

1 | **Rule 4.2. Communication with Persons Represented by ~~Counsel~~Legal Professionals.**

2 | (a) **General Rule.** In representing a client, a lawyer shall not communicate about the subject of the
3 | representation with a person the lawyer knows to be represented by a legal professional~~another lawyer~~ in
4 | the matter, unless the lawyer has the consent of the legal professional~~other lawyer~~. Notwithstanding the
5 | foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to
6 | do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that
7 | allowed by the law, rule, or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

8 | (b) **Rules Relating to Unbundling of Legal Services.** A lawyer may consider a person whose
9 | representation by a legal professional~~counsel~~ in a matter does not encompass all aspects of the matter
10 | to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's ~~counsel~~legal
11 | professional has provided written notice to the lawyer of those aspects of the matter or the time limitation
12 | for which the person is represented. Only as to such aspects and time is the person considered to be
13 | represented by ~~counsel~~a legal professional.

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

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

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

22 | (c)(3) the communication is made at the time of the arrest of the represented person and after
23 | that person is advised of the right to remain silent and the right to counsel and voluntarily and
24 | knowingly waives these rights; or

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

29 | (d) **Organizations as Represented Persons.**

30 | (d)(1) When the represented person is an organization, an individual is represented by counsel
31 | for the organization if the individual is not separately represented with respect to the subject matter of
32 | the communication, and

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

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

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

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

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

43 (d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief
44 operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the
45 extent not encompassed by Subsection (A), the chair of the organization's governing body, president,
46 treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit,
47 division or function (such as sales, administration or finance) or performs a major policy-making
48 function for the organization; and (C) any other current employee or official who is known to be
49 participating as a principal decision maker in the determination of the organization's legal position in
50 the matter.

51 (d)(3) This Rule does not apply to communications with government parties, employees or
52 officials unless litigation about the subject of the representation is pending or imminent.
53 Communications with elected officials on policy matters are permissible when litigation is pending or
54 imminent after disclosure of the representation to the official.

55 (e) **Limitations on Communications.** When communicating with a represented person pursuant to
56 this Rule, no lawyer may

57 (e)(1) inquire about privileged communications between the person and their legal professional
58 ~~counsel~~ or about information regarding litigation strategy or legal arguments of ~~counsel~~ their legal
59 professional or seek to induce the person to forgo representation or disregard the advice of the
60 person's ~~counsel~~ legal professional; or

61 (e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity
62 agreement or other disposition of actual or potential criminal charges or civil enforcement claims or
63 sentences or penalties with respect to the matter in which the person is represented by a legal
64 professional ~~counsel~~ unless such negotiations are permitted by law, rule or court order.

65 **Comment**

66 [1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule
67 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d) and (e) are substantially the
68 same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding
69 comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule
70 in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer
71 may look for general exceptions to the prohibition of communication with persons represented by
72 ~~counsel~~ a legal professional. (Because of these major differences, the comments to this Rule do not
73 correspond numerically to the comments in ABA Model Rule 4.2.)

74 [2] This Rule contributes to the proper functioning of the legal system by protecting a person who has
75 chosen to be represented by a legal professional lawyer in a matter against possible overreaching by
76 other lawyers who are participating in the matter, interference by those lawyers with the client-legal
77 professional client-lawyer relationship, and the uncounselled disclosure of information relating to the
78 representation.

79 [3] This Rule applies to communications with any person who is represented by a legal professional
80 counsel concerning the matter to which the communication relates.

81 [4] This Rule applies even though the represented person initiates or consents to the communication.
82 A lawyer must immediately terminate communication with a person if, after commencing communication,
83 the lawyer learns that the person is one with whom communication is not permitted by this Rule.

84 [5] This Rule does not prohibit communication with a represented person or an employee or agent of
85 such a person where the subject of the communication is outside the scope of the representation. For
86 example, the existence of a controversy between a government agency and a private party, between two
87 organizations, between individuals, or between an organization and an individual does not prohibit a
88 lawyer for either from communicating with nonlawyer representatives of the other regarding a separate
89 matter. Nor does the Rule prohibit government lawyers from communicating with a represented person
90 about a matter that does not pertain to the subject matter of the representation but is related to the
91 investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a
92 lawyer from communicating with a person to determine if the person in fact is represented by ~~counsel~~ a
93 legal professional concerning the subject matter that the lawyer wishes to discuss with that person.

