

MEMORANDUM

To: NH Supreme Court Advisory Committee on Rules  
From: Jeanne Herrick and Sara Greene  
Date: March 9, 2022  
RE: Judicial Conduct Committee Deferred Discipline Rule

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The Judicial Conduct Committee by letter dated August 17, 2021 proposed that the Advisory Committee on Rules consider a Deferred Discipline Rule to be added to the Procedural Rules of Committee on Judicial Conduct, Supreme Court Rule 40. We were asked by this committee to determine the proper placement of the proposed rule within the existing procedural rules.

In a memorandum submitted prior to the December 2021 meeting, we suggested placement would be under Preliminary Investigation at Supreme Court Rule 40(8)(f)(5), which governs actions that may be taken by the committee “[d]uring the course or upon completion of an investigation, or if the committee determines that no investigation is necessary.” This placement is consistent with the language in the Judicial Conduct Committee’s proposed rule, which provides that deferred discipline and referral to New Hampshire Lawyers Assistance Program (NH LAP) is appropriate if the committee has determined that (1) there is probable cause to believe that misconduct, as specified, 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. Our proposal for placement is based on the underlying fact that a report meeting these requirements would constitute a “complaint” under the rules.

At the December hearing, Jill O’Neill, the Executive Director of NH LAP, raised concerns that providing for deferral only in instances where probable cause has been found may miss other valuable opportunities for referral to NH LAP, more specifically the opportunity for early deferral prior to a finding of probable cause. To address this concern, we have added to our proposed language under Supreme Court Rule 40(5) titled “Committee Procedure After Receipt of Report of alleged misconduct.” Section 40(5)(c)(6) allows the committee to vote to hold any matter in abeyance at any stage of the proceedings for good cause. We are recommending that language be added to expressly include as “good cause” for holding a matter in abeyance the opportunity for the judge to undergo confidential evaluation under the supervision of NH LAP.

Proposed Amendment:

Revise Supreme Court Rule 40(5)(c)(6) to expressly allow early deferral to NH LAP as follows:

At any stage of the proceedings, the committee may, for good cause, vote to hold in abeyance any matter pending before it for such period of time as it deems appropriate.

**[Under this provision, “good cause” may include as the committee deems appropriate providing an opportunity for the judge to undergo confidential evaluation under the supervision of the New Hampshire Lawyers Assistance Program (NH LAP) and to**

**participate in professional treatment, counseling, after-care, and/or other assistance program recommended in the evaluation, subject to supervision by NH LAP and any other conditions established by the committee.]**

The committee shall provide the Judge and Reporter timely notice of a decision to stay the proceedings, provided that, for good cause, the committee may vote to defer notification to the Judge or Reporter for such a period of time as it deems necessary.

Add new section Supreme Court Rule 40(8)(f)(5) to allow Deferral of Impairment Cases to read in its entirety as follows:

- (A) If the matter has not been dismissed or resolved without formal discipline and the committee determines that (1) there is probable cause to believe that misconduct, as specified in the complaint, 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 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 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 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 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.