Public Policy Position
Proposed Amendment to the Code of Judicial Conduct Canon 2(F) as presented at the Representative Assembly Meeting on September 26, 2019

The Religious Liberty Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 95 members. The Religious Liberty Law Section is not the State Bar of Michigan and the position expressed herein is that of the Religious Liberty Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Religious Liberty Law Section has a public policy decision-making body with 9 members. On September 19, 2019, the Section adopted its position after a discussion and vote at a special scheduled meeting. 8 members voted in favor of the Section's position on Proposed Amendment to the Code of Judicial Conduct Canon 2(F), 0 members voted against this position, 0 members abstained, 1 member did not vote due to absence.

Oppose

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September 19, 2019

Mr. Richard Cunningham, Chairperson
SBM Representative Assembly
3030 W. Grand Blvd., Suite 10-352
Detroit, MI 48202-6030

RE: Proposed Amendment to the Code of Judicial Conduct Canon 2(F)

Dear Chairperson Cunningham:

On behalf of the State Bar of Michigan Religious Liberty Law Section, we write in opposition to the proposed amendment to Canon 2(F) of Michigan's Code of Judicial Conduct. Canon 2(F) currently states:

> A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

The proposed amendment reads as follows:

> A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. ~~A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic.~~ A JUDGE SHALL NOT HOLD MEMBERSHIP IN ANY ORGANIZATION THAT PRACTICES INVIDIOUS DISCRIMINATION ON THE BASIS OF RACE, SEX, GENDER, RELIGION, NATIONAL ORIGIN, ETHNICITY, OR SEXUAL ORIENTATION. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

The proposed amendment is both unconstitutional and unworkable. We oppose this amendment for the following reasons:

I. THE PROPOSED AMENDMENT VIOLATES THE FIRST AMENDMENT RIGHTS OF JUDGES.

This amendment essentially enacts a speech code for judges. Perhaps well intentioned, it raises serious questions of vagueness and overbreadth, and chills speech protected under the First Amendment to the U.S. Constitution and Article 1, Section 5 of the Michigan Constitution.

The undefined terms of "invidious discrimination" and "organization" make the amendment unworkable. Does "organization" include churches or other religious and nonprofit organizations that may not agree with the orthodoxy of the proponents of this amendment? What about educational institutions or other entities that hold to traditional standards regarding marriage or lifestyles?

What exactly does "invidious discrimination" mean? Webster defines invidious as:

1. tending to cause discontent, animosity, or envy; malignant.
2. likely to incur ill will or hatred, or to provoke envy; hateful.
3. is unpleasant or of an objectionable nature.
4. causes harm or resentment.

What standard will be applied to determine if an organization "practices invidious discrimination"? Former State Bar President James K. Robinson, writing in favor of a similar proposed rule in 1990, defined invidious discrimination as "arbitrary, irrational discrimination not reasonably related to a legitimate purpose." (*Discrimination and the Legal System*, SBM Journal, December 1990). How would such a definition possibly be fairly enforced by the State Bar? One person's sincerely held religious belief is another's irrational belief. Who decides? Is the State Bar going to insert itself into determining if a particular judge's religious beliefs are protected?

When a similar proposal to ban membership in organizations that practiced invidious discrimination was made in 1990, an article in the State Bar Journal summarized the opposition to the proposal:

> The Civil Liberties Committee, in particular, was aghast that the State Bar would even consider such sweeping restrictions in the name of prohibiting discrimination. The State Bar must not promulgate rules that violate civil rights and would be impractical, if not impossible, to enforce. Further, by prohibiting membership, the State Bar effectively reduces the ability of attorneys to influence members of discriminating organizations from within. The Civil Liberties Committee believes that those drafting and approving these amendments have a sincere and laudable desire to help eliminate discrimination, but have gone too far in their zeal. THESE AMENDMENTS ARE MORE VIOLATIVE OF CIVIL LIBERTIES THAN THEY ARE PROHIBITIVE OF DISCRIMINATION. (emphasis in original).

(*Against the Proposals*, SBM Journal, December 1990).

