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August 17, 2020

Hon. Colon Willoughby
President, NC State Bar

Re: Objection to Propose Changes to PREAMBLE and Rules of Professional Conduct

INTRODUCTION

I object to the Proposal based on Current ABA Model Rule 8.4(g) which reads:

> "(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

In addition the Ethics Committee has sent to the State Bar Council, for publication and comment, an amendment to the Preamble which reads:

> While acting in a professional capacity, a lawyer should not discriminate on the basis of a person's race, gender, national origin, religion, age, disability, sexual orientation, gender identity, marital status, or socioeconomic status. This responsibility of non-discrimination does not limit a lawyer's right to advocate on any issue, nor does this responsibility limit the prerogative of a lawyer to accept, decline, or withdraw from a representation in accordance with these rules.

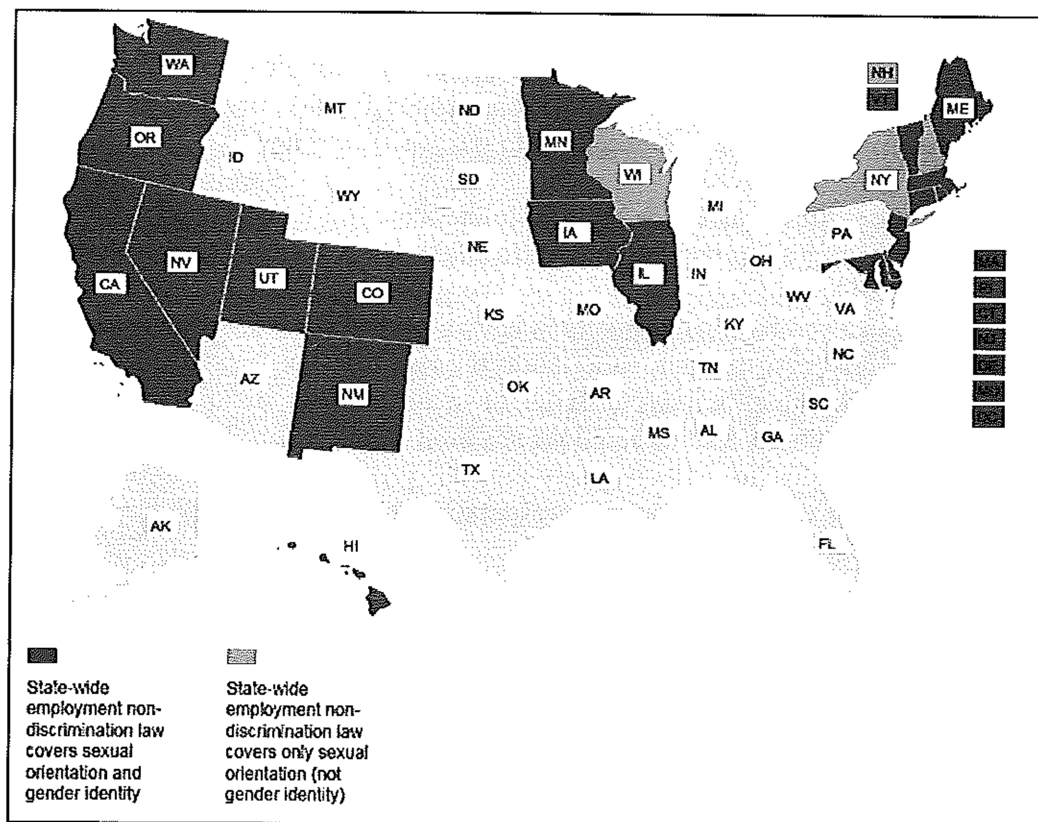
The change to the Preamble is no less a problem than the change to the rules. In my 45 years of membership I have never been disciplined. I have prized my reputation as an "ethical attorney" (and my constant AV rating). I do not appreciate even the possibility that my clients, competitors, friends or family would wonder whether the State Bar considered me to be an unethical attorney.

I do not know what the proposed changes mean. I do not know what the effects would be. There are dozens of different sexual orientations. More are being discovered every year. I have repeatedly asked advocates for this type of language to tell me which orientation they intend to

include or exclude. They always refuse. In Bostock Justice Gorsuch never tells us what "sexual orientation" means except that it has something to do with "sex" and something to do with "same sex attraction." We do not know if "orientation" requires action pursuing the orientation or not, so we have to assume it does not. "Gender identity" is a misnomer. Gender is a literary concept; sex is a biological concept. For that reason, the Preamble language is not even correct. It uses "gender" instead of "biological sex" while also including "gender identity."

