

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 470 Judicial Encouragement of Pro Bono Service

May 20, 2015

A state supreme court judge may sign a letter printed on the judge's stationery that is duplicated and mailed by the unified state bar association directed to all lawyers licensed in the state encouraging those lawyers to meet their professional responsibility under Rule 6.1 of the Model Rules of Professional Conduct and provide pro bono legal services to persons in need and to contact the bar association for information about volunteer opportunities.

A unified state bar association has asked a state supreme court justice to sign a letter encouraging lawyers to meet their obligations under Model Rule 6.1, Voluntary Pro Bono Public Service, and provide pro bono legal services to persons in need.¹ The letter will suggest that the recipient contact the bar association for information about volunteer opportunities.

The letter will be sent by the bar association on the justice's stationery to every member of the unified bar. Staff for the unified bar will manage and pay for its printing and mailing. The envelope for each letter to members of the bar will be personalized to the extent it will have the name and address of the bar member, but the salutation of the letter will not be personalized. The bar association will not track whether there is an increase in pro bono participation, nor will it report back to the justice on the responses it receives to the letter.²

Encouraging Lawyers to Provide Pro Bono Legal Services

Since their adoption in August 1983, the ABA Model Rules of Professional Conduct have included Rule 6.1, Pro Bono Publico Service. Rule 6.1 explains that lawyers have a "professional responsibility to provide legal services to those unable to pay."³ The Rule provides that lawyers should aspire to give 50 hours of free or reduced-cost legal services a year.

Rule 6.1 is a strong statement of the ABA's position on the duties of the profession.⁴ The ABA Standing Committee on Lawyers' Public Service Responsibility, in its 1993 Report to House of Delegates, explained that Rule 6.1 was a meaningful response to the crisis that exists in providing legal services to the poor.⁵

1. A unified bar association requires all lawyers licensed in the jurisdiction to be members of the association. Thirty states, the District of Columbia, U.S. Virgin Islands, Puerto Rico, Guam, and the Northern Mariana Islands are unified bars.

2. This opinion does not address the situation in which a judge asks a specific lawyer to accept appointment for a specific case. For those matters, see ABA Model Code of Judicial Conduct Rules 1.3, 2.13, 2.4, 3.1(D) and ABA Model Rules of Professional Conduct Rule 6.2.

3. MODEL RULES OF PROF'L CONDUCT R. 6.1.

4. MODEL RULES OF PROF'L CONDUCT R. 6.1, cmt. [1].

5. According to the Legal Services Corporation's most recent nationwide study of unmet legal needs, approximately 944,000 people who sought legal help from LSC-funded offices in 2009 were turned away because the offices lacked adequate resources to help. See Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

Rule 3.7 of the ABA Model Code of Judicial Conduct allows judges to participate in organizations concerned with the law, the legal system, or the administration of justice subject to the limitations of Rule 3.1. Rule 3.7(B) reads: “A judge may encourage lawyers to provide pro bono publico legal services.”

Comment [5] to Rule 3.7 explains this provision noting permitted conduct:

. . . a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

Rule 3.7(B) recognizes the symbiosis between lawyers’ duties to provide pro bono services under Rule 6.1 of the Rules of Professional Conduct and judges encouraging lawyers to meet the obligations of Rule 6.1. The Reporters’ Notes to the Model Code of Judicial Conduct explain that Rule 3.7(B) was a new provision in the 2007 Code designed to encourage judges to “provide leadership in increasing *pro bono publico* lawyering.”⁶ Rule 3.7(B) also is consistent with a judge’s duties under Rule 1.2 to ensure “public confidence in the independence, integrity, and impartiality of the judiciary . . .” and to “promote access to justice for all.”⁷

The facts presented require the Committee to construe the meaning and scope of Rule 3.7(B). This is a matter of first impression for the ABA.

Construing Rule 3.7(B) begins with the text of the Rule.⁸ The Committee notes that Rule 3.7(B) is permissive; judges may encourage lawyers to provide pro bono services, but judges are not required to do so. ABA Model Code of Judicial Conduct, Scope, paragraph [2] notes, “Where the Rule contains a permissive term, such as ‘may’ or ‘should’ the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.”

