

The Legal Ethics of Drafting Legal Opinions:
Outside Counsel Perspective¹

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1. Written Legal Opinions

a. Introduction

i. Written legal opinions delivered on behalf of clients of a law firm should represent the institutional conclusion of the law firm with regard to the matter covered, subject to any expressly stated reservations. The reputation of the law firm should support its opinions. As a result, the law firm should require that institutionalized procedures are followed when written opinions are issued.

ii. A law firm should provide for the review of certain opinions prior to issuance. Many law firms establish opinion review committees to consult with attorneys on the form, substance and content of written opinions. Guidelines should be adopted that clearly define what type of opinions are subject to review procedures and what those procedures are.

b. Determining what is and is not a written legal opinion

i. Traditionally, a written legal opinion is in letter form, and is signed either by a member of the law firm or by the law firm itself. A signature by the law firm is preferable, because it is consistent with the position that the opinion represents the institutional conclusion of the law firm.

ii. Any writing can contain a legal opinion. For example, written memoranda often contain legal opinions.

iii. Whether or not an e-mail contains a legal opinion has not been adequately addressed by many law firms.

¹ This outline is based upon the author's personal experiences derived from over 30 years' experience in the private practice of law. Unless the context otherwise indicates, the outline assumes that the attorney issuing the opinion is in private practice. However, many of the observations regarding outside lawyers also apply to in-house counsel. This outline does not constitute legal advice regarding the preparation and issuance of legal opinions.

(1) Conclusions of law stated in an e-mail may rise to the level of an opinion, but may not be rendered with the care and procedures that should be applied to an opinion.

(2) The informality of drafting and sending an e-mail may lead the sender to make statements that would not be made in letter form. Attorneys should take the same care in drafting e-mail as they do in hard copy letters and memoranda.

(3) Attorneys should take greater care in determining the content of an e-mail, particularly if it contains a legal opinion, because of the ease and informality with which e-mail is circulated.

iv. Legal opinions involve conclusions of law as applied to facts that are either known to or assumed by the law firm.

(1) Legal opinions usually should not contain representations of fact by the law firm.

(2) If an opinion does make a representation of fact, it should be carefully drafted so that the representation is within the expertise of the law firm.

(a) Opinions should not be given if they are outside the expertise of the law firm.

(b) If an opinion is given by Law Firm A to Law Firm B, and Law Firm B relies on Law Firm A's opinion in issuing an opinion to a third party, then Law Firm B should ascertain that Law Firm A had sufficient expertise to issue the opinion.

(3) The issue of whether a lawyer has adequate expertise to issue a representation of facts often arises with respect to valuation. This arises frequently in the context of Stark Law, Anti-Kickback Statute and tax-exempt status opinions, where fair market value is often a critical factor in the analysis.

(4) Attention should also be given to adequate due diligence and documentation in the file to support the representation of fact.

c. Signing the written legal opinion

i. Law firms have varying policies. Some law firms permit opinions to be signed only by partners or shareholders. Other firms permit any licensed attorney to sign an opinion.

ii. The author believes that the best policy is for a formal opinion to be signed by the law firm, and not an individual, to emphasize that the opinion represents the institutional conclusion of the law firm.

iii. E-mail raises special concerns relating to signature. Signatures can be attached, but law firm policy is often silent regarding signing and issuance of opinions in e-mail form.

d. **Unwritten legal opinions**

i. A legal opinion can also be delivered verbally. Care should be taken in verbally expressing legal opinions.

ii. It is often difficult to document later the precise nature of a verbal opinion, because memories will differ and fade, and notes may be inaccurate.

iii. When a particularly sensitive matter is being discussed, it may be appropriate for an attorney to confirm the advice in written form, to minimize disagreements regarding the nature of the advice.

iv. When discussing a matter with a client, it may be appropriate to verbally advise the client whether, and to what extent, you are giving a legal opinion.

v. File memoranda may be appropriate in certain circumstances to document an attorney's contemporaneous understanding of what she or he did or did not say.

