M&A Deal Risks: Opinions of Counsel and Closing Preparedness

Structuring Opinion Letters and Other Documents to Avoid Closing Pitfalls and Counsel Liability

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Today’s faculty features:

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Acquisition Closings

The closing is where the transaction all comes together. If the agreements have been drafted properly and the parties have followed through, there should not be many unpleasant surprises at closing, because expectations and requirements will have been specified and taken care of ahead of time. Thus, the most important things for closing should have been taken care of well in advance of the closing, and the closing should consist almost entirely of signatures, smiles, and champagne— but this is, unfortunately, not always how things turn out. Let’s see what can be done to increase the odds of a smooth closing.

1. **Documentation.** The main documents which will specify how the closing will occur include the purchase or acquisition agreement, the loan agreement, and the escrow instructions. The terms important for structuring the closing should be included in these documents. This includes conditions to closing, documents to use at closing, and the events to occur at closing. Specificity up-front avoids disputes or negotiations at closing. Beware of the “simple” release, assignment, bill of sale, consent, etc., to be delivered at closing, the terms of which have not been seen and agreed to well in advance.

   a. **Purchase Agreement.** The purchase or acquisition agreement will generally specify such matters as:

      – what lien and security interest releases will be needed (see also the preliminary title report where real estate is involved).

      – any conditions precedent to the transaction closing and the documents needed to evidence the meeting of the conditions.

      – what form of conveyance documents (deeds, assignments, bills of sale, endorsements, stock powers, etc.) will be used; to whom the conveyance documents will be delivered.

      – what other documents containing substantive provisions will be used such as bills of sale, assignments, estoppel certificates, lender consents or subordinations, consulting agreements, non-competition agreements, and so on (the forms of these are best attached as exhibits).

      – the amounts to be paid and when they are to be paid (earnest money, other deposits, break up fees, price, note, trust deed, pledges and other security, post-closing adjustments, earn outs, etc.).
– the procedure for prorations of taxes, utilities, rents, operating expenses, etc. where applicable.

– the selection of insurers, the form of title insurance and endorsements to be used where substantial real estate is involved, the form of any other required insurance certificates, and the responsibility to pay for these items.

– the allocation of closing costs and recording and UCC filing fees.

– the time limits within which the closing must (if at all) occur.

– where the closing will be held and the role in the closing of any title company, escrow agent, or similar party.

– form of any legal opinions required.

– notice provisions.

– post-closing adjustments and procedures.

b. **Loan Agreement.** A secured lender’s loan agreement or loan commitment letter will generally specify such things as:

– the conditions precedent to be met before a loan advance will be made and the sort of documents needed to demonstrate meeting the conditions (lien and security interest releases, organizational filings, consents, and approvals, governmental approvals, survey, environmental reports, estoppel certificates, agreements with key tenants, landlords, franchisors, etc., subordinations from other creditors, financial reports, insurance policies, etc., perfection of new security interests by filing, possession, control agreement, etc.).

– the form of note, trust deed, security agreement, guarantees, letters of credit, or other substantive instruments to be used (they are best attached as exhibits).

– the loan fees and costs to be paid at closing.

– the form of lender’s title policy and endorsements to be used and of any closing protection letter to be used, directions on the recording of loan participations (if substantial real property is involved).

– personal property collateral (pledges or assignments of contracts, cash items, inventory, equipment and furniture, accounts receivable, etc.) and guarantees and any security for guarantees (forms best attached as exhibits), letters of credit.

– funds transfer instructions.
c. **Escrow Instructions.** The escrow instructions or agreement generally provides for:

- holding any earnest money or other form of pre-closing or post-closing deposit (if any).
- time for receipt of other funds and of documents to be provided (deeds, notes, trust deeds, consents, lien releases, certifications, etc.).
- any amounts to be disbursed prior to closing (earnest money disbursements on failure to close, payments of liens, payment of costs and expenses and escrow fees).
- amounts to be held after closing to cover claims, repairs, indemnities, etc.
- how notice is given to establish conditions for distributions at closing and after closing; how funds held are to be invested; who is entitled to the income; how adverse claims are to be handled; and so on.
- the preparation of any closing statements.
- recording or filing (and order of recording or filing) and delivery of instruments (trust deed recording, prior lien release recording, UCC financing statement filings, etc.), and distribution of funds and issuance of any title insurance.
- payments of costs, distributions to seller or target (or, shareholders, specific creditors, etc.), payment to brokers or realtors, exchange facilitator, counsel, receipt and disbursement of loan proceeds, payment of escrow agent, etc. and the type of document needed to trigger a payment.
- method of payment (checks, cashiers checks, wire transfers, etc.).
- general duties of and protections for escrow agent, notices to parties, etc.

2. **Checklist.** All the various documents describing conditions to closing or events at closing should be reviewed ahead of time and a checklist for closing prepared and kept up to date. The checklist can be in more than one document, but the checklist documents should among them contain all important information leading to, and relating to coordinating events at, the closing, including:

- Is there a list of contact persons for all participants (parties, lawyers, bankers, title company officers, surveyors, realtors, appraisers, governmental officials, financial advisors, consultants, etc.); does it contain all needed phone numbers, e-mail addresses, fax numbers, street addresses, identification numbers (where appropriate), and similar information, including who represents or is associated with whom.
– Is there a master list of what documents exist and what other documents will be needed at the time of closing in order to meet each condition or requirement; who will update the master list as matters proceed and circulate revised copies to parties and advisors.

– Who is responsible for preparing each document not yet finished, who will follow up to see that documents are prepared on time, circulated, and approved, and what are the key issues to be resolved.

– Are special closing documents needed (e.g., good standing certificates, incumbency certificates, certifications that conditions have been met, FIRPTA affidavits, bankruptcy court consents, endorsed stock certificates, etc.).

– Are other items needed for closing not discussed in the agreements, such as tax withholding certifications, identification number certifications, WARN Act notices, ERISA plan notices, state tax clearances, etc., as required by law; who will prepare and follow up.

– Who is to arrange for holding any board, shareholder, member or similar meetings, obtain proxies, and assure organizational approvals for each organizational participant.

– Who is to sign and deliver each document, which documents require a notary, how many signed original counterparts of each document will be needed, and how may copies of each signed document will be needed; are fax or e-mail (pdf) signatures acceptable; will out of state notarizations be needed; will some documents be executed separately in counterparts with signature pages to be assembled later.

– To whom is each document to be delivered and when (at closing, after recording or filing, etc.).

– Will documents be executed at closing or will they be executed ahead of time and deposited in escrow (can more be done ahead of time).

– Where are funds coming from, and where, when, and in what form are they to arrive; are letters of credit required and if so are they to be confirmed by a local bank; who will track the status and delivery of funds in transit; is there a list of bank contacts and account and transit information (the participants to receive sensitive account information should be limited).

– Will closing be conditioned on regulatory approvals or processes, and if so who will pursue the necessary procedures and what will be the required results, e.g., non-action, a consent certificate, etc.

– Will a physical inventory count be made immediately prior to closing, and if so, who will do it and what report will be obtained.
– Will closing be by correspondence (deposit in escrow pursuant to escrow instructions) or by in-person meeting.

– Who will call and schedule “all hands” conference calls of participants to assure progress toward closing; how often should such calls occur.

– Where and when will an in-person closing be held— at the office of a lawyer, the office of a party, or a title company; is a notary available and are facilities available for last-minute document changes, copies, etc.

– How long will closing take (hours or days); is there a final time set for conclusion.

– Who will attend (parties, lawyers, brokers or realtors, lenders, title company officers, etc.); do any participants need to travel a considerable distance; will travel time (to or from) limit the time for closing or the order of events.

– What will be the order and timing of events at closing as required by the agreements.

– Have all documents been reviewed and approved by the parties and counsel, and have all necessary corporate or other organizational approvals been obtained and who is confirming these things.

– Are legal opinions needed, and if so, have the forms of them been approved in advance. Are any opinions from other jurisdictions required.

