RESOLVED that the Commentary to Canon 2 of the American Bar Association's Code of Judicial Conduct be supplemented by inserting after the first paragraph of the Commentary the following language:

It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. 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 the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.
INTRODUCTION

For the past four years, the Standing Committee on Ethics and Professional Responsibility has carefully studied and considered the matter of judicial membership in organizations that invidiously discriminate solely on the basis of race, sex, religion or national origin. As a result of its deliberations, the Ethics Committee is persuaded that the public perception of impartiality arising from judicial membership in organizations that invidiously discriminate cannot be brushed aside as insignificant or aberrant, and that it is essential to the rule of law that all segments of the public have confidence in the integrity and impartiality of the judiciary. Moreover, it is a basic tenet of the Code of Judicial Conduct that judges should both be impartial and appear to be impartial. For this reason, the Ethics Committee has concluded that the Commentary to the Code of Judicial Conduct should expressly state the general principle adopted by the Judicial Conference of the United States, the Senate Judiciary Committee, and numerous judicial and bar organizations, that it is inappropriate for a judge to hold membership in an organization that practices invidious discrimination.

This report consists of four sections:

(1) A brief history of the Committee's consideration of the issue, including its consultation with other American Bar Association Committees and Sections; (2) An explanatory note defining the term "invidious discrimination"; (3) A statement of the reasons the Ethics Committee believes the proposed Commentary amendment should be adopted; and (4) An addendum of questions
frequently asked about the proposed amendment and the Committee's answers thereto.

HISTORY OF THE PROPOSED AMENDMENT

The Standing Committee on Ethics and Professional Responsibility is charged with the duty of interpreting, and proposing amendments to, the Code of Judicial Conduct. Four years ago, representatives of the U.S. Judicial Conference requested the opinion of the Committee concerning the ethical propriety of judges belonging to organizations that invidiously discriminate. A few months later, the Section on Individual Rights and Responsibilities requested the Committee to support a recommendation to the House of Delegates that the House endorse the principle that it is inappropriate for judges to hold membership in any organization that practices invidious discrimination.

The Ethics Committee has heard from a broad segment of the bar, the judiciary, and the public on the issue of judicial membership in organizations that practice invidious discrimination. It has carefully studied and considered the issue for the past four years in consultation with its own Judges' Advisory Committee.

The Ethics Committee, together with other sponsors, submitted a proposed amendment to Canon 2 of the Code of Judicial Conduct to the House of Delegates in the spring of 1983, for debate at the 1983 Annual Meeting. Copies of the proposed amendment were circulated in advance of the meeting to all interested ABA sections and divisions. After submission, the Appellate Judges Conference proposed language amending the Ethics
Committee's proposal, which amendment the Judicial Administration Division also adopted. The Ethics Committee agreed to accept the revised language. The House debate revealed that the amendment language was confusing in some respects, however, and the House adopted a motion to defer the matter to a later meeting.

Following the August 1983 Annual Meeting, the Ethics Committee proposal, as amended by the Judicial Administration Division, was further revised by representatives of the Judicial Administration Division in consultation with the Ethics Committee. The resulting language was considered by the Judicial Conferences and by the Council of the Judicial Administration Division at the mid-year meeting in February, 1984.\textsuperscript{1} Four of

\textsuperscript{1} The proposed redraft presented to the judicial conferences and the Council of the JAD provided as follows:

