

*Key Issues in
Judicial Ethics*

RECOMMENDATIONS BY JUDGES

BY CYNTHIA GRAY



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American Judicature Society

Seth S. Andersen
Executive Director
The Opperman Center at Drake University
2700 University Avenue
Des Moines, Iowa 50311
(800) 626-4089
FAX (515) 279-3090

Cynthia Gray
Director, Center for Judicial Ethics
Box 190, 3304 N. Broadway
Chicago, IL 60657
(773) 248-6005
FAX (773) 248-6015

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CONTENTS

INTRODUCTION	1
THE GENERAL RULE – EMPLOYMENT, BAR ADMISSION, AND EDUCATION	2
<i>Employment</i>	2
<i>Bar admission</i>	3
<i>Appointments</i>	3
<i>Education</i>	4
<i>Awards</i>	4
<i>Miscellaneous</i>	5
<i>Evaluating attorneys</i>	5
<i>Certification</i>	5
<i>Appointment lists and government contracts</i>	6
CONDITIONS AND CAVEATS	7
<i>Personal knowledge</i>	7
<i>Acting as a reference</i>	8
<i>Promoting a business</i>	9
<i>Recipient or subject</i>	9
<i>Judicial stationery</i>	10
<i>“To Whom It May Concern” letters</i>	11
<i>Other caveats</i>	12
JUDICIAL SELECTION	13
LETTERS IN ADJUDICATIVE PROCEEDINGS	17
<i>Sentencing</i>	17
<i>Pardon and parole</i>	18
<i>Disciplinary proceedings</i>	19
<i>Other proceedings</i>	21
SUMMARY	22

INTRODUCTION

Providing recommendations as a favor for colleagues or friends is a common practice. However, judicial ethics standards require judges to think twice before engaging in activities they considered routine before taking the bench.

This paper discusses the guidance judicial ethics advisory committees have provided for judges deciding whether to provide a recommendation. It describes the general rule that allows judges, based on personal knowledge, to furnish a letter of recommendation or act as a reference for a person seeking employment, admission to an educational institution or the bar, awards, appointment to the bench, and similar situations. To ensure that the prestige of judicial office is not being exploited, there are exceptions to that rule and guidelines for providing an otherwise appropriate reference, which are also noted.

Judges are usually prohibited, however, from providing a letter of recommendation or acting as a reference in investigatory or adjudicatory proceedings. Thus, the paper discusses judicial ethics opinions that advise judges, absent an official request, not to write a letter to another judge in connection with the sentencing of a defendant in a criminal matter, a letter to a pardon and parole board concerning a prisoner, a letter to be used in disciplinary proceedings, and similar contexts.

Notes about the code of judicial conduct and judicial ethics advisory committees

The ethical standards for judges are established by the code of judicial conduct adopted in each jurisdiction. The basis for the state and federal codes is the *Model Code of Judicial Conduct* — adopted by the American Bar Association in 1972 and revised in 1990 and 2007, although the jurisdictions modify the model before adopting it. One of the major changes in 2007 was to reduce the number of canons from five to four, with numbered rules under each canon.

Over 40 states and the United States Judicial Conference have judicial ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action.

There are links to the web-sites of judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.

THE GENERAL RULE – EMPLOYMENT, BAR ADMISSION, AND EDUCATION

The provision of the code of judicial conduct implicated by a judge's writing a recommendation or acting as a reference is Canon 2B in the 1990 model code: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." Commentary allows a judge "based on the judge's personal knowledge, [to] serve as a reference or provide a letter of recommendation." Similarly, Rule 1.3 of the 2007 model provides: "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others," with comment 3 expressly allowing a judge to "provide a reference or recommendation for an individual based upon the judge's personal knowledge." See also Canon 2B, Utah Code of Judicial Conduct (judge "may provide honest references in the regular course of business or social life").

Allowing judges to provide recommendations recognizes that "judges are members of society, and of the community at large, and . . . not every action of a judge is intended, or could reasonably be perceived, as an assertion of the prestige of judicial office." *U.S. Advisory Opinion 73* (2009). The practice of providing recommendations within the legal profession is so customary that, when done "by a judge, it is less a function of the judicial position than it is of the judge's position within the legal community at large." *Indiana Advisory Opinion 3-88*.

Judges should not be precluded from doing things legitimately done by others in society unless there is an identifiable basis in the language of the Code of Judicial Conduct to do so. Letters of recommendation are routinely asked of people who have attained some level of competence in their field or some level of acquaintance with the applicant. Writing such a letter is often an imposition that many believe that they have a professional or social obligation to perform. Indeed, sometimes judges have special knowledge that makes them uniquely qualified to assess the suitability of an applicant for a position. *Massachusetts Advisory Opinion 94-1*.

Judicial ethics advisory committees have also cited practical considerations to support that interpretation. A contrary rule "would prevent, for example, a lawyer, or even a housekeeper, who has worked directly for a judge, from obtaining the judge's recommendation when seeking other employment, or a paralegal who has worked directly for a judge from obtaining the judge's recommendation when applying to a law school." *New York Advisory Opinion 88-10*. The code of judicial conduct was not "intended to penalize those persons who work with a judge by forbidding the judge from commenting on their character or ability to a potential employer." *Arizona Advisory Committee 92-6*. Furthermore, "it is a prerequisite to the proper operation of many institutions that recommendations be received from a cross section of the population and there is no reason to exclude judges." *Maryland Advisory Opinion 1977-5*.

Finally, such recommendations are not considered voluntary testimony as a character witness, which is prohibited by the code.

The act of making a professional recommendation for employment . . . is not subject to the abuses presumably targeted by the prohibition. A typical recommendation will not involve public testimonials, thus potentially detracting from the dignity of the office, and cannot be exploited to deflect attention from the merits of a factual contest and potentially affect the outcome of a legal proceeding. *Indiana Advisory Opinion 3-88*.

Therefore, *subject to the conditions discussed below*, as long as a judge has personal knowledge of the individual seeking the recommendation, advisory committees have approved the practice of providing a recommendation regarding employment, education, bar admission, professional awards, and similar contexts.

Employment

A judge may:

- write a letter of recommendation for the judge's clerk who is leaving public employment after working with the judge for several years (*California Advisory Opinion 40* (1988));
- write a letter of recommendation to an educational institution on behalf of an attorney who has appeared before the judge and who is

leaving the practice of law to teach (*California Advisory Opinion 40* (1988));

- complete a letter of reference form for a former law clerk applying for a position with the attorney general's office (*Connecticut Informal Advisory Opinion 2008-3*);
- write a character reference letter on behalf of a county supervisor in the division of youth services who is applying for district supervisor (*Florida Advisory Opinion 75-30*);
- write a letter as to the character and qualifications of an attorney applying to the U.S. Army Judge Advocate General Corps (*Florida Advisory Opinion 77-10*);
- act as a reference or furnish a letter of recommendation for a person seeking employment (*Illinois Advisory Opinion 95-4*);
- allow her name to be listed as a personal reference on an application for employment and respond to inquiries (*Kentucky Advisory Opinion JE-87* (1996));
- submit a recommendation on behalf of a public defender for employment as a prosecutor (*Minnesota Advisory Opinion* (2008));
- provide a letter of reference on behalf of an associate law professor, who also appears before the judge as an attorney, for promotion to a full professorship (*New York Advisory Opinion 93-26*);
- permit an attorney the judge has known since law school to include the judge's name as a general reference in the resumé he is submitting for a position at a local college (*New York Advisory Opinion 07-182*);
- give a recommendation on behalf of a judicial law clerk for employment as an attorney (*Ohio Advisory Opinion 95-5*);
- provide a letter of recommendation on behalf of a friend who wants to enter the ministry (*South Carolina Advisory Opinion 31-1996*);
- write a letter of recommendation for individuals seeking employment (*South Carolina Advisory Opinion 5-1992*);
- provide a letter of recommendation for a prosecutor who is applying for a position with a law firm (*Texas Advisory Opinion 222* (1998));
- write a letter of recommendation on behalf of an attorney seeking employment even if the potential employer has not requested such a

letter (*Utah Informal Advisory Opinion 99-8*);

- provide a letter of recommendation for an employee of a county-operated, pre-trial release and supervision program who has appeared in the judge's court and has applied for a position with the federal probation system (*Utah Informal Advisory Opinion 91-2*); and
- write a letter of recommendation for employment for court personnel or for a personal friend (*Washington Advisory Opinion 86-12*).

Bar admission

A judge may:

- give an affidavit of character for a law student who is applying for admission to the bar (*Alabama Advisory Opinion 89-357*; *New York Advisory Opinion 88-166*);
- write a letter regarding the background and character of someone who is applying for admission to the bar (*Florida Advisory Opinion 75-18*);
- complete a questionnaire sent to the judge by the Florida Board of Bar Examiners (*Florida Advisory Opinion 96-6*);
- write a letter for an attorney for admission on reciprocity to the bars in Wyoming and Montana (*New Jersey Advisory Opinion 45-91*);
- complete the board of law examiner's certificate of moral character for an applicant seeking admission to practice law in North Carolina (*North Carolina Advisory Opinion 07-3*);
- allow a friend to list the judge as a reference on a bar admission application (*Pennsylvania Informal Advisory Opinion 5/25/04*); and
- allow a law student to list the judge as a character reference for the state bar examination (*West Virginia Advisory Opinion* (January 12, 2000)).

Cf., *Connecticut Informal Advisory Opinion 2008-15* (judge may not provide a letter of reference for use in an adversarial character and fitness proceeding).

