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July 9, 2020

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Canon 2(F) of the Michigan Code of Judicial Conduct to Prohibit Membership in Organizations that Practice Invidious Discrimination

Dear Clerk Royster:

The State Bar of Michigan (SBM) recommends that the Court amend Canon 2(F) of the Michigan Code of Judicial Conduct and the accompanying comments to prohibit judges from being members of organizations that practice invidious discrimination based on religion, race, national origin, ethnicity, sex, gender identity, or sexual orientation to help ensure that judges and the judiciary are and are perceived to be impartial decisionmakers to all members of the public.

A majority of states and the Code of Conduct for United States Judges prohibit judges from being members in organizations that invidiously discriminate. This proposal was presented to the Representative Assembly (RA) at its April 25, 2020 meeting by the Women Lawyers Association of Michigan (WLAM) with the support of the 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, and Washtenaw County Bar Association.

The RA supported the following amendment to Canon 2(F) by a vote of 76 to 46 with one abstention:

> 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.

The RA also supported adopting amendments to the comments to Canon 2(F) to clarify the meaning of "invidious discrimination." The comment language is fully set forth in the WLAM April 23, 2020 letter amending its proposal to the RA, which is enclosed as Attachment A. The WLAM's original proposal to the RA advocating for this change is enclosed as Attachment B.

Rule 4.4 of Representative Assembly Rules of Permanent Procedure allows for a minority report when fewer than 75% of the voting members approved of a proposal. Here, fewer than 75% of the voting members approved of the rule proposal; therefore, enclosed as Attachment C is the Representative Assembly minority report.

Thank you for your consideration. We hope that the Court will publish the proposed amendment to Canon 2(F) of the Michigan Code of Judicial Conduct for comment and ultimately adopt the amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Aaron V. Burrell, Chair, Representative Assembly
Dennis M. Barnes, President, State Bar of Michigan

ATTACHMENT A

Women Lawyers Association of Michigan

April 23, 2020

Representative Assembly
State Bar of Michigan
Michael Franck Building
306 Townsend St.
Lansing, MI 48933-2012

RE: **Michigan Coalition for Impartial Justice Proposal to Modify Judicial Canon 2(F)**

Dear Representative Assembly:

In light of the suggestions made by the Michigan District Court Judges Association, who are in support of the Coalition's proposal, the Women Lawyers Association (joined by the Washtenaw County Bar Association) proposes that in addition to proposed language adopted from the American Bar Association Model Rule, the comments section also be added. WLAM (joined by the WCBA) believes that the addition of the comments would alleviate any concern of ambiguity in the term "invidious" as well as clarify its application.

The proposed rule with comment section would read 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 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.

Women Lawyers Association of Michigan

Comment on Rule 3.6

[1] 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.

[2] 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.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

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

[5] This Rule does not apply to national or state military service.

Additionally, please find enclosed an FAQ worksheet as well as a brief summary of the proposal. We appreciate the Representative Assembly's time and consideration on this matter.

Sincerely,

Alena M. Clark

Alena M. Clark
President

FAQ

Proposed Change to Judicial Canon 2(F) by the Michigan Coalition for Impartial Justice

Q. How is "invidious discrimination" defined?

A. An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, transgender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission.

Q. How would the rule change proposed by the Michigan Coalition for Impartial Justice (MCIJ) affect the right to practice religion?

A. It would have no effect. There is an exception regarding First Amendment rights in the current language of Canon 2(F). The plain language already ensures that a judge's right to practice religion under the First Amendment is not infringed upon. The proposal has no impact on this already existing clause of the rule and it would remain in place as it is currently written. For example, if leadership roles in one's church are contingent on a particular gender, a judge would not have to leave that church because it is their right to exercise their faith as the way they see fit.

Q. Who determines whether an organization to which a judge belongs or would like to belong, practices invidious discrimination?

