

California Judges Association
OPINION NO. 34

(Originally issued: July 6, 1987)

**MEMBERSHIP IN PRIVATE CLUBS WHICH
PRACTICE INVIDIOUS DISCRIMINATION**

AUTHORITY: Canon 2A and 2C

I. Background

Several judges have inquired whether Canon 2C requires that they resign from certain organizations.

The Judicial Ethics Committee has no practical way to investigate or find facts. We must accept the facts supplied to us by the inquiring judge. Because this is so, we feel it would be inappropriate to refer to any of the organizations in questions by name. We are aware of the following caveat in Board of Directors of Rotary International v. Rotary Club of Duarte, U.S. ___, 87 Daily Journal D.A.R. 1959, fn 6:

We did not consider whether the relationship among members of the Kiwanis Club was sufficiently intimate or private to warrant constitutional protection. Similarly, we have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the 'zone of privacy' established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue. (Roberts v. United States Jaycees, *supra*, at 620. Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting).)

We have been furnished insufficient information about the "objective characteristics of the ... relationships" among the members or the organizations which are the subject of the pending inquiries. We assume for the present that the nature of the relationship involved is not such as to render unconstitutional the limitations placed by Canon 2C on the right of judges to belong to such organizations under the principles discussed by the court in Rotary Club of Duarte.

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Canon 2C Membership in Organizations provides: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation."

This Canon does not apply to membership in any religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this Canon does not bar membership in a nonprofit youth organization.

The Advisory Committee Commentary to Canon 2C states in pertinent part: "Membership of a judge in an organization that practices invidious discrimination gives rise to a perception that the judge's impartiality is impaired."

First Inquiry

A judge is a member of a service club. Under the by-laws of the international organization, of which the judge is a member, the club excludes women from membership. No reason justifying the exclusion has been proffered. The organization's by-laws authorize an "auxiliary" organization; membership in which is limited to wives of members of the service club. Auxiliary members do not participate in decisions of the men's club.

It seems clear the judge is a member of an "organization" within the meaning of Canon 2C. The dictionary defines "organization" as, "(a) group of people that has a more or less constant membership, a body of officers, a purpose, and usually a set of regulations." (Webster's Third New International Dictionary (1981), p. 1590.) Small, informal social groups, such as bridge or poker clubs, are not "organizations." But there can be no doubt a service club of the kind in question here, with defined membership policies, run by officers pursuant to formal by-laws, is an "organization" for purposes of Canon 2C.

The next question is whether the service club "practices invidious discrimination." The language implies that some discriminations by organizations are benign and permissible. However, which are "invidious"?

The Advisory Committee Commentary addresses the exception as follows:

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 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 in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such facts, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, national origin, or sexual orientation persons who would otherwise be admitted to membership.

Applying this test, guided by the concepts and principles set forth above, we conclude the service club involved in this inquiry, discriminates invidiously. Women are permitted to belong to an auxiliary organization, but they are excluded from the men's organization solely on the basis of their sex. We have been informed of no legitimate objectives served by the discrimination; nor can we conceive of one that would be consistent with public policy. Historical practice cannot, in and of itself, be a legitimate, objective justifying this kind of discrimination. Maintenance of the women's auxiliary seems clearly patronizing and seems clearly to stigmatize women as inferior.

Separate-is-unequal logic in the equal protection decisions applies equally in the present context. By analogy to the rule of those decisions an organization which excludes women from its principal component but admits them to a separate-but-equal auxiliary must be deemed to discriminate invidiously. By excluding women from a principal, or even a coequal, organ, the organization arbitrarily denies women the opportunity to associate with men who participate in the affairs of and lead the organization, many of whom may be community leaders or other persons of influence.

In our opinion, membership in the men's club is inappropriate under Canon 2C.

Judges are cautioned that recent California cases construing the Unruh Civil Rights act appear to set forth a broader interpretation of "invidious" which does not necessarily include the concept of "stigma." To the extent that an organization engages in conduct which is prohibited by the Unruh Act or other law, membership would violate Canon 2A, which requires that judges respect and comply with the law. Portions of the relevant cases are contained in an appendix to this opinion.

