

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, October 16, 2018 10:32 AM
To: Tracy, Mary
Subject: FW: Proposed Amendment to RPC4.2
Attachments: RPC4.2.doc

From: Erik Marks [mailto:erik@egmrealestate.com]
Sent: Tuesday, October 16, 2018 10:21 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Amendment to RPC4.2

I write in regard to the proposed amendment to RPC 4.2 (copy attached for reference), which the Washington State Bar Association submitted to the Supreme Court under a GR9 cover sheet earlier this year. I understand that the comment period for the proposed amendment expired on April 30, 2018. I have a compelling concern, that does not seem to have been addressed among the 3 comments that were received during the official comment period, and so I am submitting my comment even though the deadline for comments has expired.

My concern is that the proposed amendment does not differentiate between transactional practice, and litigation. Because the proposed amendment does not differentiate, it would seem to include transactional work within its net, and as such can lead to some unintended results. My suggestion is to expressly state that Comment 13 covers matters of conflict and litigation, and does not include transactional work.

I speak from the position of being a transactional attorney for 25 years, and concurrently engaged in business enterprises.

In the course of my business work (not as attorney), I necessarily interact on a regular basis, with persons I know to be represented, without acquiring the consent of their counsel. For example, if a business I run receives a proposed form of Contract from a supplier, I will review the proposed form of Contract and provide comments on it back to the business-contact (i.e. non-lawyer) who sent it to me. Often that business-contact will tell me that they are going to "submit the comments to legal for review." At that point I know the business-contact is represented, but I will continue to negotiate the terms of the Contract with the business-contact. If I were forced to obtain express approval from the supplier's legal department, in order to be able to negotiate the form of Contract with the business-contact, I would be placed at a substantial disadvantage in completing the transaction in the ordinary course of business. While the granting of such consent might seem routine, when you are talking about large companies with established procedures and remote legal departments, the request for consent risks rumpling feathers, threatening relationships and substantial delay in finalization of the mutually desired supply Contract.

Thank you for accepting this comment for the file, even though it is acknowledged to have been submitted after the deadline. I see that the proposed amendment to RPC 4.2 has not yet been adopted, so I am optimistic that perhaps it will be given further consideration at a future date, at which time my comment can be considered.

Sincerely,
Erik Marks
WSBA 23458

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SUGGESTED AMENDMENT TO RPC 4.2

COMMUNICATION WITH PERSON REPRESENTED BY A LAWYER

Additional Washington Comments (10 – ~~12~~ 13)

[10] – [12] Unchanged.

[13] A lawyer who is representing himself or herself in a matter in which he or she is personally involved (“a pro se lawyer”) is “representing a client” in the matter and so is prohibited by this rule from communicating about the subject 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. *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 333–39, 126 P.3d 1262, 1266–69 (2006). On the other hand, a lawyer who is personally involved in a matter and has retained another lawyer to represent him or her is not “representing a client,” and is permitted to communicate directly with another person the lawyer knows to be represented in the matter without the consent of the other lawyer, provided the represented lawyer is not acting as cocounsel.