– Are bring-down certificates updating warranties and representations required and, if so, who prepares, reviews, signs, and delivers them.

– Who will control original documents prior to and at closing; what happens to them if the deal fails at the closing.

– Who is responsible for recording or filing each official document; is there a specified order for filing or recording.

– Is a formal closing memorandum to be used (the checklist, or parts of it, may be modified to become part of such a memo); will it require signatures of some or all parties or other participants.

– Are fund transfer instructions complete; are fund receipts needed and executed or electronically confirmed.

– How will postclosing deliveries be made (mail, courier, etc.); are addresses current.

– Will there be postclosing publicity and, if so, who will prepare and approve it.
– Who will prepare the closing transcript of documents, how will it be bound (as a book, three-ring binder, etc.), who will pay for it, and when will it be completed.

– Who is arranging any postclosing festivities or souvenirs and what is planned for these.

3. **Some Special Problems.** Now let’s turn to some of the problems which can arise.

   a. **Simultaneous Delivery.** It is generally understood that at closing, unless otherwise specified, nothing is delivered until everything is delivered, so that all occurrences are deemed simultaneous. However, sometimes this will vary so that one portion will conclude before another portion commences. For example, the first position loan will close and be recorded before the second position is recorded, etc.

   – It is sometimes best to have an agreement (often in the escrow instructions) about simultaneous or serial delivery.

   – What happens if the closing fails? There may be an escrow agent with instructions as to whom documents or funds are to be returned (generally to the person depositing the document or funds), but this is not always the case. Parties who dispute matters at the last minute have been known to physically fight for possession of the executed documents on the closing table. Sometimes parties agree that the closing concludes and deliveries are made only on execution of a final closing memorandum, but this may be cumbersome if there are a great many parties or if the closing will take considerable time, so electronic or telephonic confirmation may be appropriate in some situations. What happens to all the documents in the disclosures made prior to the closing? Are they to be returned or destroyed? Are there confidentiality agreements which continue post-closing or after deal termination?

   b. **Foreign Participants or Long-distancing Closings.** If foreign parties are involved, special planning and procedures may be needed.

   – There will likely be a need to meet U. S. homeland security rules, tax rules, and other such matters.

   – Also, time differences may make electronic transfers on the day of closing difficult (too narrow a time slot available) or impossible (next-day funding may be necessary), and the parties should take these matters into account in establishing closing procedures.

   – A delay during closing (e.g., a late flight for a signatory or a last-minute adjustment to the deal) may shift funding, and this may require corresponding changes to numerous documents. This can occur with domestic closings, too, but is exacerbated in closings involving persons from other countries. A difference of a day, or even hours, can mean large sums are affected for interest, currency value adjustments, etc.
– There may be one or more chains of corresponding financial institutions involved in transfers of funds, confirmations of letters of credit, and so on. These should be identified in advance and taken into account in planning the closing.

– Foreign participants should have good U.S. counsel, CPAs, and consultants because there are huge differences in the law and in business customs worldwide, and accounting rules and practices are not the same internationally; of course, the flip side is true for a U.S. participant in a cross border transaction. If the participants do not have good advice about matters affecting the other participants, major problems or delays can arise from misunderstandings.

c. Last-minute Adjustments. Parties in hurry may not have fully nailed the deal down before closing. There may be contingencies to be met or confirmed, regulatory or third-party approvals to be obtained, and so on. All documents required or advisable should be prepared ahead of time and should be at the closing, but sometimes they are not. These problems can cause significant delays at closing or can cause important shifts in the deal which may need to be accommodated, or in some cases, may kill the deal altogether. For example, some matters are interest rate sensitive and a shift in market rates just before, or during, closing may give a party the right to walk from the transaction or may require significant readjustments. If possible, everything should be nailed down firmly by prior agreement, without further rate adjustments, etc., for a sufficient time to get the closing done without change after change.

d. Trustworthiness of Participants. One of the most significant matters is the trustworthiness of the participants in the closing. People lacking honesty are not always avoidable in a transaction; other times participants just won’t know how much to trust someone. If parties and counsel do not feel comfortable with the other participants, matters go slowly and drag on until exhaustion and beyond. However, where participants have a sufficient level of trust in each other, things go much more smoothly and quickly.

– Participants may not know much about each other, but their counsel may have done numerous deals together and have faith in each other’s professionalism and integrity. For example, documents can be executed and left on the table by a participant needing to catch an airplane with confidence that if the deal craters the document will not be wrongly used but will be returned, and that no changes to any significant matter will occur without that participant being contacted. This is generally required by professional codes of ethics and by court rulings on fraud, but with a great deal at stake, some greater comfort than a code of professional responsibility or a case in a court reporter volume is desirable; nothing, but nothing, beats a longstanding reputation for integrity.

– This integrity should be reinforced at every step in the negotiation of the deal. For example, any changes in drafts should be pointed out (marked copies are best), all parties should be notified immediately of significant developments, commitments to follow up should be met or problems communicated, and negotiated items should be drafted in good faith to meet their apparent intent so that although fine points may need
further discussion on review of the draft, it is clear that an attempt was made to get the items right.

– However, some parties still feel that they are not doing their job (or are in fear of malpractice claims), unless they take every possible precaution, even though they have no lack of confidence in the other participants; this is the costly legacy of those who have acted badly in the past. In any event, if a complicated deal is being closed, these sorts of concerns can sometimes be identified in advance and accommodated or planned for so that marathon closings, where exhaustion can lead to errors, can be avoided.

e. **Promissory Notes and Negotiable Instruments.** Never have more than one original promissory note executed, unless the deal involves a series of notes, each of which is to be enforceable in full. A subsequent holder of a note executed in duplicate may well be able to enforce it, even though the party executing the duplicates only intended but one obligation; that party will pay twice and be very unhappy about it. The same point applies to checks, drafts, and other negotiable financial instruments. Mark copies of notes and negotiable financial instruments with the word “COPY.” It is best to put this right across the signature so that no one will mistake a copy for an original; a red rubber stamp works well for this purpose.

f. **Closing People.** A good transactional paralegal or title company closing officer (where substantial real estate is involved) is a very valuable person for assuring a smooth and efficient closing. Treat these people well. Do not allow other participants to abuse them when something goes wrong. Anyone with experience knows that something will almost always go wrong somewhere to some extent, despite all best efforts; but some participants lack experience, are under great emotional pressure, are exhausted, are rude, or any or all of the above. Take the heat yourself and spare the paralegal or closing officer. Certainly never let them be blamed, even by unspoken implication, for your own mistake or oversight. Give these key people the professional respect they deserve; don’t forget to thank them when they do a good job. Perhaps your next closing will go even better, or perhaps next time you will be reminded of something that saves your rear end; people remember those who appreciate their talents and never forget those who abuse them. More importantly, it’s the right thing to do.

g. **Third-party Legal Opinions.** If third-party legal opinions (i.e., from counsel for one party for the benefit of another party) are to be provided at closing, these need to be negotiated well in advance of the closing. Opinions take work to issue and some requested opinions just cost far more than any value they can provide. Also the law is not always clear and deals regularly push the edges of even known precedent. For example, clients may be willing to agree to overreaching provisions insisted upon by other parties with superior bargaining strength, and the parties, unless relatively sophisticated, may not understand why counsel is reluctant to give an opinion that such provisions will actually be enforced as written. Such clients may be upset with their own lawyers for delays caused in negotiating limitations on opinions at the last minute, even though it was the client who at the last minute agreed to have its lawyer provide a closing opinion without confirming with counsel that the opinion was appropriate. Inappropriate opinion requests need to be eliminated, or the deal needs to be terminated, or counsel needs to withdraw, very early in the process. Otherwise, counsel could be accused of killing a deal after it
has built substantial momentum (lawyers have even been held liable to their clients for last-minute refusals). Legal opinion issues can be major issues in cross border transactions because the customary practices of lawyers in various nations vary so much, even in those jurisdictions with law based on English law.