Members of the State Bar Civil Liberties Committee, which strongly and unanimously opposed its adoption, went on to object to the ambiguous language and that it was a "clear violation of first amendment rights of privacy, speech, and association." They further argued that "the proposals are an impermissible attempt by a state authority to regulate employees' rights to privacy and association, in violation of the First Amendment of the U.S. Constitution, Title VII of the Civil Rights Act, Article 1 of the Michigan Constitution, and the Elliott-Larsen Civil Rights Act."

The authors, articulating the position of the Civil Liberties Committee, next pointed out:

> The scienter requirement impermissibly invades the privacy and associational arenas. Would it create an investigatory duty on the part of the judge? Must a judge ascertain that an organization in fact applies its rules in a discriminatory manner, even when its rules are facially nondiscriminatory? As a practical matter, proving or disproving a judge's scienter would be problematic at best, and would invade areas protected by judicial privilege. Privacy considerations aside, the state as a government employer cannot use this prohibition as grounds for employee discipline. As a general rule, the government cannot condition employment on the compromise or relinquishment of a constitutional right, be it freedom of belief and association (Elrod), or freedom of speech (Pickering). *Hall v Ford*, 856 F.2nd 255 (D.C. Cir, 1988). . . . State Bar rules and regulation of membership and conduct create conditions of employment.

(*Against the Proposals*, Ingrid Farquharson and Elsa Shartsis, SBM Journal, December 1990).

If a church or nonprofit believes that marriage is a sacred union between one man and one woman, is a judge barred from belonging to the organization? If an organization is pro-life and believes all life begins at conception and is deserving of respect and protection, is a judge barred from belonging to the organization? If a litigant happens to be gay, transgender, or pro-choice, and is offended by such beliefs, is that judge now unable to hear that person's contract dispute or other legal matter? Such a standard is too vague and overbroad to be enforced in a fair manner.

What if a judge belongs to a religious organization with sacred beliefs that others who belong to another religious organization with different religious dogma find offensive? Does that qualify as invidious discrimination? Is a judge barred from belonging to a fraternity or sorority because the organizations arguably discriminate based on sex? May a judge only belong to organizations or groups who are favored by the proponents of the amendment? Isn't this "invidious discrimination" against judges who maintain traditional values and religious faith? Tolerance is a two-way street. Socially and religiously conservative judges will rightly distrust the enforcement of these new speech and religious restrictions.

Under the proposed amendment, may a judge belong to either the Christian Legal Society (which requires its members to sign a Statement of Faith and adhere to a Christian Code of Conduct – including sexual and marital restrictions) or the Catholic Bar Association (which promotes the ideals and beliefs of the Catholic faith)? Is a Jewish judge prohibited from being a member of his Orthodox synagogue? Is a Muslim judge banned from membership at his mosque because Islam does not affirm same-sex marriage?

This proposed amendment should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, we can ill-afford to regulate judges with a rule that will likely be utilized to target their speech or religious beliefs. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free expression of those with whom they disagree.

Many judges sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable questions and regularly turn to the judges serving as volunteers on their boards for general guidance on political and social issues. By making judges hesitant to serve on boards, the proposed amendment does real harm to religious and charitable institutions and hinders their good work in their communities.

This proposed amendment chills a judge's willingness to participate in political, cultural, or religious organizations that promote traditional values, including sexual conduct and marriage. Would judges be subject to disciplinary action for participating with their children in youth organizations that teach traditional values? Would it subject judges to disciplinary action for belonging to organizations that support laws promoting traditional values?

Moreover, this proposed amendment is not targeted at judicial conduct directly impacting a judge's ability to be entrusted with the professional obligations of their office, namely, to serve the legal system with honesty and trustworthiness. Without more, this amendment does nothing to address serious interference with the proper and efficient functioning of the judicial system. Nor does it address any actual harm or injury to judicial proceedings. Simply belonging to an organization with which a litigant disagrees, without more, does not prove any prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding.

The amendment now under consideration takes the Code of Judicial Conduct in a completely new and different direction. For the first time, the new Rule opens judges to discipline for engaging in conduct that neither adversely affects the judge's fitness to be on the bench, nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed amendment fails to require any showing that the proscribed membership prejudices the administration of justice by the judges' conduct on the bench, this amendment creates a subjective free-floating non-discrimination provision inviting arbitrary enforcement.

