

Tips to Avoid the Pitfalls of Legal Opinion Practice

If you think a legal opinion is *just* one more piece of paper delivered at a closing, think again. Recently, a law firm that issued an opinion letter in a loan transaction, was accused by the lender of a failure to conduct due diligence that would have allegedly uncovered a forgery and a fraud. Without giving credence to the lender's claims, the complaint illustrates the serious implications of issuing legal opinions.

Law firms should recognize the risk management concerns that surround the issuance of legal opinions and should take protective steps to guard against liability or other reputational or financial injury they may face. The risk management tips below are simple and practical measures a firm may implement to reduce the risk of liability exposure.

Know Your Client

When a law firm is asked to render a legal opinion to a new client, or to a third party on behalf of the client, the firm should consider whether to take on the new client and what sort of due diligence to conduct on the client and on the proposed transaction on which it is requested to opine.

What if the firm is contacted by another law firm purporting to be primary outside counsel to a company on whose behalf it asks the first firm to act as special counsel in rendering an opinion on a particular aspect of a transaction? Should the firm rely solely on primary counsel's assurances as to the client's identity and the scope of the requested legal opinion? A prudent law firm will likely wish to communicate directly with the client to confirm this information or propose instead that the primary counsel be its client.

In addition to clearing any conflicts of interest, the firm should send a written engagement letter directly to the client and obtain the client's acknowledgment of the terms on which the firm will render the opinion to the client.

Obtain Client Authorization For Rendering An Opinion To A Third Party

Transactional lawyers are frequently asked by their clients to render a legal opinion to a third party which is not a firm client. For example, it is customary in certain lending transactions for the lender to require a legal opinion from borrower's counsel as a condition to making the loan. Similarly, in certain corporate or real estate transactions, the buyer typically asks for a legal opinion from seller's counsel as a prerequisite for the sale. If the recipient of a firm's legal opinion is not a client, the firm would be well advised to obtain written client authorization to render an opinion to a third party in order to avoid any doubt as to the issuing firm's role in the transaction.

Conduct An Internal Opinion Review

Before a firm issues a legal opinion, it should be reviewed by at least one other partner ("Review Partner") in addition to the lawyer ("Issuing Attorney") who prepares and issues the opinion on behalf of the firm. The Review Partner should be knowledgeable in the substantive area of law and the subject matter covered by the opinion. If there are substantive legal issues that are beyond the area(s) of competence of the Review Partner, the opinion should be reviewed by an additional partner who is competent in such other substantive area(s) of the law.

Ensure That The Issuing Attorney Is A Partner Or An Otherwise Authorized Signatory

Only partners and those lawyers who are otherwise authorized to bind the firm (e.g., by written approval from the firm's management or by written agreement with the firm) should be permitted to sign a legal opinion on behalf of the firm.

State What The Opinion Does Not Cover

A legal opinion should make clear what is and is not covered by the opinion, e.g., no opinion is expressed as to any matter not governed by the laws of the State of New York. It is common for legal opinions to contain assumptions, limitations and qualifications. In addition, the TriBar Opinion Reports and other materials relating to the subject of legal opinions are important guidelines to consult in preparing and issuing opinions.

Identify Who May Rely On The Opinion And For What Purpose

Law firms are not comfortable having their legal opinions relied upon by unknown third parties. The opinion should identify the persons or entities that may rely upon it and for what purpose, and make clear that it may not be relied upon by third parties (except as specified in the opinion) or in connection with any transaction or documents other than as identified in the opinion.

If you have questions regarding this Alert, please contact the co-chairs of Moses & Singer's [Legal Ethics & Law Firm Practice](#), [Devika Kewalramani](#) at 212.554.7832/dkewalramani@mosessinger.com or [Arnold N. Bressler](#) at 212.554.7636/abressler@mosessinger.com.

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