

Memorandum

To: Rules Revision Commission

From: Paul W. Vapnek
For the Drafting Committee

Date: July 23, 2009

Agenda Item IIIG, July 24, 25, 2009

The drafting committee was split on whether to adopt Model Rule 2.3 or use the clearer language of the Restatement. The chart has the Model Rule and its comments as well as the black letter portion of the Restatement, §95 for ease in comparing the two rules.

The Restatement's Comments and illustrations are extensive (see the attachment to this memorandum) and the drafting committee deferred rewriting them until there is a decision on how to proceed: adopt some version of the Model Rule, use the Restatement language or some combination of the two, or, not adopt any such rule.

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<p style="text-align: center;"><u>ABA Model Rule</u> Rule 2.3 Evaluation For Use By Third Persons</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 2.3 Evaluation For Use By Third Persons</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.</p>	<p>(a) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.</p>	
<p>(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 client gives informed consent.</p>	<p>(b) When providing the information, evaluation, or opinion under subsection (a) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.</p>	
<p>(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.</p>	<p>(c) In providing the information, evaluation, or opinion under subsection (a), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) and not make false statements prohibited under § 98.</p>	

* The proposed rule is almost exactly §95 of the Restatement of the Law, Third, The Law Governing Lawyers

<p align="center"><u>ABA Model Rule</u> Rule 2.3 Evaluation For Use By Third Persons Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.3 Evaluation For Use By Third Persons Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Definition</p> <p>[1] An evaluation may be performed at the client's direction 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.</p>	<p>Comment</p> <p>Note to the Commission: The Restatement's Comments and illustrations are extensive (see the attachment to the agenda item materials) and the drafting committee deferred rewriting them until there is a decision on how to proceed: adopt some version of the Model Rule or use the Restatement language, or some combination of the two, or, not adopt any such rule.</p>	

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<p>[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.</p>		

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<p>Duties Owed to Third Person and Client</p> <p>[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.</p>		

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<p>Access to and Disclosure of Information</p> <p>[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.</p>		

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<p>Obtaining Client's Informed Consent</p> <p>[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).</p>		
<p>Financial Auditors' Requests for Information</p> <p>[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.</p>		

1 of 1 DOCUMENT

Restatement of the Law, Third, The Law Governing Lawyers
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Case Citations

Chapter 6 - Representing Clients--in General

Topic 1 - Lawyer Functions in Representing Clients--in General

Restat 3d of the Law Governing Lawyers, § 95

§ 95 An Evaluation Undertaken for a Third Person

(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.

(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.

(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) and not make false statements prohibited under § 98.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section deals with disparate activities, including audit response letters (see Comment *f*), internal investigations, and third-party legal opinions. Each has a separate purpose and attendant circumstances. An audit letter provides an outside check on management representations in preparing financial statements relied upon by investors and the financial community. A report on an internal investigation reviews management conduct for the protection of shareholders, the investment community, and sometimes regulators. In audit-letter-response and internal-investigation situations, the interests protected are largely or entirely unrepresented. On the other hand, in most third-party-opinion situations, those who rely on the opinion are typically represented by counsel who negotiate the opinion to be given and review it when received. Custom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises, and articles.

This Section describes forms of assistance to a client in which a lawyer undertakes to give a report to a third person, such as in issuing a legal opinion or in providing the results of the lawyer's investigation, and sometimes legal analysis, of a disputed or suspicious event or transaction. As indicated in the Reporter's Note, some aspects of the Section may be the subject of provisions of lawyer codes, from which the general term evaluation is taken. More typically, authority is found in decisions involving civil litigation on the scope of the legal duties of a lawyer involved in issuing an evaluation (see generally § 51(2) & Comment *e* thereto). On a lawyer's general obligation to inform and consult with a client, see § 20; on adverse use or disclosure of confidential client information with client consent, see § 62. On limitations on a lawyer's advice to a client, see § 94.

A lawyer may withdraw from the representation when permitted under § 32. On the circumstances in which the lawyer may make disclosures and withdraw an evaluation previously given, see § 67, Comment *j*.

A third person to whom a lawyer issues an evaluation--whether resulting from an investigation, analysis of facts, or the lawyer's professional evaluation or opinion--may obtain redress against the lawyer for the lawyer's fraudulent misrepresentation (see § 56, Comment *f*) or failure to exercise care (see § 51(2)) in providing the evaluation (see Comment *c*). Questions of liability under state and federal securities legislation are beyond the scope of this Restatement (see § 51, Comment *a*). A lawyer may also be liable for breach of a contract concerning an evaluation (see § 55(1) & § 56, Comment *d*). See also Comments *e* and *f* hereto. On liability of the lawyer's client, as principal, for the lawyer's negligence

or malfeasance in providing the evaluation that causes injury to the third person, see *Restatement Second, Agency* §§ 215-216.

A lawyer is also liable to the client for negligence in rendering an evaluation that causes injury to the client, see §§ 50-51.

A lawyer is subject to professional discipline for failure to comply with professional rules governing evaluations to a third person (see § 5), such as when a lawyer knowingly makes a material misstatement of fact to the third person (see § 98).

b. Rationale. In the course of providing legal services to a client, a lawyer may be asked to investigate or analyze issues of fact or law and report the results to persons who are not clients. For example, a lawyer for a corporation entering into a contract with a third person may address an opinion letter to the third person as to the authority of officers of the corporate client to bind the corporation to the contract. In a real-estate transaction, a title opinion rendered by the lawyer for the seller may be addressed to the purchaser or a financial institution lending funds to the purchaser to be secured by the property. In such instances, the evident intent of the parties is that an opinion so addressed may be relied on by the addressee. The client's interest is advanced by making it possible for the third person to proceed with the transaction on the basis of the evaluation.

