To:

, Judicial Ethics Committee

From:

Date: April 22, 1997

Re: Judicial Ethics Committee Opinion
Question from the

QUESTION PRESENTED

Does a judge's participation in either the Boy Scouts of America, serving on the "advancement committee," or the Masons, serving as a member, violate Canon 2C of the Vermont Code of Judicial Conduct?

SHORT ANSWER

The analysis must necessarily focus on whether or not the **selection of members** by either of these organizations arbitrarily excludes potential members on the basis of a characteristic considered "protected" by Canon 2C. Although this memo provides guidance on the question of arbitrary exclusion in membership selection, such analysis cannot be completed until there is sufficient information about each organization's selection process.

DISCUSSION

The Vermont Supreme Court adopted portions of the 1990 Model Code of Judicial Conduct in May of 1994.

Canon 2C of the Vermont Code of Judicial Conduct reads:

> A judge shall not hold membership in any organization that, in the selection of members, practices invidious discrimination on the basis of race, sex, sexual orientation, religion or national origin.

The *Report's* Notes provide some additional guidance. The prohibition in Section 2C extends only to those organizations that practice invidious discrimination in membership selection, and whether such discrimination is employed depends on the methods of selection employed in light of the purposes of the organization. ***Reporter's Notes*** (citing Commentary, Section 2C, ABA Model Code of Judicial Conduct (1990)). Generally, an organization "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members" does not practice invidious discrimination because the exclusion from membership on the prohibited grounds is not ***arbitrary.*** Id. Discriminatory exclusion, in the absence of such an independently valid purpose, is arbitrary and thus invidious. Id.[1]

The principal function of the new provision in the 1990 Model Code is to bar membership in discriminatory social clubs. Shaman, judicial Conduct and Ethics $10.18 at 325 (1995, 2d Ed.). Such membership "gives rise to the perceptions that the judge's impartiality is impaired." Id. (quoting Commentary, Section 2C, ABA Model Code). Whether the group practices "invidious discrimination" is not determined simply from an examination of its current membership list. Id. Instead, the key issue is the manner in which the organization selects its members: a club will be said to discriminate if it "arbitrarily excludes from membership"--on the basis of race, religion, sex, or national origin--those people who would otherwise be admitted to membership. Id. at 325-326.

---

[1]The ***Reporter's Notes*** also indicate that a purely private organization, whose membership limitations cannot be constitutionally prohibited, does not invidiously discriminate within the meaning intended by the Model Code. Whether or not an organization is purely private is explained in Roberts v. United States Jaycees, 468 U.S. 609 (1984) and Bd. of Dir. of Rotary Int'l. v. Rotary Club, 481 U.S. 537 (1987). ***infra.***

Thus, the difficult question is, does the particular group in question dedicate itself to a common interest or purpose such that its exclusion of certain people from membership cannot be deemed arbitrary and thus invidious.

Other States

Many other states have adopted the 1990 Model Code; however, the likelihood of confusion or misinterpretation regarding the term "invidious discrimination" has lead many states to either change the language of the new Canon 2C or make explicit commentary on its meaning and purpose.

As noted by Judge the Florida Code of Judicial Conduct makes several significant changes to the Model Code, Specifically, Canon 2C reads:

> A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. ***Membership in a fraternal,. soroal, religious, or ethnic heritage organization shall not" be deemed to be a violation of this provision.***

32 F.S.A. Code of Judicial Conduct (Emphasis added).[2] As the commentary makes clear:

> This Canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, 'such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs and Girl's Clubs; and charitable organizations,, such as United Way and Red Cross.

Commentary (Emphasis added). The commentary ***goes*** on to state that purely private organizations are also exempt from this provision in the code, and several United States Supreme Court cases on point are referenced (see ***infra*** for cited cases).

---

[2] n.b. The Florida code provides that a judge ***"should not"*** hold such membership whereas the Vermont code provides that a judge ***"shall nor."***

Other states have attempted various means of clarification of Section 2C. In Texas, for example, the word "knowingly" has been added to Canon 2C. (Judicial Conduct Reporter, Summer 1993, at 7). Other states have attempted to clear up confusion by amending or changing the word "invidious." Maine, for example, changed Canon 2C of the Model Code to read: a judge should not hold membership in an organization that practices "unlawful" discrimination. (Id., at 6). The Commentary to the Maine Code of Conduct explains the change:

> unlawful discrimination was substituted for the phrase 'invidious discrimination used in the Model Code in the interests of greater clarity and specificity. [D]iscrimination is 'unlawful* for the purposes of Canon 2C when it is the type that is prohibited by applicable state or federal law.

