

A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles

By Donald W. Glazer and Stanley Keller*

At the closing of many business transactions, counsel for the company delivers to the party on the other side—the investor, lender or acquirer—a letter, commonly referred to as a “closing opinion,” in which counsel provides the recipient its legal opinion on various matters the recipient has asked it to address.

Although closing opinions have played a role in business transactions for more than a century, the development of a body of learning on the meaning of opinions and the work required to support them has been a recent phenomenon. In 1973, a New York lawyer, James J. Fuld, published an article in *The Business Lawyer*¹ in which he raised and sought to answer questions that lawyers giving opinions had long puzzled over but that previously had not been reduced to writing. The Fuld article led to the creation of the TriBar Opinion Committee, a joint effort of three New York bar associations, and the issuance by that Committee in 1979 of a ground breaking report on closing opinions.² The TriBar Committee’s report struck a responsive chord with lawyers across the country and gained widespread acceptance. That acceptance, however, did not encompass every position taken by the TriBar Committee, and in the ensuing decade bar groups in other states, including Arizona, California, Florida and Michigan, weighed in with their own reports. The California Bar Business Law Section, in particular, took exception to the TriBar Committee’s approach to the remedies (or enforceability) opinion, which treated the opinion as covering the enforceability of each and every provision of the agreement into which the parties to the transaction were entering.

In response to the inability of state bar groups to achieve a national consensus, the ABA Section of Business Law in 1989 convened a conference of lawyers from across the country interested in opinion practice. The conference resulted in two

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1. James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915 (1973).

2. TriBar Opinion Comm., *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979).

important products, both contained in the 1991 ABA Third-Party Legal Opinion Report.³ One was the ABA Guidelines setting forth principles of opinion practice. The other was the “Accord,” a lengthy set of rules that lawyers could incorporate by reference into their opinions and that would govern an opinion when accepted by the opinion recipient.

The Accord met quick resistance from both opinion givers, who were concerned that a contractual approach was not well-suited to opinion practice or business transactions, and opinion recipients, who perceived to be embedded in the Accord an inappropriate bias toward opinion givers. In addition, lawyers on both sides and recipients were concerned about the Accord’s complexity. As a result, the Accord never gained wide acceptance. It did, however, stimulate thought about opinions and over the years concepts in the Accord made their way into opinion practice.

During the 1990s, the TriBar Committee expanded its membership and added lawyers from outside New York. As reconstituted, the Committee began work on a series of new reports. At the same time, the ABA Section of Business Law’s Legal Opinions Committee, which was an outgrowth of the ABA’s 1989 conference, became increasingly active. The TriBar Committee’s work resulted in the publication of several reports, culminating in 1998 in the publication of its Report on Third Party Closing Opinions, a comprehensive revision and update of the Committee’s 1979 Report.⁴ The 1998 Report provided a detailed analysis of customary practice as it related to many standard opinions.

The year 1998 also saw two other important developments in opinion practice. The American Law Institute published its Restatement of the Law Governing Lawyers, which included a section that specifically addressed third-party closing opinions and referred to bar association reports such as those of the TriBar Committee as a source of the customary practice it characterized as the basis for understanding closing opinions.⁵ In addition, the ABA Legal Opinions Committee published a brief statement of Legal Opinion Principles, which also emphasized the applicability of customary practice.⁶

The revised TriBar Report, the ALI Restatement and the ABA Legal Opinion Principles looked to customary practice as the foundation for legal opinion prac-

3. ABA Comm. 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).

4. TriBar Opinion Comm., *Third Party “Closing” Opinions*, 53 BUS. LAW. 591 (1998). The 1998 Report, in turn, was supplemented in 2004 by a report that amplified the Committee’s analysis of the remedies opinion. See TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483 (2004). In 2005, the California Bar followed with its own Remedies Opinion Report that bridged the gap perceived to exist between the TriBar and California approaches to the remedies opinion. See Opinions Comm. of the Calif. State Bar Bus. Law Section, *Toward a National Legal Opinion Practice: The California Remedies Opinion Report*, 60 BUS. LAW. 907 (2005).

5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. b, Reporter’s Note to cmt. b (2000).

