



STATE OF VERMONT
JUDICIAL ETHICS COMMITTEE

Opinion No.: 2728-24
Date: June 22, 2023
To: [name redacted in posted version pursuant to A.O. 35, ¶ 6]

The Committee has researched and reviewed the matter you presented to it. The following is the opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Questions Presented

Under what circumstances may a sitting Vermont judge serve as a reference, either written or oral, for an individual known to the judge, either in the judge’s personal life or through the judge’s service as a judge?

Short Answer

An incumbent judge may provide a reference based on personal knowledge of the individual, as long as providing the reference does not abuse the prestige of judicial office or create an appearance of impropriety.

Relevant Canons of Judicial Conduct

Rule 1.2 of the 2019 Vermont Code of Judicial Conduct (“the Code”) provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

Rule 1.3 of the Code provides that “[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so.” Comment 2 expressly permits a judge to provide references and recommendations with certain limitations:

A judge may provide a reference or recommendation for an individual based upon the judge’s personal knowledge. 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.

Rule 3.3 of the VCJC provides that “[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.” Comment 1 adds:

A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. Rule 1.3 Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Analysis

Based on Personal Knowledge

As comment 2 to Rule 1.3 of the Code provides, a reference must be based on the personal knowledge of the judge, not on the person’s general reputation or information learned solely from others. “Personal knowledge” is “[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.” Black’s Law Dictionary (11th ed. 2019). Thus, a judge may not give a reference based on an individual’s general reputation in the legal community or information the judge has received from court staff or others.

One caveat to the requirement of personal knowledge may arise in the context of an employment recommendation for law clerks and court staff. For example, even if a judge has not personally observed certain conduct by a law clerk or a member of court staff, the judge may have reliable information about that conduct that is consistent with information generally relied upon in giving employment references. The judge should carefully consider the source and context before passing on such information and should be clear about whether the judge has personally observed the conduct or not.

Personal knowledge may come from a judge’s personal or professional interactions with the individual. “A judge’s firsthand knowledge of an individual under these circumstances outweighs concerns about a potential abuse of the prestige of office.” Sup. Ct. of Ohio Bd. of Comm. On Griev. and Disc., Opinion No. 2021-12. If the judge’s knowledge of the individual is personal rather than professional, the judge should consider whether the individual requested the reference as a result of the nature of their personal relationship, or to benefit from the prestige of the judge’s position. Jud. Ethics Comm. of the Penn. Conf. of State Trial Judges, Formal Advisory Opinion 2021-1 (“Reference letters may be written by a judge for someone whom the judge knows personally and not professionally, such as a relative, close friend, neighbor, or student if the letters are the type that the judge would normally be requested to write because of the judge’s personal relationship. The relationship should be such that the judge ordinarily would be

disqualified from hearing that person's case.”).

A judge may provide references or recommendation letters for court employees, law clerks, or attorneys with whom a judge worked who seek employment in government agencies or law firms that appear frequently before the judge. In such cases, if that person appears before the judge in court after the judge has served as a reference or written a recommendation, the judge should disclose the relationship and fact that they provided a reference or recommendation, with the need to do so diminishing with the passage of time. *See* CT Comm. Jud. Eth., Informal Opinion Summaries, 2015-11 (allowing, with limitations, recommendation of former law clerk to Attorney General's Office).

Judges generally may write reference letters for law school applicants that appraise the abilities of the applicant personally known by the judge. NY Jud. Adv. Op. 88-10. Judges may also serve as references for an individual seeking appointment as a judge, as long as they have knowledge of the person's professional abilities, are contacted by the nominating or appointing body for that purpose and take care to limit their comments to the person's abilities rather than urging their appointment. NV Std. Comm. Jud. Eth., Opinion JE07-009; NY Jud. Adv. Op. 02-26. The New York advisory committee specifically determined it inappropriate for a judge to write a letter in support of a person seeking appointment to a quasi-judicial position—that is, to affirmatively reach out and support the appointment—although the judge could respond to a contact from the appointing authority requesting the judge's observations; this ensures that the judge's action cannot be seen as coercive.

