

*Key Issues in  
Judicial Ethics*

**ORGANIZATIONS THAT PRACTICE  
INVIDIOUS DISCRIMINATION**

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BY CYNTHIA GRAY



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## INTRODUCTION

Canon 2C of the 1990 American Bar Association Model Code of Judicial Conduct provides, "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."<sup>1</sup> Because, as the commentary states, "[w]hether an organization practices

1. Unless otherwise indicated, references to the canons of the code of judicial conduct are to the 1990 American Bar Association Model Code of Judicial Conduct. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantial changes and contains many differences in its details. This paper notes any relevant differences between the two model codes. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, forty-nine states, the United States Judicial Conference, and

invidious discrimination is often a complex question," judicial ethics advisory committees have been loath to create a "list of 'approved' or 'disapproved' groups" under Canon 2C. *Indiana Advisory Opinion 1-94*.<sup>2</sup> Committees are not "sufficiently aware of the details of the history, purpose, functions, tenets, and activities of all of these groups to address the propriety under Canon 2C of membership in any particular orga-

the District of Columbia adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either of the model codes.)

2. Over 35 states and the United States Judicial Conference have judicial ethics advisory committees to which a judge can submit an inquiry regarding the propriety of contemplated future action. See *Judicial Ethics Advisory Committees: Guide and Model Rules* (AJS 1996).

Relevant provision of the 1990 American Bar Association Model Code of Judicial Conduct:

### Canon 2C

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

### Commentary

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect 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*, 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, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective in the jurisdiction in which the person is a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

nization.” *Id.* Similarly, concluding that as a general rule it would decline to provide a definitive answer as to whether a particular organization practices invidious discrimination, the New York Advisory Committee on Judicial Ethics noted it was not an adjudicative body, it does not render judgements or issue decisions, it is not an investigative body, and it has no “authority to take testimony, conduct hearings or assess conflicting presentations of fact.” *New York Advisory Opinion 96-82*. For example, when a judge asked the committee whether membership in the Masons is prohibited, the committee noted that while it was “aware that the Masons in a centuries-old national and international fraternal organization,” it was not “equipped to undertake the kind of far-ranging investigation into the history, background, policies and internal membership of the organization that would be required.” As the Arizona Judicial Ethics Advisory Committee also stated, the “individual judge is in the best position to gather the information about the organization in which he or she is a member or prospective member.” *Arizona Advisory Opinion 94-13*. See also *North Dakota Advisory Opinion 94-1* (concluding that analyzing each organization was beyond the committee’s capacity due to “limited resources, necessary and extensive inquiry into the historical and internal makeup of each organization and the inexhaustible list of organizations [about] which judges may seek our advice”); *Nebraska Advisory Opinion 93-2* (noting that the committee “has no practical way to investigate requests or find facts”).

After a discussion of the history and purposes of Canon 2C and the constitutional issues raised by the provision, this paper will discuss the factors relevant to a judge’s exercise of his or her duty to determine whether an organization to which the judge belongs practices invidious discrimination. The analysis addresses three questions:

- whether an organization discriminates based on race, national origin, religion, or gender;
- whether an organization’s discriminatory practices are “invidious;” and
- whether the organization “is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.”

## THE HISTORY OF CANON 2C

The principle that a judge should not be a member of an organization that practices invidious discrimination was first formally adopted by the judiciary in a resolution passed by the United States Judicial Conference in March 1981. The resolution stated that a “judge should carefully consider whether the judge’s membership in a particular organization might reasonably raise a question of the judge’s impartiality in a case involving issues as to discriminatory treatment of persons on the basis of race, sex, religion, or national origin.”

In 1980, the American Bar Association House of Delegates amended the commentary to Canon 2 of the 1972 model code to add:

It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge’s impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on the history of the organization’s selection of members and other relevant factors. Ultimately, each judge must determine in the judge’s own conscience whether an organization of which the judge is a member practices invidious discrimination.

After that amendment, five states—California, Maryland, New Jersey, Utah, and Virginia—adopted similar provisions.

From 1987 to 1990, the ABA reviewed the entire 1972 model code. During that review, the question of membership in organizations that practice invidious discrimination “provoked more discussion...than any other topic” (Moser, “The 1990 ABA Code of Judicial Conduct: A Model for the Future,” 4 *Georgetown Journal of Legal Ethics* 731, 739 (1991)) and “inspired the most comment...” (Milord, *The Development of the ABA Judicial Code* at 17 (1992)).

Adopting a revised model code in 1990, the ABA House of Delegates approved a new Canon 2C and related commentary. Canon 2C of the 1990 model code provides: “A judge shall not hold membership in

any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”

Canon 2C does not require a judge to resign from an organization immediately upon learning that it engages in invidious discrimination; instead, the commentary provides that, “in lieu of resigning,” a judge may

make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge’s first learning of the practices), the judge is required to resign immediately from the organization.<sup>4</sup>

According to the ABA committee, “these provisions seek to balance a judge’s right of private association with the need of the public to be assured that every judge both gives the appearance of impartiality and is capable of fair and unbiased trial conduct and decisions.” *Report No. 112, ABA Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates and Recommendation* at 7 (August 1990).

The major change in the 1990 provision rendered the 1984 “non-mandatory, subjective” provision a “mandatory and objective” prohibition. Milord, *supra*, at 14. That change was achieved in three ways.

First, the 1990 model code eliminated any reference to a judge’s conscience, deleting the sentence, “[u]ltimately, each judge must determine in the judge’s own conscience whether an organization of which the judge is a member practices invidious discrimination.” Accepting arguments that that sentence “made purely hortatory the avoidance of activities that clearly created the appearance of impropriety,” the committee

believed it was “not appropriate or workable to leave to each individual judge’s conscience the determination whether an organization practices invidious discrimination.” *ABA Report 112* at 6. Therefore, under Canon 2C, the judge must examine an organization based on objective standards, not subjective feelings.

