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# To Avoid or Embrace? Navigating Third Party Legal Opinions

The legal opinion practice, in which lawyers offer their professional judgment on the soundness, viability or likelihood of performance of a given transaction for the benefit of third-parties, has established itself as commonplace, especially in certain practice areas. In lieu of acting solely as an advocate for their own clients, lawyers issuing legal opinions for others deviate from the traditional attorney-client relationship in one important respect. A third party benefits from the legal opinion rather than the client.

The anomaly of offering third-party legal opinions has been best described in the following way:

"The knowledge that someone is struck by lightning every year does not keep golfers off the golf course. Although the consequences are dire, the perceived risk is too small. Similarly, the knowledge that lawyers are now sued on opinions and that the damages sought can be catastrophic has not kept lawyers who work on financial transactions from giving third-party legal opinions."[1]

Offering legal opinions, or opinion letters, for third parties who are not the lawyer's client presents a host of issues that may result in potential disciplinary issues and/or third-party legal malpractice actions asserted against firms and their attorneys. This article examines some of those issues and offers suggestions for best practices when offering third-party legal opinions.

## Historically Outdated, but (Still) Widely Used

The rendering of third-party legal opinions emanates from the railroad boom of the late 1800s, when attorneys were asked to offer their professional opinions on the soundness of certain transactions within the railroad industry. Although there was minimal legal or monetary benefit, presenting such opinions created reputational risk, thus affecting their practice and livelihood. The collateral of one's reputation, practice, and livelihood was viewed as sufficiently secure to permit the parties to rely on the lawyer's judgment.

In current practice, legal opinions are offered in numerous situations. For example, opinions are sought when a corporate entity is required by another entity, investor, or financial institution to demonstrate their corporate status or ability to assume and repay a loan, and works to facilitate a lender's due diligence process in a given transaction (e.g., a merger, acquisition, or real estate transaction). The third-party recipients of the opinions may include financial institutions, investors, government regulators, who will rely on the contents and conclusions of the opinion letter when deciding to enter into or approve the transaction in question. Unfortunately, the monetary benefit of issuing an opinion letter remains low in comparison to the high level of risk exposure, especially when considering the amounts involved in the underlying transactions. Although few disciplinary or ethics opinions quantify the risk, and claims of civil liability are few, the risk lies in the potential claim severity of the work, rather than the frequency. Accordingly, lawyers must consider the following issues when rendering legal opinions for third parties.

1 Glazer and Lipson, "Courting the Suicide King: Closing Opinions and Lawyer Liability," Bus. L. Today (March/April 2008).

### Rules 1.6 and 2.3 – Maintaining Confidentiality and Providing Evaluations To Third Parties

In the traditional lawyer-client relationship, candor is encouraged between lawyers and their clients so that lawyers may provide sound legal advice. Courts have long held that such forthrightness supports a lawyer's comprehensive evaluation of the available facts, law, strengths and weaknesses in a client's matter, and ultimately advice to the client. However, that concept is reversed when the lawyer's evaluation is made for the benefit of parties outside of the attorney-client relationship.

American Bar Association (ABA) Model Rule 2.3 specifically addresses these types of legal opinions. Under Model Rule 2.3, lawyers may offer legal assessments for use and reliance by third parties outside the attorney-client relationship, but only when certain requirements are met.[2] The lawyer must: (1) reasonably believe that that making the evaluation is compatible with other aspects of the lawyer-client relationship; (2) refrain from providing such an evaluation when doing so would "materially and adversely" affect the client's interests; and (3) adhere to their duties of confidentiality under Model Rule 1.6 , except as expressly authorized by the client.[3]

When drafting opinions for parties who are not the client, confidentiality considerations are of the utmost importance. Rule 2.3 expressly permits the disclosure of otherwise confidential information when "in connection with a report or evaluation," but only to the extent that it is authorized by the client.[4] In practical terms, the disclosure is limited in two important respects for the lawyer: the amount/type of information, and the recipient of the information. First, the amount and type of information a lawyer may disclose is limited to the extent that it is in connection with a legal opinion. Second, the lawyer may disclose the information solely to the recipient expressly authorized to receive the opinion.

In other words, Rule 2.3 does not provide lawyers with the authority to reveal client information carte blanche. Rather, it provides that disclosure of any additional information beyond what is authorized or to any additional parties not connected to the opinion remains prohibited and governed by ABA Model Rule 1.6.

Nevertheless, lawyers must evaluate their clients' interests and consider whether those interests will be materially and adversely affected by providing the opinion to a third party. When there is minimal risk to the client in providing an evaluation, disclosure may be impliedly authorized to effect the legal opinion.[5] However, when a client's interests would be materially and adversely affected, lawyers must alert their client to the benefits, risks, and alternatives to the evaluation, and must obtain informed consent from the client prior to proceeding.[6]

Notably, neither ABA Model Rule 1.6 nor ABA Model Rule 2.3, standing alone, provides any protection against disclosure by the third party (i.e., the party receiving the legal opinion). Thus, lawyers should consider securing protection against disclosure by separate agreement with the client and third party. Such an agreement may serve to maintain confidentiality and avoid any wavier of the attorney-client privilege.