Appointments

A judge may:

- provide a letter of recommendation for a person applying for an appointive position on a government agency or board (*Arizona Advisory*

Opinion 92-6);

- write a factual letter to the President regarding an appointment to the board of directors of the Legal Services Corporation (*Florida Advisory Opinion 93-32*);
- write a letter of recommendation for an individual seeking an appointment to a governmental position (*South Carolina Advisory Opinion 5-1992*); and
- answer an inquiry from an appointing officer concerning the character and fitness of a candidate for appointment to any public office (*U.S. Advisory Opinion 59* (2009)).

Education

A judge may:

- provide a letter of recommendation to the director of a law school admission's office on behalf of a former business client's employee with whom the judge had worked on cases as an attorney (*Connecticut Informal Advisory Opinion 2009-22*);
- write a letter of recommendation for a person who is applying for entrance to law school (*Florida Advisory Opinion 79-3*; *Kentucky Advisory Opinion JE-74*; *Nevada Advisory Opinion JE04-004*; *New York Advisory Opinion 06-10*; *Ohio Advisory Opinion 95-5*);
- act as a reference or furnish a letter of recommendation for a person seeking admission to a college or a scholarship (*Illinois Advisory Opinion 95-4*);
- give a recommendation for a relative or neighbor for appointment to a military academy (*Maryland Advisory Opinion 1977-5*);
- send a letter of recommendation to a college on behalf of a high school student the judge has known most of the student's life (*Nebraska Advisory Opinion 07-4*);
- write a letter of recommendation for a student or prospective student for law school or college admission and/or a scholarship (*New Jersey Guidelines on Extrajudicial Activities Addendum A*);
- send a letter of recommendation to a law school on behalf of a friend's child (*Oklahoma Advisory Opinion 02-7*);

- write a letter of recommendation for a student seeking admission to a college or professional school (*South Carolina Advisory Opinion 5-1992*);
- write a letter of recommendation for a law school candidate who interned in the judge's office with information regarding her responsibilities and performance (*South Carolina Advisory Opinion 8-2009*); and
- provide a reference for a domestic violence advocate regularly involved in proceedings in the judge's court who is applying for law school (*West Virginia Advisory Opinion* (September 17, 2004)).

Awards

A judge may:

- provide a letter of support for an attorney who has been nominated to receive a professional service award from a private organization (*Connecticut Informal Advisory Opinion 2009-5*);
- submit a letter to support the nomination of an attorney for a bar association pro bono award (*New Jersey Advisory Opinion 2-07*; *New Jersey Advisory Opinion 34-06*; *New Jersey Advisory Opinion 9-99*);
- write a letter in support of the nomination of a former colleague for a professional award (*New York Advisory Opinion 08-92*);
- write a letter at the request of a local bar association to assist the association nominate an attorney for an award given by the New York State Bar Association (*New York Advisory Opinion 02-118*);
- write a letter in support of a local family services agency's nomination for an annual award from a newspaper (*New York Advisory Opinion 08-175*); and
- send a letter of recommendation for an attorney nominated for a bar association award (*North Carolina Advisory Opinion 07-2*).

But see New Jersey Advisory Opinion 11-05 (judge may not send a letter supporting the nomination of a mediator for the governor's volunteer award).

Miscellaneous

A judge may:

- write a letter of recommendation for a former staff attorney who has applied for a fellowship that affords financial support to Harvard Law School graduates who have secured a position in the federal government (*Florida Advisory Opinion 2007-6*);
- provide a letter to the department of elder affairs on behalf of a professional guardian seeking waiver of an examination requirement (*Florida Advisory Opinion 2005-4*);
- provide a letter of good character on behalf of a friend applying for a license to practice acupuncture to the state department of education (*New York Advisory Opinion 93-12*); and
- write a letter of reference to the board of a cooperative building on behalf of an individual seeking an apartment (*New York Advisory Opinion 98-103*).

Evaluating attorneys

Most opinions on the issue have advised that a judge may express a professional evaluation or opinion of a practicing attorney for use by a legal rating periodical even where the attorney frequently appears before the judge — provided the evaluation will remain confidential and will not be used to create the impression that the judge endorses a particular lawyer. For example, noting that the *Martindale-Hubbell* directory prominently explains that its ratings are based upon confidential recommendations from lawyers and judges in the city or area where the lawyer practices, the Maryland advisory committee concluded that a judge may respond to a request to rate an attorney as “one of many unnamed judges from unnamed courts playing a role in rating lawyers, which role will never be fully disclosed.” *Maryland Advisory Opinion 1977-5*. *Accord Alabama Advisory Opinion 92-448*; *Alabama Advisory Opinion 83-180*; *Florida Advisory Opinion 73-15*; *Kansas Advisory Opinion JE-148* (2006); *Nebraska Advisory Opinion 91-1*; *New York Advisory Opinion 89-119*.

In at least two states, however, a judge is prohibited from rating attorneys for *Martindale-Hubbell*. *New Jersey Guidelines on Extrajudicial Activities*

Addendum A; *South Carolina Advisory Opinion 4-2004*. The South Carolina committee explained:

While a judge may have no intention of favoring one lawyer over another, allowing a judge to rate the lawyers who may appear before him could create the appearance of partiality. Publicized ratings which indicate that a judge believes one lawyer to be superior, in one way or another, to another lawyer, could certainly create the appearance of partiality.

Certification

Advisory committees have stated that a judge may provide a reference for an attorney in connection with certification as a specialist in an area of law, as long as the reference is confidential. Thus, a judge may:

- submit a written statement giving the judge’s opinion of an attorney’s professionalism in response to a request by the attorney’s counsel in a specialization certification proceeding, even if the attorney has a case pending before the judge (*Arizona Advisory Opinion 02-4*);
- sign a confidential certificate of reference for members of the bar applying for certification under the Florida Bar Designation Plan (*Florida Advisory Opinion 78-24*);
- act as a reference in an attorney’s certification process by the National Board of Trial Advocacy (*Nebraska Advisory Opinion 94-2*);
- be listed as a reference by an attorney seeking state trial certification or National Board of Trial Advocacy certification and respond on the form provided (*New Jersey Guidelines on Extrajudicial Activities Addendum A*);
- write a letter nominating an attorney whom the judge has known for several years through bar association activities for a position on the commercial panel of the American Arbitration Association (*New York Advisory Opinion 93-129*); and
- make a written recommendation for an applicant seeking certification as an attorney specialist when requested to do so by a certifying agency even if the applicant appears before the judge (*Ohio Advisory Opinion 98-4*).

The Arizona committee explained that, although an attorney asks for the judge’s opinion to serve the

attorney's self-interest in certification proceedings, "the result is still intended to assure that only attorneys with high ethical and professional standards become certified and re-certified," noting that the judge would not be commenting on an attorney's character or reputation but on specific behavior observed in his courtroom. *Arizona Advisory Opinion 02-4*. The committee emphasized that "the mere disclosure of the judge's opinion does not render the judge biased."

Judges will always form an opinion of the attorneys who practice before them. Expressing that opinion as to a specific attorney does not render the judge biased any more than would the formation of the opinion in the first place. Obviously, if the opinion held by the judge, whether expressed or not, is so strong as to reflect an inability to be fair and impartial, then that judge must recuse himself.

But see New Jersey Advisory Opinion 16-01 (judge should not fill out a questionnaire about an attorney seeking admission to the American Academy of Matrimonial Lawyers); *New Jersey Advisory Opinion 3-06* (family division judge may not complete a questionnaire from the American Academy of Matrimonial Lawyers seeking information regarding an applicant for a fellowship); *South Carolina Advisory Opinion 26-2006* (judge may not submit a form reference for an attorney to the American Board of Professional Liability Lawyers).

Appointment lists and government contracts

Advisory committees have given judges permission to write letters for attorneys trying to get on eligibility lists for court appointments.

- A judge may write a recommendation for an attorney for membership on the panel of attorneys appointed to provide counsel in criminal cases to indigent defendants. *New York Advisory Opinion 96-32*.
- A judge may write a reference letter for an attorney seeking admission to a law guardian panel without first being solicited by the appointing authority. *New York Advisory Opinion 05-29*.
- A judge may write a recommendation letter for a lawyer who seeks to be placed on a federal court appointments list. *Pennsylvania Informal*

Advisory Opinion 6/23/03.

Further, most opinions that have addressed the issue allow a judge to make recommendations about attorneys in the context of a government contract.

- A judge may provide a recommendation based on merit as to specific attorneys to serve as contract counsel representing indigent defendants in the circuit court. *Alabama Advisory Opinion 97-672*.
- A judge may complete a confidential evaluation form for private attorneys that the city will use, with other information, to determine whether to renew the attorneys' contracts to provide public defender services. *Arizona Advisory Opinion 00-4*.
- A judge may write a letter expressing his views concerning the performance and professional conduct of attorneys affiliated with an organization that is seeking a contract with a municipality to provide legal representation for indigent criminal defendants, but should not express an opinion as to whether the organization's bid should be accepted or a particular contract entered into and should not sign a form letter provided by the organization. *New York Joint Advisory Opinion 01-100 and 01-101*.

The Arizona committee acknowledged that "any evaluation of an attorney by a judge may be perceived as casting doubt on a judge's appearance of fairness and impartiality." *Arizona Advisory Opinion 00-4*. However, the committee also noted that judges "have historically provided public evaluations of lawyers," for example, by ruling on whether attorneys fees or other sanctions should be imposed for lawyer misconduct, and that "lawyers have always been aware that a judge's evaluation may impact the lawyer's career." The committee concluded that "so long as the judge's evaluation is not the sole basis for the hiring decision, and so long as the evaluation is not abused," the evaluation was permitted.

