

1 Rule 4.2. Communication with Persons Represented by Counsel.

2 ~~(a) General Rule. A lawyer who is (a) General Rule. In~~ representing a client ~~in~~ a  
3 ~~matter~~ lawyer shall not communicate about the subject of the representation with a  
4 person the lawyer knows to be represented by another lawyer in the matter, unless the  
5 lawyer has the consent of the other lawyer, ~~or is authorized to do so by:~~

6 ~~(1) constitutional law or statute;~~

7 ~~(2) decision or a rule of a court of competent jurisdiction;~~

8 ~~(3) a prior written authorization by a court of competent jurisdiction obtained by the~~  
9 ~~lawyer in good faith; or~~

10 ~~(4) paragraph (b) of this rule.~~

11 ~~(b) Notwithstanding the foregoing, an attorney may, without such prior consent,~~  
12 ~~communicate with another's client if authorized to do so by any law, rule, or court order,~~  
13 ~~in which event the communication shall be strictly restricted to that allowed by the law,~~  
14 ~~rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.~~

15 ~~(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a~~  
16 ~~person whose representation by counsel in a matter does not encompass all aspects of~~  
17 ~~the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that~~  
18 ~~person's counsel has provided written notice to the lawyer of those aspects of the~~  
19 ~~matter or the time limitation for which the person is represented. Only as to such~~  
20 ~~aspects and time is the person considered to be represented by counsel.~~

21 ~~(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law~~  
22 ~~Enforcement. A government lawyer engaged in a criminal or civil law enforcement~~  
23 ~~matter, or a person acting under the lawyer's direction in the matter, may communicate~~  
24 ~~with a person known to be represented by a lawyer if:~~

25 ~~(c)(1) the communication is in the course of, and limited to, an investigation of a~~  
26 ~~different matter unrelated to the representation or any ongoing, unlawful conduct; or~~

27 ~~(c)(2) the communication is made to protect against an imminent risk of death or~~  
28 ~~serious bodily harm or substantial property damage that the government lawyer~~  
29 ~~reasonably believes may occur and the communication is limited to those matters~~  
30 ~~necessary to protect against the imminent risk; or~~

31 (c)(3) the communication is made at the time of the arrest of the represented person  
32 and after ~~he or she~~that person is advised of ~~his or her~~the rights to remain silent and the  
33 right to counsel and voluntarily and knowingly waives these rights; or

34 (c)(4) the communication is initiated by the represented person, directly or through  
35 an intermediary, if prior to the communication the represented person has given a  
36 written or recorded voluntary and informed waiver of counsel, including the right to have  
37 substitute counsel, for that communication.

38 (ed) Organizations as Represented Persons.

39 (d)(1) When the represented “person” is an organization, an individual is  
40 “represented” by counsel for the organization if the individual is not separately  
41 represented with respect to the subject matter of the communication, and

42 (d)(1)(A) with respect to a communication by a government lawyer in a civil or  
43 criminal law enforcement matter, is known by the government lawyer to be a current  
44 member of the control group of the represented organization; or

45 (d)(1)(B) with respect to a communication by a lawyer in any other matter, is known  
46 by the lawyer to be

47 (d)(1)(B)(i) a current member of the control group of the represented organization;  
48 or

49 (d)(1)(B)(ii) a representative of the organization whose acts or omissions in the  
50 matter may be imputed to the organization under applicable law; or

51 (d)(1)(B)(iii) a representative of the organization whose statements under applicable  
52 rules of evidence would have the effect of binding the organization with respect to proof  
53 of the matter.

54 (d)(2) The term “control group” means the following persons: (A) the chief executive  
55 officer, chief operating officer, chief financial officer, and ~~the~~ the chief legal officer of the  
56 organization; and (B) to the extent not encompassed by ~~the foregoing~~ Subsection (A),  
57 the chair of the organization’s governing body, president, treasurer, ~~and~~ and secretary, and  
58 a vice-president or vice-chair who is in charge of a principal business unit, division, or  
59 function (such as sales, administration, or finance) or performs a major policy-making  
60 function for the organization; and (C) any other current employee or official who is

61 known to be participating as a principal decision maker in the determination of the  
62 organization's legal position in the matter.

63 (d)(3) This ~~R~~ule does not apply to communications with government parties,  
64 employees, or officials unless litigation about the subject of the representation is  
65 pending or imminent. Communications with elected officials on policy matters are  
66 permissible when litigation is pending or imminent after disclosure of the representation  
67 to the official.