6. ABA Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). The ABA Committee subsequently in 2002 published Revised Guidelines, updating and refining its 1991 Guidelines. ABA Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002).

tice. That foundation was recognized by the Business Litigation Session of the Massachusetts Superior Court in *Dean Foods*, a case in which the court conducted its analysis from the perspective of customary practice and referred frequently to the 1998 TriBar Report as articulating that practice.⁷

The events in 1998 prompted the Boston Bar Association's Legal Opinion Committee to undertake the preparation of a streamlined form of opinion, building off of the ABA Legal Opinion Principles. The effort took many years, both because of the need to forge a consensus among lawyers in many firms on what that opinion should and should not say and the need to reflect new developments, such as the TriBar Committee's 2004 Remedies Report⁸ and the decisions in *Dean Foods* and other recent cases.

The Boston Streamlined Opinion is not intended to be prescriptive. Rather, in reflecting a broad consensus regarding generally acceptable opinion practice, it is intended to provide lawyers a helpful starting point from which to develop their own practices in the opinions they give, as well as the opinions they advise clients to accept. The form uses an unsecured bank loan as the basic model, and includes in an appendix opinions that would typically be given if stock were being issued. The notes included in the form provide guidance but are not meant to be a substitute for the extensive literature on closing opinions that is currently available.

The form seeks to address opinion issues in a balanced way. Some of its noteworthy features are:

- The language used to incorporate definitions from the underlying agreement is more precise than language traditionally used in closing opinions.
- The form allows opinion givers to avoid use of the phrase "to our knowledge," which has not been read in some recent litigation as being as limiting as opinion givers have supposed. In addition, if "to our knowledge" or a like phrase is used, note 21 suggests a formulation that makes clear that the phrase is intended to serve as a limitation.
- The introductory paragraphs sharpen the description of the factual investigation the opinion preparers conducted, thus avoiding any suggestion that they did more than they actually did. The description also makes clear that the opinion preparers may have relied on certificates of public officials for legal matters.
- The corporate status opinion does not use the terms "duly incorporated" or "duly organized," both of which require a more detailed investigation than many transactions require.
- Note 17 provides a detailed analysis of the Restatement approach, which has been adopted in many states, to enforcing the governing law provision in an agreement. The note suggests that in many transactions an opinion can be given without an exception for the enforceability of the parties' choice of law.

7. *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598, 2004 WL 3019442 (Mass. Super. Dec. 3, 2004).

8. See *supra* note 4.

- Paragraph 5 contains a more precise formulation of the no violation of law and no breach or default opinions.
- The form proposes a formulation of the no-litigation “opinion” that is narrower than the one often used in the past (the “opinion” is really a factual confirmation and therefore would be better referred to as a no-litigation confirmation). The narrower formulation reflects concerns raised by recent cases and is offered as an alternative to the position of some firms of declining to include any statement regarding litigation in their closing opinions.
- Attachment A addresses some of the difficulties in giving opinions on a corporation’s outstanding capital stock and on rights to acquire stock.

No form can accommodate every factual situation or eliminate the need for lawyers to exercise care when preparing closing opinions. Nevertheless, the Boston firms that are now using the Boston Streamlined Opinion have found that it improves the efficiency of the opinion process. The form can easily be adapted for use in other states, and those involved in its preparation (including the authors of this introduction) are hopeful that its approach will gain broad acceptance to the mutual benefit of both opinion givers and opinion recipients.

BOSTON BAR ASSOCIATION
Streamlined Form of Closing Opinion*

[For use when acting as Borrower's Counsel for an Unsecured Loan]

[Date]

To each Lender party to the
Credit Agreement referred to below
Ladies and Gentlemen:

We are furnishing this opinion letter¹ to you pursuant to Section ___ of the Credit Agreement dated as of _____ (the "Credit Agreement") among OpCo., Inc., a Massachusetts corporation (the "Company"), HoldCo., Inc., a Delaware corporation of which the Company is a wholly-owned subsidiary ("Holdings"), and the Lenders party thereto. Capitalized terms that are defined in the Credit Agreement and not otherwise defined in this opinion letter are used in this opinion letter as so defined.²

We have acted as counsel to Holdings, the Company and Michigan Sub, Inc., a Michigan corporation and wholly-owned subsidiary of the Company ("Michigan Sub"), in connection with the preparation of the Credit Agreement, the Holdings Guaranty, the Subsidiary Guaranty and the Notes being delivered by the Company today under the Credit Agreement (which agreements and instruments are referred to collectively in this opinion letter as the "Credit Documents"). The Company and Michigan Sub are referred to herein collectively as the "Subsidiaries."