“This means that for every client served by an LSC-funded program, at least one eligible person seeking help” was turned away. *Id.* at p. 12. More recent data from a spring 2014 report from the State Bar of Michigan noted three new developments that further threaten the ability of low income people to secure adequate representation. First, the recession has “dramatically increased the number of people in poverty” in Michigan, bringing with it an increase in the number of home foreclosures. Second, “Legal Services Corporation funding was cut 4% for 2011 and 15% for 2012.” In Michigan, the results have been devastating for LSC staff. The number of lawyers available was reduced by 26 and three paralegals and more than 15 support staffers were laid off. Two offices have closed. As a result, almost 7,000 fewer matters can be processed. Finally, LSC-funded “programs are projected to face an additional 10% in funding cuts . . .” As a result, even fewer clients will have their needs met. State Bar of Michigan and the Michigan’s Legal Services Corporation Funded Providers, *Documenting the Justice Gap in Michigan* (updated Spring 2015), <https://www.michbar.org/programs/atj/pdfs/JusticeGap.pdf>.

6. CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 70 (2009).

7. MODEL CODE OF JUDICIAL CONDUCT R. 1.2, cmt. [4].

8. “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

Rule 3.7(B) allows judges to “encourage” lawyers to provide pro bono legal services. Although not defined by the Code, the Merriam-Webster Dictionary defines encouragement as making someone more determined, hopeful, or confident; making something more appealing or more likely to happen; and making someone more likely to do something. Comment [5] to Rule 3.7 notes that judicial encouragement to lawyers “may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.”⁹

The word “including” in Comment [5] means that the actions noted are not an exhaustive list of how a judge might encourage lawyers to provide pro bono, but are examples.¹⁰ Therefore, a judge is not limited to the activities noted in Comment [5] when encouraging lawyers to perform pro bono services. Although signing a letter encouraging lawyers to perform pro bono services is not one of the specific activities listed as permissible in Comment [5], the Committee thinks the Rules do not prohibit a judge from sending the encouraging letter described in this opinion. A judge signing a letter encouraging lawyers to contact the bar association for information on pro bono activities – for a list of available pro bono programs – is consistent with the encouragement listed in Comment [5]. This finding is in accord with a number of ethics opinions from around the country.¹¹

Rule 3.7(A)(2) Does Not Prohibit Signing a Letter Encouraging Pro Bono Service

Rule 3.7(A)(2) prohibits a judge from soliciting contributions on behalf of a non-profit organization or governmental entity from anyone other than a family member or another judge over whom the soliciting judge “does not exercise supervisory or appellate authority.” Though the Terminology of the Model Code of Judicial Conduct defines “personally solicit” as “a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication” and “contributions” as including “professional or volunteer services,” the Committee concludes that the letter is not a solicitation of a contribution for the reasons stated below.¹² Rather, it is a letter encouraging

9. Comments to the Rules are designed to provide examples of permitted conduct. See MODEL CODE OF JUDICIAL CONDUCT, Scope ¶ [3]. When the ABA House of Delegates adopted the 2007 Model Code of Judicial Conduct, the House also adopted the Comments to the Code.

10. SCALIA & GARNER, *supra* note 8, at 132.

11. See Alabama Jud. Inquiry Comm’n Adv. Op. 04-847 (2004) (judge may send letter asking lawyers to participate in state bar operated pro bono program); Florida Sup. Ct. Jud. Ethics Adv. Op. 2010-13 (2010) (judge may send general solicitation letter to “Members of the Bar” asking lawyers to participate in The Florida Bar’s One Campaign for pro bono legal service); Florida Sup. Ct. Jud. Ethics Adv. Op. 2012-26 (2012) (judge may ask a local bar association to host an event at which the judge will ask lawyers to provide pro bono legal services; however, judge must monitor tone and delivery of the request to ensure it is not coercive); Maryland Jud. Ethics Comm. Op. 1996-20 (1996) (judge may write personal letters to lawyers asking lawyers to provide *pro bono* services); Texas Comm. on Jud. Ethics Op. 258 (2000) (board of judges may send letter to lawyers asking lawyers to consider providing pro bono service hours to joint project of local legal service organizations). See also Alaska Comm’n on Jud. Conduct Adv. Op. 2004-01 (2004) (judge may not refer lawyers to a particular pro bono program); Kentucky Ethics Comm. of the Judiciary Op. JE-107 (2005) (while a generic letter to the bar is permissible, judge may not urge lawyers to volunteer with a specific pro bono organization). *But see* Michigan Stand. Comm. on Prof’l & Jud. Ethics Op. J-7 (1998) (judge may not solicit individual lawyer to perform pro bono); Nebraska Jud. Ethics Comm. Adv. Op. 02-3 (2002) (judge may not sign recruiting letter for bar association pro bono campaign).