Second, the prohibition was moved from the commentary to the text of Canon 2; only the text of canons establishes mandatory standards. Third, the revised provision uses the imperative phrase “shall not,” rather than the hortatory phrase “it is inappropriate.” The preamble to the 1990 model code states that “[w]hen the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations the violation of which can result in disciplinary action.”

As of July 1999, over 35 states have adopted versions of Canon 2C. [See sidebar on the jurisdictions’ response to Canon 2C.]

4. Additional commentary to Canon 2C of the 1990 model code states:

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge’s membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

## THE PURPOSE OF CANON 2C

Canon 2C precludes judges from belonging to discriminatory organizations to prevent doubts about the judge's impartiality arising from that membership.

Membership of judges in exclusive organizations that invidiously discriminate creates understandable and predictable perceptions by significant segments of the public—particularly minorities and women—that the judicial members approve, or at least acquiesce, in the biases inherent in the organizations' membership policies. The result is a perception, shared by a significant portion of the public, that judicial members cannot perform judicial functions impartially. *Report No. 120, ABA Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates and Recommendation* at 7 (August 1984).

Based on “persuasive testimony from the very persons excluded,” the ABA committee found that the public perception of impartiality arising from judicial membership in organizations that invidiously discriminate could not “be brushed aside as insignificant or aberrant.” *Id.* at 8 nn.5 and 2. *See also North Dakota Advisory Opinion 94-1* (judges, as community leaders, must be “cognizant of how membership will be viewed by the public, especially in rural areas where they are more publicly recognizable in the organizations to which they belong”).

Moreover, the Indiana Commission on Judicial Qualifications suggested that doubts about the judge's impartiality will exist not only with respect to cases involving issues of discriminatory treatment, but in any case in which one of the participants is a member of a group excluded from an organization of which the judge is a member. *Indiana Advisory Opinion 1-94*. The “very arbitrariness and irrationality of racial, sexual, religious or origin-based distinctions in a judge's organization invites questions about the judge's commitment to equality and fairness.”<sup>5</sup>

Further, the Indiana commission stated that “the incorporation of Canon 2C into the rules of judicial ethics makes a strong statement from the profession about the unequal opportunity still encountered by minorities in the commercial, corporate, professional and business world.” Noting that the exclusion of minorities from certain clubs reinforces the barriers to

their success, the commission concluded that “Canon 2C makes it improper for a judge to participate in the perpetuation of this inequality.” The North Dakota Judicial Ethics Advisory Committee has reminded judges that they “can be catalysts for change and must not compromise the principles of fairness and justice....” *North Dakota Advisory Opinion 94-1*.

Finally, the ABA committee found that Canon 2C promotes “mutual respect and collegiality among members of the judiciary and the bar, both of which include increasing numbers of minorities and women.” *ABA Report 120* at 9.

5. *See also* Aalberts and Fonte, “Is Section 2C of *The Model Code of Judicial Conduct* Justified? An Empirical Study of the Impropriety of Judges Belonging to Exclusive Clubs,” 8 *Georgetown Journal of Legal Ethics* 597 (1995).

## CONSTITUTIONAL ISSUES

The commentary to Canon 2C was carefully drafted to narrow the scope of Canon 2C to ensure that it does not intrude upon the First Amendment right of freedom of association. In fact, to define the restriction, the commentary to Canon 2C cites the three Supreme Court cases that delineate the freedom of association.

Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect 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*, 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, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

In *Roberts v. United States Jaycees*, the Court held that application of the Minnesota Human Rights Act, which forbids discrimination on the basis of sex in places of public accommodation, to compel the Jaycees to accept women as members did not abridge the male members' First Amendment rights. In *New York State Club Association v. City of New York*, the Court held that a city law prohibiting discrimination by private clubs was not unconstitutional on its face. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that a state civil rights act did not violate the First Amendment by requiring the Rotary Clubs to admit women.

In those cases, the Supreme Court defined two aspects of freedom of association—freedom of private association and freedom of expressive association.

For freedom of private association, describing a spectrum that ranges from family relationships on one end to business enterprises on the other, the Supreme Court stated “the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.” *Roberts*, 468 U.S. at 620. Those considerations are reflected in the exception the commentary to Canon 2C creates for any organization that “is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.” That exception preserves a judge's freedom of private association.

When a challenge is based on freedom of expressive association, the test is whether the state action at issue will affect in any significant way the members' ability to express only those views that brought them together. *Roberts*, 468 U.S. at 621; *Rotary International*, 481 U.S. at 546. The exception created in the commentary for any organization “dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members...” meets that test and protects a judge's freedom of expressive association.

The Indiana commission, noting that associational freedoms are affected by enforcement of Canon 2C, stated that it would interpret the rule narrowly. *Indiana Advisory Opinion 1-94*. The Alaska code commentary states that “[n]othing in Section 2C should be interpreted to diminish a judge's right to the free exercise of religion.”

Canon 2C is not the only limitation on a judge's membership in organizations. All of a judge's off-the-bench activities must conform to the requirement in Canon 4A(1) that the judge's conduct not “cast reasonable doubt on the judge's capacity to act impartially as a judge.” Based on that restriction, judges have been cautioned against belonging to organizations such as the Fraternal Order of Police (*see, e.g., Alabama Advisory Opinion 78-35*); an association of defense lawyers or plaintiffs' lawyers (*see, e.g., Louisiana Advisory Opinion 91* (1991), *Georgia Advisory Opinion 98* (1987)); the League of Women Voters (*Washington Advisory Opinion 95-14*); and the Anti-Defamation League of B'nai B'rith, the Sierra Club, and the National Association for the Advancement of Colored People (*U.S. Advisory Opinion 40* (1975); *U.S. Advisory Opinion 62* (1980)).



