

From: W. Calvin Smith [csmith@mtdab.com]
Sent: Thursday, July 14, 2005 3:17 PM
To: Taylor, Debra
Subject: Comment; Rule 3:04

Dear Madam or Sir:

I believe the current proposed language for Rule 3:04, notwithstanding Comment 1, is discriminatory against judges or potential judges belonging to various religious organizations that may set requirements on membership or, more particularly, the holding of an office, on the basis of gender or sexual orientation. As such, I respectfully submit that it should be substantially rewritten.

I am a member and elder in the Presbyterian Church in America (PCA), whose membership includes at least one United States District Court Judge. In the PCA, the offices of elder and deacon are restricted to men, and engaging in homosexual relationships (as any sexual relationship outside of marriage) is believed to be a sin. Both of these teachings are based on our understanding of Scripture. Being a homosexual would not bar someone from attending services or even necessarily from becoming a member, though engaging in a homosexual relationship would certainly leave that person subject to church discipline.

Despite Comment 2's statement that the rule "does not prohibit a judge's membership in any organization dedicated to the preservation of religious...values", I do not believe it is sufficient to protect judges who belong and participate in many conservative Christian, Jewish or Muslim groups, among other religious groups.

Further, it could be argued that membership in such groups as the Republican Party, which has included in its platform a call for a constitutional amendment that would define marriage as between one man and one woman, would also violate the rule as written.

In my view, the ABA is inserting itself into a political question. Sexual orientation is not, like race or gender, given special status in most jurisdictions in this country. Numerous states have passed laws and/or constitutional amendments restricting the right of marriage to one man and one woman, and few states have expanded the definition of marriage to include same sex couples or permitted civil unions of same sex couples. The military discharges known homosexuals under a policy established under the Clinton administration.

I strongly believe that the phrase "sexual orientation" should be removed from the text of Rule 3:04 and the text clarified to exempt religious groups restricting the holding of offices on the basis of gender. In the alternative, the following language, or something similar to it, should be added to the text of this rule:

"Nothing in this rule shall be construed to limit the free exercise of religion by judges. In particular, nothing in this rule shall prohibit judges from belonging to, serving as leaders

in, or participating in the life of religious groups restricting membership on the basis of religious belief, religious practice or sexual orientation, or restricting the holding of religious office on the basis of gender or sexual orientation."

Respectfully submitted:

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Thank you. Melchionna, Terry, Day, Ammar & Black