12. Because the Committee concludes that the letter is not a solicitation as prohibited by Rule 3.7(A)(2), it need not address whether there is a difference between a direct solicitation and a general one or how the interpretation of the Florida rules regarding solicitation by the U.S. Supreme Court in *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015) might apply.

lawyers to meet their professional responsibility to provide pro bono legal services pursuant to Model Rule of Professional Conduct 6.1.

Rule 3.7(A)(2) and (B) can and should be read harmoniously for three reasons. First, “The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”¹³ If encouraging lawyers to contact the bar association for a list of pro bono opportunities was solicitation of a contribution under Rule 3.7(A)(2), then Rule 3.7’s Comment [5] - which allows judges to “provide lists of available programs” - would be contradictory to Rule 3.7(A)(2).

Second, a contradictory reading would be unreasonable. The Scope section of the Model Code of Judicial Conduct explains, “The Rules of the Model Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances.”

Finally, more support for this harmonious reading of paragraphs (A)(2) and (B) can be found in the legislative history of the Model Code. Before the amendments of 2007, the Model Code of Judicial Conduct had no provision specifically allowing judges to encourage lawyers to provide pro bono service. Judicial ethics scholars involved with the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct explained the interplay of the paragraphs. In their report accompanying the revisions, the scholars noted that it was “assumed that participation in organizations that promote *pro bono publico* legal services would generally be permissible under rule 3.7(A)”; nevertheless paragraph (B) was adopted to address encouraging pro bono “whether or not conducted in connection with a particular organization or entity.”¹⁴

Model Rule 3.1, Extrajudicial Activities in General

A judge’s extrajudicial activities are also guided by Model Rule 3.1. “Thus, even with respect to activities that are explicitly permitted by Rule 3.7, a judge must always consider whether participating in such activities, would on a more basic level, violate Rule 3.1, such as by leading to frequent disqualification.”¹⁵

Rule 3.1 notes that while judges may engage in extrajudicial activities, they shall not:

- (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;

13. SCALIA & GARNER, *supra* note 8, at 180.

14. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 200, 119-120 (Feb. 2007), http://www.americanbar.org/content/dam/aba/directories/policy/2007_my_200.authcheckdam.pdf.

15. GEYH & HODES, *supra* note 6, at 68.

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Interfering with the proper performance of judicial duties

Rule 3.1(A)'s prohibition regarding interference with the proper performance of judicial duties is based on Model Rule 2.1. Model Rule 2.1 explains that a judge must perform the duties of the office and that official duties take precedence over personal and extrajudicial activities. A judge taking time to sign a letter encouraging lawyers to perform pro bono is a de minimis activity that will not interfere with the proper performance of the judge's duties.

In fact Rule 1.2 proclaims one judicial duty is to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Comment [4] gives an example of such actions explaining, "Judges should . . . promote access to justice for all."

A justice who signs the letter described in this opinion encouraging lawyers to seek out pro bono opportunities by contacting the bar association is promoting access to justice for all, consistent with Comment [4] of Rule 1.2.

Activities that lead to frequent disqualifications

Model Rule 3.1(B) prohibits judges from participating in activities that lead to frequent disqualification. Model Rule 2.11 addresses when a judge must disqualify himself or herself from hearing a matter. The Rule explains, in part, that:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

The Model Code of Judicial Conduct defines impartiality as “an absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”¹⁶ A judge who signs a general appeal letter encouraging lawyers to perform pro bono service does not thereby demonstrate a bias or prejudice toward any particular pro bono organization, the people any organization serves, or the lawyers who undertake that work.¹⁷

Activities that undermine the judge’s independence, integrity, or impartiality

Model Rule 3.1(C) mirrors the language of Model Rule 1.2. That reads, in part, “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. . .”

