

COUNSELOR: | MRPC
ADVISORS | 2.1

RULE 2.1- ADVISOR

In representing a client, a lawyer **shall** exercise **independent professional judgment** and render **candid advice**.

In rendering advice, a lawyer **may** refer **not only** to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RULE 2.1 - COMMENT 1

[1] A client is **entitled to straightforward advice** expressing the lawyer's honest assessment.

Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

RULE 2.1 - COMMENT 1

In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.

Even so, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

RULE 2.1 - COMMENT 2

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.

Purely technical legal advice, therefore, can sometimes be inadequate.

RULE 2.1 COMMENT 2 – ETHICS & MORALS

It is **proper** for a lawyer to refer to **relevant moral and ethical considerations** in giving advice.

Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

RULE 2.1 CMT 3 – TECHNICAL ADVICE ONLY

[3] A client may expressly or impliedly ask the lawyer for **purely technical advice**. When such a request is made by a client **experienced in legal matters**, the lawyer may accept it at face value.

When such a request is made by **a client inexperienced in legal matters**, however, the lawyer's **responsibility** as advisor may include indicating that **more** may be involved than **strictly legal considerations**.

RULE 2.1, COMMENT 4 - NONLEGAL ADVICE

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession.

Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists.

2.1 COMMENT 5 - OFFERING UNWANTED ADVICE

[5] [*most likely to be on MPRE*] In general, a lawyer is **not expected** to give advice **until asked** by the client.

HOWEVER, when a lawyer knows that a client proposes a course of action that is likely to result in **substantial adverse legal consequences** to the client, the lawyer's **duty** to the client under **Rule 1.4** may **require** that the lawyer offer advice if the client's course of action is related to the representation.

