

1 | **Rule 4.2. Communication with Persons Represented by Counsel~~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 has provided  
11 | written notice to the lawyer of those aspects of the matter or the time limitation for which the person is  
12 | represented. Only as to such aspects and time is the person considered to be represented by counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 63 **Comment**

64 [1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule  
65 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d) and (e) are substantially the  
66 same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding  
67 comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule  
68 in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer  
69 may look for general exceptions to the prohibition of communication with persons represented by counsel.  
70 (Because of these major differences, the comments to this Rule do not correspond numerically to the  
71 comments in ABA Model Rule 4.2.)

72 [2] This Rule contributes to the proper functioning of the legal system by protecting a person who has  
73 chosen to be represented by a legal professional lawyer in a matter against possible overreaching by  
74 other legal professionals lawyers who are participating in the matter, interference by those lawyers with

75 | the ~~client-legal professional client-lawyer~~ relationship and the uncounselled disclosure of information  
76 | relating to the representation.

77 | [3] This Rule applies to communications with any person who is represented by a legal professional  
78 | ~~counsel~~ concerning the matter to which the communication relates.

79 | [4] This Rule applies even though the represented person initiates or consents to the communication.  
80 | A lawyer must immediately terminate communication with a person if, after commencing communication,  
81 | the lawyer learns that the person is one with whom communication is not permitted by this Rule.

82 | [5] This Rule does not prohibit communication with a represented person or an employee or agent of  
83 | such a person where the subject of the communication is outside the scope of the representation. For  
84 | example, the existence of a controversy between a government agency and a private party, between two  
85 | organizations, between individuals or between an organization and an individual does not prohibit a  
86 | lawyer for either from communicating with nonlawyer representatives of the other regarding a separate  
87 | matter. Nor does the Rule prohibit government lawyers from communicating with a represented person  
88 | about a matter that does not pertain to the subject matter of the representation but is related to the  
89 | investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a  
90 | lawyer from communicating with a person to determine if the person in fact is represented by counsel  
91 | concerning the subject matter that the lawyer wishes to discuss with that person.

92 | [6] This Rule does not preclude communication with a represented person who is seeking a second  
93 | opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a  
94 | communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter  
95 | may communicate directly with each other, and a lawyer is not prohibited from advising a client  
96 | concerning a communication that the client is legally entitled to make.

97 | [7] A lawyer may communicate with a person who is known to be represented by a legal professional  
98 | ~~counsel~~ in the matter to which the communication relates only if the communicating lawyer obtains the  
99 | consent of the represented person's legal professional lawyer, or if the communication is otherwise  
100 | permitted by paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person  
101 | known to be represented by a legal professional counsel in a matter without first securing the consent of  
102 | the represented person's legal professional lawyer if the communicating lawyer is authorized to do so by  
103 | law, rule or court order. Paragraph (b) recognizes that the scope of representation of a person by a legal  
104 | professional counsel may, under Rule 1.2, be limited by mutual agreement. Because a legal professional  
105 | ~~lawyer~~ for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the  
106 | lawyer who has undertaken a limited representation must assume the responsibility for informing another  
107 | party's lawyer of the limitations. This ensures that such a limited representation will not improperly or  
108 | unfairly induce an adversary's lawyer to avoid contacting the person on those aspects of a matter for  
109 | which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking  
110 | limited-scope representation also relates to the ability of another party's lawyer to make certain *ex parte*  
111 | contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and related sections of this

112 Comment are part of the additions to the ABA Model Rules clarifying that a lawyer may undertake limited  
113 representation of a client under the provisions of Rule 1.2. Paragraph (c) specifies the circumstances in  
114 which government lawyers engaged in criminal and civil law enforcement matters may communicate with  
115 persons known to be represented by a lawyer in such matters without first securing consent of that  
116 lawyer.

117 [8] A communication with a represented person is authorized by paragraph (a) if permitted by law,  
118 rule or court order. This recognizes constitutional and statutory authority as well as the well-established  
119 role of the state judiciary in regulating the practice of the legal profession. Direct communications are also  
120 permitted if they are made pursuant to discovery procedures or judicial or administrative process in  
121 accordance with the orders or rules of the court or other tribunal before which a matter is pending.

122 [9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise  
123 a constitutional right to petition the government for redress of grievances in a policy dispute with the  
124 government and if the lawyer notifies the government's lawyer in advance of the intended communication.  
125 This would include, for example, a communication by a lawyer with a governmental official with authority  
126 to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication  
127 is to address a policy issue, including the possibility of resolving a disagreement about a policy position  
128 taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the  
129 communicating lawyer must comply with this Rule.

130 [10] In the event the person with whom the lawyer communicates is not known to be represented by a  
131 legal professional ~~counsel~~ in the matter, the lawyer's communication is subject to Rule 4.3.

132 [11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all communications with  
133 represented persons by state or federal government lawyers (including law enforcement agents and  
134 cooperating witnesses acting at their direction) when the communications occur during the course of civil  
135 or criminal law enforcement. The exemptions for government lawyers contained in paragraph (c) of this  
136 Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless,  
137 where the lawyer is representing the government in any other role or litigation (such as a contract or tort  
138 claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private  
139 parties.