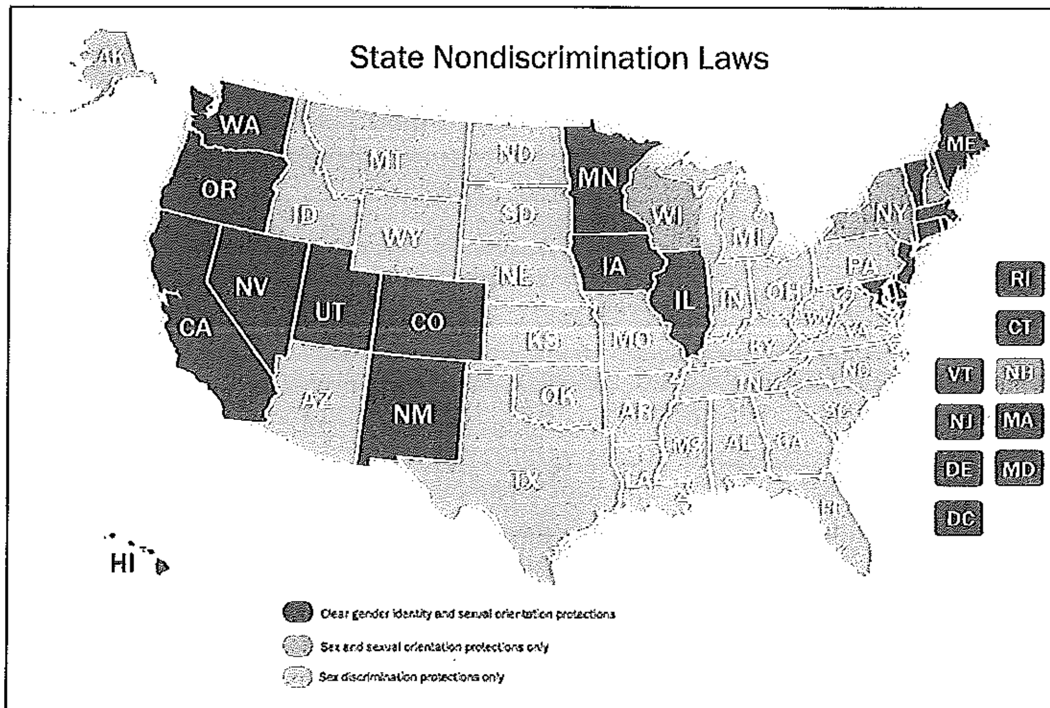
The Truth about Discrimination and State Law

North Carolina state law on non-discrimination is the same or very similar to that of 27 other states.[1] The maps below were compiled by the ACLU and Transequality. On each map gray states like North Carolina do not have extra special rights based on "sexual orientation" or "gender identity." These maps are four years old and there are perhaps some changes since. I believe Virginia has changed its status recently.



[1] *See* http://paulstam.info/wp-content/uploads/2016/05/I-WANT-TO-HELP-PAYPAL.pdf. Also see https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.

www.aclu.org



www.transequality.org

Proponents of the Charlotte type discrimination ordinance (protecting "sexual orientation," "gender identity" and "gender expression") said it had been enacted in 200 cities nationwide. Their leader, Chris Sgro, used 100 cities. Some of those cities are in states marked gray. Whether it is 100 or 200 means that about 10,000 other cities and towns located in about 27 states nationwide do not have protected classifications based on "sexual orientation," "gender identity" or "gender expression."

NORTH CAROLINA LAW PROTECTS THE RIGHTS OF LGBTQ PERSONS. LGBTQ PERSONS HAVE THE SAME RIGHTS THAT OTHERS DO.

North Carolina residents have all of the rights that come from the United States Constitution and Statutes, the North Carolina State Constitution and Statutes, and local ordinances. These rights are available in full to *almost* everyone.

Article I Section 1 of the North Carolina Constitution provides as follows:

The equality and rights of persons.

> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

There are exceptions. Aliens do not have the right to vote, whether here legally or

illegally. Children do not have the right to enter into most contracts nor the right to vote nor the right to buy alcohol. Those who by mental disease are not able to conduct their own affairs may be declared incompetent by a Court. Their rights are protected and enhanced by the appointment of a Guardian. Convicted criminals lose many of their rights. But even convicted criminals have the right in most circumstances to not undress or use the bathroom or shower in the presence of a person of the opposite sex.[2] Polygamists or polyamorists do not yet have the right to have their relationships recognized in this state.

Each of us has the same rights when facing the same circumstances. For historical reasons the exercise of these rights has been protected by additional constitutional or statutory provisions.

