

PLI BUSINESS LAW INSTITUTE

TRENDS AND ISSUES IN OPINION PRACTICE

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Lisa R. Jacobs
DLA Piper LLP (US)

Heather Sonnenberg
Blank Rome LLP

Stephanie Sprenkle
Obermayer Rebmann
Maxwell & Hippel LLP

Purpose of Legal Opinions in Transactions

WHAT IT IS: . An opinion from lawyers on one or more sides of a transaction, issued in letter form expressing **legal conclusions** about and/or legal analysis of a transaction or matter, which is relied on by the addressee of the opinion.

- Typically represents a knowledgeable practitioner's expression of how a court would likely resolve issues covered by the opinion on the date it is issued.
- The main purposes of a legal opinion are to:
 - inform the addressee of the legal effect of a transaction or matter (valid/binding).
 - identify legal risks that the addressee should consider further and evaluate, such as conflicts, pre-existing obligations, actual or potential violation of law resulting from entering into the transaction.
 - provide comfort that the counterparty to a transaction understands the impact of the transaction; has properly taken action necessary to consummate it; and has conducted the diligence required to render the transaction valid.
 - provide the recipient with knowledge about matters that are not in the recipient's control, such as: the ability of signatories to documents to bind an entity, that the documents are validly executed and the assurance that the entity is validly formed under the laws of its jurisdiction

A legal opinion is not:

WHAT IT IS NOT:

- A replacement for **factual representations** and warranties
- An “insurance policy” designed to provide a “deep pocket” for coverage in a financially stressed situation
- A training manual for the recipient on the legal structure of a transaction
 - Some exceptions – e.g., “true sale” opinion
- A guaranty of the outcome of any issue covered by the opinion that comes before a court
- A legal opinion is **not** a substitute for **legal advice** which, in a transactional context, is likely to be more extensive.

Considerations in requesting and issuing legal opinions

- Customary practice: current “market” for determining when and if a specific legal opinion should be requested in a particular business transaction.
- Cost-benefit considerations.
- Size, nature and scope of transactions to be covered and legal issues relevant to it
- Appropriate content of such opinions.
- The standard of care required under applicable law (with particular attention to the standard of care in rendering opinions in specialized areas of the law, such as securities law.)
- The nature and extent of the “diligence” investigation required by opinion giver before issuing particular types of opinions, such as the way factual information upon which an opinion is based is obtained, determining appropriate factual assumptions to be included in the opinion letter, and analyzing the extent to which additional legal research is appropriate.
- To whom is the opinion given - contract opponent vs. client (more common in UK, Europe)
- Who may rely on the opinion (assignees/participants/governmental entities)

Typical reasons to request a legal opinion

- To address whether an intended course of action is lawful or that certain desirable legal consequences will follow from an intended course of action (or, conversely, that certain legal consequences will not result from the proposed course of action);
- To satisfy contractual requirements – e.g., an opinion given by issuer’s counsel to investors in connection with the sale of securities or by borrower’s counsel to the lender pursuant to a loan agreement;
- To satisfy regulatory requirements – e.g., an opinion given in connection with the qualification of securities registered under the Securities and Exchange Act of 1933; and
- To resolve questions raised by other professionals and to provide an authoritative basis for statements, reports and opinions with respect to matters on which other professionals are not qualified to make judgments – e.g., an opinion regarding local law provided to out-of-state counsel.

Typical threshold issues

Differences between opinion givers and opinion recipients generally arise over:

- (1) the time and expense required to render an opinion on a matter that is non-material, peripheral to the transaction or to the primary concerns of the opinion recipient,
 - (2) the appropriate scope of a particular opinion,
 - (3) whether the opinion will cover matters that are essentially factual in nature,
 - (4) whether the opinion will cover matters about which there is some recognized legal uncertainty [resulting in “reasoned opinions”],
 - (5) requests for what historically were referred to as “comfort opinions” but are more properly referred to as “negative assurances”
- **Would you give it? If not, don’t ask for it.**

The “No-Nos”

- A lawyer should not:
 - render an opinion that the lawyer knows would be misleading.
 - render an opinion based on factual assumptions if the lawyer knows that the assumptions are false or that reliance on those facts is unreasonable.
 - be asked to render opinions on matters that are outside his or her area of professional competence, including knowledge of state law.
 - Where an opinion is appropriate but beyond the competence of the opinion giver, then the opinion giver should associate competent counsel to render the opinion. In no event should a lawyer be asked for opinions that are beyond the professional competence of lawyers generally, such as financial statement analysis or valuation.

What Transactions Require Opinions

Typically covered

- Financings – secured and unsecured
- Securities issuances (both registered and unregistered, e.g., private equity)
- Bankruptcy remote entities
- True Sale
- Cross board transactions

Typically not covered

- Very small transactions
- Consumer transactions
- Merger and acquisition transactions (other than cross-border or regulated industry)

Typical opinions: financings

- Status: Entity existence (vs. formation), qualification, “good standings”
- Power of entity to enter into an perform its obligations
- Due authorization, execution, delivery
- Valid and binding effect
- No conflict: organizational/formation documents; material contracts; laws, rules, orders
- All necessary consents/authorizations
- No litigation
- Valid security/perfection
 - Specialized collateral
 - Real estate
 - Filing forms
- '40 Act
- Other. . . .

Typical Carve outs

Generally:

- Laws of other jurisdictions
- Effect of bankruptcy, fraudulent transactions, etc.
- The Accord list
- Priority opinions (security interests)
- An opinion as to what damages are available to Lender in the event of default.
- Specific remedies
- Existence/ ownership/ quality of title
- Public policy exceptions

Typical Carve outs

In transactions focusing on real estate:

- Zoning - Separate zoning opinion letters may be given but those require extra due diligence and can be costly
- Title to the real property - this is covered by title insurance.
- Environmental issues - these should be covered by an environmental site assessment.
- Value of the property - this should be covered by an appraisal.
- Characterization of Assignment of Leases – particularly in Pennsylvania – absolute, collateral.
- Entitlement to collect rents absent actual or constructive possession.

A few special issues

- Due formation and the publication requirement
- Confessions of judgment; ejectment
- Entitlement to collect rents absent actual or constructive possession
- Practical realization
- Assumptions that void the opinion
- Local Counsel opinions: scope, reliance

A Bit of Ethics

Can an attorney be liable for a wrong/misleading opinion letter?

- *Greycase, Inc. v. Proud*, 826 F2d 1560 (7th Cir. 1987) provides that for a non-client to succeed in a negligence action against an attorney, the non-client must provide that the primary purpose and intent of the attorney-client relationship was to benefit or influence the third party.
- An attorney who issued a misleading opinion letter may be liable to a non-client based on negligent misrepresentation. *Mehavvy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P2d 230 (1995).
- An attorney is still responsible for his or her conduct under the Rules of Professional Conduct, particularly Rule 4.1.
- - 4.1 Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.