68 ~~(de)~~ Limitations on Communications. When communicating with a represented  
69 person pursuant to this Rule, no lawyer may

70 (e)(1) inquire about privileged communications between the person and counsel or  
71 about information regarding litigation strategy or legal arguments of counsel, or seek to  
72 induce the person to— forgo representation or disregard the advice of the person's  
73 counsel; or

74 (e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-  
75 statutory immunity agreement, or other disposition of actual or potential criminal  
76 charges or civil enforcement claims, or sentences or penalties with respect to the matter  
77 in which the person is represented by counsel unless such negotiations are permitted  
78 by law, rule or court order, paragraphs (a)(1), (2) or (3), or (b)(4).

79 Comment

80 ~~The purpose of this Rule is to foster and protect legitimate attorney-client~~  
81 ~~relationships. It seeks to guard against inequities that exist when a lawyer speaks to an~~  
82 ~~untrained lay person. The Rule should not, however, be used as a vehicle to thwart~~  
83 ~~appropriate contacts between lawyers and lay persons.~~

84 [1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from  
85 ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c),  
86 (d) and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d),  
87 adopted in 1999, as are most of the corresponding comments that address these three  
88 paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a),  
89 where the body of judicially created rules are added as a source to which the lawyer  
90 may look for general exceptions to the prohibition of communication with persons

91 represented by counsel. (Because of these major differences, the comments to this  
92 Rule do not correspond numerically to the comments in ABA Model Rule 4.2.

93 [2] This Rule contributes to the proper functioning of the legal system by protecting  
94 a person who has chosen to be represented by a lawyer in a matter against possible  
95 overreaching by other lawyers who are participating in the matter, interference by those  
96 lawyers with the client-lawyer relationship and the uncounselled disclosure of  
97 information relating to the representation.

98 [3] This Rule applies to communications with any person who is represented by  
99 counsel concerning the matter to which the communication relates.

100 [4] This Rule applies even though the represented person initiates or consents to  
101 the communication. A lawyer must immediately terminate communication with a person  
102 if, after commencing communication, the lawyer learns that the person is one with  
103 whom communication is not permitted by this Rule.

104 [5] This Rule does not prohibit communications with a represented person~~or entity,~~  
105 or an employee or agent of such ~~represented~~ person ~~or entity,~~ where the subject of the  
106 communication is outside the scope of the representation. For example, the existence  
107 of a controversy between a government agency and a private ~~person~~party, between two  
108 organizations, between individuals or between an organization and an individual does  
109 not prohibit a lawyer for either from ~~communication~~ communicating with nonlawyer  
110 representatives of the other regarding a separate matter. Nor does the Rule prohibit  
111 government lawyers from communicating with a represented person about a matter that  
112 does not pertain to the subject matter of the representation but is related to the  
113 investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule  
114 does not prohibit a lawyer from communicating with a person to determine if the person  
115 in fact is represented by counsel concerning the subject matter that the lawyer wishes to  
116 discuss with that person.

117 [6] This Rule does not preclude communication with a represented person who is  
118 seeking a second opinion from a lawyer who is not otherwise representing a client in the  
119 matter. A lawyer may not make a communication prohibited by this Rule through the  
120 acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with

121 each other, and a lawyer is not prohibited from advising a client concerning a  
122 communication that the client is legally entitled to make.

123 [7] A lawyer may communicate with a person who is known to be represented by  
124 counsel in the matter to which the communication relates only if the communicating  
125 lawyer obtains the consent of the represented person's lawyer, or if the communication  
126 is otherwise permitted by paragraphs (a), (b) or (bc). Paragraph (a) permits a lawyer to  
127 communicate with a person known to be represented by counsel in a matter without first  
128 securing the consent of the represented person's lawyer if the communicating lawyer is  
129 authorized to do so by ~~subparagraph (1), (2), or (3) of this paragraph. Paragraph (b)~~  
130 law, rule or court order. Paragraph (b) recognizes that the scope of representation of a  
131 person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a  
132 lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these  
133 circumstances, the lawyer who has undertaken a limited representation must assume  
134 the responsibility for informing another party's lawyer of the limitations. This ensures  
135 that such a limited representation will not improperly or unfairly induce an adversary's  
136 lawyer to avoid contacting the person on those aspects of a matter for which the person  
137 is not represented by counsel. Note that this responsibility on the lawyer undertaking  
138 limited-scope representation also relates to the ability of another party's lawyer to make  
139 certain *ex parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct  
140 4.2(b) and related sections of this Comment are part of the additions to the ABA Model  
141 Rules clarifying that a lawyer may undertake limited representation of a client under the  
142 provisions of Rule 1.2. Paragraph (c) specifies the circumstances in which government  
143 lawyers engaged in criminal and civil law enforcement matters may communicate with  
144 persons known to be represented by a lawyer in such matters without first securing  
145 consent of that lawyer.