The Model Code of Judicial Conduct defines independence as “a judge’s freedom from influence or controls” in the decision-making process.¹⁸ A judge must make decisions “independent of inappropriate outside influences.”¹⁹ Issues of judicial independence often arise in cases in which a judge has become an advocate for one party in a proceeding.²⁰ A judge who signs a letter encouraging lawyers to seek out pro bono opportunities by contacting the bar association is not being influenced or controlled in the decision-making process. Instead, the judge is encouraging lawyers to comply with Model Rule of Professional Conduct 6.1 and promoting access to justice for all under Model Code of Judicial Conduct Rule 1.2.

The Model Code of Judicial Conduct defines integrity as “probity, fairness, honesty, uprightness, and soundness of character.”²¹ Probity is defined as complete honesty. Cases in which judges have been disciplined for failure to be honest include matters in which a judge has lied on a resume, deceived medical professionals to gain access to prescription drugs, and lied about attending CLE.²² Uprightness and sound character cases include patterns of judicial behavior that demonstrate disrespect for the office.²³ A judge who signs a letter encouraging

16. MODEL CODE OF JUDICIAL CONDUCT, Terminology.

17. This question also has been addressed in at least two states. Both the Alaska Commission on Judicial Conduct and the Alabama Judicial Inquiry Commission noted with approval that general appeals to participate in pro bono service are permissible and do not raise disqualification issues. Alaska Comm’n on Jud. Conduct Op. 2004-01 (2004) & Alabama Jud. Inquiry Comm’n Adv. Op. 04-847 (2004).

18. MODEL CODE OF JUDICIAL CONDUCT, Terminology.

19. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 38 (2d ed. 2010).

20. See, e.g., *In re Frankel, Karp*, No. 12-118, Arizona Comm’n on Jud. Conduct (2012) (two judges disciplined for filing amicus brief in appeal of cases they heard because such action “failed to promote public confidence that judges are to be neutral and impartial and not advocates for particular legal results”); *In re Graham*, No. 09-31, Georgia Jud. Qualifications Comm’n (2010) (judge reprimanded for calling into chambers FBI agents investigating drug case and attacking their credibility and character in matter not assigned to judge and holding a hearing in chambers regarding a matter not before the judge); *Disc. Counsel v. Campbell*, 931 N.E.2d 558 (Ohio 2010) (judge became a participant in two investigations when he encouraged police to follow up on an issue, questioned defendants, and reviewed a prosecutor’s file).

21. MODEL CODE OF JUDICIAL CONDUCT, Terminology.

22. See *In re DeForest*, Nos. 12-266 & 12-275, Ariz. Comm’n on Jud. Conduct (2012) (justice of the peace reprimanded for inflating experience and training in on-line biography and on resume); *Disc. Counsel v. Ault*, 852 N.E.2d 727 (Ohio 2006) (judge got doctors to overprescribe painkilling drugs for his use); *In re Augustus*, 626 S.E.2d 346 (S.C. 2006) (judge lied about attending continuing legal education).

23. See, e.g., *In re Carpenter*, 17 P.3d 91 (Ariz. 2001) (judge removed for 14 Code violations); *In re Jefferson*, 753 So.2d 181 (La. 2000) (judge removed for pattern of conduct, including exceeding contempt power and banning city prosecutor from courtroom and thereafter dismissing 41 criminal cases when no prosecutor was present to proceed); *In re Seitz*, 495 N.W.2d 559 (Mich. 1993) (judge

lawyers to seek out pro bono opportunities by contacting the bar association is not behaving unfairly, dishonestly, or disrespectfully. Instead, the judge is encouraging lawyers to comply with Model Rule of Professional Conduct 6.1.

The Model Code of Judicial Conduct defines impartiality as “an absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”²⁴ Impartiality concerns are addressed in the opinion’s discussion of disqualification, *supra*.

