Maryland Judicial Ethics Committee

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■ Published Opinion ☐ Unpublished Opinion ☐ Unpublished Letter of Advice

Judge's Membership in All Male Private Social Club

A judge asked the Committee's opinion with regard to the propriety of his continuing his membership in an all male private social club. The club in question is a conservationist fishing and gunning organization established in 1937.

For the reasons set forth below, we conclude that it would violate Canons 2A and 2C to continue membership in the aforementioned private social club.

The Code of Judicial Conduct for judges in the State of Maryland is presently divided into those canons governing the judicial behavior of a judge while on the bench and conducting judicial duties and those regulating behavior while off the bench but having an impact on judicial duties.

Canons 2A and 2C clearly pertain to the off-the-bench conduct of a judge and, therefore, are pertinent.

The language in Canon 2A explicitly calls for judges to conduct themselves in a manner promoting public confidence in the integrity and impartiality of the judiciary. In Canon 2A the phrase "at all times" indicates the all inclusive nature of the Canon's reach to judicial duties as well as off-the-bench behavior. This conclusion is further fortified by the Commentary to Canon 2 which notes that "[a] judge must expect to be the subject of constant public scrutiny."

Newly adopted Canon 2C states as follows:

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

Under the prior Canon 2 and its Commentary, it is left to the subjective determination of each judge as to whether membership in an organization gives rise to the perception that the judge's impartiality is impaired.

A review of the notes of this Committee's meeting, at which the new Canon 2C was recommended, demonstrates that membership in discriminatory organizations was foremost in the minds of the drafters of the revised comments.

The new Canon 2C prohibited much more specific conduct on the part of the judiciary. It was modeled after Canon 2C and Commentary adopted by the House of Delegates of the American Bar Association in August 1990 and affirmatively precludes membership in an organization practicing invidious discrimination.

The Maryland Code affirmatively precludes membership in an organization practicing invidious discrimination. The Committee's notes to the Code explain the difference between the Maryland Judicial Code and its predecessor:

> After careful consideration, the Committee decided to make membership in organizations that practice invidious discrimination a violation of the Code. New Section 2C moves to black-letter text a principle that had been in the Commentary to Canon 2 of the 1989 Code. It was determined that it was neither appropriate nor workable to leave to each individual judge's conscience the determination whether

> an organization practices invidious discrimination, and this discretionary standard was removed from the Commentary.
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> The Commentary incorporates most of the Commentary to ABA Section 2C of Canon 2. The second sentence of the first paragraph is derived from the Commentary to current Md. Canon 2B and has been retained to make clear that membership in an organization would not be prohibitive unless that membership would reasonably give rise to a perception of partiality. ...

Therefore, under the Maryland Code, a judge is no longer permitted to make a subjective determination as to whether an organization to which the judge belongs practices invidious discrimination. Membership in such an organization is affirmatively and unequivocally prohibited and gives rise to an appearance of impropriety which would run afoul of Canon 2. The purpose of this prohibition is to preserve the integrity of the judiciary by placing restrictions on judges' nonofficial activities.

> By maintaining a membership in a gender discriminatory private club, a judge impliedly condones the club's discriminatory policy and calls into question the judge's off-the-bench impartiality towards women attorneys and litigants. These doubts regarding judicial impartiality detract from the dignity of the judiciary and may cause the public to lose confidence in its judges. As a result, judicial membership in gender discriminatory private clubs is properly subject to restriction.

The Membership of Judges in Gender Discriminatory Private Clubs, 12 Vt. L. Rev. 459, 465 (1987).

In the recent case of State v. Burning Tree Club, Inc., 315 Md. 254, at 269 (1989), the Court of Appeals stated as follows:

> The Maryland Equal Rights Amendment, enacted in 1972, mandated equality of rights under the law and rendered state-sanctioned sex-based classifications suspect. Decisions by this Court prior to 1981 made it clear that sex-based classifications were generally forbidden by the E.R.A. See, e.g., Rand v. Rand, 280 Md. 508, 515-516, 374 A.2d 900 (1977); Md. St. Bd. of Barber Ex. v. Kuhn, 270 Md. 496, 506-507, 312 A.2d 216 (1973). The E.R.A. and the judicial decisions construing it represent the law and public policy of the State. ...

Clearly, it appears that membership in a private club that discriminates on the basis of gender violates Canon 2A which requires a judge to "respect and comply with the law." Moreover, a club which specifically bans members on the basis of gender would fall within the meaning of the term "invidious discrimination."[1] The ban is exclusive, rather than inclusive. The discussion of the

[1] "It is now well established that invidious discrimination involves irrational exclusion of an entire class of persons because of some immutable characteristic, such as the excluded person's race or religion, on a basis that is odious and, in historical context, a stigma or badge of inferiority." M. Peter Moser, The 1990 ABA Code of Judicial Conduct: A Model for the Future, 4 Georgetown

(continued...)

Commentary clearly states that:

> Whether an organization practices and will continue to practice that kind of invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined merely from an examination of an organization's current membership rolls but may depend on (1) the nature and purpose of the organization, (2) any restrictions on membership, (3) the history of the organization's selection of members, and (4) other relevant factors such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interests to its members, or that it is in fact, an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n, Inc. v. City of New York, [487 U.S. 1,] 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940 (1987), 95 L.Ed.2d 474 [sic]; Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

A club that bans women from membership solely on the basis of their sex would fall within the definition of a group that practices invidious discrimination. A social club organized for purposes of conducting hunting and fishing should not, by its nature, exclude individuals on the basis of sex. Both men and women can derive enjoyment from such recreational activities. Therefore, this type of organization that bans women "stigmatizes" women as inferior by their "exclusion" and would be considered invidiously discriminatory.

Conversely, an "inclusive" organization is generally considered to be a political, religious, or ethnic organization formed for the purpose of perpetuating a particular belief and including as members only persons sharing this belief. NAACP v. Alabama, ex rel., Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Such organizations are given constitutional protection as part of the recognized freedom of assembly. When a shared belief forms the basis for membership, no stigma is attached to a nonmember as being inferior. See 12 Vt. L. Rev., at 476, supra, and see *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 Tex. L. Rev. 733 (1981).

Membership in a social organization that bars women does not "promot[e] public confidence in the integrity and impartiality of the judiciary" as required under Canon 2A of the Code of Judicial Conduct. Instead, it directly calls into question the judge's impartiality and bias towards women in the Court. Moreover, membership in such an organization has an exclusionary tone that is deafening and clearly violates Canon 2C of the Judicial Code.

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[1](...continued)
Journal of Legal Ethics, 731, 741, f.n. 41 (1991) (quoting the 1984 Commentary).