## **INTERPRETING CANON 2C**

Several judicial ethics advisory opinions provide guidance to a judge exercising the responsibility to determine whether an organization to which he or she belongs practices invidious discrimination. According to those opinions, an analysis of an organization under Canon 2C involves three questions:

- whether the organization discriminates based on race, national origin, religion, or gender;
- whether the organization's discriminatory practices are "invidious;" and
- whether the organization "is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited."

### **Determining if an organization practices discrimination**

#### ***Organizations with a history of discrimination***

An organization with a by-law explicitly denying membership to persons on the basis of race, sex, religion, or national origin obviously practices discrimination within the meaning of Canon 2C. However, discriminatory practices are often less obvious, and the question whether an organization discriminates can arise even if the organization's by-laws contain no explicit exclusion against, for example, African Americans, if, in fact, none of the organization's members are African American. The question is particularly likely to arise if the organization in the past had an explicitly discriminatory by-law.

In the revision process leading to the 1990 model code, comments noted that the phrase "the history of the organization's selection of membership" in the 1984 amendment to the 1972 model code had been interpreted to mean that a judge could not be a member of an organization that had in the past discriminated even if the organization had since changed its practices. To eliminate that implication, the drafters of Canon 2C deleted that phrase from the list of factors to be considered in determining whether an organization practices invidious discrimination and substituted the language "how the organization selects members." Com-

mentary also adds that Canon 2C "refers to the current practices of the organization" to "clarify that a judge is not prohibited from holding membership in an organization that has discontinued its invidiously discriminatory membership policies." Milord, *supra*, at 15. See *U.S. Compendium of Selected Opinions* §2.14(d) (1995) (a judge who had resigned from a club because it practiced invidious discrimination could rejoin after it had amended its by-laws to preclude discrimination and had in fact admitted a significant number of women and minorities).

The Arizona committee addressed the issue of past discrimination in the context of the Junior League of Tucson, an organization that in the past had by-laws that explicitly prohibited men from joining, had changed its by-laws, but still did not have any men as members. *Arizona Advisory Opinion 94-13*. Noting that a "judge must always view a group which appears to discriminate on the basis of race, gender or national origin as suspect," the committee stated that "an inference of continuing discrimination arises" if the former by-laws had expressly excluded males and the organization remained exclusively female. The committee also noted that the fact that no man had ever applied for membership "may support the inference that applications from men are not encouraged." The committee instructed judges to inquire:

What publicity, if any, accompanied the bylaw amendments to inform men that their membership was thereafter invited? What is the application process for membership? Are potential members recruited by current members? If so, is the effort limited to women? Are potential members nominated or sponsored by current members, and are those nominated only women? Are potential members actively sought out at the functions of other organizations and are these functions attended only by women?

Similarly, a male judge asked the Committee on Judicial Ethics of the California Judges Association whether he was required to resign from a local service club that did not have any women members, although the organization had changed its past policy of not allowing women as full members. The committee advised the judge that the "fact that the club has not yet admitted a woman member does not, by itself, require the judge's resignation. The effects of long-standing discriminatory practices cannot always be wiped out instantaneously." *California Advisory Opinion 34*

(1987).

“On the other hand,” the committee continued, “prolonged delay in the admission of women will create an inference that the ‘decision’ to admit them to membership was made not in good faith but rather merely to create the appearance of nondiscrimination....” The committee noted that in “some communities it may be necessary to recruit those previously excluded.” The test, according to the committee, is whether “the judge who wishes to remain a member...hold[s] a conscientious belief that the open-membership policy is bona fide and will be implemented in the ordinary course of events.”

To ensure that “the mere absence of diverse membership” would not automatically prohibit a judge from belonging to an organization, Delaware, Florida, North Dakota, and the United States Judicial Conference added “the diversity of persons in the locale who might reasonably be considered potential members” to the list of factors to be considered in determining whether an organization practices discrimination in their versions of Canon 2C. Thus, in a community with no African American residents, for example, the absence of African Americans from an organization’s membership rolls would not be considered evidence of discrimination. However, those codes note that a homogeneous membership will indicate discrimination if “reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.”

### ***Auxiliary organizations***

According to advisory committees, creation of a women’s auxiliary does not render an all-male organization non-discriminatory under Canon 2C. Relying on the “separate-is-unequal logic in the equal protection decisions,” the California committee concluded that a service club’s “women’s auxiliary seems clearly patronizing and seems clearly to stigmatize women as inferior.” *California Advisory Opinion 34* (1987). “By excluding women from a principal, or even co-equal, organ,” the committee concluded, “the organization arbitrarily denies women the opportunity to associate with men who participate in the affairs of and lead the organization, many of whom may be community leaders or other persons of influence.” See also *Nebraska Advisory Opinion 93-2*.

Noting that second-class membership status may be stigmatizing, the Arizona committee also rejected “the notion that nondiscrimination in some segments of an organization renders it non-discriminatory” for purposes of Canon 2C. *Arizona Advisory Opinion 94-7*. Thus, the committee concluded that the fact that one part of the Boy Scouts’ program (the Explorers program) was open to girls did not mean that the organization was non-discriminatory where there was discrimination in other membership categories.

### **Is the discrimination invidious?**

The 1990 model code retained the term “invidious discrimination” used in the 1984 amended commentary because the ABA committee believed the term had “gained acceptance and usage necessary to describe the type of discrimination to which the provision is directed.” *ABA Report 112* at 6. See also *ABA Report 120* at 5 (the “term ‘invidious discrimination’ is not an unfamiliar one to judges for they have interpreted and applied it in literally hundreds of cases”).<sup>7</sup> The commentary to Canon 2C contains the following definition of “invidious discrimination”: “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.” Additional definitions of the term focus on whether the discrimination is justified by a legitimate purpose and whether the discrimination stigmatizes members of the excluded group.

