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April 25, 2005

The Washington State Supreme Court
c/o Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Dear Honorable Court:

SUBJECT: Proposed Amendments to the Rules of Professional Conduct

I am a law student, so my comments are more akin to a citizen's perspective than a practicing lawyer's. As a former public employee, I am sensitive to the declining legitimacy of government in many circles, but particularly when the rules of law are manipulated to the advantage of the powerful over the powerless. It is my concern for the legitimacy and reputation of our justice system as whole that motivates my comments.

The following discussion addresses proposed Comment 2 to Rule 4.1. Proposed comment 2 is identical to that appearing in the Model Rules of Professional Conduct (2004). It reads:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious representation.

The comment refers to "generally accepted conventions in negotiation" which may be a reasonable standard when two similarly-trained professional lawyers are negotiating with one another. It is not at all reasonable, however, in the myriad of negotiations involving lawyers and non-lawyers. These include lawyers negotiating with unrepresented claimants, with agency or corporate staff, with other professionals, and so on.

The Restatement of the Law Governing Lawyers is more explicit about when such misstatements are permissible. In § 98, Statements to a Nonclient, its comment states:

d. . . .

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law . . . Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances.¹

Both of these comments strain to describe a circumstance under which it is permissible for a lawyer to persuade through the use of exaggeration,² which most people would consider to be a misstatement or a form of deception. The related idea of "puffing" is limited to the exaggeration of commendations or opinion in the context of a sale.³ Consider, though, whether the non-lawyer negotiator is likely to know the rules about puffing in the context of the Model Rules. I suggest that most do not. There is a suspicion, to be sure, which explains why many people are nervous at the prospect of even *speaking* to a lawyer, much like many people are distrustful of car salesmen.⁴ This suspicion is ironic as well as damaging to the profession, since lawyers are supposed to be trustworthy.⁵ The lawyer who wants to act like a huckster should not be able to hide under the cloak of respectability asserted by the professional of law.⁶

¹ Restatement 3d of Law Governing Lawyers, ALI, 2000.

² "To represent as greater than is actually the case; overstate." *The American Heritage Dictionary of the English Language*, Fourth Edition, 2000.

³ "The expression of an exaggerated opinion—as opposed to a factual representation—with the intent to sell a good or service. • Puffing involves expressing opinions, not asserting something as a fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say that they have attributes that they do not possess.—Also termed *puffery*; *sales puffery*; *dealer's talk*." Source: *Black's Law Dictionary*, 7th ed. 1999. Also, "The practice of making exaggerated commendations esp. for promotional purposes; *also* : the exaggerated commendations made." Source: *Merriam-Webster's Dictionary of Law*, 1996, via <http://dictionary.reference.com/search?db=inwlaw&q=puffing>.

⁴ Lisa G. Lerman, "Lying to Clients" *138 U. Pa. L. Rev.* 659 (1990). "The traditional model of lawyer-client relations might be viewed as a smokescreen that obscures the pecuniary interests of lawyers. The model of lawyer solely devoted to client interests reassures clients that their lawyers are not exploiting them. The smokescreen may be somewhat effective, but a large percentage of clients harbor unspoken mistrust for their lawyers." [footnotes omitted].

⁵ It is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. ABA Model Rule 8.4(c) (2004).

⁶ Burke, "Truth in Lawyering": *An Essay on Lying and Deceit in the Practice of Law*, 38 *ARK. L. REV.* 1, 4 (1984). Burke states:

For years we have "winked, blinked and nodded" at blatant, if not outrageous, lying and deception in pleading, negotiating, investigating, testifying, and bargaining. In almost every aspect of our professional practice we have come to accept, in fact to expect, a certain amount of lying and deception. . . . Whether predicated on the seemingly sacrosanct grounds of lawyer-client privilege, client confidentiality, or zealous advocacy, or on the less hallowed grounds of "puffing," "bluffing," and accepted conventions, lawyer lying and deception cannot be squared with any principled statement of the purposes and goals of the profession.

Also, although the dictionary definitions of “puffing” are limited to exaggeration of commendation or opinion, the proposed Model Rule comment goes well beyond that idea. The proposed comment says that statements which “ordinarily are not taken as statements of material fact” include “[e]stimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim.” Pity the fool who would understand that, when an attorney says she can offer no more than \$10,000 (or whatever the figure) for a claim (or a salary, or a purchase), he should give up and go with it.

It is difficult to see how an “exaggeration” of price or value can be anything but a material misstatement of fact, when the primary subject of negotiation is usually the price. Secondly, what a party’s “intentions as to an acceptable settlement of a claim” might be is such a vague idea that any manner of exaggeration or deception seems to be allowed here. The Court should not expect that most people in dealing with lawyers know when it’s OK for the lawyer to exaggerate or misstate things. Despite having read and studied these comments, I couldn’t draw the distinction, either. My personal difficulty in learning these distinctions as a law student is underscored by the difficulty some law professors admit in teaching them.⁷

The exception that proposed comment 2 provides is inconsistent with the approach the rules take in other areas, such as advertising. Model Rule 7.1 prohibits false or misleading statements “about the lawyer or the lawyer’s services.” Comment 3 to Model Rule 7.1 explains that even a truthful statement about a lawyer’s achievements which has the effect of creating an unjustified expectation would be misleading and hence, prohibited by the rule. Yet an exaggeration about the price or value of something being bargained for would be permitted under rule 4.1. The rules seem to be contradictory: a lawyer’s implication about the value of his services would be permissible according to comment 2 of Model Rule 4.1, but prohibited according to comment 3 of Model Rule 7.1.

Please consider also, whether a lawyer who does a lot of negotiating and puffing day in and day out is really able or willing to stop and consider the *no less than eight factors* listed in the Restatement comment, above, to decide whether puffing is appropriate in any given circumstance. Imagine how that would work: a lawyer approaches a non-lawyer for some item of business, and proceeds to evaluate

- the circumstances in which the statement is made,
- the past relationship of the negotiating persons,
- the other party’s apparent sophistication,
- the plausibility of the statement on its face,
- the phrasing of the statement,
- whether there has been related communication between the persons involved,
- the negotiating practices of the community in which both are negotiating,
- and other circumstances.

⁷ Mary-Lynne Fisher and Arnold I. Siegel, “Evaluating Negotiation Behavior and Results: Can We Evaluate What We Say We Know?” *36 Cath. U.L. Rev.* 395 (1987).

What is more likely is that, because lawyers are allowed to use puffing in their professional negotiations, lawyers adopt that habit generally in their dealings with others, whether that other person is another attorney or not.

Please consider also, that there are too many fine lines involved in puffing. It takes only a slightly greater exaggeration to turn puffing into outright lying. How many lawyers, under the competitive pressures of the work, in the competitive atmosphere of the market, and in the midst of confrontational face-offs with much at stake—how many would even notice that they've crossed the line?

This danger, no doubt, inspired the latest amendment to the Model Rules' comment. That amendment added the final statement in the comment, warning lawyers about "their obligations to avoid criminal and tortious misrepresentation."

I ask the Court to consider that puffing, while it may be traditional, has become a source of discredit to the profession. It may take considerable effort to alter this particular aspect of law practice, but I suggest that it is worthwhile to begin with a statement in the rules of ethics, that puffing, including any form of misstatement of material fact, in whatever terms it is cloaked in, is no longer acceptable practice.

Thank you for considering my views.

Sincerely,

Jackie Kettman-Thomas
(submitted via e-mail)