

1 | **Rule 2.3. Evaluation for ~~u~~Use by ~~t~~Third ~~p~~Persons.**

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

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

8 (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating  
9 to the evaluation is otherwise subject to Rule 1.6.

10 Comment

11 Definition

12 [1] An evaluation may be performed at the client's direction or when impliedly authorized in order to  
13 carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of  
14 establishing information for the benefit of third parties; for example, an opinion concerning the title of  
15 property rendered at the behest of a vendor for the information of a prospective purchaser, or at the  
16 behest of a borrower for the information of a prospective lender. In some situations, the evaluation may  
17 be required by a government agency; for example, an opinion concerning the legality of the securities  
18 registered for sale under the securities laws. In other instances, the evaluation may be required by a third  
19 person, such as a purchaser of a business.

20 [2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer  
21 does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a  
22 vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an  
23 investigation into a person's affairs by a government lawyer, or by special counsel employed by the  
24 government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is  
25 retained by the person whose affairs are being examined. When the lawyer is retained by that person, the  
26 general rules concerning loyalty to client and preservation of confidences apply, which is not the case if  
27 the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the  
28 lawyer is retained. This should be made clear not only to the person under examination, but also to others  
29 to whom the results are to be made available.

30 Duties Owed to Third Person and Client

31 [3] When the evaluation is intended for the information or use of a third person, a legal duty to that  
32 person may or may not arise. That legal question is beyond the scope of this Rule. However, since such  
33 an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the  
34 situation is required. The lawyer must be satisfied as a matter of professional judgment that making the  
35 evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer  
36 is acting as advocate in defending the client against charges of fraud, it would normally be incompatible  
37 with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related

38 transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of  
39 the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to  
40 disseminate the findings.

#### 41 Access to and Disclosure of Information

42 [4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it  
43 is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter  
44 of professional judgment. Under some circumstances, however, the terms of the evaluation may be  
45 limited. For example, certain issues or sources may be categorically excluded, or the scope of search  
46 may be limited by time constraints or the noncooperation of persons having relevant information. Any  
47 such limitations that are material to the evaluation should be described in the report. If, after a lawyer has  
48 commenced an evaluation, the client refuses to comply with the terms upon which it was understood the  
49 evaluation was to have been made, the lawyer's obligations are determined by law, having reference to  
50 the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer  
51 permitted to knowingly make a false statement of material fact or law or fail to disclose a material fact that  
52 must otherwise be disclosed under the Rules. See Rule 4.1.

#### 53 Obtaining Client's Informed Consent

54 [5] Information relating to an evaluation is subject to Rule 1.6. In many situations, providing an  
55 evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly  
56 authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is  
57 reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the  
58 lawyer must first obtain the client's consent after the client has been adequately informed concerning the  
59 important possible effects on the client's interests. See Rules 1.6(a) and 1.0(ef).

#### 60 Financial Auditors' Requests for Information

61 [6] When a question concerning the legal situation of a client arises at the instance of the client's  
62 financial auditor and the question is referred to the lawyer, the lawyer's response may be made in  
63 accordance with procedures recognized in the legal profession. Such a procedure is set forth in the  
64 American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for  
65 Information, adopted in 1975.