Article I Section 19 of the North Carolina Constitution provides:

Law of the land; equal protection of the laws

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The 14th Amendment (Section 1) to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Private v. Public

Some discrimination is appropriate for private persons but is not appropriate for a government. When Romeo met Juliet, he discriminated on the basis of (biological) sex when he chose a particular biological female. When Juliet met Romeo, she discriminated on the basis of (biological) sex, choosing a particular biological male. Homosexual or lesbian persons exercise private discrimination by choosing a partner of the same sex. Bisexual persons exercise private discrimination by choosing partners of different sexes at different times.

Discrimination based on some factors may be reasonable or wise. A "discriminating" person is defined as one who is discerning, one who notes "differences with nicety," one who has "excellent taste or judgment." But other types of discrimination are improper for a government or for a provider of public accommodations. These types of discrimination are not allowed by

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[2] The North Carolina Department of Public Safety, Adult Correction and Juvenile Justice stated in a memo on May 10, 2016, that, "Convicted criminals and inmates do have privacy rights when it comes to their using the restroom or changing clothes and they have the right to not be observed by members of the opposite sex while using the restroom or changing clothes. The specific policy language is included in the Prison Rape Elimination Act (PREA), with which the Division of Adult Correction...Community Corrections and Juvenile Justice...abides." I am not sure if this policy has been repealed by the Cooper Administration under his Executive Orders.

NC law. North Carolina private law firms are neither the government nor places of public accommodation.

In North Carolina personal characteristics subject to extra scrutiny for discrimination have been race, color, national origin, sex (biological) and religion. That was true before Bostock and is true today in every context except where Title VII applies. Other personal traits like age, disability, familial status and veteran status are also used where appropriate to the conduct addressed by statute. In other contexts discrimination based on religion is appropriate and legal.

One problem with "identity"-based preferences (like "sexual orientation" or "gender identity") is subjectivity. The "identity" actor determines the law. By choosing his or her gender identity on a particular day, the person can transform conduct from illegal to legal and back again.

"I am a Cherokee," said Sen. Elizabeth Warren, whose tenure at Harvard improved its diversity rating. But that did not make her 1% DNA into a Native American. "I want to be a girl" said the biological male who won All-State Honors in the 2016 Alaska Girls Track and Field Competition. "We are girls," said the two biological males who won numerous high school track and field contests in 2019 in Connecticut. Women athletes there are suing under Title IX since their chances for scholarships, not to mention personal privacy, are diminished. Weren't additional opportunities for women what Title IX was about?

"SEXUAL ORIENTATION" IS NOT A REASONABLE OR DEFINABLE TERM.

"Sexual orientation" is inherently undefinable. What is the meaning of the word "orientation?" Is it purely subjective? Is it what is in a person's mind or does it require behavior? No one knows.

What is meant by "sexual orientation?" Some have the "orientation" or "behavior" of wanting or having more than one sexual partner. For centuries we have had (and still have) laws against bigamy and polygamy. Those laws are being challenged in some Western states. There are tens of thousands of polygamous marriages in those states that are not prosecuted. There are tens of millions of Americans who see nothing wrong with polygamy or adultery, either because of their religious or cultural background or their own personal desires. There are civil consequences for adultery, but adultery is not uncommon and is much more common than homosexual acts.

Domination and submission are certainly sexual orientations. My opinion is that these are not character traits that are appropriate for attorneys. Yet the Ethics Committee tells us that those so oriented have to be hired and that attorneys who disagree are unethical.

How would special rights for those claiming "sexual orientation" work? Extra scrutiny for discrimination on the basis of "sexual orientation" would mean that a job applicant who states to his or her prospective employer or current employer that he or she has a polygamous marriage or is in a polygamous or adulterous living situation, or wishes to have multiple sexual

partners, (either serially or in a ménage à trois) would have extra special rights to be hired or to not be fired. If the desire (or behavior) to have multiple sexual partners is not a "sexual orientation" what could be?

There are many good reasons why an attorney might not want to employ a person whose "sexual orientation" is to polygamy or adultery (whether serially or concurrently.) The employer should have the right to make that decision. Similarly, an employee should have the right to choose to work only for those employers who do not hire those with such orientations. If not, objecting employees may find that they are soon consigned to a "hostile work environment," not excluding cases of bosses with "gender dysphoria" considered in the next section.

"GENDER IDENTITY" IS NOT A REASONABLE OR DEFINABLE TERM. President Obama's Departments of Justice and Education proved that advocates of this concept of "gender identity" intend it to be purely subjective. While the Trump administration has withdrawn the Obama directive, that does not mean that the term now has an objective component. Just ask National Geographic. Or ask the Boy Scouts of America which now determines "sex" based on what is on an application rather than on biological reality. And Justice Gorsuch used this subjective meaning in Bostock.