146 [8] A communication with a represented person is authorized ~~under subparagraph~~  
147 by paragraph (a)(1) if permitted by the Constitution or a constitutionally valid statute.  
148 ~~Under subparagraph (a)(2), lawyers may also rely on existing judicial precedent or court~~  
149 ~~rules that authorize lawyers to contact persons without permission of the represented~~  
150 ~~person's lawyer.~~ law, rule or court order. This recognizes constitutional and statutory  
151 authority as well as the well-established role of the state judiciary in regulating the

152 practice of the legal profession. Direct communications are also ~~permissible~~ permitted if  
153 they are made pursuant to discovery procedures or judicial or administrative process in  
154 accordance with the orders or rules of the court or other tribunal before which a matter  
155 is pending.

156 [9] A communication is authorized under ~~subparagraph~~ paragraph (a)(1) if the  
157 lawyer is assisting the client to exercise a constitutional right to petition the government  
158 for redress of grievances in a policy dispute with the government and if the lawyer  
159 notifies the government's lawyer in advance of the intended communication. This would  
160 include, for example, a communication by a lawyer with a governmental official with  
161 authority to take or recommend action in the matter, provided that the sole purpose of  
162 the lawyer's communication is to address a policy issue, including the possibility of  
163 resolving a disagreement about a policy position taken by the government. If, on the  
164 other hand, the matter does not relate solely to a policy issue, the communicating  
165 lawyer must comply with this Rule.

166 ~~Any lawyer desiring to engage in a communication with a represented person that is~~  
167 ~~not otherwise permitted under this Rule may apply in good faith to a court of competent~~  
168 ~~jurisdiction, either ex parte or upon notice, for an order authorizing the communication~~  
169 ~~under subparagraph (a)(3) of this Rule. A "court of competent jurisdiction" means,~~  
170 ~~depending on the context:~~

171 ~~(1) a district judge or magistrate judge of the United States District Court; (2) a judge~~  
172 ~~or commissioner of a court of general jurisdiction of a state having jurisdiction over the~~  
173 ~~matter to which the communication relates; or (3) a military judge.~~

174 ~~A proceeding under subparagraph (a)(3) should be summary in nature, but the~~  
175 ~~specific procedure for obtaining such judicial authorization may vary from jurisdiction to~~  
176 ~~jurisdiction.~~

177 ~~In determining whether a communication is appropriate the court should consider~~  
178 ~~factors such as:~~

179 ~~(1) the communication with the represented person is intended to gain information~~  
180 ~~that is relevant to the matter for which the communication is sought;~~

181 ~~(2) the communication would not be unreasonable or oppressive;~~

182 ~~(3) the purpose of the communication is not primarily to harass the represented~~  
183 ~~person; and~~

184 ~~(4) good cause exists for not requesting the consent of the person's counsel to the~~  
185 ~~communication.~~

186 ~~A written record of the application, including the grounds for the application, the~~  
187 ~~scope of the authorized communications, and the action of the judicial officer, should be~~  
188 ~~required absent exigent circumstances.~~

189 Paragraph (b)

190 [10] In the event the person with whom the lawyer communicates is not known to be  
191 represented by counsel in the matter, the lawyer's communication is subject to Rule 4.3.

192 [11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all  
193 communications with represented persons by state or federal government lawyers  
194 (including law enforcement agents and cooperating witnesses acting at their direction)  
195 when the communications occur during the course of civil or criminal law enforcement.  
196 The exemptions for government lawyers contained in paragraph (bc) of this Rule  
197 recognize the unique responsibilities of government lawyers to enforce public law.  
198 Nevertheless, where the lawyer is representing the government in any other role or  
199 litigation (such as a contract or tort claim, for example) the same rules apply to  
200 government lawyers as are applicable to lawyers for private parties.

