

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 94-13
(September 20, 1994)

**Judicial Membership in a Junior League
or a Boys Chorus Auxiliary**

Issue

1. May a judge be a member of the board of directors or the parents association of the Tucson Arizona Boys Chorus, Inc.?

Answer: Yes, with qualifications. We did not receive sufficient information to evaluate these organizations adequately under the relevant criteria, so we cannot provide a definitive answer.

2. May a judge be a member of the Junior League of Tucson, Inc.?

Answer: Indefinite, for the same reason given in the preceding answer. *See* Discussion.

Discussion

To determine whether a judge's membership in an organization is prohibited because of discriminatory practices, we look to Section 2C of the Code of Judicial Conduct which reads: "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 accompanying this provision attempts to illuminate its meaning. The relevant commentary reads:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot 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 membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership. (Citations omitted.)

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Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by law also violates Canon 2 and Section 2A and gives the appearance of impropriety.

As we stated in our first opinion on this provision, Opinion No. 94-07, Section 2C requires the following analysis. The first question is whether the organization discriminates based on race, national origin, religion or gender. Next, the organization must be examined to determine whether it "is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited." If so, a judge's membership is not forbidden. If the organization appears to not be constitutionally protected and does discriminate, then the discriminatory practices must be scrutinized to determine whether they are "invidious."

Is there discrimination based on gender?

In both this opinion and in Opinion No. 94-07, we have been presented with only limited information about the groups involved. In Opinion No. 94-07, we stated:

Whether or not a particular organization invidiously discriminates is a fact-specific question. The facts that bear upon the issue may be many and varied as our opinion suggests. Judicial compliance with Section 2C requires that each judge investigate these facts to determine whether his or her membership is permissible.

Our counterparts in Indiana have declined to opine about particular groups, explaining:

The Commission is not sufficiently aware of the details of the history, purpose, functions, tenets and activities of all of these groups to address the propriety under Canon 2C of membership in any particular organization. In any case, the Commission is disinclined to create a list of "approved" or "disapproved" groups. *See Ind. Op. 1-94.*

We too are unwilling to create such lists. We advise the reader that future inquiries may be accepted for formal opinion only as needed to develop or clarify the analysis set forth in this opinion and in Opinion No. 94-07.

The burden of complying with Canon 2C falls to each judge. Guided by our opinions, the individual judge is in the best position to gather the information about the organization in which he or she is a member or prospective member, and the judge must then assess whether his or her membership complies with Canon 2C.

The limited material presented to us suggests that both the Tucson Arizona Boys Chorus and the Junior League of Tucson discriminate based on gender. The Tucson Arizona Boys Chorus only has male singers of certain ages. From the sparse information we have received concerning the Tucson Arizona Boys Chorus, it would appear that only boys with unchanged

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voices are allowed to participate in the chorus. Although there is a staff, Board of Directors and Parents Association composed of both genders, this does not save the organization if it invidiously discriminates in membership in the chorus itself. *See* Opinion 94-07.

The Junior League of Tucson has only female members. We are advised that the bylaws were amended to be gender neutral concerning member qualifications. We assume from this that the bylaws previously prohibited men from joining. However, Article I of the current bylaws (of both the International and Tucson Junior League) still states that the Junior League is "an international organization *of women*" (emphasis added.) The bylaws contain no criteria for individual membership; only the requirements for group affiliation are set forth.

This provision could be considered to be either *explicit* or *de facto* discrimination. A written policy statement that the organization is to be "of" (comprised of) women is a declaration of gender exclusivity. At the least, the exclusion of men is implicit in this wording. Although there is nothing discriminatory in an organization that is "for women," i.e. for the benefit or advancement of women, a bylaw that the organization is to be composed only "of women" is explicitly discriminatory.

Even if the bylaws do not explicitly forbid male members, they might also operate to accomplish discrimination. If the former bylaws expressly excluded men and the organization remains exclusively female, then an inference of continuing discrimination arises. This is particularly so when coupled with the statement that an organization is to be composed "of" women. Such a provision of the bylaws may discourage men from joining the organization as a statement that men are unwelcome in the group. We are informed that no male has ever applied to membership in the Junior League of Tucson, a fact that may support the inference that applications from men are not encouraged.

