ADVISORY OPINION

Code of Judicial Conduct **#1-94**
Canon 2C

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

In March, 1993, the Indiana Supreme Court adopted a new Code of Judicial Conduct which was patterned after the ABA's 1990 Model Code of Judicial Conduct. The Court adopted Canon 2C which states that a judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Several judges have inquired about their duties under Canon 2C.

ANALYSIS

This opinion addresses, first, the purpose of Canon 2C; second, the meaning of invidious discrimination in Canon 2C; and, third, to what organizations Canon 2C applies. Generally, the Commission's view is that Canon 2C applies to memberships in country clubs, dining clubs, and service and professional organizations. Whether Canon 2C applies to fraternal organizations depends upon the organizations' particular histories, purposes, and activities.

The Reason For the Rule

Canon 2C forbids membership in organizations which practice invidious discrimination on the basis of race,, sex, religion or national origin. It is placed appropriately in Canon 2 which requires judges to avoid impropriety and the appearance of impropriety and to act at all times in a manner promoting public confidence in the integrity and impartiality of the Judiciary. Canon 2, Code of Judicial Conduct.

Membership in a club which practices invidious discrimination casts doubt on the judge's impartiality. Shaman, Alfini, & Lubet, JUDICIAL CONDUCT AND ETHICS, Page 293, 1990. This doubt will exist with respect not only to cases involving issues of discriminatory treatment. In fact, 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.

Regardless of whether a judge personally harbors discriminatory intent, discriminatory clubs are harmful because they symbolize inequality. "In a matter as sensitive to public perceptions as is judging, appearances and symbols take on an importance their own." Id. at 294.

Also, symbols and appearances notwithstanding, the incorporation of Canon 2C into the rules of judicial ethics makes a strong statement from the profession about the unequal opportunity still encountered by minorities in. the commercial, corporate, professional and business world. Opportunity for minorities often stops at a "glass ceiling", a barrier to success which is bolstered by the exclusion of minorities from certain clubs. Id. at 315. Canon 2C makes it improper for a judge to participate in the perpetuation of this inequality. See Note 1.

Invidious Discrimination

"Invidious discrimination" implies arbitrariness; an invidious distinction is one made on an illegitimate or offensive basis.- For example, governmental discrimination on the basis of race, national origin, or religion rarely survives scrutiny. See, Loving v. Virginia 388 U.S. 1, 87 S.Ct. 1817, 18 L.ED.2d 1010. See,, for example, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 79. S.Ct. 99, 3 L.Ed.2d 46 (1958); Brown v. Board of Education, 347 U.S. 483 74 S.M. 686, 98 L.Ed. 873 (1954); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954). Discrimination by gender violates the equal protection clause unless it substantially serves important governmental interests. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 1161, 50 L.Ed.2d 397, (1976).

Invidious discrimination has been defined as a classification which is irrational and not reasonably related to a legitimate purpose. United States v. Comm. of Correction City of New York, 316 F.Supp. 556, 564 (S.D.N.Y. 1970). In 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), the Rotarians failed to establish how their purposes of providing humanitarian service, encouraging high ethical standards in the professions, and building good will and peace in the world, were compromised by the inclusion of women as members. In fact, in Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the Court found that, although the focus of the Jaycees was the well-being of young men, there was no basis in the record for concluding that the activities and goals of the Jaycees would be impeded by the inclusion of women as full voting members.

Obviously, not all distinctions are arbitrary and invidious, nor do all activities lacking diversity reflect upon a judge's commitment to equality. The Commentary to Canon. 2C states that a relevant factor in gauging invidiousness is whether an organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members.

Some groups exist for the legitimate purpose of the perpetuation or celebration of cultures, historical events, and ethnic or religious identities and traditions. They tend to be inclusive of an entire group, rather than exclusive of certain groups. See, California opin. No. 34, supra at 4. Their membership limitations, rather than unfair or stigmatizing, are secondary to but inextricable from that which is being legitimately preserved or celebrated. For example, any adult woman who can establish her ancestry to a revolutionary soldier, but no man, is eligible to join the Daughters of the American Revolution. Presumably, women do not become Knights of Columbus or Sons of Italy. The Commission members do not perceive these membership limitations as invidious.

