Subject: Rule 3.04, Preliminary Draft of Model Code of Judicial Conduct

Dear Ms. Taylor:

I am an attorney who has specialized in First Amendment law for more than 20 years. For your information, I recently had an article published on the topic of the free speech rights of candidates for judicial office. See W. Weber, Judicial Campaign Speech Restrictions: Some Litigation Nuts and Bolt, 68 Albany L. Rev. 635 (2005).

I am currently Senior Litigation Counsel with the American Center for Law and Justice, though I offer these comments in my capacity as an individual attorney.

I have reviewed the current draft of Canon 3, Rule 3.04, as well as the accompanying Comment. This draft version is objectionable and very possibly unconstitutional.

1. The rule, rather than simply banning all invidious discrimination by judges, instead provides special restrictions for certain kinds of invidious discrimination. My purpose is not to question this tactic in general -- for example, our nation's sorry history of race relations may well warrant particular, express condemnation of race discrimination.

But the ABA must realize that for a large segment of our society, affording special recognition to "sexual orientation" means questioning, indeed deprecating, fundamental beliefs and moral values surrounding the proper role of human sexuality. As a prudential matter, if nothing else, I wonder if the ABA would not be better advised to rest with its general condemnation of invidious discrimination, rather than single out "sexual orientation" for special mention.

2. The rule opens itself to charges of unconstitutional vagueness.

First, what is "sexual orientation"? One might assume this includes heterosexuality and homosexuality, but what about other orientations? Probably bisexuality is included. What about transgenderism? Polygamy? Polyamory? Ephebophilia? Pederasty? Autoeroticism? Bestiality? Necrophilia? Copraphilia?

My point is not to equate these various sexual preferences, but instead to point out the opaqueness of this crucial term. If a group publicly combats NAMBLA or Utah polygamists, does that group discriminate on the basis of sexual orientation? How about if it supports an amendment banning same-sex marriage? The rule simply does not say.

Second, what is "invidious"? The Comment admits that this is a "complex question." Indeed! The Comment goes on to define "invidious" discrimination, "in general," as "arbitrary" exclusion that is "not reasonably related to a legitimate purpose." But this "definition" merely transfers the ambiguity from the term "invidious" to the terms "arbitrary," "reasonably related," ad "legitimate." Who is to judge what is arbitrary, reasonably related, or legitimate?

And what is the standard? The Comment purports to exempt organizations "dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members." So now state authorities adopting this rule are

going to judge which cultural values are "legitimate"? Or whether groups are sufficiently "dedicated" (not merely incidentally supportive?) to the preservation (not "reform"?) of certain values? Or whether the "members" (as opposed to the leadership?) genuinely have a "common interest" in such preservation.

3. The rule also faces challenge on the basis of unconstitutional entanglement with religion. It requires an official, governmental assessment of whether religious organizations meet the test for "invidiousness," or the exception for organizations "dedicated to the preservation of . . .religious values of common interest to its members."

Such assessments require the careful scrutiny and second-guessing of religious doctrine, mission, and practice, all of which are forbidden under the First and Fourteenth Amendments, as interpreted in the so-called Lemon Test.

4. The rule invites challenge under the right to freedom of association. Enforcement authorities will be examining and judging the "legitimacy" and "reasonableness" of a group's mission, tenets, and practices, and chilling association with any group that takes a normative position on marriage or sexual relations.

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This brief sketch of concerns by no means exhausts the possible grounds for legal challenge to the proposed rule. These considerations do strongly suggest, though that the ABA should reconsider whether this particular enterprise would run afoul of the ABA's commitment to the rule of law and to constitutional rights.

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