201 [12] A "civil law enforcement proceeding" means a civil action or proceeding before  
202 any court or other tribunal brought by the governmental agency that seeks to engage in  
203 the communication under relevant statutory or regulatory provisions, or under the  
204 government's police or regulatory powers to enforce the law. Civil law enforcement  
205 proceedings do not include proceedings related to the enforcement of an administrative  
206 subpoena or summons or a civil investigative demand; nor do they include enforcement  
207 actions brought by an agency other than the one that seeks to make the  
208 communication.

209 [13] Under subparagraph (bc) of this Rule, communications are permitted in a  
210 number of circumstances. For instance, subparagraph (bc)(1) permits the investigation  
211 of a different matter unrelated to the representation or any ongoing unlawful conduct.  
212 (Unlawful conduct involves criminal activity and conduct subject to a civil law

213 enforcement proceeding.) Such violations include, but are not limited to, conduct that is  
214 intended to evade the administration of justice including in the proceeding in which the  
215 represented person is a defendant, such as obstruction of justice, subornation of  
216 perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or  
217 unlawful flight to avoid prosecution. Also, permitted are undercover activities directed at  
218 ongoing criminal activity, even if it is related to past criminal activity for which the person  
219 is represented by counsel.

220 [14] Under subparagraph ~~(b)~~(2), a government lawyer may engage in limited  
221 communications to protect against an imminent risk of serious bodily harm or  
222 substantial property damage. The imminence and gravity of the risk will be determined  
223 from the totality of the circumstances. Generally, a risk would be imminent if it is likely  
224 to occur before the government lawyer could obtain court approval or take other  
225 reasonable measures. An imminent risk of substantial property damage might exist if  
226 there is a bomb threat directed at a public building. The Rule also makes clear that a  
227 government attorney may communicate directly with a represented party “at the time of  
228 arrest of the represented party” without the consent of the party’s counsel, provided that  
229 the represented party has been fully informed of his or her constitutional rights at that  
230 time and has waived them. A government lawyer must be very careful to follow Rule  
231 4.2(d) and would have a significant burden to establish that the waiver of ~~the~~ right to  
232 counsel was knowing and voluntary. The better practice would include a written or  
233 recorded waiver. Nothing in this ~~R~~Rule, however, prevents law enforcement officers,  
234 even if acting under the general supervision of a government lawyer, from questioning a  
235 represented person. The actions of the officers will not be imputed to the government  
236 lawyer unless the conversation has been “scripted” by the government lawyer.

237 [15] Under subparagraph ~~(b)(4)~~, post-charge. If government lawyers have any  
238 concerns about the applicability of any of the provisions of paragraph (c) or are  
239 confronted with other situations in which communications ~~are permitted if initiated by~~  
240 with represented persons may be warranted, they may seek court approval for the ex  
241 parte communication.

242 [16] Any lawyer desiring to engage in a communication with a represented person  
243 that is not otherwise permitted under this Rule must apply in good faith to a court of

244 competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the  
245 communication. This means, depending on the context: (1) a district judge or  
246 magistrate judge of a United States District Court; (2) a judge or commissioner of a  
247 court of general jurisdiction of a state having jurisdiction over the matter to which the  
248 communication relates; or (3) a military judge.

249 [17] In determining whether a communication is appropriate a lawyer may want to  
250 consider factors such as: (1) whether the communication with the represented person,  
251 either directly or through an intermediary, and if is intended to gain information that is  
252 relevant to the matter for which the communication is sought; (2) whether the  
253 communication is unreasonable or oppressive; (3) whether the purpose of the  
254 communication is not primarily to harass the represented person; and (4) whether good  
255 cause exists for not requesting the consent of the person's counsel prior to the  
256 communication. ~~the represented person has given a recorded voluntary and informed~~  
257 ~~waiver of counsel for that communication. The waiver may be written or "recorded" on~~  
258 ~~videotape, audiotape, or other similarly reliable means. If government lawyers have any~~  
259 ~~concerns about the applicability of any of the provisions of subparagraph (b) or are~~  
260 ~~confronted with other situations in which communications with represented persons may~~  
261 ~~be warranted, they may avail themselves of the *ex parte* procedures for seeking court~~  
262 ~~approval under subparagraph (a)(3).~~  
263 The lawyer should consider requesting the court to  
264 make a written record of the application, including the grounds for the application, the  
265 scope of the authorized communications, and the action of the judicial officer, absent  
266 exigent circumstances.

