

**Oregon State Bar  
Special Meeting of the Board of Governors  
September 23, 2011  
Minutes**

The meeting was called to order by President Steve Pucci at 10:00 a.m. on September 23, 2011, and adjourned at 11:10 a.m. Members present from the Board of Governors were Jenifer Billman, Barbara Dilaconi, Hunter Emerick, Ann Fisher, Michelle Garcia, Michael Haglund, Gina Johnnie, Matthew Kehoe, Ethan Knight, Tom Kranovich, Steve Larson, Audrey Matsumonji, Kenneth Mitchell-Phillips, Mitzi Naucler, Maureen O'Connor and David Wade. Staff present were Sylvia Stevens, Helen Hierschbiel, Rod Wegener, Kay Pulju, Judith Baker, Susan Grabe, Mariann Hyland and Camille Greene. Also present was Robert G. Burt, representing the Legal Ethics Committee.

**1. Approval of 2011 House of Delegates Agenda**

Mr. Pucci presented the draft 2011 HOD Agenda.

**Motion:** Ms. Fisher moved, Mr. Haglund seconded, and the board voted unanimously to approve the 2011 HOD Preliminary Agenda.

Mr. Pucci then asked the board to determine whether it wishes to take a position on the various delegate resolutions.

**HOD Agenda Item #12:**

**Motion:** Ms. Naucler moved, Ms. Fisher seconded, and the board voted unanimously to not take a position on HOD agenda item #12 re: Support for Judicial Department Budget Funding.

**HOD Agenda Item #13:**

**Motion:** Mr. Haglund moved, Mr. Wade seconded, and the board voted unanimously to support HOD agenda item #13 re: Support of Adequate Funding for Legal Services to Low-Income Oregonians. Ms. Naucler abstained.

**HOD Agenda Item #15:**

**Motion:** Mr. Kranovich moved, Mr. Mitchell-Phillips seconded, and the board voted unanimously to not take a position on HOD agenda item #15 re: Amendment to Oregon Rule of Civil Procedure 42.

**HOD Agenda Item #16:**

**Motion:** Mr. Wade moved, Mr. Kehoe seconded, and the board voted unanimously to oppose HOD agenda item #16 re: Increasing LRS Initial Consultation Fee. Ms. Fisher abstained.

## **2. Task Force On Discipline For Discrimination, Intimidation & Harassment**

Mr. Burt presented the task force report and recommendation that the BOG adopt a resolution for an amendment to RPC 8.4. Mr. Burt also pointed out that the Legal Ethics Committee has not had time for a thorough review of the task force's proposed rule and was, on a preliminary vote, evenly divided about the need for a rule and the language any amendment should take. Ms. Stevens reminded the BOG that OWLs would like Mr. Piucci to announce the board's action at the COE. Note: the minutes' exhibit is an updated version of Mr. Burt's letter. **[Exhibit A]**

**Motion:** Mr. Wade moved, Mr. Kranovich seconded, and the board voted unanimously to accept the task force conclusion that the rules should prohibit discrimination, intimidation and harassment in the practice of law and to send the matter back to the Legal Ethics Committee to study whether the best approach is a rule change or a formal opinion to clarify that such conduct is prohibited.

## **3. Formation of Non-Profit Law Section**

Ms. Naucler presented the proposal to form a Nonprofit Organizations Law Section.

**Motion:** The board voted unanimously to approve the P&G committee's motion to create a Nonprofit Organizations Law Section.

## **4. CEJ Request for Co-Sponsorship**

Ms. Stevens presented the CEJ request for the OSB to co-sponsor a trophy awarded annually to the region of the state that has the largest percentage increase in the number of CEJ donors.

**Motion:** Ms. O'Connor moved, Mr. Knight seconded, and the board voted unanimously to approve OSB co-sponsorship of the CEJ annual award.

## **5. Good of the Order (Non-action comments, information and notice of need for possible future board action)**

None.

# ROBERT G. BURT, P.C.

ATTORNEYS

THE 1515 BUILDING; SUITE 600  
1515 S.W. FIFTH AVENUE  
PORTLAND, OREGON 97201-5449  
TELEPHONE: (503) 223-3600

FAX: (503) 274-0778  
EMAIL: [rgb@BURTFIRM.COM](mailto:rgb@BURTFIRM.COM)

IN REPLY PLEASE REFER  
TO FILE NO: 1000-LEC

September 21, 2011

Stephen V. Piucci  
President  
OREGON STATE BAR  
Oregon State Bar Center  
P.O. Box 231935  
Tigard, Oregon 97281-1935

Re: OSB Legal Ethics Committee Task Force Review of Oregon Rules of Professional Conduct to Address the Issue of Discrimination, Intimidation, and/or Harassment In Legal Proceedings

Dear Mr. Piucci:

This is in response to a request by the OSB Board of Governors ("BOG") that the OSB Legal Ethics Committee ("LEC") review a March 18, 2011, letter from Oregon Women Lawyers ("OWLS") concerning the amendment of existing Oregon Rules of Professional Conduct ("RPCs") to "adequately address the issue of harassment in legal proceedings." The letter included endorsements by the Oregon Chapter of the National Bar Association, the Oregon Minority Lawyers Association, and the Oregon Asia Pacific American Bar Association.