– All parties need to have counsel who will not ask for opinions they would not want to be asked for themselves, who understand the meaning and effect of opinions, which generally are short-hand conclusions leaving much unsaid, who understand which opinions provide important protections at a cost not excessive for the transaction and which opinions are wasteful, and who understand the customary practice in the jurisdiction concerning opinions.

– On a substantive level, absent compelling circumstances and narrow issues, legal opinions concerning title to real or personal property or lien priority (rather than just lien enforceability and basic perfection) should generally not be requested; rather, as to real estate titles, the buyer or lender should obtain title insurance where it is available. Tax, securities, and antitrust opinions are not provided absent specific requirements.

– Other matters as to which opinions normally should not be requested (generally absent compelling circumstances) include: foreign qualification in all required jurisdictions, the need for a lender to qualify to do business, comprehensive (as opposed to narrow and specifically requested matters) legal or contractual compliance, land use and environmental matters, negative factual assurances (except in some securities offering transactions), fraudulent transfer, substantive nonconsolidation, litigation outcome (almost never appropriate), etc.

– Also, determining factual matters is generally beyond the ken of lawyers, and it is not appropriate, nor cost effective, to ask lawyers to do so. Attorneys certainly cannot, however, base opinions on assumed “facts” which are known to be unreliable.
Legal Opinions in Transactions

1. **Purposes of Opinions.** Legal opinions are often a part of a significant transaction, for example on the sale of business stock or assets, or for the merger or acquisitive reorganization of a business. The major purposes for these legal opinions are:

   a. **Legal Sufficiency.** The parties desire that attorneys carefully review the transaction for legal sufficiency, to ensure that there is no likely defense or issue which will excuse any expected performance or prevent the transaction from occurring. The investigation and review of matters involved in the preparation of the opinion may bring to light significant problems which should be resolved, including both legal and business risks.

   b. **Legal Results.** The parties may want to assure that certain desired tax or other legal results are achieved by the transaction. It may be that the transaction is not desirable unless those results are achieved.

   c. **Legal Compliance.** The parties desire that the transaction comply with regulatory and other legal requirements.

   d. **Checks on Representations.** The legal opinion process to some extent acts as a method to check at least some of the representations and warranties being made by a party.

   e. **Illegitimate Risk Shifting.** There are some illegitimate purposes for requesting opinions, the largest of which is to try to make the opining lawyer (and the lawyer’s malpractice carrier) bear some of the economic risk of the transaction failing.

   f. **Abuse of Opinions.** Some parties seek to use the good reputation of the lawyer to lend a patina of legitimacy to an ill-conceived or illegal transaction.

2. **Standards for Opinions.** Opinion giving is an important part of a business lawyer’s value to the client. It is also an important matter to third persons who may rely on the opinion. Furthermore, although this is sometimes ignored, the opinion process is also important to society at large and its governmental and regulatory protectors who seek to promote such policy goals as the reliability of information disseminated to investors and the prevention of fraudulent or abusive transactions which may damage citizens, taxpayers, or the government, or which may avoid regulatory constraints. Thus, there are a number of standards that apply to the giving of legal opinions in connection with transactions.

   a. **Ethical Obligations.** The first set of standards to apply are the ethical rules which apply to lawyers authorized to practice in a particular jurisdiction.

      i. **Competence.** A lawyer is obligated to be competent in rendering legal advice. Utah Rules of Professional Conduct 1.1. (The Utah Rules are based on the ABA
Model Rules of Professional Conduct, as are the rules of many states.) Thus, an attorney must do a competent job in reviewing matters in preparation for, and in giving a legal opinion. The lawyer must not give an opinion he or she is not competent to give.

ii. **Client Loyalty.** The foremost concern of lawyers is undivided loyalty to their clients, and this concern provides a running theme throughout all codes of ethics applicable to lawyers. Formal written transactional opinions are, however, generally given for the benefit of the other side in the transaction. How does this fit with the duty of loyalty to the attorney’s own client?

(1) **Rule 2.3.** The Utah Rules of Professional Conduct deal with this issue this way:

2.3 (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship to the client; and

(2) the client consents after consultation.

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

(2) **Restatement Rule.** The Restatement 3d of the Law Governing Lawyers published in 2000 by the American Law Institute, states:

Section 152. Evaluation Undertaken for Third Person.

(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer’s investigation and analysis of facts or the lawyer’s professional evaluation or opinion on the matter.

(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client’s interests materially or adversely, the lawyer shall first obtain the client’s consent after the client is adequately informed concerning important possible effects on the client’s interests.

(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer shall exercise care with respect to the nonclient to the extent stated in § 73(2) and not make false statements prohibited under § 157.
(3) Rule 1.2. Rule 1.2(c) of the Utah Rules prohibits a lawyer from assisting in the furtherance of a crime or fraud by the client. Thus, the lawyer must do nothing to allow the crime or fraud to occur or to cover it up once it has occurred.

(4) Confidentiality; Privilege. As part of consulting with the client, the client should be made aware that the attorney-client privilege will be waived as to information disclosed to third persons through the opinion giving process. This will usually be of small concern to a client, but if litigation arises, for example, where the client is later accused of a crime or fraud which is alleged to have occurred before or as part of the transaction, then this will become a problem for the client. Also, in some circumstances, the lawyer may be allowed to, or even required to, disclose the client’s crime or fraud. See Rules 1.6 (confidentiality of information) and 4.1(b) (disclosure to avoid assisting in crime or fraud).

There may be an implied waiver of the attorney-client privilege where several lawyers or firms may have contributed to malpractice (e.g., changes in counsel over time) but only one is sued for malpractice (e.g., earlier or later engaged counsel); the suit against one lawyer or firm may put the confidential information at issue sufficient to remove the privilege as to communication with the non-defendant lawyers. This issue of implied waiver could become important in a situation where more than one set of lawyers prepares an opinion or opinions relating to a transaction. See the implied waiver test of Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wa. 1975); compare Jakobleff v. Cerrato, Sweeney & Cohen, 468 N.Y.S.2d 895 (N.Y. App. Div. 1983) (no waiver; later attorney not a proximate cause of injury) with Pappas v. Holloway, 787 P.2d 30 (Wa. 1990) (implied waiver found; later attorney may be a proximate cause of injury).

(5) Duty to Relying Third Party. The opining lawyer will try to give as narrow an opinion as is justified. Naturally, in doing so, the lawyer may not misstate or omit to state any material fact. The lawyer may limit the scope of the opinion or of the investigation performed in preparing the opinion, but any material limitations must be disclosed to the party for whom the opinion is given. The opinion must be given fairly and with objectivity. See comments a and c to the New Restatement Section 152.

(6) Disclosure of Relationships. Since the lawyer must exercise independent professional judgment, and since the third person to whom the opinion is given is entitled to rely on such independence, any special relationship to the lawyer or the law firm (beyond the attorney-client relationship itself) which may have an effect on such independence should be disclosed to the third person.

(a) Some examples: where someone in the firm sits on the client’s board of directors, where the lawyer or firm have a stake in the transaction, where another client has an interest that would benefit from the transaction. Avoid fee arrangements which give the firm or lawyer some strong incentive to assure the transaction closes where an opinion is a condition to closing. See, e.g., Canal Corp. v. Com’r, 135 TC 199 (2010).

