

PROPOSED AMENDMENT TO THE MICHIGAN CODE OF JUDICIAL CONDUCT 2(F) TO PROHIBIT MEMBERSHIP IN ORGANIZATIONS THAT PRACTICE INVIDIOUS DISCRIMINATION

Issue

Should the Representative Assembly support the proposed amendment to the Michigan Code of Judicial Conduct 2(F) as presented below:

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.~~ **A judge shall not hold membership in any organization that practices invidious discrimination on the basis of religion, race, national origin, ethnicity, sex, gender identity, or sexual orientation.** Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

Synopsis

The Michigan Coalition for Impartial Justice is comprised of thirteen affinity bar associations and sections of the Michigan State Bar. The member organizations include:

-American Indian Law Section; -Animal Law Section; -Arab American Bar Association; -Attorneys for Animals; -D. Augustus Straker Bar Association; -Detroit Metropolitan Bar Association; -Genesee County Bar Association; -LGBTQA Law Section; -Marijuana Law Section, - Michigan Asian-Pacific American Bar Association; -Washtenaw County Bar Association; -Women Lawyers Association of Michigan.

These groups ardently agree that no individuals who interact with a court of law, in any capacity, should suffer the impression that a judge is biased against them on account of their race, sex, gender identity, religion, national origin, ethnicity, or sexual orientation. Thus, we have united to eliminate bias--actual and perceived--from our courts. In order to obtain this goal, we propose an amendment to the Code of Judicial Conduct, Canon 2(F) for the reasons described herein that prohibit membership in organizations that invidiously discriminate.

Background

I. Development of Judicial Canons Concerning Judge's Membership in Organizations that Discriminate

American Bar Association (ABA) Model Code Commentary – 1984: Judicial membership in organizations which practice invidious discrimination on the basis of race, sex, religion or national origin, as determined by the judge's own conscience, is "inappropriate"

The ABA Code of Judicial Conduct ("Code") provides direction on the manner in which judges should conduct themselves. The objective of the Code is to maintain both the reality of judicial integrity and the appearance of that reality. Canon 2 of the Code instructs a judge to avoid impropriety and the appearance of impropriety in all of the judge's activities.

Before 1984, however, the ABA did not directly address the issue of judicial membership in private restricted organizations. Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, Marquette Law Review (Volume 79 Issue 4, Summer 1996). Because the Code did not prohibit judges from belonging to such organizations, the implication was that membership was permissible. *Id.* As a result of concerns that judicial participation in private club membership casts doubt on a judge's ability to rule impartially and does not advance the public's confidence in the judiciary's impartiality, the ABA added the following paragraph to the Code's Commentary for Canon 2 in 1984:

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 by a mere examination of an organization's current membership rolls but rather depends upon 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.***

Id. (emphasis added).

The 1984 ABA addition took a cautious approach to the issue by including it in Canon 2's Commentary rather than its black-letter standards. *Id.* The 1984 Commentary also did not require a judge to choose between the judgeship or the organizational membership, but left the decision on the issue to "the judge's own conscience." *Id.* Judges, then, were free to belong to discriminatory organizations. *Id.* (citing Steven Lubet, *Judicial Ethics and Private Lives*, 79 Nw. U. L. REV. 983, 1004 (1985)).

ABA Model Code – 1990: Judges "shall not" hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

From 1987 to 1990, the ABA reviewed the entire 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)).

Ultimately, in 1990, the ABA added Canon 2C to the black-letter language of Canon 2. Abramson, *supra*. Canon 2C states: “***A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.***”

The major change in the 1990 provision rendered the 1984 “non-mandatory, subjective” provision a “mandatory and objective” prohibition. Specifically, the canon replaced the phrase “it is inappropriate” with “shall not.” In addition, the language which relegated the decision over whether an organization practices invidious discrimination to a judge’s own conscience was removed.

In addition to the use of mandatory language within the Code, the ABA amended the Code to be gender neutral, rather than using only masculine pronouns. Abramson, *supra*.

The commentary to Canon 2C stated, in part, as follows:

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).

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).

Michigan’s Code of Judicial Conduct: Judges should “be particularly cautious” with regard to membership activities that discriminate

In September 1990, the Representative Assembly of the State Bar of Michigan recommended that the Michigan Supreme Court amend the Code of Judicial Conduct. This recommendation stemmed from the joint recommendations of the Michigan Supreme Court's Task Forces on Racial / Ethnic Issues in the Courts and Gender Issues in the Courts. With regard to a judge's membership in an organization that practices invidious discrimination, the Representative Assembly recommended the following amendments to what was then Canon 2C:

A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. **A judge shall not hold membership in any organization that the judge knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin. He-A judge** should not use the prestige of ~~his~~ **the judicial** office to advance the business interests of ~~himself~~ **the judge** or others. ~~He-A judge~~ should not appear as a witness in a court proceeding unless subpoenaed.

It was not until July 1993 that the Michigan Supreme Court adopted amendments to the Michigan Code of Judicial Conduct regarding a judge's participation in organizations.¹ However, the

¹ In December 1990, SBM President James K. Robinson wrote an article in the SBM Journal, wherein he noted that the proposed amendments provide that judges and lawyers "shall not engage in invidious discrimination on the basis of race, religion, disability, age, sexual orientation, gender, or ethnic origin." He also noted that "under the proposed rules, judges and lawyers would be barred from membership in organizations engaging in invidious discrimination (i.e., arbitrary, irrational discrimination not reasonably related to a legitimate purpose)." James K. Robinson, *Discrimination and the Legal System*, SBM Journal (December 1990).

