

August 16, 2021

The Honorable Justices of the Supreme Court of North Carolina
c/o Clerk's Office
P.O. Box 1841
Raleigh, NC 27602

Re: Proposed Changes to the Preamble to the Rules of Professional Conduct

We urge the North Carolina Supreme Court to reject the Proposed Changes to the Preamble. The Proposed Changes to the Preamble have good intentions. They try to target racism and sexism. But good intentions do not guarantee good results.

The Proposed Changes may seem to help the disadvantaged. But in seeking to eliminate all harmful discrimination, they do collateral damage to good discrimination. Positive discrimination is the basis of many pro bono programs. The Proposed Changes likewise imply that attorneys who disagree about highly contested political and moral issues are unprofessional. They do this because they misunderstand the importance of legal equality and the difference between equality and justice. This Court should reject the Proposed Changes.

I. The Proposed Changes Are Too Broad and Prevent Good Discrimination.

The Proposed Changes encourage lawyers to “treat[] all persons the lawyer encounters in a professional capacity . . . equally.” Discrimination in favor of the poor and disadvantaged is different from discrimination against racial minorities. Discrimination in favor of the disadvantaged is different from discrimination

against the disadvantaged. The Proposed Changes do not recognize this distinction and threaten lawyers' ability to do justice. This alone should be enough reason for the Court to reject the Proposed Changes to the Preamble.

Lawyers should discriminate in certain situations. Though it may seem counter-intuitive, the Preamble already encourages good discrimination. Section 9 of the Preamble recognizes lawyers' "basic responsibility" to "provid[e] legal services for those unable to pay." It also encourages us "find time to participate in, or otherwise support, the provision of legal services to the disadvantaged."

Helping the disadvantaged is good and our profession should encourage it. But how do we know who is disadvantaged? The ability to pay reflects socioeconomic status. Refugees are defined in part by their national origin. We cannot defend religious minorities if we do not look at our clients' religion. Many of us believe we have unique duties to the destitute, the strangers in a strange land, the widows, and the orphans.

The Proposed Changes to the Preamble may actually harm the disadvantaged. A lawyer who does pro bono work for a poor client does not treat that client equally—and she should not. The existing Preamble recognizes that some discrimination is good. We should not always treat the millionaire and the pauper equally. We should not always treat the citizen and the foreigner equally.

More practically, not every lawyer can help every disadvantaged client he encounters. A lawyer's own financial condition and physical and mental health may limit a lawyer's ability to help disadvantaged clients. In that case, a lawyer may

turn away a poor client but welcome a rich client—only so the lawyer can put food on his own table. This lawyer discriminates too. But has this lawyer done wrong?

Because they are too broad, the Proposed Changes threaten the practical and ideal reality of practicing law. Lawyers should be free to choose to help disadvantaged clients when they can. But lawyers should also be free to decline to represent disadvantaged clients when they cannot help them. The Proposed Changes deny both sides of this and impede lawyers' ability to earn a living and to do justice.

II. The Proposed Changes Imply Lawyers with Reasonable and Sincere Disagreements About Moral, Religious, and Political Issues are Unprofessional.

Attorneys have a duty to do justice. The injustices we see reflect our moral, religious, and political beliefs. Attorneys can and do differ in their moral, religious, and political beliefs. The Proposed Changes to the Preamble imply attorneys who dissent from beliefs about sexual orientation or gender identity are unprofessional. This discourages the very reasonable and sincere disagreement the Bar should promote so lawyers may better do justice.

The Rules define professionalism for attorneys. The Preamble tells us the sort of person a lawyer should aspire to be. The Preamble uses the word “should” twenty-three times. It defines lawyers' “relationship to our legal system.” It tells lawyers how they should practice, not how they must practice. And it tells us why we practice. We are “a group of people united in a learned calling for the public good.”

Because professionalism is not partisan, the Preamble is no place for partisan division. The Preamble should separate unprofessional lawyers from professional lawyers. And lawyers who deny others' dignity are unprofessional. But lawyers can—and do—sincerely disagree about complex moral and political questions. A professional lawyer may believe the State should offer more aid to the poor. Or she may believe more State aid will not relieve poverty. A professional lawyer may believe laws criminalizing abortion will not affect abortion rates. Or he may believe abortion is wrong and should not be legal.

The same is true here. “Reasonable and sincere” attorneys can disagree “in good faith” on categories like sexual orientation or gender identity and still be professional. *See, Obergefell v. Hodges*, 576 U.S. 644, 657 (2015). The Preamble should not, explicitly or implicitly, say that these lawyers are unprofessional because of their disagreement. We urge the Court to reject this proposal.

III. The Proposed Changes Threaten Legal Equality by Relying on Changing, Contested Categories.

The Proposed Changes are too broad, in part, because they depend on changing categories. The Proposed Changes began broadly and without explaining when discrimination may be wrong:

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 it limit the prerogative of a lawyer to accept, decline, or withdraw from a representation in accordance with these rules.

About two weeks after a subcommittee meeting considering this language, I (R. Daniel Gibson) emailed the Ethics' Committee's counsel suggesting language I believe the Ethics Committee and the Bar tried to incorporate in the Proposed Changes to the Preamble:

Our legal system is built on the premise that "all [people] are created equal, that they are endowed by their Creator with certain unalienable Rights." This means all people have inherent dignity and worth, regardless of individual characteristics. Refusing others this dignity harms the practice of law and undermines the premises of our legal system. Attorneys should strive to recognize and promote this dignity in their clients, their employees, other members of the bar, court personnel, and judges.

