

# **ETHICS ADVISORY COMMITTEE**

## **STATE OF NORTH DAKOTA**

### **OPINION 94-1**

#### **ISSUE**

Whether or not membership by a judge in a particular organization constitutes invidious discrimination under Canon 2C of the North Dakota Code of Judicial Conduct.

#### **ANSWER**

The Committee has received more than one written request from a judge seeking advice on whether continued membership in a particular organization is prohibited by Canon 2C, Code of Judicial Conduct (1994). Telephone inquiries have also been received. These requests involve a number of different religious and fraternal organizations.

Based on the first request, the Committee delved into extensive research to assist in what was to be an eventual advisory opinion. In addition, the Committee reviewed a CLR memorandum, comments of the ABA Standing Committee on Ethics, federal judiciary opinions, ethics treatises and the general discussion at the North Dakota Supreme Court when the unique commentary to Rule 2C was adopted. The North Dakota commentary to Rule 2C indicates an analysis of a particular organization requires a judge to make a determination based on several considerations.

Our extensive research into one religious organization exposed the complexity of an organization-by-organization analysis. We found information that an organization is not always based on outward presentation or assumed reasons. Further, the Committee found definitions of invidious discrimination to be vague or non-existent and a lack of recent caselaw to refine earlier U.S. Supreme Court cases on the subject. Thus the Committee was placed in a position of offering a legal opinion rather than an advisory opinion.

During discussion at a series of Committee meetings, the Advisory Committee concluded that the ability to analyze each organization was beyond the capacity of our committee for several reasons: limited resources, necessary and extensive inquiry into the historical and internal makeup of each organization and the inexhaustible list of organizations which judges may seek our advice. The Committee is also mindful of the emotion which the gender fairness issue triggers in a male-dominated judiciary.

As a result, the Committee unanimously concluded that it should issue the following philosophical guide for judges to use in their own analysis:

1. The directive of Canon 2C requires mandatory action.
2. Commentary to Canon 2C suggests the complexity of the analysis of the facts involved. However, after the analysis is completed, the mandatory action of the Canon, even when the result is difficult to accept, must be accomplished by the judge.

3. Judges, as community leaders must be cognizant of how membership will be viewed by the public, especially in rural areas where they are more publicly recognizable in the organizations to which they belong.

4. Judges can be catalysts for change and must not compromise the principles of fairness and justice, particularly on the gender equity issue.

In conclusion, each judge must obtain as much information about each organization in which he/she holds membership to complete a thorough analysis of the organization. Following this analysis, the judge must then take any necessary steps deemed appropriate by Canon 2C.

This opinion should not be viewed in any manner to justify membership in any particular organization. Rather, the opinion is an instructive one for use by judges in the difficult task necessary to maintain compliance with Canon 2C.