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## Law Office Opinion Practices

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

### ANALYSIS OF A SURVEY

Every week hundreds, if not thousands, of third party legal opinions are delivered at closings for business transactions. What those opinions mean and the work lawyers are expected to do to support them has been the subject of numerous reports by this Committee, the TriBar Opinion Committee, and many state bar groups. Those reports, articles, and treatises on legal opinions have little to say about the practices law firms and law departments follow in discharging their responsibility to see that opinions are rendered (and received)<sup>1</sup> in a competent and ethical manner. This Report begins an inquiry into these matters.

Over the past thirty years, the giving and receiving of third party legal opinions has developed as a specialized area of practice. That practice is largely governed by custom.<sup>2</sup> Some transactional lawyers have developed substantial expertise in opinion practice; others have not. Thus, the Committee believes law firms and departments that deliver and receive closing opinions should periodically consider their policies and procedures for giving and receiving opinions in light of changes in their practice and personnel and developments in the law.

### THE SURVEY AND RESPONSES TO IT

In 2002, the Committee circulated a questionnaire to its more than 300 members regarding their firms' and departments' opinion policies<sup>3</sup> and procedures.<sup>4</sup> The questions<sup>5</sup> and a tabulation of responses are reproduced in the Appendix to

\* Arthur Norman Field, Chair and Reporter. Donald W. Glazer and Carolan Berkley, Co-Reporters.

1. The "opinion recipient" is the other party to the transaction, not its legal counsel. The term "received" is used here to mean review of an opinion's acceptability by the opinion recipient's counsel. This review is different from the internal "review" of opinions that was the subject of the Committee Survey.

2. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51, 52, 95 (2000); The Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998); The Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002); The Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) (providing an alternative approach that is in limited use).

3. E.g., Which Delaware opinions, if any, will a non-Delaware firm give?

4. E.g., Is the initial draft of an opinion required to be based on an office form? See Appendix, at [B 1-5]. References in this Report to specific survey questions are shown in brackets.

5. Changes have been made in a few questions for the sake of clarity.

this Report. The responses (which include comments in some cases) relate to business transactional law practice and not to other practice areas such as tax.<sup>6</sup>

Responses to the survey describe the practices of firms and departments that have representatives on the Committee and that returned completed surveys.<sup>7</sup> Thus, they are not necessarily representative of the practices followed by business lawyers generally.

The survey provides a starting point for developing policies and procedures and reviewing existing policies and procedures. The responses and comments show a wide range of approaches, reflecting the many factors that influence the choices law firms and departments make. Policies and procedures should not be adopted merely because they have been adopted by others, even many others.

### STANDARD OF CARE; CUSTOMARY PRACTICE

The standard of care to which lawyers are subject is determined by the question: What would a lawyer of reasonable skill and knowledge and similarly situated have done under the circumstances?<sup>8</sup> An opinion giver thus has the responsibility to know customary practice—that is, of knowing the practice normally followed by lawyers who regularly give opinions and lawyers who regularly advise opinion recipients regarding opinions of the kind involved.<sup>9</sup>

### COMPETENCE

Firms and departments that give or receive closing opinions have a responsibility to see that those involved in opinion practice are competent to engage in that practice and understand the ethical context in which third party opinions are given.<sup>10</sup> Competence requires not only familiarity with customary opinion practice but also relevant opinion literature, and the policies and procedures of their firm or department.<sup>11</sup> Firms and departments may or may not provide formal instruction regarding opinions and may or may not furnish to their lawyers forms and explanatory materials. The extent of formal education and written guidance appears to vary widely.<sup>12</sup>

6. Comments indicate that firms and departments sometimes follow different procedures when giving opinions outside the corporate transactional area (e.g., real estate, regulatory matters).

7. About 50 of the 250 surveys sent out were returned.

8. A lawyer who represents to a client that the lawyer has greater competence than normally demonstrated by lawyers who take on similar matters is held to the higher standard. RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1965); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. d (2000).

9. The Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). A lawyer reviewing an opinion for the opinion recipient would likely have the same responsibility. Little has been written on this responsibility, and it has not been the focus of the Committee's discussions or this Report.

10. See, e.g., THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY NY DR 1-104C (2002); MODEL RULES OF PROF'L CONDUCT R. 5.1 (2004).

