

September 9, 2005

Debra D. Taylor
American Bar Association
Center for Professional Responsibility
321 North Clark Street
Chicago, Illinois 60611

Re: Comment on Preliminary Draft of ABA Model Code of Judicial Conduct

Dear Ms. Taylor:

I write on behalf of Boy Scouts of America to comment on the June 30, 2005 Preliminary Draft of the American Bar Association's Model Code of Judicial Conduct. Boy Scouts of America requests that the proposed Commentary to Rule 3.04 be revised to make clear that the Model Code does not prohibit judges from associating with private organizations whose membership decisions are constitutionally protected.

In my letter of October 11, 2004 to the Joint Commission to Evaluate the Model Code of Judicial Conduct, I raised Scouting's concerns about the confusion created by the July 2004 proposed revisions to draft Canon Rule 3.03. Boy Scouts of America remains troubled that the subsequently proposed revisions to what is now Rule 3.04 increase the confusion as to whether judges are allowed to participate in organizations like Boy Scouts.

Paragraph 1 of the current draft Commentary to Rule 3.04 states:

A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. In general, an organization is said to discriminate invidiously if it arbitrarily

excludes from membership on the basis of race, religion, gender, national origin, ethnicity or sexual orientation those individuals who would otherwise be admitted, and the exclusion is not reasonably related to a legitimate purpose. Rule 3.04 does not

prohibit a judge's membership in any organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members.

Preliminary Draft, *Canon 3: Personal Conduct* (June 2005).

The language in this Commentary differs from the language used in the July 2004 Preliminary Draft, which stated:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, national origin, ethnicity or sexual orientation individuals who would otherwise be admitted. Rule 3.03 does not prohibit a judge's membership in any United States military organization, an organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members, or one that is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

Preliminary Draft, *Canon 3: Personal Conduct* (July 2004) (emphasis added).

Instead of providing much-needed clarity to the preliminary draft Commentary to Rule 3.04, the new draft creates even more uncertainty. In particular, the June 2005 draft deletes the explicit recognition contained in the current Model Code that a judge may belong to an organization "that is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited."

Without retaining language recognizing that association with organizations whose membership requirements are constitutionally protected is permissible, the Model Code would have an unintended chilling effect on judges' association with organizations like Boy Scouts. For example, Boy Scouts would seem to fall under the Commentary's description of an organization dedicated to the preservation of values of common interest to its members and one whose membership policies are reasonably related to a legitimate purpose. However, the deletion of language protecting participation in organizations whose membership limitations could not be constitutionally prohibited will lead to confusion over whether membership in these organizations is intended to be prohibited by the revised Rule 3.04.

Moreover, if the standard were actually adopted by governments, it would be vulnerable to challenge under the First Amendment. *See Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc) (Minnesota's canons of judicial conduct that prohibited judicial candidates from engaging in specific political activities and soliciting campaign contributions violated the First Amendment speech and associational rights, citing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)); *see also Republican Party of Minnesota v.*

White, 536 U.S. 765 (2002) (Minnesota’s canon of judicial conduct that prohibited judicial candidates from announcing views on disputed issues violated the First Amendment). Like the canons of judicial conduct declared unconstitutional by the Supreme Court of the United States and the Eighth Circuit in *White*, the draft Commentary to Rule 3.04 is not narrowly tailored and is not the least restrictive means to achieving to Canon 3’s purpose of preserving “the integrity, impartiality, and independence of the judiciary.” As a result, the present draft Commentary to Rule 3.04 unfairly stigmatizes judges who belong to countless organizations that limit membership by race (e.g., Sigma Pi Phi Fraternity), religion (e.g., Knights of Columbus), gender (e.g., Daughters of the American Revolution), and national origin or ethnicity (e.g., Order Sons of Italy in America).

Because the proposed revision to Rule 3.04 fails to properly protect the First Amendment rights of judges, Boy Scouts of America requests that the Commentary to Rule 3.04 be clarified to eliminate any potential chilling effect on judges’ associational rights. In particular, Boy Scouts requests that the ABA include the text underlined below in the last sentence of the Commentary:

Rule 3.04 does not prohibit 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 one that is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited, such as Boy Scouts of America.

If you have any questions, or need further information, please contact me at (972) 580-2005.

Respectfully submitted,

David K. Park
National Legal Counsel

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