

No. C4-85-697
STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

MAY 23 2003

FILED

In re:

Petition for Amendment of
The Minnesota Code of Judicial Conduct

THE MINNESOTA STATE BAR ASSOCIATION'S PETITION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

In furtherance of the Minnesota Code of Judicial Conduct's goal of promoting public confidence in the integrity and impartiality of the judiciary, Petitioner Minnesota State Bar Association (MSBA) respectfully petitions this court to amend the code to prohibit any judge from knowingly holding membership in any organization that practices unlawful discrimination. In support of this petition, the MSBA shows the following:

1. Petitioner MSBA is a non-profit corporation of attorneys admitted to practice law before this court and the lower courts of this state.
2. As expressly recognized by the legislature, this court has the exclusive and inherent power and duty to establish binding ethical standards for the conduct of judges. *See* Minn. Stat. § 480.05 (2002). Based on this power, this court created the Minnesota Code of Judicial Conduct, which is binding on all judges, to establish "standards for the ethical conduct of judges to reflect the responsibilities of the judicial office as a public trust and to

promote confidence in our legal system”. Minn. Code Jud.

Conduct, Preamble.

3. At the request of the Minnesota Lavender Bar Association,¹ the MSBA Court Rules and Administration Committee examined two canons in the Code of Judicial Conduct that appear to conflict with one another because one defines discrimination more broadly than the other. In particular, Canon 2C currently prohibits judges from holding membership in any organization that practices unlawful discrimination on the basis of race, sex, religion, or national origin, while Canon 3A(5) demands that judges perform their duties without prejudice, *including but not limited to* bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. (emphasis added). Thus Canon 2C bars discrimination on four bases, while Canon 3A(5) broadens the protected categories to eight. In sum, the code as currently written allows judges to hold membership in organizations that discriminate on the basis of age, disability, sexual orientation, or socioeconomic status, but demands that, in the courtroom, they manifest no such bias or prejudice in regard to those same characteristics. This creates the public perception that some types of discrimination are so deleterious that mere

¹ MLBA is an organization of legal professionals and students committed to promoting social justice through education and advocacy, and focusing on legal and public policy issues affecting lesbian, gay, bisexual, and transgender people.

association with them, through membership in an organization that discriminates on that basis, taints both the judge individually and the judiciary as a whole, and is thus prohibited by the code. In contrast, it would appear that association with other types of discrimination results in no such perception; thus judges are not barred from holding membership in organizations that discriminate beyond race, gender, religion, or national origin. After reviewing the code, Minnesota law, and the judicial conduct codes of other states, the MSBA Court Rules and Administration Committee recommended to the MSBA that Canon 2C be amended to prohibit judges from knowingly holding membership in any organization that unlawfully discriminates on any basis. The MSBA Board of Governors adopted the committee's recommendation on December 7, 2001, and this petition follows. (Ex. A, Ct. rules comm. rec. & rep.).

4. As a means of promoting confidence “in the integrity and impartiality of the judiciary”, the Minnesota Code of Judicial Conduct requires judges to (1) comply with the law at all times; (2) perform their duties without bias or prejudice *including but not limited to* bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status; and (3) forgo membership in any organization that practices unlawful discrimination on the bases of race, religion, sex, or

national origin. *See* Minn. Code Jud. Conduct, Canons 2A, 3A(5), 2C.

5. Taken as a whole, these three judicial conduct canons define discrimination more narrowly than state law. In particular, the Minnesota Human Rights Act bars discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age. *See generally* Minn. Stat. § 363.03 (2002). In employment matters, however, religious organizations may lawfully discriminate on the basis of religion and sexual orientation, where either or both are a bona fide occupational qualification for employment. Minn. Stat. § 363.02, subd. 1(2) (2002). Likewise, private-service organizations, whose primary function is providing occasional services to minors, may lawfully discriminate based on sexual orientation with respect to employment or volunteer opportunities within their programs. *Id.* at subd. 1(3).

