

## Rule 2.3: Evaluation for Use by Third Persons

### 1. Current Kentucky Rule with Official Comments:

#### SCR 3.130(2.3) Evaluation for use by third persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

#### Supreme Court Commentary

##### Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

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

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

#### **Duty to Third Person**

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

#### **Access to and Disclosure of Information**

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain

issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

### Financial Auditors' Requests for Information

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

#### 2. Proposed Kentucky Rule with Official Comments:

##### SCR 3.130(2.3) Evaluation for use by third persons

(a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1) The~~ the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; ~~and.~~

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

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

#### ~~Supreme Court Commentary~~ Comment

#### Definition

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

~~[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.~~

[3] [2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

#### **Duty Duties Owed to Third Person and Client**

[4] [3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond

the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

#### **Access to and Disclosure of Information**

[5] [4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

#### **Obtaining Client's Informed Consent**

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first

obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

### Financial Auditors' Requests for Information

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

### 3. Discussion and Explanation of Recommendation:

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

The ABA Reporter's Explanation of Changes to MR 2.3 expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 2.3

TEXT:

#### 1. Restructure text to clarify circumstances in which lawyer may provide evaluation for use of third persons

The Commission recommends restructuring the Rule to clarify its application in two situations. The first is one where the evaluation poses no significant risk to the client. Here, the lawyer may be impliedly authorized to provide the evaluation, and paragraph (a) requires only that the lawyer determine that providing the evaluation is compatible with other aspects of the client lawyer relationship. The second situation is one where there is a significant risk of material and adverse effect on the client's interests. Here, paragraph (b) provides that the lawyer may not proceed without obtaining the client's informed consent. Paragraph (c) reminds lawyers that the disclosure of information pursuant to providing an evaluation is governed by Rule 1.6, under which disclosures may be impliedly or expressly authorized.

2. Paragraph (a): Substitutes "provide" for "undertake"

This change reflects the Commission's view that it is not the undertaking that is potentially problematic but rather the actual provision of an evaluation for use by third persons.

3. Paragraph (b): Substitute "informed consent" for "consent after consultation"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (b): Material adverse effect

This paragraph clarifies that informed consent is not required in all cases but rather only those in which there is a significant risk of material adverse effect on the client's interests.

5. Paragraph (c): Substitute "authorized" for "required"

This change reflects the Commission's view that disclosures in connection with an evaluation under this Rule are not "required" but rather "authorized" and that the authorization must conform to the requirements of Rule 1.6.

COMMENT:

[1] The addition to this Comment is designed to explain the relationship between this Rule and Rule 1.2, in which the lawyer's authority to provide an evaluation may be expressly or impliedly authorized.

[2] The Commission recommends deleting this Comment on the ground that neither its meaning nor its function is clear.

Caption: The caption has been changed to reflect the context of the Comment, which addresses duties to both third persons and to clients.

[4] The Commission recommends the addition of a cross reference to Rule 4.1 in response to expressions of concern that lawyers should not render an opinion based on stated facts when the lawyer knows the facts to be otherwise.

Caption: This new caption introduces the new material in Comment [5].

[5] This new Comment discusses and explains the requirement to obtain the informed

consent of the client if there is a significant risk of material and adverse effect on the client's interests. "Informed consent" is defined in Rule 1.0(e).

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

There is no variance in the proposed KRPC 2.3 from MR 2.3.

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