11. Comments point out a need to keep Opinion Committee members informed of a broader range of matters than lawyers not on the Committee.

12. See Appendix, at [C (a)-(f)].

Some firms and departments require that the first draft of a closing opinion be based on a prescribed form.<sup>13</sup> Others require that the remedies opinion and the bankruptcy exception be stated in a particular way or that a provision defining the rights of recipients to rely be included.<sup>14</sup> This approach promotes uniformity and tends to discourage the rote copying of prior opinions. The danger of using a prior opinion (as opposed to a form) as a starting point is that the facts of the current and former transactions may vary in ways that are not obvious. Thus, modeling an opinion on a prior opinion creates the danger of giving an opinion whose implications are not fully understood.

Geography may be a factor. Those who practice outside the larger offices of the firm or department may find it more difficult to work in a system that relies on informal discussion. In some situations, the difficulty will be compounded by language and legal system differences from office to office. Specialization is also a factor. Those whose practice is highly specialized may be better able to distinguish between what is novel and what is merely beyond the experience of the particular lawyer. The availability of senior lawyers and their ability to teach can be significant. Those who have practiced together for a long time under consistent leadership will likely need less formal guidance as to opinion practice than those who have come together recently. The need for formal education, therefore, can vary from office to office within a firm as well as from one firm or department to another.

#### CONSULTATION AND THE CONSULTING LAWYER'S RESPONSIBILITY

All lawyers recognize a need to consult when they reach the limits of their own experience. Sometimes the consultation is accomplished through review of treatises, articles, and opinions given or received in other transactions. More often it involves discussions with other lawyers in the firm or department. Consultation is a basic part of the culture of many firms and departments.<sup>15</sup> Some firms and departments require consultation before the giving of an opinion.<sup>16</sup> Others require consultation only in particular circumstances, for example, when an opinion raises difficult legal or factual issues or involves a new client. Sometimes the senior opinion preparer chooses the lawyer(s) who is consulted.<sup>17</sup> In other situations, the firm or department has a mechanism for assigning a second lawyer for con-

13. *See id.* at [E].

14. Comments on statements limiting reliance rights were extensive, reflecting the high level of concern opinion givers and recipients have in this subject. A number of firms and departments have adopted or amended policies in this area.

15. The variety of approaches to consultation (as to both the depth of involvement and the question of when it is required) described in the comments suggests that (when consultation is not required in all cases) firms and departments have made a "common-sense" effort to tailor the consultation requirement to situations in which they perceive themselves to have the greatest exposure.

16. *See* Appendix, at [D 1–3].

17. Comments indicate that in some specialized areas (e.g., Investment Company Act) consultation with lawyers other than the initial consulting lawyer may be required.

sultation. In some cases, malpractice insurers have encouraged use of some kind of formal consultation system.<sup>18</sup>

Sometimes the term “review” (as in “second partner review”) is used instead of “consultation.” This Report uses the term “consultation” rather than review. “Consultation” has different meanings in different contexts. To understand the role of the consulting lawyer, one needs to ask (among other things) which (if any) of the relevant documents the consultant is to read, whether consultation should extend to all opinions being given, and whether consultation should come early in the transaction or at a later stage.<sup>19</sup> The survey indicates that when unusual issues or problems are identified early in a transaction, consultation often begins at that time. Otherwise, consultation often begins later.

In some situations, the role of the consulting lawyer is informal; it is to respond to questions of the opinion preparers. Sometimes that role is broader, extending to the form of the opinion or even the conclusions being expressed. Comments indicate that the consultant’s role may often be elastic, with consultants charged with determining the extent of their involvement. That determination may depend on the experience of the opinion preparers, the experience of the consultant, the novelty of the opinion, and other factors.<sup>20</sup> The role a consulting lawyer has played in the preparation of an opinion is confirmed in writing in some firms and departments, but in many others it is not.

Any internal consulting system assumes that the required expertise is available inside the organization. When it is not, experts outside the firm or department may be consulted, either formally or informally.

