STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

ORDER ESTABLISHING DEADLINE FOR SUBMITTING COMMENTS ON THE PROPOSED AMENDMENT TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

The Minnesota State Bar Association has filed a petition requesting the Court to amend Canon 2C of the Minnesota Code of Judicial Conduct. A copy of the petition is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed amendment shall submit fourteen copies in writing addressed to Frederick K. Grittner, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, no later than August 22, 2003.

Dated: June 13, 2003

BY THE COURT:

Kathleen A. Blatz
Chief Justice

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

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

manner[2]: "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 ___, 2003

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
Jon Duckstad, President

and

MEAGHER & GEER, PLLP

By _____
Erica Gutmann Strohl (#279626)
Katherine A. McBride (#168543)

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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.[4]

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, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, or age.[5]
>
> Lawyers shall treat all parties, participants, other lawyers, and court personnel fairly and shall not discriminate on the basis of race, color, creed,

[4]Minn. Code of Judicial Conduct, Canon 3.A(5)-(6).
[5]Minn. Gen. R. Prac. 2.02(a) (role of judges: dignity).

religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.[6]

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.[7]

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. Harassment, even it 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

[6] *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.").

[7] Minn. Rules of Professional Conduct R. 8.4.

> 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).[8]

And the Minnesota Human Rights Act prohibits discrimination of several kinds.[9]

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):

> 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.[10]

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

[8] *Id.* comment (1991).
[9] *See* Minn. Stat. ch. 363.
[10] Tex. Code of Judicial Conduct, Canon 2.C.

> 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.[11]

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

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.

M1:795890.02

[11]Maine Code of Judicial Conduct, Canon 2.C.

MOHRMAN & KAARDAL, P.A.

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August 22, 2003

Via Mail

Mr. Frederick Grittner
Clerk - Minnesota Appellate Courts
25 Rev. Dr. Martin Luther King Blvd.
St. Paul, MN 55155

Re: Letter in Opposition to the MSBA's Petition to Amend Judicial Conduct Rules
No. C4-85-697

To: The Honorable Justices of the Minnesota Supreme Court:

The undersigned submit this letter in opposition to the MSBA's Petition to Amend the Judicial Conduct Rules to provide for the imposition of sanctions against judges who knowingly are members of organizations that engage in illegal discrimination. While we believe that there are numerous grounds upon which to oppose the rule change set forth in the MSBA's Petition, this letter will focus on two aspects: (1) The MSBA's argument that judges who knowingly belong to organizations that engage in illegal discrimination would be perceived as "biased" or lack impartiality on certain issues and (2) that the proposed rule change is subject to serious constitutional problems under the First Amendment of the U.S. Constitution as violating the right of free association.

Prior to addressing these two points, the undersigned would note that the apparent impetus for the MSBA's Petition is not to correct any current problem or perceived problem with judicial ethics in Minnesota, but rather to lend this Court's prestige to one side of an on-going debate in our society regarding cultural and moral norms surrounding sexual activity and the nature of the family. According to a February 11, 2003 article in the Minnesota Lawyer, the driving force behind the MSBA filing this Petition were members of the Lavender Bar Association, an organization of attorneys that promotes gay and lesbian issues. The Lavender Bar Association's interest in proposing this Petition within the MSBA arose after the U.S. Supreme Court decision in *Dale v. Boy Scouts of America,* which enjoined the enforcement of state and federal anti-discrimination laws against voluntary non-commercial organizations under the First Amendment guarantee to free association. This fact is buttressed by the emphasis in the MSBA's Petition that the current judicial code only prohibits judges from being members of organizations that discriminate based on "race, sex, religion, or national origin" but not sexual orientation. It is clear that the goal of the MSBA and the Lavender Bar Association was to

include organizations that discriminate on the basis of sexual orientation in the judicial code despite the Supreme Court's ruling in *Dale*.