In response to the BOG's request, the LEC formed a Task Force ("TF") to evaluate the OWLS' request. This letter is the TF's evaluation of the issues raised by OWLS' letter.

## I. BACKGROUND

OWLS' letter was prompted by an ethics complaint filed by a Portland lawyer against another Portland attorney for discrimination, intimidation, and/or harassment ("Levy Matter"). The complaint arose from a March 4, 2010, incident at a downtown Portland law firm party. The female victim complained about being groped and subjected to sexually-charged statements by Jack Levy. In the victim's complaint, she stated that she believed Levy's conduct was a "strategic maneuver" to unsettle her on the night before she and Levy would be meeting at her client's property on a pending construction defect case (the victim represented the property owner, and Levy represented the property developer). The victim subsequently filed a complaint against Levy with the Portland Police Department. On July 2, 2010, Levy pleaded guilty in Multnomah County Circuit Court to a violation of ORS 166.065(1)(a)(A) (a class A misdemeanor for intentionally harassing or annoying another by subjecting that person to offensive physical contact that consists of touching the sexual or other intimate parts on the person). Levy was sentenced to two

# ROBERT G. BURT, P.C.

ATTORNEYS

Stephen V. Piucci  
President  
OREGON STATE BAR  
September 21, 2011  
Page 2

years probation, and was ordered to: write a letter of apology to the victim; stay away from the victim; and attend a class on gender issues and professionalism. On February 24, 2011,

the Oregon Supreme Court's Disciplinary Board approved a stipulation for Levy's discipline, whereby he was publicly reprimanded for violating ORS 9.527(2)(for conviction of a misdemeanor involving moral turpitude)(see, attached copy of ORS 9.527).

While the Levy Matter was pending, OWLS formed a committee to consider whether the existing RPCs adequately address the issue of discrimination, intimidation, and/or harassment by a lawyer in legal proceedings. OWLS' March 18, 2011, letter to the BOG stated (page 1):

Regardless of the outcome of the pending complaint, OWLS believes there is significant gap in the RPCs because they do not directly address discrimination, intimidation and/or harassment. Specifically, OWLS strongly believes discrimination, intimidation and/or harassment by a licensed attorney against any other person involved in a legal proceeding or legal matter in which the attorney is involved should be ethically prohibited by the RPCs. Further, any new or amended rule regarding discrimination, intimidation and/or harassment should prohibit such conduct not only on the basis of gender, but also on the basis of race, ethnicity, sexual orientation, and disability.

## II. ADEQUACY OF EXISTING RPCs

OWLS' letter concluded that "there is a significant gap in the RPCs because they do not directly address discrimination, intimidation and/or harassment." That "significant gap," from OWLS' perspective, results in:

(a) The OSB Client Assistance Office and the OSB Disciplinary Counsel's Office not considering sexual and other forms of harassment as constituting violations of the RPCs or ORS 9.527 without an accompanying criminal conviction; and

(b) The OSB not keeping pace with other state bars (or with the Oregon Department of Justice or leading Oregon law firms) in advancing a stated policy against discrimination, intimidation, and/or harassment by an attorney towards others involved in the legal process.

OWLS incorrectly states the position of both the OSB Client Assistance Office and the OSB Disciplinary Counsel's Office – a criminal conviction of harassment is not treated by either as a prerequisite for either initiating an investigation or proceeding with a disciplinary action. With the possible exception of the Levy Matter, OWLS' letter does not

# ROBERT G. BURT, P.C.

ATTORNEYS

Stephen V. Piucci  
President  
OREGON STATE BAR  
September 21, 2011  
Page 3

identify specific instances in which the OSB Client Assistance Office or the OSB Disciplinary Counsel's Office required a criminal conviction of sexual and other form of harassment as a prerequisite to pursuing a violation of the RPCs or ORS 9.527 on those grounds (see, subparagraph (a), above). The OSB Client Assistance Office's initial processing of the victim's telephone call in the Levy Matter may have left the victim with a misinterpretation of the OSB Client Assistance Office's intake policy on complaints. The

occurrence appears to have been an isolated incident, and did not ultimately result in a failure to investigate to Levy's conduct -- or in a failure to sanction Levy. The TF's inquiry has not produced another specific occurrence like the victim's experience with the OSB Client Assistance Office. Levy's conduct was unquestionably unprofessional, boorish, and rude -- and was ultimately determined to have been both criminal and a violation of ORS 9.527; however, such conduct might have been found (even in the absence of the victim filing a police report, and Levy pleading guilty to a class A misdemeanor) to have violated the following existing RPCs and Oregon statute:

## RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

## RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

\* \* \*

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

\* \* \*

(4) engage in conduct that is prejudicial to the administration of justice;