(b) However, even disclosure and a proper opinion will not always prevent serious trouble where such relationships exist. Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp., 192 F. Supp. 2d 852 (N.D. Ill. 2002) and 2004 WL 1977572 (2004), (related decisions where named partner of firm was a major shareholder and chairman of audit
committee of client, and opinion stated firm had no actual knowledge that officer certificates were false or incomplete; 10b-5 action and negligent misrepresentation action over private placement of securitization were allowed to go forward where client engaged in fraudulent scheme to divert securitized assets; although plaintiff couldn’t prove lawyers knew of fraud for the 10b-5 claim, the litigation was significantly expanded into what the attorneys knew due to the relationship).

b. Professional Liability. A leading case has stated the lawyer’s duty to be to exercise “such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake.” Lucas v. Hamm, 56 Cal. 2d 583, 591, cert. denied, 363 U.S. 987 (1961). See, also, Young v. Bridwell, 437 P.2d 686 (Ut. 1968). The standard is one of negligence; the malpractice claim by a client is a claim of professional negligence, while the claim by a third-party opinion recipient is generally a claim of negligent misrepresentation. First National Bank of Durant v. Trans Terra Corp., 142 F. 3d 802 (5th Cir. 1998) (bank receiving title opinion has claim for negligent misrepresentation against borrower’s lawyer issuing the opinion); Greycas v. Proud, 826 F. 2d 1560 (7th Cir. 1987) (opinion giver owes duty of care to recipient of third party opinion for purposes of negligent misrepresentation claim); Mehaffy, Rider, Winholz & Wilson v. Central Bank of Denver, N.A. 892 P. 2d 230 (Colo. 1995) (claim of third party recipient is not legal malpractice but negligent misrepresentation). The standards of care for malpractice and for negligent misrepresentation in the context of opinions will generally be quite similar.

i. Specialized Areas. If a specialized opinion is to be given, for example, in securities law, tax law, intellectual property law, or with respect to specialized industry regulations, then the standard of care may well be that of an ordinary competent expert in those areas. See, e.g., SEC Staff Legal Bulletin No. 19, “Legality and Tax Opinions in Registered Offerings”. Although standards are usually tied to practice in a given state, national standards may apply to certain areas of practice, such as federal tax law and other federal specialties. Restatement of the Law Governing Lawyers § 52 cmt. b (2000).

ii. Privity. How far does liability extend? Privity is no longer as strong a defense as it was. Section 73 of the New Restatement provides:

For purposes of liability . . . a lawyer owes a duty to use care . . .:

(2) to a nonclient when and to the extent that:

(a) the lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the nonclient to rely on the lawyer’s opinion or provision of other legal services, and the nonclient so relies, and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection; . . .

See also, Crossland Sav. FSB v. Rockwood Ins. Co., 700 F. Supp. 1274 (S.D.N.Y. 1988) (opinion giver liable to third party to whom opinion addressed or expressly authorized to rely on it); Geaslen v. Berson, Gorov & Levin, Ltd., 613 N.E. 2d 702 (Ill. 1993) (duty of care owed the
third persons, is not a fiduciary duty); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Investments*, 991 S.W. 2d 787 (Tex. 1999) (lack of privity does not prevent nonclient from suing for negligent misrepresentation); *Ackerman v. Schwartz*, 947 F. 2d 841 (7th Cir. 1991) (lawyer giving tax shelter opinion had duty to update opinion included in offering circular if it became misleading, and could be liable under Rule 10 b-5 if reckless). But see *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recover, Assoc.*, 775 F. Supp 1195 (S.D.N.Y. 1989) (no duty to addressee of opinion where was not given at client’s request and was not a condition to closing transaction).

(1) Normally, liability under tort laws extends to persons the attorney could reasonably foresee relying on the opinion.

(2) Although it is not a talisman against liability to additional persons who may be found to be in a class that could reasonably be expected to rely on an opinion, an opinion should contain an express statement limiting reliance on it to particular persons or parties, such as other lawyers giving opinions in the transaction, the particular parties to the transaction, and possibly to lenders or others providing financing for the transaction. See *In re Infocure Secur. Litig.*, 210 F. Supp. 2d (N.P. Ga. 2002) (no reason to disregard a limiting disclaimer in closing opinion) and compare with *Kline v. First Western Government Securities, Inc.*, 24 F. 3d 480 (3d Cir. 1994) (Rule 10b-5 case where disclaimers were ineffective where the opinion giver knew assumed facts were wrong and others were relying).

iii. Failure to Opine. Not giving an opinion where the client’s deal falls through or the client is otherwise harmed, may also be cause for liability. See *Herzfeld v. Laventhal, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976).

iv. Partial Opinion. Even if an opinion is completely accurate in what it does say, under the applicable standard of care there may be a duty to say more. *Harmon City v. Nielsen & Senior*, 907 P.2d 1162 (Ut. 1995) (even if opinion correct that transaction was not an ERISA prohibited transaction, it should have gone further concerning fiduciary duty); *Roberts v. Ball, Hart, Hart, Brown & Baerwitz*, 57 Cal. Supp. 3d 104, 128 Cal Rptr. 901 (Ct. App. 2d 1976) (technically correct opinion, but liable for negligent misrepresentation in failure to disclose that some purported general partners claimed to be limited partners); *Rubin v. Schottenstein, Zox & Dunn*, 143 F. 3d 263 (6th Cir. 1998) (technically correct opinion, but liable under Rule 10b-5 for representing to investor in client that client had no problem with bank where attorney knew transaction would be a default under the loan agreement); *Alderstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. 2002) and *Rich Family L.P. v. McDermott Will & Emery*, 230 NYLJ 20 (2003) (related cases where firm gave opinion in stock transaction technically comporting with Delaware statute and the corporation’s articles and bylaws, but the transaction was set aside for trickery and deceit of director; the buyer was allowed to pursue claim for negligent opinion).

v. Ethical Rules as Standard of Care. Although the ethical rules disclaim being a standard of care in malpractice cases, they do establish minimum standards the plaintiff’s expert might testify to against the opining lawyer. See *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 101 S. Ct. 246 (1980). However, in Utah, the Utah Rules of Professional Conduct should not themselves create a basis for civil liability. *Archuleta v.*
Hughes, 969 P.2d 409 (Ut. 1998); Preamble (note on Scope) paragraph 20, Utah Rules of Professional Conduct.

vi. **Erroneous Opinion Without Negligence.** That an opinion turns out to be erroneous does not of itself demonstrate negligence. See *Watkiss & Saperstein v. Williams*, 931 P.2d 840 (Ut. 1996) (malpractice case; attorneys not under a duty to be clairvoyant and foresee future changes in law; error on uncertain unsettled, or debatable state of applicable law not malpractice where the research and investigation to make an informed judgment has been done; no duty to advise of remote possibilities; whether the lawyer erred and whether the error was caused by vagaries of law is a question of law to be decided by the court). Also, there may be circumstances where the recipient’s own negligence contributes to an error. See *Western Fiberglass, Inc. v. Kirton McKonkie & Bushnell*, 789 P.2d 34 (Ut. App. 1990) (malpractice case; client which ignored advice and let borrower perfect security interests found 50% at fault); *Breton v. Clyde Snow & Sessions*, 299 P.3d 13, 65, (Ut. App. 2013) (intervening cause by client).

vii. **Cap on Liability.** It is not ethically permissible to ask a client for an advance waiver or limit on liability. Utah Rule of Professional Conduct 1.8(h)(1). Some lawyers have, however, advocated that lawyers giving third party opinions to non-clients negotiate for a reasonable cap on liability exposure for negligence (not applicable to reckless or willful misconduct). Donald W. Glazer, Jonathan C. Lipson, “Courting the Suicide King, Closing Opinions and Lawyer Liability”, 17 Business Law Today, No. 4, March-April 2008, at p. 59.

viii. **Client Screening.** Some clients prove to create greater risks than others, and counsel is well advised to be judicious in taking on opinion projects for certain clients. Some clients want to take advantage of the lawyer’s good reputation in selling a risky deal; some such clients are not honest. Others, though basically honest, operate in risky industries, for example, where secret processes are involved, which turn out to provide a higher than usual proportion of claims against lawyers.

c. **Other Liabilities or Sanctions.** There are numerous other possible grounds for liability or sanctions which may apply in addition to state bar ethical sanctions and professional negligence liability. Some other areas for concern include:

i. **Regulatory Agency Sanctions and Debarment.** A number of regulatory agencies have the ability to sanction lawyers in various ways for professional misconduct, including debarring them from practice before the agency, and such sanctions may be imposed in circumstances involved in the giving of opinions. A few examples are:


2. **Internal Revenue Service** Circular 230. See, also, ABA Formal Opinions 346 and 352. With respect to tax matters, a legal opinion may lead to sanctions for tax return preparation where the opinion relates to a tax position taken on a return even where
the attorney does not actually prepare the return (IRC § 6701), or for giving an opinion which subjects a party to penalties (see IRC §§ 6662, 6694). Also, there are various provisions imposing penalties on persons (including lawyers) who directly, or in some cases indirectly, participate in tax shelter or abusive transactions or tax reporting positions. See e.g., IRC §§ 6111, 6112 (tax shelters), 6661 (understatement of tax without substantial authority), 6700 (false statements relating to organization or sale of investment plan). Circular 230 now applies very strict requirements on the giving of opinions and requires very full opinions be given in certain circumstances such as covered opinions (formerly called tax shelter opinions); it also applies to any written tax advice (even by simple e-mail) and requires disclosure that advice will not relieve client of penalties. (Proposed Regulations issued in September of 2012 may simplify some of the issues under the existing rules.) Problem areas in tax opinions include intentionally false opinions, partial opinions leaving out the difficult issues, hypothetical opinions, nonopinions which do not relate the law discussed to the facts, “reasonable basis” opinions where taxpayer will probably lose if challenged, marketed opinions and transactions, listed or abusive transactions, or failure to inform client of penalties for nondisclosure of tax position taken. For example, as to this last item, revised IRC § 6694 (effective 5/25/2007) regarding disclosure on returns now applies to all taxes (not just income) and to all tax advice (not just formal opinions); it significantly increases the disclosure requirements and subjects advisors to serious sanctions.

(3) Tax Penalty Avoidance. A tax opinion does not necessarily protect the client from the application of various tax penalties. All facts and circumstances concerning the reasonableness of reliance may be considered, including the sophistication of the client, any conflicting interests of the tax lawyer (e.g., in setting up the transaction), the economic sense of the transaction, the advisor’s fees in comparison to the advice given, and so on. See, Canal Corporation & Subsidiaries v. Com’r, 135 T.C. No. 9 (2010); Long Term Capital Holdings v. U.S., 330 F. Supp. 2d 122 (D. Conn. 2004) (tax opinions did not avoid penalties under the facts and circumstances). Penalized clients are often unhappy clients who thought they were obtaining an “insurance policy” against penalties and who may try to assert liability on the part of the opining lawyer. The above rules of the Code and Circular 230 are designed in part to prevent such issues concerning the applicability of penalties by requiring higher standards for opinions.

(4) Federal Home Loan Bank Board, 12 C.F.R. § 513.4 (suspension and debarment).

ii. Other Common Law Civil Liability. Other theories for civil liability or sanctions could include: common law fraud, violation of a court injunction, breach of fiduciary duty (see Cattle Farms, Inc. v. Abercrombie, 211 So. 2d 354 (La.Ct. App. 1968); Kilpatrick v. Wiley, Reind, Fielding, 909 P.2d 1283 (Ut. 1996); see also In re Enron Corp., Case No. 01-16034 (AJG) (Bnkr. SDNY) final report of examiner (2003) (finding sufficient evidence of malpractice under Texas Rule 1.12 or negligence and also finding aiding and abetting of breach of fiduciary duties by management, based in part on opinions in various transactions)), tortious interference with contract or prospective economic advantage (e.g., by a civil conspiracy). Punitive damages might be possible in some cases (see Annotation Allowance of Punitive Damages in Action against Attorney for Malpractice, 13 ALR 4th 95 (1982) and UCA § 78B-8-201 (formerly 78-18-1)).
iii. **Statutory Liabilities.** There is a growing number of statutes which may be used to impose liability or sanctions on opining attorneys. Some are referred to with respect to tax opinions above. Some other examples are:

(1) **Securities Regulation.**

   (a) Securities Act of 1933, §§ 11 (materially misleading registration statements - legal experts, lawyer-directors), 12 (materially misleading prospectuses, if lawyer deemed a seller; see *Capri v. Murphy*, 856 F.2d 473 (2d Cir. 1988)), and 15 (control person liability, see *Seidel v. Public Serv. Co.*, 616 F. Supp. 1342 (D.N.H. 1985));

   (b) Securities and Exchange Act of 1934 § 10(b) and Rule 10b-5 (device, scheme, or artifice to defraud in purchase or sale of securities; see *SEC v. National Student Marketing Corp.*, 402 F. Supp. 641 (D.D.C. 1975));

   (c) similar provisions in various state securities acts (sometimes called “Blue Sky Laws”).

(2) **Civil RICO, 18 USC §§ 1961-65.** See *In re Federal Bank & Trust Co., Ltd. Sec. Litig.* (1984 Transfer Binder), Fed. Sec. L. Rep. (CCH) §§ 91,565 and 98,880 (D. Or. 1984); similar provisions of state little RICO or RICE statutes. *Ouwinga, et al., v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783 (6th Cir. 2012) (well known law firm providing opinion and insurance company providing the plan may be sued in a class action RICO over failed tax shelter).

(3) **Civil False Claims Act (31 USC § 3729); Antikickback law 42 USC § 1320a-7b(b) and other health care-related fraud and abuse statutes; similar state law provisions; also general government contracting rules such as the Anti-Kickback Act of 1986 (41 USC § 51).**


iv. **Criminal Liability.** Certain conduct in connection with or related to providing a legal opinion could give rise to criminal accusations against the opinion giver under various laws:

(1) Such laws include the securities laws (see *U.S. v. Frank*, 520 F.2d 1287 (2d Cir. 1975), *cert. denied* 423 U.S. 1087 (1976)), mail and wire fraud (18 USC §§ 1341 and 1343), health care fraud (18 USC § 1347), false claims act (18 USC § 287), health care false statement laws (42 USC § 1320a-7b(a)(1) and (3)) False Statement Act (18 USC § 1001), conspiracy (18 USC § 286 and 18 USC § 371), obstruction (18 USC § 1518), aiding and abetting (18USC §§ 2, 3, and 4), money laundering (18 USC §§ 1956, 1957), criminal RICO (18 USC § 1961), tax laws (IRC § 7201, *et seq.*), health care Antikickback laws (42 USC § 1320a-7b(b)), and state false claims laws, theft and fraud statutes, insurance fraud statutes, etc.

(2) Consider the case of *U.S. v. Anderson*, et al., No. 98-20030-JCL (D. Kan.), a health care fraud prosecution, in which lawyers and their physician clients who
were involved in a transaction were accused of conspiracy to violate the antikickback statute. The attorneys were accused as being a necessary component to the transactions which violated the statute. After a jury trial, the two physicians were convicted, two hospital administrators were convicted and one was acquitted on statute of limitations grounds, and the court dismissed the case against the two lawyers. The jury indicated they would have convicted the lawyers, too, if the judge hadn’t dismissed the case. The attorneys were, in essence, accused of papering over the fraud.

v.   Jurisdiction. A lawyer giving advice to a foreign state corporation on the corporate law of that state may be sued in that state under its long arm jurisdiction laws. Sample v. Morgan, 935 A.2d 1046 (Del. Ch. Nov. 27, 2007) (out of state lawyer gave advice on Delaware corporate law, filed corporate documents in Delaware, directed the defense of case involving the advice, was alleged to have aided and abetted breach of fiduciary duty by top managers; there was sufficient transaction of business in Delaware for jurisdiction under long arm statute, and corporation was financially injured by faithless conduct of its agents).

d. Duty of Recipient’s Counsel. The lawyer for a party receiving a closing opinion also has duties to his or her client.

i. Malpractice Duty. This is a true malpractice duty (as opposed to a negligent misrepresentation duty). Thus, the recipient’s attorney has a duty of care in pursuing the client’s lawful objectives in matters covered by the representation and must exercise competence and diligence normally exercised by lawyers in similar circumstances. Restatement 3d of the Law Governing Lawyers §§ 50 and 52(1) (2000). The duty is defined by the scope of the attorney-client relationship. FDIC v. Ferguson, 982 F.2d 404 (10th Cir. 1991) (lawyer did not breach duty because the lawyer “only had an obligation to provide those services for which he was hired”). If the duty is breached and the breach proximately causes damages to the client, the lawyer will be liable for malpractice to the client. See generally, Watkiss & Saperstein v. Williams, 931 P.2d 840 (Ut. 1996) (elements of malpractice case). See also Ocean Ships Inc. v. Stiles, 315 F.3d 111 (2d Cir. 2002).