Judges are perhaps in the best position to observe and evaluate lawyer performance as it relates to the administration of justice. . . . [T]he public appreciates the court's integral role in the administration of justice and there is little danger, unless there is evidence that the evaluation process is abused, that the

public's perception of the court's integrity or impartiality will suffer by allowing judges to participate in the formal process of evaluating lawyers who appear before them regularly, even if the evaluations are confidential. Moreover, judicial participation in the evaluation process is consistent with Canon 4B, under which judges are encouraged to participate in activities that are geared toward improving the administration of justice.

In contrast, the Connecticut committee advised that a juvenile judge may not provide references in response to form questionnaires for attorneys seeking contracts to provide representation to children and indigent respondents in neglect and termination of parental rights proceedings in juvenile court. *Connecticut Advisory Opinion 2009-15*. The committee acknowledged "the need for the Commission on Child Protection to evaluate attorneys on the basis of merit in the process of awarding contracts," but stated "compliance with the current process would put Judicial Officials in the untenable position of violating the Code." It noted that many juvenile courts in the state have only one judge assigned to each court location, that the applicants appear regularly before the juvenile judges, that "the process is not likely to remain confidential," and that "participation in this process would require recusal both presently and in the future with respect to any case handled by the contract attorneys." See also *Nevada Advisory Opinion JE04-004* (judge may not write a letter to a county commission in support of a candidate seeking appointment as district attorney but may privately respond to inquiries from the county commission to provide further background about the candidate's qualifications); *New York Advisory Opinion 91-59* (judge may not provide a letter of reference for a law firm to the municipal health and hospital corporation at the firm's request, but if contacted directly by the agency, may give an opinion about the firm); *New York Advisory Opinion 02-26* (judge should not write a letter of recommendation encouraging an appointing authority to appoint an attorney to a quasi-judicial vacancy but, if the appointing authority contacts her, may set forth her observations concerning the abilities of the candidate in relation to the position without recommending that the appointment be made).

CONDITIONS AND CAVEATS

Personal knowledge

The primary condition placed on a judge writing a letter of recommendation or acting as a reference is that the judge must have substantial personal knowledge of the subject of the reference. The advisory committee for federal judges explained that "whenever the relationship between the judge and the person seeking the recommendation is such that the judge is in no better position than many others would be to evaluate that person," the recommendation was probably requested because of the prestige of the judicial office, and the judge should refuse the request. *U.S. Advisory Opinion 73* (2009). The Maryland advisory committee stated:

If the judge senses that the decision maker would be genuinely assisted by the judge's contribution of special knowledge and would be so assisted even if the source of that knowledge were not a judge, the "tilt" is in one direction; if the judge senses that the decision maker would be primarily impressed by the judge's name and office, the "tilt" is decidedly in the other direction. *Maryland Advisory Opinion 1983-12*.

The committee concluded that, if a judge is in doubt, he is "well advised" to err on the side of declining to provide a recommendation.

The Nevada committee warned that a judge should not write a letter of recommendation when the judge possesses no unique knowledge of the candidate and others could provide the same information. *Nevada Advisory Opinion JE04-004*. Similarly, in New Jersey, judges have been warned never to give a recommendation "unless he or she has substantial personal knowledge of the applicant, gathered over a substantial period of time," adding "recommendations should never be provided solely as a favor for friends or relatives." *New Jersey Guidelines on Extrajudicial Activities Addendum A*.

For example, the Massachusetts committee advised a judge not to write a letter of recommendation for a neighbor's nephew, whom the judge had never met, noting "in such a situation, the weight of the recommendation" depends on the judicial status because the judge has "no relevant knowledge or information relating to the applicant." *Massachusetts Advisory Opinion 94-1*. Similarly, the California

committee stated that a judge may not write a letter on behalf of a person who appeared before the judge as a juvenile and who is seeking employment with a state agency. *California Advisory Opinion 40* (1988). Although the judge had had occasion to see the person mature since that appearance and believed that the individual was now responsible, the committee concluded that nothing in the inquiry indicated that the judge was familiar with the person's job skills, suggesting that the letter was requested to inject the prestige of office into the job application process.

In *Public Admonishment of Coates* (California Commission on Judicial Performance December 2, 2009) (<http://cjp.ca.gov/>), the California Commission on Judicial Performance found that a judge "went beyond expressing the judge's personal observations as to his former bailiff's qualifications" when he sent a memorandum to the under-sheriff that suggested that there were problems with the sheriff department's field training program and that incorporated attached e-mails from a deputy sheriff. Therefore, the Commission rejected the judge's argument that he had merely provided a permitted letter of recommendation when he sent the memorandum on behalf of his former courtroom bailiff in connection with the sheriff department's decision whether to keep the former bailiff in the training program.

Acting as a reference

Several judicial ethics committees require or suggest that, rather than agree to write a letter of recommendation, a judge should permit himself or herself to be listed as a reference and respond to any inquiries received from an educational institution or potential employer. The advisory committee for federal judges noted that "some judges have adopted a policy of inviting the applicant to list the judge as a reference, instead of initiating letters of recommendation, with the understanding that, if requested to do so, the judge would respond with information known to the judge concerning the applicant." *U.S. Advisory Opinion 73* (2009). See also *Louisiana Advisory Opinion 71* (1986) (judge may not write a letter of recommendation but may allow his name to be listed as a reference and respond if the employer or institution requests a rec-

ommendation); *Maryland Advisory Opinion 1982-12* (judge should consider suggesting that the person to whom a recommendation would be addressed request the information, to which request the judge could respond).

In New Jersey, whether a judge may write an unsolicited letter of recommendation or should simply be listed as a reference depends on the recipient. *New Jersey Guidelines on Extrajudicial Activities Addendum A*. For law schools and colleges, which do not ordinarily have procedures for soliciting letters of recommendation, the New Jersey rule provides that a judge may write a letter upon request of the applicant without any inquiry from the school. If the circumstances involve a potential private or public sector employer, however, a judge may not write an unsolicited letter but may allow an individual to list the judge as a reference and write in response to a request, preferably in writing, from the employer. The New Jersey Supreme Court publicly censured a judge for, in addition to other misconduct, giving an unsolicited, favorable reference to the deputy public defender for his former law clerk. *In the Matter of DeBello*, Order (New Jersey November 16, 2009) (www.judiciary.state.nj.us/pressrel/D-13-09%20DeBello%20Censure%20ACJC.pdf). (The order does not describe the judge's conduct; the findings of the Advisory Committee on Judicial Conduct are at www.judiciary.state.nj.us/pressrel/08-116%20%20DeBello%20Presentment.pdf).

Other states in which judges are generally allowed to provide letters of recommendation have noted situations in which it is more appropriate for a judge simply to allow the subject to list the judge as a reference than to write the letter.

- A judge may not provide a letter of recommendation to the state's U.S. Senators about a person applying for a position with the federal court system but may offer to be listed as a reference and provide a reference if contacted. *Connecticut Advisory Opinion 2009-13*.
- A judge may not voluntarily provide a reference in support of an attorney's application to adopt a child that will become part of the file that will be considered in the adoption matter by a court in the same county where the judge presides. But, because the applicant is well known to the judge and occasionally appears in the judge's court, the judge may permit the applicant to submit her

name to the adoption agency as a reference and respond to an inquiry by the agency. *New York Advisory Opinion 08-211*.

- A judge who is permanently assigned to a felony criminal court may not send a letter of recommendation to the district attorney regarding the application of a law student for a summer position but may authorize the applicant to use the judge as a reference and respond to a request by the district attorney for information or provide the applicant with a “to whom it may concern” letter of recommendation. *New York Advisory Opinion 88-53*.

Promoting a business

Another limitation on recommendations prohibits a judge from writing a letter that will be used to promote an individual’s business interests. *Nebraska Advisory Opinion 07-4*; *North Dakota Advisory Opinion 92-1*; *Virginia Advisory Opinion 06-1*. For example, a judge may not:

- provide a letter praising the skills and abilities of an attorney to be included in an advertising brochure for a litigation consulting business (*California Advisory Opinion 40* (1988));
- provide a testimonial that the media consulting company the judge used for her campaign would place on its web-site (*Louisiana Advisory Opinion 222* (2009));
- provide a letter of reference to a bank on behalf of a friend who is seeking financing for a business (*New York Advisory Opinion 89-15*);
- provide a letter supporting a private business in its bid to continue to provide services to a municipality (*New York Advisory Opinion 97-16*);
- provide a letter of reference to a friend to be used in the promotion of the friend’s real estate business (*New York Advisory Opinion 05-126*);
- provide a letter of reference to help a person obtain financing for a commercial treatment facility particularly when the judge could make referrals to the facility (*Utah Informal Advisory Opinion 91-2*);
- endorse a friend’s character for use in an advertising flyer for the friend’s business (*Washington Advisory Opinion 87-4*); or
- make a recommendation in support of a commercial venture (*U.S. Advisory Opinion 73* (2009)).