A. The Judicial Tenure Commission determines whether a judge has violated a rule and, thus, whether a judge's membership in an organization creates an appearance of impropriety. The JTC's rules and procedures determine how they investigate and prosecute violations of the rules. The proposal has no impact on any enforcement procedures or powers of the JTC.

Q. Would the rule prohibit membership in organizations like Women Lawyers Association of Michigan or other specialty or culturally based organizations?

A. The proposed rule would not prohibit a judge from being a member of these organizations because these organizations do not discriminate invidiously.

As expanded upon in Comment 2 of the ABA Model Rule:

> 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

Q. Can you provide a list of organizations which practice invidious discrimination?

A. We do not have a list because the purpose of the proposed rule change is not to single out specific organizations or individuals who may be members. Rather, the purpose of the proposed rule change is to prohibit judges from being members of organizations which invidiously discriminate because it gives the appearance of bias and impropriety. Under the current judicial canon, membership in organizations which invidiously discriminate is discretionary. The proposed rule includes mandatory language which would prohibit joining such organization.

Q. What bar associations or State Bar Sections have joined the Michigan Coalition for Impartial Justice?

A. Currently, the following organizations have joined the MCIJ:

- American Indian Law Section
- Animal Law Section
- Arab American Bar Section
- 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

B. Would the proposed rule prohibit membership in a professional organization such as Criminal Defense Attorneys of Michigan since this association precludes membership to other lawyers like prosecutors?

A. The proposed rule change would not prohibit membership in these professional organizations because they are based on a professional choices, not an immutable characteristics such as race, sex, gender, religion, national origin, ethnicity, or sexual orientation. In other words they do not invidiously discriminate.

Q. Is there opposition to the proposed rule change?

A. Yes, we have received opposition from two sections of the State Bar.

- Religious Liberty Law Section opposes the rule change based on concerns that the rule change allegedly violates the First Amendment, Due Process, and expands protected classes to include ethnicity, gender, and sexual orientation to which they object.

    - It is the position of the Michigan Coalition for Impartial Justice that the proposed rule change does not infringe on a judge's First Amendment rights because the change does not impact the current language that specifically excludes the practice of religion. The rule change does not modify the body or the process under which complaints of judicial conduct reviewed by the Judicial Tenure Commission; thus, a judge's due process rights are not impacted by the rule change. Finally, a judge is already required to dispense impartial and unbiased decisions. Expansion of the class of individuals protected only further promotes fair and impartial functioning of Michigan courts.

- The Judicial Section has also opposed the rule, stating-in full-as follows:

    > 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.

    - The Judicial Section did not provide any specific examples of an inconstant application of this rule in other states, nor is the MCIJ aware of any examples. The MCIJ has confidence that the Michigan Judicial Tenure Commission will apply the rule consistently and appropriately.

Michigan Coalition of Impartial Justice is seeking only to clarify the rule and to make mandatory, rather than discretionary, the prohibition against membership in an organization which invidiously discriminates. The proposed rule would mirror the language in the ABA Model Rule and Michigan would join the 43 other States which have already adopted this change.

COALITION FOR IMPARTIAL JUSTICE
PROPOSED AMENDMENT TO
MICHIGAN CODE OF JUDICIAL CONDUCT CANON 2(F)

The Michigan Coalition for Impartial Justice proposes an amendment to the Code of Judicial Conduct Canon 2(F). The amendment precludes judicial membership in organizations that invidiously discriminate. Such membership creates not only the appearance of impropriety, but also may lead to actual bias towards one classification of persons over another. The amendment is consistent with the American Bar Association Model Code, as well as the codes in a majority of the United States.

- The ABA Model Code Canon 2C (2007) provides:

  - 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 Coalition for Impartial Justice Proposes that the Michigan Code of Judicial Conduct Canon 2(F) be amended as follows:

  - A judge ~~should be particularly cautious~~ **shall not** ~~with regard to membership activities that discriminate, or appear to discriminate,~~ **hold membership in any organization that practices invidious discrimination** on the basis of race, **sex,** gender, **religion, national origin, ethnicity, or sexual orientation.** ~~or other protected personal characteristic.~~

- Invidious is defined by Black's Law Dictionary as "discrimination that is offensive or objectionable, especially because it involves prejudice or stereotyping." Further, Comment [2] also provides a definition as follows:

> 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.

