

TO: Mark I. Harrison, Chair
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

From: Ray McKoski, Circuit Judge, Lake County, Illinois

Date: February 28, 2006

Subject: Comments Concerning Rule 3.01 of the Final Draft Report of the Joint Commission's Proposed Model Code of Judicial Conduct.

Rule 3.01: Misusing the Prestige of Judicial Office

Paragraph [2] of the Comment to Rule 3.01 provides the following guidance to judges in determining whether official letterhead may be used for letters of recommendation:

In any case, in considering whether to write the recommendation on official or personal letterhead, the judge should carefully consider whether use of official letterhead might reasonably be perceived as an attempt to exert pressure by reason of his or her judicial office. The judge should avoid use of the office letterhead if the judge concludes that there is a likelihood of such a perception.

This provision seems unnecessary. While many judges are disciplined for the misuse of official letterhead, disciplinary actions rarely, if ever, involve the use of official letterhead for references or recommendations. Most disciplinary decisions concerning the misuse of official stationery involve letters written by judges regarding private disputes,¹ or personal or financial matters,² or letters written for purposes violative of the Code

¹ See, e.g., *In re Nesbitt*, N.Y. Commission on Judicial Conduct, June 21, 2002 (writing letter on official stationery to school official challenging a decision concerning the judge's son); *In re Gibson*, Texas Commission on Judicial Conduct, June 5, 2002 (use of official letterhead in connection with the judge's relentless complaints against the district attorney and others); *In re Mogil*, 650 N.Y.S.2d 611 (App. Div. 1996) (official stationery used to convey disparaging and offensive comments about attorneys); *In re Mosley*, 102 P.3d 555 (Nev. 2004) (judge's letter to son's school requesting school to ban ex-wife); *In re Cerbone*, 780 N.Y.S.2d 106 (App. Div. 2004) (judge's letter on court stationery demanding list of people on which a former public official kept files); *In re Peoples*, 374 S.E.2d 674 (S.C. 1988) (letter on court stationery directing recipient to pay judge's friend \$300 per month).

² See, e.g., *In re Gallagher*, 951 P.2d 705 (Ore. 1998) (judge using official letterhead to obtain financial advantage from bankruptcy trustee and golf club); *Inquiry Concerning a Judge*, 822 P.2d 1333 (Alas. 1991) (supreme court justice using "chambers" stationery for letters to trial judge before whom justice's business was a litigant); *In re Harmed*, 357 N.W.2d 300 (Iowa 1984) (letter to another magistrate asking

regardless of the official or unofficial nature of the stationery³. The disciplinary decision that comes closest to addressing the misuse of official stationery in communicating a recommendation is *In re McKeon*, N.Y. Commission on Judicial Conduct, Aug. 6, 1998. In that case the judge was disciplined for writing a letter on judicial stationery to the city attorney “urg[ing] the expeditious hiring” of a former court employee. But even Judge McKeon was not disciplined for using official stationery in providing a reference. Instead, discipline was imposed because the letter “was more than a job reference” due to the fact that the former court employee already had been hired and the judge was asking, as a favor, that the employee be placed on the payroll in an expedited manner.

As can be seen, judges repeatedly misuse official stationery, but not in connection with letters of recommendation. Using the Comment to Rule 3.01 to draw attention to the most common misuses of official stationery (as identified in notes 1, 2, and 3 of this memorandum) would be more valuable than focusing on the non-problematic use of official stationery for reference letters.

Alternatively, it is suggested that an example be included in the Comment to Rule 3.01 or in the Reporter’s Notes to the ABA Model Code illustrating the application of the test set forth in the last two sentences of paragraph [2]. Without an illustration it will be difficult for judges to envision exactly when the use of judicial stationery transforms an otherwise proper recommendation into a recommendation that improperly exerts pressure on the recipient. This is especially true because as a general proposition the use of the judicial title in a letter (which apparently is permissible under Rule 3.01)

how to handle daughter’s ticket); *In re Vasser*, 382 A.2d 1114 (N.J. 1978) (part-time judge using judicial stationery in law practice); *In re Watson*, California Commission on Judicial Performance, Feb. 21, 2006 (“chambers” stationery used in connection with judge’s real estate business).

³ See, e.g., *In re Glickstein*, 620 So.2d 1000 (Fla. 1993) (letter on official stationery announcing support of chief justice’s retention bid); *In re Thompson*, 682 N.W.2d 477 (Mich. 2004) (using judicial letterhead to solicit funds); *In re Bowers*, N.Y. Commission on Judicial Conduct, Nov. 12, 2004 (letter on judicial stationery requesting special treatment for acquaintance who received speeding ticket); *In re Fogan*, 646 So.2d 191 (Fla. 1993) (voluntarily sending character reference on official stationery to sentencing judge).

exerts as much, if not more, “pressure” than the use of official letterhead. Moreover, in situations where a recipient of a letter of recommendation is most likely to feel “pressure,” the form of the stationery is inconsequential. For example, in the context of job recommendations, a prospective employer might feel “pressure” from a judge if the prospective employer regularly appears before the judge. But in such cases the “pressure” comes from the prospective employer’s regular contact with the judge not from the form of the stationery. Another “pressure” situation might occur when a supreme court justice sends a letter of recommendation to a trial court judge. But again, any pressure on the trial judge comes from the position held by the individual acting as a reference not the form of the stationery.

In summary, because the use of official stationery in providing recommendations has not been a problem, the last two sentences of paragraph [2] of the Comment to Rule 3.01 are unnecessary. Alternatively, an example should be included in the Comment to Rule 3.01 or in the Reporter’s Notes describing circumstances under which the use of judicial stationery would exert pressure on the recipient of the recommendation.

Respectfully submitted,

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