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M E M O R A N D U M

DATE: May 16, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: ABA Model Rule 2.3 Drafting Team (Danny Chou (L), James Ham, and Lee Harris)

SUBJECT: Consideration of ABA Model Rule 2.3 ("Evaluation for Use by Third Persons")

Summary:

The drafting team assigned to study ABA Model Rule 2.3 ("MR 2.3") recommends that the Commission report to the Board of Trustees that a California version of MR 2.3 was considered by the Commission but is not recommended for adoption.

Background:

The drafting team met by teleconference on May 9, 2016. Among the items considered by the team were the following: MR 2.3; RRC1's explanation for not recommending a version of MR 2.3; the Restatement (Third) of the Law Governing Lawyers, §95 ("An Evaluation Undertaken for a Third Person"); and an ABA State Adoption Chart for MR 2.3 (dated May 8, 2015) (see Attachment).¹ At the teleconference, the drafting team discussed the policy underlying MR 2.3 and the pros and cons of adopting a California version.

Discussion:

In its entirety, MR 2.3 provides that:

Rule 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 the client gives informed consent.

¹ As indicated in the ABA chart, thirty-three (33) jurisdictions have adopted a rule that is identical to the MR 2.3.

(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.

Comment

Definition

[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.

[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.

Duties Owed to Third Person and Client

[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

[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.

The drafting team started by discussing RRC1's explanation for not recommending the adoption of a California version of MR 2.3. The drafting team agreed with RRC1's reasoning that includes the following points.

1. MR 2.3 is not sufficiently clear for purposes of lawyer discipline and, although it might offer guidance, it would be problematic as a disciplinary standard. For example, the following key phrases in paragraph (a) are unclear for disciplinary purposes: "evaluation of a matter affecting a client;" and "compatible with other aspects of the lawyer's relationship with the client."
2. In comparison with the counterpart provision in the Restatement (§95), the versions of MR 2.3 found in state variations often added rule language or comments in an apparent effort to articulate a more precise duty.

3. Regardless of the precise language, policy concerns would remain, such as likely the application of the Rule as a default civil standard in assessing a lawyer's preparation of a third party opinion letter.

In addition to the reasons provided by RRC1, the drafting team observed that the proposed new rules already cover the conduct at issue in MR 2.3. In particular, the conflict of interest rules and the duty of loyalty cases cover that conduct already, and, more specifically, rule 1.7(b) appears to cover the informed written consent requirement imposed by subdivision (b). It would not be helpful to propose a new rule if it might be regarded as duplicative and unnecessary. It was also noted that the conduct covered by this rule rarely, if ever, arises in disciplinary cases. Anecdotal support of this came from: (1) staff's observation that this rule does not arise often, if at all, in Ethics Hotline inquiries; (2) a review of past OCTC comments to RRC1 which revealed that there has been no OCTC recommendation endorsing adoption of MR 2.3; and (3) a computer search appeared to reveal no reported disciplinary cases applying MR 2.3 in any of the states that have adopted it.

The one aspect of the drafting team's study that gave some pause was the fact that a majority of jurisdictions have adopted MR 2.3. This concern was raised with Professor Mohr who provided input including the following information from the ABA Annotated Model Rules section on MR 2.3:

Rule 2.3 itself deals only with the lawyer's duty to the client, addressing the circumstances under which a lawyer may provide an evaluation to a third person and the extent to which information relating to the evaluation may be disclosed. The comment, however, goes further and provides guidance on information the evaluation may include, and how to deal with limitations on that information. The comment also points out that a lawyer may have a legal duty to the recipient of the evaluation, but that issues related to that legal duty are beyond the scope of the rule. In fact, it is those legal duties to third persons, as well as the lawyer's obligations under a variety of government regulations, that have created most of the caselaw and commentary on the subject. There is virtually no reported disciplinary authority construing and applying Rule 2.3.

The Commission has been instructed to proposed rules that would protect the public by serving as clear and enforceable disciplinary standards. Although MR 2.3 is a rule in a preponderance of jurisdictions, it does not appear that it is actually functioning as a disciplinary rule.

Conclusion:

In accordance with the foregoing, the drafting team recommends that the Commission report to the Board of Trustees that a California version MR 2.3 is not recommended for adoption.

	<p style="text-align: center;">American Bar Association CPR Policy Implementation Committee</p> <p style="text-align: center;">Variations of the ABA Model Rules of Professional Conduct</p> <p style="text-align: center;">RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS</p> <p style="text-align: center;">(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 style="text-align: center;">(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 style="text-align: center;">(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>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/jclr/home.html.</p> <p>Comments not included.</p> <p>*Current links to state Rules of Professional conduct can be found on the ABA website: http://www.abanet.org/cpr/links.html*</p>
AL Effective 2/19/09	<p>(a) is similar to first part of MR (a) but changes “provide an evaluation” to “undertake an evaluation;”</p> <p>(a)(1) is identical to the second part of MR (a), starting with “the lawyer reasonably;”</p> <p>Adds (a)(2): <i>the client consents after consultation.</i></p>
AK Effective 4/15/09	Same as MR
AZ Effective 12/1/03	Same as MR
AR Effective 5/1/05	Same as MR
CA Current	[California’s Rules of Professional Conduct are structured differently from the ABA Model Rules. Please see California Rules :

