

Digest of Ethics Advisory Panel
Opinion #91-13, Request #93
Issued March 13, 1991

This is in response to an inquiry as to whether it is proper for an attorney who is representing a borrower in a loan transaction to furnish to the lender an opinion that loan documents prepared by lender's counsel are "legal, valid, binding and enforceable."

Under Rule 2.3 of the Rhode Island Rules of Professional Conduct an attorney may undertake an evaluation of a matter affecting a client for the use of a third party, subject to certain limitations, viz, (1) the lawyer must reasonably believe that making the evaluation for a third party is compatible with other aspects of the lawyer's relationship with the client, and (2) the client must consent after consultation.

However, the comment under Rule 2.3 also points out that furnishing a third party evaluation constitutes a departure from the normal attorney-client relationship. In furnishing such an evaluation, the attorney must undertake a careful analysis to decide whether, as a matter of professional judgment, the furnishing of the third-party evaluation is compatible with other functions undertaken for the client.

In the process of undertaking the required analysis, the attorney must make sure that his independent judgment is not affected by any number of collateral considerations including, but not limited to, the fact that the attorney's fee may depend upon consummation of the loan, that the attorney's continuing relationship with the client may be undermined if the attorney does not give the requested evaluation, and that the attorney may be exposed to the risk of liability should his client subsequently take the position that the terms of the loan are not enforceable.

The complexity of the analysis required of the attorney is compounded by the fact that, as pointed out in the comment, the furnishing of an evaluation to a third party may create a legal duty to the third party as well as to the client.

In addition to the above considerations, the second requirement of Rule 2.3 is that the client must consent to the furnishing of the third party evaluation after consultation with the attorney.

In making an independent judgment as to whether the client's consent has been given freely, the attorney must consider the potential coercion which may be imposed upon the client by virtue of the fact that the lender will very likely refuse to grant the loan unless the evaluation is furnished by the attorney.

The above list of considerations is not intended to be all inclusive but it is intended to show that the propriety of furnishing a third party evaluation is very subjective and very much conditional upon a complete analysis by the attorney of the facts and of the parties involved in each particular request.

In view of the above, and notwithstanding the acknowledged wide spread use of requests by lenders for opinions from borrower's attorneys, it is the panels' opinion that the concept of furnishing such opinions is inconsistent with the traditional adversary system of lawyering (where all parties to a transaction are represented by their own attorneys).

The panel concludes that it may not extend blanket ethics panel protection to an attorney who has been requested to furnish an opinion to the lender that loan documents prepared by the lender's counsel are "legal, valid, binding and enforceable."

Without extending any protection, the panel advises that it may be proper for the inquiring attorney to furnish the requested opinion but only after he has concluded, based upon careful analysis, that the furnishing of the third party opinion would be compatible with his duty to his client and, also, after he has obtained the freely given consent of his client.

Also, the comment to Rule 2.3 notes that third party evaluations may be performed at the client's direction for the primary purpose of establishing information for the benefit of a third party.

The panel is of the opinion that it would be proper for an attorney to give third party evaluations which are limited to well defined requests for information as opposed to requests for opinions on questions of law.