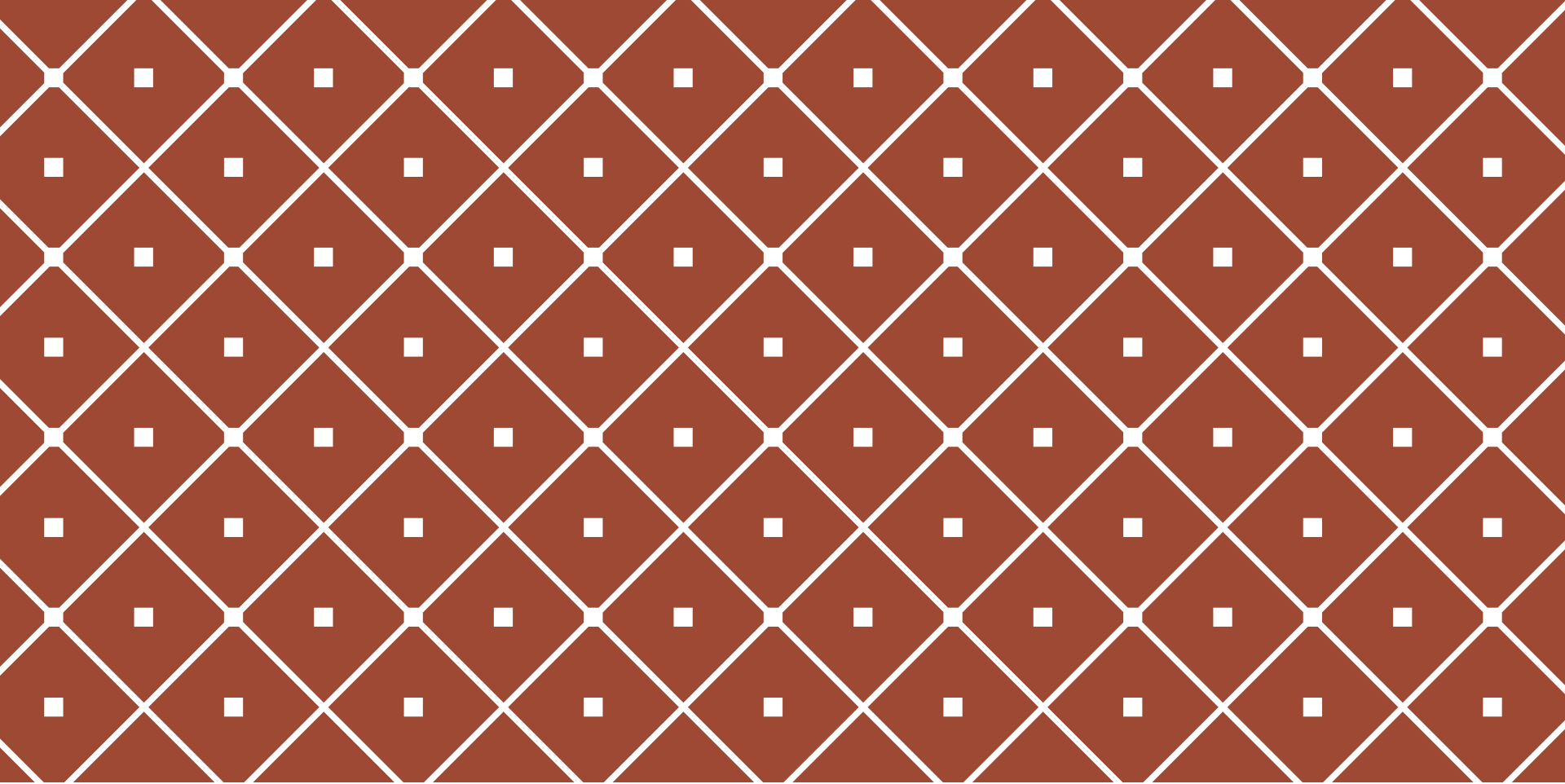
RULE 2.1 COMMENT 5 – SUGGESTING ADR

[5] . . . When a matter is likely to involve **litigation**, it may be **necessary** under Rule 1.4 to inform the client of **forms of dispute resolution** that might constitute reasonable alternatives to litigation.

[ethical duty to suggest ADR?]

RULE 2.1 CMT 5: DUTY TO INITIATE

[5] . . .A lawyer **ordinarily** has **no duty** to initiate **investigation** of a client's affairs or to give advice that the client has indicated is **unwanted**, **BUT** a lawyer **may** initiate advice to a client when doing so appears to be in the client's interest.



EVALUATION FOR USE BY THIRD PERSONS | **RULE 2.3**

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** (third person) **IF** the lawyer reasonably believes that making the evaluation is **compatible** with other aspects of the lawyer's **relationship with the client.**

RULE 2.3: INFORMED CONSENT

(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.**

RULE 2.3 – CONFIDENTIALITY

(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.

[NOTE Rule 1.6 confidentiality WINS over duties to other parties]

RULE 2.3 COMMENT 1

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation.

Some evaluations 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.

RULE 2.3 COMMENT 1

[1] . . . 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**.

2.3 COMMENT 2 - EVALUATION OR INVESTIGATION

[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.

RULE 2.3, COMMENT 2 - EVALUATION OR INVESTIGATION

[2] . . . 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.

RULE 2.3 COMMENT 2

[2] . . . 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.

RULE 2.3, COMMENT 3 - DUTIES TO THIRD PARTIES

[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.

RULE 2.3, COMMENT 3 - DUTIES TO THIRD PARTIES

[3] . . . **Even so**, since 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**.

RULE 2.3, COMMENT 3 - DUTIES TO THIRD PARTIES

[3] ...**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.

RULE 2.3, COMMENT 3 - DUTIES TO THIRD PARTIES

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.**

RULE 2.3 – COMMENT 4

[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.

RULE 2.3 – COMMENT 4

[4] . . . 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.

RULE 2.3 – COMMENT 4

[4] . . . 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.

2.3 COMMENT 4 - ACCESS TO AND DISCLOSURE OF INFORMATION

[4] . . . 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.

RULE 2.3 COMMENT 5: CLIENT'S INFORMED CONSENT

[5] Information relating to an evaluation is protected by Rule 1.6.

Where 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.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95

- 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.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95

- 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.

RESTATEMENT § 95

- 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.
- 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.

RESTATEMENT § 95

- **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, a lawyer may incur the duties of the client-lawyer relationship with the addressee, such as when the lawyer specifically invites the

RESTATEMENT § 95

However, 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.

Unless stated or agreed otherwise, a lawyer's evaluation does not entail a guarantee by the lawyer that facts stated in it are accurate.

RESTATEMENT § 95

Lawyer provides the opinion letter to Lender at the behest of Client (loan applicant), stating in it that Lawyer has neither physically inspected the property nor investigated the title, 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.

