



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Oral Advice Summary No. 2015-014

[Posted November 12, 2015]

**JUDICIAL MEMBERSHIP IN A CHURCH-SPONSORED BOY SCOUTS OF
AMERICA TROOP**

I. Question:

Will the California Code of Judicial Ethics prohibit a judge from continuing to be the scoutmaster of a local Boy Scouts of America (BSA) troop that is sponsored by the judge's church after the canon 2C amendment becomes effective in January, 2016, and the "youth organization" exemption is eliminated from the ban on membership in organizations that practice invidious discrimination?

II. Oral Advice Provided:

Canon 2¹ prohibits membership in "any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or

¹ All further references are to the canons and Advisory Committee commentary in the California Code of Judicial Ethics.

sexual orientation.” The amendment to canon 2C that becomes effective in January of 2016 eliminates a canon 2C exception for membership in nonprofit youth organizations, such as BSA. Following the amendment, canon 2C continues to state that it “does not apply to membership in a religious organization.”

The Advisory Committee commentary to canon 2C advises that determining whether an organization practices invidious discrimination depends on such “relevant factors as whether the organization is dedicated to the preservation of religious . . . or other values of legitimate common interest to its members. . . . Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes members on the basis of . . . sexual orientation” (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 2C; see also California Judges Association Formal Opinion No. 34, p. 3 (CJA) [citing and applying the Advisory Committee commentary following canon 2C as a “test” to determine whether a men’s service club practiced invidious discrimination].)

In the context of gender discrimination, canon 2C has been interpreted to allow a judge to be a member of a local group that does not discriminate against women even if the group is part of a national or international organization that allows invidious discrimination based on gender. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.25, pp. 539-540 (Rothman); CJA Opinion No. 34, pp. 3-4; see also CJA Judicial Ethics Update (1997) p. 13 [membership in the Masons is improper unless the judge is satisfied that it is a religious organization or does not invidiously discriminate in light of canon 2C].) Thus, the focus of a canon 2C inquiry is on the membership practices of the specific local group in which a judge seeks to participate.

Historically, BSA has prohibited youth and adult membership based on sexual orientation. In January, 2014, BSA adopted a [policy](#) that no youth will be denied membership on the basis of sexual orientation. In July, 2015, BSA adopted a policy that BSA employees and non-unit-serving volunteers will not be denied membership on the basis of sexual orientation. The policy also states that chartering organizations, such as those sponsoring local troops, have the right to select adult scout leaders based on the chartering organization's religious and moral values concerning sexuality.

Given these policies, the requesting judge must determine for himself whether or not his church-sponsored BSA troop excludes adult gay members based on his troop's commonly-held religious values concerning sexuality:

“A judge must determine for himself or herself whether a particular organization . . . practices invidious discrimination. The fact that no members of a particular race, gender, or other group are members of the organization, even where no by-law exists barring members of such groups, can be an indication of discriminatory practices or policies. Under those circumstances, the judge must investigate to be sure that there is no such policy or practice. Membership in a local club that does not discriminate is not prohibited, even if the club is part of a national or international organization that does discriminate.” (Rothman, *supra*, § 10.30, pp. 539-560, citing CJA Op. No. 34, pp. 3-4.)

The advice from CJA cited by Judge Rothman is in accord:

“Where an organization has made a formal decision to end discriminatory membership practices, but those previously excluded have not in fact yet been admitted, the judge who wishes to remain a member must hold a conscious belief

that the open-membership policy is bona fide and will be implemented in the ordinary course of events. If, in the circumstances, as he or she knows them, the judge cannot hold such a belief, Canon 2C requires resignation from the organization.” (Id., p. 4.)

Accordingly, the committee cannot provide an opinion as to whether the requesting judge’s troop, or any BSA troop, has a bona fide open-membership policy or is dedicated to shared religious values. The judge must investigate his troop’s policies, practices, and values of common interest to the troop members. Canon 2C, effective January, 2016, will permit the judge’s membership in his church-sponsored BSA troop if he is satisfied that the troop does not exclude members based on sexual orientation, or if he is satisfied that the troop is an organization dedicated to the preservation of religious values of legitimate common interest to the troop members. (Advisory Com. commentary, *supra*, foll. canon 2C.)

The requesting judge’s challenges to the constitutionality of the canon 2C amendment are legal questions beyond the scope of CJEO’s authority and are nonetheless moot given the conclusions above.



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