- This amendment does not preclude the free exercise of religion and preserves the language of Canon 2(F), which provides "Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion."

- 43 states have adopted a mandatory prohibition on judicial membership in organizations that practice invidious discrimination. Michigan is in the minority of states which make such membership discretionary.

- 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.

- The member organizations of the coalition are as follows:

    - American Indian Law Section
    - Animal Law Section
    - Arab American Bar Section
    - 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

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

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[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 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

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).

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

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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.

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.
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> * * *
>
> 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 Cannon 3, Rule 3.6 of the Code. Judges are entitled to the same constitutional rights and 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.

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[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.

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 Cannon 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

Rickard Denney Garno
Leichliter & Childers

June 10, 2020

VIA UPS NEXT DAY AIR AND EMAIL jwelch@michbar.org

Janet Welch
Executive Director
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

Re: Minority Report in Opposition to the Representative Assembly Decision to Recommend Approval of Revisions to the Section 2(f) of the Judicial Code

Dear Janet:

On behalf of Attorney Klevorn, Attorney Haroutunian, Attorney Mason, and Attorney Gobbo, I am tendering the Minority Report in opposition to the Representative Assembly's decision on April 25, 2020 to recommend approval of revisions to Section 2(f) of the Judicial Code. We assume this Minority Report will be tendered to the Michigan Supreme Court as part of its consideration of this matter, along with the other materials submitted to the Representative Assembly for its consideration on this matter. Please feel free to call or write me if you have any questions.

Sincerely,

RICKARD, DENNEY, GARNO, LEICHLITER & CHILDERS

Timothy W. Denney

TWD/ah
enclosure

cc w/encl (via email): Kevin Klevorn
Edward Haroutunian
Gerry Mason
Stephen Gobbo

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Minority Report
(in opposition to the proposed Amendment of Section 2(f) of the Judicial Code)

At the April 25, 2020 meeting of the Representative Assembly (RA) of the State Bar, 46 (or 37%) of the 123 Representative Assembly members in attendance voted against the following proposal to amend Section 2(f) of the Judicial Code:

> "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."

Before this meeting, a number of attorneys, judges, and organizations submitted comments of proposed 2(f). It should be noted that the following groups opposed the proposal to amend Section 2(f):

Judicial Section, State Bar of Michigan
Religious Liberty Law Section, State Bar of Michigan
Catholic Lawyers Society of Metropolitan Detroit
Christian Legal Aid Society

The arguments made against the proposal at the April 25, 2020 meeting and in accompanying written submissions included the following:

1. The Proposal Unnecessarily Infringes Upon Constitutional Liberties to Try to Fix a Non-Existent Problem:

Numerous speakers against the proposal observed that it would unnecessarily infringe upon constitutional liberties to fix a problem that did not exist. (The constitutional problems are addressed in the Sections below). Despite repeated questioning, the proponent of proposed 2(f) was unable to identify any specific examples of a violation of this proposed rule, or even to cite a single past instance to illustrate the alleged problem. One RA member asked the proponent "are there other situations that exist or have existed where this particular rule is felt to be necessary to be put forward now?" Transcript of April 25, 2020 Representative Assembly (Hereafter "Tr"), p. 15. The proponent's response was "The rule is not for necessity. It's for the appearance purposes . . .". Tr at p. 15. Judges' constitutional liberties should not be infringed upon just for the sake of "appearances" when there is admittedly no need for such a rule. The argument that, even if there is no problem now and has not been one for decades, the proposed rule is needed as a prophylactic

is no more persuasive. Needlessly infringing constitutional liberties to solve problems that do not exist now and have not for decades is unacceptable.

