

In My Opinion...

Ethical Considerations of Third-Party Legal Opinions

by Lydia C. Stefanowicz

The issuance of a third-party legal opinion as a condition to closing has become such a common practice in certain types of business transactions, most notably financing transactions, that lawyers rarely stop to consider the ethical considerations related to this practice. The third-party legal opinion is an expression of a lawyer's professional judgment on the matters covered therein relating to his or her client and the subject transaction, as of the date of the opinion letter, for the benefit of the opinion recipient. Since the opinion recipient is not the lawyer's client, such an opinion letter is commonly known as a 'third-party legal opinion.' In an adversarial legal system such as ours, a situation where an attorney has, among other duties, a duty of loyalty and care to his or her client, as well as a duty to be fair and objective to the third-party legal opinion recipient,¹ appears to create an ethical anomaly.

The practice of issuing third-party legal opinions can only be reconciled with a lawyer's ethical considerations if the issuance of the third-party legal opinion is consistent with the lawyer's duties to his or her client. Rule 2.3(a) of the New Jersey Rules of Professional Conduct (NJRPC) allows a lawyer to "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." This rule is the ethical basis of third-party opinion practice. However, it was only in 1983 that a version of NJRPC 2.3(a) was initially adopted by the American Bar Association (ABA) as part of the ABA Model Rules of Professional Conduct. It was the first ethics rule to recognize specifically the practice of third-party legal opinions, and was adopted in response to the need for some common ethics ground rules for providing information about a client to a third party while representing the client.

What are some of the ethical considerations implicated by third-party legal opinions?

First, the client should consent to the issuance of the legal opinion. That consent may be express, as, for example, pursuant to an engagement letter, or implied. NJRPC Rule 1.2(a) states that a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Thus, when a client executes a financing commitment letter or an agreement that requires the delivery of a third-party legal opinion as a condition of closing, the client has implicitly consented to the issuance of the third-party legal opinion on its behalf by its counsel in that transaction.

However, when a lawyer is engaged to act as local counsel in a transaction primarily for the purpose of issuing a legal opinion in its jurisdiction, the lawyer-client relationship may be remote. For example, the local counsel may be contacted initially by lead counsel, and may communicate only with lead counsel throughout the course of the transaction. In other cases, the local lawyer may be engaged by the opinion recipient to provide a legal opinion about a document or entity status as if it is being provided on behalf of the subject of the opinion. In those circumstances, unless the lawyer has been expressly engaged by the opinion recipient on its own behalf (in which case the lawyer will be rendering a direct opinion, not a third-party legal opinion), a lawyer would be well-advised to treat the subject of the opinion letter as its client and to confirm that by asking its client to execute an engagement letter, whereby its consent to the opinion letter will be express.

NJRPC Rule 2.3(b) requires a lawyer to obtain the *informed consent* of a client if the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely. This could occur, for example, if opinion negotiations would reveal to the opinion recipient that the transaction documents as drafted do not provide a material remedy to the opinion recipient. The informed consent of the client requires the lawyer to consult with the client and

to describe to the client in writing the conditions of the evaluation, including disclosure of any confidential client information.

Where a third-party legal opinion covers multiple parties (e.g., a borrower and one or more guarantors), there is a possibility that the interests of the parties may not be aligned in every instance. Under such circumstances, the lawyer also should consider whether a conflict of interest may arise in that context and, if so, seek the informed consent of each client involved in the transaction.

Second, as mentioned above, a third-party legal opinion may involve disclosure of confidential client information. Similar to NJRPC 2.3(b), Rule 1.6 of the NJRPC provides that disclosure of confidential information requires client consent after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except in certain other limited circumstances not pertinent to legal opinions.

Third, NJRPC 1.4 requires a lawyer to keep a client reasonably informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. This rule may be challenging to comply with in the context of opinion practice. Clients frequently have little interest in and patience for the details of opinion letter negotiation, where the issues are perceived to be esoteric, a source of unnecessary delay and of little direct value to the client's interests in the transaction.

Finally, the rules of professional conduct relating to dealings with third parties are also relevant to third-party legal opinions. NJRPC 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal, criminal or fraudulent. NJRPC 4.1 prohibits a lawyer from knowingly: 1) making a false statement of material fact or law to a third person, or 2) failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client. Thus, including in an opinion letter that will be relied upon by the opinion recipient a legal conclusion or an assumption the lawyer knows is not true is a violation of professional ethics. In addition, while the scope of a lawyer's investigations in connection with the issuance of an opinion letter may be limited, any such limitations that are material to the legal conclusions should be clearly described in the opinion letter. Omission of a material action, or departure from what may be customarily or reasonably expected of the lawyer issuing the opinion, may constitute misrepresentation if the limitation or departure is not stated for the opinion recipient to take into consideration in accepting and relying upon the opinion letter.

While the issues described in this article are some of the primary ethical considerations in opinion practice, they are not necessarily the only ones. Lawyers should be mindful of the rules of professional responsibility and ethical principles generally in the context of opinion practice as much as in other aspects of client representation. ■

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Endnote

1. See Restatement (Third) of the Law Governing Attorneys, Section 95, Comment c (2000).