

SUPREME COURT RULE 40

Proposed amendment submitted by Attorney Sara Greene and Attorney Jeanne Herrick

Supreme Court Rule 40(8)(f)(5) Deferral of Impairment Cases

(A) If the **[matter has not been dismissed or resolved without formal discipline]** and the committee **[determines]** ~~finds during the course or upon completion of an investigation~~ that (1) there is probable cause to believe that misconduct, as specified in the **[complaint]**~~report~~, occurred; and (2) that any misconduct was the result of substance misuse or mental health disorder; and (3) that the conduct is not so serious in nature as to warrant formal discipline by the supreme court, the committee and the judge may agree that the judge undergo confidential evaluation under the supervision of the New Hampshire Lawyers Assistance Program ("NH LAP"). Should the evaluation reveal the existence of a condition for which treatment is appropriate, the committee may thereafter defer resolution of the ~~report or~~ complaint. A deferred resolution would require the judge **[to]** participate in professional treatment, counseling, after-care, and/or other assistance program recommended in the evaluation and subject to supervision by NH LAP and any other conditions established by the committee.

A deferral agreement must include the contemplated resolution of the ~~report or~~ complaint if the judge successfully complies with the terms of the agreement. At the end of the deferral period the judge would bear the burden to demonstrate that he or she has successfully complied with the terms of the deferral. Upon successful completion of the deferral agreement, the ~~report~~ complaint would be resolved upon the terms set forth in the deferral agreement. If the judge does not successfully complete the terms of the deferral, the committee may proceed upon the ~~original report or~~ complaint. **[Additionally, the committee may bring forward the complaint at any time prior to successful completion of the terms of deferral upon determining that the judge is not participating in professional treatment, counseling, after-care, and/or other assistance program recommended in the evaluation or failing to comply with other conditions established by the committee. Prior to the complaint being brought forward, however, the judge shall be afforded an opportunity to appear before the committee to demonstrate that he or she has successfully complied with the terms of the deferral.]** The committee may also initiate an inquiry or complaint based on any new rule violations which may have occurred during the deferral period.

Every deferral agreement shall be reduced to writing, shall provide for periodic reporting by NH LAP to the committee regarding the judge's compliance or noncompliance, and shall be signed by the judge and the chair of the committee. A copy of the agreement will be given to the judge; the original shall be maintained in the committee's file.

- (B) All statements made by or for a judge in the course of discussions or negotiations with the committee regarding referral to NH LAP or in the course of his or her involvement in or assessment supervised by NH LAP, including statements made in connection with any evaluation, treatment, counseling, or after-care, shall be privileged and inadmissible as either substantive evidence or impeachment evidence against the judge.
- (C) **[The committee may vote to defer notification to the Reporter of deferred resolution for such period of time as it deems necessary.]** Notwithstanding any other provisions of Rule 40(3) to the contrary, if the committee resolves a report or complaint by way of a deferral agreement, the committee may enter a protective order pursuant to Rule 40(3)(g) sealing any parts of the record that would otherwise be public.