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7. Several states (Maine, Minnesota, North Carolina, Oregon, Texas, and Washington) prohibit membership in organizations that practice “unlawful discrimination” rather than those that practice “invidious discrimination.” See *sidebar*. A textual note to the Maine code explains that “unlawful discrimination” was substituted for “invidious discrimination” “[i]n the interests of greater clarity and specificity.” The commentary states that discrimination is “unlawful” for purposes of Canon 2C when it is of a type that is prohibited by applicable state or federal law,” and lists the relevant provisions of state and federal law and case decisions that define unlawful discrimination. The Oregon code prohibits membership in a discriminatory organization and defines “discriminatory organization” as “an organization that, as a policy or practice and contrary to applicable federal or state law, treats persons less favorably in granting membership privileges, allowing participation or providing services on the basis of sex, race, national origin, religion, sexual orientation, marital status, disability or age.”

Whether “invidious discrimination” is a broader term than “unlawful discrimination” will depend on the specific anti-discrimination laws in effect in each jurisdiction. However, in general, codes using the term “unlawful discrimination” probably prohibit membership in fewer organizations. Many anti-discrimination laws do not include gender in the list of prohibited bases for discrimination and apply only to discrimination in the provision of public accommodations, discrimination under color of state law, discrimination by organizations that receive federal assistance, or activities that affect interstate commerce. Those limitations on what constitutes “unlawful discrimination” may exempt many organizations that would be considered to practice “invidious discrimination.”

- “An organization ordinarily would be considered to discriminate invidiously when it is (1) exclusive, rather than inclusive; (2) excludes from membership certain persons, or categories of persons, *solely* on the basis of their race, sex, religion or national origin, and (3) such exclusion stigmatizes such persons or categories of persons as inferior.” *ABA Report 120* at 5.
- “[I]nvidious discrimination involves irrational exclusion of an entire class of persons because of some immutable fact, such as the excluded persons’ race or religion, on a basis that is odious and in historical context was a stigma or badge of inferiority.” *ABA Report 120* at 5.
- “[I]nvidious discrimination’ implies arbitrariness; an invidious distinction is one made on an illegitimate or offensive basis. Invidious discrimination has been defined as a classification which is irrational and not reasonably related to a legitimate purpose.” *Indiana Advisory Opinion 1-94*.
- “Invidious is defined as: tending to cause discontent, animosity; of an unpleasant or objectionable nature; of a kind to cause harm. Membership discrimination does not always cause harm, discontent or animosity. Moreover, if the reasons for discriminating reflect legitimate, generally accepted values, then the discrimination may be permissible.” *Arizona Advisory Opinion 94-13*.
- “[A]ny 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 as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in the organization.” *Canon 2C, Georgia Code of Judicial Conduct*.
- If “the discriminatory practice is one in which the policy of exclusion is arbitrary, and excludes persons or categories of persons or categories or persons as inferior, then the judge must conclude that the discrimination is invidious.” *New York Advisory Opinion 96-82*.

- The “common judicial definition of invidious discrimination ‘is a classification which is arbitrary, irrational and not reasonably related to a legitimate purpose,’ *McLaughlin v. Florida*, 379 U.S. 1984 (1964). *Commentary to Canon 2C, Alaska Code of Judicial Conduct*.

As an example of discrimination that is *not* invidious, commentary to Canon 2C cites membership discrimination by organizations “dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members.” *ABA Report 120*, which first proposed adding the proscription to the model code in 1984, explained:

Bona fide religious or ethnic organizations such as the Jewish Community Center or the Polish-American Society, for example, are not ordinarily considered to discriminate invidiously because these organizations (1) are inclusive (including all community Jews or all Polish Americans) rather than exclusive (excluding all community Jews or all Polish Americans); (2) are largely dedicated to the preservation of religious, spiritual, charitable or cultural values; and (3) do not stigmatize as inferior any excluded persons. *ABA Report 120* at 5.

Similarly, the Indiana commission stated:

Some groups exist for the legitimate purpose of the perpetuation or celebration of cultures, historical events, and ethnic or religious identities and traditions. They tend to be inclusive of an entire group, rather than exclusive of certain groups.... Their membership limitations, rather than unfair or stigmatizing, are secondary to but inextricable from that which is being legitimately preserved or celebrated. *Indiana Advisory Opinion 1-94*.

As examples of groups with permissible membership limitations, the commission cited the Daughters of the American Revolution, the Knights of Columbus, and the Sons of Italy. Other organizations that have been considered to have a rational basis for a membership limitation include the Girl Scouts, YWCA, YMCA, and Smith College Alumnae Club (Moser, *supra*, at 741) and university-related or other living groups whose membership is single sex (*Commentary to Canon 2C, Arkansas Code of Judicial Conduct*). The New York committee concluded that a judge may belong to an organization that preserves and publicizes the history of the accomplishments and contribution to public service of Irish Americans. *New York Advisory Opinion*

97-19.

The Arizona committee stated that a group's discriminatory membership practices were not invidious if (1) the purposes of the organization were not generally regarded as repugnant in contemporary society and (2) the discrimination materially advanced the organization's purposes. *Arizona Advisory Opinion 94-7*.

Applying that analysis to the Boy Scouts, the committee found that the Boy Scouts' purposes—promoting “the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues”—are generally acceptable to society. The committee also noted there was no evidence that the Boy Scouts “foster the type of malicious discrimination that section 2C is intended to prohibit...” and that because “the Girl Scouts exist, the opportunity to participate in scouting activities exists for girls and exclusion from the Boy Scouts is not necessarily stigmatizing.” However, although noting that it had no indication that scouting activities are unequal for boys and girls, the committee instructed judges to inquire “into matters such as the financial resources of those organizations or the details of the activities they sponsor.”

