

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 00-05
(December 14, 2000)

**Participation by Judges in Volunteer Work
with the Boy Scouts of America**

Issues

Now that the United States Supreme Court has ruled that the Boy Scouts of America is a private organization that can forbid membership and leadership based on sexual orientation, may judges ethically participate in volunteer work with the Boy Scouts of America?

Answer: Yes.

Background

In *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), Dale was an adult assistant scoutmaster of a New Jersey Troop. When the Boy Scouts learned that he was an avowed homosexual and gay rights activist, it revoked his position as an assistant scoutmaster. Dale then filed suit in the New Jersey Superior Court alleging, *inter alia*, that the Boy Scouts had violated a statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Superior Court granted summary judgment for the Boy Scouts. The New Jersey Appellate Division reversed the summary judgment and the New Jersey Supreme Court affirmed the Appellate Division, holding that the Boy Scouts violated the state's public accommodations law by revoking Dale's membership based upon his avowed homosexuality.

A writ of certiorari was granted by the United States Supreme Court. After finding that the Boy Scouts is a private, non-profit organization engaged in instilling its system of values in young people and that the Boy Scouts views homosexual conduct as inconsistent with those values, the Court reversed the New Jersey Supreme Court and held that applying the state's public accommodations statute to require the Boy Scouts to admit Dale violated the Boy Scouts' First Amendment right of expressive association.

Subsequent to this decision, an Arizona judge who participates in volunteer work with the Boy Scouts raised the question whether the organization's position prohibiting membership and leadership based on sexual orientation created any ethical problems for judges.

The Judicial Ethics Advisory Committee previously addressed this subject in Opinion 94-07 (June 13, 1994).

Discussion

Canon 1 of the Arizona Code of Judicial Conduct requires a judge to uphold the integrity and independence of the judiciary. Canon 2 requires a judge to avoid impropriety and the appearance of impropriety in all of the judge's activities, and Canon 3 requires a judge to perform the duties of the judicial office impartially and diligently. Canon 4 requires a judge to so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations. These broad statements of ethical standards, standing alone, do not provide sufficient criteria to guide a judge's day-to-day activities. Given only these broad statements, reasonable minds could reach different conclusions as to whether these ethical standards prohibit judges from participating in scouting activities. Therefore, the answer to the question must be sought by reference to the specific rules which further define these general standards.

Consistent with these general standards of ethical conduct, Canon 3B(5) specifically provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Thus, in performing judicial duties, a judge is specifically prohibited from manifesting bias or prejudice based on sexual orientation. Canon 3B(5), therefore, is consistent with the ethical standards of Canon 1 requiring a judge to uphold the integrity and independence of the judiciary and Canon 2 requiring a judge to avoid impropriety and the appearance of impropriety in the judge's judicial activities. On the other hand, in proscribing conduct related to a judge's non-judicial activities, the canons are less specific.

Turning first to Canon 4, relating specifically to a judge's extra-judicial activities, Canon 4A requires judges to conduct all their extra-judicial activities so that they do not "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." The commentary to this canon states:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. *See* Section 2C and accompanying commentary.

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Again, Canon 4A, like its parental canon, sets forth only very general ethical standards. However, the commentary directs us to Canon 2C for more specific guidance. Canon 2C, regarding a judge's membership in organizations, provides that, "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." The related commentary provides, in part, that:

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. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices such invidious discrimination, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the Judiciary, in violation of Section 2A.

Unlike other provisions of the canons, "sexual orientation" is conspicuously absent from the prohibited discriminatory activities barring membership in organizations by Canon 2C. And, given the Supreme Court's decision in *Boy Scouts of America v. Dale, supra*, it cannot be said that the Boy Scouts is "an organization that engages in any discriminatory membership practices prohibited by law," which, under the provisions of the commentary to Canon 2C would prohibit participation by judges.

In order to determine whether a judge's participation in the Boy Scouts would be a "public manifestation . . . of the judge's knowing approval of invidious discrimination," prohibited by the above-quoted commentary, it is necessary to consider the following additional commentary to the canon:

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 whether the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or whether 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.

Canon 2C commentary (citations omitted).

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Turning again to the Supreme Court's decision in *Boy Scouts of America v. Dale*, the majority opinion distinguishes the cases cited in the commentary and puts the Boy Scouts within that category of organizations "dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members" or a "purely private organization whose membership limitations could not be constitutionally prohibited." Therefore, under the decision in this case, the Boy Scouts does not practice "invidious discrimination" that would ethically bar a judge from participating in volunteer work with the organization.

Although the Boy Scouts' exclusion of membership and leadership activities based on sexual orientation has created much public debate and divergent views as to the justification for and wisdom of the boys scouts' position, we find ourselves in a position like that of the Supreme Court, and we borrow from the Court's language to point out that "We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong." 120 S. Ct. at 2457. We interpret the Code of Judicial Conduct and the commentary as written and do not believe that we should read into Canon 2C a prohibition on participation in Boy Scout activities because of the Boy Scouts' exclusion of membership and leadership activities based on "sexual orientation." If the code should be read as prohibiting membership by judges in organizations that discriminate based upon sexual orientation, then it should be amended to specifically provide this prohibition.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1, 2, 2C, 3, 3B(5), 4 and 4A (1993).

Other References

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

Boy Scouts of America v. Dale, 120 S.Ct. 2446 (2000).