Recipient or subject

A letter of recommendation may be considered inappropriate if the recipient is a party in litigation pending before the judge, for example, an attorney, law firm, or government office that frequently represents parties before the judge. Commentary to Canon 2 of the Alabama Canons of Judicial Ethics specifically states that a letter of recommendation “should not be written if the recipient is engaged in litigation before the judge or it is likely that the recipient will be engaged in proceedings that would ordinarily come before the court.” Discussing that provision, an advisory opinion explained that the recipient of the letter “might feel coerced by the judge’s letter” or “would feel that by acting favorably on the judge’s recommendation he could influence the judge” in pending litigation. *Alabama Advisory Opinion 86-269*. See also *Connecticut Informal Advisory Opinion 2009-5* (judge may provide a letter of support for an attorney nominated to receive a professional service award from a private organization unless, *inter alia*, the nominated attorney, members of her law firm, or the organization have an appearance before the judge at the time the recommendation is provided or within a reasonable period before or after); *Illinois Advisory Opinion 95-4* (judge should not provide a recommendation to a prospective employer if the judge knows the prospective employer is a named party in litigation pending before the judge).

For example, the New York advisory committee determined that a judge who is permanently assigned to a felony criminal court may not send a letter of recommendation to the district attorney regarding the application of a law student for a summer position in the district attorney’s office. *New York Advisory Opinion 88-53*. The committee concluded that, because the district attorney’s office constantly appears before the judge, a letter to the district attorney “might appear to compromise the judge’s independence or impartiality and may seem coercive with respect to the District Attorney.” However, the committee stated that the judge may authorize the applicant to use the judge as a reference and respond to a request by the district attorney for information or provide the applicant with a “to whom it may concern” letter of recommendation.

The Indiana committee advised that a judge

should consider whether a recommendation on behalf of an individual seeking employment with a law firm or government office that frequently practices in the judge's court might be given more meaning than is proper or even create a challenge to the judge's impartiality if the individual is hired and appears before the judge. *Indiana Advisory Opinion 3-88*. Similarly, New Jersey judges have been cautioned to avoid making recommendations for employment to law firms actively practicing in their jurisdiction. *New Jersey Guidelines on Extrajudicial Activities Addendum A*. The guidelines note that "there may be circumstances that require it, e.g., where such firm solicits your opinion about someone who has just served as your law clerk," but cautioned judges "to avoid as best you can the impression that might otherwise be given that pressure is being exerted on the firm."

Some committees have cautioned against furnishing letters of recommendation in connection with government employment that might suggest inappropriate political activity. For example, the Kentucky judicial ethics committee stated that a judge should hesitate before giving a reference in connection with employment with any branch of government, also warning against letters where the position sought is a sensitive one that might prove embarrassing to the judge or the judiciary. *Kentucky Advisory Opinion JE-74*.

In New Jersey, judges have been advised that, when writing a letter of recommendation that has been solicited by a public sector employer, a judge "must avoid being perceived as a supporter of or active in any political party or activity or any branch or faction of a party." *New Jersey Guidelines on Extrajudicial Activities Addendum A*. The New Jersey Supreme Court publicly censured a judge for, in addition to other misconduct, making an unsolicited telephone call to the deputy public defender regarding his former law clerk's interest in working for the office of law guardian. *In the Matter of DeBello*, Order (New Jersey November 16, 2009) (www.judiciary.state.nj.us/pressrel/D-13-09%20DeBello%20Censure%20ACJC.pdf). (The order does not describe the judge's conduct; the findings of the Advisory Committee on Judicial Conduct are at www.judiciary.state.nj.us/pressrel/08-116%20%20DeBello%20Presentment.pdf).

Recommendations related to law enforcement positions also raise concerns. The Connecticut advisory

committee stated that a judge may serve as a reference for a person applying for a position as a police officer with one or more municipal police departments only if the police department and the hiring authority are not named parties in cases pending currently and for a reasonable period after the submission of the letter of recommendation. *Connecticut Informal Advisory Opinion 2009-8*. The New York advisory committee stated that a judge should not write a letter of recommendation for a police officer where it appears likely that the officer will be a witness or otherwise involved in cases before the judge. *New York Advisory Opinion 01-37*. Noting "the inherent question of credibility that applies to any witness, and the centrality of police officer testimony in most criminal prosecutions," the committee concluded that a personal recommendation may give rise to a perception of judicial partiality. *See also Washington Advisory Opinion 95-16* (new judge who was a chief deputy prosecutor may be listed as a reference for a police officer applying to be police chief for a city outside of the judge's jurisdiction if the judge does not refer to the judicial title or include her work address).

Judicial stationery

The majority rule permits a judge to use judicial stationery to write a letter of recommendation. The codes of judicial conduct in several states expressly allow the use of official letterhead.

- Commentary to the California code allows a letter of recommendation to "include the judge's title and be written on stationery that uses the judicial title."
- Commentary to the Florida code permits a judge to "use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code."
- Commentary to the West Virginia code provides that a judge's reference or personal recommendation may be "on official letterhead, which need not bear the words 'personal and unofficial.'"

In addition, judicial ethics committees in several states advise that any letter of recommendation that is appropriate for a judge to write may be written on official stationery. The Indiana committee concluded

that an ordinary recommendation from a judge, even if drafted on court stationery, is not an exploitation of the judicial office that the code of judicial conduct is designed to prevent (*Indiana Advisory Opinion 3-88*), while the Maryland committee noted that “an important part of any recommendation is a description of the person giving it and use of judicial stationery would not be inappropriate” (*Maryland Advisory Opinion 1977-5*). *Accord Nevada Advisory Opinion JE04-004; Oklahoma Advisory Opinion 02-7; Pennsylvania Advisory Opinion 98-1*.

Several states have adopted a variation of this rule that allows a judge to use judicial stationery for a letter of recommendation but requires the judge to add the words “personal and unofficial.” See *Nebraska Advisory Opinion 07-4; New York Advisory Opinion 93-26*. Commentary to the Arkansas code of judicial conduct provides: “The 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.” Similarly, Virginia code commentary states: “When using court stationery for letters of reference an indication should be made that the opinion expressed is personal and not an opinion of the court.” The Connecticut advisory committee stated that a judge may use judicial branch letterhead, but, if he does so, the letter must indicate that the opinions expressed were the personal opinions of the judge. *Connecticut Informal Advisory Opinion 2009-22*.

In some states, whether a judge may use official stationery depends on whether the recommendation is written on behalf of a personal friend or on behalf of an individual the judge knows in an official capacity. The Washington judicial ethics committee has advised that a judge may use official letterhead for a recommendation for court personnel or for attorneys who have appeared before the judge but that a recommendation for a person the judge knows in a non-judicial capacity should be written on plain letterhead and should not reveal the judicial capacity. *Washington Advisory Opinion 86-12; Washington Advisory Opinion 93-24*. Similarly, in Minnesota, a judge may not use official judicial stationery for a recommendation containing information not obtained in the ordinary course of judicial or official court activities. *Minnesota Advisory Opinion (2008)*.

Accord Maine Advisory Opinion 98-3. See also *North Dakota Advisory Opinion 92-1* (suggesting a judge avoid using official stationery unless writing an employment reference for court personnel).

In another variation on the rule, the Arizona advisory committee stated that a judge may use judicial stationery to write an employment recommendation for an applicant who is a lawyer or former employee but that, when recommending a personal friend, the judge is required to place the caption “PERSONAL AND UNOFFICIAL” on the face of the letter. *Arizona Advisory Opinion 92-6*. The committee stated it was neither endorsing nor condemning the use of official stationery for personal references.

Finally, in some states, a judge may not use official stationery for any letter of recommendation to ensure that the recommendation does not imply that the judge is using the prestige of office to advance private interests. *Louisiana Advisory Opinion 76 (1989); Louisiana Advisory Opinion 71 (1986); New Jersey Guidelines on Extrajudicial Activities Addendum A; North Carolina Advisory Opinion 07-2; South Carolina Advisory Opinion 5-1992*. The North Carolina committee, for example, stated that, when writing a letter of recommendation, a judge should use personal stationery rather than official letterhead but may refer to the judicial office in the letter when it is necessary to explain the context of the judge’s observations of the individual. *North Carolina Advisory Opinion 07-2*. The committee did permit a judge to use official stationery if the request comes from a state agency or official requesting the judge’s input in an official capacity.

“To Whom It May Concern” letters

To prevent a recommendation from being used for an unintended or unknown purpose, judicial ethics committees advise that a judge should address the letter to a specific institution or individual and may not write a letter addressed “to whom it may concern.” *Minnesota Advisory Opinion (2008); Nebraska Advisory Opinion 07-4; North Carolina Advisory Opinion 07-2; Texas Advisory Opinion 222 (1998); Virginia Advisory Opinion 06-1*. Similar conditions require a judge to address and mail a letter directly to the party or organization for whom the information is being written. *Oklahoma Advisory Opinion 02-7; Pennsylvania Formal Opinion 98-1;*

Virginia Advisory Opinion 06-1. Other advisory committees have warned that a judge should have a reasonable assurance that a recommendation will be treated as confidential and will not be distributed by the recipient. *Nebraska Advisory Opinion 07-4*; *Virginia Advisory Opinion 06-1*.

The Oklahoma and Pennsylvania judicial ethics committees have created an exception that allows a judge to write a “to whom it may concern” letter for a personal employee of the judge, such as a law clerk, who is seeking other employment. *Oklahoma Advisory Opinion 02-7*; *Pennsylvania Formal Opinion 98-1*. See also *New York Advisory Opinion 97-110* (judge may provide “to whom it may concern” letter of reference for a court interpreter she has known for 10 years); *New York Advisory Opinion 88-53* (judge should provide applicant to the district attorney’s office with “to whom it may concern” letter of recommendation).