Moreover, the Arizona committee noted the “debate among educators, psychologists and social scientists about whether educational, social or psychological benefits accrue to children from same-gender group activity.” Finding that “the debate over the benefits is a legitimate one, with evidence on both sides,” the committee concluded, “If we were to condemn gender-based scouting, we would be condemning as illegitimate an approach to children's group activity supported by considerable evidence of its benefit to the children.” The committee did state that the “desire of members to be gender segregated is not a justification for gender discrimination.”

The Arizona committee also applied the analysis to the Junior League of Tucson, which had no male members. *Arizona Advisory Opinion 94-13*. The purpose of the Junior League is to “create a supportive environment for the personal and volunteer development of women through formal and experiential training.” The committee found that that purpose is generally acceptable and is not repugnant to society.

However, the committee also found that both women and men could help attain that goal and, there-

fore, excluding men was not necessary to advance the organization's purpose. Rejecting the argument that excluding men is justified because it serves the purpose of the organization, the committee stated, “The mere promotion of group advancement or group cohesion or identity cannot be a legitimate basis for exclusion.”

Similarly, with respect to the Tucson Arizona Boys Chorus, which presents *cambiata* music, the committee stated that the boys-only policy was justified only if there is an “inherent difference between the unchanged male voice and the young female voice that prevents all females from having the required aesthetic quality.” *Arizona Advisory Opinion 94-13*. Quoting *Roberts v. United States Jaycees*, 468 U.S. at 625, the committee rejected “‘discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes [that] forces individuals to labor under stereotypical relationship to their actual abilities.’ ”

The failure to consider whether the exclusion of women materially advanced the organization's purposes casts doubt on the conclusion of the Committee on Codes of Conduct of the United States Judicial Conference that the Masonic order does not practice invidious discrimination. *U.S. Compendium of Selected Opinions §2.14(b)* (1995). The committee noted that the judge making the inquiry had represented that the Masonic order was a fraternal organization devoted to charitable work with a religious focus and did not provide business or professional opportunities to members. Based on those representations, the committee concluded that the organization was dedicated to the preservation of religious and cultural values of legitimate common interest to its members. The committee failed to take the next step and determine whether women as well as men could advance those interests or whether admitting women would prevent the organization from carrying out its purposes.

The California committee stated that “[h]istorical practice cannot, in and of itself, be a legitimate objective justifying [gender-based] discrimination.” *California Advisory Opinion 34* (1987). See also *Arizona Advisory Opinion 94-13* (if “membership is restricted only by tradition, then the restriction would be unacceptable discrimination”). The committee noted it had not been informed of any legitimate objective served by the exclusion of women from the service club that was the subject of an inquiry and that “it could not con-

ceive of one that would be consistent with public policy.”

### ***Victims of past discrimination***

The Arizona committee advised that the victims of invidious discrimination were themselves justified in forming discriminatory organizations only if the current discriminatory practices compensated for disadvantages suffered as a result of the previous discrimination. *Arizona Advisory Opinion 94-13*. Adopting an analysis from *Mississippi University for Women v. Hogan*, 485 U.S. 718 (1982), the committee stated that discrimination, for example, by a women’s organization, was legitimate if an organization could demonstrate that:

- (1) there is a sex-based disadvantage suffered by its membership related to its basis of classification;
- (2) the intention in forming or continuing the organization is to compensate for this disadvantage;
- (3) the organization’s programs and policies are not based upon and do not perpetuate archaic and stereotypical notions of the abilities or roles of the sexes; and
- (4) it is the organization’s single-sex policy and programs that directly and substantially help its members compensate for the previous disadvantage. *Arizona Advisory Opinion 94-13*.

The Arizona committee applied that test to the Junior League of Tucson, which had no male members. First, the committee found that “women have been discriminated against in community services activities on the basis of their gender and such discrimination continues” and “there is clearly disadvantage suffered by the all-female membership of the Junior League of Tucson, Inc., which is solely sex-based.”

However, the committee stated that the information it had about the Junior League did not answer the remaining three questions, although it noted the organization might be able to provide the necessary justification. The material the committee had did not indicate whether the Junior League’s single-sex policy was enacted and continued to enable its members to overcome the disadvantages they face or reveal whether the Junior League’s policies and practices are based on or perpetuate “traditionally female activities.” Finally, the committee stated the information it had did not explain how an all-female policy would help women achieve the potential that is best developed in a single-sex environment.

### **Is the organization private?**

As noted, Canon 2C creates an exemption for groups that are so intimate and private that the U.S. Constitution protects them from government interference. The Arizona committee concluded that this “‘safe harbor’ for distinctly private groups is very narrow,” citing as an example “a few people who gather informally and periodically to play cards....” *Arizona Advisory Opinion 94-13*. The committee stated that the exemption did not apply to large, formally organized groups, such as the Junior League of Tucson, and even small, formal groups, like the Tucson Arizona Boys Chorus, which has a parents’ association, staff, and a board of directors.

The Indiana commission listed a number of factors that distinguish “organizations” from private, intimate, protected groups within the meaning of Canon 2C:

- a more or less constant membership;
- organized for professional, social, recreational, charitable, educational, or civic purposes;
- selectivity in membership;
- membership controlled by ballot or some other type of approval;
- by-laws or other written rules;
- membership requires dues, assessments, or other support;
- size;
- advertising or publicity;
- whether the organization has subjected itself to governmental regulation, such as a liquor license;
- whether it sells retail goods or services;
- whether it offers its services or facilities to non-members; and
- whether it has developed a public identity through civic or charitable activities or participation in public events.

*Indiana Advisory Opinion 1-94*. The commission reasoned that “[e]ssential to the meaning of ‘organization’ in Canon 2C is that it offer some benefits of membership beyond the interaction with other members,

such as recreation, food or bar service, guest and entertainment privileges, and opportunities for education, community involvement, or professional or business advancement.”

