

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 94-07
(June 13, 1994)

**Judicial Membership and Participation
In Scouting Programs**

Issue

May a judge be a member or leader of the Boy Scouts of America or the Girl Scouts of America?

Answer: Yes, with qualifications.

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).

Although §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 §2A and gives the appearance of impropriety.

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In our opinion, 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 can 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, the discrimination is not prohibited. Finally, if the organization discriminates and is not protected as an intimate, private group, then its discriminatory practices must be scrutinized to determine whether they are "invidious."

The facts presented indicate that both the Boy Scouts and the Girl Scouts discriminate based on gender. Although both groups permit adult leaders of either gender and the Boy Scouts' Explorer program is open to either sex, scout membership is generally limited by gender. We reject the notion that nondiscrimination in some segments of an organization renders it non-discriminatory for purposes of Section 2C. When an organization discriminates in *any* membership category, its discriminatory practices require further analysis under Section 2C.

Nor can we say that the membership limitations of these organizations are exempt from scrutiny because the groups are so intimate and private that the Constitution protects them from government interference. These organizations have vast memberships which are, except for gender limitations, generally open. (Boy Scout membership is approximately five million worldwide.) 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). A few groups may fall within the constitutional safe harbor, however. For instance, a few people who gather informally and periodically to play cards are not covered by Section 2C. However, large, broad-based groups like the Boy Scouts and Girl Scouts are clearly subject to the provisions of Section 2C.

Although deciding whether discrimination is "invidious" can be very difficult, we do know that unlawful discrimination is invidious. The commentary to Section 2C confirms that unlawful discrimination is prohibited. Whether the membership practices of the Boy Scouts and Girl Scouts are prohibited by Arizona or federal law is therefore an appropriate part of the inquiry into invidiousness.

Arizona organizations are under the jurisdiction of both Title II of the Civil Rights Act of 1964 and 41 Ariz. Rev. Stat. Ann. sections 1441 and 1442. Those laws forbid discrimination based on race, religion, or national origin in any place of public accommodation. However, they do not outlaw discrimination based on gender. Moreover, although there is no definitive Arizona or federal authority on point, the prevailing view appears to be that scout groups are not covered by these laws because they do not involve "public accommodations." *Compare Welsh v. Boy Scouts of America*, 933 F.2d 1267 (7th Cir. 1993) (holding Boy Scouts are not a public accommodation within meaning of Title II); *Schwenck v. Boy Scouts of America*, 551 P.2d 465 (Ore. 1976) (Boy Scouts are not a public accommodation within Oregon Civil Rights law); *with Curran v. Mount Diablo Council of the Boy Scouts*

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of America, 147 Cal. App.3d 712 (1983) (Boy Scouts are a business establishment within meaning of California Unruh Civil Rights Act); *Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (Boy Scouts could be a public accommodation, but refusal to offer female a scoutmaster position was not a discriminatory accommodation practice).

We are led to the next question in our inquiry: is the discrimination—although lawful—nevertheless invidious? Membership discrimination is not always invidious. If the reasons for discriminating reflect legitimate, generally accepted values, then the discrimination may be permissible. *See* Commentary to Section 2C.

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 no harm to the excluded group or harm that is minimal and that is substantially outweighed by the group's legitimate interests. However, when the harms to those excluded--such as economic or educational disadvantage or a stigma of inferiority--are significant, the assertion that the membership practices serve some legitimate common interest does not render those practices acceptable. We examine scouting membership practices in light of these considerations.

We turn first to the harm caused by discrimination to the excluded group. The greater the harm, we believe, the more persuasive must be the group's justification for its discriminatory practices. One harmful effect caused by invidious discrimination is loss of economic opportunities. Excluded groups often lose an opportunity to develop business contacts and deals. *See, e.g., Rotary International*, 481 U.S. at 537. In fact, for this reason, the Supreme Court found that New York City had a compelling interest in prohibiting discrimination in clubs providing benefits to business entities which outweighed the members' freedom of association. *See New York State Club Ass'n*, 487 U.S. at 1. However, the scout activities generally consist of recreation and community service. There is very little or no entrepreneurial activity conducted by the young girls and boys who are scouts.

Equally harmful is the stigma of inferiority that often attaches to exclusion. ("Second-class" membership status may also be stigmatizing. Some male-dominated organizations allow women only as "associate" members with fewer privileges than regular members. *See Roberts*, 468 U.S. at 609.) Because the Girl Scouts exist, the opportunity to participate in scouting activities exists for girls and exclusion from the Boy Scouts is not necessarily stigmatizing. If each group has legitimate reasons for its membership policies, and if both males and females have essentially equal opportunity to participate in scouting activities, then no stigma of inferiority is likely to attach to children of either gender. While we have no indication that scouting activities are unequal for boys and girls, we hasten to add that we have made no inquiry into matters such as the financial resources of those organizations or the details of the activities they sponsor. We advise the reader that such inquiry is best made by the member or prospective member.