II. THE PROPOSED AMENDMENT VIOLATES THE DUE PROCESS RIGHTS OF JUDGES.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the proposed amendment clearly violates these principles.

The terms "practice" and "invidious" are unconstitutionally vague. The proposed amendment prohibits judges from belonging to an organization that "practices invidious discrimination." But these terms are not defined in the proposed amendment, are subject to varied interpretations, and no standard is provided to determine whether an organization is, or is not, practicing invidious discrimination.

Does expressing disagreement with someone's religious beliefs constitute a practice of invidious discrimination on the basis of religion? Can merely being offended by an organization's conduct trigger application of this Canon? Can a single act constitute a practice of invidious discrimination, or must there be a series of acts? In order to constitute a practice of invidious discrimination, must the offending behavior consist of words, or could body language constitute such discrimination?

In short, because the terms "practice" and "invidious" are so vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide judges with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Judicial Canons to enforce the Rule arbitrarily and selectively; and (3) its vagueness chills the speech of judges who, not knowing where the "practice of invidious discrimination" begins and ends, will self-censor their free speech and religious conscience in an effort to avoid violating the Canon.

Further, the term "discriminate" is also unconstitutionally vague. The word "discriminate" has been defined as "to unfairly treat a person or group of people differently from other people or groups."[1]

But – given that definition – a legitimate question can be raised as to what sorts of behavior are, in fact, encompassed by the proposed amendment's proscription against discriminating on the basis of one of the protected classes. What constitutes "unfairly" treating a person differently from others? To what sorts of behavior does the proposed Canon apply? Would it apply to an organization's president writing an article for a legal publication or giving a speech? Would it apply to an organization's internal employment practices – such as hiring and employee disciplinary decisions?

It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. It is also true that such statutes and ordinances do not – as does the proposed amendment – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination. Michigan's Elliott-Larsen Civil Rights Act (ELCRA) specifically delineates what constitutes discrimination and what areas are covered. MCL 37.2101, et. seq.

Unlike ELCRA, however, this proposed amendment simply prohibits "membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin,

[1] Merriam-Webster On-line Dictionary, http://www.meriam-webster.com/dictionary/discriminate.

ethnicity, or sexual orientation" – thus leaving it subjectively open to what sorts of behavior might be encompassed in that proscription.

If judges are to face professional discipline for engaging in certain proscribed behavior, then they are entitled to know precisely what behavior is being proscribed and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the terms used, the proposed amendment is subject to constitutional challenge. For that reason, as well, the proposed amendment should be rejected.

III. THE PROPOSED AMENDMENT CREATES NEW CATEGORIES NOT COVERED BY EXISTING LAW.

The proposed amendment adds three additional classes to the ever-growing list of specially protected groups. ELCRA currently protects "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status." The proposed amendment adds "ethnicity," "gender," and "sexual orientation" to that list. The Michigan Legislature has refused to add these additional categories to ELCRA over a dozen times over the past twenty years. However, the phenomenon of ever-growing, never-ending lists of specially protected classes in non-discrimination laws raises a variety of problematic issues.

A. The List of Specially Protected Classes Includes Classes That Are Not Objectively Definable.

The proposed amendments continue the apparently never-ending process of adding specially protected classes to anti-discrimination laws, rules, and regulations, including judicial and professional codes of conduct. Indeed, this process has now reached the absurd result that the proliferating classes cannot even be rationally identified or objectively determined. Non-discrimination provisions and the classes they protect are more likely the result of unrestrained political agendas than of thoughtful responses to demonstrated needs.

The terms "sexual orientation" and "gender" are indefinable. Does the term "gender" include "gender identity"? Even scholars who regularly study sexual orientation cannot agree on a definition for, or an understanding of, terms. See Todd A. Salzman & Michael G. Lawler, The Sexual Person 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon.").