6. Allowing judges to knowingly join some organizations that illegally discriminate, but not others, does not comport with the code's requirement that judges "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" because membership in an organization that illegally discriminates in any manner taints both the individual judge and

the judiciary, and decreases public confidence in the impartiality of the judiciary. As the code directs, judges “must avoid all impropriety and appearance of impropriety”. Minn. Code Jud. Conduct, Canon 2, cmt. Further, “[t]he test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain doubt that the judge would be able to act with integrity, impartiality, and competence.” *Id.* It is not unwarranted to expect that a member of the public who becomes aware of a judge’s membership in an organization that illegally discriminates might “reasonably entertain doubt that the judge would be able to act with integrity and impartiality” when ruling on a discrimination claim. For example, an individual, bringing a claim for discrimination on the basis of sexual orientation under the Minnesota Human Rights Act, might reasonably entertain doubt regarding a judge’s ability to impartially review her claim if she knows that the judge knowingly holds membership in an organization that illegally discriminates on the basis of sexual orientation. This diminishes public trust and confidence in the judiciary because, as this court has noted, “it is not enough that a legal proceeding be fair and impartial, but [it is] also essential that the litigants believe that it is so.” *Violette v. Midwest Printing Co.*, 415 N.W.2d 318, 325 (Minn. 1987) (citing *Jones v. Jones*, 242 Minn. 251, 262, 64 N.W.2d 508, 515 (1954)). In sum, it is not

only de facto partiality that decreases the public's confidence in the judiciary, it is also the mere appearance of it. Consequently, this court should amend Canon 2C to bar judges from knowingly holding membership in any organization that illegally discriminates on any basis, because in its current form, it could create an appearance of judicial partiality.

7. Additionally, in its present form, Canon 2C also creates the appearance that some types of discrimination such as race, religion, and sex are more pernicious than other types of discrimination such as age, disability, and sexual orientation. This result occurs because Canon 2C bars judges' membership in organizations that unlawfully discriminate on the basis of race, religion, and sex, but not age, disability, or sexual orientation. The resulting implication is that a judge can hold membership in an organization that illegally discriminates on the basis of disability, for instance, and not be tainted by that association, but that holding membership in an organization that discriminates on the basis of, for example, sex, creates an unavoidable taint on both the individual judge and the judiciary. But Minnesota law prohibits discrimination more broadly. *See e.g.* Minn. Stat. § 363.03 (making it illegal to discriminate in employment, rental and sale of real property, and public accommodation on basis of race, color, creed, religion, national origin, sex, marital status, status with

regard to public assistance, disability, sexual orientation, or age).

The canons governing judicial conduct should be equally as broad.

This court should therefore amend Canon 2C to bar judges from knowing membership in any organization that illegally discriminates on any basis to avoid even the appearance of discrimination and to promote public confidence in the judiciary.

8. The language of Canon 4 also supports amending Canon 2C: “A judge shall conduct all extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” Canon 4A(1-3). Canon 4 further notes that judges should not participate in civic or charitable activities that reflect adversely upon the judge’s impartiality. Minn. Code Jud. Conduct, Canon 4C(3). In order to comply with the specific standards set forth in Canon 4 and the overarching goal of promoting confidence in the impartiality of individual judges and the judiciary, Canon 2 should be amended as proposed to prohibit judges from knowingly holding membership in any organization that unlawfully discriminates.
9. In accordance with the code’s goal of promoting public confidence in the integrity and impartiality of the judiciary, the MSBA petitions this court to amend Canon 2C’s language in the following