In giving a reference, a judge should note the source and extent of the judge's personal knowledge. The judge should also consider asking that the reference be treated as confidential to limit undue influence beyond the intended scope of the reference. Finally, the judge should be careful not to specifically state that an applicant “should be” hired or appointed, as opposed to supporting or encouraging the candidacy, as such language risks appearing coercive.

Use of Letterhead

Comment 2 to rule 1.3 of the Code provides two areas of consideration before using official letterhead in conveying a reference. First, the reference must be personal, as discussed above. Advisory committees in Virginia and New York recommend that the communication be marked “personal and unofficial.” Va. Eth. Op. 06-01. However, North Carolina's advisory committee has suggested that in most cases, a judge should use personal stationery because the reference is personal, except if a state official requests input in a professional capacity. N.C. Judicial Ethics Formal Advisory Op. 2007-92. Although there are differing thoughts on the matter, this Opinion concludes that official letterhead should not be used for a reference for an individual known to the judge in the judge's private capacity, such as a neighbor or social acquaintance, because, even if marked “personal and unofficial,” the use of letterhead could reasonably be viewed as attempting to use the prestige of the judicial office for the individual's private gain. A minority of the Committee believes that Rule 1.3, consistent with comment 2, leaves open

the possibility that there may be circumstances in which official stationery could be used for a reference for a neighbor or social acquaintance without exerting inappropriate pressure.

Second, the circumstances should present little or no likelihood that someone could reasonably perceive use of the letterhead as an attempt to use the judicial office to exert pressure. For example, if the judge has reason to believe the reference may be used in litigation or in the course of an investigation into wrongdoing, a reference letter would likely be improper, particularly one on official letterhead, except in response to a specific inquiry or legal process. Absent a request, an objective person could reasonably perceive the reference as abusing the prestige of judicial office.

This second consideration also affects the content of a letter of reference. As Rule 3.3 prohibits a judge from testifying as a character witness, a letter of reference that could be used in litigation or a disciplinary investigation should focus on facts and observations the judge has made about the individual, rather than on the individual's general character. In the context of an employment recommendation or qualification for an award, where general comments about character ("works hard," for example) are less likely to be seen as in the nature of testimony, a judge may comment more freely, but should always consider whether the comments, or how they are phrased, could be seen as an abuse of the prestige of the office.

Circumstances of Reference

The circumstances must not risk an appearance of inappropriately using the prestige of the judge's judicial office to further (or harm) the individual's personal or economic interests. Before serving as a reference or writing a letter of recommendation, a judge should "consider whether their position might be perceived as exerting pressure by reason of their office and . . . refrain if it would." ABA, Annotated Model Code of Judicial Conduct at 92 (3d ed. 2016). In other words, when providing a reference or writing a recommendation, the judge should confine comments to what they know about the person's abilities or qualities that relate to the specific position for which the person is applying, rather than urging or pressuring the recipient to hire the person. Similarly, the reference should not explicitly *recommend* that a person be appointed as a judge or to a quasi-judicial body. NY Jud. Adv. Op. 02-26.

This may be obvious, but the judge should always consider the context of the request or the purpose for which the letter of recommendation is requested. For example, if the judge knows the person only in passing, it is more likely that the person is seeking to use the judge's office to advance the person's own interests. As mentioned above, a written reference should not be given if it will be offered in litigation or as part of a law enforcement or administrative investigation, absent circumstances that would avoid the risk of appearing to misuse the judicial office, such as a specific inquiry from the tribunal or investigator.

While this Opinion cannot possibly address all situations in which a judge may be

called upon to give a reference or write a letter of recommendation, common requests that state judicial ethics advisory bodies generally have approved include references and letters of recommendation for individuals seeking employment or admission to law school, and references for individuals seeking appointments as judges. *See* Cynthia Gray, *Recommendations by Judges at 2–4* (2009).

Comment 3 to Rule 1.3 specifically acknowledges the importance of the observations of sitting judges in the judicial selection process:

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.

