

June 2025 WSBA Bar News Ethics & the Law Column

**RPC 2.1:
Telling Clients Hard Truths**

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

~RPC 2.1, Comment 1

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

Although not necessarily as stark as the advice doctors sometimes have to give patients, lawyers are often called on to tell clients hard truths. The circumstances vary. It may be the likely sentence a criminal defendant is facing or the expected outcome of a sensitive family law matter. In some instances, the client has asked us for our evaluation while in others the client may be avoiding the “bad news.”

RPC 2.1 addresses this difficult, but very necessary, aspect of lawyering:

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.¹

RPC 2.1 is not a rule that typically draws much disciplinary notice.² The Washington Supreme Court, for example, has noted that, while the duty to render candid advice is mandatory (because the rule uses the word “shall”), the path to meeting that duty will necessarily vary widely with the circumstances: “encouraging certain activities without prohibiting or condemning a particular course of action.”³ At the same time, the principles outlined in the rule and its

Page 2

comments address areas that most lawyers encounter often. In this column, we'll first survey the notion of "candid advice" and then discuss the factors beyond the purely legal that lawyers are permitted to bring to clients' attention when advising them.⁴

Before we do, however, three qualifiers are in order.

First, although RPC 2.1 focuses on a lawyer's role as advisor, other rules—such as RPC 1.1 on competence and RPC 1.4 on communication—also enter that mix. For example, a lawyer may need to provide "candid advice" to meet the lawyer's duty of competent representation and needs to communicate material information even if the client doesn't necessarily want to hear it.⁵

Second, because the "independent professional judgment" thread of the rule overlaps with the conflict rules—principally RPC 1.7(a)(2) on "material limitation" conflicts—we'll focus here on the "candid advice" prong of RPC 2.1.⁶

Third, at the end of the day, lawyers are agents for their clients—not principals themselves.⁷ Accordingly, RPC 1.2(a) reserves to clients major strategic decisions such as whether to settle a civil case or plead guilty in a criminal proceeding.⁸ Once lawyers have rendered their advice, therefore, it is ordinarily the client's prerogative whether to accept or reject that advice.⁹ In those comparatively rare instances when a lawyer has a "fundamental

disagreement” with a client over either means or ends, RPC 1.16(b)(4) permits the lawyer to withdraw (or seek leave to withdraw if court rules require court approval).¹⁰

Candid Advice

Comment 1 to RPC 2.1 speaks to the nub of rendering candid advice:

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. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

The Kansas Court of Appeals concluded, for example, that a lawyer was “doing his job” under the similar Kansas version of the rule when he “counseled . . . [his criminal defense client] . . . to accept the plea bargain because . . . [the client] . . . would likely lose at trial.”¹¹ Similarly, rule focuses on the lawyer's advice, not whether the client accepts it.¹² By contrast, a lawyer was disciplined under the Indiana version of the rule for telling a client what the client wanted to hear—even though the lawyer knew it was not accurate.¹³

Comment 5 to RPC 2.1, in turn, blends giving candid advice with the duty of communication under RPC 1.4—especially when the client may not fully appreciate the risks of a particular course of conduct:

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. Similarly, 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. 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.

Beyond the Purely Legal

Comment 2 to RPC 2.1 counsels that our duty as advisor may, depending on the circumstances, include suggestions beyond the purely technical:

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. 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.¹⁴¹⁵

In *Matter of Marriage of Foran*,¹⁶ for example, the Washington Court of Appeals counseled that lawyers may appropriately advise clients on the economic implications of contracts. As the Court of Appeals put it, even if a client might try to take advantage of disparate economic circumstances to “win” a

negotiating point notwithstanding the risk of non-enforcement, “[a] client is not well served by an unenforceable contract.”¹⁷

Comment 3 to RPC 2.1 notes although some legally sophisticated clients may only need technical advice, others may not recognize the non-legal ramifications of technical legal positions:

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.

At the same time, lawyers need to remember that purpose of advice is to help the client make decisions—not to substitute the lawyer's judgment for that of the client. Justice Yu juxtaposed RPC 2.1 and RPC 1.2 in a comparatively recent concurrence: “[I]n Washington, a lawyer must be guided by the client's interests, not the lawyer's . . . interests because the client has ‘the ultimate authority to determine the purposes to be served by legal representation.’”¹⁸

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. 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 503.860.2163 and Mark@frllp.com.

¹ Washington RPC 2.1 is based on its ABA Model Rule counterpart. Both have remained essentially unchanged since their adoptions in, respectively, 1983 at the ABA and 1985 in Washington. See generally ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 407-411 (2013) (outlining history of the ABA Model Rule); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 859 (1986) (discussing adoption of the Washington rule); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 175 (2004) (discussing adoption of ABA Model Rule comments to Washington RPC 2.1).

