragraphs II and III of Superior Court Administrative Rule 1-6 shall comply with all Code provisions applicable to a part-time judge as to the cases they adjudicate. Clerks of court and deputy clerks of court who are attorneys shall not practice law.

Respectfully submitted,

Dana Zucker