2. The Risk of Mislabeling Groups As "Hate Groups" to Punish Opposing Views And Judges:

Proponents of 2(f) repeatedly claimed that the amendment is needed because of the presence of "hate groups" and "white supremacy groups" in Michigan (again, without citing a single instance of a Michigan judge belonging to a group that promotes "hate" or white supremacy). The phrase "hate group" has become a club of choice to denigrate and destroy groups with which the labeler disagrees, regardless of the "hate group" label's accuracy. This proposal would have an improper and constitutionally chilling effect on judges joining organizations that would be improperly classified as hate groups. The legitimate concern is that the rule be used to bully judges out of groups that are labeled hate groups but which are not.

When the lead proponent of 2(f) stated that the State Bar did not want to allow judges to be members of supremacist or hate groups, and suggested that you could "just Google" such groups in Michigan and identify them, Some RA members did just that during the meeting. Theypointed out that organizations that have been identified as "hate groups" include the following.

A. The Thomas More Law Center:

A well-known legal organization active in religious freedom and pro-life legal matters. Its president and chief counsel is Richard Thompson, former chief prosecutor of Oakland County. Its Advisory Board has included former Senator Rick Santorum, retired Rear Admiral Jeremiah Denton, former Major League Baseball Commissioner Bowie Kuhn, and former U.S. Ambassador Alan Keyes. Tr at 28.

B. The Salvation Army:

This social service organization – which is one of the largest private groups serving the poor and those in need without regard to recipients' race, color, creed, orientation or beliefs – has been labeled a hate group at times. Tr at 21 – 22. The Salvation Army was condemned by some because at one point it received donations from Chick-fil-a, whose now-deceased founder did not support same-sex marriage, even though the company by policy and practice treated employees and customers equally regardless of their sexual orientation. Persons nominated or running for judicial campaigns can have their good names improperly tarnished when a rule like this is weaponized to attack their membership in honorable organizations like the Salvation Army.

Attempts to Force Judges Out of Other Groups:

Some members expressed concern that groups like The Federalist Society would be labeled as hate groups as well. Tr at 20. As reflected in the attached *Wall Street Journal* editorial of May 6, 2020 (Exhibit 1), the controversial idea that judges would be excluded from their position simply by being members of the Federalist Society is already being proposed by high-ranking judicial authorities. Another member also noted that a judge in their area had already been subject to a

Judicial Tenure Commission complaint just for attending a pro-life event. Tr at 19. California adopted a judicial canon rule that barred all California state judges from working with the Boy Scouts because of their views on sexual conduct. See Exhibit 2.

Who will define what constitutes a "hate group" for the purposes of the rule? Despite the proponent's urging, the choice cannot safely be left to a Google search. Many "hate group" lists can be traced back to the Southern Poverty Law Center itself the focus of much controversy, including its determination of what constitutes a "hate group."

3. The Proposed Rule Will Be Weaponized for Political Purposes:

Several RA members expressed concern that this proposed rule would be weaponized for political purposes. Tr at 20 – 22. One member agreed with the Judicial Section of the State Bar, whose governing council voted 14-0-1 against the proposed rule, concerned that the rule "could be used as a weapon against individual judges and/or associations." Some RA members expressed concern that the proposed rule crossed the line into political advocacy, which is not appropriate for State Bar entities under Keller v. State Bar of California, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990). Tr at 18. The proposal is an unnecessary filter for voters, who have proven amply efficient already at weeding out judges or prospective judges who would engage in illegal discrimination from the bench. One member described the proposal as authorizing the State Bar to become a "Roman censor to free speech." Tr at 20.

"The groups promoting this new rule (which tries to add the politically controversial categories of 'sexual orientation', 'gender identity', and 'gender expression') are not trying to fix a problem; they are trying to gain acceptance and recognition of their viewpoint using the State Bar of Michigan as a vehicle to prohibit otherwise lawful behavior, and to prevent opposition to or criticism of their position. The proponents are entitled to their views, but so are any present or prospective judges who might disagree with them."