Also in the December 1990 article, Ingrid Farquharson and Elsa Shartsis wrote a column "Against the Proposals," wherein it was argued that the amendments would violate civil rights and be impractical to enforce. In writing "For the Proposals," Victoria A. Roberts argued that the compelling interest in eliminating invidious discrimination in the profession justifies the means and that there is a constitutionally protected right to be free from invidious discrimination. *Speaking Out: Can Rules Eliminate "Invidious Discrimination?"* SBM Journal (December 1990).

In response to the above, in March 1991, the Detroit News ran an article called "Keeping Lawyers Out of 'Bad Company,'" wherein journalist Chuck Moss sarcastically attacked the proposals. Because the Detroit News refused to publish a letter to the editor, which was written by Lorraine H. Weber, Clerk of the Representative Assembly, SBM President Michael Franck published Weber's letter in the SBM Journal instead. In introducing Weber's letter, Franck stated "It was obvious that Mr. Moss had not read the proposals in question. In virtually every respect, he either misstated or distorted the provisions. He thereby very successfully trivialized an important substantive issue." Weber's letter then went on to point out all of the inaccuracies in the Detroit News article, including Moss' false conclusions that the amendments would prohibit belonging to organizations like the Boy Scouts, Special Olympics, Catholic Church, Islam, or affiliated bar associations which celebrate certain ethnic backgrounds. Weber pointed out the inaccurate conclusions of Moss and stated: "Moss' fictional dialogue is the worst kind of propaganda, relying on distortion, innuendo and sarcasm to sway public opinion."

Then, in May 1991, an "Addendum re Invidious Discrimination" was published in the Michigan Bar Journal. In that addendum, Robinson noted that the current proposals concerning invidious discrimination by judges and lawyers have produced more mail, calls and comments than any other topic in recent memory. He further stated: "Unfortunately, too many of those who have been moved by this issue to speak out seem to be adherents to the view that one should

Supreme Court fell short of prohibiting membership in organizations which invidiously discriminate.² Rather than amending Canon 2C as recommended to address membership in organizations which discriminate, the Supreme Court added section E to Canon 2, which included non-mandatory, subjective language:

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 Court noted that its “order varies in some respects from the recommendations of [the Task Force on Racial / Ethnic Issues in the Courts and the Task Force on Gender Issues in the Courts], but retains and emphasizes the central purpose: this Court's commitment to a policy that assures that all persons will be treated fairly, with courtesy and respect.” The court further noted that the Code of Judicial Conduct was being re-promulgated in a gender-neutral style that reflects the diversity of Michigan's judiciary. *Amendments to Rule 9.205 of the Michigan Court Rules, Rule 1.2 of the Michigan Rules of Professional Conduct, and to the Michigan Code of Judicial Conduct; Addition of Rule 6.5 to the Michigan Rules of Professional Conduct* (Michigan Bar Journal, August 1993).

never let the facts get in the way of one's opinions. This may be because too many have secured their information on the proposals from uninformed and incomplete accounts which have appeared in the public press rather than from the proposals themselves.” As a result, Robinson noted that by order of the Michigan Supreme Court, the proposals on invidious discrimination recommended by the Supreme Court's Bias Task Forces and the State Bar's Representatives Assembly were being published in that issue of the Bar Journal.

² This decision, however, was not unanimous. In fact, Justices Levin and Mallett dissented in part, stating that they concur in the amendment of Canon 2E of the Michigan Code of Judicial Conduct, but would go further and amend Canon 2E. to read as follows:

A judge should not be a member of an organization that discriminates on the basis of race, gender, or other protected personal characteristic. A judge may, however, belong to an organization that has a particular demographic focus, provided, if the organization is law-related, that membership in the organization is open to all and it is committed to equal justice under law. If the organization has a particular demographic focus and is not law-related, a judge should not belong if the nature or objectives of the organization cast doubt on the judge's personal commitment to equal justice under law. Nothing in this paragraph should be interpreted to diminish a judge's freedom of religion.

Michigan Bar Journal, August 1993.

To date, 43 states have adopted mandatory, objective language regarding a judge's membership in organizations which practice invidious discrimination. Michigan is one of the 7 states which has not yet done so. *See* Survey of the Law, *infra*.

ABA Model Code – 2007 : The protected class broadens to include gender, ethnicity, and sexual orientation

In the initial drafting of Canon 2C, the ABA included the categories of race, sex, religion and national origin because those are the only classes that are constitutionally protected. Milord, *supra*, at 16. In 2003, however, the ABA began an extensive review of the 1990 ABA Model Code. After three-and-one-half years of comprehensive study, those efforts culminated in the adoption of a revised ABA Model Code of Judicial Conduct in 2007. With regard to judges being members of organizations that practice invidious discrimination, the 2007 amendments broadened the protected classes to include gender, ethnicity, and sexual orientation, stating:

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

The comments to the amended Rule 3.6 provide, in part:

A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

* * *

A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

Although 27 states have amended their judicial canons to broaden the protected classes to include gender, ethnicity and sexual orientation, consistent with the ABA Model Rule, Michigan has not followed suit. In fact, for more than 25 years, there have not been any substantive amendments to Michigan's Canon which addresses a judge's membership in organizations that discriminate.³

A list of all of the states and the language of their respective judicial canons is contained within the Survey of Law section, *infra*.