When a lawyer's assumption of duties to a third person in rendering an evaluation is consistent with the lawyer's duties to the client, the lawyer may take steps reasonably appropriate to fulfill the client's objectives (see § 26), including the disclosure of confidential client information to advance the client's interests (see § 61) (see Comment *d* hereto). It would often be wasteful or impractical for the other party to a transaction to search out information or to assess a legal issue that could be determined more readily by the lawyer for the client (see Comment *f*).

c. A lawyer's duties to a third-party recipient of an evaluation. A lawyer providing an evaluation purporting to be a fair and objective evaluation does not function as an advocate for the legal or factual position of the lawyer's client. Unless otherwise required or permitted by the terms under which the evaluation is given, the lawyer's duty is to provide a fair and objective opinion. On the extent of a lawyer's liability in tort to a third-person recipient of an evaluation for failure to exercise care in providing the evaluation, see § 51 and Comment *e* thereto. By statements in the evaluation, the lawyer may undertake to exercise a higher or lesser standard of care. As stated in Subsection (3), the lawyer is prohibited by the requirement of § 98 from making false representations to the addressee, a duty included within but less extensive than the lawyer's duty under § 51.

The third-person recipient of a lawyer's evaluation does not thereby become the client of the lawyer, and the lawyer does not thereby undertake all duties owed to a client, such as confidentiality or avoidance of conflicting interests (compare § 14). In rendering an evaluation, a lawyer does not undertake to advise the third person except with respect to the questions actually covered by the evaluation. For example, if a seller's lawyer renders a title opinion to the purchaser, the lawyer does not thereby undertake to record the resulting deed or to take other steps to protect the interests of the purchaser in the transaction, such as by advising whether the recipient should proceed with the transaction, accept title in a different form, or seek alteration of other terms of the transaction. However, to the extent stated in § 14, a lawyer may incur the duties of the client-lawyer relationship with the addressee, such as when the lawyer specifically invites the addressee to rely on the lawyer to provide services beyond those involved in furnishing the evaluation (see § 51, Comment *e*; see also § 14).

The factual basis of an evaluation is that which it states, expressly or by implication from the circumstances. In all events, unless stated or agreed otherwise, a lawyer's evaluation does not entail a guarantee by the lawyer that facts stated in it are accurate. In some circumstances, such as when the lawyer purports to be making a report of a factual investigation undertaken by the lawyer, a reasonable reader of the report would assume that the lawyer is reporting facts known by the lawyer to be accurate. A lawyer normally may rely on facts provided by corporate officers and other agents of a client that the lawyer reasonably believes to be appropriate sources for such facts without further investigation or specific disclosure, unless the recipient of the opinion objects or the version of the facts provided or other circumstances indicate that further verification is required.

A lawyer may not without express disclosure rely for purposes of a legal opinion or other evaluation report on a fact or factual assumption that the lawyer knows to be inaccurate or, in the case of a factual representation, to have been provided under circumstances making reliance unwarranted. Express disclosure is unnecessary if the inaccuracy is known by or apparent to the recipient or its counsel. When an evaluation report is stated to be predicated upon a factual investigation by the lawyer, unless the report otherwise describes the investigation, issuance of the report implies that an

investigation has been conducted that is consistent with customary practice and otherwise reasonable in the circumstances, having regard to the understanding of the parties, the facts to be ascertained, the reliance likely to be placed on the lawyer's report by the addressee, and the stakes at risk.

Illustrations:

1. Lender has been asked by Client to lend money on the basis of a security interest in farm land and farm machinery located thereon that Client purports to own. Lender requires that Client provide an opinion letter at the time of closing from a lawyer selected by Client, to the effect that a deed of trust executed by Client purporting to grant Lender a mortgage lien on the property subject to the deed of trust will grant Lender a mortgage lien on such property, prior to any other recorded liens. Client retains Lawyer, and Lawyer provides the opinion letter called for, stating in the opinion letter that Lawyer has neither physically inspected the property nor investigated the state of the record title with respect to the mortgaged property and is relying solely on the preliminary title report of a title-insurance company to the effect that there are no other liens on the property and that title to the property is vested in Client. It is later determined that a third party has acquired rights in the property by adverse possession and has constructed improvements on the property that have resulted in the filing of mechanics' liens on the property after the date of the preliminary title report, which facts were not known to Lawyer at the time of rendering the opinion. Lawyer did not violate a duty of care to Lender by relying as stated in the opinion letter solely on the preliminary title report and not conducting any other investigation.

2. Lender has been asked by Client to lend money on the basis of a security interest in farm machinery that Client purports to own. Lender requires that Client provide an opinion letter at the time of closing from a lawyer selected by Client, stating that in the lawyer's opinion, based on a check of courthouse records, Client's title to the machinery is not encumbered by recorded liens or other interests. Client retains Lawyer to provide the required opinion, and Lawyer does so in an opinion letter to Lender. In fact, Lawyer made no effort to verify the facts stated by checking courthouse records. Instead, Lawyer's statements in the opinion letter were based entirely on Client's statements to Lawyer, which Lawyer did not investigate further, concerning the state of title of the property. If Lawyer had conducted the investigation described in the opinion letter, Lawyer would have seen that the public records indicated several liens superior to Lender's interest. Lawyer failed to conduct the investigation described in the opinion letter and therefore violated his duty of care.

Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer's professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation. The lawyer is not required to state reservations or doubts about legal issues unless they are of a nature that prevents the lawyer from reasonably concluding that the opinion reflects the result that would be reached by the highest court of the applicable jurisdiction.

The factual bases for legal opinions are typically subject to significant limitations and qualifications. Those may be stated in the opinion or may be unstated to the extent permitted by customary practice. Opinion letters in financial transactions, for example, typically rely as a matter of customary practice on factual representations contained in certificates of corporate officers without expressly stating that the only investigation of the represented facts conducted by the lawyer preparing the opinion was a review of the certificate and a determination that the officer who signed the certificate was an appropriate source for the facts being represented. On the effect of a limitation or qualification on the liability of the lawyer to a recipient of the evaluation, see § 51, Comment *e*.

d. Risks to a client in providing an evaluation report. A client may authorize a lawyer to provide an evaluation as provided in this Section by direction, consent, or acquiescence (see § 26); see also § 134, Comment *f* (providing reports to insurer during course of defending insured). Ordinarily there is implied authorization when both lawyer and client know that it is the practice of lawyers to provide such an evaluation in representing a client in similar matters and when there is no significant risk to the client in providing the evaluation (see also § 26, Comment *c*).

Whether and to what extent the lawyer must consult with the client concerning the evaluation depends on the circumstances. Third-party opinions commonly used in transactions normally benefit clients and do not entail disclosure of information that clients would wish to withhold or the expression of opinions that would work to clients' significant disadvantage (see § 61).

