

GABLE & GOTWALS

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Mark I. Harrison, Esq.  
Chair, ABA Joint Commission to Evaluate The Model Code of Judicial Conduct Osborn Maledon  
The Phoenix Plaza  
2929 North Central Ave.  
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Phoenix, AZ 85012-2794

Re: Proposed ABA Model Code of Judicial Conduct Changes

Dear Mr. Harrison:

I practice with the firm of Gable & Gotwals in Tulsa, Oklahoma, and have been a member of the ABA for many years. The views expressed in this letter are my own, and not the firm's. I am writing to express concerns about the proposed amendments to the Model Code of Judicial Conduct ("Code") included in the draft proposal of July 20, 2004. In particular, I am concerned about the proposed amendment that would preclude judges from holding membership in an organization that would arguably be considered as "practic[ing] invidious discrimination on the basis of ...sexual orientation," or "us[ing] the facilities of such an organization to any significant extent." Proposed amended Canon 3.03.

I have several concerns about this proposed Code provision. First of all, the phrase "sexual orientation" is extremely vague and ambiguous. It could mean any sort of sexual behavior, activity or preference, including homosexuality, trans gender or transsexual traits, pedophilia, bestiality, or just about any other type of sexual behavior one could think of. It is troubling to think that the ABA would entertain enacting a proscription against judges which is so unclear and which could apply not only to the controversial subject of homosexuality, but to many other forms of sexual behavior. And, you and I both know that creative minds could seek to apply this proposed Code provision in very imaginative and destructive ways.

Second, matters concerning "sexual orientation" are at the very least extremely controversial, and in social, legal, cultural and religious circles there are strong and divergent views as to the morality; legality and propriety of "alternative" lifestyles and sexual behavior. The ABA should not be in the business of disqualifying judges from office because they hold a legitimate personal view concerning the morality, legality or appropriateness of behavior that might be described as "sexual orientation." Nor should the ABA be in the business of chilling the constitutional rights of judges--or those with aspirations of becoming judges--who choose to be associated with organizations that believe that homosexuality and other forms of "alternative" sexual behavior are wrong. The ABA's activist stand on this issue is very troubling.

Third, this proposed Code provision could have extreme consequences, whether intended or unintended. Arguably, under this proposed Code provision, a judge's membership in a church, synagogue or mosque which rejects homosexuality and other forms of sexual behavior it believes to be deviant, and/or which supports organizations that do so, would be prohibited. However, a judge's membership in a "Gay Rights" organization, or one that promotes other matters dealing with "sexual orientation" such as the practice of pedophilia or some other sexual behavior, would be appropriate. Similarly, a judge's membership in the Boy Scouts, or another private organization that prohibits homosexual members, could disqualify him or her from office, even though the Boy Scouts and similar organizations have done so much good for our society, families, and young people for many, many years. This result would be an absurdity.

The commentary purports to explain that this proposed Code provision would allow judges to maintain "membership in...an organization that is 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." This commentary is itself vague and ambiguous, and would not give judges, or those who might aspire to become judges, any level of confidence that they may maintain membership in any church, synagogue, mosque, or other organization that one could claim discriminates on the basis of "sexual orientation." This proposed commentary simply adds to the confusion and would itself chill the rights of judges and those who aspire to be judges.

Fourth, the Commission apparently recognizes that rights relating to "sexual orientation" are very much in flux at this time. The Commission's memo of July 20, 2004 states in part that, "The Commission is aware that many jurisdictions have varied their approach to this subject, and is especially interested in receiving comments on the Rule and its Comment." In fact, as you are probably aware, a number of states, by significant majorities (many by more than 75% majorities), have passed constitutional amendments defining marriage as between one man and one woman, and have rejected the notion that same sex marriages are appropriate. Why would the Commission seek to put this provision into the Code where the Commission itself acknowledges that the states have taken varying approaches on this issue, knows that it is controversial, and is aware that the citizens of many states have strong feelings about the propriety of homosexual conduct?

Fifth, statistics and medical information concerning the homosexual lifestyle shows that it is unhealthy, destructive, and even deadly. It is damaging to our society and culture in terms of social stability, monetary resources, and health risks. Why should the ABA be promoting such a lifestyle and condemning those who disagree with it?

I would ask that you very carefully consider the consequences of including proposed amended Judicial Canon 3.03 in the final Code amendments, and would request that you not do so, for all of the above reasons. I know that a number of other ABA members share my concerns.

Timothy A. Carney