### Rule 1.1 – Ensure Competence Before Providing Legal Opinions

The issue of competence was recently examined in a recent *In Practice…with CNA* article, titled Dibble Dabble Double Trouble: Mitigating the Risks of Dabbling In Your Law Practice, in which the authors offered the following guidance:

"Dabbling in areas of the law that are different or relatively new presents a unique opportunity to expand your practice. However, it comes with an increased risk for disciplinary and legal malpractice complaints if not prepared. Before jumping in, be willing to commit to the substantial time and resources necessary to comply with ABA Model Rule 1.1."

Ensure that you or your firm are competent in the area, transaction, or practice in which you are offering your opinion. Model Rule 1.1 obligates lawyers to either ensure that they are competent to handle any given matter or to become competent by taking steps to sufficiently learn about the issue or matter in question.[7] In view of the severity of the risk associated with offering a legal opinion on a client's behalf, ABA Model Rule 1.1 offers a helpful reminder that lawyers must be competent.

2 ABA Model Rule of Professional Conduct 2.3.
3 *Id.*
4 *Id.*

5 *See* Model Rule 2.3, Cmt. [5]; *see also* Model Rule 1.6.
6 *See* Model Rule 2.3.
7 Competence includes the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation". The comments to the rule offers several steps lawyers may take when they lack the requisite competence, including self-study or associating with a more experienced practitioner. *See* Model Rule 1.1 of the Model Rules of Professional Conduct.

### Rules 1.2 and 4.1 – Be Mindful of Fraudulent Conduct by the Client or Untruthful Statements

The information contained in the opinion is intended for the use and benefit of, and often reliance by, a third party. Accordingly, lawyers must analyze each matter on a transaction-by-transaction basis. Such an analysis often will include scrutinizing the information provided by the client, any limitations, exclusions, or scope on obtaining any relevant information, any refusals by the client in providing information, involvement by the lawyer in acting as an advocate in the same or any related transaction, and the evaluation ultimately provided by the lawyer.

This perspective requires emphasis when viewed in the context of potential liability exposure stemming from claims by the opinion recipient. "An opinion giver should not should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given."[8]

Of course under ABA Model Rule 1.2(d), lawyers may not counsel or assist clients in engaging in conduct that the lawyer knows to be criminal or fraudulent. And under ABA Model Rule 4.1, lawyers are prohibited from making false statements of material fact or law, or failing to disclose material facts when necessary to avoid assisting in a client's criminal or fraudulent behavior.[9] Together, these guidelines serve as backstops against lawyers: 1) knowingly making false statements of fact or law in an opinion letter; and 2) remaining cognizant of the role in providing an evaluation and ensuring that the opinion letter will not further assist clients in criminal or fraudulent actions. In short, including conclusions or assumptions in an opinion letter that the lawyers knows to be false or misleading contravenes Model Rule 1.2 and Model Rule 4.1.

"[L]awyers must evaluate their clients' interests and consider whether those interests will be materially and adversely affected by providing the opinion to a third party."

Apart from ethical violations, courts have found that lawyers providing incomplete, misleading, or incorrect opinions may open the door to civil liability to the third-party recipients, including claims of negligent misrepresentation and breach of fiduciary duty.[10] Lawyers also may be exposed to other liability risk, depending upon practice area and subject matter of the legal opinion.[11] Other potential liability exposures include securities law or tax regulation violations.[12]

### Best Practices for Issuing Third Party Legal Opinions

When analyzing whether to engage in offering legal opinions and in drafting such opinions, the following issues should be considered:

- Focus on what you're being asked to do, and remember, competence is critical. Is rendering this opinion within your competency? Or, does this fall outside your area of practice, or does it lie somewhere in between? If outside your area, recognize what will be required in order to gain competence.
- Limit the parameters of the opinion to the scope of your firm's engagement with the client: scope creep, or departing from the scope of the engagement, leads to a host of issues, both with your client, as well as increased liability exposure to the third-party recipients.
- Advise your client of the risks, benefits, and available alternatives, to the extent that any exist, to providing a legal opinion to a third party.
- In order to maintain confidentiality and protect against waiver of the attorney-client privilege, consider having the parties execute a confidentiality agreement. Although never a complete guarantee against loss of such protections, an agreement serves as one more level of protection for the lawyer against future claims.
- Consider asking your client for indemnification against third-party claims based upon the issuance of your opinion letter.[13]

8 *Guidelines for the Preparation of Closing Opinions*, ABA Business Law Section Committee on Legal Opinions, 57 L. Bus. L. (Feb. 2002) at ¶ 1.5.
9 ABA Model Rule of Professional Conduct 4.1.