A judge must always view a group which appears to discriminate on the basis of race, gender or national origin as suspect. The burden is on each judge to comply with the code, and thus the burden is on each judge to investigate the group's membership practices to determine the extent of the discrimination, if any. "Where a club's by-laws or clear practices do not reveal the discriminatory practice, but the judge has reason to suspect more subtle discrimination, the judge has a duty to become informed on the matter and take appropriate action under 2C." *See* Ind. Adv. Op. 1-94.

Additional facts might reinforce or undercut the suggestion that an organization discriminates. In the case of the Junior League, for example, are the words "of women" merely a drafting mistake? What publicity, if any, accompanied the bylaw amendments to inform men that their membership was thereafter invited? What is the application process for membership? Are potential members recruited by current members? If so, is the effort limited to women? Are potential members nominated or sponsored by current members, and are those nominated only women? Are potential members actively sought out at the functions of other organizations and are these functions attended only by women? These

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questions should inform the inquiring judge more fully about the existence and extent of discrimination. On the limited facts available to us, however, it does appear that the Junior League discriminates on the basis of gender.

Are the organizations purely private?

We can not say that these organizations are exempt from scrutiny because the groups are so intimate and private that the Constitution protects them from government interference. The International and Tucson Junior Leagues have large memberships. Although the Tucson Arizona Boys Chorus consists of only 30 singers, the organization includes a Parents' Association, staff and a Board of Directors. The Supreme Court cases cited by the commentary to Section 2C reveal that the "safe harbor" for distinctly private groups is very narrow. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Few groups fall within the constitutional safe harbor. Large, formally organized groups like the Junior League and even smaller formal groups like the Tucson Arizona Boys Chorus are subject to the provisions of Section 2C.

Is the discrimination invidious?

Deciding whether discrimination is "invidious" can be very difficult. Although unlawful discrimination is clearly forbidden, these organizations do not appear to violate the law. *See* Opinion 94-07. Invidious is defined as: tending to cause discontent, animosity; of an unpleasant or objectionable nature; of a kind to cause harm. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (9th ed. 1988).

Membership discrimination does not always cause harm, discontent or animosity. Moreover, if the reasons for discriminating reflect legitimate, generally accepted values, then the discrimination may be permissible. *See* Commentary to §2C; Opinion 94-07.

We believe that a group's interests in its membership practices are legitimate when they (1) serve "religious, ethnic or cultural values of legitimate common interest to its members;" (2) are not generally regarded as repugnant in contemporary society; and (3) cause harm to the excluded group that is minimal and that is substantially outweighed by the group's legitimate interests. *See* Opinion 94-07.

The interests of the group which are advanced by its membership practices should be ones generally accepted by society. We understand that the purpose of the Tucson Arizona Boys Chorus is to present, and to preserve the tradition of, cambiata music. This purpose is acceptable to society in general in that it preserves a cultural tradition and brings musical enjoyment to audiences. A certain voice quality may be needed for this choral music.

If female voices are not suited for the chorus then the preservation of this type of music would require the exclusion of females. The United States Supreme Court stated in *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 468-469, 101 S.Ct. 1200, 1204 (1981), that the "Court has consistently upheld statutes where the gender classification is not

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invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Thus, there may be a legitimate purpose and need for discrimination.

However, we do not know whether an inherent difference between the unchanged male voice and the young female voice prevents all females from having the required aesthetic quality. If there is no difference or only a predominant vocal difference and not an inherent one, refusal to allow females to participate may be invidious discrimination. The Supreme Court stated in *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984), that:

[T]his Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

If chorus membership is restricted only by tradition, then the restriction would be unacceptable discrimination.

A participant judge should also inquire as to what benefits the Boys Chorus bestows on its members. Do the singers travel extensively? Are scholarships or other types of rewards available to them because of their participation in the chorus? If so, does another chorus in the Tucson area offer the same benefits to girls? If both male and female children have essentially equal opportunity to participate in similar activities, then it is possible that no stigma of inferiority attaches to either gender. *See* Opinion 94-07. The benefits denied to girls by excluding them from membership must be weighed against the asserted justification for discriminating in deciding whether the membership practices are invidious. *Id.*

The purpose of the Junior League of Tucson, Inc. is clearly stated in its bylaws. The Purpose Statement in Article I states that the organization is "committed to promoting voluntarism and to improving the community through the effective action and leadership of trained volunteers. Its purpose is exclusively educational and charitable." This is a generally acceptable purpose and is definitely not repugnant to society. However, both women and men can help attain this goal. Men can also help attain the goals identified in the Qualifications for Membership, which state that the member must be committed to "creat[ing] a supportive environment for the personal and volunteer development of women through formal and experiential training" and "reach[ing] out to women of all races, religions and national origins who demonstrate an interest in and commitment to voluntarism."