II. Justification for the Proposed Michigan Amendment

It has been a long-standing concern that judicial membership in organizations that invidiously discriminate creates not only the appearance of impropriety, but also may lead to actual bias towards one classification of persons over another.

The notion that a judge's personal opinions and organizational membership affects his or her decisions on the bench has been a notable topic of interest in modern times. Consequently, numerous studies and articles have addressed this topic. Examples include articles like "Judicial Bias: Playing Favourites," Eric A. Posner, *The Economist*, by S.M., May 13, 2014; *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, University of Chicago Law Review, (Vol 75 No. 2, Spring, 2008); Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, Duke Journal of Gender & Law (Volume 25:1, 2017); Benjamin B Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality*, Boston University Law Review (Volume 88:781, 2008). The public's perception of the judicial system many times starts with its interactions with a judge. This fact places extra significance on every judge's conduct on and off the bench. In fact, the canons themselves declare the following:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

Michigan Code of Judicial Conduct, Canon 1.

As a result, a majority of jurisdictions in the United States, the Federal Cannons, and the ABA, have specifically prohibited judicial membership in organizations that invidiously discriminate, which means that the membership of the organization excludes membership based on the race, religion, gender, sexual orientation, or national origin of the applicant. This is not to say that the canon prohibits members of the bench from exercising their First Amendment rights. See Comment on Judicial Canon 3, Rule 3.6 of the Code. Judges are entitled to the same constitutional rights and

³ Although the Michigan Supreme Court again made amendments to Canon 2 in 2013, the substance of Canon 2E remained intact; the amendments only resulted in 2E becoming 2F.

protections as the rest of the country, but they have a specific duty to remain unbiased and impartial given their unique role as gatekeepers of the legal system.

The perception that a judge is biased or impartial due to membership in an organization that discriminates based on race, religion, gender, sexual orientation, and/or national origin is particularly visible to the members of the community who have been excluded by such organizations. As noted by author Cynthia Gray, upon contemplation of revising the model judicial canons the ABA committee determined:

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.

Key Issues in Judicial Ethics: Organizations that Practice Invidious Discrimination, American Judicature Society and the State Justice Institute (Order #843, July 1999), citing *Report No. 120, ABA Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates and Recommendation* (7 August 1984).

Gray further notes that the ABA came to this conclusion based on “persuasive testimony from the very persons excluded” and thus it 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.*

Other jurisdictions have followed suit, noting the same reasoning required the change in their judicial canons. For example, Indiana noted in 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.” *Key Issues in Judicial Ethic* at 4. Likewise, North Dakota noted in an Advisory Opinion, “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.” *Id.*

Similar concerns are echoed in Michigan Ethics Opinion JI-109, wherein the commission correctly noted that regulations on judicial participation is important because:

[J]udges are supposed to be impartial, to make decisions based upon the law and the record of a case, and to uphold the law, judges should not declare their personal preferences regarding policy questions. If a judge has become identified with a particular interest group or position, and that group appears as a party or a similar issue arises before the judge in a pending matter, the judge may have to recuse himself or herself in order to preserve the fairness of the process.

JI-109, August 6, 1996.

This opinion dealt specifically with MCJC 3A(6), however similar reasoning can be applied to the need to have a clear and unambiguous language in Canon 2(F). The current language of Canon

2(F) is outdated and vague. For instance, the prior ABA rule on organizational membership, left open such a wide range of interpretation of the canon given the discretionary language, there was a very low and sparse enforcement. Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint For A Generation of Judges*, *The Justice System Journal* (Vol 28 No 3, 2007). Harrison noted:

To address the concern that a duty to avoid the appearance of impropriety was too vague for independent enforcement, the Commission's preliminary draft included comment to effect that ordinarily, when judges are disciplined for violating their duty to avoid the appearance of impropriety, it is a combination of other, more-specific rule violations that give rise to the appearance problem.

Id. at 262.

Without clear language that prohibits membership in organizations that discriminate invidiously, many members of the bench may not realize the impact their membership has on the individuals who appear before them. This is to say, this Coalition for Impartial Justice recognizes that there are members of the bench who may have joined an organization without any malicious intent to create an appearance of impropriety, because as many studies indicate, discrimination may occur because you cannot see it. Joan Williams, *et al.* *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession, Executive Summary*, ABA's Commission on Women in the Profession and the Minority Corporate Counsel Association (Executive Summary, 2018).

Moreover, as evidenced by the fact that the Michigan State Bar Representative Assembly, proposed this language previously, there is an obvious need and desire to have the canon reflect the expectations that our community has of our members of the bench. See Lorraine H. Weber, *Eliminating the Barriers Opening the Doors*, *Michigan Bar Journal*, (January, 2001).