10 *Ouwinga v. Benistar 419 Plan Services, Inc.*, 2012 WL 4096145 (6th Cir. 2012) (holding that issuing incomplete and misleading opinions "for the purpose of falsely promoting [their client's plan] to potential investors" creates a pathway to potential liability to the opinion recipient); *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver N.A., 892 P.2d 230 (Colo. 1995)* (holding that a lawyer who issued an opinion on behalf of its client to induce a bank to purchase development bonds which contained misrepresentations about its client's procedural compliance could be held liable for negligent misrepresentation);
11 Consider the law firm of Vinson & Elkins, which settled litigation in 2006 against its former client, Enron, for $30 million, stemming from its work for the now defunct energy conglomerate that included rendering legal opinions vouching for the authenticity of Enron's various business arrangements that Enron later used to facilitate transactions. See James Grimaldi, Peter Behr, "Houston Law Firm Helped Craft Enron Deals," The Washington Post, January 27, 2002.
12 *See SEC v. Fehn*, 97 F.3d 1276 (9th Cir. 1996) (holding that a lawyer who prepared several deficient filings with the Securities and Exchange Commission aided and abetted violations of securities law); *see generally* 31 C.F.R. §§ 10.35-10.37 (2017) (requiring lawyers and law firms which issue opinions on certain tax transactions to abide by U.S. Treasure Department regulations).
13 *See* N.Y. State Ethics Op. 969 (2013) (providing that the ordinary prohibition against lawyers limiting a client's claims of malpractice under Rule 1.8 do not apply to third parties when issuing a third party opinion letter); *see also* Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, 67 Bus. Law. 99 (2011) ("While professional ethics rules normally prohibit lawyers from prospectively limiting their liability to clients, these prohibitions do not apply to non-clients.")

- Be cautious about emergency requests to draft legal opinions. As with any other work, client requests at the last minute do little to benefit the lawyer and place the firm at a high vulnerability risk by assuming work with unreasonable demands and minimal time to competently prepare.
- After issuing an opinion, if you discover any criminal or fraudulent acts on the part of the client that relate to the issuance of the opinion, you may seek to revoke the opinion. For additional guidance on navigating a client's prior misconduct, see CNA's *Professional Counsel* article titled Spyware, Schemes and Sticky Fingers: Reacting to Client Misconduct.
- Remember, the risk in providing opinion letters belongs to the lawyer, rather than the client, and opinion letters create a potential for significant liability.

### Key Elements of an Opinion Letter to Consider Including

Although not an exhaustive list of language or sections to include in drafting a third party opinion letter, the issues noted herein offer a starting point for inclusion when drafting an opinion letter to a third party. These considerations are not intended to be an exhaustive list of language or sections to include, but rather should serve as initial guidance. For a more exhaustive list of resources on legal opinion letter drafting, the ABA's Legal Opinions Resources Center offers a helpful and thorough one-stop shop for opinion practice, which may be accessed here.

- Indicate the recipient clearly: To whom is the opinion letter addressed, and who may rely on its conclusions?
- State the role of the opinion giver: Are you in-house, special counsel, outside counsel or something else? Stating the role of the opinion giver will define and may even potentially limit the attorney's liability.
- Clearly define the transaction on which the opinion focuses. Definition will further help to narrow the scope of any reliance on the opinion and the extent to which an attorney may be held liable.
- Indicate the authority under which the opinion giver is operating. For example: We provide this Opinion Letter to you at the request of [Name of Opinion Requester/Client or Above-named Client] pursuant to Section [_____] of the [Title of Relevant Agreement].
- Include a section stating that the opinion(s) contained within the letter are to be interpreted in accordance with "customary practice", which is typically described as the customary practice set forth in the TriBar Opinion Committee Reports.
- Include a section in which the documents and materials reviewed are listed and described individually. Customary practice and diligence are required in factually investigating, which may include facts provided by clients or other attorneys. However, including this type of list serves to delineate and limit the sources of information upon which the opinion preparer relied in the event of a future claim.
- If qualifications were relied upon in issuing the opinion, include a section that delineates the nature and details of the qualification, such as facts or conclusions assumed without further investigation, and a statement that none of the assumed facts are false, if and when applicable.
- Include a provision allowing the attorney to revoke the opinion in the event that any criminal or fraudulent acts on behalf of the client that relate to the issuance of the opinion are discovered.
- At the conclusion, remind the recipient that this opinion is intended solely for this transaction and for the designated recipients, and state that the opinion is being [delivered/provided] solely for [the recipients] use in connection with the [specific transaction] and may not be relied upon by any other person or entity for any other purpose without prior written consent.

Apart from ethical violations, courts have found that lawyers providing incomplete, misleading, or incorrect opinions may open the door to civil liability to the third-party recipients, including claims of negligent misrepresentation and breach of fiduciary duty.

## Conclusion

Issuing legal opinions for clients to third parties is undoubtedly commonplace in today's world. Numerous business dealings, real estate transactions, and regulatory compliance actions have come to rely on this practice. Nevertheless, risks remain, and lawyers should consider the potential liability associated with issuing opinions to third parties. When offering legal opinions for third parties, lawyers should consider implementing these practices and tools to help mitigate potential risk.

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