We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to our opinions, on representations made in the Credit Documents and certificates and other inquiries of officers of Holdings and the Subsidiaries [and others].³

The opinions set forth below as to Michigan Sub are given in reliance on the opinion letter dated the date hereof of _____ with respect to Michigan law.⁴ Except to the extent of such reliance, the opinions set forth below are limited to Massachusetts law, the Delaware General Corporation Law and the

* Editor's Note: This report is published in the form approved by The Boston Bar Association's Legal Opinion Committee without any further editing by *The Business Lawyer*.

1. The opinion letter delivered to a third party in connection with the closing of a transaction also is often referred to as a "closing opinion."

2. When incorporating definitions by reference, opinion preparers should consider the appropriateness of each definition.

3. This paragraph is not needed based on the Legal Opinion Principles (referred to in the next to last paragraph of this form) but is customarily included for clarity.

4. By stating reliance on other counsel's opinion, the opinion giver is indicating that it is satisfied as to the competence of the other counsel and the coverage of its opinion. Language such as "you are justified in relying" or "the opinion is satisfactory in form and scope" does not add to the opinion giver's responsibility and for that reason has not been included in this form. By contrast, statements of concurrence or that "the opinion is satisfactory in form and substance" are understood to go further

federal law of the United States. [We note that the Credit Documents provide that they are to be governed by New York law. The opinions in paragraphs 3 and 4 below are given as though each of the Credit Documents were governed by the internal law of Massachusetts.]⁵

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that:⁶

1. Holdings is validly existing as a corporation and in good standing under Delaware law and has the corporate power to execute and deliver the Credit Documents to which it is named as a party and to perform its obligations thereunder.⁷

2. The Company is validly existing as a corporation⁸ and in good standing under Massachusetts law⁹ and has the corporate power to execute and deliver the Credit Documents to which it is named as a party and to perform its obligations thereunder.

3. Each of Holdings and the Company has duly authorized, executed and delivered the Credit Documents to which it is named as a party, and such Credit

and to change the opinion giver's responsibilities. As an alternative to addressing Michigan law in reliance on the opinion of Michigan counsel, the opinion giver could arrange for the delivery of a separate opinion letter by Michigan counsel addressed directly to the opinion recipient and then include in its opinion letter an express assumption or exclusion regarding relevant matters of Michigan law.

5. The enforceability of an agreement is usually governed by the law chosen in that agreement (see note 17 below). When the law chosen is not the law of Massachusetts, an opinion on the enforceability of the agreement "as though" Massachusetts law were the governing law might be given. In that case, the bracketed material should be included. When neither the opinion giver nor counsel for the opinion recipient is familiar with the law the agreement chooses as the governing law (New York in this form), an opinion recipient might require the Company to provide it an opinion of local counsel covering the validity, binding effect and enforceability of the agreement under that law.

6. The opinions in this form are not intended to be exclusive. Depending on the circumstances, an opinion recipient may request additional opinions (e.g., that the Company is not an investment company; that the transaction complies with margin rules).

In addition, in some transactions, such as the sale by the Company of its stock, opinions on the Company's capitalization and the status of the stock being sold typically would be included. A form of these opinions in a transaction involving the sale of convertible preferred stock is included in Attachment A. Other opinions, such as compliance with the registration requirements of the Securities Act of 1933, also might be included.

7. Opinion recipients sometimes request that this opinion also cover the Company's corporate power to own its properties and conduct its business. If given, this broader opinion typically is based on a description of the properties and business, usually in a disclosure document or an officer's certificate.

8. Opinion recipients sometimes request an opinion that the Company is "duly incorporated." This opinion may require the opinion preparers to conduct an inquiry into the past that, at least in the loan context, often is not cost justified. Ordinarily, an opinion that a Company has been "duly organized" should be avoided because of uncertainty as to what additional matters, if any, it covers.

9. The practice in Massachusetts in the past was to limit good standing opinions to "good standing with the Secretary of the Commonwealth" because this formulation tracked the provision of the Massachusetts corporation statute that was added to obviate the need to address tax good standing (see G.L.c. 156B, § 116, succeeded by G.L.c. 156D, § 1.28 as originally enacted). With the amendment of § 1.28 by c.178 of the Acts of 2004, and in view of the longstanding practice of addressing only the corporate good standing of Massachusetts corporations, many Massachusetts lawyers now give the good standing opinion without the limitation. Others continue the practice of referring to "good standing with the Secretary of the Commonwealth" or use another formulation such as "good standing on the records of the Secretary of the Commonwealth." These formulations and the formulation adopted in this form have the same meaning.