² The disciplinary cases citing RPC 2.1 in Washington typically refer to the portion of the rule requiring "independent professional judgment" and do so in the context of personal or business conflicts. See, e.g., *In re Halverson*, 140 Wn.2d 475, 493, 998 P.2d 833 (2000) (personal interest conflict); see also *Viceroy Group, LLC v. Tok, LLC*, 2021 WL 672080 at *3-*4 (Wn. App. Feb. 22, 2021) (unpublished) (addressing RPC 2.1 and RPC 1.7(a)(2) in law firm disqualification context). Washington is not alone in the comparative absence of case authority on RPC 2.1. See generally ABA, *Annotated Model Rules of Professional Conduct* at 353-61 (10th ed. 2023) (surveying authority nationally on the rule). Similarly, citations to RPC 2.1 rarely appear in the decisional law of legal malpractice. *Id.* Instead, professional judgment in the legal malpractice context is usually reflected in the standard of care. See generally *Dang v. Floyd, Pflueger & Ringer, PS*, 24 Wn. App.2d 145, 158-162, 518 P.3d 671 (2022) (discussing the interplay between professional judgment and the standard of care).

³ *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 87, 331 P.3d 1147 (2014).

⁴ The duty to render candid advice applies with equal measure to individual and entity clients. See generally ABA Formal Op. 514 (2025) (discussing Model Rule 2.1 in the entity client context). The duty to render candid advice can become considerably more nuanced when

dealing with a client with diminished capacity. For a discussion of that sensitive area under both RPC 2.1 and RPC 1.14, see ABA, *Annotated Model Rules of Professional Conduct* 53-54 (10th ed. 2023) (ABA Annotated Model Rules).

⁵ Comment 7 to RPC 1.4 recognizes that in relatively uncommon circumstances a lawyer can reasonably delay transmitting information to a client “when the client would be likely to react imprudently to an immediate communication.” Comment 7, however, contemplates that the lawyer will eventually communicate the information involved when the client is capable of receiving it.

⁶ See Note 2, *supra*. See also WSBA Advisory Op. 2024 at 5 (2024) (discussing RPC 2.1 in the context of exercising unconflicted professional judgment).

⁷ See RCW 2.44.010 (authority of attorney); see also *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992) (discussing lawyer’s role as agent).

⁸ For a discussion from a national perspective of the sometimes indistinct line between “lawyer decisions” and “client decisions” under Model Rule 1.2(a), see ABA Annotated Model Rules, *supra*, at 46-52.

⁹ See *In re Guardianship of Herke*, 1999 WL 18141 at *10-*11 (Wn. App. Jan. 19, 1999) (unpublished) (discussing interplay between rendering advice and following client decisions).

¹⁰ See *Drueding v. Travelers Home and Marine Insurance Company*, 2022 WL 6799766 at *1 (W.D. Wash. Sept. 13, 2022) (unpublished) (discussing intersection between RPC 2.1 and 1.16(b)(4)).

¹¹ *State v. Vega*, 2018 WL 5728351 at *4 (Kan. App. Nov. 2, 2018) (unpublished).

¹² See, e.g., *Harris Teeter, Inc. v. Moore & Van Allen PLLC*, 701 S.E.2d 742, 751 (S.C. 2010) (noting that lawyer gave client candid advice that the client ignored).

¹³ *Matter of O’Connor*, 553 N.E.2d 481, 484 (Ind. 1990). The lawyer in *O’Connor* was also disciplined under Indiana RPC 1.4 for the failure to communicate.

¹⁴ See also *Restatement (Third) of the Law Governing Lawyers* § 94(3) (2000) (“In counseling a client, a lawyer may address non-legal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects.”). Comment 4 to RPC 2.1 also recognizes that in some circumstances advising a client beyond technical legal points may involve referring the client to other professionals beyond the law.

¹⁵ Offering broader advice within the context of legal analysis should be distinguished from simply providing a client with business advice. While the former ordinarily falls within privilege, the latter may not and the dividing line between the two under privilege law can be indistinct. See generally *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022) (discussing tests for distinguishing legal analysis from business advice); *PUMA SE v. Brooks Sports, Inc.*, 2024 WL 4476767 at *2-*3 (W.D. Wash. Oct. 11, 2024) (unpublished) (same).

¹⁶ 67 Wn. App. 242, 255 n. 14, 834 P.2d 1081 (1992) (discussing enforceability of a prenuptial agreement).

¹⁷ *Id.* See also N.Y. City Bar Formal Op. 2011-2 at 4-5 (2011) (noting that lawyer making referral of client to litigation finance company should discuss whether the economic arrangement is in the client’s best interest as a part of the “candid advice” prong of RPC 2.1).

¹⁸ *Woods v. Seattle’s Union Gospel Mission*, 197 Wn.2d 231, 257, 481 P.3d 1060 (2021) (Yu, J., concurring) (quoting RPC 1.2, cmt. 1).