

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 in order to meet the requirements of any law, rule, or~~  
13 ~~court order, in which event the communication shall be strictly restricted to that allowed~~  
14 ~~by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this~~  
15 ~~Rule.~~

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

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

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

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

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

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

39 (ed) Organizations as Represented Persons.

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

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

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

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

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

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

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

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

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

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

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

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

80 Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

190 Paragraph (b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

327