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While we find no obvious harms accruing from the membership practices of these groups, we believe that Section 2C does not approve unjustified discriminatory practices. Exclusions based on gender, race, religion or ethnic origin are facially suspect. Discriminatory practices thus require an affirmative justification, and the mere absence of harm to excluded persons does not sanction membership.

The interests of the group which are said to be advanced by its membership practices should be ones generally accepted by society. This is consistent with the purpose of Canon 2 which is to promote "public confidence in the integrity and impartiality of the judiciary." Section 2A. The public will not have confidence in a judiciary whose members belong to organizations that discriminate. We therefore must first consider the goals of scouting in general.

The purpose of the Boy Scouts is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods in common use by Boy Scouts." R. Peterson, *THE BOY SCOUTS: AN AMERICAN ADVENTURE* 32 (1984). The Girl Scouts have similar goals in fostering the development of young females. *See* The Girl Scout Creed. The scouts also promote outdoor activity, contributions to community service, and development of lasting friendships. No one would doubt that both the Boy Scouts and the Girl Scouts have goals that are generally acceptable to society.

It remains to be seen, however, whether discrimination materially advances these purposes and activities. A "position statement" from the Boy Scouts, provided to us by the requesting judge, states:

Cub Scouting and Boy Scouting were designed to meet the emotional, psychological, physical and other needs of boys at various stages of their development. Boys in this age range seek out and enjoy group activities with other boys The Exploring program, however, is designed to provide a variety of programs for both boys and girls. Approximately 40% of the nation's more than one million Explorers are female.

We have received no similar statement on behalf of the Girl Scouts.

The desire of members to be gender segregated is not a justification for gender discrimination. We find nothing inherent in the activities of scouting that renders them inappropriate for those of either sex. Nevertheless, we cannot ignore the debate among educators, psychologists and social scientists about whether educational, social or psychological benefits accrue to children from same-gender group activity. The position statement refers to "careful professional consideration" in developing scouting programs, but does not elaborate.

Social science studies show that the types of activities preferred by children is very sex-specific and that children interact better with their own gender. *See, e.g.,* Eleanor E. Maccoby, *Gender as a Social Category*, 24 *DEVELOPMENTAL PSYCHOLOGY* 755 (1988);

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David J. Hargreaves and Ann M. Colley (eds.), *THE PSYCHOLOGY OF SEX ROLES* 118 (1986). While some argue that gender preference occurs in young children before they are able to appreciate any social status differences, *Maccoby, supra*, others argue that it is socialized behavior based on stereotypes. Marlaine E. Lockheed, *Reshaping the Social Order: The Case of Gender Segregation*, 14 *SEX ROLES* 617 (1986). Such stereotypes can be reduced by suitable mixed-gender contact. *Id.*

Girls in particular appear to fare better in same-sex groups because they are not dominated by aggressive behavior of boys. *Maccoby, supra*. Schools are increasing experimental same-sex classrooms, especially in mathematics and sciences, because classroom segregation is thought to be of educational and psychological benefit to girls. See Julie Irwin, *Girls Thrive in All-Female Class*, *THE ARIZONA REPUBLIC* B11 (Feb. 13, 1994).

We cannot determine which view is scientifically correct. We can only say that the debate over the benefits of gender segregation is a legitimate one, with evidence on both sides. If we were to condemn gender-based scouting, we would be condemning as illegitimate an approach to children's group activity supported by considerable evidence of its benefit to the children.

We believe that Section 2C does not blindly sacrifice pluralism and its attendant values in the name of combating discrimination. We have no evidence that either the Boy Scouts or the Girl Scouts foster the type of malicious discrimination that section 2C is intended to prohibit, and we have uncovered some evidence that their membership practices are beneficial to the children.

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 based on race, sex, religion, or national origin and the exclusion cannot be justified by an acceptable purpose of promoting legitimate values.

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.

Under the facts presented, we conclude that the discriminatory practices of the Boy Scouts and the Girl Scouts have some justification which, in the absence of any harm to excluded persons, would permit a judge to participate in these organizations.

Applicable Code Sections

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

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Legal References

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-17) (1981 & Supp. 1992).

. Arizona Revised Statutes § 1441 and 1442.

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

Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App.3d 712 (1983).

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

Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987).

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

Schwenck v. Boy Scouts of America, 551 P.2d 465 (Ore. 1976).

Welsh v. Boy Scouts of America, 933 F.2d 1267 (7th Cir. 1993).

Other References

The Girl Scout Creed.

David J. Hargreaves and Ann M. Colley (eds.), *THE PSYCHOLOGY OF SEX ROLES* 118 (1986).

Julie Irwin, *Girls Thrive in All-Female Class*, *THE ARIZONA REPUBLIC* B11 (Feb. 13, 1994).

Marlaine E. Lockheed, *Reshaping the Social Order: The Case of Gender Segregation*, 14 *SEX ROLES* 617 (1986).

Eleanor E. Maccoby, *Gender as a Social Category*, 24 *DEVELOPMENTAL PSYCHOLOGY* 755 (1988).

R. Peterson, *THE BOY SCOUTS: AN AMERICAN ADVENTURE* 32 (1984).

A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination, 30 *WM. & MARY L. REV.* 919, 939 (1989).