

Nebraska Judicial Ethics Committee

Advisory Opinion 93-2

**FACTS**

A member of the Nebraska Judiciary requested the guidance of this committee as to whether or not membership in certain organizations violate Section C of Canon 2 of the Nebraska Code of Judicial Conduct (1992).

The requesting judge belongs to local chapters or "lodges" of national or state organizations. To the best of the judges knowledge, neither organization limits membership based on race, religion, or national origin. The judge is not aware of any female members of either organization, although each has auxiliary organizations with female membership. Accordingly, this opinion focuses on the issue of gender.

This committee has no practical way to investigate requests or find facts. We must accept the facts supplied to us by the judge. Because this is so, we feel it would be inappropriate to refer to the organizations by name.

We are assuming that the chapters or "lodges" are "organizations" for the purposes of Section C.

**DISCUSSION**

Section 2 C provides: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

The commentary following Section C states in part: "...Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer can not be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from the membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership..."

An organization may be considered to discriminate invidiously where (1) it is exclusive rather than inclusive; (2) it excludes from membership certain persons solely on the basis

of their race, sex, religion or national origin; and (3) such exclusions may stigmatize such persons as inferior.

The fact that each organization has auxiliary organizations with female membership appears to be patronizing and stigmatizes women as inferior.

**CONCLUSION**

As stated above, this committee has no practical way to investigate requests or find facts. Therefore, the committee is of the opinion that any member of the judiciary belonging to organizations that could fall within the prohibitions of Section C must be responsible for determining whether or not any exclusion is arbitrarily based on race, religion, sex or national origin. As stated in the commentary, many factors must be considered.

If in fact, the subject organization arbitrarily excludes from membership certain persons on the basis of race, sex, religion or national origin such organization practices invidious discrimination and membership would violate Section C of Canon 2.

A previous opinion of this committee, (91-2), was issued prior to the adoption of the current Nebraska Code of Judicial Conduct and should be interpreted accordingly.

APPROVED AND ADOPTED BY THE COMMITTEE ON August 31, 1993

W. M. [Signature], Chair

**Nebraska Judicial Ethics Advisory Opinion  
No. 93-2**

**Separate Concurring Opinion**

Everything the committee opinion expresses is correct. I agree completely. However, I believe other points also should be expressed, despite the admonition of one committee member during our deliberation that we could write forever on the violations of the Nebraska Code of Judicial Conduct (1992) inherent in continuing gender prejudice. First, I will discuss the advisory opinions of the other jurisdictions who have examined similar problems. I will then discuss a select few (in deference to our colleague's admonition) aspects of this committee's opinion which I believe merit re-emphasis. Finally, I will expand the inquiry a bit further to implicate two other sections of the code of conduct.

Informed discourse is impeded somewhat when the parties discussing any issue are not apprised of what matters were considered by an advisory body in developing its opinions. To the end of enabling informed discourse among the members of the judiciary, I believe we should identify and discuss the opinions of other advisory committees which we considered in our work. In the course of our own deliberation, we reviewed California Adv. Op. 34 (July 6, 1987), Florida Adv. Ops. 85/15 (October 22, 1985), 87/10 (September 3, 1987), & 92-3 (January 21, 1992), Washington Adv. Op. 86-16 (October 17, 1986), and U.S. Judicial Conf. Adv. Op. 934 (February 4, 1993).

We have accepted the reasoning found in Cal. Adv. Op. 34, Fla. Adv. Ops. 85/15 & 87/10, to the limited extent that they reveal their underlying reasoning, do not apply. Both of those Florida opinions deal with application of the 1972 ABA Model Code of Judicial Conduct's 1984 amendment relating to gender exclusive organizations to judges operating under their adopted state code of conduct. Obviously, the model codes of the ABA do not control anyone until adopted by each state's appropriate governing bodies.

Fla. Adv. Op. 92-3 and Wash. Adv. Op. 86-16 reveal no reasoning, only the conclusions reached. I do note, however, one can read Fla. Adv. Op. 92-3 to have been issued under a state provision similar to Neb. Code Jud. Conduct §2A or §4A (1992), not a provision similar to Neb. Code Jud. Conduct §2C (1992).

U.S. Judicial Conf. Adv. Op. 934 does reveal reasoning. It is the sort of reasoning I feel demands a response. U.S. Adv. Op. 934 deals specifically with membership in a Masonic Order. My response is not directed at membership in the Masonic organization alone, but at membership in any and all gender-exclusive organizations.