266 [18] Organizational clients are entitled to the protections of this Rule. Paragraph  
267 (~~ed~~) specifies which individuals will be deemed for purposes of this Rule to be  
268 represented by the lawyer who is representing the organization in a matter. Included  
269 within the control group of an organizational client, for example, would be the  
270 designated high level officials identified in subparagraphs ~~2(A) and (B)(d)(2).~~  
271 Whether an officer performs a major policy function is to be determined by reference to the  
272 organization's business as a whole. Therefore, a vice-president who has policy making  
273 functions in connection with only a unit or division would not be a major policy maker for  
274 that reason alone, unless that unit or division represents a substantial part of the

275 organization's total business. A staff member who gives advice on policy but does not  
276 have authority, alone or in combination with others, to make policy does not perform a  
277 major policy making function.

278 [19] Also included in the control group are other current employees known to be  
279 "participating as principal decision makers" in the determination of the organization's  
280 legal position in the proceeding or investigation of the matter. In this context,  
281 "employee" could also encompass former employees who return to the company's  
282 payroll or are specifically retained for compensation by the organization to participate as  
283 principal ~~decisionmakers~~ decision makers for a particular matter. In general, however, a  
284 lawyer may, consistent with this Rule, interview a former employee of an organization  
285 without consent of the ~~organization's lawyer~~ organization's lawyer.

286 ~~If an officer or employee of an organization that is represented by counsel in a~~  
287 ~~matter retains another lawyer to separately represent the officer or employee in the~~  
288 ~~matter, a lawyer (including a government lawyer) who wishes to communicate with the~~  
289 ~~individual about the matter must obtain the consent of the individual's lawyer (if consent~~  
290 ~~of a lawyer is required by the Rule) and need not obtain the consent of the~~  
291 ~~organization's lawyer.~~

292 [20] In a criminal or civil law enforcement matter involving a represented  
293 organization, government lawyers may, without consent of the organization's lawyer,  
294 communicate with any officer, employee, or director of the organization who is not a  
295 member of the control group. In all other matters involving organizational clients,  
296 however, the protection of this Rule is extended to two additional groups of individuals:  
297 individuals whose acts might be imputed to the organization for the purpose of  
298 subjecting the organization to civil or criminal liability and individuals whose statements  
299 might be binding upon the organization. A lawyer permitted by this Rule to  
300 communicate with an officer, employee, or director of an organization must abide by the  
301 limitations set forth in paragraph ~~(d)~~.

302 [21] This Rule does prohibit communications with any person who is known by the  
303 lawyer making the communication to be represented by counsel in the matter to which  
304 the communication relates. A person is "known" to be represented when the lawyer has  
305 actual knowledge of the representation. Knowledge is a question of fact to be resolved

306 by reference to the totality of the circumstances, including reference to any written  
307 notice of the representation. See Rule 1.0(f) Written notice to a lawyer is relevant, but  
308 not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of  
309 representation is distributed to all attorneys working on a matter.

310 [22] Paragraph ~~(de)~~ is intended to regulate a lawyer's communications with a  
311 represented person, which might otherwise be permitted under the Rule, by prohibiting  
312 any lawyer from taking unfair advantage of the absence of the represented person's  
313 counsel. The prohibition contained in paragraph ~~(de)~~ is limited to inquiries concerning  
314 privileged communications and lawful defense strategies. The ~~R~~Rule does not prohibit  
315 inquiry into unlawful litigation strategies or communications involving, for example,  
316 perjury or obstruction of justice.

317 [23] The prohibition of paragraph ~~(de)~~ against the communicating lawyer's  
318 negotiating with the represented person with respect to certain issues does not apply if  
319 negotiations are authorized by ~~subparagraphs (a)(1)law, (2) rule or (3)court order~~. For  
320 example, a court of competent jurisdiction could authorize a lawyer to engage in direct  
321 negotiations with a represented person. Government lawyers may engage in such  
322 negotiations if a represented person who has been arrested, charged in a criminal case,  
323 or named as a defendant in a civil law enforcement proceeding initiates communications  
324 with the government lawyer and the communication is otherwise consistent with ~~the~~  
325 requirements of subparagraph ~~(bc)~~(4).

326