(1) The lawyer needs to advise the client of risks and consequences. Camarda v. Dan Zinger Bangser & Weiss, 561 NYS.2d 233 (NY App Div. 1990) (issues of fact as to reasonableness of conduct in failure to advise that highly-leveraged buy-out could be a fraudulent conveyance); Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973) (failure to advise lender client of facts showing borrower in precarious financial condition); Collas v. Garnick, 624 A.2d 117 (Pa Super Ct. 1993) (duty to scrutinize contract and disclose to client full impact of the instrument and any possible consequences).

(2) Normally, the lawyer for the recipient and that lawyer’s client can rely on the opinions in the opinion letter without taking action to verify them. The recipient decides whether to proceed or not. The lawyer must accept the client’s decision and has no duty to prevent the client from taking serious but legal risks. Comment 3 to Utah Rules of Professional Conduct 1.13; see also Utah Rules of Professional Conduct 1.2(a) (abide by decisions of client).
However, the recipient’s lawyer’s duty is not limited to the opinion letter. The opinion giver’s duty is so limited, but the recipient’s lawyer generally owes the client more, based on the context of the transaction. Ut. Rul. Prof. Conduct 2.1 and comments. The duty of the recipient’s lawyer generally includes informing the client:

(a) whether the opinion given meets the key goals of the client;
(b) if the lawyer has reason to believe the opinion was negligently prepared;
(c) if the lawyer finds the opinion to contain known errors of fact or law;
(d) what the opinion means (and does not mean) in light of customary practice;
(e) whether the lawyer is competent in the area of customary opinion practice.

The lawyer may be able to assert in some situations, the client’s contributory negligence as a defense to legal malpractice, where the client’s negligence does not predate engaging of counsel. See Western Fiberglass Inc. v. Kirton McConkie & Bushnell, 789 P.2d 34 (Ut. App. 1990) (client suing its own lawyer for not perfecting security interests was advised to have counsel at closing, but it chose to have debtor’s counsel perfect its security interests; jury found client to be 50% negligent); Steiner Corp. v. Johnson & Higgins of California, 996 P.2d 531 (Ut. 2000) (for professional negligence generally, prior negligence of plaintiff not a defense).

ii. The Assumption of Customary Practice. Customary practice is assumed in opinion letters. The recipient can assume the opinion giver followed customary practice, and the opinion giver can assume the recipient understands customary practice. 1998 Tri Bar Report at § 1.4(a).

This assumption includes an understanding by recipient and its counsel of such things as:

(a) the meaning of shorthand terms used;
(b) the lack of factual investigation by the opinion giver;
(c) the limits on the areas of law to which the opinion applies and does not apply (e.g., tax, securities, antitrust, insolvency are not covered unless expressly set forth);
(d) the impossibility of stating the full nature of customa
(e) the factual and legal diligence to be used in giving certain types of opinions;

(f) unstated limitations and qualifications.

(2) This assumption of understanding creates special concerns and possible duties for the opinion recipient’s counsel, such as:

(a) If a sophisticated client sets limits on its counsel’s review of the opinion, no duty is breached in following those limits. The limits should best be written.

(b) However, if the client is not sophisticated on opinion matters, but the opinion giver is assuming an understanding of customary practice (as it must as a practical matter), the recipient’s counsel may need to explain customary practice to the recipient.

(c) The lawyer for the recipient may want to determine if its view of customary practice (as to the scope of meaning of a matter or the diligence to be used in giving an opinion on the matter) is the same as the opinion giver’s, at least on the most important matters for the client, or else to more narrowly tailor certain opinions to be assured of coverage; customary practice is not always the same in every state and understanding can vary even in the same location.

(d) Counsel should confirm that overall, the opinion adequately covers the key matters of concern to the recipient.

(3) This assumption of understanding also creates special concerns for the opinion giver:

(a) If the recipient is unsophisticated and without counsel, it may be a good idea to suggest the recipient obtain good counsel. Utah Rules of Professional Conduct 4.3. It is also important the recipient not misunderstand the opinion giver’s role. The opinion giver may want to assure that the recipient does not believe or have reason to believe that the opinion giver represents the recipient or has duties beyond the opinion itself. See Margulies v. Upchurch, 696 P.2d 1195 (Ut. 1985) and Kirkpatrick v. Wiley Rein & Fielding, 37 P.2d 1130 (Ut. 2001) (reasonable basis for belief by a person that the lawyer represents the person may create duties by the lawyer to the person). See also Comment 2 to Rule 4.3 of the Utah Rules of Professional Conduct.

(b) “The effectiveness of a limitation or disclaimer depends on whether it was reasonable under the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions, and whether the recipient was represented by counsel or a similarly-experienced agent.” Restatement 3d of the Law Governing Lawyers, § 51 Comment e.
(c) If the counsel for the recipient does not understand customary practice (perhaps, for example, the recipient and its counsel are from a foreign country) or the recipient refuses to engage counsel, the opinion giver could hold off rendering the opinion hoping for sophisticated counsel to participate, could give a kitchen-sink opinion replete with caveats (at the risk of not being able to spell out everything and of confusing the recipient even more), could in the letter or another document try to explain customary practice and its importance, could proceed in the normal way, or could use some combination of the foregoing. Query: Is it negligence for the recipient not to engage knowledgeable counsel? Will recipient’s counsel’s negligence be imputed to recipient?

(d) There is no duty for the opinion giver to inquire into the sophistication of the recipient or its counsel, even if they are foreigners. There is, however, some duty to the recipient in providing an opinion. There is also no single, universally-correct answer to this problem of the known unsophisticated recipient. Raising the level of practice in this area is of benefit to all concerned. See Read H. Ryan, Jr., Recipient Counsel Responsibilities and Concerns, 62 Bus. Law. 401 (February 2007).

3. The Opinion Context. The parties and their counsel need to consider whether a formal closing opinion is necessary or desirable and what it will say given the purposes for it.

a. Costs and Benefits. Legal opinions are not cheap and the parties need to consider early in the transaction process whether an opinion will be requested and what it will cover. The costs need to be weighed against the benefits. Some relevant factors to consider are:

i. Costs of negotiating the opinion between counsel for the parties;

ii. Costs of performing the necessary reviews and investigations to give the opinions requested;

iii. Costs of preparing officer’s certificates and other factual certifications, affidavits, etc.;

iv. Costs of reviewing and finalizing the opinion; an opinion review committee process helps ensure a quality product, protecting all interested parties, including the law firm; (see also Utah Rules of Professional Conduct 5.1 on responsibilities of supervisory lawyers);

v. The novelty and complexity of the issues may make an opinion more desirable, but they will also make it more costly;

vi. The size of the transaction; the smaller the transactions, the more likely the cost may exceed the benefit;

vii. Will the opinion process help the transaction lawyers in carefully doing their jobs, or are they likely to do so in any event;
viii. Are there any regulatory rules that require an opinion in any event; for example, opinions may be required on certain issues if securities are to be issued, and the additional costs of certain other opinions may not be significant in that context;

ix. How many jurisdictions are involved in the transaction; will lawyers from other jurisdictions need to give supplemental opinions if a closing opinion is required;

x. Can the matters of concern be better covered by an outside consultant (e.g., an environmental engineer);

xi. Does the requesting party or its counsel have a realistic way to check matters for itself;

xii. How many parties will be relying on the opinion; numerous parties may not be able to provide the desired assurances for themselves, and thus may have a greater need for an opinion on certain matters;

xiii. Are pricing or other concessions being made by the requesting party which makes the cost of providing the opinion more reasonable, in the context of the transaction, to the party providing the opinion;

xiv. How much time is available to perform the necessary work given the time table of the transaction.

