D:\Documents and Settings\BoguslaL\Local Settings\Temporary Internet Files\OLK327\comm_rules_weller_092704_ddt.doc

From: Barbara Weller [mailto:bweller@gibbsfirm.com]
Sent: Monday, September 27, 2004 5:29 PM
To: Gallagher, Eileen
Subject: propopsed ABA ethical guidelines regarding sexual orientation

Dear Staff:

This email is being sent to you in response to ABA's request for feedback regarding Model Code of Judicial Conduct recommended revisions to include penalties for judges who are affiliated with groups that have high standards of conduct regarding sexual activity and that teach against sexual activity outside of traditional marriage---including adultery, fornication, and homosexuality.

As an introduction, our law firm is corporate counsel for the Christian Law Association, a non-profit religious liberties group that protects the rights of Christians who find themselves in legal difficulties because of their religious faith. It is this very issue of religious beliefs and the free exercise of religion that presents a problem to incorporating judicial penalties for judges who associate with groups that disfavor the practice of homosexuality. The majority of such groups are mainstream religious organizations. To enact penalties or to prohibit judges from association with groups that disfavor homosexuality (and other forms of sexual activity outside of traditional marriage) would have the ultimate result of disqualifying any judge who freely associated with particular traditional religious groups---including Muslims, Catholics and evangelical Christians, the religious groups most likely to disfavor the practice of homosexuality and other sexual practices outside traditional marriage. Such a restraint would also negatively impact African American judges most profoundly since African American churches are included among those most likely to disfavor homosexual conduct and non traditional marriage.

Interfering with a judge's right to the free exercise of his (or her) religion and to the right of freedom of association is fraught with numerous constitutional problems. Our nation practices a separation of church and state that cuts both ways. The state may not interfere with religious beliefs. Nor may the state make particular religious beliefs either favored or disfavored or make them a disqualification for various offices, including judicial offices (remember the no religion test portion of the Constititution?). Unless judges of various beliefs are included on the bench, the judicial system will be tilted toward one particular religious direction, not a good model for incorporating constitutional standards.

The sexual orientation issue is different from ethnicity and race because most groups that disfavor homosexuality (and particularly religious groups) disfavor it, not because of the sexual orientation itself, but because of the sexual BEHAVIOR. This would be true of all sorts of sexual behaviors outside of traditional marriage considered by various religions to be immoral and disfavored. Religions, most of which make provisions for celibacy, do not have a problem with the orientation, but with the behavior. Several problems present themselves:

1) These religious groups generally believe that a person can overcome various types of orientations and bondages and do not believe that people must act out behaviors merely because of a perceived or even a genetic tendency or predisposition. For instance, heterosexual adultery would be similarly disfavored even for heterosexuals whose genetic bent does not suit them for monogamy. Many religious groups successfully assist those individuals with various sexual problems and bondages to overcome them and to live lives that are not controlled by these dysfunctions. This would also be the case for those afflicted with a genetic bent toward alcoholism or obesity. These religious groups do not believe that one's genetics should determine one's ethical, moral, and religious standards and behaviors. Our American society has become so fixated on sex and sexual liberation that the religious values of self control, righteousness, and holy living have been overshadowed in the popular culture, but not necessarily so within the religious culture. Many would see this as a virtue, not a vice.

2) To prohibit judges who practice such religions from serving in the same manner as others would promote unequal treatment based upon religion and would skew our judicial system in a manner that would begin to disfavor certain religions in a society that claims to be (and that should be) tolerant of all beliefs. If all judges are required to believe certain things in order to be on the bench, those beliefs would begin to control judicial decisions in favor of some and against others. Our society, on the other hand, distacts that free speech should be boisterous and rowdy, with real disagreement permitted to be expressed even on important issues regarding societal change. The judiciary cannot choose one elitist-approved societal outcome by stacking the bench with judges from only one perspective of a particularly important and unresolved societal issue of consequence.

3) This issue is particularly dicey because sexual orientation is not equivalent to race or ethnicity. Some people change their stated sexual orientation throughout their lives; and there is no reliable scientific data to prove that sexual orientation is incapable of being controlled, managed, or even changed. Sexual orientation is a self identity that is not readily identifiable on sight as is ethnicity or race. A person needs to DECLARE himself to be of a particular orientation and that declaration could (and often does) change over time. It is impossible at any given time to determine which classification of sexual orientation a particular person is part of unless that person declares that category publicly. How can we objectively verify the veracity of the declaration? Could declarations be made for self interestthrough joining a protected classification when there is no way to fully determine objectively what classification the person should be part of? Could, for instance, a teenager self identify as homosexual, for instance, to qualify for a scholarship and then later decide to identify as a bisexual or even heterosexual when the financial need has been met? This system of classification of self identity, and perhaps shifting self identify, is fraught with inequities and the possibilities for fraud.

4) There is a constitutional problem in that our Declaration of Independence clearly states that the rights of Americans (of all men and women, actually) come from the Creator God (in that context, from the Judeo-Christian God of the Bible). If our rights come from the

God of the Bible and it is that God who disfavors homosexuality, how can we then argue that homosexuals have the God-given right to marry, for instance? In particular, how could we argue for that position so strongly that we would disqualify a judge from associating with a group that still believes in the dictates of the God who gave us our rights? The constitutionality of such an ethical standard would be convoluted, at best. Once we undercut the source of all our rights in order to favor one particular group, are we not sawing off the very limb on which our judicial system is so delicately balanced? This issue does not arise with respect to race or ethnicity or gender, since the Judeo-Christian God of the Bible does not recognize categories with respect to those distinctions. Categories in those areas were man-made and morally neutral. Not so with the category of sexual orientation. Here, while people may certainly differ in their interpretations of what the Bible says about this subject, one interpretation may not be categorically favored and used to limit judicial freedoms of belief and association.

Finally, there are problems of equal protection involved in regulating the freedom of belief and association of judges based on this one still rather scientifically undefined and morally unresolved issue. Restricting a judge's beliefs and association according to standards which are still so fluid in society is not narrowly tailored to serve a compelling interest. In fact, such restrictions would limit the diversity of judges on the bench and, as was stated in a recent Supreme Court decision, would involve the ABA in taking sides in a culture war that best left to the elected representative legislatures and to the people to define. Will we next prohibit judges who serve on the bench from attending particular churches, synagogues, or mosques that believe in the sanctity of life? Would non pacifist religious groups be the next judicially disfavored group? With those who still favor capital punishment be next? This snowball could keep rolling. It seems to me that the issue of homosexuality is particularly relevant with regard to association because the people have not reached a place of agreement on these issues. In fact, limiting a judge's association to people on one side of this issue would place these judges in a position at the moment of associating only with minority, not majority, groups, since the majority of the American people still disfavor special treatment for those who practice homosexuality. Therefore, the discussion is best left open for the people and the legislatures to resolve. Certainly, the ABA should not try to resolve it by ethical fiat. A society would surely eventually revolt with another Tea Party if forced to conform to the dictates of judges who do not represent the zeitgeist and diversity of the society they serve.

Please consider these very important issues and avoid making religious discrimination a part of judicial ethical standards.

Sincerely,
Barbara J. Weller
Admitted in Florida

Gibbs Law Firm, P.A.
5666 Seminole Blvd., Suite 2
Seminole, FL 33772

D:\Documents and Settings\BoguslaL\Local Settings\Temporary Internet Files\OLK327\comm_rules_weller_092704_ddt.doc

(727) 399-8300
Fax (727) 398-3907