The federal committee noted it had advised earlier that the question of whether an organization practices invidious discrimination requires a fact-sensitive inquiry into all relevant circumstances. The federal committee then admitted it did not

purport to have a complete understanding of the organization in question, but despite its lack of knowledge, on the basis of the committee's general understanding and the inquiring judge's own conclusions, the federal advisory committee still advised that the organization does not practice invidious discrimination. Thus, under the federal committee's understanding of all the circumstances (which it had already confessed it did not have before it), the federal committee opined the judge's membership was not prohibited by federal Canon 2C. The federal committee even expressed its belief (again, by its own admission, without the benefit of complete knowledge or understanding), that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members and does not practice invidious discrimination.

The federal advisory committee used a three prong analysis. First, the federal committee noted as a fact, supplied by the inquiring judge, that the organization's policies prohibit membership for business purposes or private advantage. According to the federal committee, that "fact" would indicate the organization does not provide business or professional opportunities. The federal committee correctly noted that exclusion of women from organizations which do provide business or professional opportunities is a relevant factor in invidious discrimination analysis. This prong of the federal committee's analysis is seriously flawed.

It attempts to deny a basic reality of economic life, especially rural economic life. In a state like Nebraska, life is rural in nature by eastern standards. The U.S. Department of Transportation considers all judges whose home counties have a population of less than 500,000 to be rural judges. So, we in Nebraska are all rural judges, with the possible exception of Douglas County. Who are the people in our rural communities who are members of organizations like the one considered by the federal committee? I do not have a set of factual data before me, but it is certainly not unreasonable to conclude the membership of such organizations includes the rural communities' leaders in business and the professions, along with other community spirited citizens.

Anyone who is denied the opportunity for full membership in such organizations is thus concomitantly denied the opportunity in that social setting to meet and work with the local leaders who can and do provide the contacts necessary to economic success. The organization's policy may prohibit membership for business purposes or personal advantage on paper, but cannot prevent it in reality because of the inescapable nexus between rural social life and rural economic life.

For its second analytical prong, the federal advisory committee then looked for support for "[t]he perception that... [the] fraternal organization and similar organizations" in question "do not engage in invidious discrimination." The federal advisory committee found support in a Senate Judiciary Committee resolution of August 2, 1990, expressing the sense of the Senate Judiciary Committee that it would be inappropriate for nominees to the federal judiciary to belong to organizations that practice invidious discrimination. The judiciary committee expressly excluded from its category of organizations that practice invidious discrimination 'fraternal, sororal, religious or ethnic heritage organizations.' (The federal advisory committee apparently was quoting from the judiciary committee resolution). How can one quarrel with the judiciary committee?

Resolutions of the Senate Judiciary Committee hardly can be considered authoritative declarations of national public policy in the first place. Whether that resolution is still in effect, the federal advisory committee does not reveal. The membership of the judiciary committee may have changed. Along with that change, the resolution might no longer command the support of a majority of the judiciary committee. The weight of the support provided by the judiciary committee's 1990 resolution is quite light.

Additionally, of course, conduct and memberships which may be permissible to a nominee or acceptable to a body making recommendations on confirmation of nominees (the judiciary committee only reports its recommendations to the Senate---it has no more power than that, after all) may not be acceptable conduct or memberships for sitting judges. Nominees are not judges.

The third prong of the federal advisory committee's analysis is a bootstrapping thing more nearly resembling tattered shoestrings than bootstraps. The federal advisory committee:

notes that Canon 5B expressly recognizes that a judge 'may serve as an officer...of...[a] fraternal organization,' thus suggesting that there are organizations whose membership is limited to one gender but which are nevertheless appropriate organizations for judges to belong.

Canon 5B of the Code of Conduct for United States Judges (1992) does permit judges to serve as officers of fraternal organizations. The obvious substantive difficulty with the federal advisory committee's point is that Canon 5B neither overrides nor creates an exception to Canons 2A, 2C, or any other section of the federal code of conduct. It is not necessary for a code to state that its

provisions are interrelated, but it is necessary for a code to state that one provision overrides another provision or creates an exception to another provision.

