

Rule 2.2: Intermediary (deleted)

1. Current Kentucky Rule with Official Comments:

SCR 3.130(2.2) Intermediary

(a) A lawyer may only act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Supreme Court Commentary

This Rule explicitly recognizes the special role of the lawyer acting as an intermediary, to be distinguished from joint representation as an advocate.

[1] A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the

relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship, and obtain the client's consent, preferably in writing.

[2] The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or a marital division or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

[4] In considering whether to act as 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. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. 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.

[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the

respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

[6] In some circumstances a lawyer will undertake representation of a party in litigation or negotiation, and be forced to deal with an unrepresented party. For example, the lawyer representing a spouse in a divorce case may deal with the unrepresented spouse within the limits of Rule 4.3. The fact that that lawyer negotiates with the unrepresented spouse does not make the lawyer an intermediary, or subject the lawyer to the special Rule of disqualification contained in Rule 2.2(c).

Confidentiality and Privilege

[7] 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 representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing Rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[8] 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.

Consultation

[9] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

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

Withdrawal

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

2. Proposed Kentucky Rule with Official Comments:

It is proposed that KRPC 2.2 Intermediary be deleted.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The Commission recommended deletion of MR 2.2. Although MR 2.2 attempted to address duties associated with common representation, it was felt that the Rule was misunderstood and that the issues could be adequately addressed under MR 1.7 Conflict of Interest: Current Clients. Many of the Comments from MR 2.2 are moved to proposed KRPC 1.7 Comments under the caption "Special Considerations in Common Representation." The ABA Reporter's Explanation of Changes to MR 2.2 provides more detail on its deletion. It is adopted by the Committee and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 2.2**

TEXT:

The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor

the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.

Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule.

COMMENT:

[1] This Comment has been deleted. The Commission believes the term "common representation" is preferable to "intermediation."

[2] This Comment has been deleted as no longer necessary since the term "intermediation" has been eliminated.

[3] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[4] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[5] This Comment has been deleted as no longer necessary after the elimination of the term "intermediation."

[6] This Comment has been deleted. Some of the material may be found in the Comment

to Rule 1.7 (*Ed. Note: This is Comment [7] in the current KRPC 2.2*).

[7] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7 (*Ed. Note: This is Comment [8] in the current KRPC 2.2*).

[8] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7 (*Ed. Note: This is Comment [9] in the current KRPC 2.2*).

[9] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7 (*Ed. Note: This is Comment [10] in the current KRPC 2.2*).

[10] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7 (*Ed. Note: This is Comment [11] in the current KRPC 2.2*).

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in the recommended deletion of KRPC 2.2 from the deletion of MR 2.2.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.