4. The Phrase "Invidious Discrimination" Is Excessively Vague:

Governmental restrictions, especially on freedom of speech, are an unconstitutional infringement on free speech if, as here, they are unduly vague. As the U.S. Supreme Court has noted:

> "Vague laws offend several impact values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. 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 policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of First Amendment freedoms, 'it operates to inhibit, the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer

> far under of the unlawful zone' . . . then if the boundaries of the forbidden areas were clearly marked.'" Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (footnotes and citations omitted).

The proposed rule offends all three of these principles: (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 rule. 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? 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? Would a judge be prohibited from associating with the Salvation Army if it has sexual conduct standards for its leaders? 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 Lawyers Society (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?

The case law will not solve the vagueness problem here. The case law in race cases regarding invidious discrimination is not adequate to give judges clarity as to how the phrase "invidious discrimination" will be applied in matters concerning "gender, religion . . . and sexual orientation." The U.S. Supreme Court's race cases provide little practical definitional guidance as to "invidious discrimination" that is transferrable to these other more complex areas. See e.g., McLaughlin v. State of Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).

This rule is excessively broad. On April 25, 2020, the RA expressly voted to reject an amendment to the proposed rule that would have only barred "unlawful discrimination," rather than "invidious discrimination." Rather than choose a legally definable standard, the RA has recommended a subjective standard with no apparent objective boundaries. The proponent assured us that the vague words in the rule would be interpreted in light of case law interpreted legal standards, but when the RA majority was given the opportunity to limit the prohibitions to those legal standards, it rejected it.

5. The Free Exercise of Religion Exemption Will Not Protect Judges' Religious Liberty:

While the proposed rule change retains a "free exercise of religion" exception, that will not prevent infringement of judges' religious liberty, for several reasons. First, under the federal constitution, the U.S. Supreme Court has said that the free exercise of religion clause does not exempt religious individuals from generally applicable rules. Employment Division, Department

of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Since the proposed rule applies to all judges, a free exercise exemption may not prevent infringement of their religious liberty. Similarly, the Michigan Supreme Court has shown willingness to construe an anti-discrimination rule as a sufficiently compelling state interest to justify burdening a religious individual's religious beliefs. McCready v. Hoffius, 459 Mich 131, 586 NW2d 723 (1998), vacated in part by McCready v. Hoffius, 459 Mich 1235, 593 NW2d 545 (table) (1999). While this conclusion was vacated on procedural grounds, many are rightfully concerned that, whether under the federal or state constitution, a free exercise exemption will provide nothing more than fig leaf protection for religious liberty. Contrary to the proponents' contention, it is entirely likely the courts will look at the above-described cases in deciding the breadth of free exercise protection under this rule. The narrowness of that protection gives ample reason to believe it will not be sufficient to shied our judges' religious liberty. It is also highly predictable that if this rule is adopted for judges, the next target will be to extend the same rule to all attorneys in the State Bar. The developments concerning ABA Rule 8.4 confirm this – it would apply a similar rule to all attorneys, not just judges. If this initial infringement of constitutional liberties is not stopped, the infringers will be emboldened to expand the infringement to all attorneys.

6. There is No Exemption for Infringement on Judge's Freedom of Speech and Freedom of Association:

RA members have noted that, regardless of the free exercise exemption, what about the other constitutional liberties implicated? There is no exception for the proposed rule's infringement on a judge's freedom of speech or freedom of association. See e.g., In re: Chmura, 461 Mich 517, 608 NW2d 31 (2000) (judge's freedom of speech); Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (freedom of association).