Our analog to the federal Canon 5B is Neb. Code of Jud. Conduct §4C(3) (1992). Our code makes crystal clear that what is permitted by §4C(3) is still "subject to the other requirements" of our code of conduct. That specific language was inserted in the new code to prevent frivolous arguments to the effect that §4C(3) permits what §2C prohibits (as well as other provisions that could be claimed to conflict). Our commentary to §§4B & 4C(3) discusses the relationship among code provisions and even gives the example that a judge permitted to serve as an officer of a fraternal institution may be prohibited from such service by §2C or §4A if the institution practices invidious discrimination or if such service otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

This prong of the federal advisory committee's work also disingenuously uses the English language. The federal committee latched onto the word "fraternal" in the federal Canon 5B and claimed it suggests that there are organizations whose membership is limited to one gender but which are nevertheless appropriate for judges to join or remain as members. The word "sororal" (which does not appear in any code of conduct) could be argued to open the door to the interpretation urged by the federal committee. Sororal is a single gender word at all times. Webster's New Twentieth Century Dictionary of the English Language 1732 (2d ed. 1973). Fraternal is not so limited a word. Fraternal can encompass groups of men and women. When used in the combinations, "fraternal society, fraternal order, or fraternal association," the combination refers simply to "a society, often secret, of members banded together for mutual benefit or for work toward a common goal," without reference to gender. *Id.*, at 728. The suggestion the federal advisory committee found is simply not there.

The federal advisory committee's belief that the organization the committee discussed in its opinion 934 is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members finds no support in the information the inquiring judge submitted to the federal advisory as repeated in the opinion. The information the inquiring judge supplied leads the opposite direction.

The function of our ethics committee is to develop advice on judicial ethics questions posed by proper inquiring parties. It is not our function to declare membership in any specific organization is or is not permissible nor to declare that any specific

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organization does or does not practice invidious discrimination. I do not believe those are proper functions of the federal advisory committee either. Thus, I find untenable all the reasoning underlying U.S. Jud. Conf. Adv. Op. 934 (February 4, 1993).

I do not maintain, however, that holding membership in any and all organizations whose membership is limited to one gender is always inappropriate for Nebraska judges. I do maintain that the proper questions must be asked.

One of the proper questions is whether the organization which excludes one gender from membership is an organization dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members. However, while it is a proper question, that question is only one of three necessary questions.

The second question is whether the exclusion of one gender from membership is based upon some legitimate objective sufficient to justify the discrimination and consistent with public policy. Sex alone is not sufficient. Historical or traditional practice of an organization is not sufficient.

As our committee opinion expresses, the third question is whether the exclusion of one gender from membership stigmatizes the excluded as somehow inferior to the included. The use of seemingly separate-but-equal auxiliary organizations so that women may have some connection with the men-only groups adds to the stigma through the arbitrary denial to women of the opportunity to associate with men who participate in the affairs of and lead the principal organization, many of whom may be community leaders or other persons of influence.

The time has come to grow beyond nineteenth century practices. Interest groups proliferated in the United States during the second half of the nineteenth century.

People joined together in groups not simply for mutual help, but to exclude, to define an enemy, to make common cause against outsiders. Organization was a law of life, not merely because life was so complicated, but also because life seemed to be a competitive struggle, jungle warfare over limited resources... Friedman, L.M., A History of American Law 339 (2d ed. 1985).

The continued denial to women of the opportunity to form social and economic networks through service club membership is but a continuation of the jungle warfare.

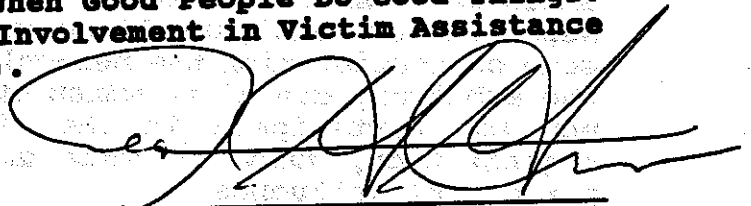
Judges who maintain memberships in organizations that practice invidious discrimination against women, by their continuing memberships, publicly manifest their approval of the organizations' invidious discrimination. Neb. Code Jud. Conduct §2C, Commentary, 3 (1992). The properly declared public policy of the State of Nebraska prohibits judges from such memberships.

Such behavior by judges diminishes public confidence in the integrity and impartiality of the judiciary in violation of §§2A & 4A, as well as §2C, of the Neb. Code of Jud. Conduct (1992).

[J]udges...are 'the subject of constant public scrutiny;' everything judges do can reflect on their judicial office. When judges engage in private conduct that is... improper..., '[p]ublic confidence in the judiciary is eroded.' Improper conduct includes creating or acquiescing in any appearance of impropriety...[A]s in many other instances concerning the conduct of judges, the appearances count as much as the facts. In re Blackman, 124 N.J. 547, 591 A.2d 1339, 1341-42 (1991).

As apposite here, as it was when written in another context, is the value judgment that "maintaining the appearance of judicial impartiality is more important to society than any benefits any extrajudicial organization of which [a] judge is a member can provide to society." Lubet, S., When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs, 69 Judicature 199 (1986).

Dated August 31, 1993.



Alan G. Gless