

1 Rule 2.3. Evaluation for Use by Third Persons.

2 (a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for  
3 the use of someone other than the client if: ~~the lawyer reasonably believes that making~~  
4 the evaluation is compatible with other aspects of the lawyer's relationship with the  
5 client. ~~;~~ and

6 ~~(2)(b) When the lawyer knows or reasonably should know that the evaluation is~~  
7 likely to affect the client's interests materially and adversely, the lawyer shall not provide  
8 the evaluation unless the client gives informed consent.

9 (c) Except as disclosure is ~~required~~ authorized in connection with a report of an  
10 evaluation, information relating to the evaluation is otherwise ~~protected by~~ subject to  
11 Rule 1.6.

12 Comment

13 Definition

14 [1] An evaluation may be performed at the client's direction ~~but or when impliedly~~  
15 authorized in order to carry out the representation. See Rule 1.2. Such an evaluation  
16 may be for the primary purpose of establishing information for the benefit of third  
17 parties; for example, an opinion concerning the title of property rendered at the behest  
18 of a vendor for the information of a prospective purchaser, or at the behest of a  
19 borrower for the information of a prospective lender. In some situations, the evaluation  
20 may be required by a government agency; for example, an opinion concerning the  
21 legality of the securities registered for sale under the securities laws. In other instances,  
22 the evaluation may be required by a third person, such as a purchaser of a business.

23 ~~Lawyers for the government may be called upon to give a formal opinion on the~~  
24 ~~legality of contemplated government agency action. In making such an evaluation, the~~  
25 ~~government lawyer acts at the behest of the government as the client but for the~~  
26 ~~purpose of establishing the limits of the agency's authorized activity. Such an opinion is~~  
27 ~~to be distinguished from confidential legal advice given agency officials. The critical~~  
28 ~~question is whether the opinion is to be made public.~~

29 [2] A legal evaluation should be distinguished from an investigation of a person with  
30 whom the lawyer does not have a client-lawyer relationship. For example, a lawyer  
31 retained by a purchaser to analyze a vendor's title to property does not have a

32 client-lawyer relationship with the vendor. So also, an investigation into a person's  
33 affairs by a government lawyer, or by special counsel employed by the government, is  
34 not an evaluation as that term is used in this Rule. The question is whether the lawyer is  
35 retained by the person whose affairs are being examined. When the lawyer is retained  
36 by that person, the general rules concerning loyalty to client and preservation of  
37 confidences apply, which is not the case if the lawyer is retained by someone else. For  
38 this reason, it is essential to identify the person by whom the lawyer is retained. This  
39 should be made clear not only to the person under examination, but also to others to  
40 whom the results are to be made available.

41 Duty Duties owed to Third Person and Client

42 [3] When the evaluation is intended for the information or use of a third person, a  
43 legal duty to that person may or may not arise. That legal question is beyond the scope  
44 of this Rule. However, since such an evaluation involves a departure from the normal  
45 client-lawyer relationship, careful analysis of the situation is required. The lawyer must  
46 be satisfied as a matter of professional judgment that making the evaluation is  
47 compatible with other functions undertaken in behalf of the client. For example, if the  
48 lawyer is acting as advocate in defending the client against charges of fraud, it would  
49 normally be incompatible with that responsibility for the lawyer to perform an evaluation  
50 for others concerning the same or a related transaction. Assuming no such impediment  
51 is apparent, however, the lawyer should advise the client of the implications of the  
52 evaluation, particularly the lawyer's responsibilities to third persons and the duty to  
53 disseminate the findings.

54 Access to and Disclosure of Information

55 [4] The quality of an evaluation depends on the freedom and extent of the  
56 investigation upon which it is based. Ordinarily a lawyer should have whatever latitude  
57 of investigation seems necessary as a matter of professional judgment. Under some  
58 circumstances, however, the terms of the evaluation may be limited. For example,  
59 certain issues or sources may be categorically excluded, or the scope of search may be  
60 limited by time constraints or the noncooperation of persons having relevant  
61 information. Any such limitations which-that are material to the evaluation should be  
62 described in the report. If, after a lawyer has commenced an evaluation, the client

63 refuses to comply with the terms upon which it was understood the evaluation was to  
64 have been made, the lawyer's obligations are determined by law, having reference to  
65 the terms of the client's agreement and the surrounding circumstances. In no  
66 circumstances is the lawyer permitted to knowingly make a false statement of material  
67 fact or law or fail to disclose a material fact that must otherwise be disclosed under the  
68 Rules. See Rule 4.1.

69 Obtaining Client's Informed Consent

70 [5] Information relating to an evaluation is subject to Rule 1.6. In many situations,  
71 providing an evaluation to a third party poses no significant risk to the client; thus, the  
72 lawyer may be impliedly authorized to disclose information to carry out the  
73 representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing  
74 the evaluation will affect the client's interests materially and adversely, the lawyer must  
75 first obtain the client's consent after the client has been adequately informed concerning  
76 the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

77 Financial Auditor's Requests for Information

78 [6] When a question concerning the legal situation of a client arises at the instance  
79 of the client's financial auditor and the question is referred to the lawyer, the lawyer's  
80 response may be made in accordance with procedures recognized in the legal  
81 profession. Such a procedure is set forth in the American Bar Association Statement of  
82 Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in  
83 1975.

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