However, in some circumstances it will be reasonably likely that providing the evaluation may require the lawyer to disclose confidential client information in a way inconsistent with the client's interests or otherwise to incur significant risk of material harm to the client. For example, disclosure of facts in an evaluation report may cause such harm by waiving the client's attorney-client privilege (see § 79) or the work-product immunity (see § 91(4)). In some circumstances, it will be apparent from the outset that the evaluation undertaking is reasonably likely to affect the client's interests materially and adversely. For example, when a lawyer is commissioned to conduct an investigation of questioned client activities in anticipation of providing a report to a regulatory agency, preliminary inquiry may indicate the likely need to report substantial wrongdoing by the client. In other circumstances, it may appear at the outset that evaluation will incur no significant risk to the client, but facts later ascertained may indicate unanticipated information or legal conclusions whose disclosure would be likely to affect the client's interests materially and adversely, but whose omission from the report would be misleading or otherwise violate the lawyer's duty under § 51 to exercise care.

In such a situation, the lawyer must appropriately consult with the client (see § 20) and obtain the client's consent (see § 62) before undertaking or continuing the evaluation. The lawyer must abide by the client's decision whether preparation of the evaluation should either be discontinued or be completed and the adverse evaluation provided to the third person (see § 21(2)). Alternatively, the lawyer and client may determine it appropriate to negotiate with the intended addressee of the evaluation to modify its scope or terms, thus removing the adverse effect to the client.

e. The nature and scope of an evaluation. In many transactions, the nature and scope of the lawyer's evaluation will be set out in an agreement between the client and the intended recipient. For example, loan agreements commonly condition a lender's obligation to lend on the rendering of legal opinions by borrower's counsel on stated subjects. The details of the opinions, including factual assumptions, and qualifications, limitations, and disclaimers are matters which, when the participants are all represented, are negotiated between the lawyers for both the client and the intended recipient. On the resolution of conflicts of interest resulting from a client's or recipient's insistence that a lawyer render an opinion that the lawyer finds entails too substantial a risk of liability or other detriment to the lawyer, see generally § 125. The parties' ultimate agreement as to the nature and extent of the opinion coverage in a particular transaction and the acceptability of limitations, qualifications, and disclaimers will normally follow customary practices for transactions of the kind in question. Similarly, once the form of the opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance.

If unrepresented parties may be entitled to rely on an opinion, the lawyer providing it should disclaim through statements in the opinion that the opinion conforms to the contract pursuant to which it is provided, if that is the case.

f. An auditor's request for information. A common type of request by a third person for a report of information within this Section is a request to a client by its auditor for a response by the client's lawyer to an inquiry concerning unasserted possible claims against the client. Responses to such questions may be necessary for a proper audit of the client's financial position, but disclosing information to the auditor can affect the client's interests materially and adversely in legal relationships with other parties. Among other considerations, the lawyer must be mindful that revelations in the response may affect, among other things, the client's attorney-client privilege (see § 79) or the work-product immunity (see § 91(4)). Typically, the request is conveyed from the client, and the lawyer and client have opportunity to consult (see § 20) concerning disclosures. Organizations of the accounting and legal professions have agreed upon what information accountants may appropriately request of lawyers and the extent to which lawyers may limit their responses to protect the confidentiality of certain information. Responses by lawyers to such requests that omit to disclose contingent liabilities in conformity to such standards satisfy the lawyer's duty of care under Subsection (3).

g. Tax opinion letters. Lawyers sometimes issue opinion letters on issues of tax law, such as those that commonly accompany prospectuses for sale of securities that are marketed for their tax savings. The specific standards applicable to such opinion letters are beyond the scope of this Restatement. In addition to providing some assurance that the sought-after tax advantages will accrue to purchasers, the opinion may also mitigate the purchasers' liability for tax fraud and negligence penalties. Standards stated in opinions of professional associations and by the government address the bases on which those opinion letters may be prepared. In addition, specific legislation may be directed to the opinion-rendering function.

REPORTERS NOTES: REPORTER'S NOTE

Comment a. Scope and cross-references. On claims for damages against the opinion-rendering lawyer by a recipient of the opinion, see § 51, Comment *e*, and Reporter's Note thereto. On reliance by the recipient, see also, e.g., *Mi-*

rotznick v. Sensney, Davis & McCormick, 658 F.Supp. 932 (W.D.Wash.1986) (bond purchaser could not recover from company's local counsel because opinion not addressed to persons in position of bond purchaser); *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 581 N.E.2d 138 (Ill.App.Ct.1991) (buyers' lawyer who drafted comfort letter concerning legal aspects of transaction owed no duty to seller to investigate and reveal client's creditworthiness), aff'd in part and rev'd in part on other grounds, 613 N.E.2d 702 (Ill.1993) (lawyer-drafter owes no fiduciary duty to opinion recipient); *Armona v. Smith*, 749 So.2d 63 (Miss.1999) (lawyer representing prospective buyers of land not liable to sellers for allegedly negligent title search that pointed out title defects that caused buyer to renounce contract; seller, who challenged opinion, could hardly have relied on same); ABA Third-Party Opinion Report, 47 *Bus. Law.* 167, 224 (1991) (recipient of evaluation would not ordinarily rely on lawyer with respect to interpretation of financial statements specifically incorporated or referred to).

A lawyer's opinion letter can provide the basis for avoiding or mitigating certain legal obligations that otherwise would apply to the recipient. Such arrangements can create incentives on the part of the recipient to seek less-than-candid opinions for their protective value. See Note, Redefining the Attorney's Role in Abusive Tax Shelters, 37 *Stan. L. Rev.* 889 (1985) (avoidance by tax-shelter investors of fraud and negligence penalties). For possible liability of such opinion-drafters to investors in the tax shelter, see, e.g., *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F.Supp. 1362, 1368 (D.Conn.1987).

On the requirement that an opinion letter not mislead, even if otherwise technically correct, see, e.g., *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal.Rptr. 901 (Cal.Ct.App. 1976) (extending rule to lawyers with respect to malpractice-based recovery by recipient).

Comment b. Rationale. See ABA Model Rules of Professional Conduct, Rule 2.3 (1983):

RULE 2.3 Evaluation for Use by Third Person

(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.

