

but the common representation may be inferred from other circumstances. Because confusion can arise as to the practitioner's role where each party is not separately represented, it is important that the practitioner make clear the relationship. In addition, the existence of a document purporting to establish an agency relationship between the inventor and invention promoter would not vitiate the possibility that the practitioner might have two clients.

Because the potential for confusion is so great, § 11.202(c) would impose the requirement that an explanation of the risks of the common representation be furnished, in writing. The process of preparing the writing would cause the practitioner involved to focus specifically on those risks, a process that might suggest to the practitioner that the particular situation is not suited to the use of the practitioner as an intermediary. In any event, a written explanation would perform a valuable role in educating the client to such risks as may exist—risks that many clients may not otherwise comprehend. A client might not agree to waive the requirement for a written analysis of the risks. The “unusual circumstances” requirement might be met in rare situations where an assessment of risks is not feasible at the beginning of the intermediary role. In such circumstances, the writing would have to be provided as soon as it becomes feasible to assess the risks with reasonable clarity. The consent required by § 11.202(c) would have to be in writing, and would refer to the disclosure upon which it is based.

Section 11.202 would not apply to a practitioner acting as arbitrator or mediator between or among parties who are not clients of that practitioner, even where the practitioner has been appointed with the concurrence of the parties. In performing such a role, the practitioner may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by the Joint Committee of the American Bar Association and the American Arbitration Association.

A practitioner 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 mediating a dispute between clients.

The practitioner 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 practitioner act as intermediary.

In considering whether to act as intermediary between clients, a practitioner 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 practitioner 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.

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 practitioner 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 include whether the practitioner subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Because the practitioner is required to be impartial between commonly represented clients, intermediation would be improper when that impartiality cannot be maintained. For example, a practitioner who has represented one of the clients for a long period of time and in a variety of matters could have difficulty being impartial between that client and one to whom the practitioner has only recently been introduced. Another example would be a practitioner who represents a client, such as an invention promoter, that refers a number of its clients to the practitioner to prepare and prosecute patent applications for the clients, and the practitioner could have difficulty being impartial between the referring invention promoter and the referred clients.

*Section 11.202 and Confidentiality and Privilege.* A particularly important factor in determining the appropriateness of intermediation would be the effect on client-practitioner confidentiality and the attorney-client or patent agent-client privilege. In a common representation, the practitioner would still be required both to keep each client adequately informed and to maintain confidentiality of information relating to each of the representations. See §§ 11.104 and 11.106. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation would be improper. With regard to the attorney-client or patent agent-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.

For example, a practitioner, hired by A and B to prepare a patent application for A's invention, acts as an intermediary under § 11.202 when, upon instructions from A and B, the practitioner prepares an assignment transferring a one-half undivided interest in A's invention and any resulting patent to A and B, even if only B is to pay the legal fees. If A and B later dispute the validity of the assignment and each retains counsel of their own choice, the practitioner may communicate the information regarding the terms of the assignment to both counsel. The attorney-client or patent agent-client privilege does not attach. The practitioner may submit his legal bills to B for past services in accordance with the retainer agreement. See Opinion 93-76 (1993) of the Ethics Advisory Panel of the Rhode Island Supreme Court.

*Section 11.202 and Full Disclosure.* In acting as intermediary between clients, the practitioner would be required to make full disclosure to the clients on the implications of doing so, and proceed only upon consent based on such full disclosure. The practitioner would have to make clear that the practitioner's role is not that of partisanship normally expected in other circumstances.

*Paragraph (d) of § 11.202* would apply the principle expressed in § 11.104. Where the practitioner is intermediary, the clients ordinarily would have to assume greater responsibility for decisions than when each client is independently represented.