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Via fax number (415) 865-7183 and U.S. Mail

The Honorable Ronald M. George
Chief Justice
Supreme Court of California
350 McAllister St
San Francisco CA 94102-4783

RE: Code of Judicial Conduct, Canon 2C

Dear Chief Justice George:

The Los Angeles County Bar Association (“Association”) respectfully requests that the Supreme Court of California consider amending its Code of Judicial Conduct (“Code”) by revising the last sentence of Canon 2C, so that membership by a judge in a nonprofit youth organization is not permitted if that organization practices invidious discrimination.

As you know, Canon 2C of the Code prohibits membership by a judge in an organization that practices invidious discrimination, including discrimination based on sexual orientation, because such membership “gives rise to a perception that the judge’s impartiality is impaired.” Advisory Committee Commentary. The last sentence of the Canon, however, states that “So long as membership does not violate Canon 4A, this Canon does not bar membership in a nonprofit youth organization.” Canon 4A in turn requires judges to conduct all of their extrajudicial activities so that they do not cast reasonable doubt on the judge’s capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties.

These provisions are undoubtedly predicated on the litany of problems associated with judges’ membership and participation in discriminatory organizations. Such actions raise serious and legitimate questions in the public’s mind about the ability of courts to render fair and unbiased justice. Indeed, Canon 2C is aimed at this very problem.

The Supreme Court last spoke to the issue of Canon 2C's youth organization carve-out in December, 2000, in the aftermath of the United States Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where that Court held that the national Boy Scouts organization ("BSA") had a constitutionally-based right to discriminate on the basis of sexual orientation. After that decision was handed down, the Supreme Court issued a statement in which it determined that *Dale* did not by itself justify a change in the Code. In our view, two more recent developments suggest that the Court should consider anew whether a change to Canon 2C is warranted.

1. The Judicial Council's 2001 Report on Sexual Orientation Fairness in California Courts: In January 2001, the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee completed its report on Sexual Orientation Fairness in California Courts. That report documented significant instances of actual and perceived sexual orientation-based bias in the California courts. Among the report's findings were the following:
 - 56% of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians;
 - 50% of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men;
 - Only 16% of lesbian and gay court users believed that the courts have been successful on *all* of the following measures:
 - a. Being able to resolve disputes involving lesbians or gay men;
 - b. Being open or accessible to lesbians or gay men; and
 - c. Providing fair and unbiased treatment of lesbians or gay men.
 - 58% of *all* court employees believe it is better if gay men and lesbians are not open about their sexual orientation; and
 - Lesbian and gay court employees believed that the courts are less fair to all court users than did heterosexual court employees.

These findings, among others made in the report, demonstrate at a minimum a perception of bias in the court system that it is one of the basic goals of the canons to eliminate. The continued existence of this perceived, as well as any actual, bias requires a response. The Association believes that the need exists for a strong and appropriate response to continued sexual orientation bias in the California court system.

2. The resolutions of the San Francisco and Santa Clara County Bars: The bar associations of both San Francisco and Santa Clara counties recently adopted resolutions requesting their respective Superior Court judges to refrain from acting as members of Boy Scout troops that fail to disavow the national organization's discriminatory policy. In response to the San Francisco bar's resolution, the judicial officers of the Superior Court for San Francisco agreed "not to participate as a member of a branch or chapter of an organization that invidiously discriminates on the basis of sexual orientation by excluding members on the ground that their sexual orientation alone renders them 'unclean,' 'immoral' or 'unfit,' unless the branch or chapter to which the Judicial Officer belongs has disavowed that invidiously discriminatory policy." The actions of these bar associations and of the judges of San Francisco County reflect a growing understanding and acknowledgment that judicial membership in such discriminatory organizations is fundamentally incompatible with judges' duties to avoid both actual and perceived bias. They also illustrate the need for a uniform approach and action at a statewide level.

In the Court's December 20, 2000 statement concluding that the Code need not be amended in light of *Dale*, the Court noted that Canon 2 C "expressly requires that the terms of Canon 4A be considered in determining whether the stated exception to the general prohibition on membership in organizations practicing invidious discrimination applies to a particular membership." Essentially, the Court's statement endorsed a case-by-case method of determining when it was inappropriate for a judge to be a member of a discriminatory organization exempted by Canon 2C. The more recent Access Committee's report and the actions of the San Francisco and Santa Clara bar associations, however, suggest that this case-by-case approach should be revisited. The report reveals, at a minimum, perceived sexual orientation discrimination in the state judicial system. Such documentation requires a recalibration of the balance struck by Canons 2C and 4A. The bar association resolutions similarly reflect an understanding of the problems caused by judicial membership in avowedly discriminatory organizations.

For these reasons, the Association respectfully requests that you consider amending Canon 2C and deleting the carve-out for non-profit youth organizations. Such a change would not prevent a judge's child from participating in such an organization. Moreover, such a change should not prevent judges from acting as members of local units that disavow any discriminatory policy announced by its national organization.¹ The amendment we request is a modest, focused response to a situation where, absent ameliorative action, the public's respect for an unbiased judiciary may be placed in jeopardy.

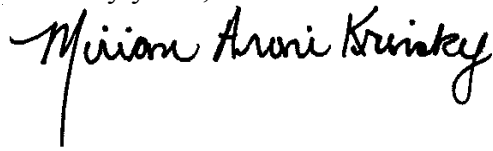
As you noted in a 1997 speech, "ensuring fairness and access [in our courts] is a continuing task." The ongoing nature of that task requires that provisions such as the Code be subject to

¹ For example, for information on Boy Scout troops that have disavowed the national organization's policy, see <http://www.scoutingforall.org/background.shtml> (website for Scouting for All organization).

review, as new facts and developments unfold. Such facts and developments exist in this case, and suggest the appropriateness of the changes we propose today.

We would be happy to meet with you or others at the Court to discuss this further, or to provide any other information that might be of assistance. Our sincere thanks for your consideration of this important issue.

Sincerely yours,

A handwritten signature in black ink that reads "Miriam Aroni Krinsky". The signature is written in a cursive style with a long, vertical tail on the letter "y".

Miriam Aroni Krinsky
President

bcc: Angela Bradstreet, President
Bar Association of San Francisco
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William D. Araiza, Chair
LACBA Committee on Sexual Orientation Bias
Jeffrey W. Erdman, Immediate Past Co-President
LGLA (formerly LHR)
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