

GR 9 COVER SHEET

Proposed Amendment

Rules of Professional Conduct (RPC)

RPC 8.4 (f)

MISCONDUCT

(1) Background. The Washington State Bar Association Committee on Opportunities for Minorities in the Legal Profession and the Washington Women Lawyers proposed the adoption of a disciplinary rule making it professional misconduct for a lawyer to engage in discriminatory acts or harassment in connection with the lawyer's professional activities. The Board of Governors approved that rule proposal in principle and referred it to the Rules of Professional Conduct Committee for comment. The Committee returned to the Board with a modified rule which they recommended be proposed to the Court as an amendment to RPC 8.4, Misconduct. The Board of Governors approved the Committee's proposal and recommends the adoption of this amendment to RPC 8.4.

(2) Purpose. The Office of the Administrator for the Courts prepared the Final Report of the Washington State Task Force on Gender and Justice in the Courts (1989), and the Washington State Minority and Justice Task Force Final Report (1990). Similarly, the Washington State Bar Association prepared the Report of the Task Force on Opportunities for Minorities in the Legal Profession (1990). Those reports all document the extent and effects of stereotyping and bias within the legal community.

The Board of Governors of the Washington State Bar Association

believes that it should be impermissible for a lawyer, in connection with the lawyer's professional activities, to engage in unlawful discrimination or acts of harassment based upon a person's sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. Similar disciplinary rules have been adopted in Florida, Michigan, New Jersey, Vermont, Rhode Island, and Minnesota.

Adoption of this rule amendment, or a rule of this nature, is supported by the National Asian Pacific American Bar Association, the Northwest Indian Bar Association, the Minority Lawyers of Eastern Washington, the Loren Miller Bar Association, the Asian American Bar Association, the Northwest Women's Law Center, the Board of Governors of the American Trial Lawyers Association, the Board of Directors of the Washington State Trial Lawyers Association, the Board of Trustees of the Seattle-King County Bar Association, the Clark County Young Lawyers Division, Dean Jim Bond of the University of Puget Sound School of Law, as well as the Washington State Bar Association Committee on Opportunities for Minorities in the Legal Profession and the Washington Women Lawyers. One lawyer wrote in opposition to a rule similar to this proposal.

In addition, there were two letters in opposition to the amendment as originally proposed. In the original proposal, the rule would have prohibited "invidious discrimination" rather than "a discriminatory act prohibited by law", and it included a list of acts defined as "invidious discrimination or harassment". Those

were opposed as being overly broad, vague, and of questionable constitutionality. The Board of Governors unanimously agreed not to include a list of prohibited acts at the time it approved the rule in principle, and it agreed with the comments of the Rules of Professional Conduct Committee recommending the current proposed rule language rather than "invidious discrimination".

(3) Washington State Bar Association Action. After initially approving in principle the adoption of this rule, the Board of Governors referred it to the WSBA Rules of Professional Conduct Committee. The Committee recommended some changes in the rule as originally proposed. On March 28, 1992, the Board of Governors, with one abstention, adopted the proposed amendment to RPC 8.4 and recommends its approval by the Court.

(4) Supporting Material. The following material was submitted to the Board of Governors in support of this amendment:

(a) Proposed amendment to RPC 8.4.

(b) Memorandum to the Board of Governors dated March 16, 1992.

(c) Report of the Subcommittee WSBA Rules of Professional Conduct Committee.

(d) Letter to Board of Governors from Kristin H. Stred, Washington Women Lawyers, dated March 20, 1992, with enclosures including "Bias in the Washington Courts: A Call for Reform" (draft).

(e) Letter to Board of Governors from Kristin H. Stred, Washington Women Lawyers, dated March 6, 1992, with enclosures.

(f) Letter to Board of Governors from Peter Greenfield, Seattle-King County Bar Association, dated March 24, 1992.

(g) Letter to Rules of Professional Conduct Committee from Richard B. Sanders, dated October 23, 1991.

(h) Proposal to Amend the Code of Professional Responsibility (original proposal to the Board of Governors).

(i) Letter to Dennis Harwick from Judith E. Bendich dated August 20, 1991.

(j) Letter to Board of Governors from Fred M. Zeder dated August 20, 1991.

5. Spokespersons: Allan H. Baris, Chairperson, Rules of Professional Conduct Committee, 710 9th Ave., Seattle, Washington 98104; Robert D. Welden, General Counsel, Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington 98121.

6. Hearing: A hearing is not recommended.



# WASHINGTON STATE BAR ASSOCIATION

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ROBERT D. WELDEN  
GENERAL COUNSEL

TO: The President and the Board of Governors  
FROM: Robert D. Welden, General Counsel  
DATE: March 16, 1992  
RE: PROPOSED RPC AMENDMENT ON DISCRIMINATION AND HARASSMENT

## RECOMMENDATION:

The Rules of Professional Conduct Committee recommends that the Board of Governors approve the following amendment to RPC 8.4 and recommend its adoption to the Supreme Court:

### RPC 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

\* \* \*

(g) commit a discriminatory act prohibited by law or harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination or harassment is committed in connection with the lawyer's professional activities.

