

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~~

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

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

(ed) Organizations as Represented Persons.

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

[1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d) and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer 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~~a~~ 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~Paragraph (b)~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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