In the case of *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), (first stayed and then vacated and remanded by the U.S. Supreme Court, March 2017) "gender identity" was the issue. On May 13, 2016, the United States Departments of Justice and Education had issued a joint letter to public schools nationwide, explaining a school's obligation under Title IX regarding transgender students and "gender identity."[3]

> "[g]ender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth...Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex...Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity." (*emphases added*).

"Gender Identity" is **purely subjective.** Only the individual determines whether "he," "she," "s(he)," or "they" is female or male on that day. And (s)he or "it" or "they" can identify with a different gender on the next day. And you would not be surprised that there are many more than two "genders." A sexually predatory "boss" can easily use this definitional loophole to create a legal (but hostile) work environment.

To see where this is headed, please see Facebook's policy on updating a user's gender identity on the user's profile page: *https://www.rt.com/usa/236283-facebook-gender-custom-choice/*. Facebook once offered 58 pre-populated options to choose from OR a user could create and type in the user's unique chosen "gender." That number will vary depending on the zeitgeist of the year.

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[3] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

Legal lines are more acceptable when drawn on the basis of benign and immutable characteristics - e.g., race, color, national origin, sex (biological) and disabilities. Religion is included as a suspect class because of its place in the First Amendment to the U.S. Constitution, Article I Section 13 of the NC Declaration of Rights, and the Religious Freedom Restoration Act, passed unanimously by Congress and signed by President Clinton.

If individuals are allowed to justify and demand acceptance of their behavior or orientation by self-determined "identity" claims, then law becomes unknowable and lawless.

Whatever the requirements placed on state or local government either by federal court decision or federal, state or local government laws and ordinances the simple fact is that attorneys in private practice are not the government. If the Bar tries to make private attorneys into government actors or as a place of public accommodation, then the rationale for self-regulation of the legal profession by the state bar eviscerates itself.

Whether this proposal is even legal under the First Amendment, or the NC Constitution's Declaration of Rights, I leave to others more knowledgeable. I don't think so. I am told that following the Supreme Court's recent decision in Nat'l Inst. v. Becerra, 138 S. Ct. 2361 (2018) even leading members of the ABA do not believe that Rule 8.4(g) is constitutional.

What does it mean to carve out an exception for a lawyer's advocacy but not for other actions of the lawyer? Perhaps I decide to hire a new associate. A person otherwise qualified (or even better qualified) makes a point of telling me that he is a pedophile by orientation but promises that he will never act on his sexual orientation nor has he in the past. He does, however, retain his membership in NAMBLA (North American Man/Boy Love Association). Am I obligated to hire this person while retaining my right to advocate for retention of laws against statutory rape and child abuse? Under this bar proposal the answer is yes. But my advocacy for the retention of laws against statutory rape would be seriously compromised. What credibility would I have if a member of my firm were on the other side of this debate?

Religion. We know what 'religion" is. Freedom of conscience is actually in our Constitutions. As it applies to law firms sufficient in size to be covered by Title VII it is already the law. I read this model rule for smaller firms as prohibiting employment decision based on religion. A Jewish firm could not prefer a Jewish employee. A Muslim hiring partner who did not hire a Jewish associate would surely find an ethical grievance in her mailbox. A self-identified Christian law firm could not recruit serious Christians. And an all Christian law firm could not prefer a Jewish attorney if it was trying to diversify. I seriously doubt that this would pass muster under existing constitutional law. But why does the ethics committee even think it is a good idea? Are small law firms really state actors or to be considered places of public accommodation?

Marital Status is problematic. Does it just mean whether a person is married or single? Or does it mean that my firm cannot reject a thrice divorced applicant with children by each marriage who, by age 35, has demonstrated an inability to keep his or her promises and the inability to play nicely with others.

Other Unintended Consequences. The proposed rule prohibits "discrimination" on various bases. Taken literally it would prohibit private law firms from affirmative actions to redress prior discrimination. The proposed Preamble would label as unethical such currently legal (Code of Judicial Conduct Canon 7B(2)) and understandable actions as that of the Chief Justice's August 12 endorsement of Kamala Harris. A reasonable person would conclude that racial identity was important to her endorsement. And Senator Jay Chaudhuri endorsed Senator Harris on the basis of national origin. I do not believe either endorsement was unethical. But this Preamble would make it so. Imagine if a non-minority attorney asked others to vote for a candidate, citing as a reason the candidate's non-minority status.

Discrimination and harassment. The ABA proposal goes beyond discrimination and includes a prohibition of "harassment." I trust you will not include that term. In the "cancel culture" we have people being sued for harassment because of such offenses as not using desired pronouns. Sensitivities abound. Allegations of harassment are limitless.

Sincerely yours,

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Letters: Willoughby, Hon. Colon