RESTATEMENT § 95

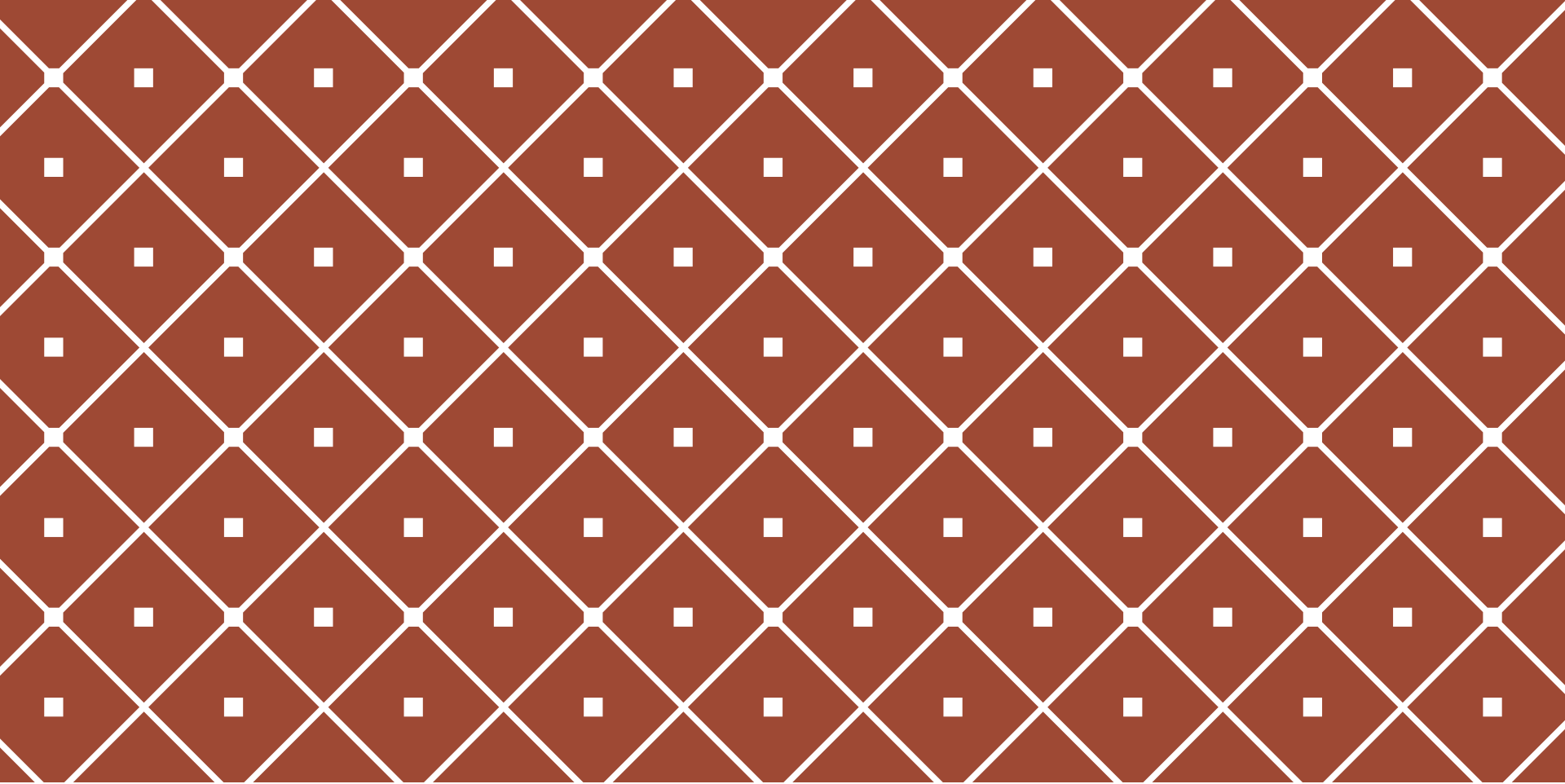
Unknown to Lawyer, a third party has acquired rights in the property by adverse possession, and mechanics' liens were put on the property after the date of the preliminary title report.

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.

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**LAWYER AS THIRD PARTY
NEUTRAL**

MRPC 2.4

RULE 2.4 – LAWYER AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists **two or more persons** who are **not clients** of the lawyer to reach a **resolution** of a dispute or other matter that has arisen between them . . .

RULE 2.4(A) - THIRD-PARTY NEUTRAL

(a) . . . Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

RULE 2.4 - THIRD-PARTY NEUTRAL

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.

When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 2.4 – COMMENT 3

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative.

The potential for confusion is significant when the parties are unrepresented in the process.

RULE 2.4 – COMMENT 3

[3] . . . Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them.

For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the **first time, more information will be required.**

RULE 2.4 – COMMENT 3

[3] . . . Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

RULE 2.4 – COMMENT 4

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter.

The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

RULE 2.4 – COMMENT 5

[5] When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), **the lawyer's duty of candor is governed by Rule 3.3.**

Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by **Rule 4.1.**