Further, neither sexual orientation nor gender identity is objectively determinable. Sexual orientation is certainly not objectively observable. Indeed, if one were to assume another's sexual orientation by reference to their public presentation and behavior, such in and of itself might be considered discriminatory. And gender identity is, by definition, completely subjective, depending entirely upon a person's self-perception, which may have nothing to do with how they objectively appear to others. The concept is malleable and subject to change. There is absolutely no requirement that someone have a temporally consistent "gender identity." In fact, proponents of gender identity protection admit that "gender identity" is not only indefinable and changeable over time but also that different "gender identities" may exist simultaneously and in different contexts. See, for example, Self-Determination In

A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities, 12 Tex. J. on C.L. & C.R. 101, 104 (2006) ("[I]ndividuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, but mean very different things by the descriptor they choose. And various individuals may view one person's gender differently and thus deploy different gender signifiers to refer to that individual."). The article was written by a proponent of a "right to gender self-determination" who posits "the addition of infinite new classifications of individuals' genders within and outside of the gender categories society currently comprehends."

Consequently, under the proposed amendment, judges must refrain from joining organizations invidiously discriminating against classes that no one can even define, let alone objectively perceive or rely upon as having any objectively consistent existence. Such a Canon is unreasonable and unenforceable.

B. The List of Specially Protected Classes in the Amendment is Inconsistent

Attempting to create and maintain a list of specially protected classes results in inconsistency and brings disrepute upon the legal profession because different classes cannot all be protected at the same time. For example, how can religion be protected at the same time as sexual orientation? Some religious organizations view certain sexual conduct and lifestyles as wrong. This internal conflict in the amendment is problematic. This inconsistency is further evidence that protected class theory may be driven more by the changing winds of political expediency than by any sort of demonstrated need.

In addition, including a list of specially protected classes factionalizes society and creates a distinction between those who are protected and those who are not. This practice of identifying groups of people – giving some of those groups and not others legal protection – pits groups of people against each other and conveys the impression that the State Bar values certain sorts of people, but not others. Which groups are protected and which are not appears to be the result of nothing more than simple political pressure. If the members of a certain interest group bring sufficient political pressure upon the State Bar, then the group gets protection. If not, they do not. Such a construct is bound to bring the State Bar into disrepute and raises the question whether it is really interested in justice, or is simply the mouthpiece of special interest groups.

If the State Bar was really interested in prohibiting discrimination, then it would prohibit invidious discrimination against everyone. Instead, it picks and chooses which groups to protect and which to leave unprotected.

C. The List of Specially Protected Classes Deprives the State Bar of any Principle Protecting it from Future Interest Group Pressure to Further Expand the List to Include Still Other Protected Classes

Even now there are additional groups claiming that their peculiar characteristics merit special recognition and protection. For example, the Wesleyan University Office of Residential Life has recognized no fewer than 15 "sexually or gender dissident communities," represented by the acronym

LGBTTQQFAGPBDSM.[2] ELCRA already protects categories which are excluded from this amendment.

The Township of Delta, Michigan, illustrates how enthrallment to the idea of protected classes results in an ever-growing and never-ending list of protected groups. Delta Township's discrimination ordinance has expanded to currently protect no fewer than 16 distinct classes, including race, color, religion, national origin, sex, age, height, weight, marital status, physical limitation, mental limitation, source of income, familial status, sexual orientation, gender identity, and gender expression. Delta Township's experience illustrates how setting forth a list of specially protected classes establishes a construct that leads to a never-ending parade of constituents attempting to advance their agendas and enshrine their favored characteristics or behaviors within the protected classes.

Arizona provides a recent example of this disturbing phenomenon. Those seeking recognition for and protection of certain sexual behaviors in Arizona's Rules of Professional Conduct sought and were granted recognition of "sexual orientation" as a protected group. But that proved insufficient to satisfy the claims of those who sought special recognition and protection based on "gender identity," which was added to Comment [3] to Rule 8.4 of the Arizona Attorney Conduct Code in 2003.

As in Arizona, it is only a matter of time before additional groups come forward to press their particular interests on the Michigan State Bar – and on what principle will it be able to reject such overtures?