A judge should not be a member of an organization that practices invidious discrimination. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired. Not every organization that has a selective or even exclusive membership practices invidious discrimination. The question of whether a particular organization that has a selective membership, or membership limited to one or more categories of persons, practices invidious discrimination depends on the particular membership history and other pertinent facts regarding that organization. An organization would ordinarily be considered to invidiously discriminate when it is (1) exclusive, rather than inclusive, (2) excludes from membership certain persons, or categories of persons, solely on the basis of their race, sex, religion, or national origin, and (3) such exclusion stigmatizes such persons or categories of persons as inferior or unworthy of membership. Organizations that are dedicated to the preservation of religious, spiritual, charitable, civic, or cultural values, and which do not stigmatize as inferior and unworthy of membership any excluded persons, would not be considered to invidiously discriminate.
the Judicial Conferences approved the revised language, one
Conference disapproved, and one Conference abstained. The
Judicial Administration Division Council voted that it preferred
that the language be revised once more to reflect more closely
the language of the U.S. Judicial Conference Resolution of March,
1981. The Ethics Committee then agreed at its meeting in April,
1984, to revise the language again to reflect more closely the
language of the U.S. Judicial Conference, and the amendment now
proposed is the result of that decision.2/

It was the Ethics Committee's intention to adhere as closely
as possible to the language of the U.S. Judicial Conference
Resolution while also adhering to the basic principle expressed
in the U.S. Judicial Conference Resolution that "[I]t is
inappropriate for a judge to hold membership in any organization
that practices invidious discrimination." The Committee

2/ The U.S. Judicial Conference Resolution of March, 1981
provides as follows:

The Judicial Conference of the United States has
endorsed the principle that it is inappropriate for a
judge to hold membership in any organization that
practices invidious discrimination. A judge should
carefully consider whether the judge's membership in a
particular organization might reasonably raise a
question of the judge's impartiality in a case involving
issues as to discriminatory treatment of persons on the
basis of race, sex, religion, or national origin. The
question whether a particular organization practices
invidious discrimination is often complex and not
capable of being determined from a mere examination of
its membership roll. Judges as well as others have
rights of privacy and association. Although each judge
must always be alert to the question, it must ultimately
be determined by the conscience of the individual judge
whether membership in a particular organization is
incompatible with the duties of the judicial office.
concluded that because the last sentence of the Judicial Conference Resolution is ambiguous and arguably inconsistent with its first sentence expressing the basic principle that it would be necessary to harmonize the two. Thus, the Committee determined not to incorporate the last sentence of the Judicial Conference Resolution, which arguably permits a judge to belong to a club that invidiously discriminates. Instead, the Committee substituted the phrase "ultimately each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination."

EXPLANATORY NOTE

It is important to note that the Committee's proposed language does not suggest that judges should relinquish membership in all exclusive organizations, including religious and ethnic organizations, but only in those that invidiously discriminate. An organization ordinarily would be considered to discriminate invidiously when it is (1) exclusive, rather than inclusive; (2) excludes from membership certain persons, or categories of persons, solely on the basis of their race, sex, religion or national origin, and (3) such exclusion stigmatizes such persons or categories of persons as inferior.

The term "invidious discrimination" is not an unfamiliar one to judges for they have interpreted and applied it in literally hundreds of cases. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Griffin v. Breckinridge*, 403 U.S. 88 (1971); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). It is now well established that
invidious discrimination involves irrational exclusion of an entire class of persons because of some immutable fact, such as the excluded persons' race or religion, on a basis that is odious and in historical context was a stigma or badge of inferiority.

Organizations that are dedicated to the preservation of religious, spiritual, charitable, civic or cultural values, and which do not stigmatize as inferior any excluded persons, therefore, are not organizations that invidiously discriminate. Bona fide religious or ethnic organizations such as the Jewish Community Center or the Polish-American Society, for example, are not ordinarily considered to discriminate invidiously because these organizations (1) are inclusive (including all community Jews or all Polish Americans) rather than exclusive (excluding all community Jews or all Polish Americans); (2) are largely dedicated to the preservation of religious, spiritual, charitable or cultural values; and (3) do not stigmatize as inferior any excluded persons. Consequently, judicial membership in these organizations does not convey an appearance of judicial bias against persons excluded from membership.