The commission advised that “Canon 2C is aimed directly at country clubs and dining clubs because they offer obvious benefits to their members from which members of protected groups are excluded. ‘Denial of access to club facilities constitutes a significant barrier to the professional advancement of women and minorities since business transactions are often conducted in such clubs, and personal contacts valuable for business purposes, employment and professional advancement are formed’ ” (quoting *N.Y.S. Club Association*, 69 N.Y.2d 211 (N.Y. Ct. App. 1987)). See also *Maryland Advisory Opinion 121* (1994) (a judge could not remain a member of an all-male private social club).

In addition, the exclusion of minorities from service clubs and professional organizations “is as detrimental as it is in the country club setting.” *Indiana Advisory Opinion 1-94*. The Indiana commission noted that two of the Supreme Court cases that upheld prohibitions on discriminatory organizations involved two service organizations, the Rotary Club and the Jaycees. See *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). See also *California Advisory Opinion 34* (1987) (stating that a judge’s membership in a service club that excludes women violates Canon 2C).

However, the commission concluded that a judge’s participation in some discriminatory groups does not signify anything “untoward about the judge’s commitment to fairness and impartiality, nor are entire protected classes of people being denied economic opportunity by the exclusions in the activities.” As examples, the commission listed mother-daughter banquets, men’s support groups, college fraternity and sorority alumni groups, Boy Scouts, girls’ basketball, or single-sex fitness facilities. (The commission also noted that those groups may not even constitute “organizations” within the meaning of Canon 2C.)

Similarly, notes to Canon 2C of the Maryland code of judicial conduct state that “[c]ertain organizations—such as congregational brotherhoods, sisterhoods, bowling leagues, etc.—may well be restricted to persons belonging to the particular congregation and therefore to those sharing a particular religious belief,

but it is hardly likely that membership in such an organization would cause people reasonably to believe that the judge is partial.” The commentary to the Colorado code states that “small, informal social groups, such as a bridge or a gourmet club, are not ‘organizations’ within the definition of Section 2C.” See also *U.S. Compendium of Selected Opinions §2.14(c)* (1995) (a judge may be member of a local all-male club that meets for fellowship and to decide on a gift to a local charity and that provides no business or commercial advantage).

## EXPANDING THE SCOPE OF THE PROHIBITION

In drafting Canon 2C, the ABA committee rejected arguments that discrimination on the basis of age, disability, and sexual orientation should be added to the list of prohibited discriminations. That refusal was based on “the fact that the categories of race, sex, religion and national origin are the only ones that are constitutionally protected.” Milord, *supra*, at 16. States, of course, are free to add to the list of prohibited exclusion when they adopt a provision similar to Canon 2C, and several have done so.<sup>8</sup>

Furthermore, the ABA committee declined to adopt suggestions to extend the Canon 2C prohibition to involvement other than membership. For example, the committee “rejected the idea that a judge should necessarily be subject to discipline for merely attending a meeting on an isolated occasion at a discriminatory club, on the grounds that in most such instances, the judge could not reasonably be expected to know the policies of the club and that the harm would be relatively minor.” Milord, *supra*, at 15.

However, although the committee refused to expand the conduct that constituted a *per se* violation of Canon 2C, the commentary to Canon 2C suggests that the general provisions of Canon 2 and Canon 2A prohibit a wider scope of conduct.<sup>9</sup> For example, the commentary states that “a judge’s membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety.” Thus, a judge’s membership in an organization that practices invidious dis-

8. New York added age, creed, color, sexual orientation, disability, and marital status. Rhode Island added discrimination on the basis of disability to the list. Oregon added sexual orientation, marital status, disability, and age. Vermont added sexual orientation.

The California code adopted in 1995 also added sexual orientation. However, California created exemptions for religious organizations, official military organizations of the United States, and nonprofit youth organizations. Commentary explains that “membership in United States military organizations is subject to current valid military regulations, and religious beliefs are constitutionally protected. Membership in nonprofit youth organizations is not barred to accommodate individual rights of intimate association and free expression.” “Nonprofit youth organizations” are defined as “any nonprofit corporation or association not organized for the private gain of any person, and one whose purposes are irrevocably dedicated to benefiting and serving the interests of minors, and which maintains its nonprofit status in accordance with applicable state and federal tax laws.”

9. Canon 2 of the 1990 model code provides, a “judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 2A provides, a “judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

crimination on the basis of sexual orientation would be prohibited in a locality where state or local law prohibited such discrimination. Moser, *supra*, at 744.

In addition, a sentence was added to the commentary explaining that, although not prohibited by Canon 2C, “public manifestation by a judge of the judge’s knowing approval of invidious discrimination *on any basis* gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary in violation of Section 2A” (emphasis added). It has been suggested that, under this provision, “a judge’s membership in an organization that engages in invidiously discriminatory membership practices on the basis of sexual orientation could constitute a violation, requiring the judge to resign from membership.” Moser, *supra*, at 743. Similarly, “a judge’s attendance at a single meeting as speaker or guest of honor at a club widely known to practice invidious discrimination might be construed as the judge’s ‘public manifestation of knowing approval of invidious discrimination’ and therefore constitute a violation of Canon 2 and Section 2A.” *Id.* The Alaska code expressly provides in the text that a judge shall not regularly use the facilities of an organization that practices invidious discrimination or “arrange to use the facilities of an organization that the judge knows practices invidious discrimination... unless there are no alternative facilities in the community and use of the facilities would not give rise to an appearance of endorsing the discriminatory practices of the organization.”

