

Supreme Court Advisory Committee on the Code of Judicial Ethics

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INVITATION TO COMMENT

SP14-02

Title

Proposed Amendments to Canon 2C of the Code of Judicial Ethics

Action Requested

Review and submit comments by April 15, 2014

Proposed by

Supreme Court Advisory Committee on the Code of Judicial Ethics
Hon. Richard D. Fybel, Chair

Proposed Effective Date

August 1, 2014

Date

February 5, 2014

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Summary

The Supreme Court Advisory Committee on the Code of Judicial Ethics proposes amendments to canon 2C and related provisions of the code. Canon 2C prohibits a judge from holding membership in an organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, but contains exceptions for religious, military, and nonprofit youth organizations. The committee proposes retaining the exception for religious organizations.

The committee proposes eliminating the military organization exception because the U.S. military no longer restricts military service by gay, lesbian, and bisexual personnel. The committee also proposes eliminating the nonprofit youth organization exception because California is the only state that prohibits membership in organizations that discriminate on the basis of sexual orientation but has an exception for nonprofit youth organizations. In addition, the committee proposes amending related provisions in the commentary to canon 2C, the commentary to canon 3E, canon 6D(5)(b), and the Terminology section of the code.

The proposals have not been approved by the Supreme Court and are not intended to represent the views of the court. These proposals are circulated for comment purposes only.

After receiving and reviewing comments on these proposals, the committee will make recommendations to the Supreme Court regarding the proposed amendments. The full text of the proposed amended canons and commentary is attached.

Discussion

1. Canon 2C

Military Organizations

The committee proposes eliminating the exception to canon 2C for membership in official military organizations because the exception is no longer needed. In December 2010, Congress passed and President Obama signed the Don't Ask, Don't Tell Repeal Act of 2010. This legislation ended restrictions on military service by gay, lesbian, and bisexual personnel as of September 20, 2011. Therefore, the U.S. military has stopped practicing invidious discrimination based on sexual orientation and the rationale for the exception in canon 2C no longer exists.

Nonprofit Youth Organizations

A. History of Canon 2C's Exception for Nonprofit Youth Organizations

Effective April 15, 1996, the Supreme Court added "sexual orientation" to the list of protected categories included in canon 2C. At that time, the court adopted an exception permitting membership in nonprofit youth organizations to accommodate the interests of judges who were members of or active in the Boy Scouts of America (BSA). The canon, which has not changed since then, reads:

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.

This canon does not apply to membership in a 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.

In 2003, the court revisited the nonprofit youth organization exception after receiving requests to eliminate the exception. The Bar Association of San Francisco initiated the request, joined by the Santa Clara County Bar Association. Once the bar association's proposal was publicized, the

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court received many communications from judges, lawyers, and others. Some of those responding supported elimination of the exception, while others opposed any amendment to the canon.

The court ultimately decided to leave the canon intact, but added commentary to canons 2C and 3E to caution judges to be sensitive to the concerns expressed by those advocating elimination of the exception. The court added the following final sentence at the end of the first paragraph of the commentary to canon 2C: “See also Canon 3E and its Commentary concerning disqualification and disclosure.” At the same time, the court added the following paragraph to the commentary following canon 3E:

In some instances, membership in certain organizations may have the potential to give an appearance of partiality, although membership in the organization generally may not be barred by Canon 2C, Canon 4, or any other specific canon. A judge holding membership in an organization should disqualify himself or herself whenever doing so would be appropriate in accordance with Canon 3E(1), 3E(4), or 3E(5) or statutory requirements. In addition, in some circumstances, the parties or their lawyers may consider a judge’s membership in an organization relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification. In accordance with this canon, a judge should disclose to the parties his or her membership in an organization, in any proceeding in which that information is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge concludes there is no actual basis for disqualification.

There have been no further amendments to these provisions since the 2003 revisions.

B. Rationale for Proposal to Eliminate Nonprofit Youth Organization Exception

Of the 47 states that bar membership in organizations that discriminate on the basis of certain enumerated classes, 22 (including California) list sexual orientation as one of the protected classes. California is, however, the only state whose code contains a prohibition against membership in organizations that discriminate on the basis of sexual orientation that also has an exception for membership in nonprofit youth organizations. The ABA Model Code of Judicial Conduct, upon which much of the California code is based, also contains no such exception.

California’s status as the only state with an ethics code that prohibits membership in organizations that discriminate on the basis of sexual orientation but has an exception for nonprofit youth organizations, combined with recent developments in the law relating to

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recognition of same-sex relationships, is anomalous and inconsistent with other principles in the canons. In the committee's view, eliminating the exception would promote the integrity of the judiciary.