#### OPINION COMMITTEES AND THEIR FUNCTIONS

A high percentage of the firms and departments represented in responses to the survey have Opinion Committees.<sup>21</sup> The function of these Committees, however, varies widely. Many Committees meet only when required to set policy or to review recent developments. Informal interaction of members is often the norm.<sup>22</sup> Sometimes Committee members are on call to consult. In other situations, the Committee may oversee the formal or informal assignment of lawyers (whether or not members of the Committee) to consult.

Often education is a Committee function. Sometimes that involves administering continuing education programs; in other cases education is informal or is

18. Comments suggest that when the level of consultation is set at a very high level, the transaction itself, rather than merely the opinion, may be the subject of the review.

19. Often consultation is deferred until counsel has agreed on the opinions to be given. When that is done, the opportunity may be lost for the consulting lawyer to be involved in (i) discussions regarding which opinions to give and their wording, or (ii) structuring the transaction to avoid opinion questions.

20. See Appendix, at [D 1–2].

21. See *id.* at [B 1].

22. Comments indicate that some Opinion Committees seldom or never meet formally but decide issues informally (using telephone, e-mail, as well as in-person meetings) when the need arises. See *id.* at [C (a)–(f)].

conducted by outside providers. Comments indicate that some firms and departments have prepared forms, policy statements, and opinion manuals.

In some firms and departments, the Opinion Committee determines what opinion policies and procedures are to be followed. In others, those questions are handled by the leaders of practice areas alone or in consultation with the Opinion Committee.

All of the tasks performed by an Opinion Committee can be handled without an Opinion Committee (e.g., they may be handled by the management group of the firm or department or the leaders of the practice areas affected or some combination of them). In some firms and departments, Opinion Committees have a central role in determining how the opinion process works. That role may even extend to administering responses to annual auditor inquiries.<sup>23</sup>

### LIMITS ON OPINION GIVING

A policy question for firms and departments is whether and how to limit the kind of opinions they are willing to give. Firms and departments often have a policy against giving opinions on the law of a state merely because one or more of its lawyers are admitted to the bar in that state. Admission to the bar does not equate to competence as to the subject matter of an opinion. Competence to give an opinion may exist without admission. Many firms and departments permit the giving of opinions on the law of states in which no one in the firm or department is admitted to practice.<sup>24</sup> One example is opinions on the Delaware General Corporation Law by lawyers not admitted to practice in Delaware. Another example is certain opinions under Article 9 of the Uniform Commercial Code.

### DISCLOSURE

Disclosure of interests that might influence the handling of an opinion (or in retrospect might be seen as an influence) raises difficult policy issues. A recipient of a closing opinion understands that an independent third party opinion giver is an oxymoron. This is because the opinion giver owes a duty to his client. Moreover, disclosure can be intrusive and would be difficult to administer.<sup>25</sup> What firm or department is in a position to identify all the personal entanglements between its lawyers and clients? Can a firm or department know whether stock of the client is held within a firm or company retirement fund?

Disclosure in an opinion of interests in and relationships with a client, therefore, is unusual. An exception is the status of a partner of the opinion giver (or law department member) as a director. Some opinion givers disclose that fact.

23. Comments and experience indicate that audit inquiry letters are often handled separately.

24. See Appendix, at [F 1-4].

25. See *id.* at [G 1-2].

## RESOURCES

The resources available to opinion givers and opinion recipients affect how they act.<sup>26</sup> For example, the survey indicates that law firms and departments make only modest efforts to maintain files of opinions given and received in a manner that facilitates later reference to them. Few firms and departments review opinions after they are given to see if policies were observed. Other areas more directly affected by ethical and legal requirements (e.g., conflicts, confidentiality) command greater resources.

## CONCLUSION

Firms and departments have the responsibility to maintain the quality of the legal opinions they deliver and the quality of their review of those they receive. No one formula exists for maintaining quality. Comments indicate that differences in policies and procedures exist not only between firms and departments of similar size and with similar practices but also between practice areas within the same firms and departments. Indeed, some firms and departments (large and small) perceive that they have no need to establish opinion policies and procedures; in their environment, they see themselves as having sufficient informal education, supervision, and consultation to make formal policies and procedures unnecessary.

All firms and departments should periodically review their opinion practices in light of changes in the nature of their practice, their size, their culture, and the location of their offices. A thoughtful periodic review will help them maintain quality in their legal opinion practice.

26. *See id.* at [H 1–2].

