From: Walter M. Weber [mailto:WMWeber@aclj-dc.org]
Sent: Monday, October 04, 2004 2:59 PM
To: Gallagher, Eileen
Subject: Comments on proposed amendments to Model Code of Judicial Conduct

To: Eileen Gallagher
From: Walter Weber, Senior Litigation Counsel, American Center for Law and Justice
Re: Canon 2C and Propose Rule 3.03

Ms. Gallagher -- The listing of only particular kinds of "invidious discriminaton" in Canon 2C has created a problem, namely, the implication that OTHER kinds of "invidious discrimination" by an organization would not be relevant to a judge who belongs to that organization. Hence the relentless move to add categories.

May I suggest that the enterprise is flawed from the outset. IF the ABA is going to treat the policies of an organization as a matter of concern to judge members, THEN I would think the best approach would be "all or nothing". In other words, to spell out special favored categories (currently, "race, sex, religion or national origin," and proposed additions of "ethnicity" and "sexual orientation"), is to imply that "invidious discrimination" on the basis of OTHER factors, e.g., age, wealth, educational level, skin color, etc., is irrelevant to judge members. If instead the rule was simply that judges should not belong to organizations that practice "invidious discrimination", simpliciter, then there could be no inference of "special" and "excluded" categories of discrimination victims.

One of the advantages of the comprehensive approach is that it totally obviates the highly controversial dispute over just which categories (such as "sexual orientation") deserve "special" treatment. Instead, ALL "invidious discrimination" is disapproved. Is this not what the ABA has in mind?

The term "invidious" already employs the comprehensive approach. It does not to purport to identify which justifications are NOT "invidious"
(e.g.,
limiting marriage to a man and a woman? limiting ordained clergy to men?
limiting a NOW chapter's officers to women? limiting a United Negro Fund Scholarship program to blacks?), an undertaking which would involve precisely the sort of value-laden controversies that the spelling out of victim classes produces.

The other alternative is to drop the idea that judges should be the policemen of their membership organizations. The current recusal rules would then be relied upon to ferret out the problem of judges who have or appear to have bias. After all, wouldn't a party rather know upfront that the judge belongs to the KKK, rather than have his racism concealed? Also, dropping the requirement would avoid the current vagueness in knowing just what kinds of discrimination will be deemed "invidious", a question which can be most difficult to answer, as suggested by some of the hypothetical cases posed in the preceding paragraph. -- Walter Weber