

The Legal Ethics of Drafting Legal Opinions: Outside Counsel Perspective

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Issuing Legal Opinions

- Written legal opinions
 - What are they?
 - Any writing
 - E-mail
 - What is the process for issuance?
 - Representations of fact
 - Reliance on other attorneys
 - Reliance on client
 - Reliance on experts

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Issuing Legal Opinions

- Signing legal opinions
 - Individual attorney
 - Firm name
 - Opinion should represent the institutional opinion of the law firm
- Unwritten legal opinions
 - Risk assessment vs. client needs
 - Subsequent documentation may avoid later disagreement

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Issuing Legal Opinions

- Unwritten Legal Opinions (cont'd)
 - Lessons Learned:
 - Example of estimated legal fees for major litigation, where initial estimate was in writing, later updates were verbal, and no advice was given about final amount. Initial estimate was 25% of final cost.
 - Plus, legal bills were sent out several months late.
 - How happy was the client?

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Issuing Legal Opinions

Lessons learned: Expressing likelihood of success in percentages

- Be careful how you articulate advice
- Documentation to back up your advice
- Make sure advice is logically correct



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Issuing Legal Opinions

- Liability for negligent opinions
- In-house legal opinions
 - Is it a representation or a legal opinion?
 - Determine recipient
 - Determine purpose
 - Relationship to representations and indemnification in legal agreements
 - Reliance by outside counsel



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Issuing Legal Opinions

- Role of outside counsel
 - Representing one client
 - Local counsel
 - Special counsel
 - General counsel
 - Transaction counsel
- Limitations on ability of transaction counsel to issue legal opinions
 - Engagement letter is important in defining role and responsibilities



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Process for Issuing Legal Opinions

- Written process defining varying levels of review and file documentation
- Third party opinions
- Other types of opinions
- Thresholds for review
- Review process
- Risk factors affecting scope of review



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Process for Issuing Legal Opinions

- Last-minute changes to opinions
 - Often off-site
 - Simple preparation steps may avoid major problems
 - Lessons learned: How to get the deal closed without going out on a legal opinion limb
 - It's lonely when you sign a legal opinion without following procedures



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Process for Issuing Legal Opinions

- Procedure for issuing opinions
- TriBar Opinion Committee's 1998 report on Third-Party "Closing" Opinions, 53 Bus. Law. 591
- TriBar 2004 Report on the Remedies opinion, 59 Bus. Law. Law. 1483
- 1998 report on Legal Opinion Principles from the ABA, 53 Bus. Law. 831



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Due Diligence

- Supports legal opinions
- Also supports underlying transaction
 - Legal agreement terms, especially representations and indemnification
 - Operational needs
- Due diligence should be tailored to needs of particular transaction
- Cookie-cutter due diligence lists should be avoided at all costs



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Due diligence

- Cookie-cutter due diligence lists
 - Review too much:
 - Miss forest for trees
 - Unnecessary cost and expense
 - May miss most important parts
 - Don't mesh with legal agreements
- Effective due diligence is an art
 - Starts the transaction off right
 - Increases chances of success in long run



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Due Diligence

- Inaccurate representations of client
 - Know
 - Have reason to know
- *Dean Foods*
 - Never give negative assurance on accuracy of disclosure when aware of a matter that falls within the description of an item to be disclosed but has not been disclosed
 - Importance of exercising due diligence in preparation of disclosure schedules to transactional documents



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Health Care Legal Opinions

- Reasoned opinions vs. unqualified opinions
- Example: Stark Law exceptions
- Important aspects of reasoned opinions:
 - Facts
 - Assumptions
 - Exceptions



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