No corresponding provision existed in the ABA Model Code of Professional Responsibility (1969), but the practice of lawyers' rendering opinions to third persons is of long standing. In view of that history, the guarded approach reflected in ABA Model Rule 2.3 would be misplaced if applied to all evaluations, including those that are clearly in the client's interest, those that reasonably appear to present no difficulty to the lawyer, and those that are otherwise routine. E.g., *In re Ethics Advisory Panel Opinion*, 554 A.2d 1033 (R.I.1989) (in rejecting position of pre-ABA Model Rules ethics-committee opinion stating that opinion letter constitutes conflict of interest with client, practice of issuing opinion letters is "standard and customary"). As is evident from the Comments to the ABA Model Rule, the concern there is with instances in which a lawyer's other work for the client or the nature of the particular evaluation to be given makes the lawyer's services as evaluator suspect or compromised. Such is the case when performing the evaluation would result in disclosure of confidential client information against the client's substantial interests. However, in many circumstances, providing an evaluation will not have such effects, and thus there is no basis for concern. Moreover, even in some instances of adverse disclosure, a sufficiently informed client may be willing to accept the costs of disclosure because of the greater benefits to be derived from the transaction. In either instance, the lawyer may proceed. See C. Wolfram, *Modern Legal Ethics* § 13.4.2 (1986). That position is reflected in the Section and Comments hereto.

The "consent" referred to in ABA Model Rule 2.3(a)(2) is not otherwise defined in the ABA Model Rules. (No definition of "consent" is provided in the Terminology.) It is understood to include, in this instance, the additional concepts of agreement and acquiescence, as discussed in the text. See Reporter's Note to Comment c hereto. The same concept of consent is employed, for example, in § 62 on client consent to disclosure of confidential information.

On the issues in this Section in general, see 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 2.3 (2d ed.1990); S. Fitzgibbon & D. Glazer, *Fitzgibbon & Glazer on Legal Opinions* (1992); J. Macey, *Third Party Legal Opinions: Evaluation & Analysis* (1992); M. Sterba, *Drafting Legal Opinion Letters* (2d ed.1992); C. Wolfram, *supra* § 13.4 see also,

e.g., Babb, Barnes, Gordon & Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 *Bus. Law*. 553 (1977); Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 *Bus. Law* 1295 (1978).

Various bar association reports have been instrumental in furthering understanding of the evaluation process and contributing to uniformity of practice among lawyers issuing legal opinions. Most such reports purport to be mainly declaratory of existing custom and practice applicable to third-party opinions. Examples of such reports are *Legal Opinions to Third Parties: An Easier Path*, 34 *Bus. Law*. 1891 (1979). The "Easier Path" document was a report of the "Tri-Bar" committee on legal opinions. Subsequent addenda and reports of the same committee have appeared at 36 *Bus. Law*. 429 (1979); 44 *Bus. Law*. 563 (1989); 46 *Bus. Law*. 717; and id. 959 (1991). In 1998, the TriBar Opinion Committee published a new report, *Third-Party Closing Opinions*, 53 *Bus. Law*. 591 (1998) that updates and supersedes most of its prior reports. By contrast, the "Accord" contained in ABA Sect. Bus. Law, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 *Bus. Law*. 167 (1991), presents a self-contained series of black-letter rules, not necessarily purporting to declare existing practice, which may be consensually adopted by transaction parties (with or without negotiated changes) to provide a framework and glossary for opinion letters delivered to third parties in certain described transactions. The Accord does not cover the use of opinion letters in tax shelters or in a regulatory context or, for the most part, in secured financing and international transactions. Its "accords" are intended to provide the framework and glossary for opinion letters that explicitly refer to and adopt them. In 1998, the standing ABA Business Law Section's Committee on Legal Opinions published *Legal Opinion Principles*, 53 *Bus. Law*. 831 (1998), providing a concise statement of many of the principles guiding legal-opinion practice in closing a business transaction.

Comment c. A lawyer's duties to a third-party recipient of an evaluation. See generally § 51, *Comment e*, and Reporter's Note thereto. On the scope of required factual inquiry (sometimes colloquially referred to by lawyers as "due diligence"), see the 1998 TriBar Third-Party Opinion Report, cited in Reporter's Note to *Comment b*, supra, 53 *Bus. Law*. at 601-02; on reliance on assumptions, see id. 615-16; on information provided by other persons, id. at 611-15; on unwarranted reliance, see id. 610. On the law addressed in a legal opinion, see id. at 631-36; on the absence of a general duty to update, see id. at 597. For the coverage of those topics, to the extent they are discussed, in the 1998 *ABA Legal Opinion Principles*, supra, Reporter's Note to *Comment b*, 53 *Bus. Law*. 831, see: (i) 53 *Bus. Law*. 833 (factual inquiry); id. 833 (reliance on assumptions); id. 833 (information provided by third persons); id. 832-33 (unwarranted reliance); id. 833 (law addressed); id. 833 (no duty to update). Regarding a legal opinion that expresses a view on how the question would be decided by courts in the relevant jurisdiction, see S. Fitzgibbon & D. Glazer, *Fitzgibbon & Glazer on Legal Opinions* 51 (1992).

In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel. If opinions are to be rendered to or relied upon by unrepresented parties, custom and practice may not permit such abbreviated presentation if the recipient cannot reasonably be expected to understand the meaning of the opinion letter including all such assumptions, limitations, and diligence standards.

An opinion speaks as of its date. E.g., TriBar Report, supra, 53 *Bus. Law*. at 597; ABA *Legal Opinion Principles*, supra, at 833. A lawyer issuing an opinion letter to a nonclient has no obligation to advise the recipient of any change of law or fact occurring after the date of the opinion TriBar Report, supra, 53 *Bus. Law*. at 597; ABA *Legal Opinion Principles*, supra, 53 *Bus. Law*. at 833, except, presumably, when failure to do so would constitute fraud on the part of the lawyer or aiding and abetting fraud of the lawyer's client.

The obligation of a lawyer may vary with the kind of transaction involved, the type of factual or legal statement made, and the customs of parties and lawyers involved in the transaction. In the securities-law context, see ABA Formal Op. 335 (1974):

The lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. . . .

Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the reasonable facts or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion. However, assuming that the alleged facts are not incomplete in a material respect, inherently inconsistent, or on their face or on the basis of other known facts open to question for other substantial reasons, the lawyer may

properly assume that the facts as related to him by his client, and checked by him by reviewing such appropriate documents as are available, are accurate.

