

The Lawyer as Intermediary

By the NHBA Ethics Committee

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Most attorneys have had to confront, at one time or another, a situation where two or more clients become involved in a matter in which they have potentially conflicting interests. What involvement may the attorney properly have and when should involvement be avoided in attempting to help achieve a mutually amicable resolution in such a situation? Rule 2.2 of the *New Hampshire Rules of Professional Conduct* attempts to provide some guidance.

Determining Appropriateness of Acting as Intermediary

First, the Attorney must determine whether it is appropriate to act as an intermediary between clients. If the dispute is not capable of resolution on an amicable and mutually advantageous bases or the clients' relationship is antagonistic, the attorney should avoid attempting to serve as intermediary since intermediation is likely to result only in additional cost and frustration for the parties. However, if the attorney 1) "consults with each client concerning the implications of the common representation . . . and obtains each client's consent . . ."; 2) "reasonably believes that the matter can be resolved on terms compatible with the client's 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 client . . ."; and 3) "the lawyer reasonable believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the client," then intermediation may be appropriate. Rule 2.2(a)

Ethics Committee Opinions

The Ethics Committee has rendered two opinions (one under the prior Code of Professional Responsibility and one under the present *Rules of Professional Conduct*) concluding that it would be impermissible for an attorney to serve as an intermediary in domestic disputes since the requirements of section (a) in most cases could not be satisfied. One the other hand, the comments to Rule 2.2 suggest certain types of situations in which intermediation could be mutually advantageous by possibly saving cost and avoiding litigation: "helping 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 interests, arranging a property distribution in settlement of an estate . . ."

Responsibilities to Clients

Complicating the decision of whether to act as intermediary are the responsibilities owed pursuant to Rule 1.4 and 1.5 which still require the attorney to keep each client adequately informed and to maintain confidentiality of information relating to the representation. If these duties cannot be met, common representation should be declined. However, the comments to Rule 2.2 indicate "the prevailing rule is that as between commonly represented clients the [attorney-client] 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.

During intermediation, substantial prejudice could result to the client if he did not fully understand the attorney's non-partisan role and failed to assume responsibility for the decisions to be made. Thus Section (b) of Rule 2.2 requires that the attorney consult with the clients regarding the implications of the decisions to be made during the course of the common representation.

The Rule leaves completely up to the attorney and clients the decision as to what form the intermediation may take but the comments caution that the form be carefully chosen.

Conditions Requiring Withdrawal from Representation

Finally, Section (c) requires the attorney to withdraw from common representation at the request of any of the clients or if the conditions originally permitting intermediation no longer exist. Subsequent to withdrawal, the attorney shall not provide further representation to "any of the clients in the matter that was the subject of the intermediation." The provisions of Rule 1.16 and Rule 1.9 concerning the right to loyal and diligent representation and the right to discharge the attorney are thus incorporated within the intermediary framework.