manner²: “A judge shall not knowingly hold membership in any organization that practices unlawful discrimination ~~on the basis of race, sex, religion or national origin.~~”³ Because this language is general and does not enumerate particular types of discrimination, it is flexible and consequently, will always be in compliance with any future changes to state or federal law. Further, the language is not that of strict liability; it only prohibits judges from knowing membership in an organization that illegally discriminates. Finally, the language is narrowly tailored to prohibit only knowing membership in organizations that unlawfully discriminate. Thus, the proposed amendment would not bar judges from holding membership in primary youth-serving organizations that lawfully discriminate on the basis of sexual orientation or in religious organizations that lawfully discriminate on the basis of sex or sexual orientation. *See* Minn. Stat. § 363.02 (excepting certain types of organizations from Minnesota Human Rights Act in certain narrow circumstances). This court should adopt the proposed amendment to Canon 2C because its effect will be to promote public confidence in the impartiality and integrity of the judiciary by barring judges from knowingly holding membership in any organization that illegally discriminates, an action that, if

² Proposed deletions ~~struck out~~, proposed additions underlined.

³ The recommended language is similar to that currently in place in Texas’s Code of Judicial Conduct: “A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.”

not prohibited, would otherwise decrease public confidence in the impartiality and integrity of the judiciary.

10. Based upon this petition, Petitioner Minnesota State Bar Association respectfully asks this court to adopt the proposed amendment to Canon 2C of the Minnesota Code of Judicial Conduct.

Dated: May 21, 2003

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

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MINNESOTA STATE BAR ASSOCIATION

JUDGES' MEMBERSHIP IN DISCRIMINATORY ORGANIZATIONS
RECOMMENDATION AND REPORT

ADOPTED BY THE MSBA BOARD OF GOVERNORS
DECEMBER 7, 2001

Recommendation

The MSBA Court Rules and Administration Committee recommends that the Code of Judicial Conduct, Canon 2.C, be amended as follows (wording to be struck out is ~~struck out~~, wording to be inserted is underlined): "A judge shall not knowingly hold membership in any organization that practices unlawful discrimination ~~on the basis of race, sex, religion or national origin.~~"

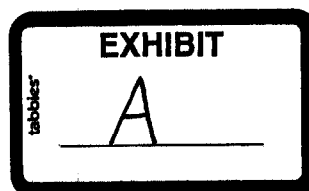
Report

This recommendation results from a recommendation by the Lavender Bar Association, "a group of Minnesota attorneys and others dedicated to addressing sexual and gender identity issues within the state's legal profession." The Lavender Bar Association recommended that Canon 2C be amended as follows (wording to be struck out is ~~struck out~~, wording to be inserted is underlined):

A judge shall not hold membership in any organization that practices unlawful discrimination on the basis of race, sex, religion ~~or~~, national origin, disability, age, sexual orientation, or socioeconomic status.

The Lavender Bar Association supported its recommendation with the argument that

The list of factors which is included in Proposed Canon 2C above is lifted *directly* from Canon 3A, paragraphs 5 and 6. These portions of Canon 3A direct that judges may not themselves engage in discrimination based on these factors, and must require lawyers in their courtrooms to refrain from doing so as well. The fact that Canon 2C identifies some, but not all, of these factors tends to suggest that a "two-tier" approach to discrimination exists: in other words, that some forms of discrimination are so unacceptable that judges may not be tainted by even indirect association with them though group memberships, while other forms of discrimination are less unacceptable, and it is therefore



permissible for judges to be associated with them. There is no clear reason why this approach should be accepted without challenge, when at least disability and sexual orientation are included in the Minnesota Human Rights Act. There is no reason to hold judges responsible for not engaging in discrimination on eight separate bases while separately addressing group memberships in only four of them. This would not affect judges who are affiliated with the Boy Scouts; such discrimination is not "unlawful" under MHRA. Notably, California has already added "sexual orientation" (though not disability, age, or socioeconomic status) to their version of Canon 2C (with a specific carve-out for youth serving agencies, e.g., the Boy Scouts, which already exists in the Minnesota Human Rights Act).

The Court Rules & Administration Committee agreed in principle with the Lavender Bar Association's proposal. But the committee has taken an even more general approach, and recommends that the canon prohibit "unlawful discrimination" of any kind, not only unlawful discrimination on certain enumerated bases (whose enumeration implies that the canon does not prohibit "unlawful discrimination" of other kinds).