(Id.) Minnesota also changed the provisions of Canon 2C of the Model Code from "invidious discrimination" to "unlawful discrimination." (Id., Fall 1995, at 6).

Oregon adopts the spirit of the Model Code Section 2C, but not the letter of 2C. Instead,. the Oregon Code prohibits

> . . . membership in an organization that the judge knows is discriminatory. For purposes of this rule, "discriminatory organization'* means an organization that, as a policy or practice and contrary to applicable federal or state law, treats persons less favorably in granting them membership privileges, allowing participation or providing services on the basis of race, religion, sex or national origin.

(Judicial Conduct Reporter, Fall 1995, at 7).

Louisiana also prohibits membership in "discriminatory organizations" as opposed to membership in organizations which invidiously discriminate. (Judicial Conduct Reporter, Summer 1996, at 4). The commentary to the Louisiana Code explains: "the judge shall not hold membership in any organization that arbitrarily excludes from membership on the basis of

race, religion, sex or national origin. " (Id.) But the commentary also makes clear, "the term organization shall not include, however, an association of individuals dedicated to the preservation of religious, ethnic, historical or cultural values of legitimate common interest to its members; or an intimate, distinctly private association of persons..." (Id.)

And, as the South Carolina Code clarifies, an organization so dedicated to the preservation of the various values or a college, university or school related organization "...is not considered to discriminate invidiously if it does not *stigmatize* any excluded persons as inferior and therefore unworthy of membership." (Id, Fall 1996, at 2)(Emphasis added).

Delaware uses the Model Code language but explains that in order to determine whether an organization discriminates invidiously one should examine:

> the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.

(Id.) The Georgia Code also attempts to define "invidious discrimination": "any action by an organization that characterizes some immutable individual trait such as a person's race, gender or national origin, as well as religion, as *odious* or *signifying inferiority,* which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in .the organization." (Judicial Conduct Reporter, Fall 1993, at 4)(Emphasis added). Similarly, the North Dakota Code attempts to set out a means of identifying invidious discrimination by adopting the language from the Model Code Commentary regarding an examination of the' "size and nature of the organization and the diversity of the persons in the locale.. . " (Id., Fall 1993, at 5).

Although the others states' changes, clarifications and noted exceptions are useful for guidance, the fact remains that the Vermont Code of Judicial Conduct adopts the plain language forbidding participation in groupsthat practice invidious discrimination in selection. Therefore, the commentary from other states' codes of conduct may help guide the analysis of whether the selection process in the Boy Scouts and the Masons arbitrarily excludes potential members on the basis of a protected characteristic, but it is not dispositive.

Social Organizations

If the organization is purely private, then the state has no power to control its selection of members and judicial participation in the organization would not be forbidden by the Vermont code. Membership in a "purely private" organization is protected by the First Amendment right of association.

To determine whether an association is personal or private, a court should consider' factors such as "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 546 (1987). The family relationship, for example, is distinguished by such traits as its smaller size, the "high degree of selectivity in decisions to begin and maintain the affiliation, [and] seclusion of others in critical aspects of the relationship." Roberts v. United States Jaycees, 468 U.S. at 620.

As the Jaycees only criteria for selection into the group were age and sex, the United States Supreme Court concluded that neither the national organization nor the local chapters possessed the "distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." Id. at 621. Likewise, the Rotary clubs' policy of "inclusive 'fellowship for service based on diversity of interest..' [was not the type of] private

or personal relationship" protected by the constitution. Bd. of Dir. of Rotary Int'l. v. Rotary Club, 481 U.S. at 547.

Although, as indicated *infra*, details on the membership selection process in both the Boy Scouts and the Masons are sparse, it is very unlikely that either of these groups--both characterized by large size and inclusive nature--would be deemed "purely private." Therefore, the only question presented is whether either or both of these organizations practice "invidious discrimination" in the membership selection process.

Invidious Discrimination

According to the Florida Code, fraternal, religious, or ethnic heritage clubs are exempted. According to another state, the organization should not limit membership in a way that would violate state or federal discrimination law. Yet another state forbids discrimination in membership selection that would stigmatize persons as inferior. And still another forbids discrimination that treats an immutable characteristic as "odious" or signifying inferiority.

As "traditionally" defined by the United States Supreme Court in Roberts v. United States Jaycees, the forbidden discrimination is

> discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes [which] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives a person of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts, 468 U.S. at 625 (citation omitted).