The committee analyzed the exception in the context of a judge being a member of the BSA. Until recently, the official policy of the BSA read: "While the [BSA] does not proactively inquire about the sexual orientation of employees, volunteers or members, we do not grant membership to individuals who are open or avowed homosexuals or who engage in behavior that would become a distraction to the mission of the BSA." In May 2013, after a national council meeting, the BSA announced its decision to permit openly gay boys to participate as scouts until age 18, but to continue its bar against gay and lesbian adults as troop leaders or in other leadership positions. Because the BSA continues to discriminate on the basis of sexual orientation, the committee agreed that eliminating the exception, thereby prohibiting judges from being members of or playing a leadership role in the BSA, would enhance public confidence in the impartiality of the judiciary.

The committee noted that the exception was developed in 1996 to accommodate judges who were members of or active in the BSA. Effectively selecting one organization for special treatment is of particular concern, especially in light of changes in the law in California and elsewhere prohibiting discrimination on the basis of sexual orientation.

Eliminating the exception would not have any effect on a judge's family members, who could still join or continue to be members of the BSA.

2. Commentary Following Canon 2C

The committee also proposes amending the commentary following canon 2C. Under the committee's proposal, the commentary would retain the language noting that membership in religious organizations is constitutionally protected, but references to military and nonprofit youth organizations would be deleted.

The existing penultimate sentence refers to "individual rights of intimate association and free expression." The committee proposes that this sentence be deleted; the code prohibits judges from being associated with *any* organization if that association would affect the integrity or impartiality of the judiciary. Because this sentence was inserted to apply to nonprofit youth organizations, the committee proposes that it be deleted.

The cross-reference to canon 3E and its commentary would also be removed because, as discussed below, the committee also proposes deleting the related commentary to canon 3E.

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3. Commentary Following Canon 3E

When the court decided to retain the nonprofit youth organization exception in 2003, it added a paragraph to the commentary to canon 3E, which addresses disqualification and disclosure. That paragraph, which the committee proposes deleting, is quoted above on page 3.

According to a news release issued at the time the court adopted this paragraph, the new language

explains that, even when membership in a particular organization is permitted by Canon 2C, Canon 4, or any other canon, the judge still should disqualify himself or herself in a particular case when doing so would be appropriate pursuant to Canon 3 and Code of Civil Procedure section 170.1.

Furthermore, pursuant to Canon 3, even if the judge believes there is no basis for disqualification, the judge should disclose the membership to the parties or their lawyers if the judge believes they may consider it relevant to the question of disqualification.

(Judicial Council News Release No. 37, June 18, 2003.)

Because this paragraph was added when the court rejected requests to eliminate the exception in 2003, the committee proposes that it be deleted. If the court decides to remove the exception from the code, the reason the paragraph in the commentary to canon 3 was added would no longer exist.

4. Terminology

Because there would no longer be a reference in the code to “nonprofit youth organizations,” the committee proposes deleting the definition of that term from the Terminology section of the code.

5. Canon 6D(5)(b)

Consistent with the proposals described above, the committee proposes amending canon 6D(5)(b), which addresses disclosure by temporary judges, referees, and court-appointed arbitrators, to delete the references to military and nonprofit youth organizations.

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Canon 2C of the California Code of Judicial Ethics would be amended to read:

1 **CANON 2. A Judge Shall Avoid Impropriety and the Appearance of**
2 **Impropriety in All of the Judge's Activities**

3
4 **A–B * * ***

5
6 **C. Membership in Organizations**

7
8 A judge shall not hold membership in any organization that practices invidious
9 discrimination on the basis of race, sex, gender, religion, national origin, ethnicity,
10 or sexual orientation.

11
12 This canon does not apply to membership in a religious organization ~~or an official~~
13 ~~military organization of the United States.~~ So long as membership does not
14 violate Canon 4A, this canon does not bar membership in a nonprofit youth
15 organization.

16
17 *ADVISORY COMMITTEE COMMENTARY*

18 *Membership of a judge in an organization that practices invidious*
19 *discrimination gives rise to a perception that the judge's impartiality is impaired.*
20 *This canon exempts membership in religious ~~and military~~ organizations ~~and,~~*
21 *subject to Canon 4A, does not bar membership in nonprofit youth organizations.*
22 *These exemptions are necessary because such membership in United States*
23 *military organizations is subject to current valid military regulations, and*
24 *religious beliefs are is constitutionally protected. Membership in nonprofit youth*
25 *organizations is not barred to accommodate individual rights of intimate*
26 *association and free expression. See also Canon 3E and its Commentary*
27 *concerning disqualification and disclosure.*