vi. Unwritten opinions often arise in the context of litigation, where an attorney may discuss likelihood of success, possibly in terms of percentages. While verbal communications are essential between attorney and client, severe misunderstandings of what was said can occur years later where the litigation does not turn out well for the client.

e. **Liability for negligent opinions:** The Restatement Second, Torts § 299A sets a liability standard for legal advice as the absence of application of "the skill and knowledge normally possessed by members of that profession or trade in good standing."

f. **In-house legal opinions**

i. In-house counsel frequently issue legal opinions. Questions arise whether in-house legal opinions constitute valid legal opinions or whether they are more in the nature of a representation by the in-house counsel's employer.

ii. The answer to this question depends in part upon the recipient of the legal opinion. Recipients can include:

- (1) The in-house counsel's employer.

- (2) A third party related to the employer.
- (3) A third party unrelated to the employer.
- (4) An outside law firm that is asked to rely on the opinion in issuing its own opinion.

iii. The answer to the questions also depends on the nature of the opinion and the purpose for which it is issued.

iv. For example, in a business transaction, such as a financing, a third party legal opinion is often required. Often, the third parties want the opinion prepared by an outside law firm, which has assets, malpractice insurance and its reputation, all of which are independent of the client. However, in other circumstances a legal opinion from in-house counsel is acceptable to third parties.

v. One issue to consider in this situation is to what extent does a third party receiving an in-house legal opinion get more protection than it would receive from a representation and warranty in a legal agreement, given that the opinion is issued by the same entity that signed the legal agreement.

vi. Another question is how to reconcile liability created by a legal opinion issued by an in-house counsel with limitations on liability and indemnification contained in the definitive agreement. Does the definitive agreement limit the employer's exposure under the legal opinion?

vii. Outside counsel are sometimes asked to rely on in-house legal opinions, to reduce the work and expense of the outside counsel. Questions arise as to whether an in-house legal opinion is substantively different from an officer's certificate. Also, questions arise regarding the ethical ability of an outside law firm to sue a former client for an erroneous opinion on which the outside law firm relied.

2. **Process for issuance of legal opinions**

a. **Scope**

i. A law firm should define the scope of its process for issuing legal opinions. Generally, the process should be applicable to all written communications that purport to express a legal conclusion and are given to third parties at the request or on behalf of a client of the law firm.

ii. Traditional third-party closing opinions delivered in connection with financing and other corporate transactions are some of the most common forms of opinions that are subject to opinion review processes. Third party opinions are also delivered from time to time in other areas of a law firm's practice, and the law firm's review process should apply to these types of opinions as well.

b. Key factors in determining the necessary scope of review

i. An opinion review process will often require review for opinions that meet any of the following criteria:

(1) The opinion authorizes third persons who are named or otherwise identified (in terms of their relationship to the client) in the opinion to rely upon the opinions rendered, and it is known or reasonably anticipated that the opinion will be relied upon by such third persons. Often there is a dollar threshold for such opinions.

(2) The opinion is issued in connection with a public offering of securities.

(3) The opinion is a “covered opinion” subject to IRS Circular 230.

(4) Usually law firms will have separate processes for responses to auditors’ requests for information.

c. Issuance of opinions

i. Typically there is partner who is responsible for writing the opinion. The responsible partner should determine in the first instance whether the law firm should issue an opinion.

ii. If the decision is made to issue the opinion, the partner should arrange for the necessary research, backup work and documentation, and for the opinion review process to the extent required.

d. Review process

i. For more significant opinions, review of an opinion is a consultative process that can involve two or more attorneys.

ii. Certain types of opinions may be subject to a higher level of review. These opinions include situations where:

(1) The opinion is likely to be challenged.

(2) The opinion involves a transaction or subject matter likely to result in litigation.

(3) The opinion involves the prediction of the outcome of specific litigation.

(4) The opinion is given to or for the benefit of public investors or a rating agency.

(5) The opinion involves issues or a transaction likely to become the subject of public notoriety.