Recently, the United States Supreme Court discussed the term "invidious discrimination" within the context of a possible 42 U.S.C. §1985(3) cause of action. In Brav v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), the Court found that such discrimination requires

either a "discriminatory animus" behind the actions or that the purpose behind such actions focus solely on the forbidden characteristic if there is to be a cause of action. Bray v. Alexandria, 506 U.S. at 268-270.

While all of these definitions provide some parameters, the most straightforward and consistent definition remains: if the exclusion from membership is based on selection aimed at the preservation of cultural values of legitimate common interest to the organization, then the discrimination is not arbitrary and not "invidious."

Two cases, Roberts v. United States Javcees and Bd. of Dir. of Rotary Int'l v. Rotary Club, both of which involved the application of a state discrimination law to the organization, required the Court to balance the State's interest in eradicating -discrimination with the organization's associational interests. In the latter case, the Court considered the values of common interest to the Rotary Club, "an organization of business and professional men united' worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world," and whose membership committee evaluated a candidate's "character, business and social standing, and general eligibility.'" Bd. of Dir. of Rotarv Int'l v. Rotarv Club, 481 U.S. at 539-541. Consideration of these goals did not, however, lead the Court to reverse the lower court's conclusion that exclusion of women from the Rotary violated the state's civil rights act. [3] Thus, while the organization should be able to

[3] Similarly, Roberts v. United States Javcees, the Court considered the group's objectives in the context of its "purely private" analysis. The Jaycees espoused "educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations . . designed to inculcate a spirit of genuine Americanism and civic interest..with opportunity for personal development and achievement... ., Roberts, 468 U.S. at 612-613. Apart from age and sex, however, the Supreme Court found that neither the national organization nor the local chapters of the Jaycees actually employed anv criteria for judging

articulate some cultural values of legitimate common interest to the organization, this alone might not be sufficient to justify exclusion of certain people.

In light of all of the foregoing concepts, the standard to be applied in this situation should include: 1) an articulation of a value, goal or objective of the organization that motivates membership selection; and 2) evidence that this goal or objective itself is not based on stereotypes or assumptions about those excluded nor is it fueled by an animus regarding those excluded.

Application of the Code to Groups Listed by Judge

Boy Scouts, Generally[4]

The aim of the Boy Scouts is to develop character, citizenship, and physical and mental fitness through work and play. They are governed, generally, by a nationwide council headquartered in new Brunswick, New Jersey. Boy Scouts, locally, are govern& by-volunteer' supervisors who undergo training and must meet age, citizenship and moral standards to become leaders.

The Boy Scouts and Girl Scouts have been specifically exempted from provisions of the U.S. Code regarding discrimination in education on the grounds that such membership has "traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age." 20 U.S.C. §1681(a)(6)(B).

---

applicants for membership, and new members were routinely admitted with no inquiry into their background. Id. at 621.

[4]This general background information on the Boy Scouts is taken from Encyclopedia Americana, Vol. 4, pp. 383-385 (1996).

Masons. Generally'

The Masons are a fraternal organization grouped by "lodges" but without a central authority. The aim of the organization is to teach its members, through the use of symbols of builders' tools, the "basic moral truths" emphasizing the fatherhood of God and the brotherhood of mankind. In order for a lodge to be recognized on a more global level, it must subscribe to certain landmark beliefs.[6] Members are not invited to join but request sponsorship from a current member.

The women's "equivalent" organization is the Order of the Eastern Star.

CONCLUSION

The above analysis is obviously incomplete, The mere fact that neither the Boy Scouts nor the Masons admit women does not automatically label them as organizations which invidiously discriminate--the question is whether women are arbitrarily exclude& There is also' a question, however, of other potential members being excluded on the basis of a protected characteristic; for example, preliminary research raises the question of whether' the Boy Scouts only admit citizens as members. Given the broad prohibition in the Vermont code--created by a rather loose definition of discrimination--membership in these organizations may very well be

---

"General background information on this organization was complied from Collier's Encvclonedia, Vol. 15, pp. 503-504 (1996) and Encyclopedia Americana, Vol. 18, p. 422 (1996).

[6]These essential beliefs include: belief in a Supreme Being; belief in the immortal soul; membership for all free men of legal age only; a system degree or grade of membership; and symbolism based on the stonemasons craft.

prohibited.' However, before such a conclusion is drawn, there should be careful consideration of their membership selection process.

[7] As a side issue, another seemingly innocuous: group has become the target of a discrimination claim. Seven women have filed a discrimination complaint with the Vermont Human Rights Commission based on'their rejection from the Hartford Elks Lodge. (Burlington Free Press, April 6, 1997).