28
29 * * *

The Advisory Committee Commentary to Canon 3E of the California Code of Judicial Ethics would be amended to read:

1 **CANON 3. A Judge Shall Perform the Duties of Judicial Office Impartially,**
2 **Competently, and Diligently**

3
4 **A–D * * ***

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6 **E. Disqualification and Disclosure**

7
8 **(1)–(5) * * ***

9
10 *ADVISORY COMMITTEE COMMENTARY*

11 *Canon 3E(1) sets forth the general duty to disqualify applicable to a judge of any*
12 *court. Sources for determining when recusal or disqualification is appropriate may*
13 *include the applicable provisions of the Code of Civil Procedure, other provisions of the*
14 *Code of Judicial Ethics, the Code of Conduct for United States Judges, the American Bar*
15 *Association’s Model Code of Judicial Conduct, and related case law.*

16 *The decision whether to disclose information under Canon 3E(2) is a decision*
17 *based on the facts of the case before the judge. A judge is required to disclose only*
18 *information that is related to the grounds for disqualification set forth in Code of Civil*
19 *Procedure section 170.1.*

20 *Canon 3E(4) sets forth the general standards for recusal of an appellate justice.*
21 *The term “appellate justice” includes justices of both the Courts of Appeal and the*
22 *Supreme Court. Generally, the provisions concerning disqualification of an appellate*
23 *justice are intended to assist justices in determining whether recusal is appropriate and*
24 *to inform the public why recusal may occur.*

25 *However, the rule of necessity may override the rule of disqualification. For*
26 *example, a judge might be required to participate in judicial review of a judicial salary*
27 *statute, or might be the only judge available in a matter requiring judicial action, such as*
28 *a hearing on probable cause or a temporary restraining order. In the latter case, the*
29 *judge must promptly disclose on the record the basis for possible disqualification and use*
30 *reasonable efforts to transfer the matter to another judge as soon as practicable.*

31 ~~*In some instances, membership in certain organizations may have the potential to*~~
32 ~~*give an appearance of partiality, although membership in the organization generally may*~~
33 ~~*not be barred by Canon 2C, Canon 4, or any other specific canon. A judge holding*~~
34 ~~*membership in an organization should disqualify himself or herself whenever doing so*~~
35 ~~*would be appropriate in accordance with Canon 3E(1), 3E(4), or 3E(5) or statutory*~~
36 ~~*requirements. In addition, in some circumstances, the parties or their lawyers may*~~
37 ~~*consider a judge’s membership in an organization relevant to the question of*~~
38 ~~*disqualification, even if the judge believes there is no actual basis for disqualification. In*~~
39 ~~*accordance with this canon, a judge should disclose to the parties his or her membership*~~
40 ~~*in an organization, in any proceeding in which that information is reasonably relevant to*~~
41 ~~*the question of disqualification under Code of Civil Procedure section 170.1, even if the*~~
42 ~~*judge concludes there is no actual basis for disqualification.*~~

The Terminology section of the California Code of Judicial Ethics would be amended to read:

TERMINOLOGY

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Terms explained below are noted with an asterisk (*) in the canons where they appear. In addition, the canons in which terms appear are cited after the explanation of each term below.

* * *

~~“Nonprofit youth organization” is any nonprofit corporation or association, not organized for the private gain of any person, whose purposes are irrevocably dedicated to benefiting and serving the interests of minors and that maintains its nonprofit status in accordance with applicable state and federal tax laws. See Canons 2C, 2C (Commentary), and 6D(5)(b).~~

* * *

Canon 6D(5)(b) of the California Code of Judicial Ethics would be amended to read:

1 **CANON 6. Compliance with the Code of Judicial Ethics**

2
3 **A–C * * ***

4
5 **D. Temporary Judge, Referee, or Court-Appointed Arbitrator**

6 A temporary judge, a person serving as a referee pursuant to Code of Civil
7 Procedure section 638 or 639, or a court-appointed arbitrator shall comply only
8 with the following code provisions:

9
10 (1)–(4) * * *

11
12 (5) A temporary judge, referee, or court-appointed arbitrator shall, from the time
13 of notice and acceptance of appointment until termination of the appointment:

14
15 (a) * * *

16
17 (b) In all proceedings, disclose in writing or on the record membership of the
18 temporary judge, referee, or court-appointed arbitrator, in any organization that
19 practices invidious discrimination on the basis of race, sex, gender, religion,
20 national origin, ethnicity, or sexual orientation, except for membership in a
21 religious ~~or an official military organization of the United States and membership~~
22 ~~in a nonprofit youth organization so long as membership does not violate Canon~~
23 ~~4A [conduct of extrajudicial activities].~~

24
25 (6)–(12) * * *