94 [6] This Rule does not preclude communication with a represented person who is seeking a second
95 opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a
96 communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter
97 may communicate directly with each other, and a lawyer is not prohibited from advising a client
98 concerning a communication that the client is legally entitled to make.

99 [7] A lawyer may communicate with a person who is known to be represented by a legal professional
100 counsel in the matter to which the communication relates only if the communicating lawyer obtains the
101 consent of the represented person's legal professional lawyer, or if the communication is otherwise
102 permitted by paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person
103 known to be represented by a legal professional counsel in a matter without first securing the consent of
104 the represented person's legal professional lawyer if the communicating lawyer is authorized to do so by
105 law, rule or court order. Paragraph (b) recognizes that the scope of representation of a person by a legal
106 professional counsel may, under Rule 1.2 of the Rules of Professional Conduct and the Rules Governing
107 Licensed Paralegal Practitioners, be limited by mutual agreement. Because a lawyer for another party
108 cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the ~~lawyer~~ legal professional
109 who has undertaken a limited representation must assume the responsibility for informing another party's
110 lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly

111 induce an adversary's lawyer to avoid contacting the person on those aspects of a matter for which the
112 person is not represented by ~~counsel~~ a legal professional. Note that this responsibility on the ~~lawyer-legal~~
113 professional undertaking limited-scope representation also relates to the ability of another party's lawyer
114 to make certain *ex parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b)
115 and related sections of this Comment are part of the additions to the ABA Model Rules clarifying that a
116 lawyer may undertake limited representation of a client under the provisions of Rule 1.2. Paragraph (c)
117 specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement
118 matters may communicate with persons known to be represented by a lawyer in such matters without first
119 securing consent of that lawyer.

120 [8] A communication with a represented person is authorized by paragraph (a) if permitted by law,
121 rule or court order. This recognizes constitutional and statutory authority as well as the well-established
122 role of the state judiciary in regulating the practice of the legal profession. Direct communications are also
123 permitted if they are made pursuant to discovery procedures or judicial or administrative process in
124 accordance with the orders or rules of the court or other tribunal before which a matter is pending.

125 [9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise
126 a constitutional right to petition the government for redress of grievances in a policy dispute with the
127 government and if the lawyer notifies the government's lawyer in advance of the intended communication.
128 This would include, for example, a communication by a lawyer with a governmental official with authority
129 to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication
130 is to address a policy issue, including the possibility of resolving a disagreement about a policy position
131 taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the
132 communicating lawyer must comply with this Rule.

133 [10] In the event the person with whom the lawyer communicates is not known to be represented by a
134 legal professional ~~counsel~~ in the matter, the lawyer's communication is subject to Rule 4.3.

135 [11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all communications with
136 represented persons by state or federal government lawyers (including law enforcement agents and
137 cooperating witnesses acting at their direction) when the communications occur during the course of civil
138 or criminal law enforcement. The exemptions for government lawyers contained in paragraph (c) of this
139 Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless,
140 where the lawyer is representing the government in any other role or litigation (such as a contract or tort
141 claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private
142 parties.

143 [12] A "civil law enforcement proceeding" means a civil action or proceeding before any court or other
144 tribunal brought by the governmental agency that seeks to engage in the communication under relevant
145 statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the
146 law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an

147 administrative subpoena or summons or a civil investigative demand; nor do they include enforcement
148 actions brought by an agency other than the one that seeks to make the communication.

149 [13] Under paragraph (c) of this Rule, communications are permitted in a number of circumstances.
150 For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the
151 representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct
152 subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that
153 is intended to evade the administration of justice including in the proceeding in which the represented
154 person is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder,
155 assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also, permitted
156 are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity
157 for which the person is represented by counsel.

