WASHINGTON STATE
BAR ASSOCIATION
Office of Disciplinary Counsel

Douglas J. Ende
Chief Disciplinary Counsel

April 13, 2018

Susan L. Carlson
Clerk of the Supreme Court
PO Box 4929
Olympia, WA 98504-0929

Re: Comment on Proposed Amendment to RPC 4.2

Dear Ms. Carlson:

As Chief Disciplinary Counsel of the Washington State Bar Association (WSBA), I submit the following comment on the proposed amendment to Rule 4.2 of Washington's Rules of Professional Conduct (RPC). The proposed amendment would add a new Washington Comment [13] to RPC 4.2.

In general, RPC 4.2 prohibits a lawyer, in the course of representing a client, from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

According to the Purpose Statement in the General Rule (GR) 9 submission,[1] one purpose of the new comment is to clarify the obligations under RPC 4.2 of a *pro se* lawyer with respect to communication with a represented person. Under this Court's holding in In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006), RPC 4.2 applies to restrict such communications by *pro se* lawyers. I have no disagreement with the first sentence of the proposed comment, which clarifies the interpretation of RPC 4.2 already established in Haley.

However, a related question is also addressed by this proposed comment: Whether a lawyer who is represented by counsel violates RPC 4.2 by communicating directly with another represented person in a matter. The second sentence of the proposed new comment provides

[1] The proponent of the amendment is the Washington State Bar Association. The amendment was approved for submission to the Court by the WSBA Board of Governors at its July 2017 meeting, upon recommendation of the WSBA Committee on Professional Ethics. At the July 2017 meeting, I requested and was granted leave by the Board of Governors under Section IV(E) of the WSBA Bylaws to submit, in my capacity as Chief Disciplinary Counsel, a public comment during GR 9 rulemaking in partial opposition to adoption of the proposed amendment.

that RPC 4.2 does not prohibit a represented lawyer from communicating with another represented person.

As acknowledged by the proponent's Purpose Statement, the Haley opinion did not decide whether the RPC 4.2 prohibition applies when a lawyer is represented by another lawyer and is not acting *pro se*. In my view, to permit represented lawyers to communicate with represented parties will, as frequently as not, lead to precisely the evils that RPC 4.2 is designed to prevent. As is evident from the existing commentary, Rule 4.2 is designed to protect represented persons from "possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation." Comment [1] to RPC 4.2; *see also* T. Andrews, R. Aronson, M. Fucile & A. Lachman, The Law of Lawyering in Washington 8-41 (2012) (lawyers will often have a much more sophisticated understanding of legal issues and relevant evidence than parties do, and this knowledge might enable a lawyer to manipulate an opponent and/or obtain prejudicial admissions if the opponent's lawyer is not present). In many situations, by virtue of legal training, ability, and experience, a lawyer, whether represented or not, will be in an unfairly advantageous position when communicating with an adverse represented party who is not a lawyer.

In my opinion, as a matter of ethics policy, it would be preferable to prohibit represented lawyers from communicating with persons represented by a lawyer (without that lawyer's consent). Although in some small number of cases such an approach may deprive a represented lawyer from having a possibly beneficial opportunity to communicate with another represented party without that party's lawyer present, in other cases, it will appropriately restrain an unprincipled or exploitative represented lawyer from taking unfair advantage of another represented party. As I see it, the risk of harm in this scenario very much outweighs the likely benefit.

While the proponent's GR 9 Purpose Statement includes some authority in support of its recommended approach, it neglects to cite existing contrary authority. Although precedent in this area is sparse, the New York State Bar Association issued an opinion concluding that all lawyers, whether they are *pro se* parties, represented parties, or representatives of other parties in a matter, are subject to the restrictions of New York's Rule of Professional Conduct (NYRPC) 4.2. In reaching this conclusion, the New York State Bar Association Committee on Professional Ethics observed as follows:

> Under this interpretation of Rule 4.2, the usual rights of nonlawyer parties to engage in direct communications are outweighed by the lawyer's professional obligations to the system of justice and the goal of protecting represented parties. Our view reflects the fact that lawyers, by virtue of their professional status, have a unique responsibility to the system of justice that requires them to subordinate their personal interest in having direct communications with represented individuals unless the exacting conditions stated in Rule 4.2 are satisfied.

N.Y. St. B. Ass'n, Ethics Op. 879 (2011); *see also* Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 260 (Tex. Ct. App. 1999) ("[W]e hold that an attorney's designation of counsel of record does not . . . preclude the application of Rule 4.02(a) to his actions in contacting an opposing party.").

In 2012, the State of New York codified Opinion 879 by amending NYRPC 4.2 to expressly impose the rule's restrictions on both *pro se* lawyers and represented lawyers when communicating with other represented persons. Paragraph (c) of New York's rule now provides as follows:

> A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

NYRPC 4.2(c) (effective Dec. 20, 2012). This approach recognizes that the policy rationale underlying Rule 4.2 – to protect people who have chosen to be represented by lawyers – applies with equal force whether a lawyer is participating in a matter while acting *pro se*, while represented by his or her own counsel, or while "representing a client."

For these reasons, I respectfully urge the Court to adopt a modified version of the proposed amendment, omitting the second sentence.

If the Court concludes that such communication ought to be permitted in some circumstances, the Court should fashion appropriate safeguards for the protection of represented individuals who are not lawyers. One possible approach would be a provision in Washington's RPC 4.2 akin to New York's NYRPC 4.2(c).

I am available to answer any questions or provide additional information if the Court so requests.

Sincerely,

Douglas J. Ende
Chief Disciplinary Counsel

cc: William D. Pickett, WSBA President
J. Donald Curran, Chair, Committee on Professional Ethics
Paula C. Littlewood, WSBA Executive Director