b. Negotiating the Opinion. If a formal opinion of some kind is desired, the parties and their counsel should negotiate the opinion as early as possible with these considerations in mind:

i. Make only reasonable requests; do not ask for an opinion you would not be willing to give under the circumstances;

ii. The opinion should be as narrow as possible given the legitimate needs of the parties;

iii. Forms and boilerplate are starting points only;

iv. A party should not agree to provide an opinion until the scope of the opinion is known; if a party does so, counsel for the party to receive the opinion will need to be flexible in negotiating the opinion once the opining counsel has had an opportunity to review the matter;

v. If the opinion giver declines to give a requested opinion, an explanation of why the opinion is declined should be given; a mere “no opinion policy” is not alone sufficient, rather, any such policy must be rationally explainable; if possible, suggest alternative methods of providing legitimate assurances;
vi. Not all areas of fact or law are certain, and the opinion giver cannot change this, so an unqualified opinion should not be requested where there is uncertainty;

vii. If a problem area arises, consider modifying the transaction to avoid the legal uncertainty;

viii. If the opinion giver or recipient desires a standard (such as a state bar opinion standard or the Silverado Accord (discussed below) to be used rather than customary practice, this standard and any modifications to it should be determined as soon as possible;

ix. If customary practice is the basis for the opinion, express exclusions and caveats may be included without limiting the other exclusions and caveats implied by customary practice; it is helpful to have a common starting point for an understanding of customary practice, such as the Tri Bar Report (discussed below);

x. It is best to have the opinion recipient review specific factual certifications (i.e., beyond a usual officer certification of the completeness of minutes, bylaws, articles, and governmental certifications).

c. **Types of Opinions.** There are three basic types of opinions which can apply to any particular issue as dictated by the level of confidence the opinion giver has with respect to the opinion to be rendered on that issue.

i. **Clean.** “Clean” or “unqualified” opinions are those in which the opinion giver has the most confidence, but these are not truly unqualified because they are still limited by standard or customary express or implied exceptions and assumptions, such as what is known as the bankruptcy exception and the presumption of regularity and continuity. Clean opinions usually begin with “it is our opinion that” or similar language.

ii. **Qualified.** Qualified opinions are those which are narrowed by an exception, limitation, or exclusion other than the customary ones. This narrowing is not accompanied by an explanation. For example, a qualified opinion might state that no opinion is given as to the enforceability or effect of a particular contractual provision, or as to a specific aspect of a matter. This may be done to avoid giving a negative opinion on the matter, or because the parties have agreed obtaining an opinion on the excluded matter would not be cost effective, or for some similar reason. The receiving lawyer may need to review the matter on which the qualification is made in order to assure himself or herself on the issue.

iii. **Reasoned.** A “reasoned” or “explained” opinion is one in which the opinion giver is not comfortable stating the opinion apart from the reasons for it. For example, there may be contradictory or conflicting authority, or there may be insufficient authority for a higher level of confidence. These sorts of opinions often state the conclusion prefaced by “although the matter is not free from doubt” or words to that effect, or even without such a preface explain the opinion so it is clear from the context it is a reasoned opinion.

d. **Basis for Opinion Practice.** Generally, and historically, opinion letters have been written based on the customary methods and usages of the legal community in which given. This has led to conflict and lack of clarity not only between lawyers from different areas
of the country but even (and perhaps mostly) among lawyers in the same bar and on the same street and sometimes within the same firm. James Fuld in his very impressive and very important article, “Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos,” 28 Bus. Law. 915 (1973), started a process of clarification of opinion practice which has branched in two directions: a codified accord on opinions, or an explanation of customary practice.

i. Accord Practice. After two years of work, referred to as the Silverado Conference, a special committee of the American Bar Association’s Section of Business Law known as the Accord Committee, produced a report in 1991 to establish “a national consensus as to the purpose, format, and coverage of a third party legal opinion, the precise meaning of its language and the recognition of certain guidelines for its negotiation.” “Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association,” 47 Bus. Law. 167 (1991). (This Accord has been supplemented by “Legal Opinion Principles, of the Section of Business Law, American Bar Association,” 53 Bus. Law 831 (1998) which sets forth in a short statement some of the most significant principles applicable to legal opinions under customary practice where the Accord is not adopted; this statement of principles is consistent with the most recent Tri Bar report described below).

(1) The Accord was designed to be incorporated into legal opinions to govern their terms except to the extent modified by the parties, but only if both the opinion giver expressly adopts the Accord and the opinion recipient accepts such an opinion. The Accord takes such a consensual approach largely because of a significant difference in opinion between California and New York lawyers (the Tri Bar) over the meaning of the remedies opinion. (Note: the standoff broke in 2004 when California issued a new remedies opinion report: Toward a National Legal Opinion Practice: “The California Remedies Opinion Report,” 60 Bus. Law. 907 (2005). See also, “Special Report of the Tri Bar Opinion Committee: The Remedies Opinion - Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483 (2004).)

(2) The Accord has not been as widely used as its authors had hoped, generally because it only deals with three basic opinions (remedies, no breach or default, and no violation of law), because some lawyers do not concur in all of its results (some believing too much burden is placed on the opinion recipient) and prefer to rely on customary practice doubting that opinion practice can be effectively codified, and because other lawyers did not want to take the time to master the intricacies of the Accord or negotiate modifications where they desire a different treatment from that contained in the Accord.

(3) Nevertheless, it is used relatively regularly and can be quite useful in negotiating an opinion even if not expressly adopted, and if nothing else, it is a good source for guidance on one view of customary practice. Some state bars have used it as a basis for establishing their own standards which may be incorporated into legal opinions; also, some states laid down rules before the Silverado Conference, the multiplicity of which caused confusion between jurisdictions, a problem which the Silverado Accord sought to remedy.
The Accord limitations have been given effect by at least one court. *In re Infocure Secur. Litig.*, 210 F. Supp. 2d 1331 (N.D. Ga. 2002) (found no compelling reason not to apply Accord limit to a no-litigation opinion where the Accord only covered threats of litigation in writing). On limitations generally, see also *Mark Twain Kansas City Bank v. Jackson Broulette, Pohl, & Kirley, P.C.*, 912 S.W.2d 536 (Mo. Ct. App. W. D. 1995) (an extreme case where the court gave effect to a typo, which caused the disclaimer to state the firm had no responsibility to the opinion, rather than no responsibility to update the opinion). On the other hand, see *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480 (3d Cir. 1994) (in Rule 10b-5 case, tax opinion disclaimers that only recipient may rely and that opinion giver had not investigated the assumed facts, were not given effect where opinion giver knew others were relying and the assumed facts were wrong).


The major underlying assumption of the Tri Bar approach is that lawyers giving and receiving opinions have a common understanding of legal opinion customary practice, so as to allow “communication of ideas . . . without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions.” With some experienced lawyers, this may be more or less true, and the Tri Bar report is an excellent source for creating such an understanding. However, many lawyers, particularly in the West, do not use the simple letters contemplated by
the attachments to the Tri Bar report but include at least some amount of explicit exceptions and caveats (where the Accord is not incorporated but sometimes even when it is) because they have a concern that the receiving party or its present transactional counsel, or its future litigation counsel and any expert called to testify (if something goes wrong), or the judge (see (4) below), may not have the same understanding as they have of customary practice on certain important areas.

(2) Opinion givers are very aware that not all matters can be covered in an opinion letter by express exclusions, and have tried to reach a balance between express and unstated exceptions so that they will not be deemed to have given up the unstated exceptions by saying too much in the way of express exceptions.