Second Inquiry

A male judge belongs to a local service club that historically, and, we assume, without any basis that would be considered rational for present purposes, excluded women. The club has now voted to allow women as full members. No woman has yet joined. The judge's local club is affiliated with an international organization. Affiliated clubs outside California exclude women from membership. The judge is a member of his local club, only. He is not a member of the international organization.

As long as the local club does not invidiously discriminate, membership in that club is not unethical in the circumstances, notwithstanding the policies and practices of out of state affiliates and the international organization. The plain language of Canon 2C prohibits "membership" in an organization that invidiously discriminates. The judge is not a member of the international organization of the affiliated clubs. The fact that they discriminate invidiously does not make his membership in the local club inappropriate. We foresee no perception-of-impartiality problem. It would be farfetched to believe that the prejudice of the others would be imputed to the California judge in the circumstances.

On the question of whether the judge's local club invidiously discriminates, the following excerpt from the Advisory Committee Commentary to Canon 2C is helpful:

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.

The appropriate test is whether the judge's club has decided in good faith to eliminate all barriers to membership by women. The fact that the club has not yet admitted a woman member does not, by itself, require the judge's resignation. The effects of long-standing discriminatory practices cannot always be wiped out instantaneously. In some communities it may be necessary to recruit those previously excluded. On the other hand, prolonged delay in the admission of women will create an inference that the "decision" to admit them to membership was made not in good faith but rather merely to create the appearance of nondiscrimination. Appearances will not satisfy the dictates of Canon 2C. Substance must and will control.

Where an organization has made a formal decision to end discriminatory membership practices, but those previously excluded have not in fact yet been admitted, the judge who wishes to remain a member must hold a conscientious belief that the open-membership policy is bona fide and will be implemented in the ordinary course of events. If, in the circumstances, as he or she knows them, the judge cannot hold such a belief, Canon 2C requires resignation from the organization.

Third Inquiry

A male judge's local service club has actually recently admitted women to membership. Unlike the judge in the preceding inquiry, this judge is a member not only of his local club but also of an international parent organization. Under the organization's governing documents the judge cannot belong to the local club without automatically belonging to the international organization. The by-laws of the international organization prohibit women from being members everywhere except in the United States. The exclusion of women is based on historical practice.

We believe that given these precise facts, the judge's membership in the international organization does violate Canon 2C. The concept of invidious discrimination has a specific historical and cultural meaning in the United States, and laws and policies directed at eliminating such discrimination must be viewed in this context. Without commenting upon or condoning practices or beliefs in other societies which conflict with our own notions of equality and fairness, we would simply emphasize that the purpose of Canon 2C, as explained by the Commentary to Canon 2C, is to insure that perception of a

judge's impartiality is not impaired by the judge's membership in an organization which practices invidious discrimination. We are in unanimous agreement that perception of a judge's impartiality is unlikely to be impaired by the judge's pro forma membership in an international organization which discriminates only outside the United States, where cultural norms and expectations may be radically different.

Fourth Inquiry

The facts are identical to those in the preceding inquiry, except that the international organization prohibits women from being members everywhere except the State of California. No legitimate objective for the exclusion has been suggested.

We are unable to reach a conclusion as to whether the judge's pro forma membership in the international organization violates Canon 2C. A plurality believe that while the application of Canon 2C should not be extended to organizations outside the United States, the Canon should be applied to organizations which discriminate invidiously within the United States, where law and public policy are imbedded with the belief that invidious discrimination is inappropriate. They argue that the fact that an international organization does not discriminate within California because of California's stricter laws does not change the organizations basic character as one which discriminates invidiously or make the judge's membership, even a pro forma membership, any less problematic.

A minority believe that Canon 2C should not apply in this instance because the problem which the Canon is intended to remedy – the impairment of perception of judges' impartiality – has not been shown to exist in the case of organizations which do not discriminate within California. They contend that since on the given facts the judge's membership in the discriminatory international organization is simply an automatic result of the judge's membership in the nondiscriminatory California organization, perception of the judge's impartiality is unlikely to be impaired, because the public is likely to be more concerned with the judge's active local affiliations than with those which are technical and remote.¹

On the facts before us, we as a body take the position that we have insufficient information concerning the effect of membership in the international organization upon public perception of the judge's impartiality to give definitive advice as to whether the judge's continued membership is appropriate. Judges similarly situated should on an individual basis consider carefully whether their continued membership is reasonably likely to impair public perception of their impartiality and should, consistent with the spirit of the Canons generally, err on the side of caution to avoid the appearance as well as the actuality of impropriety.

