

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

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

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

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

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

21 or

- 22 (2) the communication is made to protect against an imminent risk of death or
23 serious bodily harm or substantial property damage that the government lawyer
24 reasonably believes may occur and the communication is limited to those matters
25 necessary to protect against the imminent risk; or
- 26 (3) the communication is made at the time of the arrest of the represented person
27 and after that person is advised of the right to remain silent and the right to counsel
28 and voluntarily and knowingly waives these rights; or
- 29 (4) the communication is initiated by the represented person, directly or through
30 an intermediary, if prior to the communication the represented person has given
31 a written or recorded voluntary and informed waiver of counsel, including the
32 right to have substitute counsel, for that communication.

33 **(d) Organizations as Represented Persons.**

- 34 (1) When the represented person is an organization, an individual is represented
35 by counsel for the organization if the individual is not separately represented with
36 respect to the subject matter of the communication, and

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

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

42 (i) a current member of the control group of the represented
43 organization; or

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

46 or

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

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

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

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

66 (1) inquire about privileged communications between the person and their legal
67 professional or about information regarding litigation strategy or legal arguments
68 of their legal professional or seek to induce the person to forgo representation or
69 disregard the advice of the person's legal professional; or
70 (2) engage in negotiations of a plea agreement, settlement, statutory or non-
71 statutory immunity agreement or other disposition of actual or potential criminal
72 charges or civil enforcement claims or sentences or penalties with respect to the
73 matter in which the person is represented by a legal professional unless such
74 negotiations are permitted by law, rule or court order.

75 **Comment**

76 [1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from
77 ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d)
78 and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d), adopted in
79 1999, as are most of the corresponding comments that address these three paragraphs of
80 this Rule. There is also a variation from the Model Rule in paragraph (a), where the body
81 of judicially created rules are added as a source to which the lawyer may look for general
82 exceptions to the prohibition of communication with persons represented by a legal
83 professional. (Because of these major differences, the comments to this Rule do not
84 correspond numerically to the comments in ABA Model Rule 4.2.)

85 [2] This Rule contributes to the proper functioning of the legal system by
86 protecting a person who has chosen to be represented by a legal professional in a matter
87 against possible overreaching by other lawyers who are participating in the matter,

88 interference by those lawyers with the client-legal professional relationship, and
89 the uncounselled disclosure of information relating to the representation.

90 [3] This Rule applies to communications with any person who is represented by a
91 legal professional concerning the matter to which the communication relates.

92 [4] This Rule applies even though the represented person initiates or consents to
93 the communication. A lawyer must immediately terminate communication with a person
94 if, after commencing communication, the lawyer learns that the person is one with whom
95 communication is not permitted by this Rule.

96 [5] This Rule does not prohibit communication with a represented person or an
97 employee or agent of such a person where the subject of the communication is outside
98 the scope of the representation. For example, the existence of a controversy between a
99 government agency and a private party, between two organizations, between
100 individuals, or between an organization and an individual does not prohibit a lawyer for
101 either from communicating with nonlawyer representatives of the other regarding a
102 separate matter. Nor does the Rule prohibit government lawyers from communicating
103 with a represented person about a matter that does not pertain to the subject matter of
104 the representation but is related to the investigation, undercover or overt, of ongoing
105 unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating
106 with a person to determine if the person in fact is represented by a legal professional
107 concerning the subject matter that the lawyer wishes to discuss with that person.

108 [6] This Rule does not preclude communication with a represented person who is
109 seeking a second opinion from a lawyer who is not otherwise representing a client in the

110 matter. A lawyer may not make a communication prohibited by this Rule through the
111 acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each
112 other, and a lawyer is not prohibited from advising a client concerning a communication
113 that the client is legally entitled to make.

114 [7] A lawyer may communicate with a person who is known to be represented
115 by a legal professional in the matter to which the communication relates only if the
116 communicating lawyer obtains the consent of the represented
117 person's legal professional, or if the communication is otherwise permitted by
118 paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person
119 known to be represented by a legal professional in a matter without first securing the
120 consent of the represented person's legal professional if the communicating lawyer is
121 authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope
122 of representation of a person by a legal professional may, under Rule 1.2 of the Rules of
123 Professional Conduct ~~and the Rules Governing Licensed Paralegal Practitioners,~~ be
124 limited by mutual agreement. Because a lawyer for another party cannot know which of
125 Rule 4.2 or 4.3 applies under these circumstances, the legal professional who has
126 undertaken a limited representation must assume the responsibility for informing
127 another party's lawyer of the limitations. This ensures that such a limited representation
128 will not improperly or unfairly induce an adversary's lawyer to avoid contacting the
129 person on those aspects of a matter for which the person is not represented by a legal
130 professional. Note that this responsibility on the legal professional undertaking limited-
131 scope representation also relates to the ability of another party's lawyer to make certain *ex*

132 *parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and
133 related sections of this Comment are part of the additions to the ABA Model Rules
134 clarifying that a lawyer may undertake limited representation of a client under the
135 provisions of Rule 1.2. Paragraph (c) specifies the circumstances in which government
136 lawyers engaged in criminal and civil law enforcement matters may communicate with
137 persons known to be represented by a lawyer in such matters without first securing
138 consent of that lawyer.