## PROCEDURAL BACKGROUND:

This proposed rule amendment originated with the WSBA Opportunities for Minorities in the Legal Profession Committee and the Washington Women Lawyers. They presented a proposed amendment to the Board at their August, 1991 meeting. According to the Minutes of that meeting, the Board approved in principle the proposed rule, but referred it to the Rules of Professional Conduct Committee for comment.

At their October, 1991 meeting the RPC Committee appointed a subcommittee to review this proposal and report back to the Committee. The next meeting of the full RPC Committee was on January 24, 1992 at which time the subcommittee reported on its progress. They had continued to meet with representatives of the WSBA Opportunities for Minorities in the Legal Profession Committee

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and the Washington Women Lawyers. Discussion during the Committee meeting raised several issues regarding the breadth of any proposed rule and concern that it should not be so broad as to concern conduct that did not involve a lawyer's professional activities. It was argued that lawyers should not be held to a higher standard than non-lawyers in a non-professional setting. It was also noted that such a rule might involve political or ideological considerations which would need careful scrutiny.

The next full Committee meeting was held on March 13, 1992. The subcommittee recommended that the Committee recommend that the Board approve the language set out above. Also in attendance at that meeting were representatives of the WSBA Opportunities for Minorities in the Legal Profession Committee, the Washington Women Lawyers, the Seattle-King County Bar Association, and WSBA Chief Disciplinary Counsel Leland G. Ripley.

#### RULE PROPOSAL BACKGROUND:

As originally proposed to the Board, this rule used the phrase "invidious discrimination" rather than "discriminatory act prohibited by law", and included a series of definitions and examples of prohibited conduct. When the Board approved this rule in principle it specifically did not approve the definitions and examples.

Considerable discussion at both the subcommittee and Committee level concerned the term "invidious". The original proposers of the rule argued that that term would cover a wider range of discriminatory acts than "unlawful" or some similar variant. However, others, including Peter Greenfield on behalf of the SKCBA Board of Trustees, argued that "invidious" is a vague term that would be open to challenge because it does not give notice of what is prohibited. The subcommittee had also considered using the phrase "discrimination that violates public policy" but considered it similarly vague. Lee Ripley expressed similar concerns as the person who would be responsible for enforcing this rule. He expressed support for the subcommittee's recommendation, and noted that if it were subsequently found to not sufficiently address the problem, the rule could be changed.

#### COMMITTEE ACTION:

At the March 13 meeting votes were taken on three separate aspects of this proposal. First, it was moved and seconded to adopt a rule that prohibits discrimination and harassment in some form. That motion passed by a vote of 6 to 4 with one abstention. It should be noted that no member of the Committee expressed the view that such conduct should be condoned by the bar. Rather, the

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opponents of this proposal took the position either that the current RPCs sufficiently govern the conduct intended to be prohibited by this proposal, or that this is not an appropriate approach to prohibiting objectionable behavior.

Next, it was moved and seconded to replace the phrase "discriminatory act prohibited by law" with "invidious discrimination". That motion failed by a vote of 8 to 3.

It was then moved and seconded to change "harassment" to "unlawful harassment". Kristen Stred of Washington Women Lawyers argued against this motion and it failed by a vote of 4 to 8.

It was then moved to delete the listing of protected classes from the rule. This motion died for lack of a second.

Next, it was moved and seconded to approve the language as recommended by the subcommittee. That passed by a vote of 10 to 2.

Finally, it was moved and seconded to recommend that the Board approve the proposed rule for adoption by the Supreme Court. That passed by a vote of 8 to 4.

**ATTACHMENTS:**

1. Subcommittee Report
2. Letter from Kristen Stred, Washington Women Lawyers, 3/6/92, with enclosures
3. Letter from Gordon A. McHenry, Jr., WSBA Opportunities for Minorities in the Legal Profession Committee, 1/14/92
4. Letter from Peter Greenfield, Seattle-King County Bar Association, 3/4/92
5. Letter from Richard B. Sanders, 10/23/91

**WASHINGTON WOMEN LAWYERS**

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March 20, 1992

Dear Governor:

We look forward to your reconsideration, at the next Board of Governor's meeting, of the following RPC amendment, approved in principle last August:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (g) engage in invidious discrimination or harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with a lawyer's professional activities.

Enclosed please find a draft of a law review-type note analyzing the proposed amendment to the RPC's regarding harassment and invidious discrimination. This note was authored by Melisa Evangelos, a second-year law student at UPS. This draft became available to late for the RPC Committee's consideration, but Ms. Evangelos has given us permission to send you a copy in this draft form at this time.

I know you receive a lot of material before each Board meeting. This draft note, however, addresses both the practical impact on justice of the absence of a rule (pages 4-15) and the constitutional issue (beginning on page 34), both issues that the RPC Committee never fully debated.

I have also enclosed for your review the entire packet we sent to each RPC Committee member. I call your attention to a three page memorandum discussing a few of the many cases in which the word "invidious" has been used by the court. You can also find a discussion of the way the word "invidious" is



used in part of the Model Code of Judicial Conduct on pages 19-25 in Ms. Evangelos's draft note.

We thank you for your careful consideration of this important issue.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kristin H. Stred".

Kristin H. Stred  
Immediate Past President

KHS:rmt

cc: Leland Ripley  
Robert Weldon  
Sheryl Garland