But the Proposed Changes altered this language:

The North Carolina Constitution requires that "right and justice shall be administered without favor, denial, or delay." Public confidence in the justice system is strengthened when all participants are treated equally, fairly, honestly, and respectfully within the system. A lawyer, as a representative of and crucial contributor to the justice system, should foster public confidence in the administration of justice by treating all persons the lawyer encounters in a professional capacity equally, courteously, respectfully, and with dignity regardless of a person's race, sex, national origin, religion, age, disability, sexual orientation, gender identity, marital status, or socioeconomic status.

That alteration undermines the suggestion's foundation.

The foundational question here is: when is discrimination wrong? If discrimination is wrong when it hurts the disadvantaged, then discrimination will change depending on who is disadvantaged and has no precise definition. If it is

wrong when the Constitution or the law or the Bar say so, then discrimination is whatever they say it is. We reject both answers.

Discrimination is wrong when it rejects the dignity we all share. Our humanity gives us dignity. That is the principle our nation expounded when it declared its independence. “All men are created equal” and “endowed by their Creator with certain unalienable rights.” Our dignity does not flow from our social status, our race, our political affiliation, or our religion. Our dignity flows from our humanity. Our dignity is as common as our humanity.

Denying someone dignity because of their individual characteristics ultimately denies the equal humanity of those with those characteristics. We agree that our nation and our society have focused their discrimination on different groups at different times. We understand why those who are members of these groups would want to see their groups specifically called out. It highlights the discrimination they have faced and the need for change. But grounding our legal equality in our humanity *is* the solution to harmful discrimination.

The Rules of Professional Conduct are not for one group or one time. The Rules are for all lawyers. The Rules are for the lawyers of today and the lawyers of tomorrow. So the Rules should be grounded in universal principles that will be true today and tomorrow. The Preamble must make clear that discrimination is wrong when it denies the dignity that is our inheritance as humans.

By listing contested and changing categories, the Proposed Changes threaten legal equality. For example, gender’s meaning has changed dramatically in the last

half-century. For centuries, gender described parts of speech. Amicus is a masculine gendered Latin noun. Proponents of gender identity argue gender is a social construct that may express biological sex but is independent of biological sex. At the earliest, this use of gender dates to John Money's 1972 book *Man & Woman, Boy & Girl*. Many contest this usage of gender.

To guide attorneys, the Rules of Professional Conduct must be clear. The meaning of sexual orientation and gender identity is in flux and unclear. These terms cannot clearly guide attorneys today and tomorrow. The law should transcend changing, contested categories when defining rights and duties.

Recognizing equal dignity reinforces the type of positive discrimination at work when lawyers take on pro bono clients. On their faces, the two may seem contradictory. Equal humanity suggests treating everyone equally. Justice and positive discrimination suggest treating everyone based on their circumstances. How do these two not contradict?

Equality is a universal principle. Justice always examines particular circumstances. Every day judges apply the law to particular facts. The law is the same regardless of the facts—this is equality. But judges must apply the law to the facts—this is justice.

We oppose all threats to legal equality. Our nation has fought vigorously for legal equality. That equality is as precarious as it is precious. Laws favoring certain people over others threaten the precious legal equality our nation has fought so hard for.

The Proposed Changes misunderstand both the law and the facts of equality and justice. They encourage lawyers to treat all people equally—even when they are not in equal circumstances. Then they fail to base our equality in our humanity. Every person has the same legal rights because every person is human. But we should not treat every person equally because every person is different. We should treat all people with dignity, but we should not treat all people equally. Grounding our legal equality in our humanity *is* the solution to improper discrimination. The Preamble should make that clear without undermining proper discrimination. We urge you to reject the Proposed Changes.

Thank you for your consideration,

/s/ R. Daniel Gibson
R. Daniel Gibson
N.C. State Bar No. 49222

I certify that the lawyers below have authorized me to list their names on this document as if they had personally signed it.

/s/ Kevin Altman
Kevin Altman
N.C. State Bar No. 34740

/s/ Deborah J. Dewart
Deborah J. Dewart
N.C. State Bar No. 30602

/s/ Joshua O. Harper
Joshua O. Harper
N.C. State Bar No. 50757

/s/ Aaron D. Lindquist
Aaron D. Lindquist

N.C. State Bar No. 49347

/s/ Doug McClanahan

Doug McClanahan

N.C. State Bar No. 22192

/s/ J. Edward Naylor

J. Edward Naylor

N.C. State Bar No. 18359

/s/ Andy Norman

Andy Norman

N.C. State Bar No. 51838

/s/ N. T. Oakley

N. T. Oakley

N.C. State Bar No. 39951

/s/ Ernest C. Pearson

Ernest C. Pearson

N.C. State Bar No. 6807

/s/ Robert D. Potter, Jr

Robert D. Potter, Jr

N.C. State Bar No. 17553

/s/ David S. Robinson

David S. Robinson

N.C. State Bar No. 17582

/s/ Robert L. Schupp

Robert L. Schupp

N.C. State Bar No. 46384

/s/ Mary Potter Summa

Mary Potter Summa

NC Bar #12520

/s/ Robinson Williams

Robinson Williams

N.C. State Bar No. 49621