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RPC 2.3:
Opinions to Third Persons

Mark J. Fucile
Fucile & Reising LLP

Most of the time when we give legal advice in private practice, it is to our clients. RPC 2.3, however, permits lawyers to offer opinions to third persons—typically at a client's request. Circumstances vary, but ready examples are title opinions in real estate and compliance opinions for securities offerings. Although generally permitted, lawyers should be appropriately wary when providing opinions to third persons because the risk management dynamic is usually different—and potentially broader—than when simply advising a client directly. The question is often not "can I do it?" but "should I do it?"

In this column, we'll first survey the contours of RPC 2.3. We'll then turn to some of the common risks.

Before we do, two qualifiers are in order.

First, we'll leave for another day audit responses. Law firms routinely provide these for public company clients in connection with annual audits. The ABA developed guidelines for audit responses in 1975 and, with some adjustments since then, the ABA's suggested approach remains a very prudent framework. Comprehensive resources for audit response letters are available on the ABA's web site.

Second, we'll focus on circumstances where a client has asked a law firm to provide an opinion to third persons rather than situations where a client has shared advice a lawyer provided directly to the client with a third person. That scenario raises its own issues, usually revolving around potential privilege waiver.

The Rule

RPC 2.3(a) is the heart of the rule:

> 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.

RPC 2.3(b) then tempers that authority by requiring specific client informed consent "[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely[.]"

RPC 2.3(c), in turn, reminds lawyers that, except as authorized, confidential client information should remain protected under RPC 1.6's confidentiality obligations.

Oregon's rule is patterned directly on its ABA Model Rule counterpart. The ABA's Annotated Model Rules of Professional Conduct note (at 329) that "[t]here is virtually no reported disciplinary authority construing and applying Rule

2.3." The OSB's Rules of Professional Conduct Annotated essentially make this same point. The comments to the ABA Model Rule, therefore, provide practical guidance on applying the rule even though the ABA Model Rule comments were not adopted in Oregon.

Comment 2 to ABA Model Rule 2.3 emphasizes that the lawyer or law firm should clearly confirm the identity of the client for whom the evaluation is being prepared to both the client who requested the opinion and the recipients. Comment 3 underscores that Model Rule 2.3 addresses ethical obligations to clients rather than legal obligations to third person recipients. Comment 4 notes that the ultimate accuracy of an opinion can turn on the information available to the lawyer and that "[a]ny such limitations that are material to the evaluation should be described in the report." Comment 5 observes that in most situations a client's authorization to include information relating to the client is implied by the client's request to prepare the opinion for the third persons. Comment 5 cautions, however, that the client's specific informed consent should be obtained when "it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely[.]" Finally, Comment 6 includes a cross reference to the ABA guidance for audit responses.

The Risks

As noted earlier, neither Oregon RPC 2.3 nor its ABA Model Rule counterpart as adopted nationally are major sources of disciplinary cases. Instead, the ABA Model Rules of Professional Conduct Annotated (at 331) succinctly summarizes the principal risk:

> When a lawyer makes an evaluation for the use of a third party—which typically takes the form of an opinion letter in support of a contemplated transaction—the lawyer's greatest risk is that of being sued by the third party if things go wrong.

Most jurisdictions—including Oregon—typically predicate legal malpractice claims on the plaintiff being either a current or former client of the lawyer or law firm involved. Although exceptions for non-client claims exist, they are usually fairly narrow. The primary risk, however, is usually not from malpractice claims. Rather, recipients of an opinion letter asserting damage from the transaction involved are more likely to frame claims against the law firm as some form of misrepresentation or "aiding and abetting" the client's asserted fraud. The claims may be pursued by the investors or counterparties involved, the government or both. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248 (9th Cir. 2013), for example, involved a lawyer who provided opinion letters regarding stock issued by a mining company and later faced civil, regulatory, and criminal charges when the

venture failed—leaving 40,000 investors who lost over $60 million. The lawyer was also ordered to disgorge his fees from the opinion letters.

Depending on how subsequent claims are framed, they may—or may not—be covered by insurance. And, even if they are, potential claims by, for example, disappointed investors may exceed the lawyer's coverage. Law firms, therefore, need to prudently balance the potential revenue from an opinion letter with the associated financial risk. Some will make economic sense, but others may not.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.