139 [8] A communication with a represented person is authorized by paragraph (a) if
140 permitted by law, rule or court order. This recognizes constitutional and statutory
141 authority as well as the well-established role of the state judiciary in regulating the
142 practice of the legal profession. Direct communications are also permitted if they are
143 made pursuant to discovery procedures or judicial or administrative process in
144 accordance with the orders or rules of the court or other tribunal before which a matter
145 is pending.

146 [9] A communication is authorized under paragraph (a) if the lawyer is assisting
147 the client to exercise a constitutional right to petition the government for redress of
148 grievances in a policy dispute with the government and if the lawyer notifies the
149 government's lawyer in advance of the intended communication. This would include, for
150 example, a communication by a lawyer with a governmental official with authority to
151 take or recommend action in the matter, provided that the sole purpose of the lawyer's
152 communication is to address a policy issue, including the possibility of resolving a
153 disagreement about a policy position taken by the government. If, on the other hand, the

154 matter does not relate solely to a policy issue, the communicating lawyer must comply
155 with this Rule.

156 [10] In the event the person with whom the lawyer communicates is not known to
157 be represented by a legal professional in the matter, the lawyer's communication is
158 subject to Rule 4.3.

159 [11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all
160 communications with represented persons by state or federal government lawyers
161 (including law enforcement agents and cooperating witnesses acting at their direction)
162 when the communications occur during the course of civil or criminal law enforcement.
163 The exemptions for government lawyers contained in paragraph (c) of this Rule recognize
164 the unique responsibilities of government lawyers to enforce public law. Nevertheless,
165 where the lawyer is representing the government in any other role or litigation (such as
166 a contract or tort claim, for example) the same rules apply to government lawyers as are
167 applicable to lawyers for private parties.

168 [12] A "civil law enforcement proceeding" means a civil action or proceeding
169 before any court or other tribunal brought by the governmental agency that seeks to
170 engage in the communication under relevant statutory or regulatory provisions, or under
171 the government's police or regulatory powers to enforce the law. Civil law enforcement
172 proceedings do not include proceedings related to the enforcement of an administrative
173 subpoena or summons or a civil investigative demand; nor do they include enforcement
174 actions brought by an agency other than the one that seeks to make the communication.

175 [13] Under paragraph (c) of this Rule, communications are permitted in a number
176 of circumstances. For instance, subparagraph (c)(1) permits the investigation of a
177 different matter unrelated to the representation or any ongoing unlawful conduct.
178 (Unlawful conduct involves criminal activity and conduct subject to a civil law
179 enforcement proceeding.) Such violations include, but are not limited to, conduct that is
180 intended to evade the administration of justice including in the proceeding in which the
181 represented person is a defendant, such as obstruction of justice, subornation of perjury,
182 jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful
183 flight to avoid prosecution. Also, permitted are undercover activities directed at ongoing
184 criminal activity, even if it is related to past criminal activity for which the person is
185 represented by counsel.

186 [14] Under subparagraph (c)(2), a government lawyer may engage in limited
187 communications to protect against an imminent risk of serious bodily harm or substantial
188 property damage. The imminence and gravity of the risk will be determined from the
189 totality of the circumstances. Generally, a risk would be imminent if it is likely to occur
190 before the government lawyer could obtain court approval or take other reasonable
191 measures. An imminent risk of substantial property damage might exist if there is a bomb
192 threat directed at a public building. The Rule also makes clear that a government attorney
193 may communicate directly with a represented party at the time of arrest of the
194 represented party without the consent of the party's counsel, provided that the
195 represented party has been fully informed of his or her constitutional rights at that time
196 and has waived them. A government lawyer must be very careful to follow Rule 4.2(d)

197 and would have a significant burden to establish that the waiver of right to counsel was
198 knowing and voluntary. The better practice would include a written or recorded waiver.
199 Nothing in this Rule, however, prevents law enforcement officers, even if acting under
200 the general supervision of a government lawyer, from questioning a represented person.
201 The actions of the officers will not be imputed to the government lawyer unless the
202 conversation has been "scripted" by the government lawyer.

