

Advisory Committee on the Code of Judicial Conduct

Hon. James J. Wechsler, Chair
Hon. Marie A. Baca
Paul L. Biderman, Esq.
Thaddeus Bejnar, Esq.

May 26, 2004

Re: Advisory Opinion No. 04-03

Dear

You have asked this Advisory Committee for guidance on whether your membership as a Freemason violates your ethical obligation as a New Mexico judge to avoid membership in organizations that practice invidious discrimination on the basis of sex. See Rule 21-200(C) NMRA 2004. According to your letter, "Masonic membership is open to all races and religions, the primary requirement being a belief in God. Women may be members of affiliated Masonic organizations such as Eastern Star, Job's Daughters, and Rainbow Girls, but they are not eligible to become Freemasons." Your letter goes on to suggest that your membership is not barred by the Code of Judicial Conduct because Freemasonry is a "purely private organization" which is "dedicated to the preservation of religious or cultural values" and because "many judges have historically been Freemasons."

The governing section of the Code of Judicial Conduct, Rule 21-200(C), provides as follows:

C. Membership in organizations. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

The official commentary to this section of the Code acknowledges that "[w]hether an organization practices invidious discrimination is often a complex question to which judges should be sensitive." See Commentary to Rule 21-200 (C). It explains that the answer to this question "depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited." Id. The pertinent paragraph of the commentary concludes by observing that, "[a]bsent 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." Id.

In providing advice on how to answer your question with regard to the Freemasons, we find guidance in the U.S. Supreme Court cases cited in the Code commentary, in particular Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987), and New York State Club Ass'n. Inc. v. City of New York, 487 U.S. 1 (1988). Those cases involve challenges by clubs to state and local laws prohibiting discrimination on the basis of sex in extending membership to certain organizations. Rotary International 481 U.S. at 539; New York State Club Ass'n, 487 U.S. at 4. Part of the inquiry in those cases was to determine whether the organizations affected by the discrimination bans were purely private organizations or whether the organizations seek to preserve religious, ethnic or cultural values of legitimate common interest to its members. Rotary International, 481 U.S. at 548; New York State Club Ass'n, 487 U.S. at 19.

Rotary International is particularly instructive in identifying these standards. The Court noted in that case that while Rotary Clubs International did not accept women as members, women were allowed to attend meetings, give speeches, and receive awards, and women related to male members could form chapters for themselves and wear lapel pins, and younger women could join related organizations. Rotary International, 481 U.S. at 541. Despite these practices, the Court found that denying membership to women would violate the California state law prohibiting discrimination against women in certain associations. Id. at 549. The Court noted that although a purely personal or private organization would be constitutionally protected against state interference in its membership practices, Rotary Clubs International did not qualify for such protection. Id. at 545-46. Its membership rolls were uncapped; members were encouraged to recruit new members and invite strangers to meetings to expand membership and compensate for attrition; Rotary Clubs International supported and publicized its community service projects and joint activities with other organizations; and it attempted to raise community business standards and improve international relations. Id. at 546. None of these practices bore the indicia of a purely private or personal organization. Id. at 547. As for its ability to achieve its organizational goals, none of the goals identified by the organization, such as providing community service or improving business standards and relationships, was found to be served any better through exclusion of women as members. Id. at 548. Indeed, the Court found that inclusion of women would enhance its achievement of those goals. Id. at 548-49. The Court subsequently reaffirmed these principles in New York State Club Ass'n, observing that while nothing prevents an organization from excluding individuals who do not share its views, it may not use sex as a shorthand measure for denying eligibility. New York State Club Ass'n, 487 U.S. at 13.

The fact that the Commentary to the Code cites to these cases suggests that, unless the Freemasons is a purely private or personal association, dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, in contrast to Rotary Clubs International, your continued membership

" may violate the Code's prohibition against membership in an organization that practices invidious discrimination on the basis of sex. As your letter points out, membership in the Freemasons is open to virtually all except women, with the primary requirement being a belief in God. Such a broad statement of purpose seems inclusive rather than private.

We note that while Rotary International addressed the question of whether that club qualified as a business subject to California's anti-discrimination law, and while the New York law at issue in New York State Club Ass'n exempted benevolent organizations from its reach, those laws were intended to serve a different purpose. Unlike the Supreme Court in those cases, our Committee does not address the legal obligations of the organization itself, but the ethical obligations of judges who belong to the organization. The Code of Judicial Conduct does not seek to change the practices of the organization, but to remove any suggestion that the Judge who is a member may appear to the public to carry biases by belonging to an organization that engages in discriminatory membership practices.

Because our Committee does not have extensive information on the membership practices of this organization, we urge that you review the Rotary International opinion to determine how the Freemasons' policies measure up to the standards set forth in that opinion. We enclose a copy of that opinion for your convenience. Unless you determine that the membership practices of the Freemasons are significantly different from those described by the Court in Rotary International, we advise that you take steps pursuant to Rule 21-300 NMRA 2004 either to resign immediately and cease all association with or use of the club or to retain membership for up to one year for the sole purpose of urging the organization to change its membership practices to allow women in as full members.

Very truly yours,

James J. Wechsler

Chair