(6) The opinion is a “covered opinion” subject to IRS Circular 230.

(7) The client or another party to the transaction is known to be financially troubled.

(8) The client is controversial, has experienced unusually rapid growth or decline, or has had a recent unplanned change of management or outside auditors.

(9) The client is not meeting its obligations to the law firm.

(10) There is a special relationship between the client and a member of the law firm.

(11) The circumstances are such that the partner or firm is under unusual pressure to issue a favorable opinion.

iii. Attorneys will be appointed to review the opinion. Attention should be given to identifying attorneys with the proper areas of specialization.

iv. A frequent problem in issuing opinions is last minute changes dictated by various circumstances.

(1) Where the partner signing the opinion is physically separated from the law firm, fax and e-mail should be used to enable last minute review in compliance with the opinion review process.

(2) If last-minute substantive revisions in a previously reviewed opinion are needed, approval should be obtained by telephone, fax or e-mail prior to release of the opinion. Clients and third parties should be informed of the time required to make changes in opinions to avoid unexpected delays.

(3) Where appropriate, a partner should obtain advance approval or guidance for the issuance of an opinion with a range of alternatives as to the final form of the opinion.

v. Compliance with firm policies is vital to maintaining the quality of a law firm’s opinions. There is also a benefit to the attorney issuing the opinion. Full compliance, including preparing complete file documentation, is the best assurance that the law firm will stand behind the attorney if there is a problem with the opinion at some point in the future.

e. **Procedure for issuing opinions**

i. As a rule, it is best for opinions to be issued in written form on law firm letterhead and bear a manually affixed signature.

ii. Although e-mail is suitable for transmission of an opinion, i.e. as a PDF attachment, the rendering of an opinion warrants a formality that generally is inconsistent with the use of electronic formats as a medium for the rendering of an opinion itself.

f. **Further guidance**

i. It should be noted that in the case of opinions rendered to parties other than a client, Rule 2.3 of the ABA Model Rules of Professional Conduct provides:

(1) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(2) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely, the lawyer should not provide the evaluation unless the client gives informed consent.

(3) Except as disclosure is required in connection with an evaluation, information relating to the evaluation is otherwise protected by the confidentiality requirements of Rule 1.6.

g. **Covered Federal Tax Opinions under IRS Circular 230**

i. New requirements for Federal tax opinions generally apply to opinions rendered after June 20, 2005 under amendments to regulations governing practice before the Internal Revenue Service ("Circular 230"). The new regulations contain general requirements for all written advice concerning Federal tax issues that are generally consistent with existing ethical standards. The new regulations also contain detailed new requirements for the form and content of certain identified types of Federal tax opinions (called "covered opinions").

ii. The new Federal regulations define "written advice" very broadly to include e-mail messages as well as memoranda and letters. As a result, most law firms add a disclaimer to every e-mail message stating that it is not subject to the "covered opinions" requirements.

3. **Substantive issues**

a. **Literature**

i. Reference should be made to applicable literature on legal opinions. The literature increasingly reflects a nationwide practice toward legal opinions.

ii. In particular, the TriBar Opinion Committee's 1998 report on Third-Party "Closing" Opinions, 53 Bus. Law. 591, is often referred to as defining customary practice. The 98 TriBar Report is the last major document from TriBar on opinions.

iii. Reference should also be made to the TriBar 2004 Report on the Remedies opinion, 59 Bus. Law. Law. 1483.

iv. There are other reports besides TriBar, such as the 1998 report on Legal Opinion Principles from the ABA, 53 Bus. Law. 831.

b. Due diligence

i. Due diligence is an integral part of the issuance of many legal opinions. Adequate processes must be established, followed and documented in the law firm's files. The nature and scope of due diligence varies substantially depending upon the type of legal opinion required, and also upon the types of representations and warranties and indemnifications contained in the legal agreements.

ii. When a lawyer learns that a client's representations are or may not be accurate or complete, the lawyer has an obligation to look into the representations if the representations are important in connection with the opinion. This is true even where the opinion explicitly states that it is relying on the representations.