No absolute rule of law or canon of ethics can cover every conceivable situation. Determination of whether an organization invidiously discriminates, therefore, must be determined on a case by case basis. Determination cannot be made from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members, whether exclusion is grounded on the basis that those persons excluded are inferior, and other relevant factors. The
proposed amendment to the Commentary makes it clear that each judge has an ethical duty to examine the relevant factors and determine, according to the judge's own conscience, whether an organization to which the judge belongs invidiously discriminates.

STATEMENT OF REASONS THE AMENDMENT SHOULD BE ADOPTED

Equal justice under law is a basic tenet of the American legal system. An impartial judiciary is an indispensable corollary to achievement of equal justice. Equally important is public belief that the judiciary is impartial. The American Bar Association's Code of Judicial Conduct is largely concerned with ensuring both that judges are neutral and that they are perceived to be neutral.\footnote{Under Canon 3, for example, a judge who owns only a few shares of a corporation's stock may be disqualified from proceedings involving the corporation even when no actual bias is evident because public doubt about the judge's impartiality can cloud the legitimacy of the decision-making process.}

Canon 2 of the Code of Judicial Conduct expresses generally the principle that the judiciary be impartial, and appear to be impartial, by stating that a judge "should avoid impropriety" and, in addition, "the appearance of impropriety."

Moreover, Canon 2 of the Code of Judicial Conduct warns that an appearance of impropriety is to be avoided "in all [a judge's] activities." Canon 2A states that "a judge should conduct
himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

More specifically, the Code of Judicial Conduct establishes guidelines for the conduct of judges both on and off the bench. In so doing, the Code imposes restrictions on a judge's social, political, and non-judicial activities which are not imposed on other citizens. For example, under Canon 7 of the Code, a judge is precluded from engaging in most political activities. Under Canon 5 a judge is also precluded from soliciting funds, or serving as a speaker at fund raising events for "any educational, religious, charitable, fraternal or civic organization." While judges may otherwise generally participate in civic and charitable activities, the commentary to Canon 5 states that judges must regularly re-examine the activities of each organization for potential conflict and notes that "policy decisions of organizations may have political significance or imply commitment to causes that may come before the court for adjudication." Canon 5 also limits the right of a judge to accept gifts and precludes a judge from accepting appointments to governmental commissions or other appointments except in limited circumstances.

The Commentary to Canon 2B emphasizes that even the non-judicial activities of a judge are the subject of public scrutiny and can be the basis on which the public forms a conclusion about the judge's impartiality. The Commentary states:
A judge . . . must expect to be the subject of constant scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. 4/

Membership of judges in exclusive organizations that invidiously discriminate creates understandable and predictable perceptions by significant segments of the public -- particularly minorities and women -- that the judicial members approve, or at least acquiesce, in the biases inherent in the organizations' membership policies. The result is a perception, shared by a significant portion of the public, that judicial members cannot perform judicial functions impartially. This perception is especially likely to arise in the increasing number of cases involving issues of equality in employment, education, domestic relations, the military, and other areas on account of evolving constitutional interpretations and new statutes. The perception can arise, however, in any case, and in any court, where the parties, the witnesses, or counsel are barred from belonging to an organization of which the judge is a member because of that organization's invidiously discriminatory practice.

4/ The concept that the social, political, and non-judicial activities which would ordinarily be considered private must in the case of a judge be open to public scrutiny and meet standards consistent with the authority and responsibilities of judicial office is not new. The Special Committee on Standards of Judicial Conduct, which drafted the present code language, adopted by the House of Delegates in 1972, drew the Section A language from old Canons of Judicial Ethics 4, 25 and 33, adopted by the American Bar Association in 1924. See Thode, Reporter's Notes to Code of Judicial Conduct, American Bar Association 1973, page 49.
In a letter dated July 29, 1983, the Leadership Conference on Civil Rights, on behalf of 165 national organizations representing Blacks, Hispanics, Native Americans, religious groups, women, and others, urged the ABA House of Delegates to amend the Code of Judicial Conduct to make it clear that it is inappropriate for a judge to belong to clubs that invidiously discriminate. The letter stated:

We know that those who are deemed "unworthy" of membership in a private club solely on account of their race, religion, national origin, or sex inevitably lose respect for the rule of law when a judge in their community is a member of the club. An impression is plainly created that the judge shares the views of the club and will not rule objectively on the claims and defenses of those who are stigmatized as inferior by the judge's club.