(3) Some bars (notably Boston, Pennsylvania, and Iowa) have tried to use the convergence of the New Restatement Section 152, the ABA Legal Opinion Principles (for non-Accord opinions), and the most recent Tri Bar Report to create a simple form based almost entirely on unstated exceptions and assumptions, and have done so by endorsing the ABA’s Principles to allow reliance on published sources of customary practice, such as the Tri Bar Report. See Glazer, “It’s Time to Streamline Opinion Letters”, Business Law Today, Nov.-Dec., 1999, at p. 32.

(4) At least one court has expressly followed the Tri Bar customary practice approach. Dean Foods Co. v. Pappathansasi, 18 Mass. L. Rptr., 2004 WL3019442 (Mass. Super., Dec. 3, 2004) (transactional lawyer in acquisition could not base a no-litigation opinion on “guesstimate” of litigator in the firm that tax fraud investigation had closed). However, another Massachusetts case that same year read language in an opinion exactly opposite its customary meaning. National Bank of Canada v. Hale & Dorr, 17 Mass. L. Rptr. 681, 2004 WL1049072 (Mass. Super., Apr. 28, 2004) (the court reads “to our knowledge” as a claim by the law firm to have superior knowledge and to be making statements with certainty). Also, in other cases, the courts have gotten things dramatically wrong. Greyhound Leasing & Fin. Corp. v. Norwest Bank, 854 F.2d 1122 (8th Cir. 1988) (concludes erroneously that opinion giver has duty to investigate facts itself and go beyond client’s representations).

(5) The addition of typical qualifications in the opinion may provide help in defending against claims for negligent misrepresentation. In the case of Fortress Credit Corp. v. Dechert LLP, 89 A.D.3d 615, 617, 934 N.Y.S.2d 119, 122 (2011) a claim was made by a lender against an opinion giver where a purported borrower’s signatures had been forged without the knowledge of the lender or the opinion giver. The court said, “The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts. Thus, defendant's statements as contained in the opinion, were not misrepresentations (citation omitted).” Other typical qualifications, such as the disclaimer of any duty to update should be included in the opinion letter in order to make implicit understandings explicit. See Lama v. Shearman & Sterling, 758 F. Supp. 159 (S.D. N.Y. 1991) (jury question on whether firm partner orally assured client that firm would inform it of any significant changes in tax law affecting the transaction).
4. **Usual Opinions in Acquisitions.** The sources described above provide the best detailed guidance on the meaning of the typical closing opinions and the diligence required in the review and investigation needed to provide such opinions, and these matters will not be dealt with here. However, the following is a short summary of certain types of opinions generally requested and key matters to consider, here using as examples some typical opinions in closing business acquisition transactions, mostly relating to the sale of stock or an analogous equity interest. This example describes, as a starting place, some reviews to be considered in giving the opinions, but other reviews may be necessary to enable the lawyer to give the opinion. Naturally, in any given transaction other opinions may prove necessary or helpful depending on the industry and its business and regulatory environment. Some of the certifications to be considered as described below may or may not be appropriate in each case, but a review of the matter involved still needs to be considered.

   a. **Status.** The existence and good standing in its home jurisdiction and qualification to do business in the transaction jurisdiction, of the relevant business organization or organizations, e.g., acquiror, target, and (if relevant) subsidiaries and affiliates. Consider doing the following reviews:

      i. Review the company’s organizational documents (articles, bylaws), including certified copies of articles from state filing authorities of articles.

      ii. Review minute books for an initial period to confirm compliance with corporate or organizational laws on incorporation or creation.

      iii. Obtain officers’ certificates on complete and up to date Articles and Bylaws, and completeness of records of minutes, and that no dissolution has occurred or proceedings for it initialed or contemplated.

      iv. Obtain certification of good standing from appropriate governmental authority.

      v. Verify tax compliance in state of organization where not covered by a general good standing certificate and a suspension of the organization is possible.

      vi. Try to avoid opinion on qualification in all states required, or limit to obtaining good standing certificates in states identified by an officer’s certificate.

   b. **Authority.** Organizational authority exists, and all organizational authorizations have been obtained.

      i. Review organizational documents, minutes; obtain officer’s certificate on minutes and that resolutions or other authorization continue in full force. Check ability to enter into transaction, and to perform under it. Who is authorized to execute and deliver? Is there discretion and authority to take other action, sign other documents?

      ii. Review organizational statutes. Is power to do deal granted? What authorization is required, board? Shareholder?
iii. Review statutory procedural requirements.

c. **Capitalization.** Equity or stock interests authorized and issued and outstanding; may be requested to opine on its valid issuance and that is fully-paid and nonassessable; may be asked to opine on stock being sold free of liens.

   i. Review organizational documents and minutes authorizing issuance. Confirm consideration with officer’s certificate if not apparent.

   ii. Review stock or ownership records.

   iii. Review statutes--date of issuance through current time to confirm statutory authority for the capital interests and types of allowable consideration.

   iv. Obtain officer’s certificate on stock ledger or ownership records, or obtain the certificate of any independent transfer agent.

   v. Obtain officers’ certificates as to no warrants, options, conversion rights, redemption rights, or similar rights (if opinion covers such matters).

   vi. Review statutes, minutes, and corporate records to confirm no such rights exist.

   vii. Review original certificates, if possible, to confirm no liens (may need limitation on opinion as to liens not of record, etc.) and to confirm no transfer restrictions.

   viii. May desire officer’s certificate, or shareholder certificate on no buy-sell agreement or transfer restrictions.

   ix. Review organizational documents and records for any transfer restrictions.

   x. Review new certificates to be issued in transaction.

   xi. Obtain officer certificate that all transfer procedures completed.

d. **Remedies.** Enforceability of agreement.

   i. Review organizational documents and records, including minutes of recent periods.

   ii. Review statutes and case law to confirm enforceability of each part of agreement.

e. **Asset Transfer.** In an asset transaction, an opinion may be requested that assets are transferrable and free of encumbrance; try to avoid altogether, or at least limit the encumbrance opinion as to non-UCC filed liens on personal property and nonrecorded liens on real property.
i. Check any certificates of title (e.g., automobiles).

ii. Have recent UCC search performed; update with later search and officer’s certificate.

iii. Similarly check and update findings on real property records (e.g., through title company). Consider title insurance as alternative to opinion.

iv. Obtain officer’s certificate as to no liens or encumbrances.

f. **Legal Proceedings.** No pending or threatened proceedings; limit investigation, for example, to a particular agreed-upon review of most likely and significant venues.

i. Check audit response letters from attorneys.

ii. Check designated court records.

iii. Obtain officer’s certificate on whether there is any litigation or any threatened claims.

g. **No Violation.** No violation of law; local law generally is excluded; and consider using a knowledge limitation.

i. Obtain an officer’s certificate (it cannot, however, be an ultimate opinion on law);

ii. Check any reasonably available data bases.

h. **No Conflict.** Transaction does not violate or conflict with organizational documents, material agreements, etc.

i. Review organizational documents.

ii. Obtain officer’s certificate on no violation (cannot, however, be an ultimate conclusion on law) and identifying material agreements (if possible, have an agreement on the materiality standard).

iii. Review the identified agreements.

i. **Governmental Authorizations.** No governmental approvals not obtained; consider knowledge limitation.

i. Review statutes (e.g., Hart-Scott-Rodino) and industry-related statutes and regulations.

ii. Check license laws and rules.
iii. Obtain officers’ certificates on existence of needed licenses and review any licenses.

j. Due Diligence Reports. In some deals counsel for the target is asked to prepare and submit to the acquiror or its lender a report on the review of documents as part of the due diligence investigation process of the acquiror. Such reports do not contain express opinions but raise some similar associated issues. They may, for example, be deemed to contain express or implied representations or even opinions. A number of firms refuse to provide such reports without receiving a non-reliance agreement from the recipient. Whether such agreements will be effective to defeat a securities 10b-5 or Securities Act claim or similar claims is a significant issue because the report can be viewed as a disclosure document for these purposes. Many times junior associates prepare these reports; more senior attorney involvement in preparation or review is important. Attorney-client privilege matters must be carefully considered in providing these reports to third parties.
Legal Opinions in Transactions

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