Several statutes and rules already prohibit discrimination of various kinds in the judicial context. As the Lavender Bar Association's argument mentions, the Canons of Judicial Conduct themselves contain other provisions that prohibit discrimination even more broadly than does Canon 2C:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit court personnel and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, in relation to parties, witnesses, counsel or others. This Section 3A(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.¹

The General Rules of Practice for the District Courts provide that

The judge shall at all times treat all lawyers, jury members, and witnesses fairly and shall not discriminate on the basis of race, color, creed,

¹Minn. Code of Judicial Conduct, Canon 3.A(5)-(6).

religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, or age.²

Lawyers shall treat all parties, participants, other lawyers, and court personnel fairly and shall not discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.³

The Rules of Professional Conduct likewise provide that

It is professional misconduct for a lawyer to:

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities;

(h) commit a discriminatory act, prohibited by federal, state, or local statute or ordinance, that reflects adversely on a lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.⁴

The commentary to those rules explains that

Paragraph (g) specifies a particularly egregious type of discriminatory act—harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities.

²Minn. Gen. R. Prac. 2.02(a) (role of judges: dignity).

³*Id.* R. 2.03(c) (role of attorneys: non-discrimination) ("Lawyers shall treat all parties, participants, other lawyers, and court personnel fairly and shall not discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.").

⁴Minn. Rules of Professional Conduct R. 8.4.

Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession.

Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).⁵

And the Minnesota Human Rights Act prohibits discrimination of several kinds.⁶

The committee considered various approaches to drafting its recommended rule. One approach was listing all the bases on which discrimination was prohibited—the approach that the current canon takes, and which the Lavender Bar Association's proposal would extend. The Lavender Bar Association's proposal would add "disability, age, sexual orientation, or socioeconomic status," in order to conform Canon 2C to Canon 3A. The same approach might also add color, consistent with the General Rules of Practice; disability, and status with regard to public assistance, consistent with the Rules of Professional Conduct; and creed, marital status, and age, consistent with both the General Rules of Practice and the Rules of Professional Conduct.

A second, somewhat more general approach was listing, not the bases on which discrimination was prohibited, but the laws that prohibited the discrimination (wording to be struck out is ~~struck out~~, wording to be inserted is underlined):

⁵*Id.* comment (1991).

⁶See Minn. Stat. ch. 363.

A judge shall not hold membership in any organization that practices unlawful discrimination on the any basis of race, sex, religion or national origin prohibited by the Minnesota Human Rights Act, the General Rules of Practice for the District Courts, or any other law.

The committee has instead taken the most general approach of all: not limiting or otherwise qualifying "unlawful discrimination" in any way. This approach is consistent with Texas's corresponding canon, which provides that

A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.⁷

The Minnesota canon, unlike the Texas canon, does not contain a state of mind requirement. The committee believes, if the prohibition is broadened as the committee recommends, that the canon ought not to be a strict-liability prohibition but instead ought to prohibit only knowing membership in a *discriminatory* organization. Some states, such as Maine, provide a "safe-harbor" provision rather than a state of mind requirement:

A judge shall not hold membership in any organization that practices unlawful discrimination. A judge who is a member of such an organization at the effective date of this section C, or who learns at a later time that an organization of which the judge is a member practices such discrimination, may retain membership in the organization for a reasonable time not exceeding one year, but must resign if the organization does not discontinue its discriminatory practices within that time.⁸

The committee prefers the simpler approach that the Texas canon takes.

⁷Tex. Code of Judicial Conduct, Canon 2.C.

⁸Maine Code of Judicial Conduct, Canon 2.C.

Conclusion

The committee therefore recommends that the Code of Judicial Conduct, Canon 2.C, be amended as the foregoing recommendation provides.

Respectfully submitted,

*Court Rules & Administration Committee
Hon. Bruce R. Douglas and
Mark Gardner, Co-chairs*

October 2001.

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