c. Follow the process

i. It is critical that a law firm follow the process that it has adopted for issuance of legal opinions.

ii. A law firm should be able to demonstrate after the fact that it exercised due diligence in issuing its opinion.

d. *Dean Foods* case

i. In December 2004, the Massachusetts Business Court, following a bench trial that lasted several days, held a Boston law firm liable to the recipient of a closing opinion, the acquiring company in an acquisition, for more than \$9 million in damages and costs. *Dean Foods v. Pappathanasi*, 2004 WL 3019442 (Mass. Super.). The basis for liability was negligent misrepresentation stemming from the firm's giving a no-litigation opinion without disclosing in the opinion a matter the court found the firm should have disclosed.

ii. The lawyers apparently missed clues that indicated their client may already have been a target of the investigation at the time it received the subpoena. In some circumstances, lawyers should consider whether they are aiding and abetting or otherwise participating in a fraud with their client. If so, they must resign the engagement unless the client permits disclosure.

iii. A lawyer should never give negative assurance on the accuracy of disclosure when the lawyer is aware of a matter that falls within the description of an item to be disclosed but has not been disclosed. The *Dean* case also illustrates the importance of exercising due diligence in the preparation of disclosure schedules to transactional documents.

4. **Legal opinions on health care issues**

a. **Frequently occurring areas for opinions**

i. Law firms are often asked to render legal opinions regarding various health care laws, regulations, case law and other guidance. Frequently encountered areas include:

- (1) Stark Law
- (2) Anti-Kickback Statute
- (3) Tax-exempt Status
- (4) Antitrust
- (5) State law
- (6) Medicare and Medicaid Reimbursement
- (7) Over- and under-payment issues
- (8) Licensure
- (9) Certificate of Need
- (10) Outcomes of litigation regarding all of the above

ii. Generally, these areas do not lend themselves to unqualified opinions that a certain set of facts does not violate the applicable law and regulations. Rather, most opinions addressing these issues are “reasoned” opinions as discussed in the following section. Likewise, many sets of facts and circumstances which potentially implicate health care regulations are not clearly illegal or otherwise violative of the regulations. There is a tremendous number of scenarios where the activity is neither clearly violative of or clearly compliant with the applicable law and regulations.

b. **“Reasoned opinions”**

i. When a client asks a health care lawyer for a legal opinion in one of these areas, it is rare that an unqualified opinion can be given. Even assuming certain facts to be in existence, it is unusual for an unqualified opinion to be possible. Instead, what is frequently rendered to the client is a reasoned opinion that analyzes the risk of the fact situation presented by the client.

ii. Reasoned opinions generally do not give an opinion whether a given action is in compliance with the applicable health care regulations. Rather, the opinion will reach varying types of conclusions. Some examples of these conclusions follow:

(1) Reasonable/strong arguments can be made that the activity does not violate the applicable law and regulations.

(2) It is unlikely that the activity, if investigated by a government entity, would be prosecuted.

(3) It is unlikely that a judge/jury would conclude that the activity violates the applicable law and regulations.

iii. There are many other formulations that are used in “reasoned” opinions. Often the type of expression used is based on give-and-take discussions with the client, through which the attorney can learn the question that the client would like answered.

iv. When a reasoned opinion is rendered, the most important parts of the opinion are the statement of facts, particularly including the facts assumed to be true, the exceptions and the analysis on which the conclusion is based. Reasoned opinions do not give an absolute guaranty or assurance of a particular result or outcome. However, they should give comfort to the recipient that the drafter of the opinion has exercised reasonable care to identify the types and levels of risks that the subject activity could generate under the applicable regulations.

v. Clients sometimes ask for opinions on Stark Law questions that are unqualified. Many “reasoned” opinions are issued on Stark Law questions, but it is often impossible to issue unqualified opinions. This is an area of particular difficulty for in-house and outside attorneys, because the penalties for non-compliance with the Stark Law are so severe.