fucile & reising | LLP

**December 2022-January 2023 WSBA *Bar News Ethics & the Law* Column**

# RPC 2.3:
# Evaluation for Use by Third Persons

**"Just because you can, doesn't necessarily mean you should."**
**~Anonymous**

**By Mark J. Fucile**
**Fucile & Reising LLP**

Most of the legal advice we give in private practice is to our own clients. RPC 2.3, however, permits a lawyer to offer "evaluations" to third persons—typically at a client's request. An illustration of an evaluation permitted under RPC 2.3 is a title opinion provided to a potential purchaser at a client's request for a real estate transaction. Because the recipient of an evaluation under RPC 2.3 is not a client, however, the risk management considerations are different—and potentially broader—than advice rendered directly to a client. For example, an opinion on the legal feasibility of a business venture provided at a client's request to possible investors may expose the law firm involved to claims by the investors if the venture doesn't work out as planned. The question facing lawyers in this area, therefore, is not so much "can I do it?" but "should I do it?"

In this column, we'll first survey the contours of Washington RPC 2.3. We'll then turn to the risks and conclude with some suggestions for controlling those risks.

Before we do, four qualifiers are in order.

First, we'll leave audit responses for another day. Law firms routinely provide these for public company clients in conjunction with annual audits. The ABA developed guidelines for audit responses in the mid-1970s in consultation with the American Institute of Certified Public Accountants—sometimes referred to colloquially as "The Treaty"—that balance client confidentiality with the need for public companies to provide accurate information in their financial statements.[1] The ABA's suggested approach remains a prudent framework for law firms. The ABA Business Law Section has a standing committee on audit responses and extensive materials are available on its web site.[2]

Second, depending on the subject area, other law or regulations may come into play. Tax and securities opinions are examples.[3] Lawyers should carefully assess any substantive law that may apply.

Third, Comment 2 to RPC 2.3 notes that the rule applies to evaluations being provided to third persons rather than investigations being conducted of third persons.[4]

Fourth, we'll focus on evaluations that are being intentionally provided to third persons at a client's request rather than situations where a client simply reveals the content of a lawyer's confidential legal advice to a third person without the lawyer's knowledge or involvement.[5]

***The Rule***

RPC 2.3 is divided into three sections.

RPC 2.3(a) provides the basic authority for offering evaluations to third persons:

> 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.

Comment 2 provides an example of an opinion that may be "compatible with other aspects of the lawyer's relationship with the client": a title opinion on a real estate transaction. Comment 3, by contrast, offers an example of when it is not: when a lawyer is defending a client on a fraud charge, the comment counsels that it would ordinarily be incompatible to provide those affected with an opinion reassuring them about the transaction involved.

RPC 2.3(b) tempers the authority granted by requiring specific client informed consent when the evaluation would be adverse to the client:

> 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.[6]

Comment 5 to RPC 2.3 reasons that when there is no significant risk to the client, authorization to reveal information is implied to carry out the work requested by

the client. When, however, revealing information would be adverse to the client, Comment 5 reinforces the text of the rule by underscoring the need to obtain specific client authorization and includes a cross reference to the definition of "informed consent" in RPC 1.0A(e).[7]

RPC 2.3(c) reminds lawyers that, except as authorized, confidential client information should remain protected under RPC 1.6:

> 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.

Washington RPC 2.3 parallels its ABA Model Rule counterpart.[8] The latter was a part of the original set of ABA Model Rules adopted in 1983 and was amended during the ABA's "Ethics 2000" review in 2002.[9] Washington's rule followed a similar trajectory: it was adopted in 1985 when Washington moved to professional rules patterned on the ABA Model Rules and was amended as a part of the WSBA's "Ethics 2003" review of corresponding ABA Model Rule amendments effective in 2006.[10] The ABA and Washington rules are similar to Section 95 of the Restatement (Third) of the Law Governing Lawyers (2000).

Comment 1 to RPC 2.3 highlights that although an evaluation is provided to a third person, it is at the client's direction. Prudent lawyers, therefore, will generally confirm the scope of the assignment with the client and make clear to

the recipients—preferably in writing—that they are not representing the recipients. Comment 4, in turn, counsels that any "limitations that are material to the evaluation should be described in the report." Comment 4 also suggests that in preparing the evaluation the lawyer should undertake whatever investigation "seems necessary as a matter of professional judgment."

***The Risks***

The ABA Annotated Model Rules of Professional Conduct, which includes a comprehensive survey of regulatory cases nationally, notes that "[t]here is virtually no reported disciplinary authority construing and applying Rule 2.3."[11] That same resource, however, starkly summarizes the primary risk in this area:

> 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.[12]

For lawyers, claims arising "if things go wrong" in most situations means malpractice. In Washington, however, malpractice claims by nonclients, while not impossible, are difficult precisely because malpractice claims typically require contractual privity between the lawyer and the client involved. Under a "modified multi-factor balancing test," a nonclient pursuing a malpractice claim must generally show that it was an intended beneficiary of the lawyer's work in

dispute.[13] Without deciding the issue squarely, the Ninth Circuit suggested that—depending on the particular facts involved—the recipient of an opinion letter might be an intended beneficiary under Washington malpractice law.[14]

Rather than wrestle with that nuanced legal issue, claims by nonclient recipients of opinion letters are often predicated instead on asserted negligent misrepresentation by the lawyer to the recipient. The leading national treatise on legal malpractice, for example, put it this way in the context of opinion letters:

> The most common basis for a claim of negligent misrepresentation is an opinion expressed by an attorney on which the plaintiff claims to have relied detrimentally.[15]

In still other circumstances, claims are framed around the theory that the lawyer was an accomplice to a fraud allegedly perpetrated by the lawyer's client. *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.