7. The Proposed Rule is Contrary to Our Constitutional Heritage:

We have a constitutional heritage of protecting dissenting views and the groups who espouse them. This proposed rule ignores that heritage. Our First Amendment requires government rules to "permit the widest toleration of conflicting viewpoints." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 644, 638 S. Ct. 1178, 87 L. Ed. 2d 1628 (1943) (finding rule requiring child to say Pledge of Allegiance to flag unconstitutional). "If there is one fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, . . . or other matters of opinion . . ." Barnette, supra. That heritage also protects groups that opposes dissenting views. See NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). In the NAACP case the State of Alabama tried to run the NAACP out of the State by forcing disclosure of its membership lists. The U.S. Supreme Court found the law unconstitutional. The NAACP of Alabama gave rise to Dr. Martin Luther King, Jr. Yesterday's dissenter in an unpopular association can become tomorrow's civil rights icon. This Court should be highly skeptical and alarmed when, as here, the government says it intends to advance justice by silencing or punishing dissenting groups or those who join them.

In Obergefell v. Hodges, _____ U.S. _____, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), where the U.S. Supreme Court ruled that states must recognize same-sex marriages, the court went

out of its way to indicate that those religious organizations still holding a traditional view of marriage would be legally protected:

> "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."

Obergefell, 135 S. Ct. at 2607. The fact that the court meant it when it said those who held to the traditional view of meaning would be protected against state-sanctioned hostility was reinforced in Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission, ____ U.S. ____, 138 S. Ct. 1719, 1727, 201 L. Ed. 2d 35 (2018) (quoting Obergefell). If the legal protection promised by the U.S. Supreme Court in Obergefell and reinforced in Masterpiece Cakeshop is to be a reality, then the Michigan Supreme Court should not begin punishing judges who join organizations that hold to such traditional views.

Bigotry is evil, but so is the deliberate expungement of divergent voices in a culture that cherishes freedom of speech and association. The tyranny of coerced uniformity, which is its own evil, is antithetical to the First Amendment.

8. This Proposed Rule Gives Ammunition to Those Who Want to End the Mandatory State Bar:

In June 2018, the U.S. Supreme Court ruled in Janus v. AFSCME, ____ U.S. ____, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) that the First Amendment bars the State from requiring public employees to join a union as a condition of public employment. In 2019, relying on Janus, a Michigan attorney filed suit arguing that the First Amendment bars the State Bar was forcing them to join the State Bar and pay dues, asserting that this interfered with, among other rights, their freedom of association. Lucille S. Taylor v. State Bar of Michigan, et.al., Case 1:19-cv-00670-RJJ-PJG (W.D. Mich). If the State Bar seeks to impose a rule that can punish judges expressly based on the voluntary community groups they associate with – with no evidence the judge's decisions do not follow the law without any unlawful discrimination – then the State Bar will be hard-pressed to claim it does not unconstitutionally interfere with the freedom of association. (See also "The Supreme Court and the Lawyers' Guilds," The Wall Street Journal, May 13, 2020).

9. The Proposed Rule Is Constitutionally Overbroad:

The proposed rule unconstitutionally punishes a judge who is a member or an organization that allegedly practices invidious discrimination without any requirement that the judge must be aware that the group engages in such alleged discrimination. As one RA member noted, this lack of a scienter requirement makes the rule improper. The Michigan Supreme Court, in a case dealing with application of a judicial canon regarding allegedly false campaign literature, found that a judicial canon that allowed a judge to be punished for false campaign speech, even if it was not

knowingly or recklessly false, was unconstitutional, a violation of the overbroad rule under Due Process constitutional protections. In Re Chmura, 461 Mich 517, 608 NW2d 31 (2000). The Michigan Supreme Court should not adopt a rule that allows a judge to be punished for membership in an organization that engages in alleged invidious discrimination without any requirement that the judge was aware that the group engaged in such alleged discrimination. Such a rule would be unconstitutional on its face. Waiting for the court to make a subsequent narrowing construction, as done in the Chmura case, would improperly allow adoption of a new judicial canon that is admittedly unconstitutional. While we do not agree with the adoption of the amendment of the rule, even if the scienter aspect is somehow resolved, the fact remains that the proposed rule amendment raises constitutional concerns.