Illustration 2 is based on *Greycas v. Proud*, 826 F.2d 1560 (7th Cir. 1987), cert. denied, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988) (liability to recipient of lawyer's opinion letter that purported to verify existence of machinery being pledged as collateral for loan to client and absence of other recorded liens; lawyer failed to make any inquiry other than to ask client, who was lawyer's brother-in-law). See also, e.g., *Norman v. Brown, Todd & Heyburn*, 693 F.Supp. 1259, 1265 (D.Mass.1988) (lawyer who negligently drafted tax opinion letter, knowing that it would be employed in offering material for equine tax-shelter promoter and relied on by prospective purchasers, would be liable to purchasers for negligent misrepresentation of facts).

In reporting an evaluation, a lawyer must consider what facts must be disclosed to make the opinion given not misleading under the circumstances. E.g., *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901 (Cal.Ct.App.1976) (lawyer who did not reveal known dispute as to status of partnership as general or limited partnership in giving opinion to nonclient as to partnership's legal status, may be liable to recipient for negligent misrepresentation).

Comment d. Risks to a client in providing an evaluation report. See, e.g., *ABA Third-Party Opinion Report, supra*, 47 *Bus. Law.* at 232:

F. Client Consent. Delivery of the Opinion Letter should be made only after the Opinion Giver has satisfied the relevant ethical obligation to the Client to obtain its informed permission to do so. (See, e.g., ABA Model Rules of Professional Conduct, Rule 2.3 (1983).) Consent thereto may be inferred from the Transaction Document and closing arrangements (if delivery of the Opinion Letter is a condition to consummation of the Transaction), but the need for review of the Opinion Letter, and its implications, with the Client should be considered prior to its delivery.

The provision of ABA Model Rule 2.3 evidently referred to is Rule 2.3(b), quoted in Reporter's Note to Comment *b* hereto. On the question of risks to a client involved in issuing evaluation reports, see generally Spec. Comm. on Opinion Standards of Fla. Bar Bus. L. Sect., Report on Standards For Opinions of Florida Counsel, 46 *Bus. Law.* 1410, 1413-14 (1991).

With respect to the unreasonableness of requests for a legal opinion respecting legal compliance in general, see *ABA Third-Party Opinion Report, supra*, 47 *Bus. Law.* at 225, 228. The Report generally embraces a "Golden Rule" limiting requests for opinions that one party's lawyer should seek from an opposing lawyer to those that the opinion-requesting party's lawyer would render. *Id.* 226-27.

Comment e. The nature and scope of an evaluation. E.g., *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469 (4th Cir.1992) (law firm's issuance of opinion clearly limited to tax matters imposed no duty to verify veracity of financial data provided by client or to reveal therein client's past troubled commercial ventures); *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (N.Y.1992) (opining counsel not liable for opinion that mortgage documents, which all parties later conceded contained a material typographical error, were enforceable "in accordance with [their defective] terms"; court refused to construe opinion as if documents were corrected); *Pittsburgh Coal & Coke, Inc. v. Cuteri*, 590 A.2d 790 (Pa.Super.Ct.1991), rev'd on other grounds, 622 A.2d 284 (Pa.1993) (lawyer for lien beneficiary who conducted "lien search" for use of lienholder not responsible to advise of defective title, because that matter would manifest itself only in "title search").

In some circumstances, a lawyer's other undertakings to represent a client can preclude providing an evaluation at all or an evaluation directed to particular subjects. For example, because of duties of confidentiality, a lawyer hired to defend a client against a charge of fraud with some evidence to support it could not also agree to provide an evaluation to a third person with respect to the same or a related matter. See 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 2.3:101 at 525 (2d ed.1990). With respect to disclaimers, see, e.g., *Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536 (Mo.Ct. App.1995) (sophisticated lender, represented by independent counsel, could not have justifiably relied on cited factual statements in opinion letter in light of sufficient disclaimer in opinion letter stating that firm took no responsibility for information in letter).

Comment f. An auditor's request for information. See ABA Statement of Policy Regarding Auditors' Requests for Information, 31 *Bus. Law* 1709 (1976); Note, Scope of Lawyer's Responses to Auditors' Requests for Information-The ABA and AICPA Compromise, 1976 *U. Ill. L. Forum* 783; Comment, Securities Lawyers' Responsibility and Accountants' Liability: Disclosure of Contingent Liabilities, 53 *Tex. L. Rev.* 1483 (1975).

Comment g. Tax opinion letters. See *DuPont v. Brady*, 646 F.Supp. 1067 (S.D.N.Y.1986) (in suit by purchaser, negligence found in failure to advise purchaser of tax shelter in lawyer's opinion letter of undisclosed tax risks in investment), rev'd, 828 F.2d 75 (2d Cir.1987) (reversal for improper allocation of burden), on remand, 680 F.Supp. 613 (S.D.N.Y. 1988) (lawyer failed to rebut presumption of reliance by recipient). On unrealistic assumptions in tax-shelter opinion letters, see Treas. Final Circular 230, 31 C.F.R. §§ 10.33, 10.51(j), 10.52(b) (1984); Ass'n Bar Cty. N.Y. Comm. on Lawyer's Role in Tax Practice, Report: Ethics and the Tax Lawyer, 38 Rec. 218 (1983); ABA Formal Op. 346 (1982) (lawyer may not assume facts in tax-shelter opinion without basis in fact for doing so because purchasers are many and in no position to determine whether assumptions about the facts are reasonable). On assisting a client with, for example, filing tax returns with a government agency, see § 104, Comment *e*.

