DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Introduction. Based on my research of the constitutionality of applying public accommodations laws to private clubs, there are two points concerning this draft of which you should be aware:

1. Based on a Michigan statute that is remarkably similar to this draft and *Benevolent and Protective Order of Elks v. Reynolds*, 863 F. Supp. 529 (W.D. Mich. 1994), which upheld the constitutionality of that statute, it would appear that the substantive requirements of this draft would pass constitutional muster because the draft merely regulates *the use of the facilities* of a private club, rather than the membership policies of the club itself, and because the draft merely regulates the availability of all classes of membership and the exercise of voting rights for persons *who already are members* of the club, rather than the admission of new members to the club.

2. Based on *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F. 3d 1483 (5th Cir. 1994), which struck down New Orleans' public accommodations as applied to certain private clubs on freedom of association grounds, it would appear that the enforcement of this draft might be held unconstitutional as applied to certain private clubs because, to enforce the draft, the department of workforce development (DWD) must necessarily delve into and make public the private, internal workings of those clubs in violation of their constitutional right to freedom of association.

This drafter's note will first explain in general how the constitutional right of freedom of association applies to private clubs and what that application means for a law that regulates private clubs. Next the drafter's note will explain why the substantive requirements of this draft do not impair the associational rights of private clubs. Finally, the drafter's note will explain why the enforcement of this draft might impair the associational rights of a private club and will offer alternative ways to address the freedom of association concerns relating to the enforcement of this draft.

Freedom of association. The Constitution protects against undue intrusion by the government two types of freedom of association. One is freedom of *private association*, that is, the right to enter into and maintain (and, conversely, the right *not* to enter into and maintain) certain private relationships. The most obvious example of an association that enjoys freedom of private association protection is a family because it is small in size, subject to a high degree of selectivity in decisions to begin and maintain the relationship and secluded from others in critical aspects of the relationship.

Freedom of private association, however, is not limited to family relationships; other types of relationships that share those attributes also enjoy freedom of association protection. Therefore, in determining whether an association is sufficiently private to warrant constitutional protection, the courts consider the following factors: 1) the organization's size; 2) its purposes; 3) its selectivity in choosing new members; 4) the congeniality among its members; 5) whether others are excluded from critical aspects of the relationship; and 6) other characteristics that in a particular case may be pertinent. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3249–3251 (1984). Thus an organization such as the Jaycees or the Rotary Club that has hundreds of thousands of members, that has as its purpose serviced to the larger community, that is nonselective and nonexclusive in admitting new members and that encourages the participation of nonmembers in its activities, does not enjoy freedom of private association protection. *Roberts* at p. 3251; *Board of Dirs. of Rotary International v. Rotary Club*, 107 S. Ct. 1940, 1946–1947 (1987). On the other hand, an organization such as the Louisiana Debating and Literary Association that has only a few hundred members, that is purely social in purpose, that is selective and exclusive in admitting new members and that prohibits or severely restricts the participation of nonmembers in its activities does enjoy freedom of private association protection. *Louisiana Debating Association* at pp. 1495–1497. Because the draft applies to private clubs that serve only their members and guests, it is likely that the draft will apply to some private clubs that, due to their small size, selectivity, exclusivity and strictly social purpose, are entitled to freedom of private association protection.

The Constitution also protects freedom of *expressive association*, that is, the right to associate for the purpose of engaging in rights protected by the First Amendment such as speech, assembly and religion. *Roberts* at p. 3249. Although golfing is probably not a protected right under the First Amendment, if an organization, for example a fraternal lodge such as the Elks or a religious association such as the Knights of Columbus, not only operates a golf club but also engages in First Amendment activity, such an organization would enjoy freedom of expressive association protection. Because the draft does not exclude from its coverage fraternal or religious organizations that also operate golf facilities, it is likely that the draft will apply to private clubs that are entitled to freedom of expressive association protection.

If a private club is entitled to freedom of association protection, whether based on freedom of private association or freedom of expressive association, that freedom is protected against *unjustified* government interference. That does not mean that the government may never infringe a club's freedom of association, but is does mean that the government may infringe that freedom only if the government demonstrates: 1) that the infringement serves a *compelling state interest*; and 2) that the compelling state interest cannot be achieved through any significantly *less restrictive means*. *Roberts* at p. 3252. Accordingly, because the draft includes within its coverage private clubs that may be entitled to freedom of association protection, the state must demonstrate either that the draft does not infringe the associational freedom of private members or that, if the draft does infringe that freedom, the infringement serves a compelling state interest that cannot be achieved through significantly less restrictive means.

