

**10. Amendment of Oregon Rule of Professional Conduct 8.4  
(Board of Governors Resolution No. 3)**

*Whereas*, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

*Whereas*, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

*Resolved*, That the amendment of Oregon Rule of Professional Conduct 8.4 as set forth below is approved and will be submitted to the Oregon Supreme Court for adoption:

**RULE 8.4  
MISCONDUCT**

- (a) It is professional misconduct for a lawyer to:
- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
  - (4) engage in conduct that is prejudicial to the administration of justice;
  - (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; [or]
  - (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
  - (7) in the course of representing a client, knowingly engage in conduct that manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.**
- (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or

constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

**(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16**

*Presenter: Ethan Knight  
BOG, Region 5*

**Background**

At its April 2011 meeting, in response to a request from the Oregon Women Lawyers, the Board of Governors directed the Legal Ethics Committee ("LEC") to establish a special subcommittee, including representatives from OWLS, specialty bars and other stakeholders (collectively "stakeholders"), to evaluate whether discrimination, intimidation and harassment are adequately addressed in the Oregon Rules of Professional Conduct. The LEC established the group and designated it Task Force on Discipline for Harassment, Discrimination and Intimidation ("HDI Task Force").

At the September 2011 BOG meeting, the HDI Task Force submitted a recommendation and a proposed amendment to RPC 8.4 to the BOG. The Board voted unanimously to accept the task force conclusion that the RPCs should prohibit discrimination, intimidation and harassment in the practice of law. However, because the LEC itself had not had an opportunity to fully study the proposed rule, and in a preliminary vote was evenly divided on the issues of whether a rule change was appropriate and on the language of the proposed rule, the Board decided to send the matter back to the LEC for further study.

After another year of consideration including efforts to draft a formal ethics opinion, and meeting with

stakeholders, the LEC ultimately concurred with the HDI Task Force conclusion that a rule change is necessary and appropriate. Oregon is one of a minority of states that does not have either a rule or commentary that specifically prohibits lawyers from engaging in harassment, discrimination or intimidation in the practice of law. The LEC believes the time has come for Oregon to join the majority in expressly prohibiting harassment, discrimination and intimidation by lawyers in the practice of law.

In deciding what form an amendment to the rules should take, the LEC reviewed the HDI Task Force report and the rules and commentary from other jurisdictions. Using the amendment to RPC 8.4 proposed by the HDI Task Force as its starting point, the LEC's primary points of discussion were: what protected classes of individuals should be included in the new rule; what level of intent should be required (knowing or negligent); and whether the new rule should reach a lawyer's conduct only in the course of representing a client or include conduct when representing the lawyer's own interests.

On the question of what protected classes should be included in the rule, the LEC adopted the recommendations made by stakeholders, adding color, sex, gender identity, gender expression, and socioeconomic status to the list proposed by the HDI Task Force.<sup>1</sup>

There was significant debate around the issue of whether the level of intent required to violate the rule should be "knowing" or "negligent." The amendment proposed by the HDI Task Force included a "knowing" element; however, several LEC members expressed concern about the difficulty of proving that a lawyer "knowingly manifested" bias or prejudice. Moreover, civil rights laws do not require a showing of intent to prove discrimination. The LEC settled on what it believes is a fair compromise: the rule requires evidence that a lawyer *knowingly engaged in conduct* that manifests bias or prejudice, as opposed to evidence that the lawyer *knowingly manifested bias or prejudice*. Accordingly, a violation would occur, when a lawyer knowingly makes a racial slur, regardless of whether the lawyer intended to manifest bias or prejudice by such conduct.

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<sup>1</sup> The addition of sex, gender identity and gender expression was based on the U.S. Department of Education Office for Civil Rights guidance relating to Title IX.

The LEC also spent considerable time discussing whether the new rule should reach conduct "in the course of representing a client or the lawyer's own interests" or only conduct "in the course of representing a client." Some felt strongly that the rules of professional conduct should not be used to dictate a lawyer's personal conduct or to enforce laws that prohibit employment discrimination, and expressed concern that including "the lawyer's own interests" would open those doors. While mindful of those issues, others were concerned that omitting "the lawyer's own interests" would allow a lawyer to engage in offensive conduct in the course of pursuing his or her own personal legal matters. The proposed rule applies only "in the course of representing a client." Overriding all discussions was the desire to ensure that some form of an amendment to RPC 8.4 be approved by the House of Delegates. Thus, while the proposed new language may not be the preferred version for everyone, compromises were made by many in order to create a rule that would demonstrate the bar's intolerance for conduct that manifests bias or prejudice, be enforceable, and be acceptable to the majority of the membership. The BOG acknowledges and is grateful for the stakeholders' contributions to the work of the LEC in developing this proposed amendment.