For all these reasons, the State Bar should reject the proposed amendments and resist the temptation to add any new protected classes to the current Judicial Code.

IV. NO DEMONSTRATED NEED EXISTS FOR THE PROPOSED AMENDMENT.

It is striking to note that no evidence is presented that harassment or invidious discrimination actually exists to any significant degree in the judiciary – or that, if it does exist, it is such a serious and widespread problem that the Judicial Canons must be amended to infringe on judges' constitutional rights to address it. If such evidence exists, then one would have expected to see it presented.

Where is the evidence that the judiciary is so rife with harassment and invidious discrimination in the organizations to which judges belong that the amendment must be adopted to address the problem? Where are all the complaints against judges alleging such a problem? We dare say such complaints are virtually non-existent. Why? Because judicial membership in organizations (whatever their practices) cause no problems in the administration of our judicial system or in the fairness of the judiciary.

Despite the lack of evidence, those seeking to amend our Judicial Code plainly suggest judges engage in invidious discrimination through organizational membership. Do they believe judges are so vile and depraved that we must empower professional disciplinary authorities to infringe upon the sanctity of

[2] See http://www.wesleyan.edu/reslife/housing/program/open_house.htm).

their professional autonomy, not to mention their personal consciences and constitutional rights? Do they really believe judges cannot be trusted to behave honorably? We who join this Comment hold greater respect for, and confidence in, our fellow members of the legal profession.

No demonstrated need exists for the proposed amendment to Canon 2(F) – and the effort to enshrine this political agenda in the Code of Judicial Conduct does not advance the interests of the State Bar.

We expect political activists to use this amendment to punish a judge who does not accept the political orthodoxy of those proposing the amendment. Judges are called upon, and take an oath, to uphold the law and apply it equally and fairly to all litigants. That is all that can be asked of any judge. To start applying a religious or speech test, or vague standards, is plainly unconstitutional and discriminates against the judge. The social and political issues that proponents of the amendment wish to enforce against judges are best left to the legislative and executive branches of our government for resolution.

Judicial Conduct Rules are different from the Rules of Professional Conduct. Judges, unlike lawyers generally, have a legitimate professional obligation to avoid bias or the appearance of bias. So, for that reason, restrictions on judicial behavior are more understandable and relate more closely to a judge's professional obligations. The proposed changes to the Michigan Code of Judicial Conduct, however, could be used to interfere with a judge's constitutional rights of privacy, association, speech, and religion. Moreover, the very fact that the provision states that "Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion" demonstrates that the Rule could otherwise be interpreted in such a way as to do exactly that. Moreover, by using the word "*should*," the State Bar is not actually prohibited from diminishing "a judge's right to the free exercise of religion." How will the State Bar enforce this rule when there are competing interests, i.e., "religion" versus "sexual orientation"? Both interests cannot be reconciled, so which prevails?

Additionally, assurances that the proposed rule will not be applied in an unconstitutional manner does not cure the rule's constitutional infirmities. Supporters of the proposed amendment may argue that, although the rule could be applied in an unconstitutional manner, it will not be – or may suggest that, in order to assuage concerns about the proposed rule's constitutional infirmities, the proposed rule be modified so as to provide that the rule will not be applied in an unconstitutional manner. Neither approach, however, remedies the rule's constitutional infirmities.

First, proponents of the rule lack authority to speak on behalf of the state's professional disciplinary authorities. They cannot say how the disciplinary authorities will or will not interpret or apply the rule. And second, *United States v. Stevens*, 559 U.S. 460 (2010) clearly holds, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The *Stevens* Court made clear the danger in trusting government representations of prosecutorial restraint. *Id*. at 480.

We urge the State Bar to be very careful about taking politically sensitive policy positions that will only serve to divide the bar and cause dissension within our ranks. The Religious Liberty Law Section urges that the proposed amendment be denied.

Respectfully submitted,

Religious Liberty Law Section

This letter was approved by its Executive Council Members at a meeting on September 19, 2019.

The Catholic Lawyers Society of Metropolitan Detroit stands in agreement with this opposition letter.

Christian Legal Aid of Southeast Michigan stands in agreement with this opposition letter.