Furthermore, the ABA committee implied that a judge’s continued membership in even an intimate, purely private organization, which is beyond the scope of Canon 2C, would constitute a public manifestation of the judge’s knowing approval of invidiously discriminatory practices and thus a violation of Canon 2 and Canon 2A if the judge knows that the organization practices invidious discrimination. *ABA Report 112* at 10. Moreover, “a judge could be required to resign from an intimate, purely private organization that engages in invidious discriminatory membership practices on the basis of race, if the judge’s membership and the organization’s practices become a matter of public controversy.” Moser, *supra*, at 743.

Finally, the commentary to Canon 2C states that “it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge

knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club.” “Other policies” could include employment policies, for example. Milord, *supra*, at 15.

## **SUMMARY**

As the commentary to Canon 2C states, “Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge’s impartiality is impaired.” The analysis under Canon 2C asks three questions:

- whether the organization discriminates based on race, national origin, religion, or gender;
- whether the organization’s discriminatory practices are “invidious;” and
- whether the organization “is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.”

The question whether an organization discriminates requires an examination not only of the organization’s by-laws, but of its list of members to see if inclusive by-laws are belied by a homogeneous membership that indicates exclusivity. The inquiry is particularly difficult for an organization that discriminated in the past and has allegedly changed its policy, but still does not have any members belonging to the formerly excluded group. The Canon 2C test for membership in those circumstances is whether the judge reasonably believes that the policy change is genuine and will be implemented in the ordinary course of events. Advisory committees have also stated that creation of a women’s auxiliary does not render an all-male organization non-discriminatory under Canon 2C.

In deference to a judge’s right of private association, the commentary to Canon 2C created an exception for any group that is “intimate [and] purely private.” Factors that distinguish “organizations” from protected groups within the meaning of Canon 2C include selectivity in membership, by-laws, or other written rules, number of members, provision of services or facilities to non-members, and a public identity based on civic activities or participation in public

events.

Definitions of “invidious discrimination” focus on whether an organization’s discriminatory policy is reasonably related to a legitimate purpose or stigmatizes those excluded from the organization. Discrimination is *not* invidious if it is necessary to promote a culture, an historical event, or an ethnic or religious identity and tradition, at least as long as the discrimination does not stigmatize as inferior any excluded persons. Similarly, victims of invidious discrimination may themselves form discriminatory organizations only if the current discriminatory practices compensate for disadvantages suffered as a result of the previous discrimination. Examples of purposes that are not considered legitimate justifications for discrimination include historical practice, the desire of members to be segregated, and the promotion of group advancement or group cohesion or identity.



## THE JURISDICTIONS' RESPONSE TO CANON 2C

Over 35 jurisdictions have adopted provisions relating to a judge's membership in an organization that practices invidious discrimination.

- **Hawaii, Massachusetts, Nevada, Tennessee, and Wyoming** have adopted provisions identical to Canon 2C of the 1990 model code.

- The **Alaska** code adds to the text:

[A] judge [shall not] regularly use the facilities of such an organization. A judge shall not arrange to use the facilities of an organization that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin unless there are no alternative facilities in the community and use of the facilities would not give rise to an appearance of endorsing the discriminatory practices of the organization.

- The **Arizona** code omits from the commentary the statement that, in lieu of resigning from an organization that practices invidious discrimination, a judge may make immediate efforts to have the organization discontinue its invidiously discriminatory practices. The commentary to the Arizona code simply states that a judge is required to resign from any such organization within one year of the effective date of the code or the inception of his or her service as judge.

- The **Arkansas** code commentary provides:

A judge may ordinarily be a member of an organization which is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited, even though that organization is a single sex or single race organization. Likewise, a judge may ordinarily be a member of an organization which is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, even though in fact its membership is limited. Similarly, a judge may have or retain membership with a university related or other living group, even though its membership is single sex. However, public approval of, or participation in, any discrimination that gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary violates this Code. For example, an organization that conducts lobbying or advocacy on behalf of its members may raise such concerns. Ultimately, each judge must determine in the judge's own conscience whether participation in such an organization violates Canon 2 and Section 2A.

- The **California** code prohibits "membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or *sexual orientation*" (emphasis added). California adds exemptions for religious organizations, official military organizations of the United States, and nonprofit youth organizations. "Nonprofit youth organizations" are defined as "any nonprofit corporation or association not organized for the private gain of any person, and one whose purposes are irrevocably dedicated to benefiting and serving the interests of minors, and which maintains its nonprofit status in accordance with applicable state and federal tax laws." Commentary explains that "[t]hese exemptions are necessary because membership in

United States military organizations is subject to current valid military regulations, and religious beliefs are constitutionally protected. Membership in nonprofit youth organizations is not barred to accommodate individual rights or intimate association and free expression." California omits the third paragraph of the model code commentary.

- The **Colorado** and **Iowa** codes provide: "A judge shall not hold membership in any organization that *the judge knows* practices invidious discrimination on the basis of race, gender, religion or national origin" (emphasis added). The Colorado commentary adds: "small, informal social groups, such as a bridge or a gourmet club, are not 'organizations' within the definition of Section 2C."

- The **Delaware, Florida, North Dakota, and U.S.** codes add:

Other relevant factors [in determining whether an organization practices invidious discrimination] include 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.

The commentary to the Delaware code makes the changes indicated by the italics below:

When a judge *determines* that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and *continuous* efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within *two years* of the judge's first learning of the practices), the judge should resign immediately from the organization.

The North Dakota code also omits the requirement that a judge suspend active participation in a discriminatory organization while urging the organization to change its practices and gives a judge 24 months to try to change the discriminatory practices of an organization before resigning.

The U.S. code omits the paragraph of the model code commentary regarding efforts to change an organization's invidious practices.

- The **D.C.** code also prohibits membership in any organization that "engages in any discriminatory practice prohibited by the law of the District of Columbia." Commentary states, "A judge's membership in an organization that engages in any discriminatory practice prohibited by the law of the District of Columbia also violates Canon 2 and Section 2A and gives the appearance of impropriety."