Activities that a reasonable person would find coercive

Both Rule 3.1(D) and Comment [5] to Rule 3.7 prohibit a judge from employing coercion while engaged in extrajudicial activities. The caution contained in Rule 3.1(D) was added to the 2007 Model Code of Judicial Conduct because the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct heard testimony about judges coercing others into supporting extrajudicial activities supported by the judge. The Joint Commission noted that judges using coercion “can be a significant problem in small communities with only one judge or a small number of judges and a small number of lawyers who need to maintain good relations with the judiciary.”²⁵ Although the Model Code of Judicial Conduct does not define coercion or coercive practices, to coerce generally means to make or to get someone to perform some action by using force or threats.²⁶

Rule 3.1(D) uses a reasonable person standard to determine whether a judge’s conduct is coercive. Comment [4] to Rule 3.1 explains that a judge should avoid actions that risk that “the person solicited would feel obligated to respond favorably . . .” The totality of the facts should be reviewed to determine whether a judge’s actions appear coercive to a reasonable person.

In this opinion, a state supreme court justice has been asked to send a general letter, with no personal salutation, to every lawyer in the state encouraging all lawyers to meet their professional responsibility under Rule 6.1 and provide pro bono legal services to those in need. The letter encourages lawyers to contact the state bar for a list of agencies in need. No follow-up monitoring will be conducted by the state bar, the supreme court, or the justice to determine whether every lawyer in the state has provided pro bono services.

Under these facts, the Committee does not think such a letter would be coercive. The letter is not threatening and would not lead a reasonable person to feel obligated to perform pro

removed for hostile attitude toward employees, abuse of contempt power and other acts); *Miss. Comm’n on Jud. Performance v. Spencer*, 725 So.2d 171 (Miss. 1998) (judge removed for continuing pattern of offensive sexual comments).

24. MODEL CODE OF JUDICIAL CONDUCT, Terminology.

25. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 331 (2d ed. 2010).

26. *See* N.M. Adv. Comm. on Code of Jud. Conduct Op. 13-05 (2013) (judge could not preside over a school district’s hearing-like truancy proceeding in his courtroom wearing his robes at which the truant student, the student’s parents, and school personnel would speak with the judge about the student’s truancy. Judge had no jurisdiction to conduct the quasi-hearing and the extra-judicial activity was coercive regardless of beneficial purpose of the actions). CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS §9.04 [2] (5th ed. 2013) (While the specific prohibition on coercive conduct first appeared in the Code of Judicial Conduct in 2007, the prohibition against using intimidation to convince a potential donor into making a contribution is one of the concerns at the heart of the prohibition against soliciting contributions for a charitable organization).

bono services. Additionally, such a letter would not lead a reasonable person to believe that the lawyer who performs pro bono services is currying favor with the justice because no follow-up will be conducted. The justice will not have knowledge of any lawyer's response to the letter.

At the same time, the Committee can foresee facts under which a letter from a judge urging a lawyer to perform pro bono legal services could be viewed as coercive by a reasonable person. Therefore, factors that a judge should weigh before sending a letter encouraging lawyers to perform pro bono include:

- The number of lawyers who will receive the letter. In smaller jurisdictions or in limited-scope mailings that are targeted at lawyers who practice in a particular area of the law, a reasonable person might feel coerced into providing pro bono legal services.
- The number of judges serving the jurisdiction. Again, in smaller jurisdictions with a limited number or only one judge, a lawyer who receives a letter from the judge encouraging that lawyer to provide pro bono legal services could feel coerced into doing so.
- Whether the letter is a personalized correspondence or a general plea to the bar as a whole. A letter in which the recipient lawyer is identified by name in the salutation runs the risk of a reasonable person finding such a letter coercive.
- Whether there will be some kind of post-letter monitoring. A letter in which a judge encourages a lawyer to perform pro bono legal services and then explains that the lawyer's participation, or lack thereof, will be monitored runs the risk of a reasonable person finding such a letter coercive.
- The tone of the letter. A letter in which the justice speaks in aspirational and encouraging language will have a much different impact than a letter that features dictatorial, condescending language.