Additionally, the State Bar of Michigan has already taken steps to address the growing need for diversity inclusion by challenging members to become more aware in recognizing the biases around them. Legal practitioners have been asked to take the Diversity Pledge and requested to maintain a "Diversity & Inclusion Advisory Committee" at their places of employment. In addition, many task forces such as Race Relations and Diversity Task Force, the Michigan Department of Civil Rights, and the ABA Commission on Women in the Profession, have continued to fight for diversification and equal access to the judicial system. Moreover, law makers have pushed for the extension of the Elliot-Larsen Civil Rights Act for the LGBTQ community in Michigan. However, the most glaring and overwhelming is the support and enthusiasm exhibited by the bar as a whole; evident through numerous sections and organizations hosting events that celebrate our diverse bar. It is clear that now is the time for the judicial canons to be revised to more accurately and clearly reflect the values of the Michigan legal community.

In conclusion, there is no justifiable reason for a member of the bench who is charged with the high duty of impartiality and un-biasness to be a member of an organization that invidiously discriminates, absent a justifiable and lawful exercise of the First Amendment. The negative impact that unquestionably results on the individuals who are discriminated against by the organization creates a clear perception of partiality and bias that the cannons were specifically promulgated to prohibit.

Opposition

None known.

Prior Action by Representative Assembly

September 1990 (see above).

Fiscal and Staffing Impact on State Bar of Michigan

None known other than in relation to grievances filed against judges who violate the proposed amendment.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 25, 2020**

Should the Representative Assembly support the proposed amendment to the Michigan Code of Judicial Conduct 2(F) as presented above?

(a) Yes

or

(b) No

Public Policy Position
Proposed Amendment to the Code of Judicial Canon 2(F) as presented at the
Representative Assembly Meeting on September 26, 2019

The American Indian Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 211 members. The American Indian Law Section is not the State Bar of Michigan and the position expressed herein is that of the American Indian Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The American Indian Law Section has a public policy decision-making body with 11 members. On August 9, 2019, the Section adopted its position after discussion and vote at a scheduled meeting. 11 members voted in favor of the Section's position on the proposed amendment to the Code of Judicial Conduct 2(F), 0 members voted against this position, 0 members abstained, 0 members did not vote.

Support

Explanation

AALS supports the Michigan Coalition for Impartial Justice's amendment to the Judicial Canon 2(F) that includes mandatory language that judges shall not be members of organizations that invidiously discriminate.

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Public Policy Position
Proposed Amendment to the Code of Judicial Canon 2(F) as presented at the
Representative Assembly Meeting on September 26, 2019

The Animal Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 209 members. The Animal Law Section is not the State Bar of Michigan and the position expressed herein is that of the Animal Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Animal Law Section has a public policy decision-making body with 14 members. On August 9, 2019, the Section adopted its position after an electronic discussion and vote. 10 members voted in favor of the Section's position on the proposed amendment to the Code of Judicial Conduct 2(F), 0 members voted against this position, 0 members abstained, 4 members did not vote.

Support

Explanation

The Animal Law Section has joined the Michigan Coalition for Impartial Justice, which is comprised of affinity bar associations and sections of the Michigan State Bar, to encourage revision of Judicial Canon 2(F) to prohibit judges from holding membership in organizations that invidiously discriminate. The Coalition asserts that no individual who interacts with a court of law, in any capacity, should suffer the impression that a judge is biased against him or her because of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

Keller Explanation

A majority of U.S. jurisdictions, the Federal Cannons, and the ABA have specifically prohibited judicial membership in organizations that invidiously discriminate, which means that the membership of the organization excludes membership based on the race, sex, gender, religion, national origin, ethnicity, or sexual orientation of the applicant. This issue is critical to the fair and impartial functioning of the Michigan courts and is a Keller-permissible category of advocacy.

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Public Policy Position
Proposed Amendment to the Code of Judicial Canon 2(F) as presented at the
Representative Assembly Meeting on September 26, 2019

The LGBTQA Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 153 members. The LGBTQA Law Section is not the State Bar of Michigan and the position expressed herein is that of the LGBTQA Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The LGBTQA Law Section has a public policy decision-making body with 9 members. On September 5, 2019, the Section adopted its position after an electronic discussion and vote. 9 members voted in favor of the Proposed Amendment to the Code of Judicial Canon 2(F), 0 members voted against this position, 0 members abstained, 0 members did not vote.

Support

Explanation:

The LGBTQA Section of the State Bar supports the proposal by the Coalition for Impartial Justice, the Women Lawyers Association of Michigan (WLAM) that the Code of Judicial Conduct, Canon 2(F) be amended to remove the third sentence, "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." and replace it with "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of religion, race, national origin, ethnicity, sex, gender (including transgender), or sexual orientation."

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Public Policy Position
Proposed Amendment to the Code of Judicial Conduct Canon 2(F) as
presented at the Representative Assembly Meeting on September 26, 2019

The Religious Liberty Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 95 members. The Religious Liberty Law Section is not the State Bar of Michigan and the position expressed herein is that of the Religious Liberty Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Religious Liberty Law Section has a public policy decision-making body with 9 members. On September 19, 2019, the Section adopted its position after a discussion and vote at a special scheduled meeting. 8 members voted in favor of the Section's position on Proposed Amendment to the Code of Judicial Conduct Canon 2(F), 0 members voted against this position, 0 members abstained, 1 member did not vote.