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Table of Contents

July 12, 2009 Vapnek Memo to Drafters (Lamport, Martinez & Voogd):	1
July 13, 2009 Martinez E-mail to Drafters:	1
July 18, 2009 Vapnek E-mail to Martinez, cc Drafters:	1
July 18, 2009 Martinez E-mail to Vapnek, cc Drafters:	2
July 18, 2009 Vapnek E-mail to Martinez, cc Drafters:	2
July 23, 2009 Vapnek Memo to RRC (circulated by McCurdy on 7/24/09):	2
August 19, 2009 Martinez E-mail to Vapnek, cc Drafters & Chair:	3
August 20, 2009 KEM E-mail to Drafters, cc Chair & Staff:	3
August 22, 2009 Kehr E-mail to KEM:	3
August 22, 2009 KEM E-mail #1 to Kehr:	3
August 22, 2009 KEM E-mail #2 to Kehr	4
August 23, 2009 Kehr E-mail to KEM, cc Drafters (Vapnek, Lamport, Martinez & Voogd), cc Chair & Difuntorum:	5
August 23, 2009 Vapnek E-mail to Drafters, cc Chair, Difuntorum & KEM:	6
August 23, 2009 Kehr E-mail to Vapnek, cc Drafters, Chair, Difuntorum & KEM:	7
August 24, 2009 KEM E-mail to Drafters, cc Chair, Difuntorum & McCurdy:	7
August 24, 2009 Martinez E-mail to Kehr, cc Drafters, Chair & Staff:	9
August 24, 2009 Sapiro E-mail to RRC List:	9

July 12, 2009 Vapnek Memo to Drafters (Lampport, Martinez & Voogd):

Gentlemen: Tony previously voted to adopt ABA Model Rule 2.3 as is. I agree, but I ask for any input on potential issues that could arise. The rule seems to set out the law on opinions that third parties might rely upon. The annotations spell out some of the case law.

If you approve, I will submit the model rule and its annotations as our report for consideration at the upcoming Commission meeting, I apologize for the lateness of this request. Please respond as soon as possible.

July 13, 2009 Martinez E-mail to Drafters:

As usual, the ABA uses fuzzy language when it wouldn't hurt to be more precise. The scope of an "evaluation affecting a client" is very broad. Also what is an "evaluation." Virtually everything a lawyer does is an "evaluation." Compare the Restatement (attached) which more clearly explains what the rule is intended to address:

In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.

(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.

(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) and not make false statements prohibited under § 98.

The Restatement then goes on to explain in understandable language where this rule applies, stating: "This Section deals with disparate activities, including audit response letters, internal investigations, and third-party legal opinions."

It's easy to approve a rule when we don't know how or where it applies. It sounds harmless, but we need to be careful not to take the ABA's bait.

July 18, 2009 Vapnek E-mail to Martinez, cc Drafters:

Raul: The Restatement copy you attached was very helpful in understanding what MR 2.3 is supposed to cover; interestingly, it includes, in its comment b, the former version of MR 2.3. The newer version of 2.3 is definitely better. I don't see very much downside in adopting 2.3; it clearly is not going to be used for discipline, rather it will be used to try to fasten liability on lawyers for improper opinions, etc. like the Roberts v. Ball Hunt case at the end of comment a of the Restatement. The Restatement cites lots of case law relating to opinions, etc. so should not be so concerned about fuzzy language. Do you want to propose that we use the Restatement language instead?? Please comment as soon as you can.

Stan: Please let us have your view so I can get our recommendation to the staff for transmittal to the Commission before the meeting.

Tony: you have approved 2.3 as is.

July 18, 2009 Martinez E-mail to Vapnek, cc Drafters:

I would prefer using the Restatement as a starting point. The fact that reading the Restatement, as you suggest, is necessary to determine what the rule is supposed to cover is telling. The Rule should be self-explanatory and understandable to the average lawyer. This one is not. Even if the Rule is not used for discipline, we owe it to California lawyers to draft rules that are understandable without requiring lawyers to resort to outside sources or ethics experts to gain an understanding of the rule.

Another concern I have is the language in the rule that reads "compatible with other aspects of the lawyer's relationship with the client." What does this mean? Usually when we draft rules we qualify obligations in reference to other rules or the State Bar Act, not to vague "relationships with a client." We can do better. Note also how the Restatement attempts to fill in the vague gaps in the Rule, which again shows that the ABA's formulation doesn't do the job and that the drafters of the Restatement recognized the deficiencies in the Rule by filling in those gaps.

July 18, 2009 Vapnek E-mail to Martinez, cc Drafters:

Raul: Thanks for the quick response. Stan is hiking so we won't hear from him until Monday, if then.

July 23, 2009 Vapnek Memo to RRC (circulated by McCurdy on 7/24/09):

The drafting committee was split on whether to adopt Model Rule 2.3 or use the clearer language of the Restatement. The chart has the Model Rule and its comments as well as the black letter portion of the Restatement, §95 for ease in comparing the two rules.

The Restatement's Comments and illustrations are extensive (see the attachment to this memorandum) and the drafting committee deferred rewriting them until there is a decision on how to proceed: adopt some version of the Model Rule, use the Restatement language or some combination of the two, or, not adopt any such rule.

Attachments:

1. Comparison Chart Template
2. Restatement (3d) Law of Lawyers, § 95

August 19, 2009 Martinez E-mail to Vapnek, cc Drafters & Chair:

Your memo of 7-23-09 in the agenda materials (p. 369) states that the drafting committee was split on whether to adopt Rule 2.3. However, Stan never weighed in. Also, my e-mail setting forth my concerns is not in the materials (and will not be in Kevin e-mail compilations since he was not in the loop). Therefore, the Commission will not know why there is a split and will not have the necessary background to make decisions on this rule.

Rather than resigning ourselves to the fact that there is disagreement within the drafting committee, I suggest we get Stan's input and try to reach a consensus recommendation to the Commission. Otherwise, we wind up dumping the drafting committee's unfinished business on the Commission as a whole, and ultimately add to future delays in completion of this rule.

August 20, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Thanks for providing me w/ the e-mail exchange among the drafters. I've updated the e-mail compilation to reflect it. I'll be circulating the compilation late Monday or first thing on Tuesday, so the Commission will have the benefit of that exchange. If you like, I can make a special note in my cover e-mail that it contains the exchange that previously had not been provided.

If you think you might issue a supplemental report, then you should probably do so by Saturday at the latest, so the Commission members have at least part of a weekend to review the materials. I believe Harry has only intermittent e-mail access at present and may not be able to weigh in on this. In the past, however, when the drafters have not submitted materials by the weekend before, he has taken the matter off the agenda. So, if you agree that a supplemental report is in order but can't get it out until next week, please let us know so we can notify the Commission that the matter will not be considered until the September 2009 meeting.

In addition to the original recipients, I've copied Randy, Lauren & Mimi so they're on top of the current status of this item. First day of school is today, so I won't be able to work on Commission matters until tonight. I leave late morning for our annual faculty retreat that starts Friday afternoon and runs through Sunday at noon. I should have time in the evening but I'll pretty much be unreachable during the days.