Documents constitute its valid and binding obligations enforceable against it in accordance with their terms.¹⁰

4. The Credit Documents to which Michigan Sub is named as a party constitute its valid and binding obligations enforceable against it in accordance with their terms.¹¹

5. The execution and delivery by each of Holdings, the Company and Michigan Sub of the Credit Documents to which it is named as a party do not and the performance by it of its obligations thereunder will not (i) violate Massachusetts or federal law,¹² (ii) violate any court order, judgment or decree [listed in Schedule ___ to the Credit Agreement] [applicable to it and known to us],¹³ (iii) result in a breach of, or constitute a default under, or result in the creation of a Lien or a right of acceleration under,¹⁴ any agreement or instrument [listed in Schedule ___ to the Credit Agreement][to which it is a party and known to us]¹⁵ or (iv) violate its charter or by-laws.

6. No consent, approval, license or exemption by, order or authorization of, or filing, recording or registration with, any governmental authority is required to be obtained or made by Holdings, the Company or Michigan Sub in connection

10. Under Massachusetts law, a necessary element of an opinion that a note or credit agreement is a valid and binding obligation is that the loan not violate, and not be subject to avoidance under, the Massachusetts criminal usury statute, G.L. ch. 271 § 49. Therefore, when the rate of interest is a fixed rate above 20% or sufficiently close to 20% that the addition of expenses might bring it over 20%, or when the interest rate floats and is not subject to a cap of 20%, an opinion giver might consider adding the following qualification:

For the purposes of our opinions in paragraphs 3 and 4, we have assumed that each Lender has complied with, or is exempt from, the notice requirements of Massachusetts General Laws Chapter 271, Section 49.

This assumption would not be necessary if the Lender or Lenders are all identified and they (and permitted assignees under the Credit Documents) are clearly banks or other lenders exempt from the filing requirements of the criminal usury statute.

11. This opinion is based in part on opinions of Michigan counsel on the corporate status of Michigan Sub, its corporate power to enter into and perform its obligations under the Credit Documents and its due authorization, execution and delivery of the Credit Documents. An alternative to relying on local counsel is to include an express assumption regarding these matters. Sometimes, the opinion letter of local counsel also will cover the agreement's enforceability (see note 5 above), or on occasion it may simply cover enforceability while assuming the foregoing matters. If an opinion is based on an opinion of local counsel, it should be made subject to the same stated limitations, if any, to which local counsel's opinion is subject. This could be done by stating in the opinion letter that the opinions given in reliance on the opinions of local counsel are subject to the same limitations, exceptions and qualifications as are set forth in local counsel's opinion letter.

12. For the law covered, see part II of the Legal Opinion Principles.

13. The bracketed material provides alternative approaches. The first alternative, which has become common, contemplates that a list of court orders, judgments and decrees is available. A list prepared for purposes of the opinion also could be used. As for the second alternative, see note 21 below for a definition of knowledge.

14. Depending on the circumstances, this clause could be expanded to cover other adverse consequences, such as changes in terms or creation of put rights or rights of termination.

15. The bracketed material provides alternative approaches. The first alternative, which has become customary, specifies the documents covered by the opinion by referring to a list or schedule. This form refers to a schedule to the Credit Agreement. Another way to specify the documents covered is to refer instead to a list prepared for purposes of the opinion, particularly when the opinion preparers cannot be sure that no changes will be made in the schedule after they have reviewed it. In the case of public companies, the reference could be to the exhibits in an SEC filing. As for the second bracketed alternative, see note 21 below for a definition of knowledge.

with its execution and delivery of the Credit Documents to which it is named as a party or the performance by it of its obligations thereunder [other than those that have been obtained or made].¹⁶

[7. The choice of New York law as the governing law in the Credit Documents will be given effect under Massachusetts law.]¹⁷

[__¹⁸ [Except as disclosed in Schedule __ to the Credit Agreement,] we are not representing Holdings or either of the Subsidiaries in any pending litiga-

16. Although a filing by the lender could be required (see note 10 above), for most borrowers an unsecured loan will not require that they obtain any governmental approvals or make any filings.