Oppose

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September 19, 2019

Mr. Richard Cunningham, Chairperson
SBM Representative Assembly
3030 W. Grand Blvd., Suite 10-352
Detroit, MI 48202-6030

RE: Proposed Amendment to the Code of Judicial Conduct Canon 2(F)

Dear Chairperson Cunningham:

On behalf of the State Bar of Michigan Religious Liberty Law Section, we write in opposition to the proposed amendment to Canon 2(F) of Michigan's Code of Judicial Conduct. Canon 2(F) currently states:

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 proposed amendment reads as follows:

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.~~ A JUDGE SHALL NOT HOLD MEMBERSHIP IN ANY ORGANIZATION THAT PRACTICES INVIDIOUS DISCRIMINATION ON THE BASIS OF RACE, SEX, GENDER, RELIGION, NATIONAL ORIGIN, ETHNICITY, OR SEXUAL ORIENTATION. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

The proposed amendment is both unconstitutional and unworkable. We oppose this amendment for the following reasons:

I. THE PROPOSED AMENDMENT VIOLATES THE FIRST AMENDMENT RIGHTS OF JUDGES.

This amendment essentially enacts a speech code for judges. Perhaps well intentioned, it raises serious questions of vagueness and overbreadth, and chills speech protected under the First Amendment to the U.S. Constitution and Article 1, Section 5 of the Michigan Constitution.

The undefined terms of “invidious discrimination” and “organization” make the amendment unworkable. Does “organization” include churches or other religious and nonprofit organizations that may not agree with the orthodoxy of the proponents of this amendment? What about educational institutions or other entities that hold to traditional standards regarding marriage or lifestyles?

What exactly does “invidious discrimination” mean? Webster defines invidious as:

1. tending to cause discontent, animosity, or envy; malignant.
2. likely to incur ill will or hatred, or to provoke envy; hateful.
3. is unpleasant or of an objectionable nature.
4. causes harm or resentment.

What standard will be applied to determine if an organization “practices invidious discrimination”? Former State Bar President James K. Robinson, writing in favor of a similar proposed rule in 1990, defined invidious discrimination as “arbitrary, irrational discrimination not reasonably related to a legitimate purpose.” (*Discrimination and the Legal System*, SBM Journal, December 1990). How would such a definition possibly be fairly enforced by the State Bar? One person’s sincerely held religious belief is another’s irrational belief. Who decides? Is the State Bar going to insert itself into determining if a particular judge’s religious beliefs are protected?

When a similar proposal to ban membership in organizations that practiced invidious discrimination was made in 1990, an article in the State Bar Journal summarized the opposition to the proposal:

The Civil Liberties Committee, in particular, was aghast that the State Bar would even consider such sweeping restrictions in the name of prohibiting discrimination. The State Bar must not promulgate rules that violate civil rights and would be impractical, if not impossible, to enforce. Further, by prohibiting membership, the State Bar effectively reduces the ability of attorneys to influence members of discriminating organizations from within. The Civil Liberties Committee believes that those drafting and approving these amendments have a sincere and laudable desire to help eliminate discrimination, but have gone too far in their zeal. THESE AMENDMENTS ARE MORE VIOLATIVE OF CIVIL LIBERTIES THAN THEY ARE PROHIBITIVE OF DISCRIMINATION. (emphasis in original).

(*Against the Proposals*, SBM Journal, December 1990).

Members of the State Bar Civil Liberties Committee, which strongly and unanimously opposed its adoption, went on to object to the ambiguous language and that it was a “clear violation of first amendment rights of privacy, speech, and association.” They further argued that “the proposals are an impermissible attempt by a state authority to regulate employees' rights to privacy and association, in violation of the First Amendment of the U.S. Constitution, Title VII of the Civil Rights Act, Article 1 of the Michigan Constitution, and the Elliott-Larsen Civil Rights Act.”

The authors, articulating the position of the Civil Liberties Committee, next pointed out:

The scienter requirement impermissibly invades the privacy and associational arenas. Would it create an investigatory duty on the part of the judge? Must a judge ascertain that an organization in fact applies its rules in a discriminatory manner, even when its rules are facially nondiscriminatory? As a practical matter, proving or disproving a judge's scienter would be problematic at best, and would invade areas protected by judicial privilege. Privacy considerations aside, the state as a government employer cannot use this prohibition as grounds for employee discipline. As a general rule, the government cannot condition employment on the compromise or relinquishment of a constitutional right, be it freedom of belief and association (Elrod), or freedom of speech (Pickering). *Hall v Ford*, 856 F.2nd 255 (D.C. Cir, 1988). . . . State Bar rules and regulation of membership and conduct create conditions of employment.

(*Against the Proposals*, Ingrid Farquharson and Elsa Shartsis, SBM Journal, December 1990).

If a church or nonprofit believes that marriage is a sacred union between one man and one woman, is a judge barred from belonging to the organization? If an organization is pro-life and believes all life begins at conception and is deserving of respect and protection, is a judge barred from belonging to the organization? If a litigant happens to be gay, transgender, or pro-choice, and is offended by such beliefs, is that judge now unable to hear that person's contract dispute or other legal matter? Such a standard is too vague and overbroad to be enforced in a fair manner.

What if a judge belongs to a religious organization with sacred beliefs that others who belong to another religious organization with different religious dogma find offensive? Does that qualify as invidious discrimination? Is a judge barred from belonging to a fraternity or sorority because the organizations arguably discriminate based on sex? May a judge only belong to organizations or groups who are favored by the proponents of the amendment? Isn't this "invidious discrimination" against judges who maintain traditional values and religious faith? Tolerance is a two-way street. Socially and religiously conservative judges will rightly distrust the enforcement of these new speech and religious restrictions.