Please let me know if you have any questions.

August 22, 2009 Kehr E-mail to KEM:

Have you prepared a state comparison chart for this Rule?

August 22, 2009 KEM E-mail #1 to Kehr:

Unfortunately not. There's not enough time. I believe just about every (if not every) state has adopted the rule and I don't believe there is that much variation. If you can hold off until tomorrow afternoon, when I get home from my faculty retreat, I'll check the Gillers Simon book to see what selected variations they've flagged.

August 22, 2009 KEM E-mail #2 to Kehr

Bob:

The first link below is to the ABA web site that has 29 links to PDF summaries of each listed state's variations from the Model Rules. I'm in the middle of a retreat right now but will send you the relevant pages from Gillers Simon when I return home tomorrow afternoon. Thanks,

Kevin

* * *

----- Original Message -----

Subject:Re: Fw: Rule 1.7 [3-310] & PubCom - ABA Rule Comparison Links

Date:Tue, 13 Jan 2009 20:44:07 -0800

From:Kevin Mohr <kemohr@charter.net>

To:Harry Sondheim <hbsondheim@verizon.net>

CC:Difuntorum, Randall <Randall.Difuntorum@calbar.ca.gov>, Kevin [two] Mohr

<kevin_e_mohr@compuserve.com>, Lauren McCurdy

<Lauren.McCurdy@calbar.ca.gov>, Lee, Mimi <Mimi.Lee@calbar.ca.gov>

References:<002201c975c5\$80940080\$2f01a8c0@HOME> <496D1F33.700@charter.net>
<005b01c975e0\$e8feb320\$2f01a8c0@HOME>

Harry:

I'm working on this. Here is a web page on the ABA web site that provides the information for 29 of the states:

<http://www.abanet.org/cpr/jclr/charts.html>

I've attached an example of one such chart, for Arizona. When the row is blank following the rule number, it means that the state adopted the rule verbatim.

The site has a nice sample of states, ranging from the "major" (e.g., Fla, Md, NJ, Ohio, Oregon, Pa, D.C.) to the smaller states (Wyoming, Montana). Note that I included some of the states as major (e.g., Md, Oregon) not necessarily because of size, but because of my familiarity with the lawyers who were involved in drafting the respective jurisdictions rules.

There is also a page with links to charts that track the variations of specific rules across the jurisdictions:

http://www.abanet.org/cpr/jclr/rule_charts.html

I've attached an example of of one such chart, for MR 1.7.

In addition, I believe that the Ethics 2000 Review Committees in many of the states prepared red-line versions of their proposed Rules, comparing them to the Model Rules. We can try to contact the chairs or liaisons of those committees (the ABA puts out a chart with this information). It wouldn't be the final word on the rules that ultimately were adopted (the state courts can be prickly in this regard, as evidenced by the action taken

by the New York court), but it would provide us with detailed insight into how other jurisdictions reacted to Ethics 2000. I have some old charts that Sue Campbell prepared a few years ago that has that information, but we can probably get by with the information at the two links set forth above, and any other research we can do to track down information about specific rules.

Finally, here is a link to the home page of the ABA Policy Implementation Committee, the ABA committee that is charged with keeping track of Model Rule adoptions across the country:

<http://www.abanet.org/cpr/jclr/>

It contains many helpful links, including those I've pasted above.

Please let me know if you have any questions. Thanks,

Kevin

August 23, 2009 Kehr E-mail to KEM, cc Drafters (Vapnek, Lampport, Martinez & Voogd), cc Chair & Difuntorum:

Kevin: There are aspects of MR 2.3 that trouble me, so I've taken the time to look at the variations shown in the ABA chart. Here is the Florida version. It is a mix of the 1983 and current Model Rules. The current MR shows up in "informed consent" in (a)(2) and in (c). This otherwise is the 1983 version except that paragraph (b), which seems to be Florida's invention. From Florida's comment, which I haven't copied here, the concept of material limitations is not directed to limitations imposed by the client as it includes, for example, the lawyer's lack of time or the unavailability of someone with relevant information; this makes (b) appear to be a best practices rather than disciplinary provision.

FLORIDA RULE 4-2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) When Lawyer May Provide Evaluation. A lawyer may provide 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 gives informed consent.

(b) Limitation on Scope of Evaluation. In reporting the evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Maintaining Client Confidences. Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 4-1.6.

Mississippi retains the former MR but, as did Florida and North Carolina, but Mississippi replaced "consultation" with "informed consent" in (a)(2). Montana and Nebraska are the same as the current MR, but numbered as Rule 2.2 to fill in the gap b/c the MRs have no 2.2 (a problem that Nev. avoided by retaining former Rule 2.2).

My comment above about Florida having invented the material limitation disclosure is not right as it exists also in the N.J. Rule 2.3. Its Rule is:

New Jersey RPC 2.3. Evaluation for Use by Third Persons

- (a)** A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
- (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:
 - (1)** the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;
 - (2)** the lawyer consults with the client; and
 - (3)** the client gives informed consent.
- (c)** Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.
- (d)** In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

N.D. has the MR but with "informed consent" taken back to the 1983 use of "consultation".

Ohio has made one small but interesting change. In paragraph (b), it has inserted "agree to" before "provide".

Virginia makes a small wording change by adding an introductory paragraph that defines when a lawyer is acting as an evaluator. I don't think it is worth discussing.

Wyoming tracks the current MR except by removing from the end of (b) the phrase "unless the client gives informed consent" and substitutes: "unless the client makes an informed decision to allow the evaluation."

The rest of the 29 jurisdictions appear to follow the current MR.

August 23, 2009 Vapnek E-mail to Drafters, cc Chair, Difuntorum & KEM:

I haven't had a chance to review all the variations; have any of the states adopted any of the language of the Restatement as Raul and I have discussed? Are we yet in a position to make a recommendation to the Commission?

Stan we have not had any comment from you so far. Are you going to pitch in or shall we proceed without your input?

August 23, 2009 Kehr E-mail to Vapnek, cc Drafters, Chair, Difuntorum & KEM:

Each of the jurisdictions that I examined use either the 2002 or 1983 MR, or some combination of them. I didn't notice any use of the Restatement language.