1997 Note

Although the foregoing opinion was based on the 1974 Code of Judicial Conduct, the substance of the opinion is now supported under the 1996 California Code of Judicial Ethics, Canons 2A and 2C. (From the original opinion several quotes and references which are not current have been deleted.) References to earlier authority in the body of the opinion have been changed to current citations.

This opinion is advisory only. This committee acts on specific questions submitted, and its opinion is based on fact as set forth in the question submitted.

COMMITTEE ON JUDICIAL ETHICS
July 6, 1987

¹ All of us agree that the answer to both the third and fourth inquiries would be entirely different if the judge's membership in the discriminatory international organization were an independent voluntary choice rather than an automatic technical requirement of membership in the nondiscriminatory organization.

APPENDIX

“[I]t is ‘arbitrary’ [invidious], ... to exclude an entire class on the basis of stereotyped notions.” (Isbister v. Boys’ Club of Santa Cruz, Inc. (1985) 40 Cal.3d 72, 87 (emphasis in original).)

“[C]ertain types of discrimination have been denominated ‘reasonable’ and, therefore, not arbitrary” (Koire v. Metro Car Wash (1985) 40 Cal.3d 24, 30.)

“A classification is reasonable [not arbitrary or invidious] if it has a substantial relation to a legitimate objective” McClain v. City of South Pasadena (1957) 155 Cal.App.2d 423, 435.)

“[Certain] social policies ... have [been held to] justif[y] ... exceptions to the Unruh Act. For example, the compelling societal interest in ensuring adequate housing for the elderly [has been held to] justif[y] differential treatment based on age ...” (Koire v. Metro Car Wash, *supra*, 40 Cal.3d at p. 33)

“[It has been recognized that] limitation of access to members of certain groups might operate in certain cases ‘as a reasonable and permissible means ... of establishing and preserving specialized facilities [and service] for those particularly in need ... [Para] ... [But] the ‘social need’ served ... must be well-documented and established as a matter of public policy.” (Isbister v. Boys’ Club of Santa Cruz, Inc., *supra*, 40 Cal. 3d at p. 88; see Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 738-739.)

The leading Unruh Act case on sex discrimination is Koire v. Metro Car Wash, 40 Cal.3d 219. In Koire, the court, discussing “differential pricing based on sex” (“Ladies Night”), stated:

“...differential pricing based on sex may be generally detrimental to both men and women, because it reinforces harmful stereotypes ..

“Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment. (Citation omitted.) When the law ‘emphasizes irrelevant differences between men and women, (it) cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes... As long as organized legal systems .. differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women continuing to regard one another primarily as fellow human beings .. will continue to be remote...”

“This sort of class-based generalization as a justification for differential treatment is precisely the type of practice prohibited by the Unruh Act.” p. 35.

“These sex-based discounts impermissibly perpetuate sexual stereotypes.” p. 36.

The foregoing cases hold that, gender-, religion-, racial-, or national origin-based exclusivity per se could never be a legitimate organizational objective, for any such objective is clearly against public policy. Discrimination on the basis of race or color is contrary to the public policy of California and of the United States (Burks v. Poppy Construction Co., 57 Cal.2d 463, 471.) Statutes such as the Unruh Civil Rights Act are declaratory of California public policy against racial discrimination, whether by private or public action. (Winchell v. English, 62 Cal.App.3d 125.) “The Unruh (Civil Rights Act) (Civil Code section 51) is clearly a declaration that men and women be treated equally.” (Rotary Club of Duarte v. Board of Directors 178 Cal.App.3d 1035, 1047.) “Public policy in this state strongly supports the abolition of discrimination on the basis of sex. This policy is effectuated, in part, by the Unruh Act...” (Id at p. 1066.)