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Closing Opinions of Inside Counsel

*By the Committee on Legal Opinions, ABA Section of Business Law**

I. INTRODUCTION

Although closing opinions often are rendered by inside counsel,¹ the literature on closing opinions² contains little specifically addressing opinions of inside counsel.³ The subject of this report is inside counsel opinions.

Inside counsel is often in a position to render all or some of the opinions required as a condition to closing.⁴ In appropriate circumstances, delivery of an opinion of inside counsel may reduce cost and avoid delay by eliminating the need for outside counsel to familiarize itself with matters already known to inside counsel or to duplicate work performed by inside counsel in the course of employment.⁵

II. OPINION STANDARDS FOR INSIDE COUNSEL

A. GENERAL PRINCIPLE: DUTY OF CARE APPLIES TO INSIDE AS WELL AS OUTSIDE COUNSEL

Lawyers who deliver closing opinions, whether they are solo practitioners, members of a law firm or employees of a company, owe a duty of care to the

*Donald W. Glazer, Chair. E. Carolan Berkley and Seth Hoogasian, Co-Reporters. Linda C. Hayman served as a Co-Reporter for the initial draft of this report.

1. This report uses the term "closing opinion" to mean a written opinion letter delivered at the closing of a business transaction by counsel for one party to another party (or parties); the term "inside counsel" to mean a lawyer who is an employee of either the company for whom the opinion is delivered or an affiliated company; and the term "inside counsel opinion" to mean a closing opinion signed by inside counsel. Inside counsel, particularly those who also serve as officers of a company, may execute certificates in connection with the closing of a business transaction, and these certificates may contain legal conclusions. These certificates are not closing opinions as that term is used in this report.

2. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51, 52, 95 (2000 & Supp. 2001); TriBar Opinion Committee, *Third Party "Closing" Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 592 (1998) [hereinafter *TriBar Report*]; Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *ABA Principles*]; Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter *ABA Guidelines*]; DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS (2001) [hereinafter *GLAZER & FITZGIBBON*]; Darrel A. Rice, *Potential Liabilities for Legal Opinions in Securities Transactions*, 31 REV. SEC. & COMMODITIES REG. 239, 242 (1998).

3. See, e.g., *TriBar Report*, *supra* note 2, at 592, 669; *GLAZER & FITZGIBBON*, *supra* note 2, at 24–25.

4. See, e.g., Illustrative Opinion Letters of Inside Counsel attached as Appendices A-2 and B-2 to the *TriBar Report*, *supra* note 2, at 669–70, 673–74.

5. This report takes no position on when a recipient should accept an opinion of inside counsel or what matters such an opinion should cover.

recipient. That duty of care, as noted in Section 52 of the Restatement of the Law Governing Lawyers, is to “exercise the competence and diligence normally exercised by lawyers in similar circumstances.”⁶ The Restatement does not distinguish between inside counsel and outside counsel.⁷

B. CUSTOMARY PRACTICE AS STARTING POINT

The scope and nature of the work that an opinion giver is expected to perform are based on customary practice.⁸ This is so for opinions of inside counsel as well as outside counsel. As is true of outside counsel, inside counsel can limit or disclaim the obligation to exercise customary diligence.⁹

C. WHO OWES THE DUTY OF CARE

The inside counsel who signs a closing opinion has personal responsibility for satisfying the duty of care owed to the recipient.¹⁰ The other members of a law department, whether large or small, do not owe a duty of care to the recipient (unless they render an opinion and expressly permit reliance on it)¹¹ and are not vicariously liable to the recipient for violations of the duty of care by the signer of an opinion.¹²

D. RESPONSIBILITY FOR WORK OF OTHERS

Inside counsel who signs a closing opinion often is the head of the law department or, when a team of lawyers is working on a transaction, the senior member of the team. In many cases, the signer may not do all the work required to render the opinion but may need the assistance of others. Whether those other lawyers are subordinates or not, the signer of an inside counsel opinion is responsible for the care exercised by other lawyers who help prepare the opinion. The only exception is when the signer expressly relies on the opinion of another lawyer (whether inside or outside).¹³

6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000).

7. Generally, the *TriBar Report*, the *ABA Principles*, and the *ABA Guidelines* also do not distinguish between inside counsel and outside counsel. The *TriBar Report*, however, does contain two illustrative closing opinions of inside counsel, which are intended to provide context for that report. See *supra* note 4.

8. See *ABA Principles*, *supra* note 2, § I.B., at 832; *TriBar Report*, *supra* note 2, at 600–01; see also *ABA Guidelines*, *supra* note 2, at 876.

9. See *ABA Principles*, *supra* note 2, § I.C., at 832; see also *TriBar Report*, *supra* note 2, at 618–20.

10. Indemnification by the company for liability incurred by inside counsel in rendering a closing opinion may be available to inside counsel under the corporate law of the company’s jurisdiction of incorporation, pursuant to the company’s charter or bylaws, or under a contract with the company. Inside counsel may also be protected by insurance, such as directors and officers insurance or legal malpractice insurance. As a matter of customary practice, inside counsel opinions do not normally disclose whether indemnification or insurance is available to the signer. The steps inside counsel might take to protect against personal financial loss are beyond the scope of this report.

