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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: October 19, 2004
SUBJECT: Comments Concerning Rules 3.01 and 4.04 of the Second Draft of Proposed Revisions to the ABA Code of Judicial Conduct

Rule 3.01 Using the Judicial Office for Private Purposes

The fifth paragraph of the proposed Commentary to Rule 3.01 places the following restriction on the use of judicial stationery for letters of recommendation:

> However, unless the recommendation is based upon information obtained through the judge's expertise or experience as a judge, the reference or recommendation should not be communicated on the judge's judicial letterhead.

Without question, guidance concerning the propriety of using official stationery for judicial recommendations is needed. The absence of such guidance in earlier versions of the ABA Model Code has resulted in three different approaches to the issue. A few jurisdictions flatly prohibit the use of official letterhead for judicial recommendations. See, e.g., Canon 2B of the Louisiana Code of Judicial Conduct (letter must be on private stationery). Many states permit any reference letter authorized by the Code to be communicated on judicial letterhead. See, e.g., California Code of Judicial Ethics, Canon 2B(4) (recommendations may "be written on stationery that uses the judicial title"). A third group of jurisdictions permits the use of official stationery only if the recommendation is in some fashion related to the judicial function. See, e.g., Commentary to New Hampshire Sup. Ct. Rule 38, Canon 2B of the New Hampshire Code of Judicial Conduct (judge may use judicial stationery only if the recommendation is based upon "judicial knowledge" or the recipient of the letter "may reasonably be expected to know that the writer is a judge").

The proposed Commentary to Rule 3.01 takes the third approach permitting the use of judicial letterhead only if "…the recommendation is based upon information obtained through the judge's expertise or experience as a judge…." For the following reasons it is respectfully submitted that the approach suggested in the proposed Commentary is the least desirable of the three approaches to the use of official letterhead for judicial recommendations.

First, the approaches that either definitively permit or prohibit the use of official stationery have the benefit of ease of application. Both approaches are unambiguous and require no thought or analysis by the judge. The issue of whether court stationery or blank paper should be used for a reference is not of such importance as to justify burdening a judge with the task of determining, at his or her potential peril, whether a recommendation is "based upon information obtained through the judge's expertise or experience as a judge."

Second, the test suggested in the proposed Commentary will be subject to differing interpretations and therefore will not foster uniformity in the use of official letterhead for recommendations. Questions raised by the proposed test could include, (1) may a judge use unofficial stationery created on a computer in place of his or her "judicial" letterhead; (2) may a judge use judicial stationery in recommending a managerial employee in private industry based on the managerial skills and knowledge the judge learned while serving as a chief judge; and (3) may a judge identify himself or herself as a judge in the body of a reference letter which is not based upon information obtained through the judge's expertise or experience as a judge.

Third, many states permit the use of judicial stationery for any recommendation or reference permitted under the Code. See, e.g., California Code of Judicial Ethics, Canon 2B(4) (recommendations may "be written on stationery that uses the judicial title"); Commentary to Canon 2B of the Florida Code of Judicial Conduct ("judge may use judicial letterhead to write character reference letters…"); Commentary to Canon 2B of the West Virginia Code of Judicial

Conduct (same). See also Illinois Judicial Ethics Advisory Committee Opinion 96-2 (use of "court stationery" permitted for judicial recommendations); Indiana Judicial Qualifications Commission Opinion 3-88 (same) and Pennsylvania Conference of State Trial Judges Judicial Ethics Committee Opinion 98-1 (same). Unless this permissive rule has caused problems or proved unworkable in the jurisdictions that have adopted it there is no reason not to include it in the proposed Code. In this context it is relevant to note that at least two state supreme courts have included commentary in their codes of judicial conduct overruling ethics advisory bodies that had limited the use of judicial stationery for recommendations. See, Commentary to Canon 2B of the Arkansas Code of Judicial Conduct, overruling Arkansas Judicial Ethics Advisory Committee Opinion 95-1 and Commentary to Canon 2B of the West Virginia Code of Judicial Conduct, overruling West Virginia Judicial Investigation Commission Opinion of May 3, 1990.

Fourth, the rationale behind the proposed limitation on the use of judicial stationery is not readily apparent. It does not appear that the purpose behind the limitation is to prevent the misuse of judicial office because the proposed Commentary does not prohibit a judge from using the judicial title in the body of the letter, but only prohibits the use of judicial stationery. "Prestige of office" is conveyed by using the judicial title in the body of a letter at least to the extent it is conveyed by using judicial stationery.

The guiding principle for recommendation letters should be simply and solely whether the recommendation is based upon the judge's personal knowledge. If the letter is based upon personal knowledge the judge is conveying that personal knowledge not the prestige of office by writing the letter. This is true regardless of the context within which the judge obtained the personal knowledge.

Based upon the foregoing, I recommend that the following replace the fifth paragraph of the proposed Commentary to Rule 3.01:

> A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. References and recommendations may be communicated on the judge's judicial letterhead.

As a less favored alternative, I suggest that the following replace the fifth paragraph of the proposed Commentary to Rule 3.01:

> A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. References and recommendations may not be communicated on the judge's judicial letterhead.

Rule 4.04 Civic or Charitable Activities

Proposed Rule 4.04a(1)ii prohibits a judge from personally soliciting funds for any civic or charitable organization including law-related organizations. In the context of law-related organizations, however, Rule 4.04a(2)iii permits a judge to:

> appear at, participate in, and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose.

Rule 4.04 and accompanying Commentary do an excellent job addressing the major ethical and practical concerns surrounding judicial participation in fund-raising activities on behalf of law-related organizations.

By prohibiting the solicitation of funds, the proposed Rule protects the main interests served by imposing limits on judicial fund-raising, namely, "the dual fears that potential donors either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse." Judicial Conduct and Ethics, Shaman, Lubet and Alfini, sec. 9.06, p. 295 (2000). The danger lies in the "active solicitation not in the participation." Indiana

Commission on Judicial Qualifications Opinion 1-96. See also Wisconsin Supreme Court Judicial Advisory Committee Opinion 98-12 (danger is in the direct personal interaction between solicitor and potential contributor).

At the same time the proposed Rule permits judicial participation in fund-raising events where the nature of the judge's participation does not implicate the rationale supporting the restriction of judicial fund-raising. For example, merely speaking or being honored at a law-related organization's fund-raising event is a common and accepted practice that does not raise the "dual fears" identified by Professors Shaman, Lubet and Alfini.

The proposed Rule is an important and necessary change from the "rule" set out in the Commentary to Canon 4 of the 1990 ABA Model Code, which prohibits a judge from speaking or being the guest of honor at a law-related organization's fund-raising event. This provision of the Commentary to the 1990 ABA Model Code goes too far by prohibiting a judge from swearing in officers at a bar association installation dinner if the ticket price exceeds the cost of the event. Similarly the 1990 Model Code Commentary precludes a judge from presiding over an event of a law-related organization of which the judge is an officer. Even more problematic, the 1990 ABA provision makes no exception for a judge speaking or being honored at an event sponsored by an organization made up entirely of judges.

Proposed Rule 4.04 and accompanying Commentary provide a vitally needed revision and clarification of the ethical responsibilities of judges with respect to participation in fund-raising activities of organizations devoted to the improvement of the law, the legal system or the administration of justice.

Respectfully submitted,

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