

MEMORANDUM

To: The Clerk of the Washington State Supreme Court in its rulemaking capacity

From: Nikolai Lesnikov (2<sup>nd</sup> Year Law Student at the University of Washington School of Law)

Re: Overbroad language in rules 1.12 and 2.4 of the recently proposed changes to the Washington Rules of Professional Conduct

Date: April 29, 2005

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2005 APR 29 P 4:10  
BY E. J. MERRITT  
CLERK

The language pertaining to third-party neutrals in the recently proposed changes to the Washington Rules of Professional Conduct places, *on its face*, unduly broad powers in the hands of the Washington State Disciplinary Authority. Subject merely to the limitation of obtaining informed consent confirmed in writing a lawyer's duty not to represent anyone involved in a matter in which the lawyer has participated personally and substantially is so broad that it can be used by just about any rational actor to disqualify a Washington attorney from representing anyone who fits the definition of having participated in *a matter* personally and substantially.

This memorandum merely seeks the inclusion of additional comment language narrowing the definition of "third-party neutral" in such a way as not to allow the wanton destruction of particular human endeavors (or matters, as it were) where freedom of expression meets the notion of coherent institutional growth and sustainable development. In other words, when Gippetto sculpted Pinocchio he may not have known exactly what he was doing, but his creature deserved to exist as long as she didn't take herself in *all* seriousness.

The spirit of the proposed rules suggests that the overbreadth referred to *supra* is

8.3 embodied not only in the institution of the Washington Bar *per se*, but also in the *proposed* mandatory ethical *duty* (predicated upon an epistemologically obscure standard of “*knowing*”) of every practicing attorney (regardless of political affiliation) to *report* conduct raising a *substantial* question as to a lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. *See* Rule 8.3(a) (changing “should promptly” to “shall”). The problem with such a switch from a *standard* to a *rule* is that it merely echoes or mirrors the functionality of the Soviet and currently Russian power apparatus. The author of this brief witnessed the collapse of the Soviet structure with the eyes of a child and has seen it re-form with the eyes of a Seattlelite law student.

A totalitarian government can only sustain itself through a vast network of intimidation that *semantically* infuses its subjects with a sense of individual judgment *against* one another thus undermining the very notion of a rule of law. A local example of such a spirit is the presence along the highways of signs *encouraging* to report violators *by virtue of* including the letters H, E, R, and O in the phone number to call. For these reasons and without further ado, the author humbly asks that, prior to exercising your rule-making authority, this Court please consider the following

#### Scenario for a Fact Pattern.

Assume that a rational actor who is an artist decides to pursue a law degree in the State of Washington in order to be able to provide competent and diligent representation to herself as well as to others. Assume further, that this artist has a tangential penchant toward political philosophy and happens to be a keen student of both Friedrich Nietzsche, Jerome Frank and Frank Zappa, *inter alia*. In writing such works as *Beyond Good and Evil* as well as the *Genealogy of Morals*, Nietzsche was effectively acting in the capacity of a third-party neutral,

mediating between the particular Masters and slaves of *his* time. The difference between Nietzsche and the rational actor in this hypothetical is that the latter may choose to sit for the Washington State Bar.

2.4  
Before and after an eventual passage of the Bar this artist engages in active public discourse concerning the modern-day clash between liberals and Conservatives without taking a position for either one and *simply* in order to illustrate the nature of History as-such. The artist is aware that he is not the first, nor the last to undertake this task and yet she is *presently* engaged in “assisting two or more persons who are [presently] NOT [HER] clients to reach a resolution of a dispute or other matter that has arisen between them.” See Proposed Rule 2.4.

1.12  
The artist’s participation in this matter can easily be characterized as both personal and substantial. See Proposed Rule 1.12. She takes the risk of *accusing* both the Free-Marketeers and the resentful-voices-for-the-poor of their *own* being-different from one another. She challenges the adversarial system as grounded in a notion of truth-value that is as artificial as a *legal tender*. She also challenges the inarticulate factions of the anti-globalization movement as engaged in a counter-productive *demonization* of a Noble Form. Instead, she unveils the fact that each particular Blond Beast is a creature devoid of reflexive judgment and guided only by the patterns of its growth, much like a tree or a plant. Finally, she even smiles in light of a Pope dying while the institution that *has* artificially preserved his frail body for so long is itself barely grappling to the surface of reality *via* a rudimentary network of portfolio investments.

Now. As repeatedly stated *supra*, this artist is in fact a rational actor. Engaging in a manner of *alternative* dispute resolution does NOT entail an incentive for a reasonable artist to be *outside* the law. Furthermore, it is not a far cry to think that in order to properly support her ability to thus legitimately facilitate a harmonization of social mores, she will need to take on the

representation of actual clients within the scope of the traditional adversary system. Does her publicly thinking out value-as-language, make her otherwise incompetent to advance a given client's material interests? Would it be reasonable, therefore, for Proposed Rule 1.12 to require her to obtain the informed consent, confirmed in writing from no less than every client who happens to openly or latently advance the *ideological* agenda of a given group?

When confronted with the extended hypothetical articulated supra, the language pertaining to third-party neutrals in Proposed Rules 1.12 and 2.4 suffers from substantial overbreadth on its face:

Without appropriately limiting language,  
once enough *interested* actors  
*all-ready* navigating the legal system  
take notice of this reasonable artist,  
they will be able and *may* be willing,  
to use these two rules  
to effectively *screen* her,  
out of participating in *any* legal matter  
that advances the material interests  
of laypersons, who happen to be  
engaged in *any* manner of ideological advocacy.

Such an outcome  
would have an effect  
on the reasonable artist's free speech,

that is as unbearably chilling,  
as the frozen lake  
wherein Dante  
placed *his own* Satanic figure,  
from the waist down.

Furthermore,  
the two rules could be used  
to *alienate* her  
from the beautiful community  
that inspires her,  
and to thus effect a most unconstitutional of takings:  
the takings-of the reasonable artist's *livelihood*  
as-a-lawyer,  
all for a purported *re publica*.

Will anybody "talk to her"  
about *just* compensation?