Under the proposed amendment, may a judge belong to either the Christian Legal Society (which requires its members to sign a Statement of Faith and adhere to a Christian Code of Conduct – including sexual and marital restrictions) or the Catholic Bar Association (which promotes the ideals and beliefs of the Catholic faith)? Is a Jewish judge prohibited from being a member of his Orthodox synagogue? Is a Muslim judge banned from membership at his mosque because Islam does not affirm same-sex marriage?

This proposed amendment should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, we can ill-afford to regulate judges with a rule that will likely be utilized to target their speech or religious beliefs. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free expression of those with whom they disagree.

Many judges sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable questions and regularly turn to the judges serving as volunteers on their boards for general guidance on political and social issues. By making judges hesitant to serve on boards, the proposed amendment does real harm to religious and charitable institutions and hinders their good work in their communities.

This proposed amendment chills a judge's willingness to participate in political, cultural, or religious organizations that promote traditional values, including sexual conduct and marriage. Would judges be subject to disciplinary action for participating with their children in youth organizations that teach traditional values? Would it subject judges to disciplinary action for belonging to organizations that support laws promoting traditional values?

Moreover, this proposed amendment is not targeted at judicial conduct directly impacting a judge's ability to be entrusted with the professional obligations of their office, namely, to serve the legal system with honesty and trustworthiness. Without more, this amendment does nothing to address serious interference with the proper and efficient functioning of the judicial system. Nor does it address any actual harm or injury to judicial proceedings. Simply belonging to an organization with which a litigant disagrees, without more, does not prove any prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding.

The amendment now under consideration takes the Code of Judicial Conduct in a completely new and different direction. For the first time, the new Rule opens judges to discipline for engaging in conduct that neither adversely affects the judge's fitness to be on the bench, nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed amendment fails to require any showing that the proscribed membership prejudices the administration of justice by the judges' conduct on the bench, this amendment creates a subjective free-floating non-discrimination provision inviting arbitrary enforcement.

II. THE PROPOSED AMENDMENT VIOLATES THE DUE PROCESS RIGHTS OF JUDGES.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, *supra*, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, *supra*, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the proposed amendment clearly violates these principles.

The terms “practice” and “invidious” are unconstitutionally vague. The proposed amendment prohibits judges from belonging to an organization that “practices invidious discrimination.” But these terms are not defined in the proposed amendment, are subject to varied interpretations, and no standard is provided to determine whether an organization is, or is not, practicing invidious discrimination.

Does expressing disagreement with someone’s religious beliefs constitute a practice of invidious discrimination on the basis of religion? Can merely being offended by an organization’s conduct trigger application of this Canon? Can a single act constitute a practice of invidious discrimination, or must there be a series of acts? In order to constitute a practice of invidious discrimination, must the offending behavior consist of words, or could body language constitute such discrimination?

In short, because the terms “practice” and “invidious” are so vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide judges with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Judicial Canons to enforce the Rule arbitrarily and selectively; and (3) its vagueness chills the speech of judges who, not knowing where the “practice of invidious discrimination” begins and ends, will self-censor their free speech and religious conscience in an effort to avoid violating the Canon.

Further, the term “discriminate” is also unconstitutionally vague. The word “discriminate” has been defined as “to unfairly treat a person or group of people differently from other people or groups.”¹

But – given that definition – a legitimate question can be raised as to what sorts of behavior are, in fact, encompassed by the proposed amendment’s proscription against discriminating on the basis of one of the protected classes. What constitutes “unfairly” treating a person differently from others? To what sorts of behavior does the proposed Canon apply? Would it apply to an organization’s president writing an article for a legal publication or giving a speech? Would it apply to an organization’s internal employment practices – such as hiring and employee disciplinary decisions?

It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. It is also true that such statutes and ordinances do not – as does the proposed amendment – merely prohibit “discrimination” and leave it at that. Rather, they spell out what specific behavior constitutes discrimination. Michigan’s Elliott-Larsen Civil Rights Act (ELCRA) specifically delineates what constitutes discrimination and what areas are covered. MCL 37.2101, et. seq.

Unlike ELCRA, however, this proposed amendment simply prohibits “membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin,

¹ Merriam-Webster On-line Dictionary, <http://www.meriam-webster.com/dictionary/discriminate>.

ethnicity, or sexual orientation” – thus leaving it subjectively open to what sorts of behavior might be encompassed in that proscription.

If judges are to face professional discipline for engaging in certain proscribed behavior, then they are entitled to know precisely what behavior is being proscribed and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the terms used, the proposed amendment is subject to constitutional challenge. For that reason, as well, the proposed amendment should be rejected.

III. THE PROPOSED AMENDMENT CREATES NEW CATEGORIES NOT COVERED BY EXISTING LAW.

The proposed amendment adds three additional classes to the ever-growing list of specially protected groups. ELCRA currently protects “religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.” The proposed amendment adds “ethnicity,” “gender,” and “sexual orientation” to that list. The Michigan Legislature has refused to add these additional categories to ELCRA over a dozen times over the past twenty years. However, the phenomenon of ever-growing, never-ending lists of specially protected classes in non-discrimination laws raises a variety of problematic issues.