17. This opinion is sometimes requested when the opinion addresses the law of the state in which the Company is located and the Credit Documents choose the law of another state as their governing law. When given, this opinion provides comfort to the opinion recipient that the chosen law will be applied if it brings an action against the Company in the Company's own state. This opinion is not necessary when the opinion covers the law chosen as the governing law in the Credit Documents because the opinion on the enforceability of the Credit Documents covers the governing law provision.

Often, this opinion is not given alone but is supplemented by an opinion on the enforceability of the agreements as if the law covered by the opinion (Massachusetts in this form) governed the agreements (see bracketed material at note 5 above). Sometimes, the two opinions are combined by adding the following at the end of the choice-of-law opinion: "but if the internal law of Massachusetts were nevertheless held to be applicable, the Credit Documents to which each of Holdings, the Company and Michigan Sub is a party would constitute its valid and binding obligations enforceable against it in accordance with their terms under Massachusetts law."

An opinion giver's ability to give a choice-of-law opinion will depend on the applicable law and the factual context. Massachusetts follows the Restatement approach of applying the law chosen to govern the agreement if the state whose law is chosen has a reasonable relationship to the transaction or the parties and if applying that state's law would not violate a fundamental policy of a state whose law would apply in the absence of an effective governing law clause and that other state has a materially greater interest in the issue. To give the choice-of-law opinion included in this form, the opinion giver must be satisfied that New York has a reasonable relationship to the transaction or the parties (e.g., the lenders are located in New York) and that the Credit Documents do not violate a fundamental policy of Massachusetts (assuming for this purpose that Massachusetts law would apply in the absence of an effective governing law provision and that Massachusetts has a materially greater interest in the issue). As a matter of customary practice, the opinion giver does not have to (i) ascertain the policies of states other than those whose law is covered by the opinion that might have a relationship to the transaction or the parties (i.e., states other than Massachusetts in this form) or (ii) determine whether a state other than the one whose law the agreement chooses as the governing law (New York in this form) has a greater interest in the issue. When the opinion in paragraph 7 is given, some opinion preparers, to avoid any misunderstanding, choose to assume expressly that a court of the state whose law is covered by the opinion (Massachusetts) would not apply the substantive law of a state other than the states whose law is covered by the opinion or selected in the agreement as the governing law (Massachusetts and New York) notwithstanding that state's law and its relationship to the transaction or the parties. (If the opinion preparers are aware, however, that another state whose law otherwise would be applied by a Massachusetts court has a fundamental policy that is violated by a provision in the Credit Documents, they should consider whether giving the opinion would be misleading to the opinion recipient.) If an opinion giver is able to give without qualification the opinion in paragraph 3 regarding the enforceability of the Credit Documents if Massachusetts law applied, it normally will be able to give the opinion in paragraph 7 because no fundamental policy would exist under Massachusetts law that would prevent the Massachusetts courts from giving effect to those agreements' choice of New York law as the governing law.

18. Some opinion preparers do not number this paragraph so as to emphasize that, unlike the paragraphs that precede it, it is not an opinion but rather a factual confirmation.

In view of the expansion of law firm size and geographic diversity, the limited nature of many client relationships and other factors, many firms are questioning whether a no litigation confirmation, even if justifiable at one time, is justified today. The form set forth in the text is included in brackets to make clear that firms using this opinion form may properly choose not to include it.

If included, this form, by focusing on matters that the firm is handling for the Company and that

tion¹⁹ in which it is a named defendant [, or in any litigation that is overtly threatened in writing against it by a potential claimant²⁰,] that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Documents.²¹]

Our opinions above are subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and to general principles of equity.²²

We express no opinion as to. . . .²³

[This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association's Section of Business Law as published in 53 Business Lawyer 831 (May 1998).]²⁴

This opinion letter is being furnished only to you for your use solely in connection with the transaction described above and may not be relied on without

bear directly on the transaction, covers what a firm might realistically be asked to address. Opinion recipients may sometimes ask that the no litigation confirmation be expanded to cover material litigation that could adversely affect the Company. Even firms that are willing to address litigation affecting the transaction may well decline such a request. If, however, a firm decides to expand the confirmation to cover litigation affecting the Company, the opinion preparers should carefully consider the internal review procedures they will follow and the wording of the confirmation.

19. Opinion preparers sometimes are asked to refer to "action, suit or proceeding" instead of simply "litigation."

20. When this phrase is used, it is understood to mean that a potential claimant has manifested in writing to the Company its intention to assert a claim against the Company that could reasonably be expected to result in litigation.