Some may argue, however, that excluding men is justified because it serves the purposes of the organization. In general, we think that this argument conflicts with the spirit and purpose of Section 2C. The argument is one that might be used to try to justify racial, religious or sex-based discrimination in many other organizations. The mere promotion of group advancement or group cohesion or identity cannot be a legitimate basis for exclusion. It is circular to argue that this goal, discriminatory at its core, can be used as a legitimate

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purpose to excuse discrimination. Even if there is value in group advancement, unity or identity through exclusion, it is not a value which a judge may work to achieve.

We think it acceptable, however, for victims of past invidious discrimination to themselves discriminate if the current discriminatory practices compensate for disadvantages suffered as a result of the previous discrimination. We adopt the analysis of the United States Supreme Court in *Mississippi University For Woman v. Hogan*, 458 U.S. 718 (1982). The Court there considered whether a state-supported university could deny enrollment to otherwise qualified males in its nursing school. The test is explained in an article which suggests applying the *Hogan* test to gender discrimination by private groups, Chai R. Fledblum et al., LEGAL CHALLENGES TO ALL-FEMALE ORGANIZATIONS, 21 HARV. C.R.-C.L. L. REV. 171, 219 (1986):

[T]o satisfy the *Hogan* standards, the organization must demonstrate that (1) there is a sex-based disadvantage suffered by its membership related to its basis of classification; (2) the intention in forming or continuing the organization is to compensate for this disadvantage; (3) the organization's programs and policies are not based upon and do not perpetuate archaic and stereotypical notions of the abilities or roles of the sexes; and (4) it is the organization's single-sex policy and programs that directly and substantially help its members compensate for the previous disadvantages.

Applying the *Hogan* analysis, we find: (1) Women have been discriminated against in community service activities on the basis of their gender and such discrimination continues. Thus there is clearly a disadvantage suffered by the all-female membership of the Junior League of Tucson, Inc. which is solely sex-based.

(2) We do not have materials demonstrating that the Junior League's single-sex policy was enacted and continues so as to enable its members to overcome the disadvantages they face. None of the material received states that the purpose of the single-sex policy was to overcome a disadvantage, nor does it explain how its "all-female policy is designed and intended to help females achieve the potential that is best developed in a single-sex environment." 21 HARV. C.R.-C.L. L. REV. 171, 220 (1986). Of course, the organization might be able to provide such information.

(3) The materials we have do not reveal whether the Junior League's policies and practices are based on or perpetuate "traditionally female activities." Again, however, the organization may be able to provide such materials.

(4) The final question is whether single-sex activities directly and substantially overcome past disadvantages. This recalls the issue of whether the organization can serve its purpose by being an organization *for* women, instead of an organization solely *of* women.

We cannot determine whether the Junior League meets the *Hogan* test. We do note that an organization which satisfies the test does not invidiously discriminate.

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Conclusion

Memberships in organizations are permissible if they do not discriminate invidiously or are purely private and thus constitutionally protected. Invidious discrimination exists when the group excludes on the basis of race, sex, religion, or national origin, and the exclusion cannot be justified by an acceptable purpose of promoting legitimate values. Based on the limited facts available to us, we cannot say that the organizations discussed here invidiously discriminate, but neither can we give a definitive answer that they do not.

We again emphasize that whether or not a particular organization invidiously discriminates is a fact-specific question. The facts that bear upon the issue may be many and varied. Judicial compliance with Section 2C of the Arizona Code of Judicial Conduct requires that each judge investigate these facts to determine whether his or her membership is permissible.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 2C and Commentary (1993).

Legal References

Arizona Judicial Ethics Advisory Committee, Opinion [94-07](#) (June 13, 1994).

Indiana Commission on Judicial Qualifications, Opinion 1-94 (1994).

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987).

Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468-469, 101 S.Ct. 1200, 1204 (1981).

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New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988).

Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Other References

Chai R. Fledblum et al., LEGAL CHALLENGES TO ALL-FEMALE ORGANIZATIONS, 21 HARV. C.R.-C.L. L. REV. 171, 219 (1986)

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (9th ed. 1988).