Note, however, that the comment only contemplates response to inquiries from selection entities and does not sanction judges providing unsolicited observations or recommendations. Voluntarily sending a letter of reference could reasonably be seen as abusing the prestige of office.

Method of Communication

When providing written recommendations, it is advisable to be as specific as possible and to avoid writing “to whom it may concern” letters. NC Jud. Stand. Comm., Formal Advisory Opinion: 2007-02. Any letter should specifically be sent to the institution or group accepting the recommendations, not to the applicant. Va. Eth. Op. 06-01, Under some limited circumstances, a non-specific greeting may appear less coercive than one specifically addressed to an individual, so the judge should carefully consider the particular situation and relationships.

When providing a reference by telephone, a judge generally should not initiate the call because of “the greater risk that the call may be perceived as coercive or as an improper use of judicial prestige.” Va. Eth. Op. 06-01. In other words, the judge should wait for a request from the person or entity seeking the reference (e.g., a prospective employer or nominating committee) to speak with the judge, rather than contacting that person or entity by telephone unsolicited.

When References Should Not Be Provided

Although this Opinion can not address all possible situations, as any individual request may have nuances that would make a reference inadvisable, there are some situations when a reference should not be given.

Rule 3.3 requires that a judge not testify as a character witness, absent a subpoena or other order from the tribunal. This would extend to providing a reference or written letter of support that would be the substantial equivalence of testimony. Thus, the Virginia Judicial Ethics Advisory Committee, Va. Eth. Op. 06-01, 2006 WL 6574587, has advised

that judges should not initiate letters

- “supporting someone’s efforts to have their civil rights restored,”
- “supporting ... attempts to renew permits,” or
- recommending that an employer reinstate a person.

The Connecticut Committee on Judicial Ethics notes that a judge may not provide a reference for a relative seeking a judicial appointment or for any person seeking a government position that might have political implications. CT Comm, on Jud. Ethics, Op. 2015-11.

A judge should not give a reference for someone currently appearing before the judge, as the appearance of impartiality is at risk. If a judge gives a reference for a lawyer or another person who is not currently appearing before the court but may appear in the future, the judge should disclose the reference in any proceeding in which the individual appears for a reasonable period after the reference was made or was effective. If, however, the judge believes that after disclosure recusal will be likely or necessary, particularly if that recusal might occur frequently, then the judge should consider not giving the reference in the first place.

Finally, even if all the considerations above are met, a judge may choose to decline an invitation to provide a recommendation at any time. The judge should certainly do so if the judge believes that given the specific circumstances involved, providing a recommendation would create an appearance of impropriety or abuse of judicial office.

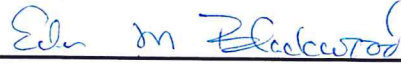
Conclusion

An incumbent judge may provide a reference based on personal knowledge of the individual, as long as providing the reference does not abuse the prestige of judicial office or create an appearance of impropriety. Personal knowledge may arise out of a personal or professional relationship but should generally be based on the judge’s own observations and interactions.

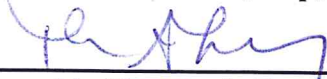
Use of official letterhead is permitted, but using that letterhead in relation to a person known primarily through the judge’s private life is not appropriate. The lack of connection between the judicial position and the judge’s knowledge of the individual increases the risk of an appearance of improper use of the prestige of judicial office.

In deciding whether to give a reference, a judge must consider all of the circumstances and context, particularly whether providing the reference would create the appearance of abuse of the prestige of office, and must avoid any circumstances that would cause the judge to violate any other provisions of the Code, such as the prohibition on testifying as a character witness.

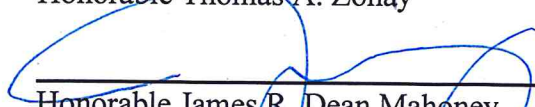
Members of the Judicial Ethics Committee



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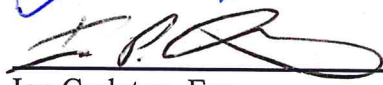
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