Other caveats

Two committees have advised against judges’ making recommendations on the telephone in most circumstances. The Virginia committee noted that, “if a judge initiates a telephone call in order to recommend someone, there is a greater risk that the call may be perceived as coercive or as an improper use of judicial prestige.” *Virginia Advisory Opinion 06-1*. Therefore, the committee stated, a judge “should make a recommendation in writing, or by telephone in response to an inquiry from the decision maker,” initiating a call “only if the surrounding circumstances are such that the judge is reasonably certain that the call will not be perceived as coercive or improper” and the judge emphasizes that the call is personal, not official court business. Similarly, in New Jersey, judges have been advised not to give a recommendation by telephone unless that is clearly the appropriate form of response, for example, when the executive branch solicits judges for their opinion about lawyers being considered for the bench or other public employment or when law firms call for a reference about a former law clerk. *New Jersey Guidelines on Extrajudicial Activities Addendum A*.

Some judicial ethics committees have advised judges to include disclaimers in their letters of recommendation.

- A judge should consider including a disclaimer, such as “this letter is not intended as an endorsement of the private or political interests” of the individual on whose behalf it was written. *North Dakota Advisory Opinion 92-1*.
- A letter written for a friend should state that the letter is being written “purely as a friend.” *Washington Advisory Opinion 86-12*.
- A letter should include a disclaimer stating that the judge is not attempting to lend the prestige of the office to advance the private interests of others. *Washington Advisory Opinion 87-10*.
- A letter written for an attorney who has appeared before the judge should clearly state that it is based on the judge’s personal observations and does not necessarily reflect the views of other members of the court. *Washington Advisory Opinion 87-10*.

Other opinions have warned judges not to promote one candidate over all other applicants.

- A judge may write a character reference for a person applying for an appointive position on a government agency that does not endorse one candidate over another. *Arizona Advisory Opinion 92-6*.
- A judge should not follow up a letter of recommendation with any activity that smacks of a campaign on behalf of the applicant. *Massachusetts Advisory Opinion 94-1*.
- A judge may write a letter of recommendation on behalf of candidate for a bar association office as long as the letter does not actively promote the lawyer. *Pennsylvania Informal Advisory Opinion 7/17/02*.

Finally, committees have advised that a letter of recommendation:

- should be limited to what the judge personally has observed and should not include the judge’s opinion about the individual’s reputation or convey what others have told the judge (*Nebraska Advisory Opinion 07-4*; *Virginia Advisory Opinion 06-1*); and
- should include a statement of the source and extent of the judge’s personal knowledge (*Pennsylvania Formal Advisory Opinion 98-1*).

JUDICIAL SELECTION

Commentary to Canon 2B of the 1990 model code provided that “judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.” Similarly, comment 3 to Rule 1.3 of the 2007 model code provides:

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

The Arizona judicial ethics committee concluded that the proscription against lending the prestige of judicial office did not prohibit judges from making recommendations regarding judicial appointments because the “private interests of others” does not directly or indirectly refer to the judicial selection process. *Arizona Advisory Opinion 87-1*. Although the California advisory committee did consider such a judicial selection recommendation as clearly intended to advance the private interests of the candidate, it concluded that a recommendation was appropriate under the permission the code gives judges to participate in the improvement of the administration of justice. *California Advisory Opinion 40* (1988). The committee explained that, where a judge’s letter would offer specific knowledge of the personal and professional qualities pertinent to performance as a judge, a judge is “uniquely able to contribute insight to the judicial selection process and thereby to the administration of justice,” without casting doubt on the judge’s impartiality in hearing any issue. Similarly, the U.S. judicial ethics committee reasoned that cautions against lending the prestige of office to advance private interests “are consistent with judges providing, when asked, recommendations and evaluations, based on their insight and experience; judges may in this way further the public interest in a judiciary characterized by quality and integrity.” *U.S. Advisory Opinion 59* (2009).

Finally, the Maryland advisory committee concluded that a recommendation submitted in the

judicial selection process does not violate the limits on a judge engaging in political activity because the judicial appointments process is designed to be as “nonpolitical” as possible and a letter of recommendation cannot be “analogized” to active political activity. *Maryland Advisory Opinion 1980-1*.

Thus, a judge may:

- write a letter of support regarding a potential judicial nominee to a nominating commission and respond either orally or in writing to inquiries from members of the commission or the governor (*Arizona Advisory Opinion 87-1*);
- respond to judicial selection inquiries, provide recommendations (including a general character reference) relating to the evaluation of a person being considered for a judgeship, and otherwise participate in the process of judicial appointment (*California Advisory Opinion 40* (1988));
- act as a reference and furnish a letter of recommendation for a person seeking a federal judgeship (*Illinois Advisory Opinion 93-9*);
- send a letter of recommendation to the executive council in support of a nominee for appointment to the judiciary (*Massachusetts Advisory Opinion 95-9*);
- furnish a letter of recommendation to a judicial nominating commission (*Nebraska Advisory Opinion 90-2*);
- write a letter to a judicial nominating commission for a judge who has applied for appointment to a judicial vacancy (*New Mexico Advisory Opinion 05-3*);
- write a letter on behalf of an individual seeking appointment to a federal judgeship (*Ohio Advisory Opinion 95-5*);
- write a letter on behalf of another judge seeking reappointment at the request of the screening panel or selection committee or in response to a public solicitation in the local legal newspaper (*New York Advisory Opinion 98-123*);
- write a letter of recommendation to the judicial nominating commission on behalf of an applicant for a judicial position (*Oklahoma Advisory Opinion 02-1*);
- write a letter of recommendation for another judge who has been nominated to the federal bench (*Pennsylvania Informal Advisory Opinion 2/16a/05*);

- write a reference letter recommending a former law clerk being considered for judicial appointment by the governor's appointment committee (*Pennsylvania Informal Advisory Opinion 6/6/02*);
- respond to an inquiry from an appointing official or committee as to the character and fitness of a candidate for the judiciary (*South Carolina Advisory Opinion 9-1989*);
- provide information about a judicial candidate to a screening committee if requested by the committee (*South Carolina Advisory Opinion 14-2009*);
- write a letter of recommendation for a fellow judge who has applied for another judicial position (*Texas Advisory Opinion 222 (1998)*);
- respond to inquiries from judicial nominating commissions (*Utah Informal Advisory Opinion 94-5*);
- answer a proper inquiry from an appointing officer about the judge's knowledge of the character and fitness of a candidate for judge (*U.S. Advisory Opinion 59 (2009)*);
- respond to a candidate's request for a letter of recommendation if a merit selection commission has requested that all candidates submit a recommendation from a judge (*U.S. Advisory Opinion 59 (2009)*); and
- recommend persons to be considered for a judicial appointment when requested to do so (*U.S. Advisory Opinion 59 (2009)*).

See also *Massachusetts Advisory Opinion 05-1* (judge may use court stationery to write a letter of recommendation to a judicial nominating commission on behalf of a candidate for a judicial position); *New York Advisory Opinion 99-4* (at the request of the state senate, judge may testify on behalf of the appointment of an associate judge of the court of appeals). Cf., *Florida Advisory Opinion 89-15* (judge may not appear before a judicial nominating commission personally to introduce a candidate or speak to members of the commission about his judgment as to the best qualified person); *Maryland Advisory Opinion 1989-6* (judges of a circuit court, acting in concert, may not submit to a judicial nominating commission their evaluation of whether applicants were "qualified," "highly qualified," or "unqualified"); *Virginia Advisory Opinion 03-2* (judge may not respond to a request from a community com-

mittee appointed by a legislator to recommend candidates for judicial positions because such committees are not committees of the general assembly and have no official standing).

In some jurisdictions, a judge can provide a recommendation only if requested to do so by the nominating or appointing authority.

- A judge is discouraged from communicating recommendations to the judicial selection commission unless requested to do so or unless circumstances, in the exercise of the judge's sound discretion, make it especially compelling to do so. *Hawaii Advisory Opinion 01-2*.
- A judge may submit a letter of recommendation for a candidate for appointment to a judicial office only if formally requested to do so by the appointing authority. *Nevada Advisory Opinion JE98-6*.
- A judge with knowledge of an applicant's professional abilities may respond to requests for recommendations for judicial appointments as long as the requests come from or at the direction of agencies or groups officially tasked with selecting candidates for appointment. *Nevada Advisory Opinion JE07-9*.
- A judge may respond to inquiries about attorneys being considered for judicial posts from those within the executive or legislative branches with official responsibilities in the matter. *New Jersey Guidelines on Extrajudicial Activities Addendum A*.
- A judge may not, at the request of another judge seeking reappointment, submit a letter in support of reappointment to the mayor's committee on the judiciary, but may respond to an inquiry by the committee. *New York Advisory Opinion 96-117*.
- Unless specifically requested to do so, a judge may not write a reference letter concerning a judicial candidate to the judicial nominating committee or appointing authority. *North Dakota Advisory Opinion 92-1*.
- A judge may provide information about a candidate for judicial appointment to a screening committee if requested by the selection committee. *South Carolina Advisory Opinion 14-2009*.
- A judge may not write a letter or place a telephone call on behalf of a candidate for judicial

office to a screening committee appointed by a legislator when the request is made by the candidate but may do so if the request is made by or on behalf of the legislator. *Virginia Advisory Opinion 03-2*.

See *New York Advisory Opinion 00-124* (administrative judge may respond to an oral request from an appointing authority without requiring a formal written request).