11. See *infra* note 15.

12. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. C (2000) (“The lawyers of a corporate law department are not vicariously subject to each other’s liabilities . . .”).

13. See generally *TriBar Report*, *supra* note 2, art. V, at 636–40.

By stating in a closing opinion that the signer is relying on the opinion of another lawyer, inside counsel, like outside counsel, may limit inside counsel's professional responsibility for the care exercised by the other lawyer in rendering that opinion.¹⁴ In appropriate circumstances, the signer of an opinion may rely expressly on an opinion of another member of the law department, for example for legal matters arising under the law of a state or a specialized statute as to which the signer lacks the requisite competence.¹⁵

E. INVESTIGATION OF FACTS

The duty of inside counsel to investigate the facts supporting a closing opinion is the same as for outside counsel. Thus, inside counsel may properly look to (and may properly obtain) certificates from officers of the company with regard to the factual matters underlying particular opinions.¹⁶

F. RESPONSIBILITY FOR INFORMATION KNOWN TO OTHERS IN COMPANY

The signer of an inside counsel opinion is responsible for the knowledge of the lawyers who have participated in the preparation of the opinion (for factual matters relating to the opinions they have worked on). The signer also has responsibility to seek out others if the signer has identified others as having information not known to the signer that is needed to support particular opinions.¹⁷ Otherwise, the signer of an inside counsel opinion is not responsible for information known to others in the company.

G. INAPPROPRIATE OPINION REQUESTS

Opinion requests that the legal opinion literature characterizes as inappropriate should not be directed to inside counsel any more than they should be directed

14. By expressly relying on the opinion of another lawyer (e.g., local or specialized counsel), the signer of the opinion indicates that in the signer's professional judgment such reliance is reasonable. To establish that reasonableness, the signer must ascertain the reputation of the lawyer relied on for competence in matters of the kind involved. *Id.* at 638 (also pointing out that in expressly relying on the opinion of other counsel, an opinion giver is responsible for determining that the other opinion responds to the opinion giver's needs).

15. In the case of express reliance on another lawyer's opinion, the other lawyer should either address his or her opinion to the recipient of the principal opinion and grant the signer of the principal opinion permission to rely or address it to the signer and grant the recipient permission to rely. *Id.* at 639; see GLAZER & FITZGIBBON, *supra* note 2, § 5.3.1, at 135–38. Alternatively, the recipient might accept two separate opinion letters. See *TriBar Report*, *supra* note 2, at 636–38 (discussion of umbrella opinions and unbundled opinions).

16. See *ABA Principles*, *supra* note 2, § III.C., at 833; *TriBar Report*, *supra* note 2, art. II, at 608–19.

17. See *ABA Principles*, *supra* note 2, § III.A. & B., at 833. This responsibility derives from the signer's responsibility for the care exercised by lawyers who assist in preparing the opinion. The result is the same as for opinions of outside counsel: In each case the opinion giver is responsible for the knowledge of those who have participated in the preparation of the opinion. If other lawyers assist the signer in preparing the opinion, the signer is also responsible for those lawyers' seeking out others whom they have identified as having information needed to support the opinions on which they are working.

to outside counsel.¹⁸ Thus, inside counsel, like outside counsel, should not be asked to evaluate the possible outcome of litigation (except in unusual circumstances)¹⁹ or to deliver opinions that the company is qualified in each jurisdiction in which qualification is required,²⁰ is not in default of any contract, or is in compliance with all laws.²¹

III. FORMALITIES

The lawyer who delivers an inside counsel opinion should sign the opinion in his or her own name and not in the name of the company or law department. This is because neither the company nor the law department is a lawyer or law firm and thus lacks the professional standing required to deliver a closing opinion.

Often, inside counsel opinions are delivered on company letterhead²² and the signer's full corporate title (e.g., Vice President and General Counsel) appears below the signer's manual signature. Neither the use of company letterhead nor the indication of the signer's position with the company is understood as a matter of customary practice to change the signer's personal responsibility for an opinion.

In preparing a closing opinion, inside counsel should consider following the format for closing opinions recommended generally in the literature. That includes customary recitations and a statement that limits the law covered to that of a specific jurisdiction or jurisdictions.²³

18. The presence or absence of indemnification or insurance does not affect the appropriateness of an opinion request.

19. *ABA Guidelines*, *supra* note 2, § 4.7, at 881.

20. *Id.* § 4.1, at 879.

21. *Id.* § 4.3, at 880.

22. Company letterhead is often personalized with the signer's name and position. Larger companies may have specialized letterhead for use by their law departments. Such personalized or specialized stationery has no legal significance. Indeed, it is not even necessary that the company for whom the opinion is delivered have its own separate stationery. In the case of affiliated companies, such letterhead may not exist.

23. Like outside counsel, inside counsel, in deciding what law to cover, should consider his or her competence in the applicable area of law. See *TriBar Report*, *supra* note 2, at 632.