## APPENDIX

A. ABOUT YOU AND YOUR FIRM/DEPARTMENT

## 1) How many lawyers are in your firm/department?

1-5	0
6-25	4
25-100	8
over 100	38

## 2) How many lawyers in your firm/department are primarily engaged in a business law transactional practice?

1-5	0
6-25	6
25-100	20
over 100	24

## 3) How many offices (different cities) does your firm/department have?

1	10
2-5	18
over 5	22

## 4) Does your firm/department have non-U.S. offices?

Y	18
N	30

B. ABOUT THE COMMITTEE(S) IN YOUR FIRM/DEPARTMENT

## 1) Does your firm/department have an opinion committee(s)?

Y	34
N	10

2) If your firm/department has *more than one* opinion committee (or uses sub-committees), please describe by checking one or more choices below:

- |   |   |
|---|---|
| (a) separate committees for different geographic areas or offices   | 2 |
| (b) separate committees for different practice areas <i>e.g.</i> , corporate, real estate, tax, intellectual property, bankruptcy | 6 |
| (c) separate committees for opinions to clients (rather than third party closing opinions)  | 1 |
| (d) other ( <i>please describe</i> )  | 5 |

3) **The opinion committee(s) (or some “steering committee” of it) meets:**

(a) monthly	2
(b) quarterly	1
(c) at the call of the Chair	22
(d) ordinarily by written consent to adopt policy	1
(e) other ( <i>please describe</i> )	14

4) **How large is the opinion committee(s): (total on all committees)**

(a) 5 or less	15
(b) 6–10	17
(c) 11–15	2
(d) more than 15	6

5) **Does the committee(s) keep minutes of meetings?**

Y	4
N	34

NOTE: All questions that follow are about Opinion Committees.

**C. FUNCTIONS OF THE COMMITTEE**

1) **Does the committee(s):**

(a) circulate information about current cases and problems?	
Y	26
N	13
(b) conduct educational programs on opinions?	
Y	31
N	10
(c) provide written guidance about firm/departmental policies on opinion giving?	
Y	36
N	4
(d) provide an opinion manual or other guide for opinion giving?	
Y	25
N	16
(e) make materials available in the office/law department to lawyers who prepare opinions about opinion giving?	
Y	36
N	5

- (f) review opinions given (after the fact) as a quality control effort?
- |   |    |
|---|----|
| Y | 6  |
| N | 35 |

#### **D. CONSULTATION PRIOR TO GIVING OPINIONS**

##### **1) Does your firm/department require that:**

- (a) an opinion preparer routinely consult with an opinion committee member (or other designated lawyer) before giving any third party opinion?
- |   |    |
|---|----|
| Y | 33 |
| N | 12 |
- (b) an opinion preparer consult with an opinion member (or other designated lawyer) before giving any third party opinion that is novel or presents difficulty in any respect?
- |   |    |
|---|----|
| Y | 29 |
| N | 13 |
- (c) an opinion preparer consult with an opinion member (or other designated lawyer) before giving any third party opinion only if in the judgment of the opinion preparer that is advisable?
- |   |    |
|---|----|
| Y | 9  |
| N | 31 |

##### **2) When there is consultation with an opinion committee member (or other designated lawyer) about an opinion:**

- (a) the level of involvement of the consulting lawyer is determined on a case by case basis by the Committee, having in mind the subject matter of the opinion and its novelty
- |   |    |
|---|----|
| Y | 22 |
| N | 15 |
- (b) the level of involvement of the consulting lawyer covers the form of the opinion only
- |   |    |
|---|----|
| Y | 6  |
| N | 29 |
- (c) the level of involvement of the consulting lawyer is agreed upon by the opinion preparer and the consulting lawyer
- |   |    |
|---|----|
| Y | 23 |
| N | 16 |
- (d) the level of involvement of the consulting lawyer is determined by guidelines that have general application
- |   |    |
|---|----|
| Y | 12 |
| N | 24 |
- (e) other (*please describe*) 11

**3) The consulting lawyer:**

- (a) becomes involved at the outset of the transaction
  - Y 3
  - N 32
- (b) becomes involved when the need is perceived, ordinarily after the transaction documents have been circulated
  - Y 38
  - N 7
- (c) other (*please describe*) 8

