Friends:

I write to express my objection to the proposed amendments to Model Rule 8.4. I understand the Committee wishes to acknowledge new scholarship and criticisms of traditional views of gender, sexuality, socioeconomics, and marriage. However, the Committee's approach elevates a (cloistered and limited) view, holding that none of these differences can ever matter outside representation. It weaponizes the ethics rules against reasonable accommodations, to the detriment of the groups it claims to protect.

The Committee's proposal is drafted as if a minimally professional lawyer will always avoid conduct that will "result in a person or persons being treated in a different and harmful way...." The rule allows lawyers to recognize and accommodate differences in the course of *representation*, but prohibits any different treatment in other "conduct related to the practice of law" not arising out of representation.

Yet there is a reason our clients sometimes require advocacy on these issues within our representation: there can be actual differences implicated by these distinctions.

I am reminded of Martha Minow's observation in *Making All the Difference*, that "impartiality is the guise that partiality takes to seal bias against exposure." The Committee's proposal imagines a world where impartial, ethical professionals do not have to reckon with the differences of other professionals. But that view is only possible among those who insulate themselves against exposure to the real world, and have no strong identity in, or understanding of, the various differences among these groups.

Ethics and justice require the hard work of determining when differences matter. It is one thing to suggest that some lawyers continue to harbor unfair bias against members of the listed groups, and to prevent expression of those biases in ways that unfairly impact the administration of justice. It is quite another thing to encourage ethics complaints against lawyers who, among their fellow professionals, act in good faith where they believe the differences actually matter. Other lawyers may analyze and criticize decisions by fellow professionals as insufficient or even wrong. But the ABA's model rules are not discussion starters. They are the third rail of the profession, and lawyers will seek to avoid any allegation of different treatment at all costs. Thus, firms will organize to elevate those who claim to see no differences among these groups, and strive mightily to make sure no differences ever arise.

That does no service to those who are different.

As Professor Volokh has pointed out, the rule appears to prevent any screening based on education (a marker of socioeconomic status), which surely cannot be the intent of a professional body. But it also appears to apply to any act that results in different treatment of any of the groups. So what about an affirmative action program? Can law firms express support of any minority bar association? What about a maternity leave policy, or special networking events for women? What about a special accommodation for lawyers who have a non-traditional Sabbath obligation, while still requiring other lawyers to work? Should the law firm grant or oppose a request a religion-based request for firm dinners without alcohol? In each case, there can be perfectly legal and reasonable accommodations of difference. And those outside the accommodation can often argue that a different treatment is "harmful." The Committee's proposal appears to put all these accommodations outside the bounds of the profession.

I remain committed to the kind of pluralism that allows peace and cooperation despite differences, even minimizing differences, without erasing those differences. Others have pointed out the difficulty of determining how, exactly, the new and fluid criticisms of gender and sex really apply, and whether they are amenable to the same rules as race or national origin. But the largest error, in my view, is the Committee's view that "discrimination" -- defined merely as treating things differently -- is unethical, even where there are differences. This elevates those who see no differences, to the detriment of the profession, its minority members, and the public.

While I have experienced my share of ribald and offensive firm functions, this proposal's bad effects will outweigh the good. I would respectfully ask the Committee to withdraw its proposal.

Sincerely,

Jonathan R. Whitehead