

To: The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
From: David L. Hagen, 61485 CR 13, Goshen IN 46526.
Date: August 3, 2005
Re: Comments on Preliminary Draft of Code: **Rule 3.04 Protect Judge's unalienable rights**

Summary: Canon 3, Rule 3.04 Re "invidious discrimination"

Strongly recommend deleting Rule 3.04. If it must be kept, change it to read:

"A judge ~~shall not hold~~ **is encouraged to avoid membership** in any organization that practices **blatant** invidious discrimination on the basis of race, gender, religion, **or** national origin, ~~ethnicity,~~ ~~or sexual orientation,~~ and ~~shall not use~~ **avoid using** the benefits or facilities of such an organization to any significant extent. **Judges retain their unalienable rights to the free exercise of religion, freedom of speech and peaceable association."**

COMMENT [1] lines 13-15: "Rule 3.04 does not ~~prohibit~~ **hinder** a judge's membership in any organization dedicated to the preservation of ~~religious,~~ ethnic or legitimate cultural values of common interest to its members **or to the free exercise and propagation of religion."**

Rule 3.04 Protect Judge's unalienable rights

As written, the proposed draft Rule 3.04 stands on its head the unalienable right of religious freedom preserved Amendment 1. To clearly preserve a judge's unalienable rights to religion, speech and assembly, I **strongly recommend deleting Rule 3.04.**

If it must be kept, I strongly recommend specifically changing

Rule 3.04 Comment [1] (Canon 3 p 3 line 13-14) "preservation of religious . . . values" to read:

"Preservation of ~~religious~~ ethnic or legitimate cultural values of common interest to its members, **or to the free exercise of religion**" and adding to the end of Comment [1] (p3 line 15): **"Judges retain their unalienable rights to the free exercise and propagation of religion, freedom of speech and freedom of peaceable association."**

I strongly recommend keeping in Rule 3.04 only terms explicitly referred to in Federal anti-discrimination legislation. E.g., Ethnicity should be moved to a Comment.

Strongly recommend deleting ~~sexual orientation~~ in every occurrence and replacing it by "**or as proscribed by law.**" Rule 3.04 as written will likely be used by homosexual activists to destroy a Judge's reputation and prevent him from exercising his unalienable religious rights with people who believe homosexual activity is morally wrong and breaches the foundational 'laws of nature and of nature's God' that were mutually required by all States.

Discussion

The Commission asks feedback on Rule 3.04, including "ethnicity" and "sexual orientation."

The proposed draft Rule 3.04 is very troubling, raising the likely prospects of serious progressive degradations to judges' unalienable rights to freedom of religion, speech and assembly.

invidious: of, relating to, or being discrimination that arises from the creation of a classification that is arbitrary, irrational, or capricious and not related to a legitimate purpose.

Merriam-Webster's Dictionary of Law ©1996.

This definition of “invidious” includes discrimination based on “irrational” classifications. The criteria “Invidious” is strongly dependent on the viewer. E.g., every exercise of religion and action influenced by religious beliefs will likely be considered ‘irrational’ by an atheist or Fascist, and thus could be forbidden except for a very narrow group “authorized” by the caveat for “preservation religious . . . values” provided in Comment [1].

Both Fascist and Communist governments considered anyone with religious beliefs as irrational, superstitious, or drugged. They counted them as Enemy Number 1 and a foundational threat to their rule. They used such terminology to imprison and murder millions of pastors and believers because of their beliefs, and to destroy churches. E.g., Hitler’s Holocaust which killed about 6 million Jews - AND a similar number of Christians. During the 20th century alone, more than 125 million people were killed in democracies taken over by such tyrants. See: Stephane Courtois et al. *The Black Book of Communism: Crimes, Terror, Repression* (1999) Harvard University Press 858 pp, ISBN: 0674076087. China’s current treatment of Christianity is typified by Paul Hattaway, *The Heavenly Man* (2003) Monarch Books 352 pages, ISBN: 082546207X.

Rule 3.04 presents a very serious threat to the religious freedom, expression and assembly. It could easily be misused in the wrong hands. This is a far greater demonstrated threat to unalienable rights and the Rule of Law than the apparent threats of discrimination. Even Britain destroyed a major portion of the Presbyterian churches in the Colonies because of their support for unalienable rights to religious freedom and for the Rule of Law.

The term “preservation” in Comment [1] is particularly troubling. Communists interpreted “religious freedom” to only allow marriages, burials, and letting old people “preserve” their “religious values”. They forbade teaching religion to children, destroyed seminaries and prohibited any propagation of religion. Fascist, Islamic and Hindu countries have similarly prohibited religious practice, especially its propagation, imprisoning and executing believers of other faiths.

Rule 3.04 is likely to be used to falsely accuse and defame judges in elections as being biased and discriminatory, whether they are or not. Instead of people upholding unalienable rights to freedom of religion with mutual tolerance, they are now accusing Christians in America of being fanatical “Christian Taliban.” Rule 3.04 presents serious dangers of being used to falsely destroy a judge’s reputation in elections or for appointment to higher courts, especially for judges exercising their unalienable rights to free exercise of religion and of referring to the intentions, practices, and beliefs of almost all of the Founders. E.g., Benjamin Franklin’s call to prayer.

Rule 3.04 focuses on the superficial appearance of discrimination and fails to address foundational principles protecting the Rule of Law. For instance, the Code makes no mention of the problem of justices such as Hugo Black incorporating their previous practice in blatantly discriminatory organizations into their interpretation of the Constitution while ignoring the Founders’ explicit practice and declared intent. E.g., by Black’s incorporating the Klu Klux Klan’s anti-Catholic creed: “I believe in the eternal Separation of Church and State.” See Philip Hamburger *Separation of Church and State*, 2002 Harvard University Press ISBN 0-674-00734-4, p 408-411, 458-461.