- The **Florida** code adds to the text: "Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision." The Florida code omits the sentence in the commentary, "Section 2C refers to the current practices of the organization." It adds to the commentary:

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.

Florida also adds to the commentary:

Other relevant factors [in determining whether an organization practices invidious discrimination] include 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.

- The **Georgia** code provides that judges “should not” hold membership in any organization that practices invidious discrimination. The Georgia code defines invidious discrimination as: 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 as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in the organization.

Georgia adds to the commentary: “Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.” The Georgia code omits the last two paragraphs of the model code commentary.

- The **Idaho** provision states: “A judge shall not hold membership in any organization that practices invidious discrimination on any basis, including but not limited to the basis of race, sex, religion, or national origin.”

- The **Indiana** code omits the commentary requirement that a judge “suspend participation” in an organization while the judge is making efforts to have the organization discontinue its discriminatory practices.

- The **Louisiana** code states:

A judge shall not hold membership in any organization that arbitrarily excludes from membership, on the basis of race, religion, sex or national origin any persons who would otherwise be admitted to membership. 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 whose membership limitations would be entitled to constitutional protection.

- The **Maine** code prohibits a judge from holding “membership in any organization that practices *unlawful* discrimination” (emphasis added). A textual note explains that “unlawful discrimination” was substituted for the phrase “invidious discrimination” used in the 1990 model code “[i]n the interests of greater clarity and specificity.” The commentary states that discrimination is “unlawful” for purposes of Canon 2C when it is of a type that is prohibited by applicable state or federal law,” and discusses the relevant provisions of state and federal law and case

decisions.

- **Maryland** has had a provision regarding membership in organizations that practice invidious discrimination since 1989. In 1992, Maryland moved that restriction from the commentary to the text. The Maryland provision allows a judge two years to try to persuade the organization to change its discriminatory practices before the judge must quit. Commentary to the Maryland code adds “the nature and purpose of the organization” and “any restrictions on membership” to the list of factors to be considered in determining whether an organization practices invidious discrimination.

- Instead of Canon 2C of the 1990 model code, the **Michigan** code provides:

A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

- The **Minnesota** code states that a judge “shall not hold membership in any organization that practices *unlawful* discrimination on the basis of race, sex, religion or national origin” (emphasis added). The Minnesota code does not have any commentary to any part of its code.

- **Nebraska** has added to the commentary:

A person who is not a judge on the date this Code becomes effective and who thereafter becomes a candidate for judicial office is considered to be on notice of the requirements of this Code upon becoming a candidate for judicial office. Such a person would be required, before becoming a judge, to resign from any organizations that practice invidious discrimination.

- The **New Jersey** code provides:

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

Commentary: Organizations dedicated to the preservation of religious, spiritual, charitable, civic or cultural values, that do not stigmatize any excluded persons as inferior and therefore unworthy of membership are not considered to discriminate invidiously.

- The **New York** code states:

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate interest to its members.

New York did not adopt any commentary to any part of its code.

- The **North Carolina** provision states:

A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

- The **Ohio** code does not include the second paragraph of the commentary.

- The **Oregon** code provides:

A judge shall not hold membership in any organization that the judge knows is a discriminatory organization. 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 membership privileges, allowing participation or providing services on the basis of sex, race, national origin, religion, sexual orientation, marital status, disability or age.

Oregon did not adopt any commentary to any part of its code.

- The **Rhode Island** code adds discrimination on the basis of disability to the list of prohibited bases for discrimination.

- **South Carolina** has added the following commentary:

An organization dedicated to the preservation of religious, spiritual, charitable, civic or cultural values, or a sororal, fraternal, alumni, or other 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.

- **South Dakota** adds that “[o]rganizations dedicated to the preservation of religious, fraternal, sororal, spiritual, charitable, civic, or cultural values, which do not stigmatize any excluded persons as inferior and therefore unworthy of membership, are not considered to discriminate invidiously.”

- In 1994, **Texas** adopted a code that provides: “A judge shall not *knowingly* hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin” (emphasis added). In 1996, the provision was amended to state, “A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.” Texas did not adopt any commentary to any part of its code.

- The **Utah** provision states: “A judge *should* not belong to any organization, *other than a religious organization*, which practices invidious discrimination on the basis of race, sex, religion, or national origin.” Utah did not adopt any commentary to any part of its code.

- The **Vermont** code specifies that the prohibited discrimination is “in the selection of members.” Vermont includes “sexual orientation” in the list of prohibited bases.

- The **Virginia** code provides:

A judge should not hold membership in any organization which practices invidious discrimination. For the purposes of this Canon, an “organization which practices invidious discrimination” shall mean any organization which arbitrarily excludes persons from membership upon the basis of race, sex, religion, or national origin. 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 whose mem-

bership limitations would be entitled to constitutional protection.

- **Washington** adopted a provision that states: “Judges should not hold membership in any organization practicing discrimination prohibited by law.” Washington did not adopt any commentary to any part of its code.

- The **West Virginia** code adds to the text a definition of “organization which practices invidious discrimination” that is drawn primarily from the model code’s commentary.

- The **Wisconsin** code omits the sentence from the commentary referring to current practices of the organization. Wisconsin adds to the commentary: “Whether an organization, club or group is ‘private’ depends on a review of the following factors: 1) size; 2) purpose; 3) policies; 4) selectivity in membership; 5) congeniality; and 6) whether others are excluded from critical aspects of the relationship.” The new Wisconsin code provides that “[o]rganizations dedicated to the preservation of religious, fraternal, sororal, spiritual, charitable, civic or cultural values which do not stigmatize any excluded persons as inferior and therefore unworthy of membership are not considered to discriminate invidiously.” The Wisconsin provision omits most of the second paragraph but states “[p]ublic manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary.” The Wisconsin code says a judge must resign if the organization does not change “as promptly as possible.”