August 24, 2009 KEM E-mail to Drafters, cc Chair, Difuntorum & McCurdy:

I was going to send Bob the Selected State variations page re MR 2.3 from the Gillers Simon Rules book but he's already reviewed all the jurisdictions' rules listed there except for Missouri.

1. **Missouri** has retained the 1983 version of the Model Rule.

I also took a look at the jurisdictions that have most-recently adopted post-Ethics2000 versions of the Model Rules: Alaska, Kentucky, Maine, New York and Vermont:

2. The **Kentucky** and **Vermont** rules are identical to the 2002 version of Model Rule 2.3.
3. **Alaska** is identical to the 2002 version of Model Rule 2.3, except that it substitutes "confidences and secrets" for "information" in paragraph (c), so that paragraph (c) now provides:

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

The changes in Alaska reflects Alaska's retention of the definition of "confidences" and "secrets" from the ABA Code of Prof. Responsibility, DR 4-101, in its version of the Model Rules. Alaska also makes corresponding changes in Comments [2] and [5] to conform the comment to the blackletter language.

4. **Maine** makes changes similar to Alaska, except that it substitutes "confidences and secrets" for the phrase, "information relating to the representation." Please note that Maine is the only state besides California that had not adopted a rule numbering system based on either the ABA Code or the Model Rules. Note also, however, that the now superseded Maine Code took its language primarily from the ABA Code, so its retention of "confidences and secrets" should not be surprising.

In addition to the foregoing changes, Maine has also added the following "Reporter's Notes":

Model Rule 2.3 (2002) sets forth the approach to be taken by lawyers asked to provide evaluations or render legal opinions to third parties. There is no corresponding provision in the Maine Bar Rules, although Model Rule 2.3 (2002) is in accord with the legal opinion practice that has long been customary in Maine. Lawyers often provide opinion letters concerning a client for the use of third parties. Commonly, these opinion letters are issued in the context of representing a party or parties to a transaction. Rule 2.3 recognizes that a lawyer's evaluation (opinion) for the use of third parties is an important part of the representation of his or her own client. The Rule provides guidance as to how to discharge such responsibility.

Rule 2.3(a) corresponds to Rule 1.2's prescription that a "lawyer may take such action on behalf of the client as impliedly authorized to carry out the representation." Rule

**RRC – Rule 2.3 [MR 2.3]
E-mails, etc. – Revised (8/24/2009)**

2.3(c) affirms that unless disclosures of clients' confidences and secrets are authorized, any confidences and secrets relating to the evaluation are protected by Rule 1.6. The Task Force recommended that Rule 2.3(c) include the phrase "confidences and secrets," consistent with the recommended formulation in Rule 1.6.

The question of how much investigation a lawyer should conduct before providing a legal opinion is not squarely and thoroughly addressed in Model Rule 2.3. The Task Force noted that lawyers will find guidance with respect to this and related questions in various reports and articles published by the American Bar Association and state bar associations (see e.g., TriBar Opinion Comm., Third Party "Closing" Opinions, 53 Bus. Law 591 (1998); see generally, The RESTATEMENT (THIRD) of the Law Governing Lawyers cmt a. (2000) ("[c]ustom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises and articles")).

The foregoing notes appear on the official rules web site:

<http://www.mebaroverseers.org/M%20R%20Prof%20Cond/Rule%202-3.html>

5. The blackletter of New York Rule 2.3 is nearly identical to MR 2.3, except that in paragraph (c) it substitutes "unless" for "except as" and deletes the word "otherwise."

a. Adds the following clause at the end of the last sentence of Comment [1]:

"or of intellectual property or a similar asset."

b. Adds the following sentence at the end of Comment [4]:

"A knowing omission of material information that must be disclosed to make material statements in the evaluation not false or misleading may violate this Rule."

c. Revises the second sentence of Comment [5] as follows:

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 [lawyer has consulted with the client and the](#) client has been adequately informed concerning the [conditions of the evaluation, the nature of the information to be disclosed](#) [and](#) important possible effects on the client's interests.

d. Revises the first sentence of Comment [6] as follows:

When a question [is raised by the client's financial auditor](#) 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.

I've attached clean and redline copies of the New York Rule so you can review the changes in context.

Please let me know if you have any questions.

August 24, 2009 Martinez E-mail to Kehr, cc Drafters, Chair & Staff:

What caught my attention about the Restatement language was that it attempts to "translate" the terms used in the Model Rule into plainer English. The Model Rule uses the term "evaluation" which is quite broad, whereas the Restatement explains what an evaluation is by using more specific terms like "investigation and analysis...professional evaluation and opinion." Comment [1] of the MR then goes on to use the term "evaluation" as if everyone knows what it means. The rules should be written so that they can be understood by the average lawyer.

The Restatement Comment "a" also fleshes out the rule by explaining that the rule deals with things like audit response letters, internal investigations, and third-party legal opinions. Thus, the reader has at least a clue as to what the Rule applies to. It is telling that the Restatement has to put into plain English the cryptic concepts discussed in the MR.

Some of the comments in the MR (e.g. Comment [4]) seem to me to be pure blather.

August 24, 2009 Sapiro E-mail to RRC List:

1. I gather that the drafting committee is unclear about whether to adopt such a rule. If so, I agree with them. Therefore, I recommend we not endeavor to adopt the rule or to adapt as a disciplinary rule either the Model Rule or Restatement Section 95.
2. As a disciplinary rule, the Model Rule does not work.
3. In part, it is unclear. Do I have to obtain the informed consent of a client before I may tell an expert witness or consultant my evaluation of the facts of a litigation matter? Under the pressures of litigation, obtaining informed consent, or informed written consent, may not be practicable.
4. Conversely, if the rule is intended to apply to third party opinions given by the lawyer, such as an opinion letter to a client's auditor, such opinions are normally only given after written request by the client. In that case, is this rule necessary?
5. Many essays and texts have addressed at length the duties of care of a lawyer asked to render a third party opinion letter. They are not capable of succinct formulation in a disciplinary rule. Parsing out the nuances of third party opinions in a disciplinary rule is, I think, a hopeless task. I do not think we should try to do so.
6. I also think the statement in paragraph (c) of the Model Rule to the effect that information relating to the evaluation is otherwise protected by Rule 1.6 is misleading. If the lawyer's opinion waives confidentiality about certain facts, a court may hold that the confidentiality of related facts is also waived.