21. Although this form obviates the need for the phrase "to our knowledge" or a variant of it, many forms include that phrase. When they do, a definition of "knowledge" normally should be included to avoid misunderstanding over the meaning of the term. (See also bracketed material at notes 13 and 15 in paragraph 5.) An example of a definition that is derived from the Legal Opinion Principles (and that would apply if no definition were included) is:

When used in this opinion letter, the phrase "to our knowledge" or an equivalent phrase limits the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate.

Some opinions preparers include in the definition in place of the second reference to "this opinion letter" the phrase "the particular opinion or confirmation containing that reference." Also, some opinion preparers refer to "conscious awareness" instead of "actual knowledge."

In preparing the confirmation, the opinion preparers normally would conduct an inquiry of those lawyers in their firm who the opinion preparers believe are reasonably likely to have information not otherwise known to them that is called for by the confirmation. As a matter of customary practice, the confirmation is understood not to cover information known to other lawyers in the firm. Depending on the circumstances and the formulation of the confirmation, the opinion preparers also might make inquiry of appropriate officials of the Company. In preparing a no litigation confirmation, the opinion preparers are not required as a matter of customary diligence to check court or other public records. Although not necessary, some opinion preparers choose to make this clear, for example, by stating expressly that they did not examine court or other public records.

If the opinion preparers are aware that a material legal proceeding is being handled by another firm, they should consider whether providing a confirmation (however worded) regarding litigation without noting the existence of that legal proceeding would be misleading to the opinion recipient.

22. These exceptions, although usually stated in the opinion, are understood to apply whether or not stated.

23. Include any additional exceptions to the opinions that may be necessary.

24. Many firms choose to include this paragraph to emphasize the application of the Legal Opinion Principles (which state that they apply whether or not expressly incorporated).

our prior written consent for any other purpose or by anyone else other than your participants and assignees permitted by the Credit Agreement.

Very truly yours,

[Boston Area Law Firm]

Attachment A

___ The authorized capital stock of the Company consists of (i) _____ shares of Common Stock, \$0.01 par value, of which _____ shares are issued and outstanding, and (ii) _____ shares of Preferred Stock, \$0.01 par value, of which _____ shares have been designated Series A Preferred Stock, _____ shares of which are issued and outstanding, and _____ shares have been designated Series B Preferred Stock, none of which are issued and outstanding.^a [All such issued and outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.]^b

___ The Series B Shares [*shares of Series B Preferred Stock to be issued pursuant to the Purchase Agreement*] have been duly authorized, and when issued, delivered and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares [*shares of Common Stock issuable upon conversion of the Series B Preferred Stock*] have been duly authorized and, upon issuance in accordance with the Company's articles of organization upon conversion of the Series B Shares, will be validly issued, fully paid and nonassessable. [The issuance and sale of the Series B Shares and the issuance of the Conversion Shares upon conversion of the Series B Shares are not subject to any preemptive rights under Chapter 156D of the Massachusetts General Laws or the Company's articles of organization or by-laws.]^c

a. The appropriateness of an opinion on the number of outstanding shares will depend on the circumstances. For example, in the case of a public company, the opinion usually adds little to a certificate from the transfer agent; in the case of a private company, the opinion preparers may be able to base the opinion on applicable Company records. Some law firms, even if they are willing to cover the number of outstanding shares, will do so only if they also are giving an opinion on the valid issuance of those shares (see note b) to avoid any misunderstanding over the meaning of an opinion on the number of outstanding shares.

b. Whether an opinion on the valid issuance of all the outstanding shares is appropriate similarly will depend on the circumstances. Because the opinion will require a review of each issuance of shares, in many situations it will not be cost justified. See "Third-Party 'Closing' Opinions: A Report of The TriBar Opinion Committee," 53 *Bus. Law.* 591, 651-652 (1998).

Opinion recipients sometimes ask for an opinion whether, to the opinion giver's knowledge, the Company has any outstanding options, warrants or other rights to acquire stock other than as disclosed in the transaction documents. Many law firms decline to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. If, however, a firm is willing to give it, the opinion should describe what the opinion preparers have done to support it.

c. Even though a valid issuance opinion could not be given on shares issued in violation of preemptive rights granted by statute or the charter or by-laws, opinion recipients sometimes request an opinion that expressly addresses the absence of those rights. Such an opinion does not cover contractual rights.