

MINNESOTA BOARD ON JUDICIAL STANDARDS

Advisory Opinion 2013-1

References and Letters of Recommendation

Issue. What are the standards a judge must or should follow in providing a reference or recommendation for an individual?

Authorities. The principal authorities for this opinion are Rule 1.3 and Rule 1.3 comment 2. Unless otherwise noted, all references to Rules and Comments are to those in the Minnesota Code of Judicial Conduct (2009) (amended 2013) (“Code”). Other authorities include Rule 3.3 and Rule 4.1(A)(3).

The Comments serve two functions: (1) they “provide guidance regarding the purpose, meaning, and proper application of the rules,” and (2) they “identify aspirational goals for judges.” Code, Scope.

Authority to Issue Advisory Opinions. “The board may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. . . . The advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities.” Rules of the Board on Judicial Standards, Rule 2(a)(2) (2009).

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Code Provisions. The Code provides three basic principles that are directly relevant to the issue. First, “[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others.” Rule 1.3. Second, “[a] judge may provide a reference or recommendation for an individual based upon the judge’s personal knowledge.” Rule 1.3 cmt. 2. Third, “[t]he judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.” *Id.*

Prior Code. Before amendment in 2009, the Code in effect from 1996 to 2009 allowed judges to provide letters of reference or recommendation, subject to certain conditions. Canon 2.B. cmt. The prior Code included a broader prohibition than current Rule 1.3, viz.: “A judge shall not lend the prestige of the office to advance the private interests of the judge or others.” *Cf.* Canon 2.B. The prior Code did not address use of official letterhead.

Providing References Based on Personal Knowledge. Comment 2 to Rule 1.3 expressly permits a judge to provide “a reference or recommendation” (hereinafter “reference”) that is “based upon the judge’s personal knowledge.”

This permission implies that the judge should not provide a reference where the judge does not have “personal knowledge” of the individual. Personal knowledge includes knowledge gained through the judge’s experience as a judge, e.g., that a lawyer is punctual, well-prepared, courteous, etc., as well as knowledge gained through the judge’s experience in a non-judicial capacity. Subject to the caveats below, examples of proper references include those for a person seeking (1) employment, (2) admission to an educational institution, or (3) admission to a bar.¹ Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 80-81 (2d ed. 2011) (“*Annotated Model Code*”).

Improper references would include those where the judge does not have personal knowledge of the individual. A reference could also be improper, although the judge had personal knowledge, where the prestige of judicial office would likely appear coercive to an addressee. For example, such coercion might well appear where the addressee was a party, or a lawyer for a party, in a matter pending or impending before the judge. See Cynthia Gray, *Recommendations by Judges*, American Judicature Society, 9-10 (2009) (“*Recommendations by Judges*”).²

Use of Official Letterhead for Reference. In addition to the requirement that a judge have personal knowledge of the individual, comment 2 to Rule 1.3 provides two conditions on when a judge “may use official letterhead” for making a reference. Rule 1.3 and Rule 1.3 cmt. 2.

First, when using official letterhead the judge should indicate in the letter “that the reference is personal.” *Id.* Pursuant to the principles adopted by the comment, a judge may provide an employment reference on judicial letterhead for a person under the judge’s supervision as long as the judge indicates the reference is “personal.” Likewise, when providing a reference on official letterhead for a person whose principal relationship to the judge is extra-judicial, a judge should clearly indicate that the reference is “personal and unofficial.” See generally *Recommendations by Judges* at 10-11 (indicating that the majority of states permit judges to use official letterhead for references).

¹ A judge may sign an affidavit of good character for an applicant to submit with an application for bar admission if the affidavit is based upon the judge’s personal knowledge. See Minn. R. Admis. Bar 4.C(4). An initial bar application is not an “adjudicatory proceeding” within the meaning of Judicial Code Rule 3.3, which prohibits a judge from testifying as a character witness except when duly summoned. However, because a hearing under Minn. R. Admis. Bar 15 is an adjudicatory proceeding within the meaning of Judicial Code Rule 3.3, a judge may not give character testimony at such a hearing, except when duly summoned.

² This article is available at the National College of State Courts website, <http://www.ncsc.org/~media/files/pdf/topics/center%20for%20judicial%20ethics/publications/recommendationsbyjudges.ashx>.

Second, a judge should not use official letterhead if using it could reasonably be perceived as an attempt to exert pressure by reason of judicial office. Rule 1.3 cmt. 2. For example, as noted above, a judge should not provide a reference on official letterhead where the subject of the reference or addressee will appear before the judge in a pending or impending matter. *Recommendations by Judges* at 9-10.

“To Whom It May Concern.” A reference letter should ordinarily be addressed directly to the party for whose information it is being written, rather than being addressed “To Whom it May Concern.” With the latter form of address, the judge normally will not know how the reference is actually used. In the case of a personal employee of the judge, such as a law clerk who is seeking other employment, a general letter of reference may be provided and addressed “To Whom it May Concern.” *Recommendations by Judges* at 11-12. To avoid addressing a letter “To Whom it May Concern,” a judge could allow the judge’s name to be listed as a reference and then respond to direct solicitations for references as appropriate.

Related Code Provisions. A judge should not give a reference in the form of testimony or vouching as a character witness in a legal proceeding, “except when duly summoned.” Rule 3.3.

A judge or judicial candidate “shall not publicly endorse or, except for the judge or candidate’s opponent, publicly oppose another candidate for public office.” Rule 4.1(A)(3). A “[j]udicial candidate” is “any person, including a sitting judge, who is seeking selection for judicial office by election or appointment.” Code, Terminology. An underlying purpose of this prohibition is to “prevent [judges] from abusing the prestige of judicial office to advance the interest of others” contrary to Rule 1.3. Rule 4.1 cmt. 4. As long as a judge does not publicly disseminate the reference, a judge may write a reference for a lawyer applying to the Governor for a court vacancy.

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