Rule	http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf
CO Effective 1/1/08	Same as MR
CT Effective 1/1/07	Same as MR
DE Effective 7/1/03	Same as MR
District of Columbia Effective 2/1/07	Same as MR
FL Effective 5/22/06	(a): same as MR but adds “When Lawyer May Provide Evaluation.” to beginning and ends paragraph after “if” (a)(1): contains rest of material from MR paragraph (a) Adds (a)(2): the client gives informed consent. Does not have MR (b) Adds: (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): same as former MR but adds “Maintaining Client Confidences.” to beginning
GA* Effective 1/1/01	<i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i> (a) Changes “provide” to “undertake;” and puts “the lawyer reasonably...client; and” into subparagraph (a)(1); Adds: <i>(2) the client consents after consultation.</i> Does not have MR (b); (b) is MR (c); Adds to end: <i>The maximum penalty for a violation of this Rule is a public reprimand.</i>
HI Effective 1/1/14	(b): Changes “gives informed consent” to “consents after consultation.” (c): Adds “of these Rules” after “Rule 1.6” to end.
ID Effective 7/1/04	Same as MR
IL Effective 1/1/2010	Same as MR
IN Effective	Same as MR

As of May 8, 2015

1/1/05	
IA Effective 7/1/05	Same as MR
KS Effective 7/1/07	Rule 2.2 is equivalent to MR Rule 2.3, but changes wording: (a) and (1) combined are the same as MR (a); (a)(2) is the same as the last clause of MR (b); (b) is the same as MR (c).
KY Effective 7/15/09	Same as MR
LA Effective 3/1/04	Same as MR
ME Effective 8/1/09	(c) Changes “information...evaluation” to “confidences and secrets are.”
MD Effective 7/1/05	Same as MR
MA Amendment Effective 7/1/2015	MR (a) is MA (a) and (a)(1) (a)(2) <i>the client gives informed consent or providing the evaluation is impliedly authorized to carry out the representation.</i> (b) <i>Reserved.</i> (c) <i>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.</i>
MI* Rules effective 10/1/88	<i>*Made only partial amendments effective 1/1/2011 since the most recent amendments to the ABA Model Rules (amended Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 and adopted new Rules 2.4, 5.7, and 6.6.</i> (a) Moves clause, “for the use of someone other than the client” to after “lawyer may;” changes “provide” to “undertake;” moves “the lawyer reasonably...client; and” into subparagraph (a)(1); Adds: <i>(2) the client consents after consultation.</i>
MN Effective 10/1/05	Same as MR
MS Effective 11/3/05	(a) and (1) combined are the same as MR (a); Adds (a)(2): “The client gives informed consent in writing;” (b) is the same as MR (c).
MO Effective 7/1/07	(a) and (1) combined are similar to MR (a), but changes “provide” to “undertake” in Missouri Rules (a); Adds (a)(2): “The client consents after consultation;” (b) is the same as MR (c).

As of May 8, 2015

MT Effective 4/1/04	Same as MR
NE Effective 9/1/05	Same as MR
NV Effective 5/1/06	Same as MR
NH Effective 1/1/08	Same as MR
NJ Effective 1/1/04	(b) provides that the lawyer shall not provide the evaluation unless “(1) <u>the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;</u> (2) <u>the lawyer consults with the client, and</u> (3) <u>the client gives informed consent.</u> ” Adds (d): “In reporting an evaluation, the lawyer shall indicate any material limitation that were imposed on the scope of the inquiry or on the disclosure of information.”
NM Effective 11/2/09	(a) Renamed “ A. Limitations; ” (b) Renamed “ B. Client consent required; ” (c) Renamed “C. Protected information.”
NY Effective 4/1/09	Same as MR
NC Effective 3/1/03	(a) and (1) combined are the same as MR (a); Adds (a)(2): “the client so requests or the client consents after consultation;” (b) is the same as MR (c).
ND Effective 8/1/06	Rule 2.2 is the same as MR 2.3.
OH Effective 2/1/07	(a): adds “agree to” before “provide”
OK Effective 1/1/08	Same as MR
OR Effective 12/1/06	Same as MR
PA Effective 7/1/06	Same as MR
RI	Same as MR

As of May 8, 2015

Effective 4/15/07	
SC Effective 10/1/05	Same as MR
SD Effective 1/1/04	Same as MR
TN Effective 1/1/2011	Same as MR
TX* Effective 3/1/05	<i>*Has not amended Rule since the most recent amendments to the ABA Model Rules</i> Does not have.
UT Effective 11/1/05	Same as MR
VT Effective 9/1/09	Same as MR
VA Effective 1/1/04	(a) A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. (b) and (b)(1) combined are similar to MR (a) but change "provide" to "undertake;" Adds (b)(2): "the client consults after consultation."
WA Effective 9/1/06	Same as MR
WV *Amendment effective 1/1/2015	Same as MR
WI Effective 7/1/07	Same as MR
WY *Amendment effective 10/6/14	Same as MR

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As of May 8, 2015

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