158 [14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to
159 protect against an imminent risk of serious bodily harm or substantial property damage. The imminence
160 and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be
161 imminent if it is likely to occur before the government lawyer could obtain court approval or take other
162 reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb
163 threat directed at a public building. The Rule also makes clear that a government attorney may
164 communicate directly with a represented party ~~at the time of arrest of the represented party~~—without
165 the consent of the party's counsel, provided that the represented party has been fully informed of his or
166 her constitutional rights at that time and has waived them. A government lawyer must be very careful to
167 follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was
168 knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this
169 Rule, however, prevents law enforcement officers, even if acting under the general supervision of a
170 government lawyer, from questioning a represented person. The actions of the officers will not be imputed
171 to the government lawyer unless the conversation has been "scripted" by the government lawyer.

172 [15] If government lawyers have any concerns about the applicability of any of the provisions of
173 paragraph (c) or are confronted with other situations in which communications with represented persons
174 may be warranted, they may seek court approval for the *ex parte* communication.

175 [16] Any lawyer desiring to engage in a communication with a represented person that is not
176 otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either *ex*
177 *parte* or upon notice, for an order authorizing the communication. This means, depending on the context:
178 (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a
179 court of general jurisdiction of a state having jurisdiction over the matter to which the communication
180 relates; or (3) a military judge.

181 [17] In determining whether a communication is appropriate a lawyer may want to consider factors
182 such as: (1) whether the communication with the represented person is intended to gain information that
183 is relevant to the matter for which the communication is sought; (2) whether the communication is

184 unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the
185 represented person; and (4) whether good cause exists for not requesting the consent of the person's
186 ~~counsel-legal professional~~ prior to the communication. The lawyer should consider requesting the court to
187 make a written record of the application, including the grounds for the application, the scope of the
188 authorized communications, and the action of the judicial officer, absent exigent circumstances.

189 [18] Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which
190 individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing
191 the organization in a matter. Included within the control group of an organizational client, for example,
192 would be the designated high level officials identified in subparagraph(d)(2). Whether an officer performs
193 a major policy function is to be determined by reference to the organization's business as a whole.
194 Therefore, a vice-president who has policy making functions in connection with only a unit or division
195 would not be a major policy maker for that reason alone, unless that unit or division represents a
196 substantial part of the organization's total business. A staff member who gives advice on policy but does
197 not have authority, alone or in combination with others, to make policy does not perform a major policy
198 making function.

199 [19] Also included in the control group are other current employees known to be "participating as
200 principal decision makers" in the determination of the organization's legal position in the proceeding or
201 investigation of the matter. In this context, "employee" could also encompass former employees who
202 return to the company's payroll or are specifically retained for compensation by the organization to
203 participate as principal decision makers for a particular matter. In general, however, a lawyer may,
204 consistent with this Rule, interview a former employee of an organization without consent of the
205 organization's lawyer.

206 [20] In a criminal or civil law enforcement matter involving a represented organization, government
207 lawyers may, without consent of the organization's lawyer, communicate with any officer, employee, or
208 director of the organization who is not a member of the control group. In all other matters involving
209 organizational clients, however, the protection of this Rule is extended to two additional groups of
210 individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the
211 organization to civil or criminal liability and individuals whose statements might be binding upon the
212 organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an
213 organization must abide by the limitations set forth in paragraph (e).

214 [21] This Rule does prohibit communications with any person who is known by the lawyer making the
215 communication to be represented by a legal professional ~~counsel~~ in the matter to which the
216 communication relates. A person is "known" to be represented when the lawyer has actual knowledge of
217 the representation. Knowledge is a question of fact to be resolved by reference to the totality of the
218 circumstances, including reference to any written notice of the representation. See Rule 1.0(f). Written
219 notice to a lawyer is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that
220 written notice of representation is distributed to all attorneys working on a matter.

221 [22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person,
222 which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair
223 advantage of the absence of the represented person's legal professional~~counsel~~. The prohibition
224 contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful
225 defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications
226 involving, for example, perjury or obstruction of justice.

227 [23] The prohibition of paragraph (e) against the communicating lawyer's negotiating with the
228 represented person with respect to certain issues does not apply if negotiations are authorized by law,
229 rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in
230 direct negotiations with a represented person. Government lawyers may engage in such negotiations if a
231 represented person who has been arrested, charged in a criminal case, or named as a defendant in a
232 civil law enforcement proceeding initiates communications with the government lawyer and the
233 communication is otherwise consistent with requirement of subparagraph (c)(4).