10. Expansion Of Protected Classes Beyond Those Recognized By The Courts

Some members have also suggested that if the U.S. Supreme Court rules in the cases of R.G & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission, 139 SCt 1599 (2019) and Bostock v. Clayton, Georgia Board of Commission, 139 SCt 1599 (2019) that the term "sex" in Title VII does not protect "sexual orientation" or "gender identity" that those terms should not be included in Section 2(f) because they attempt to extend protected classes beyond those recognized by the courts.

CONCLUSION:

The Michigan Supreme Court is an important bulwark for protection of our constitutional liberties. This Court should not permit infringement on the constitutional liberties of our judges – merely for the sake of "appearances" – to solve a non-existent problem. This proposed rule is a political club just waiting to be weaponized by political activists to punish opposing views and the associations who espouse them. These activists are ready and willing to use this club to apply the hate group label to groups with whom they disagree, even if the label is completely false. We urge this Court not to create this political club for them to abuse.

Minority Report Signatories

This report is executed by the following members of the Representative Assembly who dissented from the proposed rule:

/s/ Kevin Klevorn Date: June 10, 2020
Kevin Klevorn

/s/ Edward Haroutunian Date: June 10, 2020
Edward Haroutunian

/s/ Gerry Mason Date: June 10, 2020
Gerry Mason

/s/ Stephen Gobbo Date: June 10, 2020
Stephen Gobbo (Concurring as to Paragraphs 4, 8 and 9 and the resulting conclusion)

EXHIBIT 1

REVIEW & OUTLOOK

Judicial Code of Misconduct

Here's one for the books: The ethics committee that wants to bar judges from belonging to the Federalist Society because it is supposedly too political is now being used as a political weapon against a judicial nominee.

An ethics advisory committee is used to defeat a nominee.

Let's unspool the political skulduggery. In January we told you about the draft advisory opinion by the Committee on Codes of Conduct of the U.S. Judicial Conference. The committee, composed of 15 or so judges, sets ethical guidelines for the judiciary. The committee had circulated a draft that reversed decades of policy by saying judges shouldn't belong to the Federalist Society or American Constitution Society (ACS).

The draft offered a phony political balance because the Federalist Society leans right and ACS was created as a liberal counter to the Federalist Society. But the ACS plays an active role in political issues while the Federalist Society avoids taking sides on policy and doesn't file amicus briefs. The Federalist Society is composed of chapters, notably at law schools, that host debates and panels on legal issues that often include giants of the legal left.

Our editorials echoed in the judicial community, which has responded with what we're told are more than 70 letters to the Codes of Conduct Committee. The vast majority oppose the advisory draft. A March 18 letter was signed by 210 judges, including such lions of the judiciary as José Cabranes of the Second Circuit Court of Appeals and district court judges Richard Leon and Royce Lamberth of the D.C. Circuit.

"We believe the exposure draft conflicts with the Code of Conduct, misunderstands the Federalist Society, applies a double standard, and leads to troubling consequences," the judges write. "The circumstances surrounding the issuance of the exposure draft also raise serious questions about the Committee's internal procedures and transparency. We strongly urge the Committee to withdraw the exposure draft." That's what we call feedback.

But here's the rub. One of the signers is Justin Walker, a district court judge in Kentucky whom Donald Trump has nominated to fill a vacancy on the D.C. Circuit Court of Appeals. The political left is trying to stop Judge Walker's confirmation, and his Senate hearing is scheduled for this week. In what is no coincidence, the letter signed by Judge Walker was leaked Sunday to the New York Times.

Here's how the daily diary of the judicial left spins the letter: "As the Senate this week considers elevating a politically connected judge to an influential federal appeals court, the judge has stepped into a fierce ideological debate about a legal group shaping President Trump's rightward overhaul of the judiciary.

"The judge, Justin Walker of the U.S. District Court in Kentucky, has joined more than 200 federal judges—a majority of them appointed by Mr. Trump—in signing a letter that defends their right to be affiliated with the group, the Federalist Society."