A. The List of Specially Protected Classes Includes Classes That Are Not Objectively Definable.

The proposed amendments continue the apparently never-ending process of adding specially protected classes to anti-discrimination laws, rules, and regulations, including judicial and professional codes of conduct. Indeed, this process has now reached the absurd result that the proliferating classes cannot even be rationally identified or objectively determined. Non-discrimination provisions and the classes they protect are more likely the result of unrestrained political agendas than of thoughtful responses to demonstrated needs.

The terms “sexual orientation” and “gender” are indefinable. Does the term “gender” include “gender identity”? Even scholars who regularly study sexual orientation cannot agree on a definition for, or an understanding of, terms. See Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) (“The meaning of the phrase ‘sexual orientation’ is complex and not universally agreed upon.”).

Further, neither sexual orientation nor gender identity is objectively determinable. Sexual orientation is certainly not objectively observable. Indeed, if one were to assume another’s sexual orientation by reference to their public presentation and behavior, such in and of itself might be considered discriminatory. And gender identity is, by definition, completely subjective, depending entirely upon a person’s self-perception, which may have nothing to do with how they objectively appear to others. The concept is malleable and subject to change. There is absolutely no requirement that someone have a temporally consistent “gender identity.” In fact, proponents of gender identity protection admit that “gender identity” is not only indefinable and changeable over time but also that different “gender identities” may exist simultaneously and in different contexts. See, for example, *Self-Determination In*

A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities, 12 Tex. J. on C.L. & C.R. 101, 104 (2006) (“[I]ndividuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, but mean very different things by the descriptor they choose. And various individuals may view one person’s gender differently and thus deploy different gender signifiers to refer to that individual.”). The article was written by a proponent of a “right to gender self-determination” who posits “the addition of infinite new classifications of individuals’ genders within and outside of the gender categories society currently comprehends.”

Consequently, under the proposed amendment, judges must refrain from joining organizations invidiously discriminating against classes that no one can even define, let alone objectively perceive or rely upon as having any objectively consistent existence. Such a Canon is unreasonable and unenforceable.

B. The List of Specially Protected Classes in the Amendment is Inconsistent

Attempting to create and maintain a list of specially protected classes results in inconsistency and brings disrepute upon the legal profession because different classes cannot all be protected at the same time. For example, how can religion be protected at the same time as sexual orientation? Some religious organizations view certain sexual conduct and lifestyles as wrong. This internal conflict in the amendment is problematic. This inconsistency is further evidence that protected class theory may be driven more by the changing winds of political expediency than by any sort of demonstrated need.

In addition, including a list of specially protected classes factionalizes society and creates a distinction between those who are protected and those who are not. This practice of identifying groups of people – giving some of those groups and not others legal protection – pits groups of people against each other and conveys the impression that the State Bar values certain sorts of people, but not others. Which groups are protected and which are not appears to be the result of nothing more than simple political pressure. If the members of a certain interest group bring sufficient political pressure upon the State Bar, then the group gets protection. If not, they do not. Such a construct is bound to bring the State Bar into disrepute and raises the question whether it is really interested in justice, or is simply the mouthpiece of special interest groups.

If the State Bar was really interested in prohibiting discrimination, then it would prohibit invidious discrimination against everyone. Instead, it picks and chooses which groups to protect and which to leave unprotected.

C. The List of Specially Protected Classes Deprives the State Bar of any Principle Protecting it from Future Interest Group Pressure to Further Expand the List to Include Still Other Protected Classes

Even now there are additional groups claiming that their peculiar characteristics merit special recognition and protection. For example, the Wesleyan University Office of Residential Life has recognized no fewer than 15 “sexually or gender dissident communities,” represented by the acronym

LGBTQQFAGPBDSM.² ELCRA already protects categories which are excluded from this amendment.

The Township of Delta, Michigan, illustrates how enthrallment to the idea of protected classes results in an ever-growing and never-ending list of protected groups. Delta Township's discrimination ordinance has expanded to currently protect no fewer than 16 distinct classes, including race, color, religion, national origin, sex, age, height, weight, marital status, physical limitation, mental limitation, source of income, familial status, sexual orientation, gender identity, and gender expression. Delta Township's experience illustrates how setting forth a list of specially protected classes establishes a construct that leads to a never-ending parade of constituents attempting to advance their agendas and enshrine their favored characteristics or behaviors within the protected classes.

Arizona provides a recent example of this disturbing phenomenon. Those seeking recognition for and protection of certain sexual behaviors in Arizona's Rules of Professional Conduct sought and were granted recognition of "sexual orientation" as a protected group. But that proved insufficient to satisfy the claims of those who sought special recognition and protection based on "gender identity," which was added to Comment [3] to Rule 8.4 of the Arizona Attorney Conduct Code in 2003.

As in Arizona, it is only a matter of time before additional groups come forward to press their particular interests on the Michigan State Bar – and on what principle will it be able to reject such overtures?

For all these reasons, the State Bar should reject the proposed amendments and resist the temptation to add any new protected classes to the current Judicial Code.

IV. NO DEMONSTRATED NEED EXISTS FOR THE PROPOSED AMENDMENT.

It is striking to note that no evidence is presented that harassment or invidious discrimination actually exists to any significant degree in the judiciary – or that, if it does exist, it is such a serious and widespread problem that the Judicial Canons must be amended to infringe on judges' constitutional rights to address it. If such evidence exists, then one would have expected to see it presented.