Several judges have inquired about the impact of Canon 2Con judicial membership in various lodges or fraternal organizations such as the various orders of Masons, the Independent Order of Odd Fellows, the Loyal Order of Moose, the Improved Benevolent and Protective Order of Elks of the World, the Nobles of the Mystic Shrine, and the Ancient Order of Hibernians. The Commission is not sufficiently aware of the details of the history, purpose, functions, tenets, and activities of all of these groups to address the propriety under Canon 2C of membership in any particular organization. In any case, the Commission is disinclined to create a list of "approved" or "disapproved" groups. Practices may vary from chapter to chapter; a group's exclusionary practices may have no invidious impact on the excluded class in a urban setting but might in rural areas; some lodges or benevolent orders adhere to centuries-old rituals in perpetuation of tradition and history, and others are, in effect, merely restaurants, bars or inns which exclude entire classes of individuals from entry. Some organizations prohibit the use of membership as a business tool, which is a strong indication that their exclusionary policies do not perpetuate inequality outside of the group and, therefore, do not implicate Canon 2C.

Organizations subject to 2C

For the purposes of this opinion, and as a general guideline, an "organization' refers to a group or club with a more or less constant membership, organized for professional, social, recreational, charitable, educational, or civic purposes, in which membership is controlled by ballot or some other type of membership approval. A club often will have by-laws of some kind or other written rules, and membership may require dues or assessments or other support. The size of the group is less important than these other factors, but distinctly private, intimate groups are not within the purview of the Code. See Note 2.

Essential to the meaning of "organization" in Canon 2C is that it offer some benefits of membership beyond the interaction with other members, such as recreation, food or bar service, guest and entertainment privileges, and opportunities for education, community involvement, or professional or business advancement. The Commission's assessment is that Canon 2C is aimed directly at country clubs, dining clubs, and service and professional organizations. See Note 3.

Service clubs and professional organizations offer obvious benefits to members. The exclusion of minorities is as detrimental, as it is in the country club setting. The Supreme Court of the United States has spoken to membership restrictions in service organizations. In Rotary, supra, the Court held that California's Unruh Act, which entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments of the state, applied to Rotary International, and that the Act was violated by Rotary's exclusion of women from membership. In Jaycees, supra, the Court held that Minnesota's Human Rights Act, which forbids discrimination in places of public accommodation, required the Jaycees to admit women. The Court wrote:

By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms .... [T]his Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life .... That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race". Id. at 3254.

Country clubs and dining clubs also provide opportunities from which minorities cannot legitimately be excluded. New York City's local ordinance, which forbids invidious discrimination in so-called "private" clubs, was enacted "[In sensitivity] to the reality that business is often conducted and professional contacts initiated and renewed in private clubs". N.Y.S. Club Association (Ct.App. 1987) 69 N.Y.2d 211, 513 New York Supp.2d 349. The court wrote that the law was based on the City Council's conclusion that "denial of access to club facilities' constitutes a significant barrier to the professional advancement of women and minorities since business transactions are often conducted in such clubs, and personal contacts valuable for business purposes, employment and professional advancement are formed." Id. at 351. See Note 4.

CONCLUSION

Clubs which arbitrarily exclude persons from the privileges of membership on the basis of race, sex, religion, or national origin perpetuate inequality and prejudice. A member of a discriminatory club appears to endorse its exclusionary politics. Where a club's by-laws or clear practices do not reveal the discriminatory practice, but the judge has reason to suspect more subtle discrimination, the judge has a duty to become informed on the matter and take appropriate action under 2C. A judge who belongs to one of these clubs must either immediately resign, or begin efforts to change the club's policy. In Indiana, a judge may retain active membership in the organization for one year in an attempt to change its discriminatory practices. Canon 2C; Commentary, Code of Judicial Conduct.

Note 1: Associational freedoms are affected by enforcement of the rule in Canon 2C. It does cover memberships in some organizations commonly thought of as private; that is, not open to the general public. Because fundamental rights are clearly implicated, the Commission has attempted to interpret Canon 2C narrowly

Note 2: Factors contributing to a determination that a group is not distinctly private might be, in addition to size, its overall selectivity in membership, whether it advertises or publicizes its activities, whether it has subjected itself to governmental regulation such as with a liquor license, whether it sells retail goods or services, whether it offers its services or facilities to non-members, or whether it has developed a' public identification such as through civic or charitable activities or participation in public events.

Note 3: Many judges have asked about the propriety of engaging in various activities which draw distinctions by gender. Canon 2C does not proscribe participation in mother-daughter banquets, men's support groups, college fraternity and sorority alumni groups, boy scouts, girls' basketball, or single-sex fitness facilities. To the extent any of these constitute organizations, participation signifies nothing untoward about the judge's commitment to fairness and impartiality, nor are entire protected classes of people being denied economic opportunity by the exclusions in the activities.

Note 4: Some judges have asserted that their clubs are of such modest appointment that they are not places where clients are likely to be courted. Nevertheless, if an organization is a club as defined in this opinion, it is, by definition, probably subject to 2C.