

AMERICAN BAR ASSOCIATION
CPR POLICY IMPLEMENTATION COMMITTEE

COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS

RULE 3.6 *Affiliation with Discriminatory Organizations*

(A) 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.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[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.

Ten (10) states have identical language (CO, IN, KS, MD, MS, NE, NV, NH, OH, TN)
Thirteen (13) states have similar language (AZ, AR, DE, HI, IA, MN, MO, MT, NY, OK, UT, WA, WY)

AL

AK	
AZ Effective 9/1/09	<p>Adds (C) <i>A judge’s membership or participation in a religious organization as a lawful exercise of the freedom of religion, or a judge’s membership or participation in an organization that engages in expressive activity from which the judge cannot be excluded consistent with the judge’s lawful exercise of his or her freedom of expression or association, is not a violation of this rule.</i></p> <p>[2]: replaces language between “the organization” and “or whether” with “stigmatizes excluded persons as inferior and odious, whether it perpetuates and celebrates cultures, historical events, and ethnic or religious beliefs, identities, or traditions”</p> <p>Deletes Model Code [4]</p> <p>[4]: similar to Model Code [5] but replaces “apply to” with “prohibit a judge’s”</p>
AR Effective 7/1/09	<p>(A): deletes language after “discrimination”</p> <p>(B): in first sentence, deletes language after “discrimination”</p> <p>[1]: deletes “on any basis”</p> <p>[2]: replaces first sentence with “Invidious discrimination will generally be demonstrated if an organization’s exclusionary membership practices are arbitrary, irrational, or the result of hostility or animus toward an identifiable group.”</p> <p>Adds [2A] <i>A judge may ordinarily be a member of an organization which is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited, even though that organization is a single sex or single race organization. Likewise, a judge may ordinarily be a member of an organization which is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, even though in fact its membership is limited. Similarly, a judge may have or retain membership with a university related or other living group, even though its membership is single sex. However, public approval of, or participation in, any discrimination that gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary violates this Code. For example, an organization that conducts lobbying or advocacy on behalf of its members may raise such concerns. Ultimately, each judge must determine in the judge's own conscience whether participation in such an organization violates Rule 3.6.</i></p>
CA (as pro- posed)	<p>(A) – CA Canon 2C and Commentary: Proposed amendments are based on MC. Similar to MC, the Committee proposes adding <i>gender and ethnicity</i> to CA list of protected categories.</p>
CO Effective 7/1/10	<p>Identical</p>
CT Effective 1/1/11	<p>(A) Adds “physical or mental disability” before “or sexual orientation;” adds to end: “When a judge learns that an organization to which the judge belongs engages in unlawful discrimination, the judge must resign immediately from the organization;”</p> <p>(B) Changes “invidious” to “unlawful;”</p> <p>Does not have any Model Code Comments.</p>
DE Effective 11/1/08	<p>(A): replaces “shall” with “should”</p> <p>First Comment: same as 1990 Model Code Canon 2C Commentary first paragraph, first two sentences</p> <p>Second Comment: same as 1990 Model Code Canon 2C Commentary first paragraph, third and fourth sentences</p>

	<p>Third Comment: beginning is new, <i>“Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.”</i> Last sentence same as fifth sentence of 1990 Model Code Canon 2C Commentary first paragraph but adds gender, ethnicity and sexual organization to list.</p> <p>Fourth Comment: similar to 1990 Model Code Canon 2C Commentary second paragraph but adds gender, ethnicity and sexual orientation to list throughout</p> <p>Fifth Comment: similar to 1990 Model Code Canon 2C Commentary third paragraph (B): replaces “shall” with “should”</p>
DC (as proposed)	(A) Adds at the end: “or engages in any discriminatory practice prohibited by the law of the District of Columbia.”
FL	
HI Effective 1/1/09	(A) and [2]: adds disability, age, socioeconomic status, marital status and personal characteristics to list
ID	
IL	
IN Effective 1/1/09	Identical
IA Effective 5/3/10	(A) Adds to end: “A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not prohibited;” Does not have MR Comment [4]; [4] is the same as MR [5].
KS Effective 3/1/09	Identical
KY	
MD Effective 7/1/10	Identical
MA	

MI	
MN Effective 7/1/09	Replaces “invidious” with “unlawful” throughout (A): adds “knowingly” before “hold” and deletes language after “discrimination” (B): ends first sentence after “discrimination” [2]: adds “or other classification protected by law” after “orientation”
MO Effective 1/1/2012	(A) Replaces text after “invidious” with: “discriminatory conduct against any person who is protected by law from discrimination.” (B) Deletes all text in the first sentence after “invidious discrimination;” Adds “Rule 2-3.6” to this rule” [1] Replaces text with: <i>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.</i> [3] Adds “against any person who is protected by law from discrimination” after “invidious discrimination;” Adds at the end: “unless the organization corrects its practice within six months” [4] Adds “Rule 2-3.6” to “this rule”
MS (as pro- posed)	Identical
MT Effective 1/1/09	(C): combines Model Code [4] and [5] and deletes them from Comment
NE Effective 1/1/2011	Identical
NV Effective 1/19/10	Identical
NH Effective 4/1/2011	Identical
NJ	
NM (as pro- posed)	(A) Adds prohibited grounds of discrimination: “color”, “ancestry”, “gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap, or serious medical condition.” (B) Deletes the last sentence
NY (as pro- posed)	Adds “color, creed, disability, marital status” after “ethnicity.”
NC	
ND (as pro- posed)	[4]: Deleted ND [4] is the same as MC [5]

OH Effective 3/1/09	Identical
OK Effective 4/15/2011	(A) Deletes language after “invidious discrimination.” (B) Deletes language after “invidious discrimination.” (C) Adds C: same as the last sentence of MC (B). [2] Deletes first sentence.
OR	
PA	
SD	
TN (as pro- posed)	Identical
TX	
UT Effective 4/1/10	(A) Adds to end of paragraph: “A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule;” (B) Adds “under paragraph (A)” after “not permitted to join;” [2]: adds “such as scouting organizations” to end Deletes [4]
VT	
VA	
WA Effective 1/1/11	(A) Adds clause at end of paragraph, “or other classification protected by law.”
WV	
WI	
WY Effective 7/1/09	[2]: adds “Absent these or similar factors, such an organization may be perceived to discriminate invidiously. A judge’s apparent condoning of such practices diminishes public confidence in the integrity and impartiality of the judiciary” to end.

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