\* \* \*

**9.527 Grounds for disbarment, suspension or reprimand.** The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

(1) The member has committed an act or carried on a course of conduct of such nature that, if the member were applying for admission to the bar, the application should be denied:

# ROBERT G. BURT, P.C.

ATTORNEYS

Stephen V. Piucci  
President  
OREGON STATE BAR  
September 21, 2011  
Page 4

\* \* \* \* \*

(4) The member is guilty of willful deceit or misconduct in the legal profession:

With the exception of ensuring that the OSB Client Assistance Office is appropriately sensitive to inquiries concerning harassment, the TF believes that the circumstances surrounding the victim's contact with the OSB Client Assistance Office is a case of "no harm, no foul." After a rough start, the process ultimately worked as it should have. The existing RPCs and ORS 9.527 provide bases upon which to address lawyer

conduct involving discrimination, intimidation, and/or harassment in a legal proceeding. In the absence of other considerations (see, Part II, below), the TF believes that there may not be a need to amend the existing RPCs.

### III. AMENDMENT OF EXISTING RPCs

OWLS' letter observes "that many jurisdictions have a rule or combination of rules in effect that address intimidation and harassment" (see, subparagraph (b), above). OWLS' observation is correct. Many other state bars (as well as the American Bar Association) address the issue of discrimination, intimidation, and/or harassment in their functional equivalents of RPC 4.4 and/or RPC 8.4. The TF's review indicates that, with varying degrees of specificity, 29 other state bars have a rule that proscribe discrimination, intimidation, and/or harassment – in fact, 6 of those other state bar's rules specifically proscribe sexual harassment itself.<sup>1/</sup>

### IV. CONCLUSION

Although RPC 4.4(a), RPC 8.4(a)(2) or (4), and ORS 9.527 provide potential bases to address discrimination, intimidation, and/or harassment by lawyers in legal proceedings, the TF agrees with OWLS -- that it is in the interests of the OSB and its members to now amend RPC 8.4 to advance, in a specific manner, a policy against lawyers knowingly manifesting, by words or conduct, in the course of representing a client or the lawyer's own interests, bias or prejudice based upon race, religion, age, gender, sexual orientation, national origin, marital status, or disability. Toward that end, the TF has prepared, and by this letter recommends that the Board of Governors adopt a resolution for, an amended RPC 8.4 to implement such a specific policy by the OSB and its members. I have attached the TF's recommended amended RPC 8.4.<sup>2/</sup>

---

<sup>1/</sup> They include the state bars for: Iowa (Rule 32:8.4); Maryland (Rule 8.4); Minnesota (Rule 8.4); Missouri (Rule 4-8.4); New Jersey (RPC 8.4); and Wisconsin (SRC 20:8.4)

<sup>2/</sup> On October 14, 2011, OWLS is sponsoring a conference in Portland – "Diverse Perspectives Bringing the Legal Profession into the 21st Century." The conference's keynote speaker will be Professor Anita Hill. Although an amendment of RPC 8.4 cannot be accomplished by the conference's date, it would be a fine gesture from the OSB and its members if Professor Hill could, in her presentation at the conference, announce that she has learned that the OSB has joined six other state bars in adopting an RPC that states a policy against discrimination, intimidation, and/or harassment (including a specific policy against sexual harassment)

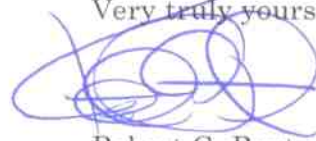
**ROBERT G. BURT, P.C.**

*ATTORNEYS*

Stephen V. Piucci  
President  
OREGON STATE BAR  
September 21, 2011  
Page 5

If you have any questions concerning the above, please do not hesitate to contact me.

Very truly yours,



Robert G. Burt  
Task Force Chair

RGB/mgp  
Enclosures: as

## OREGON REVISED STATUTES

**9.527 Grounds for disbarment, suspension or reprimand.** The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

- (1) The member has committed an act or carried on a course of conduct of such nature that, if the member were applying for admission to the bar, the application should be denied;
- (2) The member has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of the conviction shall be conclusive evidence;
- (3) The member has willfully disobeyed an order of a court requiring the member to do or forbear an act connected with the legal profession;
- (4) The member is guilty of willful deceit or misconduct in the legal profession;
- (5) The member is guilty of willful violation of any of the provisions of ORS 9.460 or 9.510;
- (6) The member is guilty of gross or repeated negligence or incompetence in the practice of law; or
- (7) The member has violated any of the provisions of the rules of professional conduct adopted pursuant to ORS 9.490. [Formerly 9.480; 1989 c.1052 §11]



# OREGON RULES OF PROFESSIONAL CONDUCT

## 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;

(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) knowingly manifest by words or conduct, in the course of representing a client or the lawyer's own interests, bias or prejudice based upon race, religion, age, gender, sexual orientation, national origin, marital status, or disability.*

(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 declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16, or from engaging in legitimate advocacy with respect to the bases set forth therein.*