*CMKM Diamonds* is an extreme example, but useful in illustrating the principal risk of opinion letters: for what may be a modest fee (all things considered), a lawyer—and the lawyer's law firm—may be assuming at least a

theoretically significant financial risk if the transaction or venture doesn't pan out. To again quote the nation's leading treatise on legal malpractice:

> Attorneys can face enormous financial exposure to nonclients for negligence if their representation concerns large commercial transactions.[16]

***Controlling Risk***

Comment 3 to RPC 2.3 notes that the rule itself is centered on a lawyer's duty to the lawyer's client. The comment then counsels that while the existence of a legal duty to the third person is a question of substantive law beyond the RPCs, "careful evaluation of the situation is required." Although all risk cannot be eliminated, law firms should take at least three steps when considering issuing opinions to third persons. These are intended to be a starting point rather than a complete catalog.

First, the firm should realistically assess whether the potential economic risk is worth the fee revenue involved. These internal deliberations should touch on such areas as whether (a) the firm's work would be covered by insurance, (b) the firm's insurance is adequate for the project involved,[17] (c) the firm has the requisite expertise, and (d) the client is trustworthy. Because the financial risk will be borne by the firm, firms should also consider having this evaluation

include firm members other than those who will be credited directly for the fee revenue involved.

Second, even if the firm has the requisite substantive expertise, the firm should also realistically evaluate whether it has the time to sufficiently investigate and prepare the evaluation involved. The Restatement suggests the standard against which an opinion letter may be held:

> 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.[18]

Third, appropriate qualifiers and limitations should be included in the opinion. These should include noting information that was supplied others—including the client.

***Summing Up***

Firms should not reflexively assume that evaluations to third persons are just another piece of legal work. Because the risk management calculus is fundamentally different than for direct client work, firms should carefully balance the potential fees and risks involved in deciding whether to undertake the project. Sometimes the project will make sense. Other times it 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.

---

[1] *See generally* Alan J. Wilson, Stanley Keller, Randall D. McClanahan, Noel J. Para, James J. Rosenhauer, and Thomas W. White, *The ABA Statement on Audit Responses: A Framework that Has Stood the Test of Time*, 75 Bus. Law. 2085 (2020) (discussing the history and evolution of the ABA approach to audit responses).

[2] *See* https://www.americanbar.org/groups/business_law/committees/audit_responses/.

[3] *See generally* ABA, *Annotated Model Rules of Professional Conduct* 332 (9th ed. 2019) (Annotated Model Rules) (discussing applicable substantive law and regulations for federal tax and securities opinions).

[4] Similarly, RPC 2.3 does not apply to internal investigations being conducted for a corporate client. *See generally* Geoffrey C. Hazard, Jr., W. William Hodes, and Peter R. Jarvis, *The Law of Lawyering* at 27-8 (4th ed. 2020) (discussing this point under the corresponding ABA Model Rule).

[5] *See generally* Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in Washington*, § 9.05[7][a] (5th ed. 2021) (discussing waiver of the attorney-client privilege); *see*

*also* ABA Formal Op. 11-459 (2011) (addressing a lawyer's role in educating clients about preservation of confidentiality).

[6] *See, e.g.,* WSBA Advisory Ops. 1318 (1989) (addressing RPC 2.3 in the context of disclosing delinquent client accounts to credit reporting bureau) and1451 (1991) (discussing RPC 2.3 when providing assessments to a client's creditors on the prospects for receiving payment).

[7] Informed consent is defined in RPC 1.0A(e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Although not required to be confirmed in writing under RPC 2.3(b), prudent practice suggests doing so.

[8] *See* ABA Model Rule 2.3.

[9] *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2013 at 423-433 (2013) (historical overview of the rule). There was no counterpart under the earlier ABA Model Code of Professional Responsibility. *Id*. at 429.

[10] *See generally* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 861 (1986) (surveying Washington's adoption of professional rules patterned on the ABA Model Rules); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 176-77 (2004) (on file with author) (discussing amendments to the Washington RPCs proposed in light of then-recent amendments to the ABA Model Rules). Comment 5 to RPC 2.3 was further amended in 2015 to reflect a numerical change to the terminology rule from RPC 1.0 to RPC 1.0A.

[11] Annotated Model Rules, *supra*, at 329. The disciplinary notice search engine available on the WSBA web site suggests the same experience in Washington.

[12] *Id*. at 331.

[13] *See generally Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) (describing the "modified multi-factor balancing test"); *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013) (discussing *Trask* with an accent on the nonclient being an intended beneficiary).

[14] *Stock West Corp. v. Taylor*, 942 F.2d 655, 666 (9th Cir. 1991). The discussion in *Stock West* anticipated, but occurred before, the Washington Supreme Court's decision in *Trask*. To further cloud *Stock West*, rehearing occurred *en banc* and the case was dismissed on complex procedural grounds. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992).

[15] Ronald E. Mallen, *Legal Malpractice* 836 (rev. ed. 2020) (Mallen). *See also* Restatement (Third) of the Law Governing Lawyers § 51(2)(a) (2000) (Restatement) ("[A] lawyer owes a duty to use care . . . to a nonclient to when and to the extent that . . . the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion[.]").

[16] Mallen, *supra*, at 836.

[17] Indemnification by the client may also be considered. *See generally* NY State Bar Op. 969 (2013) (indemnification by client requesting opinion letter to third person permissible).

[18] Restatement, *supra*, § 95, cmt. c.