Where is the evidence that the judiciary is so rife with harassment and invidious discrimination in the organizations to which judges belong that the amendment must be adopted to address the problem? Where are all the complaints against judges alleging such a problem? We dare say such complaints are virtually non-existent. Why? Because judicial membership in organizations (whatever their practices) cause no problems in the administration of our judicial system or in the fairness of the judiciary.

Despite the lack of evidence, those seeking to amend our Judicial Code plainly suggest judges engage in invidious discrimination through organizational membership. Do they believe judges are so vile and depraved that we must empower professional disciplinary authorities to infringe upon the sanctity of

² See http://www.wesleyan.edu/reslife/housing/program/open_house.htm).

their professional autonomy, not to mention their personal consciences and constitutional rights? Do they really believe judges cannot be trusted to behave honorably? We who join this Comment hold greater respect for, and confidence in, our fellow members of the legal profession.

No demonstrated need exists for the proposed amendment to Canon 2(F) – and the effort to enshrine this political agenda in the Code of Judicial Conduct does not advance the interests of the State Bar.

We expect political activists to use this amendment to punish a judge who does not accept the political orthodoxy of those proposing the amendment. Judges are called upon, and take an oath, to uphold the law and apply it equally and fairly to all litigants. That is all that can be asked of any judge. To start applying a religious or speech test, or vague standards, is plainly unconstitutional and discriminates against the judge. The social and political issues that proponents of the amendment wish to enforce against judges are best left to the legislative and executive branches of our government for resolution.

Judicial Conduct Rules are different from the Rules of Professional Conduct. Judges, unlike lawyers generally, have a legitimate professional obligation to avoid bias or the appearance of bias. So, for that reason, restrictions on judicial behavior are more understandable and relate more closely to a judge's professional obligations. The proposed changes to the Michigan Code of Judicial Conduct, however, could be used to interfere with a judge's constitutional rights of privacy, association, speech, and religion. Moreover, the very fact that the provision states that "Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion" demonstrates that the Rule could otherwise be interpreted in such a way as to do exactly that. Moreover, by using the word "*should*," the State Bar is not actually prohibited from diminishing "a judge's right to the free exercise of religion." How will the State Bar enforce this rule when there are competing interests, i.e., "religion" versus "sexual orientation"? Both interests cannot be reconciled, so which prevails?

Additionally, assurances that the proposed rule will not be applied in an unconstitutional manner does not cure the rule's constitutional infirmities. Supporters of the proposed amendment may argue that, although the rule could be applied in an unconstitutional manner, it will not be – or may suggest that, in order to assuage concerns about the proposed rule's constitutional infirmities, the proposed rule be modified so as to provide that the rule will not be applied in an unconstitutional manner. Neither approach, however, remedies the rule's constitutional infirmities.

First, proponents of the rule lack authority to speak on behalf of the state's professional disciplinary authorities. They cannot say how the disciplinary authorities will or will not interpret or apply the rule. And second, *United States v. Stevens*, 559 U.S. 460 (2010) clearly holds, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The *Stevens* Court made clear the danger in trusting government representations of prosecutorial restraint. *Id.* at 480.

We urge the State Bar to be very careful about taking politically sensitive policy positions that will only serve to divide the bar and cause dissension within our ranks. The Religious Liberty Law Section urges that the proposed amendment be denied.

Respectfully submitted,

Religious Liberty Law Section

This letter was approved by its Executive Council Members at a meeting on September 19, 2019.

The Catholic Lawyers Society of Metropolitan Detroit stands in agreement with this opposition letter.

Christian Legal Aid of Southeast Michigan stands in agreement with this opposition letter.

Public Policy Position
Amendment to Code of Judicial Conduct as Presented to the Representative
Assembly on April 25, 2020

Oppose

Explanation:

The Judicial Section was concerned about the need for the change and its interpretation and application. Other states that have adopted this language are not consistent with the interpretation and application. The Judicial Section was concerned this could be used as a weapon against individual judges and/or associations.

Position Vote:

Voted For position: 14

Voted against position: 0

Abstained from vote: 1

Did not vote (absent): 12

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Michigan District Judges Association

PAST PRESIDENT

Hon. Beth Gibson
Newberry

PRESIDENT

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Bay City

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Hon. Kim Wiegand
Sterling Heights

TREASURER

Hon. Mike Carpenter
Midland

February 25, 2020

Dear Members of the Representative Assembly:

The executive board of the Michigan District Judges Association has reviewed your proposed amendment to the Michigan Code of Judicial Conduct 2(F) which would prohibit membership by judges in organizations that practice invidious discrimination. We urge you to support that amendment.

We note that Michigan is one of seven states that has not amended their code of judicial conduct to add a similar prohibition.

We agree that the categories of persons most likely to be subject to discrimination should be expanded to include "religion, race, national origin, ethnicity, sex, gender identity, or sexual orientation."

This standard of "practicing invidious discrimination" is subjective and hard to define. Therefore, it would be helpful to include a commentary similar to the ABA commentary to ABA Canon 2C to add some clarification. Organizations "dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members" or "intimate, purely private organization(s)" would not normally be considered invidious.

Thank you for taking the lead in this area.

Sincerely,

Julie H. Reincke
Chair, MDJA Court Rules Committee