**4) The consulting lawyer:**

- (a) is responsible to determine that the form of the opinion meets Committee (office) standards
  - Y 32
  - N 11
- (b) is responsible to respond to questions of the opinion preparer and to raise matters that are apparent, but not to have overall responsibility for the opinion
  - Y 41
  - N 2
- (c) is responsible only to determine whether the relationship between the opinion preparer and the client is such as to require special scrutiny, and if so, to provide such scrutiny based on the facts available
  - Y 1
  - N 39
- (d) is responsible to "concur" in the opinion as if he or she had been the opinion preparer
  - Y 9
  - N 31
- (e) has such responsibility as the opinion preparer and the consultant determine
  - Y 16
  - N 25

**5) The relationship between the consulting lawyer and the opinion preparer:**

- (a) is formalized by the consulting lawyer signing the office copy of the opinion to indicate concurrence
  - Y 10
  - N 30
- (b) is formalized by a memo for the opinion committee files
  - Y 5
  - N 34

(c) is formalized by a memo in the transaction files

Y 12

N 28

(d) is not formalized

Y 23

N 15

#### E. FORMAT FOR OPINIONS

1) Does your firm/department require that:

(a) opinions be in a designated form?

Y 21

N 27

(b) a supporting memo be prepared as to opinions to be given?

Y 9

N 37

#### F. LIMITS ON OPINION GIVING

1) Is there a firm/departmental policy or custom that precludes or limits giving opinions as to the law of a jurisdiction in which the firm/department has no office?

Y 36

N 13

If a limitation, what is it? 37

2) Is the giving of opinions under the Delaware General Corporation Law?

Y 42

N 6

3) Is there a firm/departmental policy or custom that precludes or limits giving opinions as to certain specialty areas (e.g., intellectual property, bankruptcy, tax).

Y 9

N 38

If so, describe which areas: 14

4) Does your firm/department permit the giving of opinions as to the law of jurisdictions in which the opinion preparer is not admitted?

Y 34

N 14

- (a) as to the Delaware General Corporation Law?  
Y            45  
N            2
- (b) as to Delaware LLCs?  
Y            34  
N            11
- (c) as to the law of any state where a firm/department lawyer is  
admitted who reviews the opinion?  
Y            17  
N            29

5) **Is there a firm/departmental policy or custom against the giving of opinions to third parties that are *not* closing opinions?**

- Y            7
- N            38

**G. OPINION LIBRARY**

1) **Does your firm/department collect opinions *given by* it in a manner that facilitates reference to them in giving other opinions**

- Y            17
- N            31

2) **Does your firm/department collect opinions *received from others* in a manner that facilitates reference to them in giving other opinions?**

- Y            6
- N            42

**H. DISCLOSURES IN OPINIONS**

1) **Does your firm/department have a policy or custom of disclosing any of the following in opinions:**

- (a) a partner is a director of the client  
Y            17  
N            17
- (b) a partner is related by blood or marriage to a principal officer or controlling shareholder of the client  
Y            9  
N            20
- (c) the firm or the opinion preparer has a significant investment in the client, any firm pension or profit sharing arrangement  
Y            12  
N            19

(d) one or more lawyers in the office (or immediate family members have a significant investment (directly or through a retirement plan) in the client

Y 7

N 19

(e) other (*please describe*) 11

2) **If there is a disclosure policy, as to investments or relationships, how is the information to enable disclosure maintained on a current basis?**

(a) periodic questionnaires?

Y 4

N 5

(b) requirement to periodically report?

Y 4

N 4

**I. LIMITATIONS ON LIABILITY**

1) **Does your firm/department ordinarily include in third party opinion letters (or otherwise try to effect) a limitation on its liability for the opinion? If so, please describe:**

Y 5

N 28

**J. LIMITATION ON USE OF OPINION LETTER**

1) **Does your firm/department ordinarily include in third party opinion letters (or otherwise try to effect) a limitation on the assignability of the opinion letter? If so, please describe:**

Y 47

N 1

2) **Does your firm/department ordinarily include in third party opinion letters (or otherwise try to effect) a limitation on use of the letter in subsequent related or unrelated transactions?**

Y 37

N 10

**K. COMMENTS, QUESTIONS**