The Ethics Committee has received numerous letters from organizations representing minorities and women making the same point.5/

The perspective that is important is not that of judges, but the litigants' and the publics', who see judges belonging to organizations that they cannot join because they are considered inferior. Moreover, a judge's participation in any activity from which his fellow citizens are invidiously excluded not only offends those excluded but offends all citizens who deplore invidious discrimination.

5/ The Conference of Private Organizations, representing a group of private clubs, has stated its view that there is no evidence that a judge's membership in a club which practices invidious discrimination causes that judge to be perceived as biased against excluded persons. The Committee has heard persuasive testimony from the very persons excluded, and organizations representing them, that the perception does indeed exist.
The evolving nature of discrimination law requires a high degree of personal and private adherence to public standards by judges. Judges who are able to do through private clubs what it would be unlawful to do in bus stations, lunch counters or hotels invite controversy as well as questions of impropriety.

Because of the public perception of bias that membership in clubs that practice invidious discrimination fosters, numerous judicial and legal professional organizations have adopted policies in recent years prohibiting the use of club facilities with discrimination policies. For example, it has been the policy of the American Bar Association since 1978 that no ABA functions be held in clubs that invidiously exclude women and minorities. ABA Policy and Procedure Handbook, p. 80. Similar policies have been adopted by a number of state bar associations. The Senate Judiciary Committee has unanimously adopted the policy that "it is inappropriate for candidates for judgeships to be members of clubs that practice invidious discrimination." State governments have also enacted laws prohibiting the use of state funds to defray the costs of state functions at clubs or other institutions which have discriminatory admissions policies. For example, the South Carolina Code prohibits the use of state funds "to sponsor or defray the cost of any function by a state agency or institution at a club or organization which does not admit as members persons of all races, religions, colors, sexes or national origins." S.C. Code Sec. 11-915, July 24, 1978.

Finally, mutual respect and collegiality among members of the judiciary and the bar, both of which include increasing
numbers of minorities and women, is adversely affected by judicial memberships in organizations that practice invidious discrimination. Organizations that invidiously discriminate, particularly professional and business organizations which are meeting places for discussions of policy and decisionmaking, or which serve to recognize community leaders for their community service and professional accomplishments, to which minorities or women would be admitted but for their race, religion, sex or national origin, are perceived as signaling a message that the members of those organizations view the persons excluded from membership as inferior colleagues. This perception can seriously damage working relationships among the members of the judiciary and the bar.

Although it can reasonably be argued that the language of the existing Commentary to Canon 2 discussed above already proscribes judicial membership in organizations that invidiously discriminate, the Commentary does not directly discuss the issue. This absence is a likely reason that judges continue to belong to organizations that practice invidious discrimination. For this reason, the Ethics Committee has concluded that the Code of Judicial Conduct Commentary should expressly state the general principle that it is inappropriate for a judge to hold membership in an organization that practices invidious discrimination.

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6/ A survey made by the Southern Regional Council in the late 1970's, and submitted to the Senate Judiciary Committee, revealed that in the eleven southern and four northern states surveyed, more than 50% of sitting federal judges belonged to social clubs that excluded members on the basis of race.
CONCLUSION

For the foregoing reasons, the Standing Committee on Ethics and Professional Responsibility recommends that the American Bar Association adopt the proposed additional Commentary to Canon 2 of the Code of Judicial Conduct.

Respectfully Submitted,

H. William Allen, Chairperson
Standing Committee on Ethics and Professional Responsibility