Substantive requirements. The substantive requirements of this draft are remarkably similar to a Michigan statute whose constitutionality was upheld in *Benevolent and Protective Order of Elks v. Reynolds*, 863 F. Supp. 529 (W.D. Mich. 1994). Specifically, in 1992 Michigan amended its public accommodations law to eliminate certain exclusionary practices by private clubs. Michigan did so by amending its definition of "place of public accommodation" to include *the facilities of* certain private clubs (MLCA s. 37.2301 (a)) and by expressly requiring those private clubs to do all of the following:

1. If a private club allows the use of its facilities by one or more adults per membership, make the use of those facilities equally available to all adults who are entitled to use those facilities under the membership.

2. Make all classes of membership available without regard to race, color, gender, religion, marital status or national origin.

3. Offer memberships that permit use during restricted times only if the restricted times apply to all adults using the membership.

4. Allow equal access to its food and beverage facilities for all adults in all membership categories at all times. (MLCA s. 37.2302a).

So, the Michigan statute differs in substance from this draft only insofar as this draft in addition requires nondiscrimination in assigning tee times and equal voting rights in the governance of a private golf club.

In the *Elks* case, the Elks challenged the constitutionality of the Michigan law, contending that it violated the right to freedom of association of its members because the law would unjustifiably interfere with the club's membership policies. The Court, however, held that the Michigan law did not interfere with the Elks' membership policies because the law regulates *the use of the facilities* of a private club and not the club itself or its membership policies. In other words, the law does not require a private club to admit women, but if a private club does admit women, the club must allow equal access to its facilities and make all classes of memberships available *to all person who already are members. Elks* at p. 533. Similarly, because this draft regulates the facilities of a private club, but does not regulate the club itself or its membership policies, and because this draft regulates access to all classes of memberships and equal voting rights for all persons who already are members of a private club, but does not regulate the admission of new members to the club, it would appear that the Michigan law and the *Elks* case upholding that law would be strong precedent for upholding the constitutionality of the substantive requirements of this draft.

Enforcement. This draft, if enacted, would be enforced as provided in s. 106.04 (10), stats., which among other things permits DWD to hold hearings, subpoena witnesses, take testimony and make investigations; requires a hearing examiner to make written findings; and permits DWD or an aggrieved person to bring a civil action for damages and injunctive relief. Significantly, s. 106.04 (10), stats., does not authorize closed hearings or exempt public accommodations enforcement records from the open records law.

The U. S. Court of Appeals for the fifth Circuit, in *Louisiana Debating Association*, held that similar enforcement measures in New Orleans' public accommodations law

rendered that law unconstitutional as applied to private clubs that enjoy freedom of association protection because those enforcement measures did not provide adequate safeguards against intrusion into the private affairs of such clubs in that the law did not prevent hearings from being public and did not prevent the city from demanding the membership lists of such clubs. Therefore, the Court held that the city failed to meet its burden of demonstrating that the means chosen to achieve the compelling state interest of eradicating discrimination were the least intrusive on the private association rights of private clubs. Similarly, because s. 106.04 (10), stats., does not permit or require closed hearings, does not exempt any information from the open records law and does not limit the scope of information that DWD may subpoena, it would appear that the lack of safeguards against intrusion into the private affairs of a private club might, under the teaching of *Louisiana Debating Association*, render this draft unconstitutional as applied to private clubs that enjoy freedom of association protection.

Accordingly, it appears that there are three things you can do to address the freedom of association concerns of private clubs:

1. Do not change the draft to accommodate those concerns. A holding of the U.S. Court of Appeals for the fifth Circuit, which covers the Deep South, is not binding on the U.S. Court of Appeals for the seventh Circuit, which covers the Upper Midwest. Significantly, the issue of enforcement was not even reached by the U.S. District Court for the Western District of Michigan in the *Elks* case. Moreover, "(i)t is commonly recognized that publicizing efforts to eliminate discrimination with respect to specific instances can be a beneficial tool in deterring its spread or eliminating it." 60 OAG 43, 53 (1971).

2. Balance the desire to protect the privacy of private clubs with the salutary effects of publicizing the misdeeds of malefactors who discriminate by drafting, either on redraft or by amendment, a narrow, carefully tailored provision that addresses the specific privacy concerns of private clubs, but that also allows DWD to collect the information that it needs to enforce the law and allows for appropriate publicity of the guilty. For example, depending on the specific privacy concerns of the private clubs, the draft could prohibit DWD from demanding the names of the members of a private club, could permit or require hearings involving private clubs to be closed or could provide that enforcement records relating to a private club are exempt from the open records law.

3. Provide at the outset for blanket privacy protection for private clubs.

If you have any questions concerning this drafter's note or the draft, please do not hesitate to contact me directly.

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