

RULE 2.2: LAWYER SERVING AS AN INTERMEDIARY BETWEEN CLIENTS

- (a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.
- (b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:
 - (1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;
 - (2) the lawyer's representation of another client, responsibilities to a former client or a third person, or the lawyer's personal interests, or the representation, responsibilities, or personal interests of a lawyer associated with the lawyer in a firm will not prevent the lawyer from providing competent and diligent representation to each of the clients the lawyer will serve as an intermediary;
 - (3) the lawyer discusses with each client:
 - (i) the lawyer's responsibilities as an intermediary;
 - (ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);
 - (iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and
 - (iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients, and any responsibility of the lawyer to a former client or a third person, and any personal interests of a lawyer associated with the lawyer in a firm that presents a significant risk of materially limiting the lawyer's representation of a client the lawyer will serve as an intermediary; and
 - (4) each client gives informed consent, confirmed in writing to the lawyer's representation, and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any

information relating to the representation to the extent that the lawyer reasonably believes is required to comply with RPC 1.4.

- (c) While representing clients as an intermediary, the lawyer shall:
 - (1) act impartially to assist the clients in accomplishing their common objective;
 - (2) as between the clients, treat information relating to the intermediation as information protected by RPC 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with RPC 1.4; and
 - (3) discuss with each client the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.
- (d) A lawyer shall withdraw from service as an intermediary if:
 - (1) any of the clients so requests;
 - (2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by RPC 1.4 to reveal to them; or
 - (3) any of the other conditions stated in paragraph (b) are no longer satisfied.
- (e) If the lawyer's withdrawal is required by paragraph (d)(3), the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by RPC 1.6.

Comment

[1] A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the information, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as an intermediary; the open, candid, and non-adversarial nature of the clients' pursuit of a common objective; and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (i.e., the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by lawyers, and because it requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interest may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

[2] Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served by an intermediary, this Rule, and not RPC 1.7, applies. RPC 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer

must afford that client the protections of RPC 1.7. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients and the matters are substantially related, the lawyer must afford the former client the protections of RPC 1.9.

[3] RPC 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See RPC 2.4; Tenn. Sup. Ct. R. 31.

[4] Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by RPC 1.7 rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not RPC 1.7, will apply.

[5] A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis, such as helping to organize a business in which two or more clients are entrepreneurs or working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

[6] In considering whether to act as an intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[7] The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation," in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose, to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the situation involves creating a relationship between the parties or terminating one; the relative experience, sophistication, and economic bargaining power of the clients; and the existence of prior familial, business, or legal relationships.

Confidentiality and Privilege

[8] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the presentation. See RPCs 1.4 and 1.6. Complying with both requirements while acting as an intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

[9] Paragraphs (b)(4) and (c)(2) make clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

[10] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Informed Consent

[11] In acting as an intermediary between clients, the lawyer is required to discuss with the clients the implications of doing so and may proceed only upon informed consent, confirmed in writing. The discussion should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

[12] Paragraph (c)(3) is an application of the principle expressed in RPC 1.4. Where the lawyer is an intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[13] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in RPC 1.16, and the protection of RPC 1.9 concerning obligations to a former client.

[14] Because the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

[15] Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of RPCs 1.9 and 1.10.

DEFINITIONAL CROSS-REFERENCES

”Confirmed in writing” *See* RPC 1.0(b)

“Informed consent” *See* RPC 1.0(e)

“Material” and “materially” *See* RPC 1.0(o)

“Reasonably believes” *See* RPC 1.0(i)