Consistent with this, the goal of the MSBA is not to correct some perceived problem with any past or present jurist or any public perception of any past or present jurist. The Petition itself points to no past or present jurist who would have violated the proposed rule since the proposed rule only prohibits membership in organizations which engage in "illegal discrimination" which presumably would not include voluntary associations such as the Boy Scouts. (Although that is not entirely clear from reading the proposed rule that gives further pause to the undersigned as to the motive behind the Petition.) Likewise, the representative of the Lavender Bar Association quoted in the Minnesota Lawyer article referred to the proposed rule as being "largely symbolic." The fact that the MSBA is seeking a remedy for an ill that does not currently exist leads the undersigned to conclude that the goal of this Petition is for the Court to put its imprimatur on one side of an on-going debate in our society regarding cultural and moral norms surrounding sexual activity and the nature of the family, rather than engage in the serious business of ensuring that our Courts are fair and impartial. The undersigned are very concerned about the Court lending its prestige to either side of this on-going debate.

Because of the interplay between Canon 4 of the Code and the *Dale* decision, it is unclear when, if ever, ***any*** of the current anti-discrimination provisions contained in the judicial code could ever be enforced in light of *Dale*. *Dale* essentially held that the First Amendment's right to free association prohibits enforcement of state and federal laws seeking to regulate membership in voluntary *non-commercial* organizations. Canon 4 prohibits judges in a very broad way from involvement or "membership" in any commercial or business organization. Thus, it would seem that the MSBA's proposed rule's prohibiting judges from being members in any organization engaging in "illegal discrimination" could never arise under the either the current Code or the Petition's proposed rule because judges cannot belong to commercial organizations and *Dale* would prohibit enforcement against non-commercial organizations.

As a result of this analysis, the undersigned, who are all Roman Catholic attorneys, are very concerned that the proposed rule contained in the Petition, because of the emphasis on sexual orientation, could be used as a tool to file ethics complaints against Roman Catholic judges. The Roman Catholic Church has several unequivocal teachings and rules that, absent an exception for religious organizations contained in the Minnesota Human Rights Act, directly conflict with the state's anti-discrimination law. For example, the Church limits membership in both the priesthood and the deaconate to men. The Church unequivocally teaches that homosexual acts are a grave sin and the Church would not allow openly homosexual men into the priesthood or deaconate. [1] For instance, members of the Roman Catholic Church have formed organizations that are not formally connected to the Church, such as the Knights of Columbus, that limit membership by gender and denomination. Absent the exception contained in the Minnesota Human Rights Act and the protections provided under the First Amendment as expressed in *Dale*, Roman Catholic judges who were members of such organizations would be in

[1] The undersigned wish to emphasize the Roman Catholic Church also teaches that discrimination or any uncharitable conduct directed against individuals engaging in homosexual conduct is likewise a grave sin and the undersigned, as faithful members of the Church, adhere to this teaching.

violation of the proposed Canon. The undersigned request that the Court carefully consider the prospect the proposed rule would have on Roman Catholic judges particularly in light of the fact that the proposed rule is not remedying any current problem in judicial ethics.

Turning to the two points to be addressed in this letter – bias and constitutional concerns - the problem with the MSBA's concern for perceived bias in the judiciary is demonstrated in the following example cited at pages 4 and 5 of its Petition:

> 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.

The problem with the MSBA's example is that precisely this same analysis could be applied to a judge who currently belongs to an organization that, while the organization may not discriminate with respect to employment, the organization nonetheless advocates or expresses strong views on issues that are likely to come before the Court. For instance, there is no difference *in reason* between the example the MSBA cites and the following example: a business defending a discrimination claim in front of a judge who belongs to an organization that promotes the interests of individuals in the same protected class as the plaintiff (such as the various ethnic bar associations currently operating under the MSBA's mantle) would similarly have significant doubts with respect to the judge's impartiality in such a case. The fact that the legislature may have classified one organization's "discrimination" as illegal while the other organization's discrimination is not illegal based entirely on whether one organization is a voluntary association does not in any way inhibit the perception of bias and in fact may actually enhance it. Individuals join businesses or commercial associations in part for the economic benefit to be gained. On the contrary, individuals donate their free time and money to voluntary associations generally out of a passion to promote the goals of the organization. It is actually more reasonable for a litigant to conclude that a judge who belongs to an organization which promotes the interests of a specific ethnic group may harbor stronger views with respect to certain parties and issues that may come before that judge.