The horror. The horror. A judge who belongs to the Federalist Society, as dozens of others do, signed a letter defending membership in the group. The story rolls through the usual fantasy political offenses of the Federalist Society and, inevitably, calls on the Senate's main antagonist of conservative judges, Sheldon Whitehouse (D., R.I.) for an above-the-fray, fair-minded, thoughtful comment. Or not.

Reports the Times: "'The Federalist Society has become so significant in the judicial selection process,' Mr. Whitehouse said in an interview. 'That is a particularly noxious role for an organization that has judges as its members.'"

The Times did not report that Mr. Whitehouse has a friend and long-time legal collaborator who contributed to the Codes of Conduct draft. His name is John McConnell, a former Rhode Island plaintiff lawyer who is now a federal district court judge. The main Senate sponsor of Judge McConnell's nomination? Sheldon Whitehouse.

We don't know who leaked the judges' letter, and many people saw it. But the leaker set up the Times reporters to spin the story as an attack on Judge Walker days before he is scheduled to appear before the Senate Judiciary Committee. Mr. Whitehouse is on Judiciary.

* * *

All of this raises even more doubts about the fairness and transparency of the Codes of Conduct Committee's deliberations and advisory draft. As the letter from the 210 judges puts it: "Yet reports suggest that no member of the Committee was permitted to dissent, despite some members' strong disagreement with the exposure draft. Other reports suggest that at least one member of the Committee was barred from voting on the draft, And the Committee's reversal of its prior, settled interpretation—without any relevant change in the Code—raises further concerns."

We'll be blunter. This ethics committee is being manipulated unethically to stigmatize the Federalist Society and now to defeat a judicial nominee. Chairman Ralph Erickson, a judge on the Eighth Circuit, has let his committee be used. If he lets the draft become formal policy, even when it is opposed by so many judges, he will have turned the committee into precisely the politicized body his draft claims to dislike.

What an embarrassment—to Judge Erickson, to the Judicial Conference, and perhaps to the entire judiciary if the committee accedes to Sheldon Whitehouse's agenda. Chief Justice John Roberts is the official head of the Judicial Conference, and he should call Judge Erickson and tell him to kill this draft forthwith.

EXHIBIT 2

Supreme Court of California
350 McAllister Street, San Francisco, CA 94102-4797
www.courts.ca.gov/supremecourt

NEWS RELEASE
Contact: Cathal Conneely, 415-865-7740

FOR IMMEDIATE RELEASE
January 23, 2015

Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations That Discriminate

SAN FRANCISCO—The Supreme Court of California unanimously voted to eliminate an exception in Canon 2C of the California Code of Judicial Ethics that permitted judges to belong to nonprofit youth organizations that practice invidious discrimination.

The Supreme Court adopted the recommendation of its Advisory Committee on the Code of Judicial Ethics to eliminate an exception to an ethics rule that prohibits judges from holding membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation. The prior rule permitted an exception for nonprofit youth organizations.

The proposed rule change was sent out for public comment last year, and the change was supported by the California Judges Association. The amended rule is now consistent with the American Bar Association's Model Code of Judicial Conduct. Judges will have until January 21, 2016 to comply with the new rule.

"The only remaining exception to the general rule is membership in a religious organization," said Fourth District Court of Appeal Justice Richard D. Fybel, chair of the Supreme Court's Advisory Committee on the Code of Judicial Ethics. "One other exception—belonging to a military organization—was eliminated as well, because the U.S. armed forces no longer restrict military service based on sexual orientation."

Under the California Constitution, the Supreme Court adopts the Code of Judicial Ethics, which establishes standards of ethical conduct for state judges on and off the bench and for candidates for judicial officer.

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The Supreme Court of California is the state's highest court and its decisions are binding on all other California state courts. The court's primary role is to decide matters of statewide importance and to maintain uniformity in the

law throughout California by reviewing matters from the six districts of the California Courts of Appeal and the fifty-eight county superior courts (the trial courts). Among its other duties, the court also decides all capital appeals and related matters and reviews both attorney and judicial disciplinary matters.