Incidental Use of Court Resources for Activities that Concern the Law, the Legal System, or the Administration of Justice

Rule 3.1 cautions judges that when they engage in extrajudicial activities they must not use court premises, staff, stationery, equipment or other resources unless permitted by law or such use is incidental and is "for activities that concern the law, the legal system, or the administration of justice." Applying this caution to the facts in this opinion, the Committee notes that the justice's leadership of the state court system could easily be seen as part of the justice's judicial responsibility, and thus writing the letter may not be extrajudicial activity. Even if the activity were deemed to be extrajudicial, no court resources will be used to duplicate or mail the letter and only one piece of the justice's stationery need be used to create the general letter that will be sent to all lawyers in the jurisdiction, which is incidental use.

Model Rule 1.3, Avoiding Abuse of the Prestige of Judicial Office

Abuse of the prestige of judicial office is addressed in Rule 3.7 Comment [5] as well as Model Rule 1.3. We will address them together.

Rule 1.3, Avoiding Abuse of the Prestige of Judicial Office, reads: “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” Before 2007, the Model Code of Judicial Conduct prohibited judges from “lending” the prestige of their office. The Reporters’ Notes to the 2007 Code explain that the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct believed the word “abuse” more accurately described the conduct Rule 1.3 sought to prohibit. The goal was to address conduct that exploited the prestige of the office in inappropriate ways.²⁷ In their report to the House of Delegates, the Commission wrote, “In the Commission’s view, the term ‘lend’ created unnecessary confusion.”²⁸ As a result, the word “lend” was deleted from the rule.

The Committee is of the view that a supreme court justice does not abuse the prestige of judicial office when the justice signs a letter on court stationery encouraging lawyers to meet their professional responsibilities under Rule 6.1 and directing lawyers to the bar association for a list of organizations in need of pro bono assistance.²⁹

Model Rule 2.4 External Influences on Judicial Conduct

ABA Model Rule 2.4(C) reads: “A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.” Comment [1] to Rule 2.4 explains, “Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.” A judge who signs a general appeal letter mentioning no specific organization’s need, but instead encouraging lawyers to perform pro bono service and directing lawyers to contact the bar association for a list of pro bono service organizations does not convey the impression that the judge’s decisions can be influenced by a pro bono service organization or a person connected to a pro bono service organization. This letter writing activity is completely different than having an ex parte communication with one litigant³⁰ to a matter or holding separate and specially scheduled evening bond hearings,³¹ for which judges have been found to violate Rule 2.4(C). Nor does the judge’s letter writing activity permit the bar association or any pro bono organization to convey the impression that it is in a position to influence the judge.

27. GEYH & HODES, *supra* note 6, at 22-23.

28. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, *supra* note 14, at 38.

29. See Kentucky Ethics Comm. of the Judiciary Op. JE-107 (2005) (when crafting a general letter urging lawyers to perform pro bono, judges should “simply exhort the goodness and desirability of pro bono work” to avoid using the prestige of office). *But see* Nebraska Jud. Ethics Comm. Op. 02-3 (2002) (using the prior standard of “lend the prestige of judicial office”).

30. Miss. Comm. on Jud. Performance v. Lewis, 913 So.2d 266 (Miss. 1994).

31. *In re David*, 645 S.E.2d 243 (S.C. 2007).

Conclusion

A state supreme court judge may sign a letter printed on the judge's stationery that is duplicated and mailed by the unified state bar association directed to all lawyers licensed in the state encouraging those lawyers to meet their professional responsibility under Rule 6.1 of the Model Rules of Professional Conduct and provide pro bono legal services to persons in need and to contact the bar association for information about volunteer opportunities.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Myles V. Lynk, Tempe, AZ ■ John M. Barkett, Miami, FL ■ Arthur D. Burger, Washington, DC ■ Robert A. Creamer, Cambridge, MA ■ Barbara S. Gillers, New York, NY ■ Amanda Jones, Chicago, IL ■ J. Charles Mokriski, New York, NY ■ Ellen A. Pansky, South Pasadena, CA ■ Jennifer A. Paradise, New York, NY ■ Hope Cahill Todd, Washington, DC

CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel, Mary McDermott, Associate Ethics Counsel

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