Of course, the Court's interest is not at eliminating bias or the perception of bias with respect to a judge's membership in only a select few organizations but rather with respect to a judge's membership in any organization that would create an impression of bias. However, the Court's current Rules and Code, coupled with Minnesota's Constitution, already contain ***neutral*** remedies for parties appearing in front of judges who would harbor such strong prejudices against a party. First, Canon 3 already requires a judge who concludes his or her membership in *any* organization would result in a perception that the judge has a bias or prejudice in a particular matter to recuse him or herself from the case. Second, if the judge is unable to come to this conclusion him or herself, Rule 63 empowers the aggrieved party to bring a Rule 63 Motion to Recuse the judge. Such Motions are made in open court and the judge must specifically address

the points of the Motion in a publicly recorded Order either denying or granting the motion. Moreover, a judge's Order on such Motions is subject to two levels of public appeal in Minnesota - the Court of Appeals and the Supreme Court. Finally, under Minnesota's Constitution, all judges must stand for election every six years. The undersigned have complete faith that the Minnesota electorate would never tolerate allowing a judge to remain on the bench who was perceived in engaging in the type of bias or prejudice set forth in the MSBA's Petition.

In addition to the fact that the MSBA's argument regarding bias is problematic as set forth above, the MSBA's proposed rule is also of doubtful constitutional validity under the First Amendment free association guarantee. Among the numerous First Amendment problems with the proposed Rule, a First Amendment challenge to ***any*** governmental restriction on free association would be subject to strict scrutiny analysis – i.e., the government would bear the burden of proving that the proposed judicial canon is narrowly tailored to serve a compelling state interest. One of the tests the Supreme Court has developed under strict scrutiny analysis for determining whether the state's articulated interest is compelling is whether or not the law or regulation at issue is "under-inclusive" – i.e., whether scope of the law applies to all of the problems the state seeks to address as opposed to simply a select set of problems. If the law's scope is under-inclusive, the Court will cast great doubt on the genuineness of the state's alleged compelling interest and in fact begin to suspect that the government's goal is in fact to burden members of a specific class as opposed to serving the alleged compelling interest. A finding of under-inclusiveness will thus cast great doubt on the constitutionality of the law. As set forth above, the proposed judicial canon by its very nature is under-inclusive since judges can belong to voluntary associations or religious organizations that are exempt under the Minnesota Human Rights Act.

To conclude, the undersigned wish to emphasize that they have strong moral objections to acts of uncharitable discrimination by anyone, including particularly judges. As a result of tremendous efforts by courageous individuals in our nation, much of this type of discrimination, primarily centering on discrimination based on race or ethnicity, has been eliminated. However, certain groups in our society are now classifying as "discrimination" teachings of the Roman Catholic Church on moral issues regarding sexual conduct and the family. Because of our substantial concerns that the proposed rule, particularly in light of the expressed goals of the Lavender Bar Association underlying the proposed rule as being "largely symbolic," could be aimed at filing ethics complaints against Roman Catholic judges who simply belong to Catholic organizations that are faithful to Church teachings, the undersigned respectfully request that the Court deny the MSBA's Petition.

Respectfully submitted,

William F. Mohrman

Vincent J. Fahnlander

HENNEPIN COUNTY BAR ASSOCIATION

August 12, 2003

Mr. Frederick K. Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

IN Re; Petition for Amendment of The
Minnesota Code of Judicial Conduct
No. C4-85-697

Dear Mr. Grittner:

Please be advised that the Executive Committee of the Hennepin County Bar Association, at its regularly scheduled meeting on July 22, 2003, voted to support the above-described Petition.

Amendment of Canon 2C, as proposed, will create a more uniform and consistent set of anti-discrimination rules. The Executive Committee supports the broadening of the Canon to clarify that judges are prohibited from being members of organizations that unlawfully discriminate.

Thank you for the opportunity to comment.