However, in other jurisdictions, a judge can provide a recommendation even if the judge's opinion has not been solicited by the appointing authority. In those states, a judge may:

- at the request of an attorney, write a letter to a judicial panel recommending the attorney for appointment to judicial office (*Alabama Advisory Opinion 98-689*);
- write a letter to the judicial council concerning the qualities and abilities of an applicant for a judicial position even if the letter was not solicited by the council (*Alaska Advisory Opinion 97-1*);
- support, in an unsolicited letter, a candidate seeking appointment to a judicial position through the selection process (*Florida Advisory Opinion 89-15*);
- initiate correspondence with a judicial nominating commission regarding the qualifications of applicants (*Florida Advisory Opinion 95-24*);
- make a recommendation regarding a candidate for appointment to a judgeship regardless whether the judge's views were requested (*Maryland Advisory Opinion 1980-1*);
- write a letter of recommendation, solicited or unsolicited, to the judicial nominating commission on behalf of an applicant for a judicial position (*Oklahoma Advisory Opinion 02-1*);
- volunteer information or submit a name for a candidacy (*South Carolina Advisory Opinion 9-1989*); and
- offer unsolicited information to the judicial nominating commission (*Utah Informal Advisory Opinion 99-8*).

Some advisory committees distinguish between recommendations made to *nominating* authorities and those made to *appointing* authorities. The Kansas judicial ethics committee, for example, advised that a judge may write a letter addressed to the nominating commission stating that she believes

a potential nominee is qualified to fill a vacancy, but may not write a letter to the appointing authority because such a recommendation would constitute an endorsement of a candidate for public office prohibited by the code. *Kansas Advisory Opinion JE-40* (1992). Thus, a judge may not write a letter of recommendation to the governor endorsing one of three candidates recommended for a judicial vacancy (*Kansas Advisory Opinion JE-27* (1989)), to the President or members of Congress supporting the appointment of a potential nominee to the federal judiciary (*Kansas Advisory Opinion JE-45* (1993)), or to a district judicial nominating commission that has the final word in selecting a magistrate judge (*Kansas Advisory Opinion JE-128* (2005)). Similarly, an Alaska advisory opinion states that sending an unsolicited letter to the governor is improper because the "Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political." *Alaska Advisory Opinion 97-1*.

Other states, however, do not draw that distinction. See *Florida Advisory Opinion 88-1* (judge may communicate a statement in support of, or in opposition to, a person whose appointment is pending before the governor); *Maryland Advisory Opinion 1980-1* (judge may give views concerning applicants for a judgeship to those who may be in a position to recommend appointments to the governor).

Several opinions supply guidance regarding the way in which a judge should communicate any recommendation or evaluation in the judicial selection process to avoid abusing the judicial position. As in all recommendations, the judge must have personal knowledge of the person being recommended. Further, the judge should avoid pleading for or endorsing one candidate as opposed to all others. *Florida Advisory Opinion 95-24*; *Massachusetts Advisory Opinion 94-1*; *Oklahoma Advisory Opinion 02-1*; *U.S. Advisory Opinion 59* (2009). Committees advise that a judge should not lend his name to a publicity campaign for a candidate (*Massachusetts Advisory Opinion 94-1*; *Oklahoma Advisory Opinion 02-1*; *U.S. Advisory Opinion 59* (2009)), or actively solicit support and engage in other activities on behalf of an applicant, including asking community leaders, lawyers, and others to write letters of support (*Florida Advisory Opinion 91-28*). At least two committees require that the judge's letter of

support must remain private (*Arizona Advisory Opinion 87-1*) or that the judge reasonably expect that the endorsement will not be publicly announced or publicly distributed (*Oklahoma Advisory Opinion 02-1*).

Further, a judge's recommendation should:

- address those qualities that relate to the criteria used by the nominating commission in evaluating applicants (*Alaska Advisory Opinion 97-1*);
- be and appear to be directed only to factors relevant to performance of the judicial office (*Massachusetts Advisory Opinion 94-1*; *Oklahoma Advisory Opinion 02-1*; *U.S. Advisory Opinion 59* (2009));
- avoid addressing the substantive merits of any social or political issue surrounding the nominee (*Massachusetts Advisory Opinion 95-9*);
- be "objective and informative" (*Massachusetts Advisory Opinion 94-1*; *Oklahoma Advisory Opinion 02-1*; *U.S. Advisory Opinion 59* (2009));
- be factual, even-handed, succinct, and discreet (*Florida Advisory Opinion 89-15*; *Oklahoma Advisory Opinion 02-1*); and
- be an honest assessment of the candidate (*Utah Informal Advisory Opinion 94-5*).

See also *Connecticut Informal Advisory Opinion 2008-10* (judge may not write a letter of recommendation for a relative who is being considered for a judgeship); *Pennsylvania Informal Advisory Opinion 6/6/02* (judge should state that a recommendation for an appointment is not to be considered an endorsement for subsequent election); *Utah Informal Advisory Opinion 99-8* (providing information to individual nominating commission members is discouraged, but not unethical).

In some states, bar associations establish committees that evaluate candidates for elective judicial office, and judges have been given permission to provide information to these evaluation committees.

- A judge may answer written questions from a bar association that is evaluating a candidate for a judgeship and discuss personal observations of the candidate, but should not discuss the candidate's character. *Pennsylvania Informal Advisory Opinion 2/4b/05*.
- A judge may respond to inquiries from an independent judicial election qualifications commission or a bar association judicial candidate

evaluation committee about the qualifications of candidates for elective judicial office. *New York Advisory Opinion 07-130*.

- A judge may respond to a mass e-mail that a bar association judicial screening committee sends to its general membership asking about the qualifications of an attorney who is a potential candidate for judicial office but should neither urge approval nor disapproval of a candidate. *New York Advisory Opinion 08-160*.

LETTERS IN ADJUDICATIVE PROCEEDINGS

In formal adjudicative proceedings, letters of recommendations from judges raise additional questions of propriety under the last sentence of Canon 2B of the code of judicial conduct: “A judge shall not testify voluntarily as a character witness.” Advisory opinions have interpreted that prohibition to apply, not only to court proceedings, but to any investigatory or adjudicative proceeding, regardless whether administrative, civil, or criminal, where a person’s legal rights, duties, privileges, or immunities are determined. In 2007, the provision was clarified, and Rule 3.3 of the model code now provides. “A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.”

Sentencing

Judicial ethics advisory opinions addressing the question have, without exception, declared that a judge may not voluntarily write a letter to another judge in connection with the sentencing of a defendant in a criminal matter at the request of the defendant or counsel on the defendant’s behalf even if the sentencing judge is not in the same jurisdiction as the judge writing the letter. *Alabama Advisory Opinion 00-744* (on behalf of acquaintance); *Arkansas Advisory Opinion 2005-1* (lifelong friend); *Florida Advisory Opinion 75-18* (letter to federal judge); *Illinois Advisory Opinion 95-12*; *Indiana Advisory Opinion 5-91* (on behalf of lawyer in judge’s county); *Massachusetts Advisory Opinion 97-2*; *New York Advisory Opinion 88-63* (court employee); *New York Advisory Opinion 89-73* (lawyer); *New York Advisory Opinion 91-46* (close friend); *Pennsylvania Informal Advisory Opinion 10/24/07* (neighbor’s son); *Pennsylvania Informal Advisory Opinion 9/13/05* (son’s former coach); *Washington Advisory Opinion 92-17* (adult child of family friend); *West Virginia Advisory Opinion* (March 19, 2007) (family member of good friend).

The prohibition also applies to a request for a character reference to be used at a bond hearing (*South Carolina Advisory Opinion 21-2005*) or in support of a bail application for a former client

(*New York Advisory Opinion 98-88*). Further, a judge may not submit a recommendation to a district attorney in connection with a former law clerk’s plea bargain (*New York Advisory Opinion 89-4*) or regarding a close friend’s arrest for driving while intoxicated (*Pennsylvania Informal Advisory Opinion 3/12a/08*).

A letter or other communication from a judge on behalf of a person awaiting sentencing may be viewed as an implied request by the judge for favorable treatment of the defendant. *Alabama Advisory Opinion 00-744*. A judge is prohibited from writing a character reference for use in sentencing even if the letter is written on plain paper without using the judicial title, is addressed “To Whom It May Concern,” is based on the judge’s personal observations, and is given to the defendant’s attorney. *Washington Advisory Opinion 92-17*.

Several judges have been disciplined for writing character reference letters, using official court stationery, on behalf of friends to sentencing judges.¹ In *Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994), for example, the Florida Supreme Court acknowledged that the judge’s letter, “standing alone, constitutes no major act of judicial misconduct. Judge Fogan said some nice things about a friend. These things are, no doubt, also things that a sentencing judge may like to know, especially when they come from another judge.” The court concluded, “therein lies the danger that the Canons seek to curb.”