140 [12] A "civil law enforcement proceeding" means a civil action or proceeding before any court or other  
141 tribunal brought by the governmental agency that seeks to engage in the communication under relevant  
142 statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the  
143 law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an  
144 administrative subpoena or summons or a civil investigative demand; nor do they include enforcement  
145 actions brought by an agency other than the one that seeks to make the communication.

146 [13] Under paragraph (c) of this Rule, communications are permitted in a number of circumstances.  
147 For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the  
148 representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct

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

155 [14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to  
156 protect against an imminent risk of serious bodily harm or substantial property damage. The imminence  
157 and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be  
158 imminent if it is likely to occur before the government lawyer could obtain court approval or take other  
159 reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb  
160 threat directed at a public building. The Rule also makes clear that a government attorney may  
161 communicate directly with a represented party A at the time of arrest of the represented party" without the  
162 consent of the party's counsel, provided that the represented party has been fully informed of his or her  
163 constitutional rights at that time and has waived them. A government lawyer must be very careful to follow  
164 Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was  
165 knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this  
166 Rule, however, prevents law enforcement officers, even if acting under the general supervision of a  
167 government lawyer, from questioning a represented person. The actions of the officers will not be imputed  
168 to the government lawyer unless the conversation has been "scripted" by the government lawyer.

169 [15] If government lawyers have any concerns about the applicability of any of the provisions of  
170 paragraph (c) or are confronted with other situations in which communications with represented persons  
171 may be warranted, they may seek court approval for the *ex parte* communication.

172 [16] Any lawyer desiring to engage in a communication with a represented person that is not  
173 otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either *ex*  
174 *parte* or upon notice, for an order authorizing the communication. This means, depending on the context:  
175 (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a  
176 court of general jurisdiction of a state having jurisdiction over the matter to which the communication  
177 relates; or (3) a military judge.

178 [17] In determining whether a communication is appropriate a lawyer may want to consider factors  
179 such as: (1) whether the communication with the represented person is intended to gain information that  
180 is relevant to the matter for which the communication is sought; (2) whether the communication is  
181 unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the  
182 represented person; and (4) whether good cause exists for not requesting the consent of the person's  
183 counsel prior to the communication. The lawyer should consider requesting the court to make a written  
184 record of the application, including the grounds for the application, the scope of the authorized  
185 communications, and the action of the judicial officer, absent exigent circumstances.

186 [18] Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which  
187 individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing  
188 the organization in a matter. Included within the control group of an organizational client, for example,  
189 would be the designated high level officials identified in subparagraph(d)(2). Whether an officer performs  
190 a major policy function is to be determined by reference to the organization's business as a whole.  
191 Therefore, a vice-president who has policy making functions in connection with only a unit or division  
192 would not be a major policy maker for that reason alone, unless that unit or division represents a  
193 substantial part of the organization's total business. A staff member who gives advice on policy but does  
194 not have authority, alone or in combination with others, to make policy does not perform a major policy  
195 making function.

196 [19] Also included in the control group are other current employees known to be "participating as  
197 principal decision makers" in the determination of the organization's legal position in the proceeding or  
198 investigation of the matter. In this context, "employee" could also encompass former employees who  
199 return to the company's payroll or are specifically retained for compensation by the organization to  
200 participate as principal decision makers for a particular matter. In general, however, a lawyer may,  
201 consistent with this Rule, interview a former employee of an organization without consent of the  
202 organization's lawyer.

203 [20] In a criminal or civil law enforcement matter involving a represented organization, government  
204 lawyers may, without consent of the organization's lawyer, communicate with any officer, employee, or  
205 director of the organization who is not a member of the control group. In all other matters involving  
206 organizational clients, however, the protection of this Rule is extended to two additional groups of  
207 individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the  
208 organization to civil or criminal liability and individuals whose statements might be binding upon the  
209 organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an  
210 organization must abide by the limitations set forth in paragraph (e).

211 [21] This Rule does prohibit communications with any person who is known by the lawyer making the  
212 communication to be represented by a legal professional ~~counsel~~ in the matter to which the  
213 communication relates. A person is "known" to be represented when the lawyer has actual knowledge of  
214 the representation. Knowledge is a question of fact to be resolved by reference to the totality of the  
215 circumstances, including reference to any written notice of the representation. See Rule 1.0(f). Written  
216 notice to a lawyer is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that  
217 written notice of representation is distributed to all attorneys working on a matter.

218 [22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person,  
219 which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair  
220 advantage of the absence of the represented person's legal professional ~~counsel~~. The prohibition  
221 contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful

222 defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications  
223 involving, for example, perjury or obstruction of justice.

224 [23] The prohibition of paragraph (e) against the communicating lawyer's negotiating with the  
225 represented person with respect to certain issues does not apply if negotiations are authorized by law,  
226 rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in  
227 direct negotiations with a represented person. Government lawyers may engage in such negotiations if a  
228 represented person who has been arrested, charged in a criminal case, or named as a defendant in a  
229 civil law enforcement proceeding initiates communications with the government lawyer and the  
230 communication is otherwise consistent with requirement of subparagraph (c)(4).