Very truly yours,

Laurence R. Buxbaum

Laurence R. Buxbaum
Executive Director

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

In re:

Petition for Amendment of
The Minnesota Code of Judicial Conduct

SUBMISSION OF ATTORNEY PETER A. SWANSON

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

The Minnesota State Bar Association ("MSBA" or "Petitioner") filed a Petition to amend Canon 2C of the Minnesota Code of Judicial Conduct. For the reasons stated below, the undersigned respectfully urges the Court to narrowly define the knowledge requirement in the published rule and commentary to include only those instances where the law on discrimination is settled.

Petitioner has made assurances that the proposed rule would not prohibit membership in the Boy Scouts, due to what it describes as a "carve-out" in the law for youth serving agencies. It is important for the Court to recognize these exceptions in the published rule and commentary. There has been a suggestion that the rule change was inspired by a California judge who resigned from the Boy Scouts in response to similar changes to the California version of Canon 2C. *Bar Groups Seek to Broaden Canon 2 Judicial Restrictions*, Minnesota Lawyer, February 11, 2002.

The membership policies of various organizations are often the subject of controversy and litigation. Organizations ranging from health clubs to minority bar associations have been subject to scrutiny for their membership rules. There is a

potential that a judge would resign membership in an organization in response to threatened litigation, even if such litigation were never initiated, was without merit, or if the litigation ultimately vindicated the position of the organization.

It is conceivable that a judge who is subject to this rule would be aware of certain membership policies of an organization, but be unaware or unclear that the policies are unlawful. The Court should clarify in the published rule and commentary that the knowledge provision of the rule does not apply where litigation is pending or the law is not settled. It would place an unfair burden on judges to require them to predict the outcome of controversial cases that are in progress or contemplated.

The attorneys for Greg Wersal recently convinced a divided U.S. Supreme Court that a different portion of the Minnesota Code of Judicial Conduct was, in part, unconstitutional. *See Republican Party Of Minnesota v. White,* 536 US 765 (2002). On March 25, 2002, the eve of the oral argument in his case, Wersal told Minnesota Public Radio that he was currently facing ethics charges. Whether or not one agrees with the methods and motives of Mr. Wersal, it is clear the ultimate success of his legal claim did not prevent ethics charges from being filed in the meantime. Judges should not be forced to choose between resigning membership at the first hint of controversy, or gambling that the organization will successfully defend its policies.

Ramsey County District Court Judge Edward Cleary was formerly a defendant in Wersal's lawsuit, as well as a lawyer who successfully argued a case before the U.S. Supreme Court. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In his book, *Beyond the Burning Cross*, Judge Cleary recounts an encounter with a former legal ethics professor who suggests that Cleary's decision to represent R.A.V. was unethical. It is

clear that the ultimate success of a case does not insulate one from claims that the case itself is unethical. The Court should clarify the knowledge provision in the rule to require knowledge of the unlawfulness of the membership policies.

There is a troubling trend of ethical charges being leveled for ideological disagreement. In a letter to the Minnesota Board of Continuing Legal Education, dated June 29, 2001, Attorney G. Marc Whitehead complained about a CLE seminar that was sponsored by the Northstar Legal Center and the Federalist Society. Whitehead stated that he was considering filing ethical complaints as a result of the seminar and that he assumed that "some sanction should be pursued against the individuals organizing, sponsoring and participating in this event." That ethics charges were apparently never filed does not change the chilling effect of the message. Without explicit clarification of the knowledge requirement, judges may decline to participate as faculty or audience members in CLE seminars where the sponsoring organization seeks to promote lively debate on important issues.

The MSBA Board of Governors approved this Petition unanimously and with very little discussion on December 7, 2001. *Bar Groups Seek to Broaden Canon 2 Judicial Restrictions*, Minnesota Lawyer, February 11, 2002. The MSBA President at the time stated, "No one said they were opposed to it. That was good." *Id.* This is a telling, albeit inadvertent, statement about the tolerance of dissent within the organized bar. There are certain ideological positions that are disfavored among the leadership of the state and local bar associations. An explicit clarification of the knowledge requirement in the rule will help to allow judges to retain memberships in organizations that are controversial, but law-abiding.

For the reasons stated above, the undersigned respectfully asks this Court to narrowly define the knowledge requirement in the proposed amendment to Canon 2C of the Minnesota Code of Judicial Conduct to include only cases where the law is settled.

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Respectfully submitted,

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