Judges must not act on their own initiative, especially

1. *Inquiry Concerning Abel*, 632 So. 2d 600 (Florida 1994) (public reprimand for authoring and mailing a letter on official court stationery to a federal judge as a character witness and reference on behalf of a defendant who had pled guilty); *Inquiry Concerning Stafford*, 643 So. 2d 1067 (Florida 1994) (public reprimand for writing a letter on official court stationery to a United States probation officer as a character witness and reference on behalf of a convicted defendant); *Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994) (public reprimand for writing a character reference letter on official court stationery for a personal friend waiting to be sentenced in federal court); *Inquiry Concerning Ward*, 654 So. 2d 549 (Florida 1995) (public reprimand for a letter to a federal judge that extolled the virtues of a friend and recommended a sentence of probation); *In re Decuir*, 654 So. 2d 687 (Louisiana 1995) (censure for, in addition to other misconduct, writing a letter to a federal judge concerning the sentencing of friend); *In re Marullo*, 692 So. 2d 1019 (Louisiana 1997) (writing a letter on official stationery to a sentencing judge was misconduct; no sanction warranted); *In the Matter of Martin*, Determination (New York State Commission on Judicial Conduct December 26, 2001) (www.scjc.state.ny.us) (admonition for twice sending ex parte letters on judicial stationery that sought special consideration for defendants who were awaiting sentencing in other courts); *In re Bonner*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct August 3, 2007) (www.cjc.state.wa.us/) (admonishment for writing a letter on court stationery using the judicial title to a sentencing judge at the request of the defendant).

in judicial proceedings, to lend the prestige of their office for the private benefit of another. This practice and its appearance undermines the very prestige and respect that is being traded upon and, inevitably, erodes public confidence in the judiciary.

The argument that a judge is not “testifying” because a letter is not under oath was rejected in *Fogan*. The court held that the prohibition on testifying as a character witness was sufficiently broad to encompass a written statement voluntarily submitted with the knowledge and understanding that it may be used directly or indirectly in some adjudicatory proceeding.

If a judge is properly summoned to testify, however, a judge is obligated to comply. *See, e.g., Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994). Moreover, a judge may answer an official request for information from the sentencing judge (*Illinois Advisory Opinion 95-12*), the prosecutor (*Arkansas Advisory Opinion 2005-1*), a parole and probation officer on behalf of the sentencing judge (*Florida Advisory Opinion 75-22*), or the probation department (*New York Advisory Opinion 91-46*). A defense attorney’s representation that a probation officer has requested a letter, however, is not an official, formal request to which a judge may respond. *Inquiry Concerning Ward*, 654 So. 2d 549 (Florida 1995). Moreover, a letter extolling a defendant’s virtues and recommending a particular sentence is not “information” within the meaning of the exception, but a prohibited character reference. *Inquiry Concerning Ward*, 654 So. 2d 549 (Florida 1995).

Both the general rule and the exception were expressly incorporated in commentary to Canon 2B of the 1990 model code: “A judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.” That provision was omitted from the 2007 model code. The California code of judicial conduct creates an exception to the prohibition on communications to a sentencing judge or a probation or corrections officer that allows a judge to “initiate communications with a probation or corrections officer concerning a member of the judge’s family, provided the judge is not identified as a judge in the communication.”

Pardon and parole

Similarly, a judge is not permitted to make a recommendation regarding parole, pardon, or clemency. *See Alabama Advisory Opinion 78-44* (pardon or parole); *Florida Advisory Opinion 77-17* (parole); *Florida Advisory Opinion 82-15* (pardon); *Florida Advisory Opinion 97-7* (clemency for former client); *New York Advisory Opinion 97-92* (probation for former client); *New York Advisory Opinion 08-143* (clemency for former litigant); *Pennsylvania Informal Advisory Opinion 3/22/04* (presidential pardon); *South Carolina Advisory Opinion 6-1994* (pardon for college classmate); *Texas Advisory Opinion 146* (1992) (parole); *Texas Advisory Opinion 207* (1997) (presidential pardon); *U.S. Advisory Opinion 65* (2009) (commutation of sentence; pardon, parole).

Even the judge who sentenced an inmate may not provide a recommendation about parole or clemency although the judge may provide information in response to an official request. *See, e.g., Kansas Advisory Opinion JE-79* (1998); *U.S. Advisory Opinion 65* (2009). *But see Alabama Advisory Opinion 83-177* (judge who presided over trial may respond, either positively or negatively, to proposed parole for inmate where a statute requires that the trial judge be given notice of the impending parole). The Illinois advisory committee emphasized that a judge may respond only to a direct and formal request from the prisoner review board and that neither the petitioner’s notification to the sentencing judge of a clemency hearing nor a general invitation for comments directed to interested parties and published in a newspaper constitutes an official request. *Illinois Advisory Opinion 05-6*. Further, the Alaska advisory committee cautioned that a sentencing judge who responds to an official request by the pardon or parole board should refrain from giving personal opinions and should narrowly address the criteria used by the pardon or parole board. *Alaska Advisory Opinion 2003-1*. The opinion did add that, “because the only permissible communications are ‘official’ communications, official court stationery should be used for the letters to the pardon or parole board.”

A few advisory committees have allowed a judge to write a letter of recommendation on behalf of a

fomer client to a pardon or parole board in response to an official request. The New York judicial ethics committee cautioned that the statement must be based upon the judge's knowledge of the inmate and be designated "personal and unofficial." *New York Advisory Opinion 97-92*. The Tennessee judicial ethics committee concluded that a judge may write a letter to a parole or pardon board on behalf of a former client because a judge "should not be required to forego his or her First Amendment right to free speech in all instances." *Tennessee Advisory Opinion 94-5*. The committee noted that the judge believed his former client had a meritorious cause, emphasizing that its opinion should not be broadly interpreted, but was limited to the facts of the particular request.

In contrast, the Florida advisory committee stated that a judge should not provide a *recommendation* regarding a former client who was seeking commutation of his sentence even in response to a request from the parole and probation commission although the judge could furnish *information*. *Florida Advisory Opinion 84-14*. The committee was concerned that a letter of recommendation would inject the prestige of the judicial office into the proceeding and be misunderstood as an official testimonial. The committee also noted a potential for a conflict between the judge's "duty as an attorney not to reveal matters unfavorable" to a former client, and her "duty as a judge to be completely candid and truthful."

There may also be an exception for judges who are former prosecutors. The Washington advisory committee stated that a judge may, based on information the judge learned while acting as the prosecuting attorney, write a letter to the indeterminate sentence review board that focuses on the nature of the defendant's criminal activity and its impact on the victims. *Washington Advisory Opinion 97-14*. The committee cautioned that the letter should not be on official letterhead or refer to the judge's current position and should use the judge's personal address.

The Alabama advisory committee stated that a judge may write a letter opposing the parole of a prisoner from a sentence imposed as the result of a conviction prosecuted by the judge as an assistant district attorney where a statute envisions that officers of the court who participated in the trial can

provide input into the parole decision. *Alabama Advisory Opinion 06-866*. However, the committee cautioned that the judge should not provide the information on the judge's official letterhead, should not identify herself as a judge, and should provide only facts consistent with her capacity as the trial attorney. Similarly, the Kentucky judicial ethics committee advised that a judge who had formerly served as commonwealth's attorney could comply with parole board rule requiring a prosecutor to write a letter saying he has no objection to a felon receiving early parole board review. *Kentucky Advisory Opinion JE-81* (1991).

An Alaska advisory opinion allows judges to write a letter to the pardon or parole board "in their personal capacity when a member of their immediate family is either the victim of the crime or the convicted person coming before the board." *Alaska Advisory Opinion 2003-1*.

Disciplinary proceedings

In most states, the rule against voluntary character testimony has been construed to prohibit a judge, unless requested by bar officials, from writing a character letter to be used in attorney disciplinary proceedings. Thus, a judge may not:

- provide a letter on behalf of a disbarred attorney seeking re-admission to the bar (*Florida Advisory Opinion 88-19*; *Missouri Advisory Opinion 137* (1988); *New York Advisory Opinion 95-75*);
- submit a character letter to the state supreme court in bar proceedings to suspend an attorney pending an appeal from a conviction for tax evasion (*Florida Advisory Opinion 75-6*);
- send a letter or affidavit attesting to an attorney's character, competence, and service to the bar and his clients for use at a hearing to determine the sanction in a discipline proceedings (*Nebraska Advisory Opinion 02-2*);
- provide a character reference on behalf of a lawyer seeking reconsideration of disbarment (*New York Advisory Opinion 89-73*);
- provide a letter of support for a lawyer in a proceeding involving either discipline or reinstatement (*North Dakota Advisory Opinion 91-1*);
- write a letter in a support of a lawyer who is being investigated by a discipline committee

(*Pennsylvania Informal Advisory Opinion 7/29/02*); or

- sign an affidavit attesting to the competency of an attorney to be used in a grievance proceeding (*Texas Advisory Opinion 277 (2001)*).

See also *Connecticut Informal Advisory Opinion 2008-15* (judge may not provide a letter of reference for use in an adversarial character and fitness proceeding). The prohibition applies even if the attorney is being investigated for conduct that occurred in a trial over which the judge presided. See *Florida Advisory Opinion 92-1*; *New York Advisory Opinion 90-156*.

Similar advice has been given regarding judicial discipline proceedings.

- An administrative judge should not write a letter to the State Commission on Judicial Conduct expressing her views of the professional performance of a judge who is the subject of a matter before the Commission. *New York Advisory Opinion 99-101*.
- A judge may not write a letter at the request of another judge's lawyer about his impressions of the other judge to be submitted to the supreme court with the response to judicial discipline charges *West Virginia Advisory Opinion* (September 4, 1997).

See also *New York Advisory Opinion 97-97* (in review of determination of the State Commission on Judicial Conduct, individual judges and a judges' association should not communicate with the Court of Appeals that a judge, who is a member of the association, should not be removed); *In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000) (it is, "at least, inadvisable" for a judge to write a letter speaking to the character of a respondent in judicial disciplinary proceeding).