203 [15] If government lawyers have any concerns about the applicability of any of the
204 provisions of paragraph (c) or are confronted with other situations in which
205 communications with represented persons may be warranted, they may seek court
206 approval for the *ex parte* communication.

207 [16] Any lawyer desiring to engage in a communication with a represented person
208 that is not otherwise permitted under this Rule must apply in good faith to a court of
209 competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the
210 communication. This means, depending on the context: (1) a district judge or magistrate
211 judge of a United States District Court; (2) a judge or commissioner of a court of general
212 jurisdiction of a state having jurisdiction over the matter to which the communication
213 relates; or (3) a military judge.

214 [17] In determining whether a communication is appropriate a lawyer may want
215 to consider factors such as: (1) whether the communication with the represented person
216 is intended to gain information that is relevant to the matter for which the communication
217 is sought; (2) whether the communication is unreasonable or oppressive; (3) whether the
218 purpose of the communication is not primarily to harass the represented person; and (4)

219 whether good cause exists for not requesting the consent of the person's legal professional
220 prior to the communication. The lawyer should consider requesting the court to make a
221 written record of the application, including the grounds for the application, the scope of
222 the authorized communications, and the action of the judicial officer, absent exigent
223 circumstances.

224 [18] Organizational clients are entitled to the protections of this Rule. Paragraph
225 (d) specifies which individuals will be deemed for purposes of this Rule to be represented
226 by the lawyer who is representing the organization in a matter. Included within the
227 control group of an organizational client, for example, would be the designated high level
228 officials identified in subparagraph(d)(2). Whether an officer performs a major policy
229 function is to be determined by reference to the organization's business as a whole.
230 Therefore, a vice-president who has policy making functions in connection with only a
231 unit or division would not be a major policy maker for that reason alone, unless that unit
232 or division represents a substantial part of the organization's total business. A staff
233 member who gives advice on policy but does not have authority, alone or in combination
234 with others, to make policy does not perform a major policy making function.

235 [19] Also included in the control group are other current employees known to be
236 "participating as principal decision makers" in the determination of the organization's
237 legal position in the proceeding or investigation of the matter. In this context, "employee"
238 could also encompass former employees who return to the company's payroll or are
239 specifically retained for compensation by the organization to participate as principal
240 decision makers for a particular matter. In general, however, a lawyer may, consistent

241 with this Rule, interview a former employee of an organization without consent of the
242 organization's lawyer.

243 [20] In a criminal or civil law enforcement matter involving a represented
244 organization, government lawyers may, without consent of the organization's lawyer,
245 communicate with any officer, employee, or director of the organization who is not a
246 member of the control group. In all other matters involving organizational clients,
247 however, the protection of this Rule is extended to two additional groups of individuals:
248 individuals whose acts might be imputed to the organization for the purpose of
249 subjecting the organization to civil or criminal liability and individuals whose statements
250 might be binding upon the organization. A lawyer permitted by this Rule to
251 communicate with an officer, employee, or director of an organization must abide by the
252 limitations set forth in paragraph (e).

253 [21] This Rule does prohibit communications with any person who is known by
254 the lawyer making the communication to be represented by a legal professional in the
255 matter to which the communication relates. A person is "known" to be represented when
256 the lawyer has actual knowledge of the representation. Knowledge is a question of fact
257 to be resolved by reference to the totality of the circumstances, including reference to any
258 written notice of the representation. See Rule 1.0(f). Written notice to a lawyer is relevant,
259 but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice
260 of representation is distributed to all attorneys working on a matter.

261 [22] Paragraph (e) is intended to regulate a lawyer's communications with a
262 represented person, which might otherwise be permitted under the Rule, by prohibiting

263 any lawyer from taking unfair advantage of the absence of the represented person's legal
264 professional. The prohibition contained in paragraph (e) is limited to inquiries concerning
265 privileged communications and lawful defense strategies. The Rule does not prohibit
266 inquiry into unlawful litigation strategies or communications involving, for example,
267 perjury or obstruction of justice.

268 [23] The prohibition of paragraph (e) against the communicating lawyer's
269 negotiating with the represented person with respect to certain issues does not apply if
270 negotiations are authorized by law, rule or court order. For example, a court of competent
271 jurisdiction could authorize a lawyer to engage in direct negotiations with a represented
272 person. Government lawyers may engage in such negotiations if a represented person
273 who has been arrested, charged in a criminal case, or named as a defendant in a civil law
274 enforcement proceeding initiates communications with the government lawyer and the
275 communication is otherwise consistent with requirement of subparagraph (c)(4).

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