However, at least three states allow a judge to write a reference letter in discipline proceedings even absent an official request. Canon 2B(2)(b) of the California code of judicial conduct permits judges, even without a subpoena, to "provide the Commission on Judicial Performance with a written communication containing . . . information related to the character of a judge who has a matter pending before the commission, provided that any such factual or character information is based on personal knowledge."

The Washington advisory committee reasoned that a character letter from a judge to the Washington Bar Association concerning the reinstatement of a disbarred attorney was appropriate because the bar association operates as an arm of the supreme court. *Washington Amended Advisory Opinion 88-5*. See also *Washington Advisory Opinion 03-8* (judge may provide factual testimony to bar association about attorney's professional skills in a letter that will be part of the attorney's disciplinary file, not as a mitigating factor but as an acknowledgment that the lawyer is considered an excellent trial attorney).

The Alabama advisory committee has also issued several opinions allowing a judge to submit a letter of support or an assessment of an attorney's performance in discipline proceedings. *Alabama Advisory Opinion 78-48* (judge may respond to a general notice of a petition for reinstatement to the state bar that requests that members of the public furnish information relevant to the qualifications of the petitioner); *Alabama Advisory Opinion 80-84* (judge may submit a letter in support of an attorney's application for reinstatement at the attorney's request); *Alabama Advisory Opinion 86-269* (judge may submit a letter to the Board of Bar Commissioners in support of an attorney against whom disciplinary action has been taken or is being contemplated); *Alabama Advisory Opinion 89-390* (judge may submit an assessment of an attorney's performance at a trial over which the judge presided to the state bar grievance committee even if the case is pending on appeal).

A judge is permitted to furnish the judge's opinion about a lawyer's character in response to an official request from the referee in attorney discipline proceedings (*Nebraska Advisory Opinion 02-2*); from the presiding hearing officer or disciplinary committee or its counsel (*New York Advisory Opinion 89-73*); or from a discipline committee that is investigating a lawyer (*Pennsylvania Informal Advisory Opinion 7/29/02*). In addition, a judge may authorize a lawyer to tell the disciplinary committee that it may contact the judge (*New York Advisory Opinion 90-156*). See also *Commentary to Canon 2B, California Code of Judicial Ethics* (judge "shall provide information to disciplinary bodies when officially requested to do so").

Judges are also prohibited from providing letters of recommendation in disciplinary proceedings

involving court employees or individuals in other professions.

- A judge may not write a letter attesting to the character of a court employee and opposing termination of the employee for disciplinary reasons for use in the appeal from a termination decision. *Massachusetts Advisory Opinions 04-4 and 04-5*.
- A judge should not write a letter at the request of a court employee facing disciplinary charges attesting to the employee's good character, work ethic, and job performance. *New York Advisory Opinion 05-34*.
- A judge may not write a letter of support on behalf of the judge's personal physician in a hearing by state medical licensing authorities considering whether the doctor may continue to practice. *Nevada Advisory Opinion JE04-004*.

Other proceedings

Other situations in which judges have been warned against providing a letter of recommendation or similar reference, at least without an official request, include family court, permit and licensure, and immigration proceedings and in support of terminated employees or insurance applications.

- A judge should not, without a subpoena or official summons but under threat of subpoena, sign an affidavit providing opinion evidence concerning the parenting skills of the parties in a pending matter, identifying himself as a judge, and stating that his opinion was shared by other judges in the county. *In re Poyfair, Stipulation, Agreement, and Order* (Washington State Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa.us).
- A judge may not write a recommendation for use in a pending marital dissolution in which custody of a child is at issue to the effect that the judge's stepson is a person of good character. *California Advisory Opinion 40* (1988).
- A judge may not provide pretrial character testimony to a guardian ad litem in a post-dissolution of marriage action involving a close personal friend even if it is pending outside the judicial circuit of the inquiring judge. *Florida Advisory Opinion 2003-19*.

- A judge may not voluntarily provide a reference in support of an attorney's application to adopt a child that will become part of the file to be considered by the court, which is located in the same county where the judge presides. *New York Advisory Opinion 08-211*.
- A family court judge should not provide a reference for the foster parent application of a friend because the application will be heard in family court. *New York Advisory Opinion 05-60*.
- A judge should not send a letter to an employer recommending that a former employee be reinstated. *Nebraska Advisory Opinion 07-4; Virginia Advisory Opinion 06-1*.
- A judge should not write a letter to a modeling agency asking them to reinstate an employee who had been fired after an arrest. *In the Matter of Wright, Determination* (New York State Commission on Judicial Conduct 1988) (www.scjc.state.ny.us).
- A judge should not write a memorandum to the under-sheriff in connection with the sheriff department's decision whether to keep the judge's former bailiff in a field training program. *Public Admonishment of Coates* (California Commission on Judicial Performance December 2, 2009) (<http://cjp.ca.gov/>).
- A judge should not initiate letters supporting an individual's efforts to have their civil rights restored. *Nebraska Advisory Opinion 07-4; Virginia Advisory Opinion 06-1*.
- A judge should not initiate letters supporting an individual's efforts to renew permits such as those allowing the possession of concealed weapons. *Nebraska Advisory Opinion 07-4; Virginia Advisory Opinion 06-1*.
- A judge should not provide a letter of good character on behalf of a friend applying for a license to practice acupuncture with the state department of education. *New York Advisory Opinion 93-12*.
- A part-time judge may not write a letter of reference to the sheriff in the county in which the judge presides in connection with the application of a long-time client for a pistol permit even if the letter would not mention the judicial office and would be written as an attorney on the attorney's letterhead. *New York Advisory Opinion 95-33*.

- A judge should not write a letter, on official court stationery signed in the judge's name, to the New Jersey Racing Commission extolling a client and good friend who had unsuccessfully sought a license. *In the Matter of Anastasi*, 388 A.2d 620 (New Jersey 1978).
- A judge should not write a letter of reference for his dog walker to be submitted to the United States embassy in a foreign country to aid the individual's fiancé to obtain a visa. *New York Advisory Opinion 02-123*.
- A judge should not write a letter to the state department of labor supporting an application for alien labor certification at the request of a waiter at a neighborhood restaurant known to the judge and the judge's family. *New York Advisory Opinion 03-47*.
- A judge should not voluntarily write a letter to the Immigration and Naturalization Service attesting to the good character of a member of the judge's church and requesting an expedited exclusion hearing, but may respond to a request from the INS for a letter of good character. *New York Advisory Opinion 03-51*.
- A judge may not write a "to whom it may concern" letter on behalf of an attorney who has had her insurance policy canceled as a result of a malpractice claim. *Washington Advisory Opinion 87-1*.
- A judge should not write a letter of recommendation on behalf of an attorney applying for a life insurance policy who had been addicted to a controlled substance, but has since been rehabilitated. *New York Advisory Opinion 05-107*.

SUMMARY

In general, a judge may furnish a letter of recommendation or act as a reference for a person seeking employment, admission to an educational institution or the bar, appointment to the bench, or similar situations. In addition, most opinions on the issue have advised that a judge may express a professional evaluation or opinion of a practicing attorney for use by a legal rating periodical or in connection with certification as a specialist, an eligibility list for court appointments, or a government contract.

The primary condition placed on a judge writing a letter of recommendation or acting as a reference is that the judge must have substantial personal knowledge of the person who is the subject of the reference. Further, several judicial ethics committees require or suggest that, rather than agree to write a letter of recommendation, a judge should permit himself or herself to be listed as a reference and respond to any inquiries received from an educational institution or potential employer. Another limit on recommendations prohibits a judge from writing a letter that will be used to promote an individual's business interests. A letter of recommendation may also be considered inappropriate if the recipient is a party in litigation pending before the judge or in connection with government employment that might suggest inappropriate political activity.

The majority rule permits a judge to use judicial stationery to write a letter of recommendation. Several states have adopted a variation of this rule that requires the judge to add the words "personal and unofficial" when using official stationery. In some states, whether a judge may use official stationery depends on whether the recommendation is written on behalf of a personal friend or on behalf of an individual the judge knows in an official capacity. Finally, in some states, a judge may not use official stationery for any letter of recommendation.

Some advisory opinions direct a judge not to write a "to whom it may concern" letter, not to make a recommendation on the telephone, not to promote one candidate over all other applicants, and to include disclaimers in their letters of recommendation.

A judge may provide a recommendation regarding a person being considered for judicial office. In

some jurisdictions, a judge can provide a recommendation only if requested to do so by the nominating or appointing authority, but other states permit a judge to write an unsolicited letter. Some advisory committees allow recommendations only to nominating authorities and not to appointing authorities, but other states do not draw that distinction. When providing a letter in support of a candidate for appointment, a judge should avoid pleading for or endorsing one candidate as opposed to all others and should address only factors relevant to performance of the judicial office.

In contrast, judges may not provide a recommendation in investigatory or adjudicative proceedings, regardless whether administrative, civil, or criminal, where a person's legal rights, duties, privileges, or immunities are ultimately determined. Thus, a judge may not, without an official request, write a letter to another judge in connection with the sentencing of a defendant at the request of a defendant or counsel on the defendant's behalf. Similarly, a judge may not make a recommendation regarding parole, pardon, or clemency although there may be limited exceptions for a judge who sentenced an inmate or who, while an attorney, defended or prosecuted the inmate.

In most states, the rule against voluntary character testimony has been construed to prohibit a judge, unless requested by bar officials, from writing a character letter to be used in disciplinary or reinstatement proceedings for an attorney, judge, court employee, or other professional.

